A QUARTER CENTURY OF NEW DIRECTIONS IN LEADERSHIP AND MISSION

NATIONAL ACADEMY OF ARBITRATORS

Theodore J. St. Antoine, Editor

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DEDICATION

The volume celebrating the fiftieth anniversary of the National Academy of Arbitrators was dedicated to the 49 Academy presidents who had served from 1947 to 1997. It seems only fitting to dedicate this quarter-century history to the presidents from 1998 to 2022. Their efforts helped chart the Academy in fruitful new directions while preserving the best of the past in labor and employment arbitration.

Academy Presidents

James M. Harkless, 1998
Theodore J. St. Antoine, 1999
John Kagel, 2000
James J. Sherman, 2001
Richard I Bloch, 2002
Walter J. Gershenfeld, 2003
George R. Fleischli, 2004
Margery F. Gootnick, 2005
Dennis R. Nolan, 2006
Barbara Zausner, 2007
Michel G. Picher, 2008
William H. Holley, Jr., 2009
Gil Vernon, 2010
Roberta L. Golick, 2011
Sara Adler, 2012
James C. Oldham, 2013
Shyam Das, 2014
Allen Ponak, 2015
Margaret R. Brogan, 2016
Kathleen Miller, 2017
David A. Petersen, 2018 (posthumously)
Edward B. Krinsky, 2018
Barry Winograd, 2019
Daniel J. Nielsen, 2020
Susan L. Stewart, 2021
Homer C. La Rue, 2022

Susan L. Stewart
Academy President, 2021-2022

FOREWORD

This history of the Academy at 75 reflects a quarter century of an ongoing quest for excellence. As George Nicolau observed in his foreword to the volume on the Academy at 50, our history at that time was characterized by the unceasing promotion of professionalism and the constant protection of the arbitration process. That history has continued. However, as President Nicolau also observed, like any vibrant institution, the Academy in 1997 was a work in progress. Among other challenges, the Academy has wrestled with issues of ethics and self-regulation, evolutions in thought and practice, and legal developments. There have been changes in the structures of workplaces and in levels of unionization. Then, of course, there was the pandemic. Throughout this tumultuous period the Academy has retained a focus on the best way to adapt and serve in an ever-changing world, while remaining true to its founding principles.

This volume demonstrates how the Academy has been consistently guided by a keen sense of its mission, described in our Constitution as the establishment and fostering of: "the highest standards of integrity, competence, honor, and character" among arbitrators. The Academy's role as a strategist for ensuring excellence in service to the parties has continued over the last 25 years. This has been reflected in the publication of our proceedings, our contributions to scholarship through the Research and Education Foundation, our conferences, the development of new arbitrators, and in our relationships in the broader labor relations communities in North America and internationally. It has also been reflected in our role in litigation and as a resource for factual information about arbitration, as well as in the various contributions in reports and in committee work. Most recently, it has been reflected in the extraordinary work done by the Academy during the pandemic, with the immediate establishment of remote hearing training and the development of protocols. This work was shared with the broader community and reinforced the Academy's role as a leader in the justice system at a critical juncture of history.

While the foregoing achievements are considerable, comment on the last 25 years would be incomplete without reference to the opportunities for friendship and collegiality within the Academy. These relationships have generated great pleasure and personal growth for Academy members. Of course they have also led to deep sadness because of the loss of many revered colleagues during this time.

The past 25 years have been marked by positive developments in terms of diversity and inclusion in both the Academy's membership and in our leadership. However, this is an area where there remains much work to be done, as the Academy rises to the challenge of moving to greater diversity and inclusion, ensuring that we have the institutional benefit of a broad spectrum of the voices of the talented and the work of the dedicated. I am optimistic that the person who has the privilege of preparing the foreword to the Academy at 100 will report positively on our achievements in this area. I am confident that our strong foundations will allow the Academy to evolve and flourish as we confront the challenges of the next 25 years.

January 2022

Susan L. Stewart
President (2021-2022)

PREFACE

In 1997 the National Academy of Arbitrators marked its fiftieth anniversary by having the dinner at its annual meeting a black-tie affair. That was entirely fitting and I saluted then-President George Nicolau for adding this stylish touch. Nonetheless, there was inevitably a certain clubbish air about it as well, perhaps with some overtones of exclusivity.

Toward the end of the Twentieth Century the Academy was primarily an organization of elderly white males. No African American and only two women had been president during the Academy's first half century. There was another important area of exclusion. The attention of most of the organization's members was historically focused on the arbitration of union claims under collective bargaining agreements. Only gingerly did the Academy begin to pay heed to the growing field of arbitration involving individual nonunion employees.

The last quarter century has seen dramatic changes of direction in the Academy's leadership and mission. Seven women and the first two African Americans have been elected president of the Academy. That both reflected and encouraged a determined outreach for fresh blood and new ideas.

Mission changes also had significant policy implications. The NAA first flatly opposed so-called mandatory arbitration of employees' statutory claims. Later the Academy modified that position by saying voluntary arbitration was "preferable," adding it was "desirable" for employees to be able, after a dispute has arisen, to opt for either court or administrative processes or arbitration. The Academy then proceeded to issue general guidelines for handling all employment arbitrations, including contractual as well as statutory claims. More specific and more stringent guidelines applied to mandatory arbitrations imposed as a condition of employment.

Internally, perhaps the most momentous Academy development of the quarter century was the work of the New Directions Committee. After much deliberation and membership votes at two annual meetings, the NDC's proposal was adopted to incorporate nontraditional forms of employment dispute resolution into the Academy's domain. A principal effect was to provide for the counting of nonunion employment arbitration cases as part of the total required arbitration caseload of a candidate for admission to the Academy.

The book published to celebrate the Academy's first half century in 1997, *NAA: Fifty Years in the World of Work*,[1] was organized

[1] Gladys W. Gruenberg, Joyce M. Najita & Dennis R. Nolan, *The National Academy of Arbitrators: Fifty Years in the World of Work* (1997).

chronologically. Our updating for the past quarter century is instead broken down by subject matter to put more emphasis on different Academy activities, and especially on changes in leadership and mission. Individual chapters will thus focus on Academy governance, codes of ethics, racial and gender composition, education and training, arbitration in various industrial and national settings, nonunion employment arbitration, amicus briefs, antitrust problems, technology, and the future.

A veritable "Who's Who" of Academy members were willing to participate in putting this work together. The very quality of the writers made editing relatively easy. That same quality, and the accompanying press of multitudinous other commitments, sometimes made the meeting of deadlines a bit more vexing. It took time but the job was eventually done, and a deep debt of gratitude is owed to all those listed on the following page of contributors.

Academy members exhibit a wide range of opinions on a wide range of subjects. It goes without saying that the views expressed by our contributors are their own, and do not necessarily reflect the views of the Academy. Our common allegiance is to a private system ensuring due process and the timely, measured resolution of disputes among unions and employers and employees.

January 2022 *Theodore J. St. Antoine*
Chair, *Fifty Years* Supplement Committee

CONTRIBUTORS

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Joshua M. Javits is a Vice President of the Academy and a former Chair of the National Mediation Board. He began as a trial attorney for the NLRB and then practiced at different times for both labor unions and management.

Nancy Kauffman (ex officio) has chaired the Academy History Committee. She has written extensively on arbitration and mediation for the *Dispute Resolution Journal* and other reviews.

Homer C. La Rue is President-Elect of the Academy. He received the 2020 D'Alemberte-Raven Award, the highest honor bestowed by the ABA Section of Dispute Resolution for an individual's contribution to the ADR field.

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Barbara Zausner (editing) is a Past President of the Academy and chaired the Academy's Nominating Committee and Membership Committee. She has represented a teachers union and served as an employee relations coordinator at Rutgers University.

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A special word of thanks goes to Katie Griffin and Melissa Kelley of the NAA Operations Center for their invaluable help in data collection and the publication process.

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Chapter 1

THE ACADEMY'S BOARD OF GOVERNORS

Walt De Treux

Introduction

The history of the Board of Governors (BOG) since 1997 can be found primarily in the minutes of its meetings.[1] If there is an overall theme that emerges from a review of those minutes, it is, "Plus ça change**,** plus c'est la même chose." The issues that the BOG grappled with in the late 1990s and earlier 2000s are remarkably similar to the issues that the BOG continues to confront today.

The structure of the BOG has not changed, although it may have changed by the time this chapter is published. Pursuant to Article IV of the Academy's Constitution, "The government and management of the Academy shall be vested in a Board of Governors consisting of twelve (12) members in addition to the ex-officio members." The ex-officio members include the president, four vice presidents, the executive secretary-treasurer, the president-elect, and the immediate past president.

In 2019 President Barry Winograd appointed the Governance Reform Committee to make recommendations on issues raised by the Academy's change to one meeting a year and declining membership over the past decade. Chaired by President-Elect Dan Nielsen, the Committee recommended reducing the number of governors from 12 to 8 and the number of vice presidents to two. The membership at the 2021 Annual Meeting accepted those changes, which become effective for the 2022-23 BOG term. The Board has approved restoring one vice presidency, however, and the BOG may have three vice presidents beginning the 2023-24 term.

One other constant over the past two decades has been the location and staff complement of the Academy's Operations Center. When William Holley took over as Executive Secretary-Treasurer in 1996, the Op Center relocated from Ithaca, New York to Auburn, Alabama where Holley lived and worked. Kate Reif served as Operations Manager under former EST Dana Eischen and continued to work from her home office in the Southern Tier Region of New York State when Holley became EST. The Academy also employed Brenda Ryan in the Auburn office.

When David Petersen became EST in 2002, the Operations Center relocated to Cortland, New York, where it remains to this day. While

[1] Bill Holley, who served as EST from 1996-2002, kept very detailed minutes of BOG meetings. Those minutes usually ranged from 25 to as many as 60 pages. His successor, David Petersen, had an impressive command of the issues that came before the BOG, but he did not always prepare minutes of the BOG meetings. The Academy does not have copies of any minutes from Petersen's first term and some of his second term. With some lapses, the minutes were regularly done beginning in 2008. Minutes of the membership business meetings do not appear to have been regularly recorded until 2017. I have to thank several former presidents and governors who helped bridge some gaps in the history that could not be gleaned from the minutes.

When David Petersen became EST in 2002, the Operations Center relocated to Cortland, New York, where it remains to this day. While Petersen was based in Pittsburgh, he recognized a need for stability in the Op Center location. Each time the office was moved to the home base of the EST, the Academy incurred expenses. The move from Ithaca to Auburn cost the Academy approximately $15,000. Since the EST did not have to be physically present in the Op Center, the Academy found a permanent location in Cortland near Reif's home.

In 1998 the Academy hired Suzanne Kelley as a part-time employee to assist at the Annual Meetings and FECs. Suzanne's hire was the beginning of the Kelley Gang. In 2003 Katie Griffin, Suzanne's daughter, was brought on part-time and soon rose to Operations Manager when Reif left in 2005. The Kelley Gang was complete when Melissa Kelley, Suzanne's daughter-in-law, was hired in 2019 on a part-time basis for her financial and technological expertise. The Kelley Gang keeps the Academy running. Their dedication to the Academy's mission and its members led the BOG to name Suzanne and Katie honorary members of the Academy in 2018 (prior to Melissa's hire).

Although BOG policy limited an executive secretary-treasurer to two three-year terms except "in extraordinary circumstances,"[2] David Petersen's fine work and selfless dedication must have created those extraordinary circumstances because he remained a constant presence as EST for 15 years. Assuming the office in 2002, Petersen was elected to an unprecedented five terms until he stepped down in 2017. Petersen brought a steady and calming hand to the Academy, guiding many presidents and BOGs through difficult issues and stabilizing the Academy's finances during his time in office. His impact on the Academy cannot be overstated. His intellect, his organization skills, his institutional memory, and his easy accessibility to any Academy member made him well-suited to the role of EST. His untimely death in 2018 stunned and saddened the Academy, but the love and respect he engendered led to his posthumous election as President of the Academy at the 2018 Annual Meeting in Vancouver.

While Petersen and the Kelley Gang have given the Academy a constant and reassuring presence over the years, the issues the BOG has had to confront since 1997 also remain remarkably similar, percolating for years until a satisfactory, albeit sometimes temporary, resolution can be found.

Membership and Finances

The level of membership and attendance at meetings determine the financial health of the Academy. The financial goal has always been that the meetings pay for themselves, and dues pay for the rest. That goal has not always been met, and financial shortfalls have often led to significant changes in the Academy.

When he became EST in 1996, Bill Holley found the Academy to be "financially healthy." Membership included 656 total members, 580 of

[2] All quotations in this chapter are from the BOG meeting minutes unless indicated otherwise.

whom paid full dues.[3] In June 1998 membership had increased to 592 full dues-paying members, and Holley characterized the Academy as "financially strong." But he noted that 1997 saw "a significant deficit" and warned, "[I]f the Academy continues to spend money the way it has without increasing revenues and the deficit continues to accumulate every year, it would face a definite problem." Holley's prescience proved true the following year when the Academy decided to raise dues $100, from $350 to $450 per year, and instituted cost-cutting measures. By the 2000 Annual Meeting, Holley was able to report the financial condition as "stable due to the reduction in expenses and increase in dues." In Fall 2000, however, membership levels had dropped to 612 total members with 536 paying full dues.

The Academy seemingly stabilized its dues revenues with the $100 increase for a few years, but the second prong of the financial base took a hit. Attendance at the 2001 Annual Meeting in Atlanta failed to meet projections, and the Academy suffered a $43,000 loss. In proposing his final budget in 2002, Holley noted, "the anticipated deficit and additional expenditures caused by the FTC inquiry[4]" required another $100 dues increase, to $550 per year.

Membership remained remarkably stable through the first decade of the 2000s. In 2006, the Academy had 654 members and 546 paying full dues. In 2012, it had 640 members and 552 paying full dues. Much to the detriment of the Academy, that full dues-paying number began a steady decline the following year. Although total membership held steady at 638, the full dues payers dropped to 516. Senior members of the Academy retired from practice in significant numbers and took dues waivers, and new members were not admitted at a level sufficient to replace the retiring or deceased members – a trend that continues to this date. In 2018, the Academy had 489 full-dues paying members and more than 100 retired members. By June 2020 the full dues-paying number had dropped further to 434.

Membership levels were stable through most of Petersen's term as EST. Using his astute financial acumen, he set the Academy on a firm financial footing. In 2005 the full dues amount was $650 per year, its current level as of this writing. Meetings were designed to break even, but fulfilling that goal depended entirely on attendance. Some meetings resulted in a surplus, others (like the Atlanta meeting) led to a loss. In a representative five-year period (2010-2014), the Annual Meetings and the FECs showed a $8600 surplus. But a closer review reveals the fluctuation between meetings. In 2010 and 2012 the meetings had surpluses of $78,600 and $42,800 respectively. But in 2011 and 2014 the Academy suffered losses of $64,400 and $47,900 respectively. Only the 2013 meeting met the goal of breaking even. In more recent years, the meetings have been more likely to result in a deficit than a surplus, which led to changes by the BOG that will be discussed later in this chapter.

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[3] The Academy has long had a policy that allows waivers for members who are no longer arbitrating or have reduced their practice. As of June 2020, the policy allowed for a 50% waiver for members that no longer serve as arbitrators but continue in other employment and a 100% waiver for members who have fully retired from active employment. It also provides a 100% waiver for a 20-year member who hears five or fewer arbitration cases per year. The membership numbers also include Honorary Life Members, comprised of retired past presidents and other distinguished members, who are not required to pay dues.

[4] The FTC case is discussed at length *infra* ch. 12, Richard Bloch, "The FTC and the Academy."

Despite the fluctuation in meeting revenue but with a stable source of dues revenue at least through 2013, the Academy thrived financially. In 1990 the Constitution and By-Laws were amended to include a reserve fund of $200,000. In 2008 a Board Designated Reserve Fund was established and set at $300,000. When the reserve funds grew through sound investments to approximately $700,000 in 2014, the BOG reconsidered the necessity of such large reserves. After its review, the BOG decided to increase the reserves to protect against "the potential cost of litigation…a disastrous meeting experience…and obvious market fluctuations."[5] By June 2020 those reserves had grown to approximately $1.6 million.

With membership decline and unpredictability in meeting revenues, the Academy faced some financial uncertainty as it entered the third decade of the Twenty-first Century. The reserves have proven a bulwark against financial problems, but the Academy still needs to return to its goal of "meetings pay for meetings, and dues pay for everything else." The financial stability of the Academy was a problem that the BOG faced in the late 1990s and continues to face today. Some of the proposed solutions in the past regarding meeting revenue finally came to fruition almost twenty years later.

Annual Meetings and FECs

Pursuant to the terms of the Constitution and By-Laws, the Academy is required to hold an Annual Meeting in the spring of each year. The Annual Meeting is open to members and guests (nonmember arbitrators and advocates). In addition, the Academy has held a Fall Education Conference (FEC) for many years and in various forms. Sara Adler, Program Chair for the 1996 FEC in Baltimore, recommended that the BOG institutionalize the FEC "so it could be treated with the same respect as the Annual Meeting." She urged the BOG to set the meeting several years in advance and "to give continuity of procedure from year to year." The BOG listened to Adler as the FEC became an established and much-anticipated members-only meeting each year. However, fluctuating meeting attendance and the Academy's financial situation often threatened the fall meeting.

In 1998, the Committee on Cost and Attendance at Annual Meeting was formed. In a survey of the membership, "[m]any respondents wrote that two meetings per year made both meetings financially impossible and was draining on hearing dates." They suggested one meeting per year or a fall meeting every other year. Nonetheless, the FEC continued.

By 2012, after her visits to the Regions during her term, then-President Sara Adler concluded that "the time had probably come for the NAA to consider holding just one national meeting per year." She cited "the declining economies of [members'] practices and the pressures and burdens associated with attending two national meetings per year." President Adler declined to make a motion to enact her recommendation, but she asked the BOG to begin considering a change to one national meeting per year.

The FEC's fate was inextricably tied to the Annual Meeting. The Annual Meeting remained strong and attractive to members and guests in the 1990s. The 1996 Annual Meeting in Toronto drew 677 attendees, including

[5] The quoted language comes from the Committee report on the reserve policy. The Committee was chaired by Dan Nielsen.

229 members and a total of 478 paid registrants (members' spouses and certain guests did not have to pay a registration fee). A year later in Chicago, 492 members and guests paid to attend the meeting. Nonetheless, the Academy continually sought to improve the meeting program and to retain and attract guests.

As noted, the Committee on Cost and Attendance at Annual Meeting was formed in 1998. In 2008 President Bill Holley appointed a Special Committee on Meeting Attendance chaired by Dan Nielsen. In its 2010 Report, the Committee found that member attendance at the Annual Meeting from 1996 through 2010 varied significantly from a low of 158 members in San Juan (2003) to a high of 275 members in Chicago (1997). The number of guests showed a similar range, though the decline was more noticeable beginning in the early 2000s. With the exception of two well-attended meetings – Chicago 2005 and Ottawa 2008, guest attendance peaked at 227 in 2000 and dipped to 118 guests by 2010. (The San Juan meeting in 2003 only attracted 93 guests.) The Special Committee issued 13 recommendations to increase the attendance of advocates, including shortening the public portion of the meeting by reserving Saturdays for members only, establishing a rotation of four cities in which to hold the meeting,[6] and reducing the registration costs for advocates.

Not all the recommendations were implemented by the BOG, and advocate attendance at the Annual Meeting did not improve. The 2017 Annual Meeting in Chicago drew only 68 guests. Meanwhile, the FEC drew fewer members, from 160 in 2000 (Scottsdale) to 115 in 2015 (Denver), explainable in large part by the decline in active membership. In response to continuing concerns about the viability of the both the Annual Meeting and FEC and recognizing that a majority of the Academy was finally willing to adopt significant change, President Kathleen Miller appointed the Bloch Committee, chaired by Richard Bloch. The Bloch Committee issued a comprehensive report that recommended a move to one meeting per year, the Annual Meeting and Member Education Conference (MEC). It also recommended several other initiatives and cost-saving measures designed to make the meeting financially viable and attractive to members and advocates. President Ed Krinsky followed up the work of the Bloch Committee by appointing Paula Knopf to chair the Bloch Report Implementation Committee (BRIC). Knopf's Committee produced a well-received report that included a checklist to guide future Program Chairs in implementing the Bloch Committee and BRIC Recommendations.

The last FEC was in 2019 in Savannah, Georgia. The first Annual Meeting and Member Education Conference was scheduled to be held in May 2020 in Denver, Colorado. Unfortunately, the worldwide COVID-19 pandemic forced a cancellation of the meeting.[7] The debut of the Annual Meeting/MEC was then set for Spring 2021 in Marina del Rey, California.

[6] Those four cities – Washington, DC, Chicago, Toronto, and San Francisco – had proven to attract a high number of members and guests.

[7] In 2017 a hurricane forced the cancellation of the 2017 FEC in Miami.

Membership Standards [8]

Throughout the last 25 years, the Academy has had a continuing interest and concern in ensuring that its membership standards reflect the reality in the arbitrator marketplace. In the late 1990s an applicant needed to issue 50 awards in 5 years as a threshold for consideration of admission to the Academy. At that time, however, an arbitrator's services were in great demand and caseloads were high. The Membership Committee expected applicants to have more than 100 awards in the 5-year time frame. At the same time, President James Harkless had appointed the Committee on the Academy's Future. At the 1999 FEC in Montreal, Quebec, Committee Chair George Fleischli reported that the principal issue for the Committee was "whether to expand the Academy's membership to those who act as arbitrators mostly in cases involving employment disputes arising outside the labor-management field." The issue was not resolved at that meeting, but it loomed large over the Academy for several years.

In 2005, President Richard Bloch convened a BOG retreat to discuss the state of the Academy and a general strategic plan for the future. A second retreat followed under President Fleischli. The Academy was divided, with some BOG members opposed to any change in the high membership standards of the Academy and others advocating for credit for employment cases to recognize the expanding field of work and increase the Academy's influence and membership rolls. Those retreats led to the formation of the New Directions Committee (NDC), [9] co-chaired by Jeffrey Tener and Barry Winograd representing both sides of the debate. The NDC established a Membership Standards Working Group to address changes to the membership standards.

The work of the NDC on membership standards spanned three Presidents – Fleischli, Barbara Zausner, and Michel Picher. The recommended changes to the membership standards faced a healthy debate at the 2007 Annual Meeting in San Francisco and a membership vote at the 2008 Annual Meeting in Ottawa. The recommended changes passed by a slim margin.

Under the new standards, an applicant needed 60 awards in 6 years as a threshold to admittance. Forty of those 60 cases had to be labor arbitration cases. A "second bucket" of 20 cases was created, consisting of workplace dispute resolution decisions such as fact-finding, advisory arbitration, work as an independent hearing officer for a labor or civil service agency, and no more than 10 employment arbitration awards.

Membership standards continued to evolve in the ensuing years. In 2009 the Membership Committee, chaired by Margaret Brogan, reinstated the Veterans' Procedure, through which a candidate who clearly meets the Academy's standards, could apply for membership "without filling out worksheets and providing supporting documentation of their caseload." Regional Chairs were tasked with identifying worthy candidates for

[8] Special thanks to Past President Margaret Brogan, who previously served as Membership Chair, for her assistance in providing history and context to the BOG's actions on membership standards before and after the New Directions Committee report.

[9] The New Directions Committee is covered in more detail *infra* ch. 9, Dennis R. Nolan, "New Directions: The Academy's Encounter with Employment Arbitration."

admission through this procedure. At the same meeting, Gil Vernon, chairing a special committee on railroad membership, placed a recommendation before the BOG that provided, "Each certificate of appointment to a Section 3 tribunal…under the Railway Labor Act by the National Mediation Board…accompanied by one issued and adopted award will be considered as one countable 'workplace' dispute resolution decision." The BOG adopted the Committee's recommendation. Soon thereafter the Membership Committee expanded its alternative standard (for prominent authorities in the labor-management field) to include "regional stars," individuals of prominence in certain areas of the U.S. and Canada who were well-regarded in the field but did not have a national reputation.

By 2019 the Academy continued to suffer a decline in membership through death and retirement of members and a contraction of arbitration work in some areas of the country. President Barry Winograd established the Membership Standards Committee to look at all areas of arbitration work that may indicate general acceptability and whether that work should be considered in evaluating NAA applicants. Chaired by Sarah Garraty and staffed by former Membership chairs, the Committee recommended several changes to the membership standards including recognition of appointments and settled cases, an area often cited by members, including Canadian members, who actively and regularly settle disputes to which they are appointed. The BOG adopted the Committee's recommendations, which are best summarized as follows:

> The basic standard for NAA membership is "general acceptability by the parties" as reflected in the applicant's "substantial and current experience." We take "substantial and current experience" to require at least five years as an arbitrator and at least 60 decisions in a six-year period. The heart of that 60-decision requirement is 40 written decisions. At least 25 of those 40 written decisions must be in labor-management cases; and the other 15 either may be additional labor-management awards or may be written decisions in other workplace disputes such as civil service, teacher tenure, etc. (No more than ten of them may be in employment arbitrations.) The remaining 20 cases may also be labor-management awards; they may also be workplace dispute decisions; or they may be in the form of a consistent record of mutual selection. Because the ultimate standard is "general acceptability," we find that a record of actually being selected by opposing parties is a source of evidence for meeting that standard; and we therefore count five mutual selections (that produced no formal decision) as the equivalent of one award (above the 40 written decision minimum). If the applicant was actively involved in the resolution of a dispute after s/he was mutually selected to hear it, we count two of those mutual selections as the equivalent of one award. Remember that this 60-decision minimum satisfies the "substantial and current experience" requirement; and

> the Membership Committee still must find in the applicant's experience convincing evidence of his or her general acceptability by the parties. [10]

The standards for membership in the Academy are likely to continue to change as the nature of arbitration work changes and caseloads rise and fall. In his 2020 Presidential Address, Barry Winograd proposed, "[T]he Academy should be the 'single home' for all neutrals – arbitrators and mediators – who render workplace justice." Time will tell if the Academy takes up Winograd's challenge.

Visibility and Outreach

The Academy's mission has always been to "establish and foster the highest standards of integrity, competence, honor, and character among those engaged in the arbitration of labor-management disputes." [11] Yet, throughout the last 25 years, the BOG has consistently worried that the good work of the Academy goes unnoticed by those who derive its benefits.

At the 1997 Annual Meeting in Chicago, President George Nicolau announced "plans to develop an action plan to increase the Academy's visibility in the arbitration field." He cited a newspaper article on employment arbitration, commenting, "it is this entire new field that we may be involved in." He also suggested that a standardized list of media contacts should be developed so that the Academy's Annual Meetings could receive press coverage. Governor James Oldham summed up the need for a Visibility Committee:

> "Our organization is facing a different phase in its life now than it once did. We are a shrinking organization and are not well known to many people in the ranks. For our own best interest as an organization, we ought to make ourselves better known."

A few months later at the 1997 FEC, the Action Plan/Visibility Committee submitted a report to the BOG that recommended, among other things, employing a professional public relations firm to "put together a visibility plan, design an information kit, and make contacts with the media." The one-year agreement with the firm cost the Academy $50,000.

The visibility plan was considered successful, but it was short-lived. At the 1998 Annual Meeting in New Orleans, Immediate Past President Nicolau recommended that the contract with the PR firm not be renewed because "it was not affordable" and "the goals of the Committee to increase visibility through major media…had been accomplished."

The Visibility Committee was discontinued in 1999, but was resurrected a decade later when President Bill Holley appointed David Vaughn to chair a Special Committee on Academy Visibility. The Committee completed a one-year study and issued a report at the 2010 Annual Meeting in Philadelphia. The Committee made 13 specific recommendations, including encouraging members "to display their

[10] *See* www.naarb.org
[11] Article II, Constitution and By-Laws.

Academy membership on cards, letterheads, communications and lapels," maximizing content on the Academy website, developing an Academy Speakers Bureau, and developing a brochure to describe the Academy and its mission.

President Gil Vernon followed up on the Committee's report by appointing Margo Newman Visibility Coordinator and Walt De Treux Regional Activities National Coordinator. Vernon's idea was for the Academy to expand its visibility on a national level while also encouraging activity and growth in the Regions through educational programs ("Regional Rejuvenation Initiative"). Over the next couple of years, the Regional Education Conference Resources Subcommittee developed a formal curriculum that would allow Regions to sponsor 1-day, 2-day, or 3-day advocacy training programs.[12] During that same period, Newman introduced various initiatives for members that would help advertise and highlight their Academy membership, such as a "Dos and Don'ts Brochure for Advocates" and the increased wearing of NAA lapel pins.

The Academy's visibility efforts were often geared toward advocates and other participants in the arbitration process. But the BOG also recognized the need to focus on non-member arbitrators, from newer arbitrators aspiring to join the Academy one day to experienced arbitrators who may not be aware of or never sought membership in the Academy.

The reinstituted Veterans' Procedure and expanded alternative standard allowed for more experienced arbitrators to enter the Academy. At various times, the BOG focused with success on increasing the ranks of its relatively small, but impressively influential and active, Canadian members.

In 2017, President Margaret Brogan established the Outreach Committee to assist in the development and mentoring of newer arbitrators with the hope that they would soon meet the standards for Academy membership. The Outreach Committee was implemented on a Region-by-Region basis and quickly found success in training programs, one-on-one mentoring, and salons, in which several newer arbitrators would meet on a regular basis with experienced arbitrators to discuss all aspects of their practice. When Brogan became Past President, President Kathleen Miller appointed her to Chair the Outreach Committee, which continues as of this writing.

A special initiative of the Outreach Committee was to bring more diversity to the arbitrator ranks by reaching out to women and people of color. Going in a slightly different but equally important direction, Vice President Homer La Rue conceived of the Ray Corollary Initiative (RCI) in 2019 to achieve diversity and inclusion in arbitration selection. Working closely with Vice President Alan Symonette, La Rue presented the RCI to the BOG, the ABA Section of Labor and Employment Law, and other labor-management stakeholders. The BOG wholeheartedly adopted the RCI. The Initiative aims to ensure that parties to an arbitration will always consider candidates from underrepresented populations when selecting arbitrators. The RCI is in its

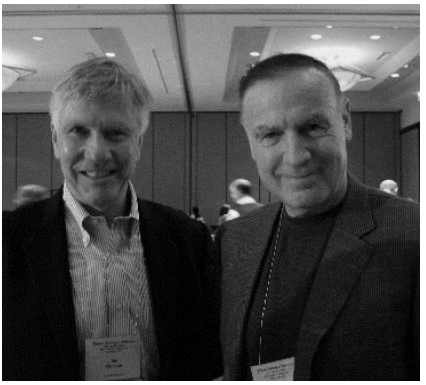
[12] The curriculum was developed in significant part with the assistance of Members Brogan, Jack Clarke, Homer La Rue, and Winograd, who served as long-time arbitrator trainers for the Federal Mediation and Conciliation Service. *See also infra* ch. 11,
Elizabeth C. Wesman, "Education and Training."

infancy at the time of this writing, but we hope it gains quick acceptance in the field.[13]

The Academy may have been most visible in the labor-management community during a public health and economic crisis. In 2020, the COVID-19 pandemic thrust itself on an unsuspecting world, resulting in a shutdown of many workplaces for several months. In-person arbitration hearings were restricted or prohibited by many state and local safety protocols. President Winograd and President-Elect Dan Nielsen created the Videoconference Task Force (VTF). Chaired by Jeanne Charles with an able assist from Keith Greenberg and La Rue among others, the VTF quickly and efficiently developed protocols and training for arbitrators and advocates to conduct videoconference hearings. The work of the VTF had a significant impact on the ability of the labor-management community to continue to hear and resolve workplace disputes at a time when parties could not safely convene.

Outreach to advocates, nonmember arbitrators, and other participants in the arbitration field will certainly remain one of the primary missions of the Academy. If it continues that outreach, the Academy is well positioned to remain visible and relevant in the labor-management arena.

[13] The role of race in the Academy and in arbitration is discussed in detail *infra* ch 3, Homer C. La Rue & Alan A. Symonette, "The Academy at 75 and the Arbitrator of Color."



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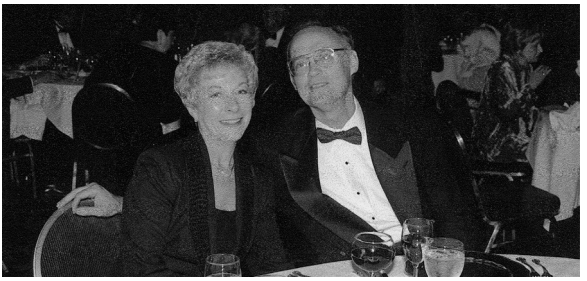
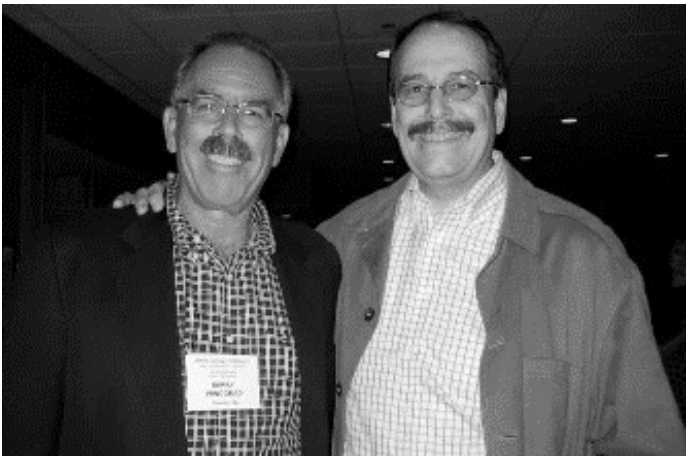


Betty Holley and William Holley Jr.

George Nicolau, David Feller, and Charles Coleman

Joshua Javits, William Gould IV, and Homer La Rue



Barry Winograd and Gil Vernon

Walt De Treux

**Shyam Das, Kathleen Miller,
David Petersen, and Daniel Nielsen**

**Alan Symonette
and Susan Stewart**

David Petersen

Chapter 2

THE CHALLENGE OF SELF-REGULATION: ETHICAL STANDARDS IN ARBITRATION

Dan Nielsen

Beginning in 1947 and continuing to this day, there has been a struggle to guide and regulate the conduct of labor-management arbitrators. This struggle is not difficult because of any intrinsic character defects in arbitrators as a species, but because arbitration is not a single thing. At its core, it is defined by the practices and needs of the unions and employers who seek the help of arbitrators in resolving their myriad disputes. What is acceptable in one region, or one industry may be utterly unacceptable in another. Some parties may want an arbitrator to mediate, while others would be horrified. Some may want an informal hearing, while others may wish to wax eloquent about the Federal Rules of Evidence. Some may wish to orally close even on a complex contract case, while others will wish to fully brief a verbal warning. All these preferences and habits constitute what is or is not arbitration in a given setting, making it hard to generalize what is and is not within the parties' expectations. There are, as there must be, substantial gray areas.

Add to those gray areas the fact that arbitrators are individual actors, who are not part of a larger business enterprise and who are not in any meaningful way subject to or accustomed to supervision. They are professionally ill-disposed to anyone second-guessing them or telling them what to do – they view that as being their job. The combination of a field in which it is hard to generalize and a professional grouping that prizes its independence and authority makes for a less than promising environment in which to impose a code of professional conduct. Yet I would argue that the National Academy of Arbitrators, after halting first steps and some strong midcourse corrections, has succeeded to a surprising degree.

The challenge of reducing 75 years of effort to a chapter of reasonable length is daunting, and some things have necessarily been left out. This chapter focuses on the regulation of arbitral ethics in labor-management disputes. It does not, other than tangentially, address the arbitration of nonunion employment disputes. Although some historical background is provided, there is little detailed analysis of the original 1951 Code of Ethics and Procedural Standards. And, other than a comment here and there, I have tried to avoid any editorializing, in favor of informing the reader about the Code of Professional Responsibility and its workings.

Initial Efforts at Articulating Standards of Conduct

Since its establishment, the National Academy of Arbitrators has recognized its obligation to identify and promote ethical standards in the practice of arbitration. Article II of the original By-Laws identified high ethical standards as one of the basic aims of the organization:

> The purposes for which the Academy is formed are: To establish and foster the highest standards of integrity, competence, honor, and character among those engaged in the arbitration of labor-management disputes on a professional basis….

At the founding meeting in 1947, a Committee on Ethics was one of two standing committees established by the new organization (the other, naturally enough, being the Membership Committee). Professor Nathan Feinsinger of the University of Wisconsin was named the first chair of the Committee on Ethics and was charged with considering the formulation of a code of ethics. [1]

At the Annual Meeting in January 1949, Chair Feinsinger provided an initial report, advising the Board of Governors of the Committee's need to explore the nature of the arbitral process – judicial vs. legislative vs. bargaining – before proceeding to a Code and identifying potential topical areas for a Code. It bears remembering this was a period when the very basic questions about what the proper role of the arbitrator should be were not well settled, and this committee was being asked to formulate a code governing a wide-ranging field that had barely existed ten years earlier. An agenda for discussion was agreed upon in early 1950, and a drafting committee was formed. The committee largely settled on a judicial model for the composition of the Code.

In 1951 a Code of Ethics and Procedural Standards for Labor-Management Arbitration (Ethics Code) [2] was jointly adopted by the AAA, FMCS, and the Academy. It purported to regulate the behavior of arbitrators and of the parties to arbitration. The Ethics Code broke into three parts. Part I was titled "Code of Ethics for Arbitrators." It addressed the general characteristics that should be demanded in an arbitrator, and the reasonable expectations for his conduct in general. [3] Part II, "Procedural Standards for Arbitrators," spoke to the mechanics of the process – how arbitrators are to be compensated, how hearings should be arranged and conducted, the proper content of an Award, including whether there should be an Opinion, and a prohibition on publishing the Award without consent. Part III, "Conduct and Behavior of Parties," sought to set out the expectations for the advocates and parties who appeared before an arbitrator. This section rather ambitiously sought to admonish parties to "approach arbitration in a spirit of cooperation with the arbitrator and […] seek to aid him in his duties," [4] abide by whatever rulings he might make, avoid concealment of necessary facts or the use of exaggeration, and it cautioned, "Acrimonious, bitter or ill-mannered conduct is harmful to the cause of good arbitration." [5] Notably, no representatives of the parties were involved in the drafting of the Code.

The Ethics Code as originally constituted was, in many ways, aspirational rather than functional. The enforcement mechanism consisted of

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[1] Whitley McCoy was the organizing chair at the first meeting of the Committee. He stepped away and Feinsinger took over as chair for the substantive work.
[2] 15 LA 961 (1951); "Code of Ethics and Procedural Standards for Labor-Management Arbitration," in *The Profession of Labor Arbitration, Selected Papers From the First Seven Meetings, National Academy of Arbitrators 1948-1954* at 151 (Jean T. McKelvey ed. 1957).
[3] The Ethics Code, at least in its drafting, did not admit the possibility of a female arbitrator.
[4] 15 LA 965.
[5] 15 LA 966.

the ability to issue Formal Advisory Opinions, informing members and agencies of the Committee's views on specific fact situations, with explanations that could then be generalized. That authority was granted to the Committee in 1953. Between 1951 and 1975, there was no notable enforcement of the Code beyond the private counseling of members.

At the 1960 Annual Meeting, a symposium titled, "The National Academy After Twelve Years," was presented. As reported in that meeting's *Proceedings*, then-new member (later President) Rolf Valtin led off by questioning the efficacy of the Code and the professionalism of the Academy:

> I want to turn for a moment to the role of the Academy as an overseer of its members. Recognizing that this is a delicate area, I nevertheless note that even we new members run into disturbing questions pertaining to such things as excessive charges, solicitation, self-aggrandizement, etc. The difficulty we have in running into questions of this sort is that we have no answer - other than to resort to shoulder-shrugging. We can point out that the Academy's constitution deals with the matter of abuses - to quote from it here: "To establish and foster the highest standards of integrity ... among those engaged in the arbitration of industrial disputes ... to adopt and encourage the acceptance of and adherence to canons of ethics to govern the conduct of arbitrators …." But we do not think we are in a position to tell anyone that the Academy has established the means by which to effectuate these objectives. This troubles us because we do not like to have to admit that the stated objectives are no more than a declaration of intent. Such admission must be accompanied by a loss of pride in the Academy.
>
> Here again, I assume that the matter of the Academy's role on unethical conduct by its members has been thoroughly studied in the past. And I assume, further, that seasoned minds concluded that an essentially passive role was the wisest course. We new members don't presume to tell you that it is the wrong course. But it does raise the nagging question as to whether the Academy's orientation is one of a club or one of an influential professional organization. If it is a professional organization, I, for one, would expect to have my professional affairs scrutinized by an arm of the governing body. The question I am raising is whether the time has possibly come for the Academy to take another look at its role in this regard. Should it not keep searching for appropriate mechanics for the enforcement of its own standards? [6]

[6] Rolf Valtin, "What I Expect of the Academy," in *Challenges to Arbitration, Proceedings of the 13th Annual Meeting, National Academy of Arbitrators* 18-19 (Jean T. McKelvey ed. 1960).

In considering whether arbitration could properly be considered a profession, the second speaker in that 1960 symposium, member William Loucks, was even more blunt that Valtin:

> …While preparing these thoughts for presentation I made inquiry as to what this Committee has done during its lifetime. *I received a one-word answer: "Nothing."* This is intolerable if we are serious about this matter of professionalization. If the Committee has seen fit not to open its facilities to complaints against individuals, it should be dealing with ethical aspects of arbitration in broader terms. There are numerous ways in which it could stimulate and assist arbitrators, individually or in groups, to visualize and reflect upon ethical or professional aspects of their activities. Why has it not been engaging in such potentially fruitful activities? [7]

Loucks went on to comment on the characteristics that distinguish a profession from a trade or other business enterprise, with the clear implication that the Academy did not yet possess the necessary focus:

> [A profession] "consists of a membership composed solely of those who are willing and anxious to follow an enlightened consensus on what activities and acts are permissible, demanded, or precluded to the practitioner -- basically without fear of organized sanction against the individual…The concern of the classic professions is to see that established emphases upon function, service, and codes of behavior are not chiseled away - our concern is to see that more and more emphasis is put upon performance of function, that more and more we build, through our individual behavior as arbitrators, those codes of right and wrong which keep our efforts focused on performance of function." [8]

Concern about the professionalism of labor arbitration was not confined to the Academy itself. In 1964 Judge Paul Hays of the Second Circuit, a former arbitrator, delivered a set of three Storrs Lectures on Jurisprudence at Yale Law School, discussing arbitral ethics. He did not comment directly on the Academy's Ethics Code, but he did express his view that labor arbitration was marked by the self-interest, self-promotion, fee padding, careerism, and general incompetence of most labor arbitrators. After praising Harry Schulman and Archibald Cox for their skill and professionalism, he then commented on the rest of the field:

> But surely arbitration cannot properly claim the right to be judged by the standards established by its best exemplars. What of the "man" whose work is characterized by "incompetence, maneuvering, and even downright

[7] William Loucks, "Arbitration – A Profession?" *id.* at 30 (emphasis added).
[8] *Id.*

> chicanery?" What of the "rascals in arbitration" who have "in some fashion ... to be made to conform to some ethical standards or be thrown out?" What of the arbitrators who indulge in "ambulance chasing" and "fee padding?" What of the arbitrators whose "interest" is in "how to perpetuate themselves" or of the arbitrator who in deciding a case asks himself, "How secure (am I) in (my) position?" "What is the importance of the relevant arbitration duties to (my) career?" [9]

Professor Benjamin Aaron characterized Hays as having pursued the evils of arbitration "without fear and without research." [10] Judge Hays was, as his book title suggested and Aaron's review affirmed, advancing a distinctly minority view. His lectures nonetheless caused a stir and provided grist for the continuing discussions over whether arbitration was evolving into a fully recognized profession, and about the efficacy of the Academy's attempts at passive self-regulation.

There followed a period of relative inaction, aside from the renaming of the Committee as the Ethics and Grievances Committee in 1965, and a continuation of internal discussions, what member Alex Elson termed "our intensive soul searching." Finally, at the 1971 Annual Meeting, Elson unveiled a proposal to replace the Code of Ethics with a Code of Professional Responsibility. While characterizing the existing Code as superbly drafted for its time, he asserted that the field was sufficiently well established that positive statements of what should be expected of an arbitrator could be made with confidence, and would be more effective in promoting professionalism than the "thou shalt not" formulations in the Code of Ethics. Elson patterned his proposal on the Code of Professional Responsibility the American Bar Association had devised for attorneys.

Elson gave four reasons for the comprehensive change he proposed – the need for public confidence in institutions, including the professions; the still unsettled question of whether, despite enormous growth in the field, arbitration could yet claim to be a profession; the recurring reports of serious misconduct among arbitrators outside of the Academy; and the pervasive problems of excessive cost and unreasonable delay. [11]

Elson contended that the revised Code should have four main objectives: to ensure "impartiality, competency, expedition, and reasonableness of cost." [12] In the first of these, Elson would emphasize the appearance of impartiality as well as genuine impartiality, and the need to step aside in any case when a party could reasonably perceive a conflict of

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[9] Paul R. Hays, *Labor Arbitration: A Dissenting View* 52 (1966). *Cf.* Jean T. McKelvey, "Ethics Then and Now: A Comparison of Ethical Practices," in *Arbitration 1985: Law and Practice, Proceedings of the 38th Annual Meeting, National Academy of Arbitrators* 283, 289 (Walter J. Gershenfeld ed. 1985) [hereinafter McKelvey].

[10] Benjamin Aaron, "Books Reviewed," 42 *Wash. L. Rev.* 969, 976 (1967).

[11] Alex Elson, "The Case for A Code of Professional Responsibility for Labor Arbitrators," in *Arbitration and the Public Interest, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators* 194-97 (Gerald G. Somers & Barbara D. Dennis eds. 1971).

[12] *Id*. at 198.

some type. In the second, he described a shared obligation among the Academy, the designating agencies, and the individual arbitrators to ensure competency. The Academy and the designating agencies, in Elson's view, were obligated to provide regular and continuous educational programs for arbitrators and advocates, while individual arbitrators were obliged to participate in that training, assist in the training of new arbitrators, and recognize the limits of their own knowledge and experience.

As to expedition, Elson acknowledged that some of the delay in the grievance process was solely attributable to the parties in delaying the processing of grievances to the arbitration step, but he identified delay in issuance of the award as the primary problem and the sole responsibility of the arbitrator. Lastly, Elson stated the twin truisms that excessive fees should be avoided, and that "excessive" was a matter of both circumstance and opinion. He observed generally that fees should be based on more than a mere accounting of time and should bear some reasonable relationship to the complexities of the case. He also counseled that a Code should make allowances for fee reductions where the financial circumstances of the parties warranted, noting, "An important characteristic of a profession is its willingness to place service first and to provide that service to all who need it on a basis on which they can afford to pay." [13]

Beyond the four principal concerns, Elson suggested that a Code promulgated by the Academy and the designating agencies was probably a poor vehicle for policing the conduct of parties to arbitration, as the existing Code purported to do, but that if they were to be regulated, they must be included in the drafting and approval process. He asked whether the Code should impose obligations to protect individual employees from collusive behaviors by unions and employers, such as rigged awards. He further challenged the drafters to consider the scope of activities to be regulated by a new Code – whether it should be limited to arbitration, or should extend to mediation, fact-finding and other neutral activities in the labor relations arena.

In her authoritative presentation on the development of the modern Code at the 1985 Annual Meeting, Jean McKelvey described the aftermath of Elson's powerful case for reform:

> As a result of Elson's eloquent and stimulating challenge the same three groups that had endorsed and promulgated the 1951 Code of Ethics undertook a major revision of the Code in 1972. Their efforts culminated in the publication on November 30, 1974 of the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes - our current "Blue Book." The reasons for revision were noted briefly in the Foreword. These included the advisability of combining ethical considerations and procedural standards under the caption: Professional Responsibility; the advisability of eliminating admonitions to the parties; the need to consider the substantial growth of third-party participation in the public

[13] *Id.* at 202.

sector; the growing significance of interest arbitration; and, the emergence of new and more diversified problems in private sector grievance arbitration. In comparing this new Code with the old one I note what appear to me to be the significant differences, changes, or innovations in the new Code as follows:

1. It applies to any procedures in which the neutral is empowered to make decisions *or* recommendations.

2. It applies to *statutory* as well as voluntary procedures in which impartial third parties are called upon to function, such as advisory arbitration, impasse resolution panels, statutory arbitration, fact-finding, and other special procedures.

3. It stresses the importance of technical competence on the part of the arbitrator as well as the need for an arbitrator to keep current with the principles, practices, and developments in his or her field of arbitration practice.

4. It states the obligation of experienced arbitrators to cooperate in the training of new arbitrators.

5. It covers new areas such as mediation by an arbitrator and med-arb; independent research and reliance on other arbitration awards; the use of assistants; consent awards; the avoidance of delay; and detailed prescriptions on fees.

6. It sets forth standards of prehearing, hearing, and posthearing conduct.

In short, as the Code itself recognizes, there can be no attempt to draw rigid lines between ethics and good practice.

So far as enforcement procedures are concerned the only reference to charges of professional misconduct is contained in the Preamble [14]

The new Code of Professional Responsibility was adopted by the FMCS, the AAA, and the Academy in 1974, ushering in the modern era of ethics regulation for the profession. [15] It replaced the passive admonitions of the Code of Ethics to refrain from certain actions with statements of the arbitrator's affirmative responsibilities to the parties, to the administrative agencies, and to the profession as a whole.

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[14] McKelvey, *supra* note 9, at 291-92.

[15] The adoption of the new Code was not without controversy, as related in Gladys W. Gruenberg, Joyce M. Najita, & Dennis R. Nolan, *NAA: Fifty Years in the World of Work* 158-63 (1997). As an illustration of the robust nature of the debate, Lewis Gill expressed the concern that the discussion of hearing practices and fees represented "grubby housekeeping details," with William Simkin responding that failure to address the issues would "help perpetuate a monstrosity." For the full text of the Code, as last amended in 2007, *see* https://naarb.org/code-of-professional-responsibility/.

The Structure and Substance of the Code of Professional Responsibility

The new Code abandoned the pretense of regulating the parties to an arbitration, focusing instead on the responsibilities of the arbitrator to the profession, the parties, and the administrative agencies. It is broken into a Preamble and six substantive sections, the first three of which describe those general responsibilities, and the last three of which describe the ethical requirements for an arbitrator's performance of his or her duties, in the areas of pre-hearing conduct, hearing conduct, and post-hearing conduct.

Preamble

The Code cannot properly or fully be understood without first referring to the Preamble.[16] The Preamble provides background on the Code, the assumptions on which it is based, its scope, format, and application. It advises the reader that the Code drafters understood that there are shades of gray in assessing conduct, and that as between two similar sounding situations, one may fall into the category of failing in a professional responsibility, while another may simply represent a case of poor professional practice. To aid in the understanding of the Code, it is drafted using three type faces. Bold faced type indicates a statement of general principles. Italics are used for statements amplifying those general principles. Regular type is used for explanatory or illustrative comments.

Arbitrator's Qualifications and Responsibilities to the Profession

This section describes the general qualities that an arbitrator must possess, including "honesty, integrity, impartiality and general competence in labor relations matters," and the admonition that compromise for the sake of acceptability is unprofessional. It advises the arbitrator not to accept cases that the arbitrator is not qualified to judge, or cannot become qualified to judge, and to remain current in the principles, practices and developments in the field. It sets forth the arbitrator's duty to assist in the training of new arbitrators. Most critically, it cautions that "An arbitrator shall not engage in conduct that would compromise or appear to compromise the arbitrator's impartiality."

Responsibilities to the Parties

The second section of the Code addresses the arbitrator's responsibilities to the parties and, naturally enough, is the lengthiest portion of the Code. It begins by describing the arbitrator's duty to become familiar with and respect the customs and practices of the parties he or she is working with. It cautions, though, that the duty does not extend to approving or consenting "to any collusive attempt by the parties to use arbitration for an improper purpose." This primarily goes to the concern over "fixed awards" where the parties dictate an outcome that may not be justified by the facts or the governing language, essentially using the arbitrator as cover to reach a desired result.

[16] The Foreword also provides valuable information on the history and development of the Code.

The duty to disclose relationships or circumstances that might give rise to a perception of impropriety or lack of impartiality is treated at some length and addresses business relationships, representational relationships, financial stakes, familial relationships, and personal relationships. The principal duty of the arbitrator in all such circumstances is to disclose the relationship and allow the parties to inquire further or to object to the arbitrator's service. The caveat is that an arbitrator who believes that there is a clear conflict of interests must withdraw from the case, even if both parties give their knowing consent to his or her continued service.

The privacy of arbitration is presumed, and the arbitrator is prohibited from disclosing details of a case to anyone not involved in the case, or from discussing the case except in confidence with another arbitrator. The arbitrator is also prohibited from publishing an award, unless both parties have been advised of the intent to publish and been given an opportunity to object, or unless applicable law requires publication.

There is an unusual and somewhat vague provision in subsection D regarding personal relationships with parties, that could be read as overlapping with the duty to disclose:

> An arbitrator must make every reasonable effort to conform to arrangements required by an administrative agency or mutually desired by the parties regarding communications and personal relationships with the parties.
>
> **a.** Only an "arm's-length" relationship may be acceptable to the parties in some arbitration arrangements or may be required by the rules of an administrative agency. The arbitrator should then have no contact of consequence with representatives of either party while handling a case without the other party's presence or consent.
> **b**. In other situations, both parties may want communications and personal relationships to be less formal. It is then appropriate for the arbitrator to respond accordingly.

The most plausible interpretation of this provision is that it goes to the interactions between the arbitrator and the parties in the course of the case, and the degree of formality that might be expected of the arbitrator. This would be important in the case of an arbitrator who is quite well acquainted with one party or advocate, but new to the other side. While there may be no need to make a disclosure of the arbitrator's familiarity with the advocate or party, the arbitrator must be mindful of the impression being made on the other side by his or her interactions, and the impact they may have on that side's perceptions of impartiality.

The arbitrator's duty to respect the decisions of the parties as to settlement of issues is specified, as is the arbitrator's potential role as a mediator. No party may be required to engage in mediation, unless the contract imposes such an obligation, and the arbitrator has the right to refuse to mediate, unless it was agreed to at the time of appointment.

Reliance on other arbitrators' awards, and the use of assistants by the arbitrator, are both addressed with the primary guidance being that the arbitrator is responsible for the ultimate award and cannot delegate any decision-making responsibility to others. One minor exception lies in the area of Consent Awards, where the parties themselves may make agreements or stipulations as to portions of the decision and ask the arbitrator to include them in his or her award. So long as the arbitrator is confident of his or her understanding of the terms, and has no reason to believe there is any improper purpose being served by the issuance of the Consent Award, it is consistent with the Code to include the stipulated terms.

In practical terms, the final two portions of Section 2, "Avoidance of Delay" and "Fees and Expenses," are significant because they are two of the evils that Elson identified as underlying the need for a revised Code. Delay is also significant because it is the most common complaint raised with agencies and with the CPRG. The Code requires compliance with the time limits imposed by the contract or the designating agency. The arbitrator must plan his or her work schedule to allow for compliance with those limits. This would include refusing work where the arbitrator knows that it will interfere with timely performance of the arbitrator's duties. An arbitrator who cannot meet time limits is affirmatively obligated to communicate with affected parties, request an extension of time, and provide them with a reasonably accurate estimate of completion dates.

Fees are addressed at length and in detail, although in the end the guidance amounts to (1) charge the rates you said you would charge when the case began; (2) don't charge for more time than you spend; (3) don't charge for more time than the case reasonably should have required; and (4) don't charge for expenses you didn't incur. All of this is fairly common sensical from a business standpoint, but the Code makes clear that it is also an ethical requirement.

Responsibilities to Administrative Agencies

This is the briefest of the six Code sections, as the arbitrator's responsibilities to the administrative agencies are not complicated or nuanced. The arbitrator is responsible for complying with the rules of a designating agency and being truthful in any representations made to the agency. The arbitrator must not seek improperly to influence any agency by means such as gifts, and an arbitrator must acknowledge that the primary responsibility of the agency is to serve the parties' interests, and not the arbitrator's.

Prehearing Conduct

The last three sections of the Code address ethical requirements in prehearing, hearing, and post-hearing conduct, but also include guidance as to what is and is not good practice in those settings. For example, the brief section on Prehearing Conduct includes the ethical directives, "All prehearing matters must be handled in a manner that fosters complete impartiality by the arbitrator" and all prehearing communications must be shared with all parties. In between those ethical obligations, the Code offers what amounts to a practice tip:

> **a.** … If differences of opinion should arise during such discussions [of procedural matters] and, particularly, if such differences appear to impinge on substantive matters, the circumstances will suggest whether the matter can be resolved informally or may require a prehearing conference or, more rarely, a formal preliminary hearing….

This paragraph says nothing in particular about the ethics of the prehearing procedures but gives guidance about the appropriate use of a prehearing conference.

Hearing Conduct

The section on hearing behavior is somewhat longer than the others because there are more issues that can arise concerning the hearing. It begins with a statement of the general principles governing an arbitrator's conduct in a hearing:

> An arbitrator must provide a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence and argument.
>
> **a.** Within the limits of this responsibility, an arbitrator should conform to the various types of hearing procedures desired by the parties.
>
> **b.** An arbitrator may encourage stipulations of fact; restate the substance of issues or arguments to promote or verify understanding; question the parties' representatives or witnesses, when necessary or advisable, to obtain additional pertinent information; and request that the parties submit additional evidence, either at the hearing or by subsequent filing.
>
> **c.** An arbitrator should not intrude into a party's presentation so as to prevent that party from putting forward its case fairly and adequately.

The section then goes into specifics on the use of transcripts and recordings, and plant visits. These are governed by the wishes of the parties, when the parties can agree. An arbitrator cannot insist on a transcript if the parties disagree, unless that was made a condition of accepting an appointment. An arbitrator may, however, avail him or herself of a transcript prepared for one side. An arbitrator is required to consent to a plant visit at the request of either party, or may request a plant visit.

This section also provides that the possibility of an ex parte hearing can be consistent with the Code, with the rather general guidance, "In determining whether to conduct an ex parte hearing, an arbitrator must consider relevant legal, contractual, and other pertinent circumstances." The arbitrator is also required to be certain that the party who is not in attendance was given notice of the time, date and place of the hearing.

Finally, the section on Hearing Conduct requires the arbitrator to honor the parties' agreement as to the issuance of a bench decision, as long as the arbitrator knew of that requirement when accepting the appointment. If not, the arbitrator may decline to issue a bench decision, and if it is only a unilateral request, the arbitrator should refuse absent "most unusual circumstances."

Post Hearing Conduct

Section 6 of the Code spells out the arbitrator's general duty to respect the practices and agreements of the parties with regard to post-hearing briefs or arguments, and the arbitrator's right to resolve disputes over whether briefs should be required.

The section addresses the Award, beginning with the prohibition on disclosing the terms of the Award to one party before it is provided to the other, recognizing that in tri-partite situations it may be permissible to share a proposed Award with the party arbitrators, and that in some settings the parties may want and expect the arbitrator to use a draft of an award to promote stipulations or agreement. The provision on Awards again mixes ethical directives with advice on good practice. The general requirement is that the award should be "definite, certain, and as concise as possible." This is followed by advice on the factors to be considered in drafting the Award:

> **a.** When an opinion is required, factors to be considered by an arbitrator include: desirability of brevity, consistent with the nature of the case and any expressed desires of the parties; need to use a style and form that is understandable to responsible representatives of the parties, to the grievant and supervisors, and to others in the collective bargaining relationship; necessity of meeting the significant issues; forthrightness to an extent not harmful to the relationship of the parties; and avoidance of gratuitous advice or discourse not essential to disposition of the issues.

Again, these are not ethical commands but simply sound advice to the arbitrator.

The final portion of Section 6 addresses the arbitrator's role after the issuance of the Award. First, the Code makes clear that the doctrine of *functus officio* is an ethical principle, in that "No clarification or interpretation of an award is permissible without the consent of both parties." The obvious corollary point is that even where there is a provision for clarification or interpretation, both parties must be heard before any decision is made. There is, however, an exception to the rule against clarification or interpretation, and that deals with the remedy. Remedial jurisdiction may be retained, with or without the consent of the parties, for the sole purpose of resolving "any questions that may arise over application or interpretation of a remedy." The final provision of the Code makes it clear that an arbitrator has no role in the enforcement of an Award, and that the confidentiality of arbitration requires that an arbitrator not voluntarily participate in any enforcement proceeding.

The Evolution of the Code – Procedures for Amendment

As there are three parties to the Code, any amendments must be accepted by all three in order to become effective. While amendments may be proposed by the FMCS or the AAA, in practice since 1974 the Academy has initiated all amendments. The Academy's process for amendments is specified in Article IV, Section 2 of the By-Laws. It generally requires that they be drafted by the CPRG and approved by a two-thirds vote of that committee. The draft is then presented to the AAA and the FMCS for approval. If approved, the amendment is then returned to the Academy for approval by the Board of Governors and adoption by the membership at an Annual Business Meeting.

Given the fairly comprehensive coverage of the Code, and the cumbersome process for amendments, there have been few changes since the original adoption in 1974. The first was in 1985, when a long simmering disagreement over the ethics of requesting permission to publish awards was resolved by allowing an arbitrator to seek permission in writing at the hearing, with an option for a party to revoke permission within 30 days of issuance, or through the inclusion of a statement at the time of issuance to the effect that the arbitrator wishes to publish the award, and that a failure to object within 30 days will be treated as implied consent to publication.

In 1996 the Preamble of the Code was amended to clarify that an arbitrator serving as a decision maker (either binding or recommended) under a statute, employment contract, unilaterally adopted dispute resolution system, court order, fair share mechanism, or the like should be guided by the provisions of the Code in rendering such services. (In conjunction with this charge, Section II A.3 of the Code was amended to make clear that an arbitrator is under no obligation to accept appointment under a unilaterally adopted process, but that if he or she chooses to do so, there would be a duty to disclose any on-going relationship with the employer or union.) Article II, Section 1 of the NAA Constitution was also amended to add "and employment" in the Academy's Statement of Purpose describing the scope of the Academy's promotion of the study and understanding of arbitration, and its cooperation with other institutions. As discussed immediately below, the intent and impact of these changes remains a matter of considerable controversy within the Academy.

Separately, in 1996, the Academy's ban on advertising was slightly loosened. However, in 2003, following a threat of litigation by the Federal Trade Commission, the Academy agreed to remove the ban entirely, with the exception of advertising deemed to be "false or deceptive."[17] This was then extended to allow written solicitations of work, so long as the solicitation is not "false or deceptive" and the solicitation is copied to the other party to the contract.

In 2007 the last major amendment was made, providing that an arbitrator could, on his or her own motion, properly retain jurisdiction over a case to resolve disputes over the remedy ordered. This is distinct from any effort to interpret or clarify nonremedial aspects of the Award, which remain strictly prohibited unless agreed by the parties.

[17] *See infra* ch. 12, Richard I. Bloch, "The Academy and the FTC."

The Code's Application to Employment Arbitration and Other ADR Mechanisms

The Code and the predecessor Code of Ethics were intended to guide and regulate the conduct of arbitrators in labor-management disputes. With the rise of ADR and the increasingly diverse activities of neutral practitioners, the question arises "what is the place of the Code in neutral dispute regulation other than labor-management disputes?" This is a point of some controversy and disagreement within the Academy itself.

In 1993 a committee chaired by Michael Beck issued a report addressing the role of the Academy, if any, in employment arbitration.[18] It recommended, in essence, elevating employment arbitration to an equal footing with labor-management arbitration as a focus of the Academy's activities and purposes. While much of the report was adopted, the statement of purpose in Article II of the Constitution was amended in a far more modest way, simply recognizing that the Academy had an interest in both labor and employment disputes, and in cooperating with other institutions sharing those interests.

In 1996, however, amendments were made to the Code itself addressing the broadened scope of the disputes members of the Academy were called upon to resolve. It is fair to say that the general ethical regulation of employment arbitration was not the primary focus of these changes. The larger issue of the day was whether the arbitrator had an obligation to accept grievance style disputes arising from unilateral employer policies, or fair share and agency fee cases arising from unilateral union policies. The Code amendments, authored by George Fleischli for the CPRG, made it clear that acceptance of such cases was purely voluntary.[19] That was the only substantive amendment of the Code. However, the Foreword and the Preamble were also amended. The amendment of the Foreword was simply made as part of a recitation of the history of amendments over time.

The rewriting of the Preamble was arguably more substantive in nature and gives rise to the disagreement within the Academy. The Preamble, as previously discussed, is an important source of guidance for those seeking to understand and apply the Code. As rewritten, the Preamble, in both the "Background" and "Scope of Code" sections, strongly suggests that the Code is intended to cover the wide range of dispute resolution activities Academy members engage in, including employment arbitration:

Preamble

Background

> The provisions of this Code deal with the voluntary arbitration of labor-management disputes *and*

[18] For other views of the Beck report and succeeding developments, *see infra* ch. 9, Dennis R. Nolan, "The Academy's Encounter with Employment Arbitration."

[19] Code of Professional Responsibility, Section 2 – Responsibilities to the Parties, Subsection A.3: "An arbitrator who is asked to arbitrate a dispute under a procedure established unilaterally by an employer or union, to resolve an employment dispute or agency shop or fair share dispute, has no obligation to accept such appointment. Before accepting such an appointment, an arbitrator should consider the possible need to disclose the existence of any ongoing relationships with the employer or union."

certain other arbitration and related procedures which have developed or become more common since it was first adopted.

…

Arbitrators of labor-management disputes are sometimes asked to serve as impartial third parties under a variety of arbitration and related procedures dealing with the rights and interests of employees in connection with their employment and/or representation by a union. In some cases these procedures may not be the product of voluntary agreement between management and labor. They may be established by statute or ordinance, ad hoc agreement, individual employment contract, or through procedures unilaterally adopted by employers and unions. Some of the procedures may be designed to resolve disputes over new or revised contract terms, where the arbitrator may be referred to as a Fact Finder or a member of an Impasse Panel or Board of Inquiry, or the like. *Others may be designed to resolve disputes over wrongful termination or other employment issues arising under the law, an implied or explicit individual employment contract, or an agreement to resolve a lawsuit*. In some such cases the arbitrator may be referred to as an Appeal Examiner, Hearing Officer, Referee, or other like titles. *Finally, some procedures may be established by employers to resolve employment disputes under personnel policies and handbooks or established by unions to resolve disputes with represented employees in agency shop or fair share cases.*

The standards of professional responsibility set forth in this Code are intended to guide the impartial third party serving in all of these diverse procedures.

Scope of Code

This Code is a privately developed set of standards of professional behavior for arbitrators who are subject to its provisions. It applies to voluntary arbitration of labor-management disputes and the *other arbitration and related procedures described in the Preamble, hereinafter referred to as "covered arbitration dispute procedures."* [Emphasis added throughout the above quotations]

As noted by Dennis Nolan and Ted St. Antoine in their chapter on employment arbitration,[20] this language, on its face, would make the Code applicable to employment arbitration cases not arising under a collective bargaining agreement. The controversy is generated by the fact that these

[20] See *supra* note 18.

changes were not, at the time they were adopted, generally understood as having that effect, and have never been treated as having that effect. The Code has never been applied to an employment arbitration case, and the great majority of Academy members would, I believe, be surprised by the thought that it could be. Even Professors Nolan and St. Antoine would concede that the plain language argument for applying the Code to employment arbitration was never advanced until after the effort to adopt a binding Code for Employment Arbitration failed at the Academy's 2013 meeting in St. Louis. One of the principal arguments for refusing to adopt the proposed Code was the unwillingness of our Code partner at the American Arbitration Association to agree to outside regulation of its employment arbitrators. Since the Code is a three-party system, it is very unlikely that the AAA understood the 1996 amendments to extend Code coverage to employment cases, and indeed – as noted by St. Antoine – its chief legal officer does not believe those amendments did so.

Given the conflict between the plain language of the Preamble and the history of the Code's administration, it is safe to say that Academy members acting as employment arbitrators would be well advised to conduct themselves as if the Code applied, until the internal day of reckoning arrives for the Academy on this question.

Enforcement of the Code

The Code imposes obligations on arbitrators, but it says nothing about enforcement other than a passing reference in the Preamble. Each of the three parties to the Code has at least a potential role in enforcing it. The Code applies to labor-management arbitrators generally, including those who are not members of the Academy if the arbitrator is appointed in the case by the FMCS or the AAA. The AAA views its responsibilities as being primarily to its clients and does not engage in formal enforcement activities. Instead, it responds to Code violations by reducing (or eliminating) the number of panels the arbitrator is listed on. [21] The FMCS, for its part, does have a formal enforcement mechanism through its Arbitrator Review Board for cases involving misconduct other than late awards. In cases of serious misconduct other than untimeliness, if the Director of Arbitration Services cannot satisfactorily resolve a complaint against an arbitrator, the arbitrator may be given an opportunity to respond to the complaint, and the Arbitrator Review Board may, if warranted, order an investigation and a due process hearing. Otherwise, it may act on the basis of the complaint and the response. Sanctions may extend as far as removal from the roster. In the case of late awards, the FMCS will inquire and may suspend the arbitrator from the panels for a period of time needed to address the underlying issue. [22]

The NAA did not, in any meaningful way, enforce the Ethics Code, aside from providing Advisory Opinions, cautions, and counseling. Following the adoption of the Code of Professional Responsibility, the Academy in 1975 replaced the Ethics and Grievance Committee with the

[21] Robert Coulson, "Dissemination and Enforcement of the Code of Ethics," in *Arbitration 1988: Proceedings of the 41st Annual Meeting, National Academy of Arbitrators* 230 (Gladys W. Gruenberg ed. 1988).

[22] Jewel Myers, "Dissemination and Enforcement of the Code of Ethics," *id*. at 235.

Committee on Professional Responsibility and Grievances (CPRG), composed of a chair and such other members as may be appointed by the president. By custom, the chair serves a three-year term.

With the establishment of the CPRG, the Academy adopted By-Laws changes to provide due process in investigating complaints, determining guilt, assessing penalties and providing for appeals (Article IV, Section 2). The CPRG is the only one of the Academy's standing committees addressed in any detail in the By-Laws. It is charged with three responsibilities. First, as noted above, the CPRG recommends amendments to the Code. Second, as discussed in greater detail below, the CPRG drafts formal advisory opinions, offering interpretations of the Code to advise members and guide appointing agencies in the application of the Code. The third and primary responsibility of the CPRG under the By-Laws is the investigation and disposition of complaints against members for alleged violation of the Code. [23]

Upon receipt of a written complaint, the chair or the chair's designee is required to investigate the complaint, contacting the complainant and the charged member. The investigation is to be conducted "using an informal and conciliatory approach where appropriate," which in practice means that the chair will attempt to seek a voluntary resolution of the complaint. Sometimes this involves clarifying what occurred, if there is a misunderstanding between the arbitrator and the complainant, and sometimes this involves active mediation, with the chair seeking some mutually satisfactory resolution. In the case of a late award, for example, the chair may seek a commitment from the arbitrator to issue the award within a set period of time, and a commitment from the complainant that that will resolve the complaint.

If the complaint cannot be resolved informally, the chair will gather the relevant facts. The member is obligated under the By-Laws to respond promptly and fully to any request for relevant information. On completing the investigation, the chair will confer with two other members of the CPRG and will determine whether there is probable cause to believe a violation has occurred. If the chair determines there is no probable cause, the chair will communicate that to the member and the complainant in writing, and the complaint will be dismissed. If the chair finds probable cause, that too is communicated in writing. The chair's determination of probable cause is not appealable. The target for concluding the investigation phase is 45 days from the filing of the complaint.

If probable cause is found, the chair will designate a member of the CPRG (other than the two who were consulted in making the cause determination) to serve as a hearing officer. The hearing officer supplies the member with the written charges, including a specification of what Code provisions may have been violated. The member then has 21 days to respond in writing. Failure to respond leads to a presumption that the allegations have not been denied.

If there is no dispute of fact, the hearing officer may proceed based upon the written record. If there are factual disputes, the hearing officer will

[23] Although it is not specifically mentioned in the By-Laws, perhaps the major activity of the CPRG is the provision of informal advice to members seeking guidance on the Code's applicability to a given situation.

set a hearing, giving at least 30 days' notice to the complainant and the member. The hearing is a private proceeding. Parties may be represented if they wish, but the hearing need not follow formal court procedures. A record is made at the Academy's expense. Following the hearing, the parties may submit briefs in support of their respective positions. The hearing officer will provide a written report, setting out the findings of fact, and the appropriate disposition of the charges. The evidentiary standard for finding a violation is "clear and convincing evidence." Article IV, Section 2e of the By-Laws dictates the three possible outcomes of the hearing:

> (i) If the Hearing Officer finds that the charge has not been proved by clear and convincing evidence, the complaint shall be dismissed and both the complainant and the charged member will be notified of this action by the Chair of the Committee, who shall transmit a copy of the Hearing Officer's report to both persons.
>
> (ii) If the discipline determined to be appropriate by the Hearing Officer is either advice or reprimand, such decision shall be conveyed to both the charged member and the complainant by the Chair of the Committee together with a copy of the report.
>
> (iii) If the Hearing Officer believes that discipline more severe than advice or reprimand may be appropriate, the Hearing Officer shall consult with two past presidents of the Academy before arriving at a decision. Following such consultation, if the Hearing Officer decides that censure, suspension or expulsion from the Academy is the proper discipline, that determination shall be transmitted to the charged member and the complainant by the Chair of the Committee together with a copy of the report.… [24]

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[24] As should be evident, the hearing officer has a range of possible penalties available, depending upon the severity of the offense and the prior history of the member. These penalties are defined in the CPRG's Policies and Procedures Manual:

> **Advice:** Advice is the lowest level of discipline, suitable for violations that are deemed minor and/or inadvertent. Advice may include guidance about what the violation was, and how to avoid such violations in the future. It may also include directions to take remedial action, such as sending a letter of apology or carefully reviewing the Code. (CPRG revision 9/30/16)
>
> **Private Reprimand:** A private reprimand is appropriate for violations of the Code or Bylaws that are deemed to be relatively less serious and severe, or involve a first offense. A private reprimand shall be communicated only to the charged member and to the complainant.
>
> **More Severe Discipline:** If the Hearing Officer determines that discipline more severe than advice or a private reprimand is appropriate, the Hearing Officer shall consult with two past Academy presidents before arriving at a decision. (CPRG revision 9/30/16)
>
> **Public Censure:** A public censure is appropriate for violations of the Code or Bylaws that are deemed to be relatively more serious and severe, or involve a second or subsequent offense. In the event a public censure is issued, the Executive Secretary-Treasurer of the Academy will notify the membership of the name of the member disciplined, the nature of the offense committed, and the discipline imposed. This notification may be satisfied by publication in the Chronicle.

The decision of the hearing officer is final unless it is appealed within 30 days to the Academy's Appeals Tribunal. The Tribunal is a three-member body appointed by the president, and it generally consists of senior members of the Academy, often past presidents themselves. The Tribunal receives written arguments in support of and opposition to the appeal. It determines, on the basis of the record generated before the hearing officer, whether the findings of fact are based on substantial evidence, and whether a finding of a violation is supported by clear and convincing evidence.[25] The decision of the Tribunal is final.

Where a charge is proved, but the appropriate discipline is no more than advice or reprimand, notice of that discipline is provided to the member and to the complainant. If, on the other hand, censure, suspension, or expulsion is the appropriate discipline, the member and complainant receive notice, and the executive secretary-treasurer of the Academy will notify the Academy's membership of the member's name, the nature of the offense, and discipline imposed, either by direct communication or by publication in *The Chronicle*, which is the Academy's official publication.

Non-Enforcement Activities to Further the Code

The bulk of the CPRG's work does not involve hearing and resolving complaints, but in helping members to avoid complaints. The chair of the CPRG is the point of contact for inquiries about ethical obligations, and the appropriate course of action where a member is unsure of how the Code might apply to a particular situation. The chair also responds to requests for guidance from parties who believe they may have grounds for a complaint, and from designating agencies. These are informal and

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Suspension or Expulsion: Suspension or expulsion is appropriate for violations of the Code or Bylaws that are deemed to be the most serious and severe, or involve multiple, repeated or egregious offenses. In the event the Hearing Officer determines that suspension or expulsion is appropriate, the Hearing Officer will impose the following terms of suspension or expulsion, as applicable, in accordance with the guidelines adopted by the Board of Governors:

1. A suspension shall be for a minimum period of one year.
2. The member's name shall be removed from the Academy directory and mailing lists.
3. The member is prohibited from using the Academy's name as a reference or for identification purposes.
4. The member is prohibited from attending Academy members-only meetings.
5. The member may not serve in any Academy office or committee.
6. The member's Academy-provided legal representation benefits are cancelled.
7. The member (or the Academy's Executive Secretary-Treasurer if the member prefers) shall notify all designating agencies listing the member that the member has been suspended or expelled and shall request the agencies to omit Academy membership from any biographical material for that member during a period of suspension. A copy of the notice shall be sent to the CPRG Chair.
8. The Executive Secretary-Treasurer shall notify the Academy membership of the disciplined member's name, the nature of the offense committed, and the discipline imposed. This notification may be satisfied by publication in the Chronicle.
9. The member's obligation to pay dues and make Legal Representation Fund contributions during a period of suspension is cancelled.
10. During a period of suspension, the member's failure to comply with any of the terms and conditions of suspension may result in expulsion from the Academy.

[25] In rare circumstances, the Tribunal may also modify a penalty if it concludes that the hearing officer's proposed penalty is too harsh or too lenient.

confidential contacts, but they are by far the greater part of the chair's work, and the most valuable contribution the CPRG makes to the profession.

From time to time, the CPRG also issues formal Advisory Opinions, explaining the correct application of the Code to a specific fact situation. [26] In the early days under the Code of Ethics, the issuance of Advisory Opinions was the primary means of securing compliance with the Code. The determination of when and on what subject to issue an Advisory Opinion is within the discretion of the Committee, and the entire Committee will participate, although initial drafting may be assigned to two or three members. The chair will seek consensus, even though there is no requirement of unanimity for the issuance of an Opinion. Once the Committee arrives at an acceptable final draft, the chair presents it to the Board of Governors for approval. If the Board accepts the draft, it is transmitted to the designating agencies and is published on the Academy's website. This same process is followed for the revision or rescission of Advisory Opinions. [27]

In 2016, faced with a series of inquiries from a designating agency on a wide range of topics, the CPRG adopted a less formal system for more quickly providing guidance on Code issues. Advice Letters are similar to Advisory Opinions, in that they may address a specific situation or a general question. An Advice Letter expresses the opinion of the current chair of the CPRG as to the proper interpretation of the Code when a designating agency requests such guidance, including whether the chair would or would not find probable cause for a violation if presented with the facts described by the agency. The Advice Letter is drafted by the chair and reviewed with at least two other members of the CPRG, much the same as a probable cause determination would be. The Advice Letter is not subject to approval by the Board of Governors and is not published. All Advice Letters include the admonition that "the advice contained therein is the opinion of the Chair who drafted the letter, is not binding on the CPRG, and may be modified or overruled by a future Chair." [28]

In addition to providing guidance to members and agencies, the CPRG actively seeks to promote public awareness of the Code. The Code of Professional Responsibility can only serve to increase confidence in the members of the Academy and in the profession as a whole if it is known to the consuming public. To that end, the Academy has taken steps to make the Code and the complaint process more accessible to people outside of the organization. The traditional method of publicizing the Code has been through presentations at meetings of the Academy, the FMCS, and other labor-management organizations.

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[26] By-Laws, Article IV, Section 2. These Opinions may be derived from actual cases, or they may address issues of importance that have not yet been presented as complaints. They typically require a year or more of drafting and editing before being presented for approval, although much of that time resulted from the twice-yearly meeting schedule of the Committee. The increased use of email and video for conducting business has compressed the time. In response to the 2020 coronavirus pandemic, for example, the CPRG issued Opinion 26, discussing the rights and obligations of arbitrators faced with a demand for an in-person hearing. This Opinion was issued on April 1, 2020 at the very beginning of the lockdowns.

[27] The Academy has issued twenty-six Advisory Opinions in its history, eleven of which have been rescinded, and two of which have been withdrawn, rewritten, and reissued.

[28] CPRG Policies and Procedures Manual, as revised September 30, 2016.

In keeping with the digital age, the Code and the Formal Advisory Opinions are available to the public on the Academy's website at www.NAARB.org. To increase accessibility, in 2016 the CPRG drafted a plain language description of the complaint process, and how to initiate a complaint. This too is on the Academy's website, and it incorporates a permanent email address for the chair of the CPRG (ChairCPRG@GMail.com), that people can use to file complaints or receive information. The plain language version runs about one single-spaced page:

> The NAA CPRG exists primarily for the purpose of enforcing the Code of Professional Responsibility for Labor-Management Arbitrators. The Committee has jurisdiction only over members of the National Academy of Arbitrators, not over employers, unions, lawyers, or arbitrators who are not members of the NAA. The Committee is not a forum for reviewing the merits of any decisions or for appealing them.
>
> - If you believe that an arbitrator has violated the Code, you can make a complaint to the Chair of the CPRG at ChairCPRG@GMail.com.
> - If possible, indicate what provisions of the Code you think were violated. The Code is available on the Academy's website, www.naarb.org.
> - Be specific about the conduct you think violated the Code. If you cite rulings or decisions of the arbitrator, specify which actions you are questioning. If possible, provide the Chair with a copy of any award or decision involved.
> - It is also helpful to indicate whether there is something the arbitrator can do to satisfy your concerns.
> - The Chair will investigate the complaint. The Chair will speak to the complainant and the arbitrator to gather information and seek explanations for what has occurred.
> - The Chair will try to determine whether the parties in the dispute can come to a meeting of the minds that might resolve their dispute. The Chair will also determine whether there is probable cause to believe that a Code violation has occurred.
> - Usually, the investigation is completed in about 45 days.
> - At the conclusion of the investigation, the Chair consults with two other members of the CPRG and then makes a determination as to whether there is, or is not, probable cause to believe the Code has been violated. A finding of no probable cause is a final determination and there is no appeal.
> - If the Chair finds probable cause, he or she appoints a hearing officer from among the members of the

CPRG, someone who was not consulted in making the probable cause determination. The hearing officer will determine facts relevant to the matter and consider arguments made by the complainant and the arbitrator.

- In some cases, a formal hearing is required, but that is not usual. If a hearing is required, it may be conducted electronically. The hearing is not open to the public, it is limited to the necessary parties, their representatives, and witnesses. The parties may be represented by lawyers, at their own expense.
- The hearing officer makes a decision as to whether a violation has occurred and issues a decision. If the hearing officer determines that a Code violation has occurred, he or she will decide what penalty is appropriate. The general range of penalties runs from a private reprimand up to suspension or expulsion from the National Academy of Arbitrators. The CPRG cannot change any award or decision or award damages to anyone.
- The hearing officer's decision is final unless it is appealed by either party within 30 days of its issuance. There is a three member Appeals Tribunal which hears these appeals. Their decision is final.

There was some initial concern within the Academy that a plain language set of instructions on how to file complaints would encourage more complaints, but that was not considered likely by the Committee. In fact, the guide more probably has the effect of discouraging some complaints, since it makes it clear that filing a complaint will not lead to removing the arbitrator from the case, vacating an adverse award, or any award of monetary damages, and that there must be some specific basis for a complaint beyond dissatisfaction.

The Code in Practice

While the Code, the By-Laws, and the CPRG Practice and Procedures Manual provide an elaborate system for enforcement, the fact is that formal complaints are relatively rare, the appointment of a hearing officer rarer still, and the imposition of penalties is quite rare. This may suggest that there is no effective regulation of arbitrator conduct, but that would be misleading. Members of the Academy routinely contact the chair of the CPRG to ask for guidance when faced with a situation that may involve the Code, or simply a situation in which they are uncomfortable with some course of action. Thus, violations are avoided rather than remedied. Even if a party feels aggrieved by some action of an arbitrator, it is the case that most complaints are resolved before they ever come to the Academy's attention, simply through direct contacts between the arbitrator and the aggrieved party. Voluntary resolution can also follow from contacts between the designating agency and the arbitrator, since the complaining party always has the right to go to the FMCS, AAA, or whatever agency made the appointment, and those

agencies would have no reason to contact the CPRG if the problem is satisfactorily resolved.

Even when a complaint is received, the chair of the CPRG will explore possible resolution with the complainant and the member, and a very high percentage of cases will resolve at that step. If a complaint does not resolve, the chair will investigate and make a probable cause determination. Many complaints are brought on grounds that are not covered by the Code, or seek remedies that are not available under the Code. Individual complainants quite often come to the CPRG with what are, in essence, disagreements with the arbitrator's reasoning or rulings, hoping to have the CPRG order the arbitrator off the case or the Award vacated. In those cases, if the complainant will not accept that these are matters beyond the CPRG's domain, the chair in consultation with two other members will dismiss the complaint as being unsupported by probable cause. Finally, if a complaint is supported by probable cause, a member accused of serious misconduct will quite often resign rather than face the hearing process and the possible embarrassment that may follow. This complaint process applies only to Academy members. Resignation terminates all proceedings, and resignation may occur at any time before the actual imposition of a penalty. Thus, it is likely that there will never be a formal expulsion from the Academy, given that the degree of publicity and notoriety associated with an expulsion is more damaging to the member than a simple resignation would be.[29] As much as anything, then, the lack of formal action by the CPRG indicates the ready availability of "off ramps" in the process, whereby a formal hearing is rendered unnecessary.

It is, of course, the case that some matters do go to hearing and result in a finding of a Code violation. In 2016 the chair of the CPRG examined all of the disciplinary files to study the imposition of penalties and attempt to determine what standards applied to penalty determinations. 1988 was the first year in which a member was disciplined with anything more than an Advice or Censure, even though the By-Laws had at least theoretically provided for discipline above that level since at least the mid-1960s. In that case a member was suspended for one year for excessive delay in providing an Award, including ignoring inquiries and making apparently insincere commitments to the parties and the CPRG.

Excessive delay is far and away the most common basis for formal discipline. This makes sense because any party might have an interest in bringing such a complaint, it is not hard to prove, and it is difficult to defend against. The following sets forth a summary of penalties against members of the National Academy of Arbitrators found guilty of misconduct:

Summary of Penalties

Nature of Complaint	**Penalty - Special Circumstances**
Delay	One Year Suspension - Member repeatedly failed to issue the Award despite assurances to the

[29] It should be noted that when a member resigns to terminate disciplinary proceedings, a record of the proceedings is maintained by the Academy, and is shared with the Membership Committee should the member ever reapply to the Academy. By-Laws, Article IV, Section 2.

	parties, the appointing agency and the CPRG. Delay in excess of three years.
Delay	One Year Suspension - Member repeatedly failed to issue the Award despite assurances to the parties, the appointing agency and the CPRG. Repeat offender. Delay in excess of three years.
Delay	Private Censure - Stipulated between member, complainant, and CPRG.
Delay	One Year Suspension - Member referred by FMCS which removed the member from its roster. This was the member's fourth offense. The members had also made repeated unmet promises to produce Awards.
Delay	Private Censure - Anecdotal – unknown number of cases. This is the recollection of former Chair Dana Eischen that this was the standard penalty where the member was not a repeat offender and/or had not misled the CPRG and designating agencies.
Delay	One Year Suspension - Anecdotal – unknown number of cases. This is the recollection of former Chair Dana Eischen that this was the standard penalty when the member was a repeat offender and/or had misled the CPRG and designating agencies. This may be a duplicate of the second delay case listed above.
Ex Parte Contacts / Unilateral Disclosure of terms	Censure - Good faith error based on ignorance of the Code. The Appeals Tribunal found the penalty of Advice imposed by the hearing officer was too lenient given the egregious nature of the violation.
Excessive Fees	No Penalty - The elderly, seriously ill member had closed his practice by the time the complaint was investigated.
Conflict of Interest/ Failure to Disclose	Private Censure - Apparent good faith error.
Conflict of Interest/ Failure to Disclose	Violation Noted - Purely technical violation – the conflict was attenuated and based on a political relationship that was long in the past.

Conflict of Interest/ Failure to Disclose	One Year Suspension - Negotiated outcome with complainant, member, and CPRG chair.

Additional Functions of the CPRG - Membership Standards and Internal Grievances

The CPRG's primary job is the interpretation and enforcement of the Code. It is, however, the only body in the Academy with processes for the resolution of disputes. As such it has been treated as something like a Swiss Army knife and tasked with several responsibilities unrelated to the Code.

The CPRG and Membership Standards – Article VI, Section 6

In 1976 the Academy barred members from engaging in labor-management advocacy. Members admitted before April 1976 were grandparented as to labor-management advocacy in general but were prohibited from appearing as advocates before other Academy members. In May 2008 these prohibitions were extended to advocacy in other workplace dispute resolution, again with a grandparenting provision.

These changes were made under the membership standards provisions of the By-Laws, Article VI, Section 6, and do not represent ethical violations. Rather, they represent the Academy's judgment that advocacy by Academy members is inconsistent with the nature and purposes of the organization. As the original prohibition went to membership standards, enforcement was vested in the Membership Committee. Over time, however, it became clear that the Membership Committee was not logically structured to undertake the fact-finding required when a violation might be alleged. In May 1991, the By-Laws were amended to assign enforcement of this provision to the CPRG.

The Academy's Internal Grievance Procedure

Except in the most general terms, the Code does not regulate dealings among members of the Academy. In response to complaints by members, and after considerable study by a select committee formed for that purpose, in May 2020 the Academy's Board of Governors unanimously adopted a policy directed at offensive interactions between members. The Policy Statement is brief:

> One of the stated purposes of the National Academy of Arbitrators is to 'encourage friendly association among the members of the profession.' We are all accomplished professionals, or we would not have qualified for membership. The hallmark of our dealings with one another must be the respect due to a fellow professional. The Board of Governors deems this a basic obligation owed to the profession, the organization and one another. It is the policy of the National Academy of Arbitrators that any member who, in dealings with another member, engages in harassment or discrimination fails in this obligation and is subject to disciplinary consequences

to the same degree as a member who violates the Code of Professional Responsibility.

Enforcement of this policy is through the Coordinator of Internal Grievances, who is appointed by the president. The coordinator is an ex officio member of the CPRG, and functions in an almost identical fashion as the CPRG chair when presented with a complaint. The coordinator speaks with the parties involved and seeks to determine whether a mutually satisfactory resolution can be reached. If not, the coordinator investigates and makes a probable cause determination, in consultation with two members of the CPRG. If no probable cause is found, the grievance is dismissed. If probable cause is found, the grievance is set for hearing. As with a complaint under the Code, the probable cause determination on a grievance is final.

If the grievance is set for a hearing, the hearing is conducted by a member of the CPRG selected by the coordinator. The hearing is conducted using the complaint procedures of the CPRG. Unlike Code violations, however, the hearing officer in a grievance case is guided by a schedule of penalties, set forth in the policy itself. The normal progression of penalties is:

> First offense: Confidential letter of caution, maintained in the files of the coordinator.
>
> Second offense: Confidential letter of reprimand, maintained in the files of the coordinator.
>
> Third offense: Letter of censure and warning, issued by the executive secretary- treasurer and copied to the members of the Executive Committee.
>
> Subsequent offenses: Temporary or permanent suspension of membership and membership privileges. The imposition of this penalty must be authorized by the Executive Committee.

The hearing officer has the discretion to determine that discipline shall commence at a higher step in the progression if the nature or severity of the conduct warrants.

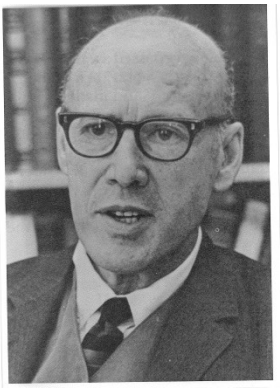
In cases of objectively offensive conduct or a statement by another member, or by a participant in Academy activities, which does not rise to the level of harassment or discrimination, members are directed to report that conduct or statement to the president or the executive secretary treasurer. They are charged with making appropriate inquiries and, if warranted, intervening with the subject of the complaint.

Conclusion

Lord Mansfield, the Chief Justice of England and Wales in the 1700s, is sometimes credited as having been the first to say: “A speech is like a love affair. Any fool can start it, but to end it requires considerable skill." Much the same can be said of a book chapter. The purpose of this exercise has been to familiarize the reader with the challenges of professional self-regulation is a diverse field. The National Academy of Arbitrators, in conjunction with the FMCS and the AAA, has been engaged in that exercise for nearly 75 years with varying degrees of success. The first third of that time was spent in a passive and largely ineffective attempt, featuring the

articulation of standards without much effort to enforce them. The conversion to the more proactive Code of Professional Responsibility and the creation of the CPRG in the mid-1970s, together with a maturing of the profession itself, led to a more vigorous and successful regulatory regime. The CPRG's reliance on advice, education, and outreach has allowed it to police the profession without frequent recourse to formal disciplinary procedures. This, it can be argued, is the true mark of success for any such body.

Alex Elson



Nathan Feinsinger

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Chapter 3

THE ACADEMY AT 75 AND THE ARBITRATOR OF COLOR: REFLECTING WHAT IS, MOVING TO WHAT SHOULD BE

Homer C. La Rue and Alan A. Symonette

Introduction

One experienced observer, Pamela Newkirk, has declared: "Our current diversity conversation began in 1968, when President Lyndon Johnson's National Advisory Commission on Civil Disorders recommended inclusion of African Americans in institutions that had historically excluded them."[1] In 1968 there was little attention paid to the other racial groups in America who have suffered systemic oppression, some to the point of extinction or nearly so.

For the purposes of this discussion, the authors will define diversity in terms of race. Professor Newkirk, in her critique of the diversity industry, shines a bright light on those who have made millions of dollars as *diversity trainers* and *diversity consultants.*[2] The question posed is: Why is our society not likely to reach Justice O'Connor's deadline set in the Supreme Court affirmative action decision in *Grutter v. Bollinger*[3]? The authors do not suggest, by this reference to Justice O'Connor's 25-year deadline, that the Academy adopt an affirmative action program. We do say quite emphatically, however, that the time for handwringing over the lack of diversity is over, and that the Academy, like other American institutions, must embark on a plan of action.

The authors also wish to speak to the scope of what will be included in the term *diversity* as used in this essay. Professor Newkirk, cited earlier, put it well, and we adopt her use of the term *diversity*. She writes (and we interpolate):

> Since 1968, diversity … has been expanded to encompass other racial and ethnic minorities along with women, people with disabilities, LGBTQIA individuals, and other marginalized populations. However, given the

[1] Pamela Newkirk, *Diversity, Inc.: The Failed Promise of a Billion-Dollar Business* (2019) [hereinafter Newkirk, *Diversity*]. The advisory body was the Kerner Commission, which "highlighted the need to address the shameful legacy of slavery and Jim Crow." *Id.*

[2] *Id*. at 5.

[3] 539 U.S. 306, 343 (2003) (per Justice O'Connor):

> It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. See Tr. of Oral Arg. 43. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

> issues unique to each distinct group and the ways in which the plight of racial minorities in general and African Americans in particular have been overshadowed by other categories within this overtaxed term, … [the authors] will specifically address the progress … [the Academy] has made toward *racial* diversity.[4]

Finally, the authors define their use of the phrase *diversity and inclusion*. "In recent years, organizations have begun to use the term *diversity and inclusion* to underscore the need for compositional diversity *and* institutional belonging."[5]

Put colloquially, "diversity is being invited to the party, inclusion is being asked to dance." We use the term *diversity* to cover both.

Bringing the Issue Front and Center

A Contemporary Event That Refocused a Long-Standing Problem

The recognition of the lack of diversity in the ranks of the membership in the NAA became the subject of significant discussion soon after the founding of the Academy in 1947. There also have been several attempts to increase the number of members of color, with little success.[6] The lack of diversity in the Academy is not unique to the Academy. The lack of diversity in the ADR (alternative dispute resolution) field has existed almost since the term "ADR" was coined years ago.

An event quite unrelated to the Academy or to labor-management arbitration focused attention on this long-standing issue. On November 28, 2018, an article in the music pages of *The New York Times* described a commercial dispute between an entrepreneur, Shawn Carter, and the Iconix Brand Group.[7] The dispute concerned a trademark infringement matter involving the use of the "Roc Family" of trademarks principally promoted and associated with the well-known hip-hop performer Shawn Carter ("Jay-Z"). Jay-Z was sued by Iconix because his entertainment company called Roc Nation had entered into an agreement with Major League Baseball to sell New Era baseball caps with the Roc Nation paper airplane logo. Iconix claimed that the agreement violated the original sale agreement with Jay-Z involving the sale of his Rocawear Brand. Jay-Z counterclaimed saying that the agreement he had with Iconix applied only to Rocawear, not Roc Nation. The agreement of sale provided that the parties were to have the matter presented to a panel of arbitrators under the rules of the American Arbitration Association applicable to Large and Complex Cases.

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[4] Newkirk, *Diversity*, *supra* note 1, at 3 (emphasis in the original).
[5] *Id.* at 5 (emphasis in the original).
[6] "Report of the Special Committee to Review Membership and Related Policy Questions of the Academy – Otherwise Known as the Reexamination Committee," in *Arbitration 1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators* 361 (1977).
[7] "Jay-Z Says Arbitrators' Race Matters in Dispute," *N. Y. Times*, Nov. 30, 2018, at C3 [hereinafter "Jay-Z Says"];
Deb Sopan, "Jay-Z Criticizes Lack of Black Arbitrators in a Battle Over a Logo,"
https://www.nytimes.com/2018/11/28/arts/music/jay-z-roc-nation arbitrators.html?searchResultPosition=1 (Nov. 28, 2018) [hereinafter Sopan, "Jay-Z Criticizes"].

The AAA provided a list of twelve arbitrators to the parties from its database of neutrals qualified to handle such cases. According to Jay-Z, he "could not identify a single African-American arbitrator on the Large and Complex Cases roster."[8] Jay-Z expressed his concern to the AAA and discovered that out of the 200 eligible arbitrators on the roster only three identified as African-American, two men and one woman. One of the men had a conflict of interest, leaving just two arbitrators to choose from. On November 27, 2018, counsel for Jay-Z filed a petition asking the New York Supreme Court (the trial court) in Manhattan to enjoin the processing of the arbitration if the dispute was not resolved. *The New York Times* article stated: "The dearth of qualified Black arbitrators deprives litigants of color of a meaningful opportunity to have their claims heard by a panel of arbitrators reflecting their backgrounds and life experience: because of 'unconscious bias' that most people have against people of different races, Jay-Z's lawyer, Alex Spiro, wrote in the filing."[9] This according to the lawyers was a form of racial discrimination. The *Times* noted that the petition did not cite any legal precedent. The article added, however, that courts have ruled that jurors in criminal trials cannot be eliminated from jury pools on the basis of race.[10]

Diversity in Labor Arbitration and in the Academy –The Challenges to Inclusion

The lack of diversity is not novel to those who have been deeply involved in the arbitration of labor-management and employment disputes. This issue has always had critical resonance in an increasingly diverse workforce. Arbitrators of these disputes in general, and NAA members in particular, enjoy a reputation of upholding the "highest standards of integrity, competence, honor and character among those engaged in the arbitration of labor-management disputes on a professional basis…."[11] Given the sentiments raised by Jay-Z and others, combined with the criticism of the arbitration process in other areas of dispute resolution, arbitration as a dispute resolution mechanism has come under increasing danger of losing critical credibility.

The objective of this chapter is to discuss the current demographic makeup of the Academy membership, the factors that have contributed to the disparity in the racial makeup of professional arbitrators, and the efforts of the Academy to recruit arbitrators of color as well as its current endeavors to encourage parties to fully consider and select these arbitrators for their panels. We will also be including extensive quotations from James Harkless, the fifth member and the first and until now the only African American President of the Academy.[12] He served in 1998-99.

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[8] Sopan, "Jay-Z Criticizes," *supra* note 7.
[9] "Jay-Z Says," *supra* note 7.
[10] The petition itself was not published. For an understanding of the underlying dispute, *see* Iconix Brand Group., Inc. v. Roc Nation Apparel Group, LLC., 2019 U.S. Dist. LEXIS 169140 (S.D. N.Y. 2019).
[11] *See* www.naarb.org/who-we-are/.

[12] Arbitrator Harkless was interviewed extensively for the NAA's newsletter, *The Chronicle.* He was interviewed in 1995 and 1996 by Clara Friedman and in 2006 by Anna Duval Smith. All the interviews are available on the NAA's website, https://naarb.org/presidential-interviews/.

It is important to note that the authors of this chapter are males of African ancestry. We broadly use the term "persons of color" to include those men and women arbitrators whose ancestry derives from China, India, Japan, and Latin America. All of them have contributed to the professionalism and growth of the Academy but remain terribly underrepresented in its ranks.

There is limited information describing the extent of the lack of diverse neutrals involved in labor-management and employment dispute resolution. Neither of the major appointing agencies who have NAA members on their roster, the American Arbitration Association (AAA) and the Federal Mediation and Conciliation Service (FMCS), maintains demographic statistics of its arbitrators. As members of the Academy, however, we have been able to research the membership rolls of the Academy. Through our personal knowledge and the Academy's oral and institutional history, we have been able to identify nearly all the persons of color who have served or are serving as members.

The authors have determined that as of the 2019 Annual Meeting, the Academy had accepted 1488 members over its 73-year history; approximately 43 persons or 2.88% of that group were persons of color. Half of those persons of color were admitted within the last 25 years. The Academy currently has 36 members of color. A graph showing those numbers is included as figure 1.

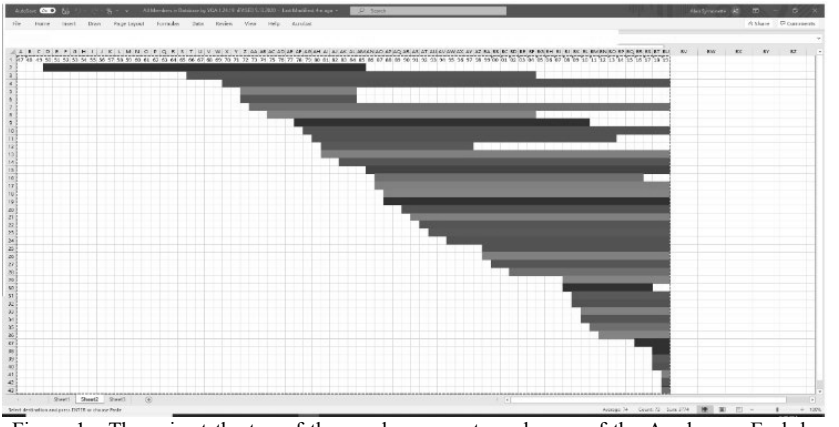

Figure 1: The axis at the top of the graph represents each year of the Academy. Each bar represents one person of color's tenure as a member of the Academy. All except one member left the NAA due to death. One person retired from membership.

According to the graph above, the first person of color, Lloyd H. Bailer, became a member of the NAA in 1950. The following are the net total number of members by decade:

1950 – 1960	1
1960 – 1970	2
1970 – 1980	10
1980 – 1990	19
1990 - 2000	23
2000 - 2010	25
2010 - 2020	36

To appreciate the few members of color in the NAA, one must consider the various factors that contribute to the overall demographic makeup of professional arbitrators. Most of these factors have a neutral impact on the challenges one must face to become a professional arbitrator. One's success in the profession depends almost exclusively on the ability of the individual to be recognized and selected by the parties as being competent, as being fair and ethical, and capable of doing the best job possible in resolving the underlying dispute. In selecting an arbitrator, the parties almost consistently select arbitrators with whom they are comfortable based on reputation or prior experience. In short, the parties tend to select "who they know." This practice can at times lend itself to unintended biases or a failure to recognize equally competent and capable but somewhat less experienced neutrals.

Generally, a successful arbitrator is one who is acceptable to the parties.[13] That person is recognized as one who can run a hearing and is discerning and judicious in their writing and decision-making. There is no certification process for one to become eligible to serve as an arbitrator. Arbitrators usually have extensive prior experience as advocates, teachers, judges, or hearing officers. After that, however, there are stark differences in the path an arbitrator must take to be recognized as a practitioner in the field. This depends on whether one intends to arbitrate issues that arise in the nonunion employment field or issues arising under a collective bargaining relationship.

To work as an *employment* arbitrator, one gains the necessary experience advocating on behalf of employers or employees as litigators or in-house counsel. Over time, even before the person begins to serve as an arbitrator, the individual becomes recognized as someone who not only knows the process of dispute resolution but is civil and fair to all parties. What is important here is that anyone seeking to arbitrate *employment* disputes may continue their practice on behalf of employers or employees while deciding those nonunion cases.

On the other hand, one who wishes to arbitrate *labor-management* disputes must also be experienced in the area and recognized by the parties but, significantly, in order to be listed by leading appointing agencies, must *not* act as a partisan advocate while serving as an arbitrator of labor-

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[13] Membership in the Academy is premised in part on the acceptability of the applicant to the labor-management community as a neutral. The NAA By-Laws, Article VI, Section 1 in pertinent part reads:

> ***
>
> In considering applications for membership, the National Academy of Arbitrators will apply the following standards: (1) the applicant should be of good moral character, as demonstrated by adherence to sound ethical standards in professional activities. (2) *The applicant should have substantial and current experience as an impartial neutral arbitrator of labor-management disputes, so as to reflect general acceptability by the parties*. (3) As an alternative to (2), the applicant with limited but current experience in arbitration should have attained general recognition through scholarly publication or other activities as an important authority on labor management relations. (Added by Amendment May 26, 2007) (emphasis added).
>
> *See* https://naarb.org/constitutions-and-by-laws/.

management disputes. Therefore, many labor–management arbitrators have been former officials with government agencies, notably the National Labor Relations Board or other labor-focused federal and state agencies. Many are academicians engaged in the study of labor relations law or policy. Since labor and employment arbitrators need not have a law degree, many also have experience as former management executives or union representatives.

Most important, regardless of the path initially taken to become a professional arbitrator, in order to qualify for membership in the NAA, arbitrators cannot be partisan advocates when serving as either a labor-management or employment arbitrator.[14] In this regard, it is acknowledged that these requirements of neutrality do place a unique burden on a person seeking to become a labor or employment arbitrator and Academy member regardless of demographic category. The candidate must effectively stop his or her practice and find another source of income while building an arbitration practice and seeking Academy membership. As a practical matter, since listing with a leading appointing agency is so important, the potential arbitrator with extensive experience as an advocate in the labor field ordinarily has to relinquish that practice and its income in order to practice as a labor-management neutral, regardless of any aspirations about joining the Academy.

The neutrality requirement has supported the integrity of those arbitrators committed to the collective bargaining process. Nevertheless, some have suggested that the advocacy standard be relaxed for some limited time to enable more candidates of color to enter the field without presenting a significant risk to their livelihood while they are struggling to make a "go of it." Many would disagree. Indeed, several parties have wondered if one can maintain a positive collective bargaining relationship if the person on the

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[14] NAA By-Laws Article VI Membership, Section 6 states:

> Pursuant to the membership policy adopted on April 21, 1976 and amended on May 24, 2008 the Academy deems it inconsistent with continued membership in the Academy:
>
> a) For any member who has been admitted to membership since April 21, 1976 to undertake thereafter to serve partisan interests as advocate or consultant for Labor or Management in labor-management relations or to become associated with or to become a member of a firm which performs such advocate or consultant work.
>
> b) For any member who has been admitted to membership since May 24, 2008, to undertake thereafter to serve partisan interests as advocate or consultant of an employee or employer in any workplace dispute proceeding or to become associated with or to become a member of a firm which performs such advocate or consultant work. (Added by Amendment May 24, 2008.)
>
> c) For any member to appear, from and after April 21, 1976, in any partisan role before another Academy member serving as a neutral in a labor-relations arbitration or fact-finding proceeding.
>
> d) For any member to appear, from and after May 24, 2008, in any partisan role before another Academy member serving as a neutral in any other workplace dispute proceedings. (Added by Amendment May 24, 2008.)

See https://naarb.org/constitutions-and-by-laws/.

It should be noted that the numbers of cases counted to meet the membership threshold are weighted differently depending on whether a case is a labor-management dispute rather than a "workplace" dispute.

other side of the bargaining table one day is your arbitrator in another matter the next. Any advantage that may be given to candidates because of this change will have a far greater impact on the integrity of the process and unfairly label such persons as being somehow underqualified to adequately handle cases as arbitrators.

James M. Harkless, the First African American President of the Academy

For James Harkless, success as an arbitrator was due to an understanding of labor relations based on his personal experience in the workplace combined with his diligence as a labor lawyer. Prior to college he worked beginning as a paper boy at the age of 10, shining shoes at 12, and then in the local A&P.[15] He attended Harvard beginning in 1948 as one of only four Black students in his class.[16] While in college he worked in the foundry at Ford Motor Company in Detroit. His father was one of the first Black foremen at that facility.

Harkless then attended Harvard Law School and studied labor law with Archibald Cox.[17] After graduating, he interviewed in Detroit at the UAW and Chrysler and several white firms. However, he returned to Massachusetts and worked for the firm of Grant and Angoff, which represented organized labor. At the firm he handled negotiations and presented a number of arbitrations. In 1961 he moved to Washington, D.C., where he worked for the NLRB and the Customs Service, and was the Executive Secretary in the Office of Equal Employment Opportunity. He returned to arbitration in 1970.

Harkless was interviewed and selected by Bethlehem Steel and the United Steelworkers Union to serve as one of their umpires. During that time, Harkless was given a guaranteed income as a fledgling arbitrator at the same level he was receiving in private practice. Harkless observed that "at my stage in life, in my early forties with children and a wife, I could not have made that career change if I had to risk earning an equivalent income as an arbitrator."[18] Such an arrangement is practically unheard of for new arbitrators today.

As the authors were completing this chapter, the 2020 Nominating Committee of the Academy announced Homer C. La Rue as the nominee for President of the Academy in 2022. La Rue expressed his gratitude to his Academy colleagues who supported his nomination. He also echoed the words of Past President Margaret Brogan in her 2017 Presidential Address when she commented on her being President of the Academy:

> I was reminded that the Academy's story includes the fact that even though this is the 70th birthday of the National Academy of Arbitrators, I am only the seventh woman to be president of the Academy… There was a 25-year gap in the Academy's history from 1980 to 2005 when

[15] Clara Friedman, Interview of James M. Harkless, Nov. 10, 1995, https://naarb.org/interviews/JamesHarkless.PDF, at 3.
[16] *Id.*at 5-6.
[17] *Id.* at 13.
[18] Clara Friedman, Interview of James M. Harkless, June 25, 1996, https://naarb.org/interviews/JamesHarkless.PDF, at 18.

> no woman was called to be president despite many illustrious and worthy female members in our ranks. This history is important to remember. [19]

La Rue noted that his call to the presidency upon the 75th anniversary of the National Academy of Arbitrators marks him as only the second Black man or woman to be president of the Academy. He further noted the irony of the similarity between the 25-year gap (1980 to 2005) "… when no woman was called to be president …." and the 24-year gap (1998 to 2022) between the presidency of James Harkless and that of La Rue. As did Past President Brogan, La Rue observed that there was this hiatus "… despite many illustrious and worthy … [Black persons] in our ranks."

Obstacles to Entry and Efforts to Overcome Them

Even if an individual is able to begin work as an arbitrator, the parties, as the gatekeepers [20] to the selection of neutrals, use a variety of processes and have differing reasons for selecting an arbitrator. The selection may depend on the parties' comfort level with the arbitrator based on one's perceived fairness and the comfort of the client. Parties have expressed preferences for arbitrators because of the nature of the case, the arbitrator's fee schedule, his or her willingness to travel, and his or her handling of expenses.

The selection process may include certain biased perceptions based upon an arbitrator's race or gender as it relates to the arbitrator's ability to make fair and reasoned decisions. Some parties have found the power dynamic between the arbitrator and the advocates to be contrary to certain expectations. Some parties have also based preferences on the perception that an arbitrator's race or gender may show a bias toward individuals of the same race [21] or gender. [22]

It would not be accurate to conclude that the NAA has ignored the lack of diversity in the ranks of its members and in the arbitration profession in general. Indeed, the NAA as well as the appointing agencies have been engaged in the mentoring and nurturing of new arbitrators of color. Past Presidents have periodically made statements noting these mentoring attempts in their remarks. The largest effort prior to 2010 occurred in 1973

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[19] Margaret R. Brogan, "Presidential Address: Changing the Narrative: A Call to Increase Diversity and Inclusion in the Ranks of the National Academy of Arbitrators," in *Arbitration 2017: The New World of Work, Proceedings of the 70th Annual Meeting, National Academy of Arbitrators* 245 (Stephen L. Hayford ed. 2018). *See also* https://naarb.org/presidential-addresses/.

[20] The *gatekeeper* phenomenon is discussed in an earlier article co-authored by Homer La Rue, also a co-author of this book chapter. While the focus in this chapter is on arbitration and the issues related to the underutilization of persons of color and women, those issues are not limited to the selection of neutrals in arbitration; rather, they apply equally to the selection of neutrals in mediation—particularly high-stakes mediations. *See* Marvin E. Johnson & Homer C. La Rue, "The Gated Community: Risk Aversion, Race, and the Lack of Diversity in the Top Ranks," 15 *Disp. Resol. Mag.* 17 (Spring 2009).

[21] *See* Homer C. La Rue, "The Ethics of Disclosure by Arbitrators of Color: Have the Rules Changed?" 42 *Lab. L.J.* 619 (1991).

[22] For example, interviews of James Harkless and Hon. Harry T. Edwards, "The Art and Science of Labor Arbitration," in College of Labor and Employment Lawyers, *Video History Project. See generally* DVD: *The Art and Science of Labor Arbitration* (Carol M. Rosenbaum 2013).

when then-President Eli Rock created a Special Committee to Review Membership and Related Policy Questions of the Academy, otherwise known as the Reexamination Committee. Arbitrator Rolf Valtin served as Chairman.

The initial charge of the Committee was quite broad, considering questions relating to many features of Academy life, including the size and nature of the Annual Meetings, the dues structure, and whether the operations office should be staffed by paid assistants. The Committee decided, however, to confine its work to six topical areas and made recommendations and explanatory comments. Those areas were the following:

> 1. Whether the Academy should merge with the Society of Professionals In Dispute Resolution ["SPIDR"]; 2. Whether SPIDR's existence should affect NAA membership policy; 3.The size of the Academy as to its administration and the character of the Annual Meetings; 4. Admission standards particularly the "Substantial and Current" standard; 5. Representational Work; and 6. the "Grandfather Policy" relating to representational work. [23]

While the question of representational work garnered the most dissent in the Committee, the Committee report spent most of its time discussing the "Substantial and Current" standard. At that time, the membership standards were found in a document entitled, "Statement of Policy Relative to Membership." Clause 2A represented the fundamental requirement for admission to membership. It stated: "The applicant should have substantial and current experience as an impartial arbitrator of labor–management disputes." [24]

The Committee acknowledged that "there are those who believe that the Academy has been too restrictive in its admissions policy and who, particularly in the light of the emergence of public-sector bargaining and its mediation and fact-finding roles, want to open things up." After a discussion about what that standard means with respect to the number of demonstrated cases and its charges of possibly being a "closed shop" or "elitist," the Committee decided that the standard be retained substantially both in language and in application. It noted that certain factors be given weight. [25]

What is of particular note in this report is an acknowledgment of the gender and racial makeup of the Academy membership. Specifically, the Committee recognized the following facts:

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[23] "Report of the Special Committee to Review Membership*," supra* note 6, at 363–78.

[24] The current version of that standard is found in Article IV, Section 1 of the current By-Laws. It states: "The applicant should have substantial and current experience as an impartial neutral arbitrator of labor-management disputes, so as to reflect general acceptability by the parties." *See* https://naarb.org/constitutions-and-by-laws/.

[25] Those weighted factors mentioned are: 1. "The applicant has attained stature or unusual competence in the field of labor–management relations." 2. "The applicant is from a geographical area which has relatively little industry." 3. "The applicant is of relatively young age and shows unusual promise by such indicators as selection for 'min' or 'expedited arbitration work, special training under an established arbitrator or arbitrators, or extensive formal and relevant education." According to the Committee, "These factors as crediting factors does not represent the downgrading of the Academy's quality objective." *See* "Report of the Special Committee to Review Membership*," supra* note 6.

> "It is to be understood that we gave long consideration to the underrepresentation of minority groups and women in the Academy's membership. Out of a total of about 450 persons, the Academy has seven blacks and five women. These are plainly distressing statistics. But the Academy cannot itself rectify them without abandoning general acceptability by the parties as the central measure of qualification for membership. Nevertheless, the reiteration of the Academy's long and firm policy against discrimination on the basis of race or sex should be part of this report. And we additionally make these observation: that it is silly to deny that blacks and women have often been denied a fair opportunity to demonstrate their capabilities, and thus establish the degree of acceptability needed for Academy membership; that it is incumbent on the Academy to cooperate in every appropriate way with programs designed to encourage the continued development of competent, qualified arbitrators among women and minority groups; and that we would be less than proud of an Academy which failed to be sensitive to the barriers facing these potential members." [26]

This final version of the report does not really describe the nature of the debate. According to Arbitrator Harkless, one of the original recommendations was that there should be a "tilting factor for females and minorities." Harkless recalled that several members opposed the proposal. "Reg Alleyne … was appalled…. Harry Edwards … spoke against it. Marcia Greenbaum spoke against it." [27] In Harkless's opinion, "Affirmative action in my view should not operate with a lesser standard…. But it certainly is a mistake in my view to have minorities or females accepted where the majority white male population feels that they were being given something they don't deserve, with lesser qualifications/requirements than apply otherwise." [28]

The Academy's Current Efforts to Address Membership Diversity

Challenging the Status Quo, Creating the New Paradigm

ABA Resolution 105. The discussion in this section must be placed in the context of the larger ADR community. In August 2018, the ABA House of Delegates adopted ABA Resolution 105, encouraging providers of domestic and international dispute resolution services to expand their rosters with minorities, women, persons with disabilities, and persons of differing sexual

[26] "Report of the Special Committee to Review Membership," *supra* note 6, at 370–71.
[27] Clara Friedman, Interview of James M. Harkless, June 25, 1996, https://naarb.org/interviews/JamesHarkless.PDF, at 36-37. Reginald Alleyne became a member of the NAA in 1975. He died in 2004. Harry Edwards became a member of the NAA in 1972. He is currently the Chief Judge Emeritus of the U.S. Court of Appeals for the District of Columbia Circuit. Alleyne was and Edwards is African American. Marcia Greenbaum became a member in 1973. She was one of the first women to be inducted into the Academy.
[28] Clara Friedman, Interview of James M. Harkless, *supra* note 27, at 37.

orientations and gender identities ("diverse neutrals"), and to encourage the selection of diverse neutrals.[29] Resolution 105 reads:

> RESOLVED, That the American Bar Association urges providers of domestic and international dispute resolution services to expand their rosters with minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities ("diverse neutrals") and to encourage the selection of diverse neutrals; and
>
> RESOLVED, That the American Bar Association urges all users of domestic and international legal and neutral services to select and use diverse neutrals.[30]

In a summary statement of the problem, the ABA Section of Dispute Resolution noted:

> The available data and materials outlined in the report show starkly that diversity in dispute resolution significantly lags the legal profession as a whole. The problem can be broken down into two areas: the "roster issue," namely the still unrepresentative nature of the panels of the major providers despite their efforts to improve the situation; and the "selection issue," the fact that diverse neutrals on rosters are not selected as often as their non-diverse colleagues. Both issues arise from the network-based and confidential nature of the profession, which undermine potential efforts to address the roster issue and result in selection of neutrals taking place in relative obscurity, enabling implicit bias to play a greater role in the selection process. The limited prospects for selection in turn discourage minority attorneys from applying for acceptance on institution rosters. The lack of transparency also minimizes public awareness of lack of diversity in the field, thus reducing the incentive of stakeholders such as clients, outside counsel, institutional service providers, and established neutrals to take proactive steps.[31]

The ABA Section of Dispute Resolution goes on to outline steps that advocates, providers, and membership organizations can take to further the effectiveness of Resolution 105. In pertinent part, the recommendations are:

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[29] Nika Gholston & Rebecca Simpson, "Recognizing the Importance of Using Diverse Neutrals in Family Cases: Preparing for Mediation Week and Implementing ABA Resolution 105," in ABA Section of Family Law, *Alternative Dispute Resolution* (Sep. 25, 2019), https://www.americanbar.org/groups/family_law/committees/alternative-dispute-resolution/diverse-neutrals/#:~:text=In%20August%20of%202018%2C%20the%20ABA%20House%20of,and%20to%20encourage%20the%20selection%20of%20diverse%20neutrals.

[30] See "ABA Resolution 105 – Diversity in ADR: Summary and Action Steps v. 1 for Steering Committee Consideration," in ABA Section of Dispute Resolution, *Resources*, https://www.americanbar.org/groups/dispute_resolution/resources/aba-resolution-105/.

[31] *Id*.

What Clients/Inside Counsel Can Do:

(a) Select diverse neutrals whenever possible.

(b) Include JAMS diversity inclusion language in dispute resolution clauses: "The parties agree that, wherever practicable, they will seek to appoint a fair representation of diverse arbitrators (considering gender, ethnicity and sexual orientation), and will request administering institutions to include a fair representation of diverse candidates on their rosters and list of potential arbitrator appointees."

(c) Take public diversity pledges available from various institutions. The International Institute for Conflict Prevention and Resolution (CPR) provides a diversity pledge for clients and law firms: "We ask that our outside law firms and counterparties include qualified diverse neutrals among any list of mediators or arbitrators they propose. We will do the same in lists we provide." The Equality in Arbitration Pledge, focusing on women in arbitration, is available at http://www.arbitrationpledge.com.

(d) Raise ADR diversity issue at internal and industry association meetings.

(e) Raise issue with outside counsel:

(i) Circulate Resolution 105 and the Report to outside counsel with a note supporting the resolution.

(ii) Revise outside counsel guidelines to include requirement that outside counsel present lists of diverse neutrals, tying this effort directly to efforts to increase diverse attorneys on teams pursuant to ABA 113.

(iii) Ask outside counsel to use JAMS diversity inclusion rider or similar language in contractual dispute resolution clauses see (b) above).

(iv) Encourage outside counsel to take diversity pledges (see (c) above).

(f) Raise issue with providers such as AAA, JAMS, CPR and others:

(i) Encourage providers to increase diversity in their rosters.

(ii) Ask for diverse neutrals to be included on selection lists.

(iii) Ask for opportunities to meet or otherwise become familiar with diverse neutrals on the panels of major providers.

What Outside Counsel Can Do:

(a) Promote Resolution 105 and the Report in internal firm meetings and with Women's and other Diversity Initiatives.

(b) Take diversity pledges (see above).
(c) Include JAMS diversity inclusion rider in contracts (see above).
(d) Encourage providers to increase diversity on their rosters.
(e) Ask providers to provide diverse lists.
(f) Ask that providers create opportunities to meet or otherwise become familiar with diverse neutrals on their panels.

What Providers of Dispute Resolution Services Can Do:

(a) Promote Resolution 105 and the Report to management and case managers.
(b) Promote Resolution 105 and the Report to clients and create client communications encouraging selection of diverse neutrals.
(c) Continue efforts to identify and promote diverse neutrals, including performing outreach to diversity bar associations, etc.
(d) Encourage or require case managers to include qualified diverse neutrals on lists.
(e) Create opportunities for users to learn about and meet diverse neutrals through profiles, events, etc.
(f) Track annual progress regarding increased roster diversity and selection of those neutrals.

***

What Other Stakeholders Can Do:

(a) Neutral organizations: Revise membership *requirements to permit new members who have not previously served on panels with existing members, and to eliminate any other requirements that result in the exclusion of qualified diverse neutrals* (emphasis added).
(b) Law schools: Encourage diverse students to become actively involved in dispute resolution organizations.
(c) Industry organizations (such as construction): Request that members increase their use of diverse neutrals and take diversity pledges. [32]

President Margaret R. Brogan—The Academy Must Act Now. By 2020 the Academy had taken steps to act in accordance with Resolution 105. Before that, in 2017, then-President Margaret R. Brogan made the call to action during her Presidential Address. She spoke about the seventy-year history of the Academy and the fact that only seven women had been president of the Academy during that period, with a 25-year gap between two of them. Her words were a challenge to the Academy when she said:

[32] *Id.*

> We were slow to change due to many forces, but we are now faced with an enormous shift in the political landscape which will rattle our labor laws and rock our workplaces. This will certainly impact the relations between the management and the unions. It will impact the profession of labor and employment arbitration, and it will impact our membership. We the NAA can no longer afford to take our time and be slow to change.
>
> I'm not talking about a change in theory but a concrete change in how our organization does things. Today, I challenge the Academy, the appointing agencies, and the parties who select us to find ways to bring new people into our profession and into our organization. We need new arbitrators who reflect the full range of our society and the folks who come to our arbitration table.
>
> ***
>
> It is obvious that there would be enormous benefits if we expanded the diversity of labor arbitrators and Academy members, while at the same time, respecting age and experience. Study after study have demonstrated that these benefit an organization.
>
> ***
>
> I believe that we are at a crisis point. It is my view that if we don't increase our diversity, and do it soon, there will be a lack of trust in our organization by outside parties resulting in a lessoning in the organization's influence, relevance, and reputation. Academy membership will simply not mean the same. Parties who select us will not attach as much significance in our being an Academy member. They will see us as out of touch. This is not a problem way over horizon but facing us now. We need arbitrators in our ranks to reflect the full diversity of society. [33]

President Brogan's 2017 Presidential Address and ABA Resolution 105 of 2018 are important benchmarks for the discussion of the most recent steps that the Academy has taken to meet her "… challenge [to] the Academy … to find ways to bring new people into our profession and into our organization." [34] Leading the way, she has chaired the Academy's Outreach Committee—an initiative to assist newer arbitrators to become members of the Academy. "The initiative's mission is geared to the identification of promising newer arbitrators regionally, with a goal of increasing diversity and inclusion in … [the Academy], and to assist and support them in gaining acceptability by the parties." [35]

One of the specific initiatives to grow out of the Outreach Committee is what has become known as the *Salon*. The *Salon* was proposed

[33] Margaret R. Brogan, "Presidential Address," *supra* note 19.
[34] *Id.*
[35] NAA Outreach Committee—Description (on file with authors).

to the Outreach Committee by member Homer C. La Rue and supported by Past President Margaret Brogan and Executive Secretary Treasurer Walt De Treux. The proposal described the idea for the Salon as follows:

> One of the definitions of a "Salon", provided by Webster's Dictionary is "… a fashionable assemblage of notables (such as literary figures, artists, or statesmen) held by custom at the home of a prominent person." The term is an apt one for the undertaking by Arbitrator Eva Robins and Arbitrator Peter Sykes in the late 1970s and early 1980s…. Together, they invited a small number of new arbitrators into their homes. The purpose of those gatherings was to permit these new arbitrators (i.e., those who had a promising arbitration practice but who had not yet reached the level of qualifying for membership in the NAA), to muse about their growing practices. Those reflections were with two of the most prominent arbitrators in the field at the time.
>
> The discussions took place in confidence; and therefore, created a "safe space" for a new arbitrator to ask the otherwise hard-to-ask question. One of the purposes of this proposal for a "[D.C./] Mid-Atlantic Regional Salon" would be to carry forward this tradition, permitting a small cohort of newer arbitrators (not novices) to share their experiences questions and concerns with more seasoned arbitrators, as well as, with their peers. [36]

One of the specific goals of the *Salon*, now in its second iteration (2020) in the D.C./Mid-Atlantic Regions, is to identify and to assist persons of color and women who have a labor and employment practice and who aspire to become members of the Academy. The appeal of the *Salon* has grown. There are now four additional regions of the Academy that have begun a version of the *Salon.* Those regions are: (1) Southern California, (2) Pacific Northwest, (3) Southwest Rockies, and (4) Northern California.

ABA Resolution 105 is significant to our discussion of the Academy because it promotes what President Brogan called for in her address. It "challenge[s] the [ADR community including the] Academy, the appointing agencies, and the parties who select … [arbitrators] to find ways to bring new people into … [the] profession…." [37]

[36] The proposal for the *Salon* to the Outreach Committee was made as a joint venture between the D.C. Region and the Mid-Atlantic Region of the Academy. *See* Margaret R. Brogan, Homer C. La Rue & Walt De Treux, Response to NAA Outreach Initiative 1, 4 (Feb. 28, 2018).
[37] Margaret R. Brogan, "Presidential Address," *supra* note 19.

ABA Resolution 113[38] and ABA Resolution 105 are well-intentioned but fall short of what the authors of this chapter believe is necessary at this point in history. We have published an article on the Ray Corollary Initiative™ (RCI), indicating how to achieve diversity in arbitrator selection.[39] The social science data suggest that the needle does not move unless there is accountability and identifiably achievable goals. The authors therefore suggest that the next iteration of Resolution 105 include additional "Resolved" statements. The article also explains why a metric is necessary if ABA Resolution 105 is going to be anything more than a hortatory proclamation. The article sets forth an action plan for a Ray Corollary Initiative. ™

Following a full and robust discussion, the Board of Governors of the Academy unanimously voted to take a leadership role to jump-start the implementation of the Ray Corollary Initiative. ™ The role of the Academy is to convene and organize an Organizing Committee, composed solely of NAA members. The Organizing Committee, appointed by the President of the NAA, will coordinate the activities necessary for bringing into being a national task force to oversee the implementation of the RCI. ™ The period of operation of the Committee would be for the duration of the time necessary to organize the task force and to get it up and functioning.

The specifics of the Board's charge to the Organizing Committee is set forth in the Board's resolution. In pertinent part, it reads:

> - The *Ray Corollary Initiative*™ (*RCI)* is national effort by the ADR community to address the issue of diversity and inclusion in the selection of arbitrators and mediators in labor-management, employment and commercial disputes.
> - The RCI establishes that there shall be a minimum percent of diverse neutrals considered in the selection

[38] In 2016 the American Bar Association's House of Delegates, the governing body of the American Bar Association (ABA), approved Resolution 113. It reads:

> RESOLVED, That the American Bar Association urges all providers of legal services, including law firms and corporations, to expand and create opportunities at all levels of responsibility for diverse attorneys; and
>
> FURTHER RESOLVED, That the American Bar Associate urges clients to assist in the facilitation of opportunities for diverse attorneys, and to direct a greater percentage of the legal services they purchase, both currently and in the future, to diverse attorneys; and
>
> FURTHER RESOLVED, That for purposes of this resolution, "diverse attorneys" means attorneys who are included within the ambit of Goal III of the American Bar Association.

American Bar Association, Adopted by the House of Delegates 113, (Aug. 8-9, 2016), https://law.duke.edu/sites/default/files/centers/judicialstudies/panel_4-american_bar_association_resolution.pdf.

[39] Homer C. La Rue & Alan A. Symonette, "The Ray Corollary Initiative: How to Achieve Diversity and Inclusion in Arbitrator Selection," 63 *Howard L.J.* 215 (2020).

process (i.e., *strike-and-rank* lists and party-prepared rosters) for arbitrators and mediators. The RCI does not seek to change the criteria for the selection of arbitrators and mediators by the parties.

- The National Academy of Arbitrators ("NAA") is the preeminent membership organization of professional arbitrators in labor-management and employment disputes, composed of arbitrators and mediators in the United States and Canada.
- The NAA wishes to continue its ongoing commitment to diversity and inclusion in the selection of diverse arbitrators and mediators by the establishment of an Organizing Committee to promote the *Ray Corollary Initiative*. ™
- The NAA hereby forms an Organizing Committee to convene a national collaboration of stakeholders in labor-management, employment and commercial disputes to address the national problem of arbitrator and mediator selection, that is, significantly increase diversity and inclusion in the selection of ADR neutrals.
- The Organizing Committee is composed of NAA members who will organize and convene a gathering of ADR stakeholders that shall include:
    - Sections of the American Bar Association
    - Private and public arbitrator rostering agencies and associations
    - Lawyers and law firms who select arbitrators and mediators
    - Private and public entities that hire lawyers and law firms who select arbitrators and mediators for disputes
- The identified stakeholders shall form a national task force to be known as the Ray Corollary Initiative™ National Task Force ("RCINT") for the purpose of bringing about diversity in the selection of ADR neutrals.
- The RCINT will develop a corollary of the *Mansfield Rule* and the *Rooney Rule* that has been used in "biglaw" and in the National Football League, respectively, to increase diversity in law firms and in the number of Black coaches and upper-level managers among professional football teams.
- The RCINT also would engage in research to support the implementation of the RCI and would determine, among other things, the degree of underrepresentation of diverse neutrals and ADR community attitudes impacting arbitrator selection.
- The role of the NAA Organizing Committee would be to convene the members of the RCINT and to facilitate the organization of the RCINT.

- The Organizing Committee will entertain the application for participation on the RCINT based on at least three (3) principles which are not intended to be exhaustive:
    - Commitment
    - Accountability
    - Transparency

Commitment - This would be demonstrated by applicants for the RCINT committing themselves to the implementation of a plan that would eventually result in *strike/rank* lists and final -selection lists for private arbitration/mediation rosters that adhere to a 30 percent metric for the inclusion of persons of color and women.

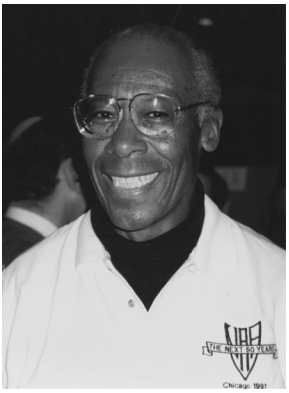
Accountability - This would be demonstrated by applicants for the RCINT committing themselves to a plan that will include the collection and reporting data as to compliance with the *30% consideration metric.*

Transparency - This would be demonstrated by applicants for the RCINT committing themselves to the sharing of their experiences, in the form of data, that demonstrates the implementation of all aspects of the *RCI* with others involved in the *Initiative*. [40]

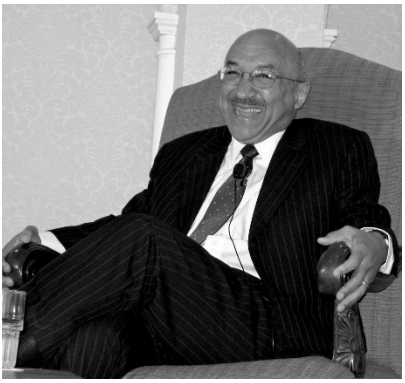
Conclusion

In the past 75 years, developing a diverse membership has been a vexing issue in the Academy. According to Past President James Harkless: "We've made slow and steady progress. However, there needs to be more emphasis now in dealing with this question." [41] Today, the Academy is taking a major step forward to address diversity in the membership of the Academy. The Academy, in doing so, also is stepping into the leadership of creating a new paradigm to make diversity in labor-management and employment arbitration a reality and not merely a long-term hope.

[40] NAA BOG Resolution*, Ray Corollary Initiative*™: Charge for the NAA Organizing Committee (Dec. 9, 2019).
[41] Anna DuVal Smith, Interview of James M. Harkless, Oct. 13, 2006, https://naarb.org/documents/JamesM.HarklessinterviewedbyAnnaDuValSmith.PDF, at 26.



James Harkless



Judge Harry Edwards

Margaret Brogan
and Homer La Rue

Chapter 4

WOMEN AND THE ACADEMY

Kathryn A. VanDagens

First Woman Member of the NAA

In the beginning of the Academy, there was only one. In 1947 any arbitrator invited to attend the first organizational meeting or the First Annual Meeting in 1948 was offered charter membership status in the National Academy of Arbitrators. According to the NAA Bulletin No. 1, 105 arbitrators accepted the offered membership. The initial membership list for 1947 includes 72 names. There is only one woman included in either list: Jean McKelvey of Cornell University from Ithaca, New York.

McKelvey initially attended Wellesley College intent on studying chemistry, but her father, a chemical engineer, dissuaded her from a field he believed unsuitable for women. Instead, she majored in economics, sparking her interest in the labor movement. While an undergraduate, she attended union meetings in Boston, which introduced her to union workers. McKelvey received her master's and doctorate in economics from Radcliffe College (now Harvard). Her thesis, finished in 1933, was titled, "Union Management Cooperation." [1]

McKelvey began teaching at Sarah Lawrence, where she said she taught "very wealthy little girls about economics and labor.... Most of my wealthy students at the beginning, the Melons and the Fords and some of the others, became Communists in the thirties. Mostly I think to spite their families." [2] In order to introduce her students to the "real world," McKelvey organized field trips, such as to a textile factory strike. One of those field trips led to her next faculty appointment.

McKelvey was hired as the first faculty member in the Industrial and Labor Relations School at Cornell University. McKelvey lived with her husband in Bronxville, New York and intended to commute to Ithaca, but in 1943 the War made commuting impossible. McKelvey took a job in an organized factory for Delco of General Motors, hoping to get factory and union experience. She became the secretary of the shop steward's council and was shocked by the men's indifference toward women's interests, such as a separate changing room for the women factory workers. She said that when she tried to raise these issues, the men made it clear that she was the secretary and was to simply "keep the minutes." [3] McKelvey did keep the minutes and later used them as source material for her academic writing.

Later, when McKelvey applied for membership to the War Labor Board, her experience as a union officer was viewed by some as an impediment to her serving as a neutral. But others were impressed that she

[1] Interview by Marian Warns with Jean T. McKelvey, NAA Past President, in Chicago (May 31, 1989) [hereinafter Warns-McKelvey Interview].
[2] *Id.*
[3] *Id.*

had real-world experience and in 1944, McKelvey was appointed to serve as a public panel member. She handled approximately 50 cases before the war ended in 1945 and the Board was dissolved. She described the only case she had been overruled on:

> The union and the company had agreed to a woman's wage scale and a man's wage scale. Our philosophy was that if the parties agreed to something, there's no dispute. So I sent this in to New York and got a nasty letter back from Walter Gelheim saying the War Labor Board does not approve of sex discrimination. When I got that letter, that was in July, the war ended in August, and I'd set up another meeting at this plant in LeRoy, New York, saying that the Board would not approve the wage scales in the contract; this was really interest arbitration, although we didn't call it that then. So, I called another meeting and then to my surprise, and I still have the letter, I got a letter from the head of the company saying "Jean McKelvey, your royal highness,…[N]ow that the war is over, would you please keep your dirty hands off our business."[4]

After the War Labor Board ended, McKelvey began teaching labor law at the ILR School at Cornell. She was added to the Federal Mediation and Conciliation Service roster of arbitrators. When she arrived at her first hearing in Auburn, the parties assumed she was the secretary. When McKelvey introduced herself, the parties told her that "Jean" was a man's name and no one told them "they were getting a woman." McKelvey reflected, "I always thought I had an advantage in arbitration with a name that could be a man's name."[5]

She went on to suggest that her gender-neutral name had contributed to her being selected to arbitrate more cases than her other female peers. She recalled that the parties were often surprised when she walked into the arbitration room and it was clear that they had been expecting her to be a man.[6] Interestingly, her interviewer, Marian Warns, concurred that she felt she had had a similar experience, as "Marian" could be either a woman's or a man's name.[7] Ironically, this gender confusion over McKelvey's name was not limited to her early career: when she concluded her term as the NAA President in 1971, she was presented a gavel inscribed with her name, and signed, "Given with the affection and esteem of his colleagues."[8]

McKelvey said that Aaron Horvitz wrote to her to tell her that she had been selected as a charter member of the National Academy of Arbitrators. Of that honor she said, "It was a surprise to me. I really didn't do much in those early years. I didn't have any money, for one thing, to go

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[4] *Id.*
[5] *Id.*
[6] Joseph D. Garrison, "Perceived Differences in Male and Female Mediators and Arbitrators," *Disp. Resol. Mag*., Spring 2012, at 29, 30-31.
[7] Warns-McKelvey Interview, *supra* note 1.
[8] Telephone Interview of Marcia Greenbaum, NAA member (Dec. 10, 2019) [hereinafter Greenbaum Interview].

to the meetings."[9] McKelvey attended her first NAA meeting during Saul Wallen's presidential term in 1954 and joined the Executive Board. Wallen wanted to create a record of the Academy's past seven meetings and it fell to McKelvey, Chair of the Research Committee, to edit them. This first volume of *The Proceedings*, edited by McKelvey, contained presentations made at the NAA's earliest meetings. The volume published a Survey of the Arbitration Profession in 1952,[10] which collected demographics on age, education, caseload, and income, but perhaps unsurprisingly, does not mention gender. McKelvey remained editor of *The Proceedings* until 1961 when she was appointed as the first Coordinator of Regional Activities.

Additional Women Join

In 1951 a second woman, Lois MacDonald of New York and a Professor of Economics at New York University, joined the Academy. MacDonald served as an economist with the Wage Stabilization Division of the War Labor Board from 1942 to 1944 and was a public member from 1944 to 1945.[11] Nine years later, two additional women from the New York State Board of Mediation joined the membership: Mabel Leslie, a nationally recognized mediator,[12] and Eva Robins. Robins obtained her law degree about the time that the labor relations field emerged. She initially worked inside the industry but eventually took a civil service examination to leave the private sector and begin work as a mediator. She said that although she took a significant pay cut, getting into mediation "was the best move I ever made."[13] While working at the New York State Mediation Board, she primarily mediated cases, but there were unions that came to the board to have cases arbitrated for free. Robins began to be selected to hear arbitration cases outside of New York in surrounding states. Robins did not have an arbitrator mentor, recalling, "If there were mentors around that time, I didn't know who they were." She was not on any agency rosters other than the Mediation Board. Robins did not recall having difficulty being selected as an arbitrator after other women had paved the way. In 1989 she reflected:

> I think that it was easier [for] me, for Mabel Leslie who was a member of the Board of the New York State Board of Mediation and was a fine arbitrator, and for Jean McKelvey and for a few others. It was easier for us than it is for today's females. There are more today. They are more anxious to succeed right away. We knew we had to wait. We knew it would be slow, but we knew we would get there if we worked hard and did the job well. I don't remember ever having had any problem once I left industry; any problem about being a female or any other

[9] Warns-McKelvey Interview, *supra* note 1.
[10] "Survey of the Arbitration Profession in 1952," Appendix E, in *The Profession of Labor Arbitration: Cumulative Selection of Addresses at First Seven Annual Meetings, National Academy of Arbitrators, 1948 through 1954* at 176-82 (Jean T. McKelvey ed. 1954).
[11] "Remembrance of Lois J. MacDonald," *The Chronicle*, Feb. 1988.
[12] Arthur Stark, "An Administrative Appraisal of the New York State Board of Mediation," 5 *Indus.& Lab. Rel. Rev.* 383, 390n12 (1952); JSTOR, www.jstor.org/stable/2518766.
[13] Interview by Marian Warns with Eva Robins, NAA President, in Chicago, Illinois (May 31, 1989) [hereinafter Warns-Robins Interview].

minority aspect to myself. Everybody complains today. I don't recall being aware of a problem. [14]

In 1960 the NAA had 260 members; four, or 1.5 percent, were women. [15] McKelvey later stated that she felt that the NAA had different admissions standards for women and men, citing the membership's initial reluctance to admit Robins due to her experience at a public agency, even though men from the same agency had been admitted. [16]

Over the years, McKelvey invited a number of prominent arbitrators to speak to her classes at Cornell. Saul Wallen spoke to the class about an arbitration decision that had been reversed and later reinstated in the First Circuit. After the class, he told McKelvey that he wanted to hire a student as an assistant. Later she recalled that it hadn't occurred to her that he would be interested in hiring a woman as an assistant, because it was so difficult for women to get established. McKelvey suggested hiring an editor of the Law Review and Wallen disagreed, saying that he wanted to hire the student that had appeared to him to be the brightest in the class, referring to her as "that bright little girl." Once McKelvey confirmed that he was referring to Marcia Greenbaum, she hesitated because Greenbaum had not yet finished her master's degree. Wallen replied that it was up to Greenbaum to decide. [17]

Greenbaum surmised that she must have asked a lot of questions the day that Wallen spoke to McKelvey's class. She confirmed that she moved to Boston in the fall of 1963 after Wallen hired her to follow Arnold Zack as his intern, and never did finish getting her degree. She drafted opinions for Wallen and traveled with him when he heard cases. Wallen suggested to several parties that they try Greenbaum as their arbitrator. One countered, "Sorry, I would never buy a pig in a poke." Greenbaum said that she had to look up what a "poke" was, because she had never heard the expression. She heard her first case in 1967, when Wallen had a conflict and again offered to send his intern to hear the case. The parties accepted his offer and Greenbaum wrote her first award. [18]

The Rise of Public Sector Bargaining

In the 1960s and 1970s, collective bargaining took hold in the public sector in many states, giving police officers, fire fighters, teachers, and other public employees the right to organize and negotiate. Eventually, their grievances went to arbitration and many women found that public sector unions and agencies were more willing to try out lesser known arbitrators. Greenbaum recalled that she provided training to many of these public sector employees who had recently gotten the right to collectively bargain. Many of the occupations in the public sector, such as teachers, nurses, and social workers, were dominated by women. With the rise of the women's movement in the 1960s, they often wanted a female arbitrator. Because of the training she had done of teachers, school committee members, and superintendents,

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[14] *Id.*
[15] Gladys W. Gruenberg, Joyce M. Najita & Dennis R. Nolan, *National Academy of Arbitrators: Fifty Years in the World of Work* 153 (1998), citing membership directories and NAA archives.
[16] Warns-McKelvey Interview, *supra* note 1.
[17] *Id*.
[18] Greenbaum Interview, *supra* note 8.

Greenbaum was familiar to many in the public sector, and she began hearing even more arbitration cases.

First Woman President of the NAA

In 1970 the NAA elected Jean McKelvey as its first female President, 23 years after she was asked to join the Academy as a charter member. Never one to shy away from her unique position, McKelvey's Presidential address was titled, "Sex and the Single Arbitrator."[19] She initially noted the tension between arbitrators who believed their role was to adjudicate the collective bargaining agreement alone (the "Meltzer view") and those who thought they had a statutory responsibility as well (the "Howlett camp"). She then analyzed arbitration awards in which her colleagues had been asked to decide issues involving charges of sex discrimination, especially contractual provisions that were alleged to contradict state or federal law addressing employment of women. What followed was a thorough examination of awards interpreting contractual provisions that upheld or ran afoul of state protective labor provisions, such as those that limited working hours or lifting heavy objects, or federal legislation prohibiting discrimination based on sex. McKelvey wrote:

> "Most of the published decisions of this period indicate that arbitrators would not uphold a woman's right to a job if the consequence would entail a violation of state protective legislation by the employer. In fact, the dean of the arbitration profession, the late Harry Shulman, ruled that the existence of legal limitations on the work which women could do created a legal class disability which was not discriminatory because it was dependent "entirely on objective, indisputable tests of sex and weight, and is not subject to personal idiosyncrasy, differences of opinion as to physical capacity, or malingering for the purpose of securing a better job."[20]

McKelvey later lamented that although her Presidential Address presented a very well-researched paper, it was her speech as the President-Elect that everyone remembered. Rather than introducing the NAA members at the head table and their "lovely and charming" wives, McKelvey introduced each of the wives by her own considerable accomplishments, adding that she was accompanied by her "handsome and charming" husband.

Throughout her Academy tenure, McKelvey was focused on the education and training of new arbitrators. As President, McKelvey created the Special Committee for Development of New Arbitrators, hoping to increase the number of qualified female and minority arbitrators. Regional training efforts emphasized affirmative action in recruitment of participants in training programs. Eventually, the training and recruitment of new arbitrators fell primarily to universities and agencies.

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[19] Jean T. McKelvey, "Sex and the Single Arbitrator," in *Arbitration and the Public Interest, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators* 1 (Charles M. Rehmus ed. 1971).

[20] *Id.* at 11, quoting from Bethlehem Steel Co., 7 LA 163 (1947).

The fifth woman to join the NAA was Frances Bairstow. Bairstow was raised and educated in Wisconsin but her first job was as Industrial Secretary for the Chicago YWCA. In 1943 Bairstow joined the Chicago War Labor Board as a wage analyst and then was moved to the disputes section, handling strikes and other industrial turmoil. After moving to Kentucky for her husband's career, Bairstow started a worker's education center and began teaching classes to train shop stewards for bargaining. She said, "The idea of a woman in this job was not too popular at that time. But there wasn't anybody else with qualifications who would work for so little money." [21]

After Bairstow's first marriage ended, she and her son moved to Washington, D.C., where she was offered a job with the Senate Labor Committee, which required Senate approval. Bairstow quipped that during the committee interviews, she was "amazed that busy senators took time" to concern themselves with what arrangements she had made for childcare for her son. [22]

Later, Bairstow was awarded a Fulbright fellowship in Industrial Relations at Oxford. While waiting for the fellowship to begin, she applied for a job at Lockheed in Los Angeles. The employment manager knew her background and offered her a job in labor relations, but she turned him down, preferring to work on the factory floor. Bairstow spent several months making nose cones and plastic parts for airplanes, all the while studying the relationship between shop stewards and their members.

While at Oxford, Bairstow met a Canadian film maker who would become her husband. After interning in California with several NAA arbitrators, Bairstow had to tell them that she was leaving to join her husband in Ottawa. She said that one suggested that her decision confirmed why people were reluctant to give jobs to women: because they leave. [23] In 1959 Bairstow began her academic career at McGill University in Montreal, Quebec. She heard her first arbitration case in 1962 when the Dean of Arts at McGill recommended her to parties when he became so busy that he had to turn away cases. Of that first case she recalled, "My theory was that they were happy to take a chance on a woman they didn't know, because they knew they were going to lose anyway." [24] In 1972, she became the fifth woman admitted to the Academy.

Meanwhile McKelvey, not one to back away from a challenge, endeavored to increase the number of women in the NAA. She extended invitations to NAA meetings to advocates and former students who she knew wanted to be arbitrators, including Greenbaum. McKelvey's former student said that soon after she heard her first arbitration case, Wallen announced that he was giving up his arbitration practice, so she went out on her own. In 1968 the American Arbitration Association agreed to put her on its roster of arbitrators. Around this same time, she began sharing office space with Zack. Much later, the same union that had rejected Greenbaum as a "pig in a poke" did choose her as an arbitrator, and she arbitrated there for many years. She said that in some instances, she began hearing cases in a more female-

[21] Interview by Joyce M. Najita with Frances Bairstow, NAA Vice President, in Minneapolis (May 6, 1994).
[22] *Id.*
[23] *Id.*
[24] *Id.*

dominated area, such as flight attendants, and then transitioned to arbitrating for the more male-dominated occupations in the same industry, like airline pilots. Eventually she was selected for cases with the Steelworkers and the "door flew open." She theorized that simply "showing up and persistence" account for a large part of her success as a female arbitrator. [25]

In 1973 McKelvey's efforts to increase female membership were rewarded when her friend, Alice Grant, and her student, Marcia Greenbaum, were admitted to the NAA, bringing the total number of women members to seven, or 1.1 pecent. Grant was a graduate of Cornell University and was the director of the Rochester district office of the New York State School of Industrial and Labor Relations at Cornell University. Her work "included training a large number of women and minorities as arbitrators." [26] At a memorial service for Grant, Robins remarked:

> Alice became a member of the academy in 1973 and immediately began the service to the academy and to arbitrators that would mark the balance of her life. Without fanfare— without seeking credit or personal benefit—she helped develop programs that were aimed at perfecting both the members' skills and their competence as arbitrators. She helped structure academy and other training programs for interns and mentors.…There are literally hundreds of arbitrators and advocates who owe their knowledge of their craft to programs Alice developed or set in motion or participated in in some meaningful way. There probably was no meeting of the academy since 1973 that does not bear some mark of Alice's contribution. The academy benefitted from the example she set in her interest in continuing education. The quiet guidance she gave to members and nonmembers of the academy in the training of interns was itself a tremendous effort, and one for which she sought no credit. [27]

In 1974 a Reexamination Committee headed by Rolf Valtin issued a report on membership standards, in which the Academy's under-representation of minorities and women was addressed head on:

> Out of a total of about 450 persons, the Academy has seven blacks and five women. These are plainly distressing statistics. But the Academy cannot itself rectify them without abandoning general acceptability by the parties as the central measure of qualification for membership. Nevertheless, the reiteration of the Academy's long and firm policy against discrimination on the basis of race or sex should be part of this report. And we additionally make these observations: that it is silly to deny that blacks and women have often been denied a fair opportunity to demonstrate their capabilities, and thus

[25] Greenbaum Interview, *supra* note 8.
[26] Alice Grant Obituary, *The Chronicle,* March 1989, at. 8.
[27] Alice Bacon Grant: A Celebration of Her Life, Dec. 10, 1988.

> establish the degree of acceptability needed for Academy membership; that it is incumbent on the Academy to cooperate in every appropriate way with programs designed to encourage the continued development of competent, qualified arbitrators among women and minority groups; and that we would be less than proud of an Academy which failed to be sensitive to the barriers facing these potential members. [28]

Some members believed membership standards should be modified for women and minorities as it would be the only way to increase their membership in the NAA, since the labor-management community was rarely selecting them as arbitrators. However, an equally strong opposition arose, particularly among those women and minorities who were already members. They felt that lowering the standards would tarnish their own reputations or demean those who sought admission in the future. The suggested change was soundly rejected, and the proposal was eventually abandoned. NAA President Margery Gootnick described the dispute this way:

> There was a time just before I got into the Academy, where the committee considered if it should accept women and other minorities, African-Americans, Asians, on lower standards. This proposal was objected to by the women and the minorities in the Academy and was defeated. If the proposal had passed, we always would have been looked upon as second-class members. [29]

The next woman to join the NAA was Marian Kincaid Warns of Louisville, Kentucky. She held graduate degrees in Industrial Psychology from the University of Louisville and was admitted to the NAA after careers in labor and personnel, and as an instructor in psychology at the University of Louisville. Warns and her husband, NAA member Carl Warns, Jr., had a joint arbitration practice. [30] After Warns was admitted in 1975, eight of the Academy's 446 members were female, still less than 2 percent. When interviewing McKelvey for the History Committee, Warns remarked: "I know there were very, very few, even at the time that I got in, because I was only ... I was the [eighth] woman, and that astounded me. The fact that at that time, there were only seven women in the Academy. It was extraordinary." [31]

The Academy continued to admit qualified women arbitrators. In 1977 Clara Friedman from New York City was admitted, followed closely in 1978 by Margery Gootnick of Rochester, New York; Emily Maloney of Santa Cruz, California; and Helen Witt of Pittsburgh, Pennsylvania.

Although Margery Gootnick went to Radcliffe College (Harvard University) and Cornell Law School, her early legal career was spent

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[28] "Report of the Special Committee to Review Membership and Related Policy Questions of the Academy," in *Arbitration – 1976: Proceedings of the 29th Annual Meeting, National Academy of Arbitrators* 361, 370-71, Appendix F (Barbara D. Dennis & Gerald G. Somers eds. 1976).
[29] Interview by Donald McPherson of Margery F. Gootnick, Past NAA President, in Chautauqua, New York (Aug. 1, 2010) [hereinafter McPherson-Gootnick Interview].
[30] "Remembering Marian Kincaid Warns," *The Chronicle,* Fall 2003.
[31] Warns-McKelvey Interview, *supra* note 1.

searching titles and repossessing refrigerators. She made $35 a week although the man hired at the same time as she was paid $50 a week and was given an office. After her second child was born, she was let go as the law firm felt she had chosen her role as a mother over her career. Gootnick said she then took a fourteen-year maternity leave, which ended when McKelvey invited her to attend an arbitrator development course in Rochester. Although Gootnick had never taken a course in labor law, she enrolled. McKelvey introduced the students to "many of the stars of the Academy," and Gootnick "fell in love with arbitration."[32]

In the early days of her career, Gootnick accompanied McKelvey and Grant to some of their arbitrations. She took a position as a hearing officer for the New York State Division of Human Rights, where she "learned to run a hearing from a court reporter."

Gootnick recalled that she was an earnest researcher. Her first case was a "sleeping" case and before she wrote her award, she read every published sleeping case she could find. Two of Gootnick's early cases turned out to have some prominence. She described one in great detail:

> One was an interest arbitration under the New York State Police and Fire statute. What I didn't know: It was mid-November. I did not know and no one told me that there had been an election. The person who was representing the Village on the tripartite Arbitration board was returning very shortly to the bargaining unit.
>
> The Village representative wanted to award a remarkable raise to the union, about 9% more than comparable units. The union representative on the tripartite board sat very quietly and never opened his mouth. I tried to explain to the Village representative that he was not a neutral, that I was the neutral and he was an advocate for the village. I told him people would think he was dishonest.
>
> Eventually as the neutral, I decided that I had to write a dissent! I was told by PERB that it would try to protect me, but didn't know if it could. What kind of an interest arbitrator writes a dissent when the management and the union are in agreement? After I wrote the dissent, I took to my bed. I was certain that was the end of my new career. The Village appealed it to the New York State Supreme Court. I do not believe the Court had proper jurisdiction. However, the judge thought that he did have jurisdiction. During the testimony it came out that the Village representative was going back to the bargaining unit. So suddenly, from the biggest idiot in the world, I became Ms. Ethics and Honesty.[33]

[32] McPherson-Gootnick Interview, *supra* note 29.
[33] *Id.*

Gootnick recalled that after this case and another one where she was branded "No Gootnick" all over New York, her arbitration case load increased substantially after previously languishing without much success.

After attending her first NAA meeting as McKelvey's guest, Gootnick was so enamored, she sought to join the organization immediately. Membership Chair Jack Dunsford gently shared the membership qualifications with her, whereupon she realized she had not yet met any of them. Gootnick was turned down after her first application but was admitted on her second try. She almost immediately set a goal for herself to serve as a president for the organization she referred to as "one of the major joys" in her life.

Gootnick said that when she was admitted to the Academy, there was no orientation for new members, making her realize how important it is to have a formal welcoming. Accordingly, when she was later appointed Chair of the New Member Orientation Committee, she took the role "more seriously" than any job she'd had in the Academy. [34] Gootnick's love for the Academy and its members, particularly the newer members, was legendary. She was frequently referred to as the "mother" or the "heart" of the NAA and many members recalled afterward that she was the first to introduce herself when they attended their first NAA meeting.

Helen Witt's road to labor arbitration began in 1971 when she was invited to participate in a new dispute resolution project between the United Steelworkers of America and the eleven steel companies who bargained together as the Coordinating Committee. Of the 100 participants who were considered for the panel, Witt was the only woman. She and ten men were selected for the first Expedited Arbitration Panel, to train in arbitration to be ready to fill in as seasoned arbitrators left the panel. A year later, she was asked to join the United States Steel/United Steelworkers Board of Arbitration, then chaired by Sylvester Garrett. She gave up her private law practice and entered the life of an arbitrator on a full-time basis. [35]

Gootnick and Witt met when they joined the Academy together and became close friends, accepting their thirty-year pins together. Gootnick recalled that there were not many women in the Academy when she joined. She felt that this was not because the NAA discriminated against women when they applied, but because there weren't many women arbitrators.

In 1979 the NAA had 500 members, 2.4 percent (or twelve) of whom were women. The next year, 1980, Ruth Kahn of Detroit, Michigan was the thirteenth woman admitted to the Academy. In that same year, Eva Robins was elected as the NAA's second female President. Robins's goal was to set up a good continuing education system for the NAA. She felt that at that time, there was unwarranted concern about the standards for membership and it was suggested that the admission standards be made more stringent. She said, "I thought that was pulling up the ladder. I wasn't about to participate in it." [36] Robins said that the best thing she was involved in as President was setting up training so that those interested in arbitration could become comfortable with it. In her presidential address, Robins praised the

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[34] *Id*.

[35] "Spotlight on Helen M. Witt, A Woman of Steel with a Heart of Gold," *The Chronicle*, Winter 2020, at 30-31.

[36] Warns-Robins Interview, *supra* note 13.

help she had received at the start and announced that Peter Seitz and she had developed a salon to help new arbitrators, hosted in her home:

> We wish to repay that great gift we received by sharing our knowledge and our intuitions with others—with the new hopefuls coming along. Peter and I will give to perhaps six persons at a time the opportunity to discuss arbitration with us, to read and talk about some of the treasured writings on the subject. The persons who will be admitted to our discussion series will have to have tried to prepare themselves for arbitration by obtaining some practical exposure to collective bargaining and the administration of the labor contract which we think is so important to an understanding of the philosophy of arbitration. [37]

The Modern Era

In 1981 the NAA welcomed five female members; five more were admitted between 1982 and 1983. The NAA welcomed more new members in 1987 and 1988 than in any other years; of the 74 members admitted in those two years, 15 were women. By 1989 an additional five women had joined the NAA's ranks. Among these classes were three women who would go on to serve as one of the NAA's presidents: Barbara Zausner, admitted in 1983, was elected to the Academy's highest position in 2007; Roberta Golick joined in 1984 and served as President in 2011-12; and Sara Adler joined in 1987 and followed Golick as President in 2012-13.

In 1985 the NAA Research Committee undertook a comprehensive study of the demographic characteristics of NAA and non-NAA arbitrators in North America, expanding the scope of previous surveys which had only polled NAA members. First, the study reported that the average age of NAA respondents was higher than in previous studies, suggesting that the mean age of Academy members had increased between 1969 and 1989. They also concluded that "[f]emale arbitrators constitute a larger share of the non-NAA group." [38] The authors of the study made the following observations about gender:

> Note that 9.4 percent and 4.1 percent are the proportions of female non-NAA and NAA members, respectively. We examined whether the age differences between male and female arbitrators could account for the Academy versus non-Academy gender distributions. The Academy screens applicants on experience. Assuming that age and experience are positively correlated, it was hypothesized that the proportion of member and

[37] Eva Robins, "The Presidential Address: Threats to Arbitration," in *Arbitration Issues for the 1980s*, *Proceedings of the 34th Annual Meeting, National Academy of Arbitrators* 1, 16 (James L. Stern & Barbara D. Dennis eds. 1982).

[38] Mario F. Bognanno & Clifford E. Smith, "The Demographic and Professional Characteristics of Arbitrators in North America," in A*rbitration 1988: Emerging Issues for the 1990s, Proceedings of the 41st Annual Meeting, National Academy of Arbitrators* 266, 289 (Gladys W. Gruenberg ed. 1989).

> nonmember female arbitrators would be equal within the age categories of 50 and under, and over 50. This hypothesis was rejected.
>
> Explaining the gender-based differences in membership is not a trivial exercise. A complete study would require access to data on applicants to NAA membership, including information on the screening decisions reached. This issue is further complicated by the small sample size. Within the 1986 population, if only 30 to 35 female nonmembers had become NAA members, the proportion of female NAA and non-NAA arbitrators would have been approximately equal. Conclusions regarding gender-based discrimination cannot be reached without further research. [39]

The authors concluded that one area of fruitful future research would be to, "Examine why women and minorities constitute such a small fraction of all labor arbitrators and why the Academy's membership has proportionally fewer women than the set of nonmember arbitrators." [40]

The Academy membership continued to admit new members, but the percentage of women members remained low. Between 1990 and 1999, 157 new members were admitted to the NAA, 33 of whom were women. In 2000, Cornell/PERC Institute on Conflict Resolution conducted a survey of the NAA membership. With respect to gender and race, the authors wrote:

> Only 12 percent of Academy members are women and less than 6 percent are nonwhite. A significantly greater proportion of women members are full-time neutrals (66.1 percent) than men (47.4 percent). On the other hand, a higher proportion of whites are full-time neutrals than nonwhites. On average, the female members of the Academy are younger (mean age of 56) than the males (mean age of 64)….Relatively more men than women have law degrees and Ph.D.s. [41]

The authors of the study found "no significant differences in either mediation or arbitration caseloads between men and women." But they found that "women are nearly twice as likely as men to have done pro bono work" and that a significantly higher proportion of this work was done by younger members and women. [42]

The study also compared differences in rates charged for mediation and arbitration by gender, writing:

> Many results of the analysis of gender differences within the Academy have been a surprise, and the analysis

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[39] *Id.*
[40] *Id.*
[41] Michel Picher, Ronald L. Seeber & David B. Lipsky, "The Arbitration Profession in Transition: A Survey of the National Academy of Arbitrators." in *Arbitration 2000: Workplace Justice and Efficiency in the Twenty-first Century*, *Proceedings of the 53d Annual Meeting, National Academy of Arbitrators* 267, 277-78 (Steven Briggs & Jay E. Grenig eds. 2001).
[42] *Id.* at 296.

> of fees fits that pattern. Women charge significantly more for their mediation services than do men—about 25 percent more at the lowest rate and nearly 30 percent at the highest rate. We suspect that this is largely due to the high demand for female neutrals within the newer areas of practice, particularly the mediation of employment discrimination charges. This finding, however, is quite unusual in the wider context of the U.S. economy, where women are typically paid less than men in nearly every occupation. Arbitration rates reveal that male Academy members charge more at the lowest level, and roughly the same at the highest levels. [43]

The authors concluded,

> The demographic picture the survey draws will no doubt give some analysts cause for concern. Apart from the average age of Academy members being at a relatively high 63, the data reveal that women and minorities appear to be substantially underrepresented in Academy membership whether by comparison with the population generally or with other professions. These findings should be of interest to agencies involved in the recruitment and development of professional neutrals, and to Academy members involved in mentoring. [44]

Margery Gootnick realized her goal of serving as the NAA's President in 2005-06, when she became the third woman elected to the post. Gootnick believed that the most important challenges facing the Academy were visibility and getting new members involved in the Academy. She summed up her thoughts on serving as an arbitrator:

> I don't quite mean [arbitration is] my religion. I mean that it has been nothing but a joy, a challenge and a huge responsibility. I think it is an honor and a privilege to be chosen to make decisions on large issues or even very small issues. The day that an arbitrator believes that any issue is *de minimis*, she should quit the profession. I have never lost the joy, the challenge and the excitement of arbitration. Many of you have heard me say that I intend to retire two weeks after I die. I hope I can make it. [45]

Gootnick's adoration was on full display during her presidential address entitled, "My Love Affair with Arbitration," a multimedia extravaganza with original songs, comics, and heartfelt gratitude for her profession. In her remarks, Gootnick said:

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[43] *Id.* at 300.
[44] *Id.* at 319.
[45] McPherson-Gootnick Interview, *supra* note 29.

> Arbitration offered adventure, learning, interaction with great minds, integrity, humor, humility, and the thrill of accomplishment. Through my love affair, I encountered a diversity of experiences. I saw a way to serve people in workplace crises whose only salvation just might be a professionally binding decision. Doors were open to meeting other arbitrators, many of whom have become life-long friends.
> As I became entrenched in this field, I had opportunities for progressive change, for expanding the horizons of our profession, and I was deeply honored to become part of the Academy, which serves ethically, with integrity, with honesty and with good, hard work. [46]

In 2002 and again in 2006, Cynthia Alkon, a professor at Appalachian School of Law, surveyed only the women members of the Academy, publishing her findings in 2006. In 2002 54 members responded to her survey; in 2006 96 members answered her questions. The author pointed out that while women comprised 30 percent of the legal profession, they accounted for only 15 percent of the NAA's membership at the time of the second surveys, up from 8 percent at the time of her first survey. [47] One unique statistic collected by Alkon was the number of female NAA members who were related to other NAA members. She found:

> Twenty-six percent of the 2002 respondents reported being related to established arbitrators. In 2002, half of the respondents related to arbitrators had married arbitrators, and the other half reported that their fathers were arbitrators. This number decreased in the 2006 survey, with 22.8% of the respondents reporting that they were related to arbitrators, including one highly experienced respondent who reported that her husband just recently became an arbitrator. Four members reported their husbands were arbitrators, one stated that her ex-husband was an arbitrator, and another reported that her cousin was an arbitrator. Two members reported that their fathers were arbitrators. [48]

In 2002 respondents reported earning 75 percent of their income from arbitration; in 2006 this number had increased to 86 percent. In this same interval the number of respondents stating that arbitration was their only source of income increased from 39 to 50 percent. The average number of years it took to reach this marker had increased from six to eight years. In 2002 respondents lived in twenty states, but over half of them reported living

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[46] Margery F. Gootnick, "My Love Affair with Arbitration," in *Arbitration 2006: Taking Stock in a New Century*, *Proceedings of the 59th Annual Meeting, National Academy of Arbitrators* 1 (Patrick Halter & Paul D. Staudohar eds. 2007).
[47] Cynthia Alkon, "Women Labor Arbitrators: Women Members of the National Academy of Arbitrators Speak About the Barriers of Entry into the Field," 6 *Appalachian J.L.* 195 (2006).
[48] *Id.* at 200. One survey respondent objected to the question suggesting that nepotism accounted for the entry of women into the profession.

in California, New York, or Philadelphia. New York alone accounted for 25percent of the women members. By 2006 the percentage in those three states had decreased to 39 percent of the total.[49] The survey results suggest that the women perceived that those in New York and California had had an easier time starting an arbitration career than in other states.[50]

Professor Alkon asked the respondents, "To what extent has your gender affected your ability to become established as an arbitrator?" In 2002 85 percent of the respondents indicated that her gender had affected her ability to become established; in 2006, the percentage answering affirmatively had decreased to 70 percent. Several remarked that the advent of collective bargaining in the public sector had increased opportunities for female arbitrators. Comments included the observation that parties frequently seemed to prefer having a woman arbitrator on certain kinds of cases. In the second survey, most agreed that it was easier for women to become established than it had been previously,[51] but all agreed that it was more difficult in general to start an arbitration career.[52]

Two terms after Gootnick, Barbara Zausner was elected President in 2007. Zausner began her college education at Oswego State Teachers College in upstate New York, graduating after a long hiatus with a BA in English. When she returned to college at St. Johns University in NY, the AAUP was trying to organize the faculty and Zausner refused to cross the picket line protesting the firing of AAUP members who were in favor of organizing. As a result, she became involved with the NYC teachers' union before she began her first teaching job. When she found herself laid off from that job, she found a summer job writing educational materials for the Communication Workers of America.

In the mid-1970s, the arbitration profession actively began to recruit more women and minorities. The New Jersey PERC (together with AAA, FMCS, and local agencies) offered a training program for arbitrators in which Zausner and Tia Denenberg, who joined the Academy in 1981, enrolled. While she was finishing her masters' degree in Labor Relations at Rutgers, Zausner served as an apprentice to Philadelphia arbitrator Joe Raffaele, drafting opinions for his signature. She also participated in the arbitration salon run by Eva Robins and Peter Seitz.

Zausner was listed on several arbitration rosters while still working as an apprentice. Initially, she mostly heard cases in the public sector but soon began hearing private sector cases, as well. Zausner found everyone in the Philadelphia and New Jersey area to be kind and supportive of new arbitrators. Zausner said that if she was being discriminated against as a female arbitrator, she "wasn't aware of it." She said that she always felt that her gender was "irrelevant" to her arbitration career.[53] Zausner could not ever recall being mistaken for the court reporter at a hearing, a gaffe frequently reported by women arbitrators.

When Zausner joined the NAA in 1983, she immediately began serving on its committees. McKelvey, Robins, and Witt were deliberately

[49] *Id*. at 201-02.
[50] *Id*. at 205.
[51] *Id*. at 203.
[52] *Id*. at 203.
[53] Telephone Interview with Barbara Zausner, NAA Past President (Oct. 28, 2019).

seeking out women to serve in leadership roles and Zausner was very soon recruited by Witt to serve on the Board of Governors (BOG). Zausner could not recall feeling unwelcome in the Academy, stating: "As long as women were available and willing to take care of things, we were able to do whatever we wanted. All you had to do was step up and do the work."[54] Once Zausner was in a position to do so, she joined Witt in trying to bring other women along into leadership positions in the Academy.

Zausner said she was "delighted and surprised" when she was nominated to serve as the NAA's fourth female President, at a time when women comprised approximately 15 percent of the Academy's membership. However, she presided over a very contentious time when the Academy was debating whether to include employment cases in the cases counted toward admission. In Zausner's presidential address in 2008, she chose to pay homage to her "foremothers," acknowledging that she was only the fourth woman to helm the NAA. She quoted from McKelvey's presidential address, which had sought to capture the prevailing social attitude toward women in the workforce in 1970:

> The [ ] candid arbitral view that females as a class are to be regarded as the "weaker sex" was given most eloquent and definitive expression by Arbitrator Peter Seitz, who opined:
>
> > There is no basis on which it should seem sound to deny to the Company the right to indulge the assumption made in most of the States in this nation that females, *as a class*, and because of their biological structure and function, require more protective regulation as a part of the labor force than males.[55]

Zausner also included Gladys Gruenberg's observation regarding the effect of the passage of the 1972 Amendments to the 1964 Civil Rights Act on the careers of women arbitrators. Gruenberg wrote:

> Sex discrimination cases needed women arbitrators – at least that's what the men involved thought. They didn't discover until it was too late that when it comes to deciding cases, women arbitrators think the same way as men.[56]

The next woman to assume the mantle of the NAA Presidency was Roberta Golick, whom Zausner described as her "best friend in the Academy." Golick was raised in Boston and attended Barnard College in

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[54] *Id.*.

[55] Barbara Zausner, "Presidential Address," in *Arbitration 2008: U.S. and Canadian Arbitration: Same Problems, Different Approaches*, *Proceedings of the 61st Annual Meeting, National Academy of Arbitrators* 1, 4-5 (Patrick Halter & Paul D. Staudohar eds. 2009), citing Jean T. McKelvey, "Sex and the Single Arbitrator," *supra* note 19.

[56] *Id.* at 5, citing Gruenberg Society of the St. Louis University John Cook School of Business. Available online at alumni.slu.edu/gruenberg/lessons.

New York City, majoring in Asian studies with a concentration in Japanese language. Because she was doubtful that her proficiency in Japanese would permit her to earn a living, Golick decided to attend law school at Boston University.

After graduation, Golick began what she referred to as a "serendipitous" search for a legal position. She packed her resume in her new briefcase and went to downtown Boston. She began her quest in the State office building, riding the elevator to the top floor. Beginning with the first office she came to, she walked in and introduced herself, explaining that she was very interested in working in whatever department she had just arrived in. Golick repeated this introduction in every office she could. On the 11th floor, she found the Department of Labor. Because she was sitting in front of him, the Chair hired Golick as general counsel. Consequently, her first position after graduation was with the State of Massachusetts in the Department of Labor at the Board of Conciliation and Arbitration.

The Chair also planted the seed of an idea for Golick, musing, "Who knows, maybe someday you can be the first female mediator in this 100-year old agency." At the time, the agency employed eight mediators, all male, none of whom was interested in mentoring her. Undeterred, Golick sat in on mediations and arbitrations conducted at the agency. When she was later asked if she experienced sexual harassment on the job, Golick replied:

> I don't think we really talked about sexual harassment in those terms but I certainly was treated poorly and in a sexual way -- in a way that made me very uncomfortable at times by some of the people that I tried to work with. Those who paid attention to me fell either into the camp of helping me in a really wonderful way as mentors and later as peers. And then there was the other camp of men who made gestures, suggestions, overt sexual remarks all the time. In those days, it was just different for us. We didn't want to make a fuss. We didn't really feel like we had a right to make a fuss. I was eager to maintain my job and move forward and so I took a grin-and-bear-it attitude towards these guys. I'm happy to say that I came out ahead at the end. The cost was putting up with that nonsense. But everything that I gained in that position made it worth it. But I can't imagine anyone doing that today. I can only believe and hope that today women would not put up with it. Today there would be support and opportunity to put a stop to it, where there wasn't then. [57]

After a year Golick was promoted to Acting Chairman of the Board when the Chair left to arbitrate full-time. She assumed the role of neutral chair on a three-person arbitration board, which was a service provided by the State without charge to the parties. The next year the department created a position called Mediator Arbitrator, tailoring the qualifications to fit only her. As a result, she did become the first female mediator in the Board's history. She

[57] Interview by Margaret Brogan with Roberta Golick, NAA President in Philadelphia (April 2012).

continued to mediate and arbitrate for the State and in 1978 was listed on the American Arbitration Association's labor roster. By 1982 Golick was receiving so many outside appointments the time had come to leave her full-time employment with the State. Golick said that some of the challenges of beginning a mediation or arbitration practice are the same for everyone:

> As you know, being selected for a case is the hardest part of the job. We know we have the intelligence to be good but we need to be given the opportunity to show it. And that is the hardest thing for somebody who wants to break into the field. How do you get picked when people don't know you? And how will they know you if you're not exposed to them? It was a dilemma 35 years ago and it's a dilemma today. [58]

Golick believed that she benefitted early on from the success of other women arbitrators in her region and because, as a woman, she stood out among the arbitrators trying to get started. She recalled:

> Another thing that enabled me to gain instant recognition was the fact that there were very few women doing arbitration and mediation in this country in the 1970s and early '80s. There were some absolute stars and we know who they are by the stories that we know about them. They were the real pioneers. In New England, there were very few women who were well known. And people who didn't even know who I was, knew that there was a woman. And they would say who's that woman who arbitrates and somebody would answer, well you either mean Marcia Greenbaum or you mean Roberta Golick. Marcia was the real leader in the New England region, did wonderfully and still does. [59]

Golick remembered that when she first began hearing arbitration cases, she faced the dual hurdles of being female and significantly younger than anyone else in the room. She was frequently mistaken for the court reporter when she arrived, as oftentimes the parties were expecting "Robert," not "Roberta." But she also thinks that some parties believed that a female arbitrator would better understand a case brought by a female grievant. She thought that parties often sought a female arbitrator when the subject matter might embarrass a man, such as a woman who had been disciplined for staying too long in the bathroom due to "women's issues." She feels that in general parties prefer having the choice of both women and men as arbitrators because the diversity broadens the perspectives and backgrounds of the pool of decision-makers.

In 1984, at the suggestion of Greenbaum and Arnold Zack, Golick joined the NAA. Following Gootnick's advice, Golick tried to meet one new person at each meeting she attended. She cannot recall how many women were in the Academy when she joined, but she doubts there were many,

[58] *Id*.
[59] *Id.*

because of the small number of women in the profession in general. Golick said that the history of the Academy shows that it took a very long time for women to get a foothold in leadership positions but believes now that people are elevated because of their merit, not their gender. [60]

Golick served on numerous Academy committees and in 2011 was elevated to serve as the NAA's fifth female President. In her presidential address, she spoke of the role of empathy in deciding labor arbitration matters, stating:

> So, how do we achieve an appropriate separation between our life experience and our arbitral responsibilities? And how can the parties who select us for our good judgment be assured that the product we've delivered is a just outcome based on the record presented? First, we must all acknowledge the fundamental truth that we're not robots.... [M]ost of us who arbitrate have been on the planet for many decades and have witnessed and experienced a lot of life. We don't mechanically process testimony and documents, spit out an answer and reset at zero for the next hearing. Some of us can identify with the downtrodden; some of us relate better to the business establishment; some of us have hated our bosses; some of us have been bosses; many of us have raised children, buried parents and friends, and battled illnesses. We don't shed our identities at the hearing room door. [61]

The following year Sara Adler was elected to the Presidency, and for the first time the Academy was led by a woman in consecutive years. Adler was raised in Chicago and attended the University of Chicago, majoring in education and intending on becoming a teacher. She began teaching High School English at age 19 when, due to her age and short stature, she was "indistinguishable" from the student body. [62] She followed her first husband to California where she taught special education students. After trying social work, she enrolled in law school at the University of California, Los Angeles.

After law school Adler remarried and began working in a large law firm doing litigation work, which she disliked. Her husband, a management-side labor attorney, asked Joe Gentile to take her on as an arbitration apprentice, which he agreed to. Adler shadowed Gentile and practiced neighborhood law to earn money. Eventually she worked as a hearing officer for the Civil Service Commission. In 1978, two years after leaving the law firm, Adler heard her first case as an arbitrator.

Adler recalled that at the time in California, parties were getting a lot of pressure to use women arbitrators. Mei Bickner and Edna Francis were also beginning to arbitrate in Southern California and Adler soon found that

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[60] Telephone Interview with Roberta Golick, NAA Past President (October 25, 2019).

[61] Roberta Golick, "Presidential Address: The Human Condition: Its Impact On Arbitral Thinking," in *Arbitration 2012: Outside In: How the External Environment Is Shaping Arbitration*, *Proceedings of the 65th Annual Meeting, National Academy of Arbitrators* 16, 19 (Nancy Kauffman & Matthew M. Franckiewicz eds. 2013).

[62] Telephone Interview with Sara Adler, NAA Past President (May 27, 2020).

parties were often unable to distinguish among the three women. She said that more than once, a party would refer to having appeared before her in a case that she hadn't heard, but she assumed that the arbitrator had been one of the "other" female arbitrators in the area. One time at a LERA meeting, another attendee read Adler the riot act about a case, but she soon realized that she had again been mistaken for one of the other two. The three women became friends, often lunching together and discussing the profession. By 1987 all three women were members of the NAA.

Generally, however, she found that being a female arbitrator was a benefit to her career, despite often being mistaken for the court reporter when she entered a hearing room. Adler enjoyed public speaking and was often asked to appear on panels when the organizers were looking for a female panelist. Her frequent speaking opportunities benefited her career greatly.[63]

Adler began attending NAA meetings as an apprentice and joined the NAA at the urging of Gentile. She recalls being very aware that only 6 percent of the membership at that time was female. While there were men who were very friendly and welcoming in the Academy, Adler recalled that Robins, McKelvey, and Gootnick made a point of ushering new women members into the fold. Adler joined several smaller committees almost as soon as she became a member of the NAA. When she joined the Legal Representation Fund, she felt she was finally performing a very useful service for Academy members. She proposed a formal connection for members to an insurer, which helped to encourage reluctant members to get insurance. She served as the editor of *The Chronicle*, changing the format from a newspaper style to a magazine format.

A good deal of Adler's practice is as an employment arbitrator. As such, she was eager to see the NAA embrace policies that supported its members who arbitrated non-labor employment cases. When she was asked to serve as President, she accepted because she wanted to further the Academy's move toward becoming an organization that supports all forms of workplace dispute resolution.

Adler was elected to be the Academy's President in 2012. During her term, she tried to increase the NAA's focus on best practices for employment arbitrators. She was also one of the instigators of what would eventually become arbitrationinfo.com, the Academy's website dedicated to publicizing accurate information to the public about labor and employment arbitration.

In Adler's presidential address, she challenged the NAA members to embrace the changes that were affecting labor relations in the United States and Canada and to consider widening their view:

> Without abandoning our core mission, we should begin to seriously consider how we can proactively reach out to the workplaces in both of our countries to develop and promote peaceful ways to manage the conflict that will follow in the absence of broadbased unions and arbitration, and which will provide for a reasonable measure of due process and fairness for both employees and employers.

[63] *Id.*

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> In our NAA community of both arbitrators and advocates, there is a tremendous body of experience and thoughtfulness that could, and in my view, should, be able to craft an expanded body of workplace dispute resolution processes—probably most effectively with our sister organizations. [64]

The shortage of women members in the NAA was reflected in arbitration panels generally. In a 2014 paper on gender diversity in labor and commercial arbitration, the author found that the lack of diversity on arbitration panels was frustrating to the users:

> Those involved in alternative dispute resolution processes, including corporate leaders, have openly complained about the lack of gender diversity in arbitrator selection lists, saying that they are repeatedly getting the "same short list of mediators and arbitrators to choose from, consisting mainly of older white males." [65]

The author suggested that there were both supply and demand reasons for the scarcity of women serving as arbitrators, writing that an implicit bias may affect selection of arbitrators. He hypothesized,

> Arbitrators must express confidence and may need to be aggressive in their decision making in order to be considered effective, yet women who do behave in such a way are likely to be viewed negatively by both men and women. These women are therefore less likely to be chosen to arbitrate, even though they are utilizing tactics that might be considered perfectly acceptable or even desirable if utilized by a male arbitrator. [66]

Margaret ("Margie") Brogan of Philadelphia joined the Academy in 1996 and served as its seventh female President in 2016-17. Brogan was born in New Jersey and attended St. Joseph's College and Villanova Law School. She was the first person in her family to go to college and to obtain a graduate degree.

While Brogan attended law school, she began working for a union-side firm. She got the job because her mother was a clerk at a Teamsters local union. One day a lawyer who represented the Teamsters walked in and said to Brogan's mother, "Don't you have a daughter in law school?" While Brogan initially resisted the idea of getting a job through her mom, it was an

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[64] Sara Adler, "Presidential Address: Arbitration Under Fire," in *Arbitration 2013: A Tale of Two Countries*, *Proceedings of the 66th Annual Meeting, National Academy of Arbitrators* 23, 27 (Matthew M. Franckiewicz et al. eds. 2014).

[65] Turner Caley, "'Old, White, and Male': Increasing Gender Diversity in Arbitration Panels," *CPR International Institute for Conflict Prevention & Resolution*, March 3, 2015, at 2, citing F. Peter Phillips, "Diversity in ADR: More Difficult to Accomplish Than First Thought," *Disp. Resol. Mag.*, Spring 2009, at 14.

[66] Turner Caley, *supra* note 65, at 10.

excellent union firm where she learned real world labor law and arbitration, and the experience helped her gain her next job.

After graduating from law school, Brogan immediately went to work for the National Labor Relations Board. For the next six years, she gained trial experience and did a significant amount of hands-on work. Brogan left the Board after her second child was born, feeling that trial work was not compatible with mothering two small children. To earn money, she began teaching labor law and arbitration courses at her college alma mater at night, but she was looking for something more challenging.

Brogan spoke with Alan Symonette, whom she knew from Villanova. He had just begun an arbitration practice and encouraged her to start one as well. In 1990, at the age of 35, Brogan was accepted on the American Arbitration Association's labor roster and began hearing arbitration cases.

She soon found that although she had had no difficulty controlling a hearing while at the Board, the parties often seemed to want to push around newer arbitrators, especially a "young-looking woman." She found the atmosphere in Washington, D.C. to be more "genteel" and the ones in Philadelphia and New York to be tougher. Brogan recalled that in one of her early arbitrations at which she was pregnant with her third child, she suggested that they take a lunch break. The parties did not want to recess but she explained she needed to eat. They told her she could eat while they continued, so she ate her lunch while they questioned witnesses and passed exhibits through her. Much later, those parties told her that they were humiliated recalling how they had treated her that day. [67]

Brogan is glad to see that the influx of women into labor arbitration has changed the atmosphere in some ways. When she was a new arbitrator, she often got pushback if she tried to end a hearing day so that she could retrieve her children from day care. Now, she sees younger male attorneys with that same concern and wonders whether they understand how difficult it was for women before fathers regularly shared childcare responsibilities. [68]

She did not serve an apprenticeship to anyone in the field. Although one arbitrator offered, she had to turn him down because his practice involved extensive travel. She could not yet afford the travel expenses and had three young children at home. Neither did she participate in any formal training programs or any arbitrator "salons." But while a new arbitrator herself, Brogan began training newer arbitrators through the American Arbitration Association. [69]

Five years after she decided her first case, Brogan joined the NAA. She felt the Academy members were warm and welcoming, and becoming a member had a positive effect on her arbitration caseload. She was appointed to several Academy committees right away, including membership, where she learned about the application process. Brogan saw first-hand the conflict regarding which cases should count toward membership, and that eventually led to her participation in the New Directions Committee. To Brogan the expansion of the types of "countable cases" was a recognition of the realities of the market, not a lowering of admission standards. Her philosophy is that

[67] Telephone interview with Margaret Brogan, NAA Past President, (October 22, 2019).
[68] *Id.*
[69] *Id.*

an arbitrator who is consistently acceptable to the parties should be welcomed by the NAA. She said: "Parties have made it clear that they want arbitrators who resemble them and resemble the work force. They want diversity." [70]

Even before beginning her term as President, Brogan made clear that one of her passions is the mentoring and education of newer arbitrators. As the National Coordinator of Regional Activities, Brogan encouraged robust activity by the regions in educating and supporting arbitrators who were "not yet" NAA members. As President she created the Outreach Initiative for the express purpose of improving the existing manner of mentoring and training arbitrators and creating new models for the future.

In her presidential address, Brogan asserted that the organization could "only benefit from the expansion of diversity and inclusion in our ranks" and outlined programs and ideas for mentoring aspiring arbitrators that were taking shape through the Academy's regional chapters. Brogan then reflected on the role and experience of women in the Academy and challenged the Academy to include in its ranks more members who reflect the diversity of the current workforce:

> Seventy years. As I stand up here, I am beyond humbled and honored to be at this podium, a woman president of the Academy. It is gratifying that I will be followed by the next female president, Kathleen Miller.
>
> Forgive me, gentlemen, I am going to focus on women – because I can, and because I must. I am proud to say that women now attain many leadership positions in this organization. They sit on our board of governors and chair our most important committees.…While engaged in extremely vibrant arbitration practices, these women have taken on an enormous amount of work, giving us their time and talent for free to improve the Academy and to enhance our profession.
>
> Given the clear female presence, one might say, what is the big deal? Why even call attention to gender? Indeed, early in my regional visits I said something to that effect – that being a woman president of the Academy was no big deal – thinking in part that was true, and also thinking being humble was the right approach. Sitting next to me was our shining-light role model, Helen Witt. She sternly but quietly and kindly said to me, "Don't you ever say that again. It is a very big deal." Helen will be receiving an honorary life membership this Saturday.
>
> I carried Helen's words with me all year. As I thought about it, I was reminded that the Academy's story includes the fact that even though this is the 70th birthday of the Academy, I am only the seventh woman called to be president….

[70] *Id.*

> That history is important to remember. We were slow to change, due to many forces. But we are now faced with an enormous shift in the political landscape that will rattle our labor laws and rock our workplaces….
>
> I am not talking about a change in theory, but a concrete change in how our organization does things. Today I challenge the Academy, the appointing agencies, and the parties who select us to find real ways to bring new people into our profession and into our organization. We need new arbitrators who reflect the full range of our society and the folks who come to our arbitration table. [71]

After serving as President, Brogan continued to chair the Outreach Committee, focusing on inclusion and providing assistance to newer arbitrators. Brogan has seen small but incremental changes in the way newer arbitrators are supported. She said that after her children, the committee "is the greatest thing I've ever accomplished. It is so rewarding to learn from the newer arbitrators and to assist them in their practice. Their joy is my joy." [72]

In the year following Brogan, Kathleen Miller served as the Academy's eighth female President. After Miller earned her undergraduate degree in English, she taught writing and literature courses in college while she earned her master's degree and worked on her Ph.D. As Miller was beginning to work on her dissertation, she was introduced to the labor arbitration profession by friends in the legal community. After accepting an invitation to attend an arbitration chaired by Richard Mittenthal, she was hooked. Miller found herself at a crossroads: should she complete her dissertation to finish her Ph.D. in English or go to law school? She knew either road would be long and difficult, especially with two young children at home, but she decided to make an investment in herself. She enrolled in law school at the University of Pittsburgh with the intention of becoming a labor arbitrator.

During this time, Miller called McKelvey, despite never having met her, because she had read an article about McKelvey's course in women in arbitration. Miller figured the worst that could happen was that McKelvey wouldn't speak with her. Instead, McKelvey was gracious and encouraging, although she told Miller that the course for women arbitrators would not be repeated. McKelvey suggested that Miller contact other arbitrators for insight and direction. That led to more encouragement, especially from Witt, who was extremely generous with her time and advice. Miller recalled the time when Witt invited her and her family to the Witt home for an elaborate, home-cooked Sunday brunch. [73]

During Miller's second year in law school, one of her friends appeared as an advocate in an arbitration before Sylvester Garrett and mentioned Miller. When the friend later described the conversation, Miller

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[71] Margaret Brogan, "Presidential Address: Changing the Narrative: A Call to Increase Diversity and Inclusion in the Ranks of the National Academy of Arbitrators," in *Arbitration 2017: The New World of Work, Proceedings of the 70th Annual Meeting, National Academy of Arbitrators* 245 (Stephen L. Hayford ed. 2018).

[72] Telephone interview with Margaret Brogan, NAA Past President, (October 22, 2019).

[73] Telephone Interview with Kathleen Miller, NAA Past President (October 29, 2019).

was surprised to learn that Garrett was already aware of her burgeoning interest in labor arbitration. Miller gathered a stack of her writing samples and sent them to Garrett, mentioning her friend's name. Garrett invited her to lunch, where he warned Miller how difficult it was to break into arbitration and told her to call him when she finished law school.

By the time Miller graduated, however, she had accepted a clerkship with a federal judge. But before she could start, she received a call from Garrett who had just returned from a six-week trip to China and needed assistance. Miller returned from their meeting with an armful of files, wondering where to begin with the work she had agreed to perform on a trial basis. When Garrett later presented Miller with an employment contract to work as his full-time assistant, she hadn't yet taken the bar and the judge was expecting her to come to work for him after she did. She said she knew the judge would have no trouble replacing her, but she never could replace the opportunity to work with Garrett in her chosen profession. She recalled that the judge was shocked when she notified him that she would turn down a clerkship in the federal court. But according to Miller, Garrett proved to be a committed mentor as well as an employer, and she never has regretted her decision. [74]

While Miller worked for Garrett, she also began hearing cases on her own and gradually built her own caseload. She recalled the first case she heard on her own in 1987 and is proud that she still serves on the parties' arbitration panel 33 years later. Miller recalled fondly that for the first decade of her career as an arbitrator, she shared a suite of offices with Garrett and Clare ("Mick") McDermott. During those years, she was appointed to the Bethlehem Steel/United Steelworkers arbitration panel, where she worked under Impartial Umpire Rolf Valtin. Miller is grateful to McDermott and Valtin, whom she counts among what she called her "embarrassment of riches of mentors." [75]

As Miller's caseload grew, she saw that being a female arbitrator both helped and hindered her career. She laughed at the many times she was mistaken for the court reporter when she entered a hearing room. She also recalled being told by parties that she had not been selected for a particular case because they felt embarrassed about presenting to a woman detailed evidence of the grievant's alleged obscene misconduct and being a speaker at a conference where another speaker addressed the group – accurately – as "Gentlemen and Kathy…." But Miller also recalled more than a few occasions when parties were openly enthusiastic about the opportunity to retain a woman as an arbitrator, and she believes that she benefitted from affirmative efforts to increase diversity. [76]

Both Garrett and McDermott encouraged Miller to apply to the NAA. She said she waited until her case count far exceeded the minimum number, as she thought she wouldn't be able to face her mentors if she were turned away. Happily, she was accepted in 1994. Even before she became a member, Miller attended Academy meetings and recalled Gootnick's warm welcome, which included spending generous amounts of time providing advice and more encouragement. Miller became heavily involved in

[74] *Id.*
[75] *Id*.
[76] *Id.*

committee work, which led to leadership positions in the NAA. She said her ongoing work with many other devoted members has resulted in deep friendships that have made the Academy "both a professional and a personal home."[77]

Miller served as President in 2017-18. She is proud to be one-half of the first married couple to serve as Presidents of the NAA; her husband, Shyam Das, was President in 2014-15. Nonetheless, she said, their presidencies were distinct as they did not initiate or work on the same projects. Miller appointed the Bloch Committee to study the viability of continuing the Fall Education Conference. She also was, and remains, a strong supporter of the work of the Outreach Committee, seeking to increase diversity among arbitrators, which had been initiated by Brogan the previous year. Miller is concerned about the future of the profession and the Academy unless a substantial number of arbitrators are willing and able to make it their life's work, not just a job they do for a few years after retiring from another career.

In her presidential address, Miller, like Golick, spoke about the state of arbitration in general, rather than that of women arbitrators specifically. She warned of the political climate threatening the very existence of arbitration:

> It is for all these reasons that, with all due respect to the Academy's historical leaders, I am convinced that our members face unprecedented challenges in 2018. I have no definitive answer to these challenges. I only can convey some of the thoughts that form the foundation of my own game plan. To a large extent, all the participants in labor arbitration—the parties, the advocates, and we arbitrators—will be passive vessels as we await legal and political events we have no ability to control. But I believe that, although our profession likely will contract for the foreseeable future, labor arbitration will survive. And as long as it does, we labor arbitrators, as always, actually will have an inordinate degree of control with respect to our ability to shape and preserve the unique and historically effective process of labor arbitration.[78]

Miller suspects that many people believe that the Academy has "solved its problem" with respect to women members because the women in the NAA are disproportionately visible. She said because women always have performed a lot of committee work and more recently have taken on many leadership roles, some people may perceive that there are more women members than there actually are. Miller expressed gratitude for her ability to stand on the shoulders of the great women arbitrators who preceded her: McKelvey, Bairstow, Gootnick, and Witt. She acknowledged: "As difficult

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[77] *Id*.

[78] Kathleen Miller, "Presidential Address: Rising to the Challenge," in *Arbitration 2018: Boundaries and Bridges*, *Proceedings of the 71st Annual Meeting, National Academy of Arbitrators* 19 (Timothy J. Brown ed. 2019).

as it was for me, it was harder for them. But they didn't pull the ladder up; they reached back to help others who came after them." [79]

As President-Elect Susan Stewart prepares to take the helm of the NAA in 2021, the 2020 Membership Directory of the Academy lists 584 members in the United States and Canada. Of these 125, or 21 percent, are women. Stewart, the first female Canadian arbitrator elevated to the Presidency, thinks that the NAA has finally reached its critical mass of women leaders. Her opinion is that the women who have risen in the NAA are extraordinarily hard workers and are deeply committed to caring for the Academy. As well, she has observed their focus on identifying and nurturing future leaders. [80]

Stewart was born in Vancouver, British Columbia and was raised in a very small village on a lake north of Kingston, Ontario. She feels fortunate to have grown up with immediate access to nature and the surrounding rural community. Weekly visits to the library, in a town about thirty miles away, were a highlight of her childhood. Based on her reading, she knew from an early age that she wanted to be a lawyer. She received her undergraduate and law degrees from Queen's University in Kingston. Although 20 percent of her law school class were women, Stewart recalls being asked why she was taking a man's place. After graduation, she articled at the Ontario Labour Relations Board, where she met Michel and Pam Picher. [81]

Stewart practiced law for a couple of years and began working for the Workers' Compensation Appeals Tribunal as an adjudicator after she had her first child. Eventually she applied to the Ontario Ministry of Labour arbitrator development course and believes she was accepted, despite her young age, because of her experience as a neutral. Those who successfully completed the course were listed on the province's arbitrator roster. Stewart was called to a meeting and told that her work and recommendations were faultless, but they believed she was too young and too nice to be successful as an arbitrator. Despite those reservations, she was placed on the list and appointed to several cases. Her practice grew in both the private and public sectors. In 2001, she was appointed as the Chair of the Ontario Grievance Settlement Board, with a roster of approximately 30 arbitrators.

Stewart joined the NAA in 2002 at the insistence of Michel Picher. She was happy to reconnect with Michel, Pam, and as well as with Ken Swan, a former law professor, in Academy activities She was also very pleased to meet Canadian colleagues from other parts of the country, and to develop relationships with wonderful American colleagues. One of the benefits of the Academy that she identified is the opportunity to discuss issues and learn different approaches to problem solving, especially because arbitration can be an isolating profession. Once she was a member, Stewart was mentored by Golick, Adler, Brogan, and Miller, who nurtured her and guided her through the workings of the organization. Stewart says, "Women are inclusive…and are sensitive to challenges that other people have to go through." [82]

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[79] Telephone Interview with Kathleen Miller, NAA Past President (October 29, 2019).
[80] Telephone Interview with Susan Stewart, NAA President-Elect (November 15, 2019).
[81] *Id.*
[82] *Id.*

Stewart points out that the Code of Professional Responsibility makes it incumbent on arbitrators to contribute to the training of new arbitrators. During her presidential term, she hopes to continue the efforts of those who are seeking to increase diversity in the profession and to develop new arbitrators. She is interested as well in broadening opportunities for our members. She notes that the Academy brings the highest standards of competence and ethical conduct to the neutral dispute resolution process. [83] Going forward, it appears that diversity and inclusion and expansion of opportunities will continue to be a focus for the Academy.

[83] *Id.*

Gladys Gershenfeld, Rose Jacobs, and Gladys Gruenberg

Kathleen Miller

Bonnie Bogue
and Mei Bickner

Women of the NAA

Marcia Greenbaum and Frances Bairstow

Roberta Golick

Jacquelin Drucker

Barbara Zausner and Margaret Brogan

Frances Bairstow and Allen Ponak

Margery Gootnick and Sara Adler

Alice Grant and Jean McKelvey

Chapter 5

THE ACADEMY AND THE RAILROAD INDUSTRY

M. David Vaughn [*]

Introduction

Railroads were the first national industry and the first unionized [1] industry. As railroads expanded and evolved, they became the most important industry in the economy and were the subject of special governmental regulation to ensure reasonable rates and reliable service. Railroads were also the subject of the first comprehensive federal laws governing employee and labor relations. Relations between labor organizations and railroad management were frequently contentious. Strikes and lockouts became recurrent threats to the national economy. The government sought ways to minimize disruptions that might result from such labor-management strife. Thus, the dispute resolution process plays a particularly important role in the industry. Technological change in the industry and the development of alternative forms of transportation have changed, but not completely loosened, the regulatory structures.

Industry Overview

In 1945 at the end of World War II, railroads employed three million workers [2] and moved most freight and passengers. In the 75 years since, the industry has experienced continuous technological and operational change and has adapted to a very changed role in the overall transportation system. By 1999 freight railroads employed only 228,000 employees, but moved 1.4 trillion-ton miles, an increase in employee productivity from the industry's 1916 peak route mileage of approximately 24.5 times. Railroad industry productivity has continued to increase, while employment has continued to decline. While the percentage of represented employees has not declined, by the 2019-2020 national bargaining round, the industry had only 120,000 such employees. That number will almost certainly continue to decline, even as productivity continues to increase.

Technological and Operational Changes and Their Impact on Labor Relations and Employment

Railroads excel in long-haul movements of freight and have expanded or maintained significant shares of intermodal traffic, "just-in-time" manufacturing traffic, grain, coal, chemicals, and materials, and more

[*] The author acknowledges the assistance of arbitrators DeAndra Roaché and Richard Radek.

[1] Railroad unions began in 1863 as "Brotherhoods," and were essentially fraternal organizations. They evolved to resemble the modern labor union model by the mid-1870s, and played a major role in the Great Strike of 1877. Railroad unions are called "organizations" or "brotherhoods."

[2] U.S. Railroad Retirement Board, 23 *Monthly Rev.* No. 11 (Nov. 1962).

recently fracking supplies. To handle the increased demands, railroads have converted to high-performance diesel-electric locomotives, have shed or delegated to smaller carriers their less productive branch lines, and have consolidated duplicate routes and facilities. Single-car local deliveries have declined precipitously; the formerly ubiquitous boxcar has been replaced by intermodal shipping containers moved by rail from ports and transferred to truck trailers for final delivery. Bulk goods such as coal and grain frequently move in unit trains, which require less handling.

Railroads have consolidated traffic on a smaller number of main lines, producing ever increasing amounts of freight moved. The consolidation of smaller lines reduced the more than 65 large carriers in the 1960s to seven systems: Union Pacific and Burlington Northern Santa Fe in the West, Norfolk Southern and CSX in the South and East, and Canadian National, Canadian Pacific, and Kansas City Southern in the Midwest. Trains that once languished in rail yards awaiting switching and transfer to the next carrier now move long distances, virtually without delay other than necessary crew changes. The 1971 creation of Amtrak, a quasi-governmental corporation, allowed freight railroads[3] to escape most of their intercity passenger trains. The creation of regional transit authorities has transformed commuter rail service.

The industry's technological and operational changes[4] have resulted in reductions in the size of freight train crews in most cases from five to two, even as the power and speed of the locomotives they operate and the tonnage hauled have increased dramatically. Computers, communications technology, and automatic car identification have streamlined accounting procedures. Maintenance of way equipment and procedures have been mechanized and welded rail has replaced jointed rail, resulting in significant reductions in employment. Higher capacity and better utilization have decreased the size of the freight car fleet. Higher reliability by larger locomotives and locomotive leasing have resulted in smaller shop forces.[5] More recently, the adoption by many carriers of so-called Precision Scheduled Railroading (PSR), which structures railroad operations to emphasize point-to-point freight car movements on simplified routing networks, with fewer, longer trains operating on fixed schedules, has improved railroad financial and operating metrics, uses fewer freight cars and locomotives, and results in fewer workers being employed for a given level of traffic. Implementation of congressionally mandated Positive Train Control (PTC) has also affected railroad operations and intensified the discussion whether trains can be safely operated with a single crewmember in the cab. As indicated, the smaller numbers of railroad employees are not only far more productive than their predecessors but perform far more complex duties requiring greater training and responsibility in a closely regulated environment. Both equipment and rules are more sophisticated.

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[3] Railroads other than Amtrak, commuter rail authorities, and shortlines.

[4] For example, the conversion to diesel locomotives from steam eliminated the need for locomotive firemen. The development of integrated trackside defect and wheel and axle heat detectors eliminated the need for a caboose at the rear of trains and the crew members who formerly staffed it.

[5] For an understanding of how the industry operates, *see* John H. Armstrong, *The Railroad; What It Is, What It Does* (5th ed. 2008).

Accommodation of Changes through Collective Bargaining

For more than nine decades, the freight railroads have conducted collective bargaining negotiations on a national, multiemployer, multiunion basis. The National Carriers' Conference Committee (NCCC) of the National Railway Labor Conference (NRLC) represents most of its members in national (multi-employer) negotiations with the twelve major rail labor organizations. Labor had a similar umbrella organization, the Rail Labor Executives Association (RLEA), that performed similar representation and coordination functions. The erosion of national bargaining and other factors resulted in RLEA's demise, replaced by shifting ad hoc union coalitions. The bargaining process has been remarkably successful in reaching contract settlements without crippling labor strikes or lockouts. In fact, over the past 30 years, there have been only two days of service disruption arising from rail industry bargaining; the most recent was in 1992. The technological and operational changes described have affected the terms and conditions of employment that the parties have implemented through the collective bargaining process. When bilateral bargaining, mediation, and interest arbitration procedures have been unsuccessful, Presidential Emergency Boards (PEBs) have been used as a last resort.

The process has resulted in pay and benefits packages for rail employees that are among the best of all industrial jobs in the United States, as well as a profitable, stable industry. Indeed, the elimination of firemen, the relaxation of craft work rules, the elimination of cabooses, the change from mileage-based compensation for operating employees, evolution of health and welfare benefits, employee scheduling and rest, and initial forays into single-person crews and unmanned automated locomotives have all been achieved through the dispute resolution process. Other changes in terms and conditions of employment, such as drug testing and certification requirements, have been imposed by federal law and regulation.

In almost all cases, railroad employees continue to be employed and to be represented by labor organizations, which remain generally organized by "crafts," that is, by types of work. Each craft guards its jurisdiction.[6] However, as a result of changes in technology and operations, some crafts and classes of employees have disappeared or been merged into other crafts represented by other consolidated labor organizations. For instance, trainmen are now able to perform any duties formerly performed by firemen and hostlers. Machinists are able to perform some items of electrical work in connection with a particular mechanical repair or installation task. Employees of carriers consolidating or abandoning duplicative lines or unprofitable branches have generally been beneficiaries of negotiated labor protective provisions (LPPs) required as conditions of approval of the transaction.[7]

[6] The assignment or reassignment of work to crafts in the face of such changes resulted in large numbers of jurisdictional disputes over work, called "scope" claims, named after the contract rules that provided for jurisdiction. Scope claims are processed in the same manner as other rules cases. *See infra* discussion. Such claims have evolved as crafts have merged. Craft lines have rationalized and relaxed in the face of new technology and through negotiations.

[7] *See infra* discussion.

Railway Labor Act

Railroad industry labor relations are governed by the Railway Labor Act (RLA),[8] a unique federal statute jointly developed by railroad management and labor organizations and, as so written, adopted by Congress in 1926. A series of labor strikes and lockouts beginning in the 1880s had resulted in several attempts to achieve labor-management stability through legislation. Each attempt failed for various reasons. In 1922 the shop crafts had initiated a protracted national strike that created great disruption to commerce, ending only with the use of force by several state governors and the Harding Administration. In the aftermath of the strike, it became apparent to many that a comprehensive legislative solution was needed to stabilize the industry's labor-management relations. The culmination of the parties' efforts was the enactment of the RLA. The purpose of the law is to protect and balance the interests of management and labor, while minimizing the likelihood of interruptions in commerce that might result from strikes or lockouts.

The provisions of the RLA applicable to railroads have remained basically unchanged since 1934. The Act has been amended to include airlines[9] and commuter railroads, and to create public law boards (PLBs) and special boards of adjustment (SBAs).[10] Both labor and management have resisted efforts to change the law in other ways, notwithstanding ongoing criticism of its structure and operation.[11]

Under the RLA, employees have the right to form and join labor organizations, whose independence is protected. Carriers have the obligation to recognize and bargain with the organizations, and to reach agreements with them. The RLA as written did not provide for compulsory, binding resolution of employee grievances. This fundamental weakness was remedied by the 1934 amendments to the Act, which created the National Railroad Adjustment Board (NRAB) to adjudicate claims (grievances).[12] Organizations and individual employees have the right to grieve claimed violations of existing agreements and to have their claims adjusted. Arbitration decisions under the RLA are final and binding, with very limited grounds for judicial review.[13]

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[8] 45 U.S.C. § 151 *et seq*. (2018). A history of the RLA through 1976 is *The Railway Labor Act at Fifty* (Charles Rehmus ed. 1976). For an overview of the Act and its operation, *see* ABA Section of Labor and Employment Law, *The Railway Labor Act* (2012); Frank N. Wilner, *Understanding the Railway Labor Act* (2009).

[9] *See infra* ch. 6, Joshua Javits, "NAA's Role in Airline Labor-Management Relations."

[10] These special boards are commonly called "public law boards" after Public Law 89-456 that amended the RLA (45 U.S.C. § 153 Second) to create them. They supplement the National Railroad Adjustment Board.

[11] *See, e.g., The Dunlop Commission on the Future of Worker-Management Relations: Final Report* (Dec. 1, 1994) (hereinafter Dunlop Commission); Frank N. Wilner, *RLA and the Dilemma of Labor Relations* (1991).

[12] These amendments created the National Railroad Adjustment Board (NRAB), 45 U.S.C. § 153 First, to resolve grievances (minor disputes) between railroads and their employees.

[13] Judicial review of awards of the NRAB, PLBs, and SBAs are provided in paragraphs (p), (q), and (r) of § 153 First of the RLA.

National Mediation Board: Structure and Function

The National Mediation Board (NMB) is the independent agency of the Executive Branch of the Federal Government that administers the RLA. [14] It is comprised of three members, whose nominations are for staggered three-year terms, continuing after expiration until replaced. NMB members are proposed by the President of the United States and confirmed by the United States Senate. Members have generally been professionals in railroad industry dispute resolution, either as management or labor advocates or as neutrals. NAA members Robert Harris, Joshua Javits, and Helen Witt have served as NMB members during the last 25 years**.**

The NMB oversees RLA section 6 (major) disputes [15] by monitoring the industry and its collective bargaining and by providing mediation by a cadre of in-house mediators and, on occasion, by Board members themselves. It makes recommendations for appointments to Presidential Emergency Boards (PEBs) and provides logistical support for PEBs once selected. The NMB also administers RLA section 3 (minor) disputes). Claims involve either employee discipline or contract interpretation ("rules") issues arising from the interpretation or application of existing agreements. The RLA lacks unfair labor practice provisions. Disputes which would be resolved administratively as ULPs under the National Labor Relations Act must be heard as section 3 disputes, or in court.

The premise of the Act is that minor disputes will be adjusted through "on-property" handling, which is the functional equivalent of grievance steps. However, if claims are not resolved on the property, a party may appeal the dispute to arbitration. The NRAB is the default adjudicatory body provided by the RLA. It is divided into divisions and hears disputes involving multiple carriers and organizations. Bipartite panels are designated to hear disputes. If the panel deadlocks – which it almost always does – the dispute is referred for arbitration using neutral arbitrators ("referees"), who sit as ad hoc members of the NRAB for purposes of breaking the deadlock. Neutrals are selected by NRAB divisions from the roster of neutrals maintained by the NMB, which appoints and pays them. Referees are generally appointed to hear multiple cases at a time ("dockets").

The original plan of the RLA was to resolve minor disputes on a national basis in recognition of the national structure of contracts, and to develop uniform interpretations of contract language and disciplinary standards. The thinking was that disputes regarding national agreements should be interpreted and resolved on a uniform national basis, with ever declining numbers of unresolved issues. Virtually no disputes were resolved in that manner, which led to the enactment of a provision that added neutrals.

In 1970, in response to the large case backlog at the NRAB, Congress amended section 3 to allow establishment of single-carrier single-organization boards of arbitration to adjust minor disputes. These tribunals

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[14] For a description of the history and operation of the NMB, *see* Charles M. Rehmus, *The National Mediation Board at 50* (1984).

[15] The classifications of disputes as "major" and "minor" do not appear in the Act but have been adopted to describe disputes and the procedures that apply to them. Minor disputes involve grievances concerning the interpretation and application of existing contract terms and conditions. Major disputes involve the negotiation of new or amended agreements and the changes to terms and conditions that result.

are called public law boards (PLBs) or special boards of adjustment (SBAs) and are also administered by the NMB. They constitute alternative forums to resolve section 3 disputes and may be elected by individual carriers and organizations. PLBs and SBAs are created by written agreement of the parties and approved by the NMB. They give those parties more control over the priority and scheduling of cases and the selection of neutrals to hear them. The parties agree on a neutral or panel of neutrals to handle disputes assigned to each board.

The NMB works with railroad industry stakeholders who provide information, assessments, and recommendations. In 2009 the NMB formed a successor group to continue the work begun by the original Dunlop Commission. The Dunlop II Group provides feedback on agency performance, industry trends, worker-management relations, and other information vital to the NMB mission. The NMB has also established a Section 3 Committee to discuss minor dispute initiatives, and it sponsors an Arbitration Forum to obtain feedback from users of the section 3 process. This group includes representatives of rail labor and management as well as a representative from the arbitration community.

The NMB administers a roster of neutrals who serve in railroad dispute resolution.[16] All section 3 neutrals must be listed on the NMB roster to be eligible for selection to hear section 3 minor dispute cases. The NMB does not make arbitrator selections or send out lists of neutrals except in rare circumstances. Those selections are left to the parties, either directly or from panels provided. Neutrals so selected serve as government contractors and are subject to NMB pay rates, procedures, scheduling, and federal government travel regulations. Placement on the NMB's roster of arbitrators is for one fiscal year. Retention on the roster is not automatic; arbitrators are annually required to submit an application for retention.

The NMB pays the fees and travel expenses of the arbitrators. Each fiscal year the NMB awaits budgetary approval from Congress and usually operates by continuing resolution from the previous fiscal year's budget until approval of the new budget is received. Performance of section 3 work is subject to the availability of government funds and NMB approval. Railroad arbitrators are issued an official work order to hear and render decisions on cases for which they have been selected. Work orders generally expire at the end of each fiscal year. Prior to receiving compensation or reimbursements, arbitrators are required to register with the government's System for Award Management (SAM). Requests to perform compensable service must be authorized through the NMB's online Arbitrators Work Space system and submitted to the Office of Arbitration Services. Hearings must be conducted within 120 days of the date of arbitrator assignment. Once the cases have been heard, the arbitrator must render the awards within 90 days of the hearing unless otherwise mutually agreed by the parties.

The NMB, parties, neutrals, and the section 3 groups have worked diligently and successfully to reduce the large backlogs of cases that have periodically developed. As this is written, there is no appreciable backlog of

[16] Although the airline industry is also governed by the RLA and is overseen by the NMB, the arbitration process, including neutral selection, is entirely separate.

section 3 cases.[17] Increased government funding has played a major role in backlog reduction.

There have been efforts through the years to reform, streamline, or restructure the section 3 arbitration process. These efforts have included introduction of additional types of alternative dispute resolution, *e.g.*, grievance mediation, pilot or lead case designation, parties-pay arbitration, and expedited boards, to NMB-required filing fees for grievance arbitration cases to outright elimination of the section 3 process. These initiatives have met with limited success. The use of grievance mediation has increased, in large part because of the NMB's encouragement, and because claims backlogs can be reduced by the technique. However, claims referred to mediation seldom include serious discipline cases, such as long suspensions or dismissals. While management decries the volume of cases filed and has generally favored ending government-paid arbitration, rail labor has opposed any effort to chip away at the publicly funded section 3 structure. It argues that it agreed, at the time the RLA was negotiated, to limit labor's ability to exercise economic power (strikes) in exchange for publicly funded arbitration of minor disputes. If public funding for the process were reduced or eliminated, the organizations would lose the benefit of the bargain. That opposition notwithstanding, some limited numbers of section 3 disputes are handled by parties with private funding before so-called "parties pay" boards of arbitration. Such boards may be used for disputes of particular importance or disputes in need of prompt resolution.

The selection of cases to be arbitrated, the tribunals to which cases are assigned, and the relative priorities of different boards are matters of intense debate. There have been instances where designations of cases as lead or "pilot" claims cannot be agreed to for political reasons, or to avoid liability for many claims at once, or to give up the "second bite at the apple" that multiple identical or similar cases may afford.[18] Unlike the vast majority of negotiated dispute resolution processes outside the railroad industry, section 3 provides individual claimants the right to handle their own cases up to and including arbitration (before the NRAB).

Railroad industry arbitration awards have not been readily available in the past to anyone other than practitioners, who generally include in their submissions awards favorable to their positions. The NMB Knowledge Store, a research tool located on the NMB's Website, is a free archive available to practitioners, neutrals, and to the public. It contains over 100,000 documents in a searchable format, including section 3 arbitration awards (coded by subject), interest and special arbitration awards, PEB reports and recommendations, and collective bargaining agreements.[19] That availability notwithstanding, independent research by neutrals handling cases is neither expected nor appropriate.

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[17] The NMB reported at the September 2018 meeting of the National Association of Railroad Referees (NARR) that the fiscal year ended with the funding of every case on the section 3 waiting list.

[18] One Class 1 LR officer once said that if there were 400 identical claims, he had 400 opportunities to win!

[19] NMB FY 2021 Congressional Budget Submission at 45.

Neutral Compensation

Neutrals who handle RLA section 3 cases do so as government contractors. This reduces the cost of arbitration to the parties but subjects the dispute resolution process to the vicissitudes of government bureaucracy and funding. For instance, referee travel to hearing locations is often restricted or prohibited for budgetary reasons. Cases assigned to referees and ready for hearing and decision sometimes languish for months because the NMB does not have the funds to allocate for them. Then, when funding becomes available, many cases are funded at once and the parties and neutrals are swamped by the resulting work.[20]

Federal funding for the NMB's activities, and by extension funding for the section 3 process, has been largely stagnant for many years. In 1974 referees were paid a fee of $220 per day. That amount was increased to $300 dollars in the early 1990s. Until recently that level of compensation remained fixed. In 2009 that daily rate, adjusted for inflation, would have been just over $700.[21] Currently the NMB compensates neutrals on a case (time) average equal to approximately two days at the former ($300) per diem rate. The case compensation covers all services in connection with the award, including research and writing. The irregularity and unpredictability of NMB funding (unapproved federal budgets, continuing resolutions allocating partial funding, and general budget reductions) pose challenges to agency operations and its ability to process rail arbitration cases.

Some NAA members accept section 3 assignments, but the administrative complications and low rates of compensation discourage such participation, as do the industry's unique nomenclature and rules, and the appellate nature of the process, as discussed below.

Neutral Development, Utilization, and Training

Rail industry neutrals have always been a mix of industry professionals and those who come in from outside, including from the Academy. Getting established as a railroad arbitrator is difficult for those not from the industry, due to its unique procedures, customs, terminology, contract language, and work practices. The labor relations environment is highly charged and minor disputes can be of great importance and sensitivity. Some cases are extremely technical and the on-property records, prehearing submissions, and presentations vary widely in quality. The tripartite process allows for blistering dissents, and both parties make use of blacklists of arbitrators who issue awards that displease them. There has been a high turnover of neutrals and high wash-out rates among those who seek to become railroad arbitrators.

The parties have recognized the need for a steady supply of new arbitrators and have been increasingly proactive in identifying potential arbitrators and providing them with training and opportunities. They have

[20] The NMB established time limits for the handling and writing of section 3 cases. This was done to discourage the parties' practice of "parking" cases (filing but not pursuing them), and to discourage the practice of some neutrals to "sit" on cases for long periods, in the worst examples, three to five years.

[21] Statistics presented in a panel report at the September 2009 annual meeting of the NARR (unpublished).

started to provide joint training for prospective or new neutrals and to provide opportunities to hear and decide cases. In the past ten years or so, the NMB and parties have made efforts to find and train female and minority arbitrators. In 2015 the NMB sponsored the Arbitrator Utilization Program, a course aimed at providing training and education to current or prospective labor arbitrators with minimal experience in the railroad industry. The NAA provided instructors for the program. The training program was well received in the industry and brought together experienced railroad referees, rail carriers, and rail labor organizations to develop and implement the training. Many of the arbitrators who participated in the training have subsequently been selected for railroad cases. [22]

Railroad Industry Dispute Resolution Processes

Section 3 Discipline Cases

Section 3 requires that railroad employees subject to discipline receive a fair and impartial hearing. That said, discipline originates with a notice to the employee to attend an investigatory hearing, which is held before a carrier official sitting as the investigating officer. The officer conducts the hearing, receives testimony and documents, asks questions, and hears arguments. The carrier officers conducting the hearings are generally line managers who hear cases only part-time and the quality and objectivity of hearings varies widely. The employee is represented by a local officer of the organization. The quality of advocacy varies. In the hearing, the carrier and organization present witnesses and documents. The hearing officer makes evidentiary rulings and credibility determinations. A transcript of the hearing of witness testimony is prepared. Hearings before partisan and generally untrained officers usually turn out as would be expected. The carrier makes a determination based on the hearing record as to what rules were violated, whether to discipline, and how severe a penalty to assess. Some carriers allow employees to accept discipline and receive a reduced or "record" (no loss of pay) suspension, but the offer and acceptance of such reduced penalties generally rests with the carrier. The efficacy of the investigation and discipline process is low.

If the organization (or an individual claimant) is not satisfied with the discipline assessed, it can submit an. appeal to the carrier. If the parties are unable to resolve the dispute on the property, the organization (or claimant) can invoke arbitration, ordinarily to the NRAB or to a PLB with jurisdiction. All claims by unrepresented employees are docketed with the NRAB. Arbitration proceedings in the industry are, with only certain minor exceptions, appellate in nature. The arbitration proceeding usually takes place before a tripartite board consisting of a single neutral and one partisan arbitrator appointed by each party. The party-appointed arbitrators do not, as a practical matter, give up their advocate roles, but do help to safeguard the process. The parties submit advance written briefs to the tribunal based on the on-property record. No new evidence or argument may be considered. Precedent requires that credibility determinations made by the carrier-appointed hearing officers are to be credited. Only the most blatant instances

[22] *NMB Press Release,* April 1, 2020.

of partiality by the on-property hearing officer constitute grounds to overturn the discipline.

The burden of proving cause for discipline rests with the carrier but the quantum of proof required is "substantial credible evidence considered on the record as a whole." "Substantial evidence" is defined as evidence on which the trier of fact could reasonably base a decision, even if a de novo determination by a different tribunal might have had a different result.[23] In other words, the carrier need not prove cause for discipline by even a preponderance of the evidence. The process produces rough justice at best.

Since 1991 the Federal Railroad Administration (FRA) has required railroads to certify to the agency that their locomotive engineers have the necessary training, skills, and operating rule knowledge to perform their jobs competently.[24] In 2011 the FRA required railroads to certify their conductors in much the same manner.[25] Along with the certification requirements, FRA created a process whereby railroads must suspend or disqualify certified employees for violating certain types of operating rules.[26] Railroads may also initiate disciplinary action based on the conduct, thereby creating two parallel proceedings involving the same offense and usually based upon the same company-level hearing record. The interrelationship of these two separate proceedings can be problematic for arbitrators hearing railroad discipline cases.[27]

Rules (Contract Interpretation) Cases

Claims of contract violations (termed in the industry "rules cases," a "rule" in this context being a provision of a governing agreement) are also presented in arbitration on a written record. However, such cases do not include an on-property investigatory hearing. A claim of a rules violation is initiated by a written protest submitted to the carrier. The claim may be supported by documentation such as agreements, prior awards, and settlements, by affidavits, and by other evidence. The carrier responds in similar fashion. Denials place assertions in dispute. Specific authorities in support of an assertion trump general and conclusory denials. Evidence is produced and exchanged in the forms of affidavits, prior correspondence, precedential settlements, and so on. On the basis of the exchange, the parties attempt to resolve the dispute. If those efforts are not successful, the record, consisting of all the assertions and documents produced and arguments made as the claim progressed, is presented to the arbitration tribunal for

[23] Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) (applying § 10(3) of the National Labor Relations Act).
[24] 49 CFR Part 240.
[25] 49 CFR Part 242.
[26] A multi-stage appeal process, including a due process hearing pursuant to the Rules of Civil Procedure. is provided in 49 CFR § 240.401 *et seq*.
[27] It is possible in these cases, especially with respect to contractual due process issues, that an arbitrator could come to a different decision from the FRA. For instance, the FRA does not consider some procedural defects, such as contractual time limits, if it concludes public policy is not served by considering them. It is also possible in such cases that a favorable award in a discipline case must take into account in fashioning a just cause remedy a concurrent decertification period imposed by the FRA, during which the employee is prohibited from working in a certified position on the railroad. For a comprehensive explanation of this issue, *see* John La Rocco & Richard Radek, "The Dilemma of Locomotive Engineer Certification Vis-à-vis Contractual Due Process in Discipline Cases," 40 *Transp. L.J.* 81 (2013).

consideration. Again, no new evidence or argument may be considered in such cases. The burden of proving a rules violation rests with the organization, which must establish the violation by a preponderance of the evidence.

Labor Protective Provision Arbitrations

The Surface Transportation Board (STB) is an independent federal agency charged with the economic regulation of the freight railroads. It succeeded the Interstate Commerce Commission. The STB maintains economic oversight of the industry's business dealings and has jurisdiction over railroad mergers, takeovers, coordination, and abandonments. Historically, regulatory approval for operational changes resulting from such actions by or between railroads has been required. Such regulatory approvals have historically been subject to agreements between involved carriers and organizations representing affected employees to provide them various types of job protections from consequences of the transaction. Disputes involving the application of these labor protective provisions (LPPs) are made subject to arbitration. The neutrals in such disputes serve as STB delegees. They are selected and paid by the parties, not as part of the section 3 minor disputes process.

Major (Bargaining) Disputes

The procedures for resolution of bargaining disputes are provided for in section 6 of the RLA. Disputes concerning bargaining are termed "major disputes." The parties are obligated to bargain with respect to the terms and conditions of employment. The statutory purpose of section 6 is to avoid interruptions of commerce by providing successive mechanisms to encourage resolution of disputes and by making strikes and lockouts difficult. Unlike other collective bargaining processes that generally produce agreements expiring at the end of defined periods of time, RLA agreements do not expire but become "amendable" after a period of time agreed between the parties in the agreement. New agreement terms are layered over prior agreements, including those negotiated between predecessor parties, that continue in force and effect until modified or rescinded. When an agreement becomes amendable, the parties can initiate bargaining by filing or exchanging "Section 6 Notices." These notices list the contractual changes the parties are seeking.

The freight rail industry's labor negotiations have been conducted on a national, multiemployer basis, coordinated through the National Carriers' Conference Committee (NCCC) of the National Railway Labor Conference (NRLC). The employees are represented by 12 major rail organizations, which had been coordinated through the Railway Labor Executives Association (RLEA) and, more recently, in smaller, shifting coalitions. Major carriers and organizations have engaged in multiemployer multi-organization "rounds" or cycles of bargaining; on a national basis, a process called "national handling." The parties bargain separately but in a coordinated fashion on a craft basis, with a goal of reaching one or more national agreements that are then used as a pattern for organizations representing other crafts and classes. Sometimes a carrier or organization (or

several) will break away and negotiate separately. Carriers and organizations also negotiate system or local agreements, both during bargaining rounds and separately, in the form of side agreements. The jockeying for position can produce unintended consequences. In the 2020 bargaining round, the NCCC was denied the right to represent all carriers in a single arbitration case on the important issue of crew consist and forced separate carrier-by-carrier arbitration.

The bargaining structure described above prevailed for decades. More recently, owing in large part to the parade of mergers drastically reducing the number of carriers, the effect of newer technologies, the decline of passenger trains, the creation of Amtrak, and mergers of rail labor organizations, to name only a few, "national" handling has been reduced from its former scope and importance and sometimes involves only one or two carriers or only some of the labor organizations and sometimes only a single issue. The (very large) remaining carriers (and their represented employees) have found advantages in making "system" agreements tailored to that carrier's business and service characteristics. Examples of this approach can be seen in the Canadian National's "hourly-rated" agreements with its operating crafts, and the profit-sharing or productivity incentive agreements on Norfolk Southern. Amtrak has entirely revamped the passenger service working rules and pay provisions of the former Class I passenger service agreements. As a general matter, the approximately 80 smaller carriers adopt the terms. The last vestiges of national bargaining are pay rates – which are handled nationally unless one of the large carriers reaches agreement, in which case the NCCC has adopted the agreed rate – and "health and welfare," which includes issues of medical, dental, vision, and hospitalization benefits. There may never be a return to broader national handling because the interests of the parties have become too dissimilar.

The parties to negotiations may pursue direct bargaining, without the participation of outsiders, for as long as it as mutually beneficial. Direct bargaining concludes when the parties reach agreement, either side unequivocally terminates negotiations, a party requests mediation under the auspices of the NMB, or the agency proffers mediation. At such time as negotiations enter into the mediation phase, NMB assumes control of the schedule, location, and format of negotiations. The NMB's goal is to facilitate a mutually acceptable agreement by the parties, using its "best efforts."

The rights of labor organizations to strike and carriers to lock out over bargaining disputes are restricted by the RLA. Bargaining that is not successful is followed by mediation by the NMB. Economic action (strikes and lockouts) is not allowed during bargaining and is only available after the NMB releases the parties from mediation and the statutory cooling-off periods are exhausted. There is no prescribed timeline for the mediation process. While a party or parties can request that the NMB release them from mediation, the NMB has no obligation to do so. The courts have upheld NMB's effective total control over the decision whether and when – if at all,

even after years of negotiations and mediation – to release the parties.[28] NMB mediators use control over that release to extract bargaining concessions, particularly from the party most seeking release. Indeed, negotiations may languish for years without release. As time passes circumstances change and pressures build on one or both parties. If sufficient pressure builds, the parties may reach agreement. Resolution validates the process, the purpose of which is, as indicated, to avoid interruptions to commerce that would otherwise occur.

When the NMB determines that a collective-bargaining dispute cannot be resolved in mediation, the agency proffers interest arbitration to the parties. Either labor or management may refuse the offer and, after a 30-day cooling-off period, engage in a strike, implement new contract terms, or engage in other types of economic self-help, unless a Presidential Emergency Board (PEB) is established. The parties are also free at any time during their bargaining to agree to binding arbitration.[29] If both parties agree, the arbitration board's award will be final and binding. There are advantages to the parties in arbitration.[30] The willingness of the parties to use interest arbitration may be increasing. In 2014 national bargaining commenced between the national freight railroads and the various rail organizations. By late 2017, most of the unions had settled, creating what was arguably a national pattern of settlement. Several of the unions, however, did not reach agreement or the agreements were not ratified. Four unions ultimately submitted their disputes to final and binding arbitration, resulting in three arbitration board decisions, issued by Gilbert Vernon (BMWED and SMART-Mechanical), Joshua Javits (IBEW), and Charlotte Gold (IAM). Each board found and applied the pattern contract terms. Arbitration can be a useful mechanism to resolve negotiations in which ratification has failed or is threatened, as arbitration awards generally do not require ratification to be effective.

Throughout the negotiation process prescribed by the RLA, there are up to three cooling-off periods. These 30-day windows provide additional time for parties to reach an agreement before disruptive "self-help" tactics are permitted. If the NMB determines, pursuant to section 10 of the Act,[31] that the bargaining dispute threatens to interrupt interstate commerce to a degree that will deprive any section of the country of essential transportation service, it will notify the President of the United States. He can then choose to appoint a PEB to investigate and report on the dispute. When faced with

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[28] Interminable delays are not inevitable. *See, e.g.,* Carmen R. Parcelli & N. Skelly Harper, "Major Disputes under the Railway Labor Act: How to Expedite the Act's 'Almost Interminable' Negotiation Process" (paper at ABA's Sixth Annual Section of Labor and Employment Law Conference in Atlanta in 2012).

[29] In the 2016 round of negotiations by way of example, the railroads and the Brotherhood of Maintenance Way Employees (BMWE) and the Sheet Metal, Air, Rail and Transportation Workers (SMART – Mechanical) reached agreement on all issues except for health care. They resolved that issue through arbitration.

[30] As the Brotherhood of Maintenance of Way Employees Division of the Teamsters Union (BMWED) explained to its members in 2018, such mechanism "… avoid[s] the uncertainty that would encompass a [PEB] and possible Congressional intervention. … using binding arbitration allows our unions to have input in the process (arbitration selection, questions presented and presentation of evidence and argument that a PEB would not have afforded us)." 127 *BMWED Journal,* Jan.-Mar. 2018.

[31] 45 U.S.C. § 160 (2018).

stoppage threats in major freight rail bargaining, the President typically does so. Unlike the Taft-Hartley Act,[32] the RLA does not prohibit PEBs from making recommendations to resolve the dispute.

Issues vary between bargaining rounds and from carrier to carrier and craft to craft. However, major issues consistently raised in bargaining and before PEBs have been compensation, scheduling, crew size, work rules, and health insurance. Several PEBs have been appointed to address commuter rail bargaining impasses. Over the past 15 years, there have been 11 PEBs involving seven different labor disputes. Additionally, four disputes led to the formation of second PEBs in accordance with the section 9a process applicable to commuter rails.

PEBs are generally comprised of labor relations neutrals – frequently NAA Members[33] – who investigate the dispute, undertake informal settlement efforts, and issue a report and recommendations to the President of the United States. When a PEB is appointed, hearings are scheduled and conducted. Positions are received and informal meetings are held, including discussions to attempt to resolve or narrow the dispute. The statute allows 30 days, start to finish, for completion of the PEB process and submission of the board's report and recommendations. Status-quo conditions must be maintained throughout the period that the PEB is impaneled and for 30 days following the PEB report to the President. The report that emerges is a combination of award and mediated effort, sometimes incorporating off-record concessions by the parties. The PEB process may resolve the dispute, or otherwise bring the parties closer to resolution.

Following the issuance of the PEB's report, negotiations enter a final 30-day cooling-off period under the RLA. The parties may accept the PEB's recommendations as terms of settlement, thereby ending the dispute. If no agreement is reached, and there is no intervention by Congress, the parties are free to engage in self-help 30 days after the PEB report to the President. If PEB settlement efforts are unsuccessful, its report is not accepted by the parties to resolve the bargaining dispute, or the parties do not resolve the dispute during the final cooling-off period, the parties may, in theory, take economic action in the form of strikes or lockouts. Since the enactment of the RLA, most national freight rail negotiations have been resolved without any service interruptions. However, in rare instances when the parties have not reached an agreement before exhaustion of the RLA dispute-resolution process, Congress has stepped in to prevent or terminate service disruptions. Past congressional measures have included additional cooling-off periods to continue negotiations, implementation of PEB recommendations, and compelled arbitration.

Section 9a of the RLA[34] provides special, multi-step emergency board procedures for unresolved disputes affecting employees on publicly

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[32] 29 U.S.C. § 176 (2018).

[33] Over the past 25 years, the following NAA members have served on one or more PEBs: Richard I. Bloch, Scott E. Buchheit, Shyam Das, Barbara C. Deinhardt, Gladys Gershenfeld, Roberta Golick, Robert O. Harris, William P. Hobgood, Ira Jaffe, Joshua Javits, Richard Kasher, Ann S. Kenis, Herbert L. Marx, Jr., Donna R. McLean, Richard Mittenthal, Elizabeth Neumeier, Robert M. O'Brien, Nancy Peace, Robert E. Peterson, Lois A. Rappaport, George S. Roukis, Josef P. Sirefman, David P. Twomey, Rolf Valtin, M. David Vaughn, Gilbert Vernon, Bonnie Siber Weinstock, Elizabeth C. Wesman, Helen Witt, Arnold Zack, and Barbara Zausner.

[34] 45 U.S.C. §159(a) (2018).

funded and operated commuter railroads. When bilateral bargaining does not resolve the dispute, NMB may intervene to provide mediation. When mediation is exhausted, the parties to the dispute or the governor of any state where the railroad operates may request that the President establish a PEB. The President is required to establish such a board if requested. If no settlement is reached within 60 days following the creation of the PEB, the NMB is required to conduct a public hearing on the dispute. If there is no settlement within 120 days after the creation of the PEB, any party or the governor of any affected state may request a second, final-offer PEB. No self-help is permitted pending the exhaustion of these emergency procedures.

Pattern Bargaining

In analyzing disputes, both interest arbitrators and PEBs look for and apply terms from so-called "pattern" agreements that became accepted comparators relatively early under the RLA. Under the "pattern" analysis deference is accorded to the settlements reached between other labor organizations or other carriers. When a pattern is determined to exist, it will be influential if not determinative in the analysis and recommendations of the tribunal. However, significant settlements may be reached in the same round of negotiations that might not be accepted as a "pattern" but may still be considered and may influence the analysis and recommendations of PEBs.

By the mid-1950s pattern bargaining, along with other factors, was credited with the decrease in the labor disputes going to PEBs and in the reduction in strikes. The principle was so accepted before PEB 116 in 1957 that testimony as to the importance of the pattern was not even challenged. Today pattern bargaining addresses industry-wide bargaining with multiple labor organizations, as well as bargaining between one carrier and its multiple labor organizations. Patterns may also be found within industry sectors, such as commuter rail operations, which may include commuter rail operations that are part of larger mass transit authorities with non-RLA operating units.

Two different pattern agreements exist: internal, which pertain to agreements between one carrier and one or some of its labor organizations, and external patterns, which pertain to agreements between other carriers and their labor organizations. Patterns developed on other carriers may be considered informative but might not be controlling on the settlements of a different carrier. In such cases there generally is deference to an "internal pattern" of a particular carrier. However, there is at least one instance where an external pattern was deemed appropriate when there was an internal pattern. When there is no internal pattern, the asserted external pattern may still not be controlling. The facts of the specific cases as well as the bargaining history are extremely important in the analysis.

Although the early rationale for patterns focused on settlements involving large percentages of the represented employees that had settled, significant settlements representing smaller percentages of employees, when there is no determination of a pattern, may be taken into consideration by a PEB when circumstances are deemed appropriate. To this effect are PEBs 220, 221, 222, 228, 229, 230, 234, 243, 244, and 248. Even when there is a determination of a pattern by a PEB, in limited instances exceptions have been made when supported by compelling arguments that warranted altering the pattern's application for those seeking such an exception. PEBs 204, 225,

231, 237, 242, and 246. A recurring and dominant factor in support of patterns is the destabilizing effect of not applying patterns. PEBs 116, 220, 222, 242, and 243. In a larger sense, the threat of having a bargaining dispute subsumed and a pattern from other carriers or organizations imposed can motivate parties to resolve their disputes on their own terms.

While various rationales are given to support patterns, a frequent explanation has been based on the "combined judgments" of the union and management officials that formed the pattern settlement. PEB 116. When the settlements advanced as a pattern include settlements established by awards, or other third-party determinations, and not by voluntary agreements, the settlements may not be characterized as patterns, but may nevertheless be given substantial weight in the PEB's recommendations. PEBs 220, 222, 228, 229, 230, and 234. While greater weight may be given to internal patterns over external patterns, exceptions have been made to an internal pattern and an external pattern applied in some cases. PEB 225. In assessing the application of patterns to commuter rail operations, a PEB's determination that relatively large non-rail agreements are included as a component part of an overall transit authority's economic pattern has been an element of the recommendations, PEBs 231, 237, 240, and 246, even when that position is not asserted by the carrier. PEB 244.

Determination of Disputes as "Major" or "Minor"

The RLA provides, in section 3, for the adjustment of claims (minor disputes). Courts, frequently at the urging of management, prefer to classify disputes under section 3 of the Act, to be resolved in arbitration, rather than the cumbersome section 6 major dispute process, with its risk of work stoppages and economic disruptions. The analysis is easily seen in two signal Supreme Court decisions.

In *Chicago River*[35] the Trainmen were unsuccessful in resolving a group of grievances, and then notified the Carrier that if it did not move to resolve them, a strike would be called. The railroad petitioned the district court to issue a permanent injunction on the basis that the Union could not strike over grievances but had to progress them to the NRAB. The Supreme Court held that the resolution of minor disputes (grievances) was within the exclusive jurisdiction of the NRAB. Disputes then arose between the parties as to what particular grievances rose to the level of a change in working conditions, thereby triggering section 6 (major disputes). In *Conrail*[36] the Court had to decide whether the addition of a urinalysis screen for illicit drugs during a routine periodic or return-to-work physical examination constituted a change of working conditions, and thus a major dispute. The Court found the dispute was minor, stating:

> Where a carrier asserts a contractual right to take a contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties' collective bargaining agreement. Only if the employer's claims are

[35] Railroad Trainmen v. Chicago River & Indiana R.R., 353 U.S. 30 (1957).
[36] Conrail v. RLEA, 491 U.S. 299 (1989).

> frivolous or obviously insubstantial, the dispute is major. Such classification is ultimately decided in court. [37]

Thus the standard applied to the determination that a dispute is minor is extremely low. All that is necessary is an argument, not entirely frivolous, that the action is justified under the governing agreement. This standard has been applied by special boards of adjustment (SBAs) or public law boards (PLBs) to disputes involving the implementation of remote controlled locomotives supplanting locomotive engineers, the administration of indiscriminate or random drug and alcohol tests, craft-related pay differentials affected by crew size reduction agreements, and many other issues that, but for the "not entirely frivolous" standard, would seemingly constitute changes of working conditions, and therefore be classified as major disputes. [38] It is increasingly rare to encounter a dispute that cannot be found to be minor. That means that while most section 3 disputes are in fact minor, many disputes important to the parties and appropriate to the bargaining process are handled under section 3. Thus SBAs, PLBs, and the NRAB are tasked to decide issues with significant policy, economic, and practical effects.

In *Railroad Signalmen* [39] a district court found that a dispute was minor because Amtrak's decision to assign work in a specific building to nonunion employees was "arguably justified" by the collective bargaining agreement, divesting the court of jurisdiction over the case. The court concluded that the company's position was not a frivolous or insubstantial reading of the CBA, making the dispute minor and providing exclusive arbitral jurisdiction over the dispute.

In February 2020 a group of eight railroads asked a federal district court to require SMART-TD, which represents railroad conductors, to bargain over its proposals on crew consist. SMART-TD took the position that it would be inappropriate for crew consist issues to be handled nationally, and that a moratorium provision prevented new proposals on the subject of crew size. The court issued a permanent injunction enjoining SMART-TD from refusing to bargain over the railroads' proposals. [40] The railroads had sought a declaratory judgment and injunctive relief. The court noted that "injunctive relief here does not permit an immediate reduction of crew size, but merely compels SMART-TD to begin good-faith negotiating over crew size proposals." [41] Further, the court considered the parties' arguments concerning the moratorium language and found "the Railroads have met the 'relatively light burden' necessary to show that their interpretations of the CBAs are arguably justified such that the instant dispute is a minor one." [42] The Organization's appeal was pending as of this writing.

The distortion of the dispute resolution process in consequence of the low bar to classifying important bargaining issues as minor is illustrated by the dispute as to which craft would be assigned the work of operating

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[37] *Id.* at 307.
[38] *See, e.g.*, SBA 1141 (2002) (remote-control locomotive technology); SBA BLE v. UP (1993) (pay differentials); SBA 1058 Award 1 (1993) (engineers' seniority standing).
[39] R.R. Signalmen v. Nat'l R.R. Passenger Corp., 310 F. Supp. 3d 131 (D.D.C. 2018).
[40] BNSF Ry. v. SMART-TD, Civil Action No. 4:19-cv-00789-P (N.D. Tex. Feb. 11, 2020).
[41] *Id.* at 19.
[42] *Id.* at 15.

locomotives using remote-control devices. On September 26, 2001, six carriers (BNSF, Conrail, CSX, KCS, NS and UP) signed a letter of intent with the UTU stating that UTU-represented employees, *i.e*., trainmen, would be assigned that work. Needless to say, the industry-wide implications of such an assignment were enormous. The Brotherhood of Locomotive Engineers (BLE), believing its engineers had exclusive jurisdiction over the work of operating locomotives, responded to the letter of intent by threatening to strike. The carriers petitioned the federal district court to enjoin the strike. On January 14, 2002, the court, relying upon the *Conrail v. RLEA* standard, ruled it would grant the injunction, stating:

> The court is not deciding whether the railroads' plan to implement the new technology is justified by its agreements with the BLE. The court is merely deciding whether the Railroads' argument that the parties' agreement justifies its plan is "not frivolous or obviously insubstantial."…
>
> This court stresses that it is in no way agreeing with the Railroads' interpretation of the collective bargaining agreements; in fact, it is arguable that locomotive engineers should have exclusive control over operation of the remote-control transmitters. However, the court need not make this determination. "The resolution of the case depends upon the interpretation of the agreement, and while we realize that the [Railroads'] actions might be in violation of that agreement, it is for the appropriate adjustment board, and not this court, to draw the boundaries of the practices allowed by the agreement."[43] [Citations omitted.]

Subsequently, as directed by the court, SBA 1141 was established. Arbitrator Gil Vernon was selected to chair the board. UTU requested and was granted party status. After hearings, the board ruled in favor of the carriers and the UTU.[44] Rather than see the remote-control device as a set of controls by which an employee operated a locomotive, the board accepted the carriers' argument that the remote control device merely sent radio commands to the locomotive where microprocessors actually controlled the locomotive.[45] And while the BLE argued that existing rules included control of locomotives within the scope of engineers' duties, the board noted that the BLE had jurisdictional rights to remote control operations of locomotives. It reasoned, if the Organization believed it already had the right to the work, the Organization would not have sought to bargain for it. Thus BLE, in the arbitrator's view, did not have exclusive jurisdiction of the remote-control operations, leaving the carriers free to assign it to trainmen. The case is illustrative of the propensity of the courts to direct virtually every dispute, including those with significant industry-wide impact, to section 3

[43] BNSF Ry. v. BLE, 2002 WL 47963 (N.D. Il. Jan. 14, 2002).
[44] SBA 1141 (2003), http://etnsplace.com/758/stuff/sba1141.htm.
[45] This point of view was not shared by the Federal Railroad Administration, as made evident by its inclusion of remote-control operators under the federal regulations applicable to locomotive engineers (49 CFR Part 240).

arbitration, and in so doing to avoid potential interruptions of interstate commerce.

National Academy of Arbitrators and Its Members

Academy members serve as members of the NMB, members of PEBs, and as neutrals in railroad industry disputes. Academy members also provide training and mentoring to new arbitrators, both independently and through NMB and party-sponsored training. In recent years, the NAA has included railroad industry-specific topics on its annual meeting and fall educational conference programs.

The Academy's recognition of railroad industry awards as counting toward membership has evolved over time. Prior to 2009 the Academy's general membership policy and practice did not allow arbitration decisions in the railroad industry to be included in the evaluation whether an application demonstrates "substantial and current experience so as to reflect general acceptability." The thinking was that railroad industry cases are small in scope and appellate in nature and did not equate to experience in conducting hearings and assessing evidence and credibility. A number of Academy members, including Gil Vernon, Herbert Marx, and Barry Simon, sought to have the Academy credit railroad cases toward membership.

Following the report of the Academy's New Directions Committee, the June 2008 amendments to the bylaws and the associated changes in NAA's membership policy, which allowed limited credit toward the threshold for consideration of certain workplace dispute decisions, the Academy established a Special Committee on Railroad Arbitration and Membership Policy. The committee was chaired by Gil Vernon and included Simon and Marx, as well as Margery Gootnick, Roberta Golick, and Margaret R. Brogan. Based on the committee's report, the Academy's policy as to railroad decisions was changed. The Academy now treats those cases in the new but limited workplace decision category. Board policy was changed to consider each certificate of appointment to a section 3 tribunal (NRAB, SBA, or PLB) issued by the National Mediation Board (indicating it was based on a selection by the parties or "partisan members"), as well as LPP (labor protective provisions) and "parties pay" cases, when accompanied by an issued and adopted award, count as a workplace dispute resolution decision.

National Association of Railroad Referees

Based on perceived unmet need and in part as a result of the Academy's earlier policies with respect to railroad industry arbitration and minimal railroad-specific program topics, an industry-specific professional organization, the National Association of Railroad Referees (NARR), was founded in 1991. The NARR holds a conference every September in Chicago that is attended by railroad management and labor representatives, NMB members and staff, and railroad arbitrators. The annual conference provides referees with education and professional development. The NARR's first seven presidents[46] and many of its members have been NAA members.

[46] NARR presidents have been:

Future of Dispute Resolution in the Railroad Industry

The future of dispute resolution in the railroad industry looks like a continuation of past and present issues and trends. Issues in bargaining have been predictable. By way of example, the major elements of the SMART-TD's 2019 section 6 notices include pay increases, allowances and adjustments, paid sick leave, pay for training, scheduling adjustments to increase rest and improve quality of life, and enhanced health and welfare benefits. In short, labor's bargaining demands are conventional and predictable, a continuation and improvement of the terms and conditions of employment for its existing work force and protection for the jobs and duties threatened by technological and operational changes.

Management seeks more significant changes in basic terms and conditions of employment. These include a change in crew consists to have only a single person in the cab of locomotives, with the present second crew member – the conductor – converted to a ground job.[47] Carriers also seek work rules changes to give railroads greater flexibility in subcontracting in non-core areas, to reform "provisions that restrict management discretion over the assignment of work," and to allow management greater "flexibility over which crafts and employees may perform work, when such work may be assigned and performed, and the duration such work may be performed." Railroad management wants, in addition, to relax arbitrary geographical limits on work performed by train crews, allowing for greater flexibility to timely deploy teams to critical projects and curtailing furlough protections. Management further seeks to consolidate multiple legacy railroad contracts within the same workgroup, reducing methods of payment calculation, and accelerating when certain operational changes may be implemented. Finally, management would like to change health and welfare benefits to reduce costs through plan design changes and increases in employee premium sharing, copay, and deductibles.

In addition to ongoing competitive and economic pressures, current bargaining issues are driven by the industry's desire to take full advantage of the billions of dollars in investment in Positive Train Control (PTC), which it contends make single member operating crews safe. Crew size and work rule changes are also proposed by carriers to realize the full benefits of precision scheduled railroading that has resulted in fewer workers being employed for a given level of traffic.

Collective bargaining is a flexible process. Its application in the railroad industry, using the RLA dispute resolution structure, is time tested. While the issues described are difficult, the process has been made easier by a leaner, more profitable industry and ever-increasing employee productivity.

1991 – 1994: Joseph A. Sickles, NAA Member
1995 – 1998: Herbert L. Marx, Jr., NAA Member
1998 – 2000: M. David Vaughn, NAA Member
2000 – 2004: Francis X. Quinn, NAA Member
2004 – 2006: M. David Vaughn, NAA Member
2006 – 2010: Barry E. Simon, NAA Member
2010 – 2014: Elizabeth C. Wesman, NAA Member
2014 – 2016: Joshua M. Javits, NAA Member
2018 – 2020: Joseph Cassidy

[47] Information provided by the National Railway Labor Conference.

It is unlikely there will be any significant changes to the RLA provisions applicable to the railroad industry or to the parties' utilization of its dispute resolution processes. If anything, the parties more recently have been addressing their issues in bargaining, with less reliance on the PEB process.

Labor has demonstrated no interest in giving up publicly funded grievance arbitration. Carriers favor the major dispute processes, as compared with other possible alternatives. That process, while protracted, virtually eliminates the use of strikes and lockouts. Arbitration is available when bargaining does not resolve the dispute.

The benefit to the public has been and will continue to be stability, with no interruption of rail transportation services, and the benefit to the rail industry and its employees is sustainability. No pressure for legislative change is likely. While no one in the industry would assert that the system approaches perfection, no one has been able to devise an alternative acceptable to all stakeholders to replace it. If adequate and reliable funding is provided, the RLA dispute resolution process, including the significant role played by Academy members and other neutrals, works well enough to continue.

Chapter 6

THE NAA'S ROLE IN AIRLINE LABOR-MANAGEMENT RELATIONS

Joshua M. Javits

Introduction

NAA: Fifty Years in the World of Work, the 1997 history of the first half-century of the National Academy of Arbitrators, touched on the airline industry only briefly and noted the impact of federal deregulation in the late 1970s.[1] Today the U.S. airline industry warrants a prominent position in the NAA's historical record in light of the volume, variety, and importance of cases that NAA members handle.[2] In addition, this heavily unionized industry has grown enormously and has a significant impact on the economy, with airlines carrying 2.5 million passengers per day and aviation accounting for more than 5 percent of gross domestic product.[3]

The NAA, as an institution and through its members, has played an essential role in the cyclical and unpredictable world of airline labor-management relations during the last 25 years.[4] NAA members have been instrumental in helping the parties through the major challenges in this tumultuous industry. Moreover, they have been the nearly exclusive source for neutrals in resolving day-to-day grievance arbitration disputes. NAA members also have played a major role in facilitating discussions and needed changes in collective bargaining throughout the period.

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[1] Gladys W. Gruenberg, Joyce M. Najita & Dennis R. Nolan, *The National Academy of Arbitrators: Fifty Years in the World of Work* 171-72, 249 (1997). *See* Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, codified as amended in different sections of 49 U.S.C. (2018).

[2] The NAA has paid special attention to the airline industry at its annual meetings in recent years. Moreover, the industry has been the subject of panels and of papers in the organization's proceedings. Airline industry panels comprised of advocates and neutrals have given well-attended presentations at nearly every NAA annual meeting during the last 25 years. Several sessions have dealt with issues stemming from airline mergers, including the negotiation of joint collective bargaining agreements and the arbitration of seniority list integration. Topics have also included system boards of adjustment, just cause, mediation, med-arb interest arbitration, employee ownership interests in the 1990s, and the impact of 9/11. In addition, National Mediation Board (NMB) chairs and members have presented on the agency's operations and the Railway Labor Act's legal structure.

[3] Airlines for America, *Economic Impact of Commercial Aviation by State*, https://www.airlines.org/data/; Federal Aviation Administration, *The Economic Impact of Civil Aviation on the U.S. Economy*, www.faa.gov.2016-economic-impact-report_FINAL. The lessening of union penetration in the rest of the private sector also has heightened the industry's impact on U.S. labor relations.

[4] Joshua Javits, Robert Harris, and Helen Witt were both NAA and NMB members. Other NAA members affiliated with the NMB were Steven Crable (chief of staff), Dana Eischen (special assistant to the chairman), Richard Kasher (general counsel), and Joyce Klein (legal counsel). Former airline labor relations officials Mark Burdette, Paul Chapdelaine, Elizabeth Neumeier, and Elliott Shaller became NAA members.

President Clinton established the Dunlop Commission on the Future of Worker-Management Relations in 1993—so-named for NAA charter member John Dunlop who chaired the Commission—to look into worker-management relations and U.S. labor law and make recommendations for reform. The Dunlop Commission found that railroad labor and management jointly drafted the Railway Labor Act (RLA),[5] and these parties desired no changes in the law.[6] This was in strong contrast to the many changes the relevant parties sought in the National Labor Relations Act (NLRA).[7]

The Dunlop Commission recommended that an Airline Industry Labor-Management Committee be created—as well as a committee for the railroad industry—to work with the parties to "make specific recommendations for change which would improve the processes and performance of collective bargaining in the resolution of 'major' and 'minor' disputes."[8] The Airline Committee, co-chaired by NAA member and former chairman of the National Mediation Board (NMB) Robert Harris, consulted with the parties and submitted a report to the Departments of Labor and Commerce in 1997. The NMB subsequently implemented the recommendations.

In 2009 the NMB established a group comprised of representatives of airline and railroad carriers and unions, called Dunlop 2,[9] which meets several times a year with the agency to discuss issues of mutual concern. The group reflects the ongoing history of the unions, carriers, and the NMB working together on statutory and administrative issues.

Railway Labor Act

The Railway Labor Act is the legal framework that governs labor relations in the airline industry. The law was enacted in 1926 as a result of negotiations between labor leaders and railroad companies following the failure of prior labor relations statutes to address the often violent disputes between rail labor and management. The RLA's primary objective was to avoid interruptions in interstate commerce, including the transport of crucial commodities such as coal and food. In 1936, as a result of lobbying efforts by the Air Line Pilots Association (ALPA), amendments to the RLA extended its coverage to the airline industry.[10]

The RLA provides for comprehensive bargaining obligations designed to ensure agreements are reached and transportation is maintained.

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[5] 45 U.S.C. § 151 *et seq.* (2018).

[6] *The Dunlop Commission on the Future of Worker-Management Relations: Final Report* 92-93 (Dec. 1, 1994) [hereinafter Dunlop Commission]. The Commission noted: "Unlike the National Labor Relations Act, which was enacted through substantial labor-management and political conflict, the 1926 Railway Labor Act was made law with the full agreement of railroad labor and management…. These parties regard the Railway Labor Act as their creation, achieved through a bi-partite process, and they are justly proud of their role in the enactment of the statute." *Id.* The RLA was later amended to include the airline industry after discussion with the parties.

[7] 29 U.S.C. §§ 151–169 (2018).

[8] Dunlop Commission, *supra* note 6, at 93.

[9] Seth Rosen (airline unions), Robert DeLucia (airline management),Kenneth P. Gradia (rail management), Joel Parker (rail unions), and Joshua Javits (facilitator) were the initial members of Dunlop 2.

[10] 45 U.S.C. § 181 (2018).

These include direct negotiations between the parties,[11] followed by a period of mediation by the NMB[12]; the proffer of interest arbitration, which is engaged if both parties agree[13]; and the potential creation of a Presidential Emergency Board (PEB).[14] The parties are required to maintain the status quo throughout the multifaceted bargaining process.[15] Congressional intervention in settling disputes is always possible, but such action is not part of the RLA statutory process.

In addition, the RLA contains a representation election process[16] and a requirement for all carriers to create system boards of adjustment (SBAs) to resolve grievances.[17] It provides for only narrow judicial review of arbitration decisions and awards.[18]

National Mediation Board Role and Roster

The National Mediation Board was created under the RLA to administer the essential RLA provisions.[19] The NMB mediates the parties' "major" disputes—defined as disputes about the modification of existing agreements or the creation of new ones.[20] It has nearly unreviewable authority to hold the parties in mediation until it deems mediation to be unsuccessful.[21] Unlike the NLRA, unfair labor practice claims are under court, not NMB, jurisdiction.

The NMB maintains a roster of neutral arbitrators. The neutral arbitrators are used, for example, when airline parties request a strike panel or request a single arbitrator to hear a dispute. Of course, the parties may select an arbitrator who is not on the NMB roster.

All NAA members are automatically qualified to be on the NMB roster under the agency's rules.[22] If the arbitrator is not an NAA member, he or she must have issued decisions in five cases, or have 10 years of experience, in airline or railroad industry labor relations. Most airline collective bargaining agreements require that arbitrators serving on permanent panels, or those being chosen on an ad hoc basis, be NAA members.

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[11] *Id.* § 152, Sixth.
[12] *Id.* § 156.
[13] *Id.* § 155 (b).
[14] *Id.* § 160.
[15] *Id.* § 156.
[16] *Id.* § 152, Ninth. Interestingly, subordinate officials are first-level supervisors who would be excluded from coverage under the NLRA but are covered under the RLA.
[17] *Id.* § 184. Railroad arbitration is administered and paid for by the Federal Government through the NMB. In contrast, the airlines' arbitration scheme is a matter of negotiation so long as a system board of adjustment is established.
[18] *Id.* § 153(q). Grounds for review are failure to comply with the RLA, acts in excess of jurisdiction, and fraud or corruption.
[19] *Id.* § 154.
[20] *See* Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 723-24 (1945).
[21] IAM v. NMB, 425 F. 2d 527, 537 (D.C. Cir. 1970), confirmed in IAM v. NMB, 930 F.2d 45 (D.C. Cir.), *cert. denied*, 502 U.S. 858 (1991).
[22] NMB, *Uniform Procedures for Placement and Retention on the National Mediation Board's Roster of Arbitrators* (Mar. 11, 2009).

"Major" and "Minor" Disputes

In interpreting and applying the RLA, the courts have traditionally categorized labor disputes involving collective bargaining as "major" disputes or "minor disputes." "Major" disputes concern the making or changing of the collective bargaining agreement. "Minor" disputes involve interpreting or applying the collective bargaining agreement.[23]

In contrast to the detailed procedural requirements for arbitration between the railroads and their unions,[24] or the legal requirements under the National Labor Relations Act, the RLA as applied to arbitration in the airline industry only dictates that the parties establish a system board of adjustment to resolve grievances. The RLA does not dictate any other requirements, such as the duty to provide information or engage in discovery as part of system board procedures.[25] However, the parties may voluntarily agree to such provisions in their collective bargaining agreements.

System Boards of Adjustment

System board rules and procedures are solely a creature of the collective bargaining agreement. Courts have held that no duty exists to create a system board of adjustment until the parties have a first binding collective bargaining agreement.[26]

System boards of adjustment are comprised of an equal number of labor and management representatives, usually two or four partisans."[27] These partisans sit with a neutral arbitrator if they cannot resolve the dispute themselves at an earlier grievance step. Each SBA member has a single vote, including the neutral.

The party members are helpful in three ways. First, they provide the neutral with technical understanding of the issues (e.g., complex pilot performance, qualification and scheduling issues). Second, they can, where appropriate, act as conduits to the parties to facilitate settlement. Third, they can help the neutral identify and weigh key evidence in light of their knowledge of unique workplace realities.

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[23] *See Elgin*, *supra* note 20; Conrail v. RLEA, 491 U.S. 299 (1989).

[24] Unlike railroad arbitration, for which the Federal Government compensates arbitrators, the parties pay airline arbitrators. In addition, airline arbitration is a de novo procedure, not an appellate one as with railroads. *See supra* ch. 5, M. David Vaughn, "The Academy and the Railroad Industry."

[25] 45 U.S.C. § 184 (2018) states: "It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this [Title], to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of Section 153 of this Act." *See* IAM v. Central Airlines, 372 U.S. 682 (1963).

[26] ALPA v. Jetstream Int'l Airlines, 716 F. Supp. 203, 204 (D. Md. 1989).

[27] System board members assigned by each party are sometimes referred to as "partisan neutrals," having some indicia of partisanship because they are chosen by one side only. Yet, they are also able, if not necessarily expected, to use their independent judgment. To ensure their independence, many collective bargaining agreements protect party SBA members from retaliation based on their board activities.

Interest Arbitration and Release by the NMB

Although most bargaining disputes are resolved in direct or mediated negotiations, the parties have sometimes availed themselves of interest arbitration. The RLA provides that after the NMB determines mediation has been unsuccessful, the NMB will proffer arbitration to the parties.[28] If both sides agree, the dispute is submitted to interest arbitration. If not, the parties are released to use self-help. Although this dispute resolution approach is relatively rare, when it is agreed to, NAA arbitrators have been called on to conduct the interest arbitration. The RLA lays out specific procedures for interest arbitration, but the parties may agree to their own process.

If one of the parties rejects the proffer of arbitration, it is precluded, and the parties are released to use self-help following a 30-day cooling-off period. Self-help allows unions to strike. Management can then permanently replace striking employees, lock out the particular work group, or unilaterally impose contract terms so long as the subject matter has been negotiated.

Presidential Emergency Boards

At any time after release, the National Mediation Board can trigger a Presidential Emergency Board by notifying the president of its finding that a shutdown would have a substantial impact on the national or regional economy.[29] Once notified, the president then has the discretion to create a PEB. If created, the status quo must be maintained during which self-help is prohibited for a 60-day period—30 days for the PEB to hold hearings and issue a report to the president and another 30-day cooling-off period thereafter.[30] Nearly all PEBs have three or five neutrals who are almost always NAA members and are listed on the NMB roster.

Three PEBs were created in the airline industry from 1997 to 2001, after a lapse of 31 years since the last prior airline PEB was established in 1966[31]:

- President Clinton created PEB 233 in 1997—with Robert Harris, Anthony Sinicropi, and Helen Witt—after pilots represented by the Air Line Pilots Association struck American Airlines. The PEB did not issue a recommendation because the parties reached an agreement during its existence.

[28] 45 U.S.C. § 155 (b). Although the RLA lays out detailed procedures for interest arbitration, the parties are free to establish their own process. In addition, the parties may mutually agree to interest arbitration even before an NMB proffer.

[29] *Id.* § 160. *See* https://joshuajavits.com/sites/default/files/uploads/images/stories/SettlingAirlineDisputes.pdf.

[30] A provision of the RLA applicable to commuter railroads calls for two PEBs on initiation of a single party or the governor of an affected state. *See supra* ch. 5, M. David Vaughn, "The Academy and the Railroad Industry."

[31] Increasing consolidation in the airline industry and rising passenger loads—prior to the COVID-19 pandemic—are changing the dynamics for triggering a PEB. These developments make PEBs more likely to avoid self-help, given the tremendous economic consequences of a shutdown or even a threatened shutdown.

- In 2001 President Bush established PEB 235—with Helen Witt, Robert Harris, and Richard Kasher—for a Northwest Airlines (NWA)/Aircraft Mechanics Fraternal Association (AMFA) dispute; the dispute was settled just before the PEB issued its report.
- PEB 236—with Helen Witt, Ira Jaffe, and David Twomey—was established in a United Airlines/International Association of Machinists (IAM) dispute in 2001; an agreement was reached after the PEB report was issued.

Where the parties have still not reached agreement after a PEB, they again have the right to use self-help. Congress has sometimes stepped in to legislate an end to the dispute in the public interest.[32] Not since prior to deregulation in 1978 has Congress intervened in an airline dispute.

Strikes

The airlines are an essential industry, part of the vital infrastructure undergirding the rest of the U.S. economy. The RLA contains built-in processes that control the timing, frequency, and impact of shutdowns in the public interest. The law's mechanisms and purposes encourage settlements, which provide stability and consistency to the industry. As a result, only four strikes have occurred during the last 25 years:

- An NWA/ALPA strike over Labor Day weekend in 1998 was settled after a 13-day walkout.
- Pilots represented by ALPA struck Comair, a wholly owned regional subsidiary of Delta, for 13 weeks in spring 2001 until finally reaching an agreement.
- An NWA/AMFA strike in 2005 began a month before NWA went into bankruptcy; the parties never reached a settlement.
- A four-day strike in 2010 ended when Spirit and ALPA came to terms on a collective bargaining agreement.

Airline Industry Trends

The airline industry is heavily unionized; in 2019 unions represented about 55 percent of the 740,000 employees. Three of the Big 4 airlines—United Airlines, American Airlines, and Southwest Airlines, along with Alaska Airlines—are between 80 and 85 percent organized. The rate of unionization in the airline industry is still about eight times higher than the average of 7 percent of private-sector U.S. workers.

The industry moves more than 2.5 million passengers per day in the United States. It is extraordinarily affected by changing fuel prices,

[32] It has done so by imposing the PEB report as the parties' new collective bargaining agreement, by ordering interest arbitrations, or by extending the status quo period. Congressional action is not part of the RLA process. Congress had intervened in the past to end self-help, though almost exclusively to end railroad strikes. The parties perceived congressional intervention as a real possibility, so they felt pressured to reach agreement after a PEB—often on the basis of the PEB report.

competition from low-cost carriers, and declines in air travel due to recession, epidemics, and terrorism.

The cyclical economic sensitivity of the business, as well as the impact of powerful nonrelated factors, lead to both serious clashes and cooperative efforts between the carriers and their unions. NAA arbitrators are regularly called on to help the parties deal with these externally and internally generated challenges and contribute toward a more stable and predictable environment.

Several developments and scenarios have been defining ones for the airline industry:

> *1995-2000*. The airline industry was consistently profitable for the first time since full implementation of deregulation in 1981; restrictions on market entry and fare regulation were lifted in 1981.
>
> *2001*. The U.S. economic downturn prior to 9/11 severely affected the industry, which was already projected to lose $2 billion. The terrorist attack on September 11, 2001, caused the closure of U.S. airspace and the grounding of aircraft for five days. Airlines attempted to shrink to profitability, but the viability of existing airlines was seriously questioned. The Federal Government made loans to the industry to help it survive.
>
> *2001-2005*. The industry sustained $35 billion in losses because of reduced travel demand, intense competition, high fuel prices, Middle East conflicts, and security concerns that led to the creation of the Transportation Security Administration. Major job losses resulted, and voluntary concessions were sought through restructuring agreements. NAA members were very involved in helping the parties work through the issues that arose. The carriers used force majeure clauses to escape from contract restrictions on reductions in force. Despite the parties' efforts to negotiate concessions, many airlines went into bankruptcy and used the bankruptcy law's contract rejection process to extract employee concessions. Some employee pensions were terminated, with the Pension Benefit Guaranty Corporation assuming control and establishing sometimes lower ceilings on benefits.
>
> *2005-2011*. Significant consolidations marked the period 2005 to 2011. Nine major airlines in late 1990s consolidated down to four mega carriers: Delta Air Lines, United Airlines, American Airlines and Southwest Airlines.[33] NAA arbitrators were deeply involved in the parties reaching joint collective bargaining agreements through interest arbitrations and through arbitrations to determine how seniority lists would be integrated.

[33] The Big Four resulted from these consolidations: US Airways/America West (2005); Delta Air Lines/Northwest Airlines (2008); United Airlines/Continental Airlines (2010); Southwest Airlines/AirTran Airways (2011); and American Airlines/US Airways (2013).

2011-2020. The industry was consistently profitable despite the impact of the Great Recession (2008-2010). Unions were able to recoup many of the concessions from the 2001–2010 period. Pattern bargaining, which historically was practiced in the industry, intensified, especially for pilots at the Big 4.

2020. The COVID-19 pandemic has reduced passenger travel substantially. In addition, revenue has been suddenly and vastly reduced. The long-term implications of these reductions are not yet known. [34]

Airline Industry Carriers

The airline industry is composed of several distinct business groupings: major airlines, low-cost carriers, regional airlines, and air cargo carriers.

Major Airlines

The Federal Aviation Administration defines a "major" carrier as having more than $1 billion in revenue annually, and approximately 10 passenger airlines and two cargo carriers meet this definition. As a result of industry consolidation between 2008 and 2013, four mega carriers emerged. Delta Air Lines, United Airlines, American Airlines, and Southwest Airlines now control more than 80 percent of airline passenger revenue and dominate origin and destination flying. The six smaller major carriers—JetBlue, Alaska, Hawaiian, Frontier, Allegiant and Spirit—each control less than 5 percent of the market. Just prior to the COVID-19 pandemic, approximately 2.5 million passengers per day flew in the United States. The concentration of the industry brought a degree of stability in labor relations. In addition, international flying has also become more coordinated with the development of international airline alliances in the 1990s.

Low-Cost Carriers

Low-cost carriers (LCCs) tend to keep the ticket prices of the major airlines lower than they would otherwise be. However, they do not have the size of the Big 4 and, therefore, cannot provide the route coverage, trip frequency, frequent flyer, and other perks that business travelers appreciate. This is especially true of LCCs such as Allegiant, Frontier, Spirit, and Sun Country that use low prices alone to attract price-sensitive leisure travelers rather than business travelers, the source of profitability for the larger majors.

[34] Ironically, the two most profitable and stable periods for the airlines, 1995 to 2000 and 2009 to 2019, were each brought to an abrupt and disastrous halt by unforeseen external events—9/11 and the COVID-19 pandemic, respectively. Just when the airlines begin to think they are invulnerable, they have been rudely awakened by calamities not of their making. Other shocks, if of less historic proportions, have always played a role in the industry and management's relations with its unions and employees.

Regional Airlines

The major airlines operate narrow and wide-body aircraft from their large hubs and other big cities as well as to and from international destinations. However, they are fed passengers from small and midsized markets serviced by regional airlines, which fly aircraft with 50 to 76 seats. [35]

The regional airlines are either independently owned or wholly owned by major airlines and code share with them. The major airlines handle all the bookings using their own reservation system for the regional flights. The flights appear to passengers as part of the major airline by virtue of the use of the major's reservations code as part of the flight numbers and their nearly identical livery (paint job) and flight crew uniforms.

The regional carriers enter into capacity purchase agreements with the majors, and this restricts their operations. They pay their employees far less than the majors, but initial jobs are easier to come by with a regional carrier than with a major carrier. Pilots, in particular, will build up their flying hours with a regional so they are eligible for hire by a major airline. [36]

The regional airline industry is not immune to consolidation. Consolidation has occurred among regional airlines but is still less common than among the major airlines.

Air Cargo Carriers

The air freight industry includes carriers such as FedEx, UPS, Atlas Air, the growing Amazon Air and others that provide a critical service of carrying freight nationally and internationally. [37] They are a vital link in the global supply chain. The International Brotherhood of Teamsters (IBT) represents many of the pilots at these freight carriers. Passenger airlines also carry a great deal of freight in their cargo holds, which is a profitable aspect of their business.

Airline Industry Labor Organizations

Labor organizations represent about 55 percent of industry workers, including pilots, flight attendants, and ground employees (e.g., mechanics, fleet service employees, and customer service agents).

Pilot Unions

The Air Line Pilots Association is the largest union representing over 63,000 pilots at 34 carriers in Canada and the United States, including Delta Air Lines, FedEx, and United Airlines. ALPA also represents many of the regional airline pilots. The Allied Pilots Association (APA) represents

[35] The 76-seat limit is dictated by scope clauses in the major airlines' pilot contracts. These clauses are collective bargaining agreement provisions that aim to protect the work of the pilots at a major carrier by attempting to restrict the carrier's ability to divert flying to lower-cost airlines.

[36] As a result of a pilot shortage, many regionals made agreements with their unions to pay bonuses of $20,000 or more as well as pay for the extensive training required to be an airline pilot. Captains are in especially short supply, and the majors are eager to poach these more experienced pilots from the regionals. At least such was the case prior to the advent of the COVID-19 pandemic.

[37] Emery Air and DHL Aviation went out of business during this period.

pilots at American Airlines, and the Southwest Airlines Pilots Association (SWAPA) represents pilots at Southwest Airlines. The Independent Pilots Association (IPA) represents UPS pilots. APA, SWAPA, and IPA are independent unions. The Teamsters Union (IBT) represents the pilots at several smaller cargo carriers and those of Allegiant, FlexJet, and other carriers.

Flight Attendant Unions

The largest flight attendants union is the Association of Flight Attendants (AFA), which represents flight attendants at Alaska Airlines, United Airlines, and many regional airlines. The Transport Workers Union (TWU) represents Southwest Airlines and JetBlue flight attendants, and the Association of Professional Flight Attendants (APFA) represents American Airlines (AA) flight attendants. IBT represents flight attendants at several regional carriers.

Ground Employee Unions

The Machinists Union (IAM) represents mechanics and related employees and fleet employees (baggage handlers, cleaners, etc.) at United Airlines and other airlines. A TWU/IAM joint council represents American Airlines mechanics and fleet workers. AMFA represents Southwest and Alaska mechanics, and the IAM represents Southwest's fleet employees.

NAA Member Roles in the Airline Industry

Airline arbitrators perform critical neutral activities in different ways: traditional grievance arbitration, grievance mediation, interest arbitration, med-arb, and service on Presidential Emergency Boards. They have played an especially important role in the post 9/11 period—one marked by bankruptcies and industry consolidation that resulted from multiple enormous mergers and acquisitions. Arbitrations involving seniority list integration, also a result of this industry consolidation, have been particularly complex and contentious.

Nearly all airline collective bargaining agreements require arbitrators to be members of the National Academy of Arbitrators; this requirement reflects the industry's recognition of the high standards tied to NAA membership. The complexity and uniqueness of airline disputes place special demands on neutrals, and the parties seek not only sophisticated arbitrators but also those with experience in the industry.

When negotiating a "major" dispute relating to contract creation and amendment, NMB mediators and members are normally directly involved. However, on many occasions the parties agree to a med-arb or pure interest arbitration process in which independent neutrals guide the process toward reaching a collective bargaining agreement.

Several important cases arose from the many and various headwinds facing the industry. Several resulted from the transformative emergence of regional jets in the 1990s and the dire economic consequences of 9/11, numerous bankruptcies and subsequent mergers and acquisitions. These disruptions led to serious labor-management conflicts, which then brought forth creative resolution processes handled by neutrals with expertise and

sensitivity. The repeat use of a select group of NAA arbitrators is the surest affirmation of their rising to the occasion. The COVID-19 pandemic may similarly test the system and require use of NAA resources.

Interest Arbitration, PEBs, and Other Significant Cases

The period 1995 to 2020 has seen several major interest arbitrations. These and other cases have tested the capabilities of airline arbitrators and highlight NAA member roles in the airline industry.

American Airlines/Association of Professional Flight Attendants Interest Arbitration (1993–1995). In late 1993, the NMB released AA flight attendants, who then struck for five days just before the busy Thanksgiving holiday. The carrier could not operate because it could not qualify new replacement flight attendants until they had undergone federal aviation regulation-mandated training. AA planes flew empty, resulting in enormous losses. The impact of flight attendant training regulations, and their use by APFA, thus greatly influenced the course of the strike and its subsequent resolution.

The Clinton administration became involved, and AA agreed to accept interest arbitration. Interest arbitration resulted in a binding agreement; this solution was preferred over a PEB, which would have allowed a second opportunity for self-help if both parties did not accept its recommendations. The hearings continued for nine months before a panel of seven arbitrators—four party representatives, NAA members Richard Kasher and Geraldine Randall, and Chair Charles Resnick, a commercial arbitrator who was not an NAA member. The panel's decision was issued October 11, 1995, and the parties settled the dispute on the basis of the arbitration report.

American Eagle/Air Line Pilots Association Collective Bargaining Agreement (1997–2013). In 1995 four regional air carriers wholly owned by AMR Corporation, also the parent of AA, consolidated into a single carrier, American Eagle. Two years later, labor and management agreed to a 16-year framework agreement with a 2013 amendable date that allowed for several expedited amendment rounds. The deal provided for an industry index that was used to periodically adjust pilots' pay rates. The parties used a formula to calculate the average change in pay rates across the regional industry at carriers not in bankruptcy, with a minimum increase guaranteed at 1.5%. That minimum increase became important after 9/11, because all the comparator carriers were dialing rates back while American Eagle was locked into increases. The parties could also each bring five issues to the interim interest arbitrations.

One such interest arbitration, which followed the defeat of the 2000 tentative agreement, used a panel of three arbitrators (Richard Bloch, Richard Kasher, and George Nicolau). Of particular concern was the definition of an "issue." The carrier argued that the union was bundling multiple issues in some of the five issues it raised in arbitration. The arbitration panel refrained from awarding items that did not reflect patterns in the regional industry. The future amendment rounds were successfully negotiated without resorting to interest arbitration.

American Airlines/Allied Pilots Association Presidential Emergency Board and Flow-Through Agreement (1997). In 1997 APA struck AA, and President Clinton created PEB 233 with Robert Harris, Anthony Sinicropi, NAA former president, and Helen Witt. The PEB did not issue a recommendation because the parties reached an agreement during its existence. Harris was instrumental in mediating an agreement during meetings on Orcas Island, Washington, in which Don Carty, chairman and CEO of AMR Corp (the parent company of AA) participated.

After the PEB decision was prepared but not yet issued, Harris moved the parties to agreement partly by expanding on a scope issue APA initially raised in its proposal to perform *all* flying for the carrier. This would include flying done by American Eagle, AMR Corp's wholly owned regional carrier.

The negotiation of a flow-through agreement[38] became a key element in resolving matters before the PEB. The four parties to the flow-through agreement were APA, AA, ALPA, and American Eagle. The Air Line Pilots Association was also in negotiations with American Eagle at about the same time.

Approximately 15 four-party flow-through arbitrations occurred, some of which involved the rights of the furloughed AA pilots. Richard Bloch made an important decision on the impact of the expiration date of the flow-through agreement; the agreement had a 10-year duration, which ended in 2008.

Bloch ruled that the American Eagle pilots holding AA pilot seniority numbers—though they did not fly AA aircraft—could keep them, as a vested right, even after the expiration of the flow-through agreement. These pilots would also have a future right to flow to AA when AA resumed hiring. Bloch did not rule on precisely how their seniority would be used.[39]

George Nicolau subsequently ruled on a grievance brought by ALPA, holding that Eagle pilots who held AA seniority numbers, but continued to fly at Eagle, had the right to occupy 50 percent of the class slots at AA under the flow-through agreement. In his remedy award, Nicolau specified the exact process by which Eagle pilots would flow to AA.[40] ALPA, APA, AA, and American Eagle abided by the Nicolau award and the

[38] The flow-through agreement allowed Eagle pilots to obtain AA pilot seniority numbers and flow up to American when AA was hiring new pilots. Before flowing up to AA, Eagle jet captains had to serve training blocks of 18 or 24 months at Eagle. The agreement also allowed AA pilots to flow down to Eagle during pilot furloughs at American. It provided that at least one of every two new-hire positions per new-hire class at American would be offered to Eagle captains in order of seniority. The agreement became part of both the AA/APA and the American Eagle/ALPA contracts. As a result, pilots flowed up from Eagle to AA, until 9/11 caused layoffs at AA and AA pilots flowed down to Eagle.

[39] Approximately 125 Eagle pilots could take advantage of the flow-up opportunities to AA, while more than 300 AA pilots could bump into Eagle positions. Eagle pilots received AA seniority numbers upon successfully completing training as a regional jet captain at Eagle when AA was hiring. Because of the rapid growth of Eagle's regional jet fleet, AA pilot hiring, and the 18- and 24-month training locks, about 800 Eagle pilots held AA seniority numbers they had received prior to 9/11. These pilots were still flying at Eagle between 1999 and 2001, because a backlog of pilots in training freezes developed.

[40] Several pilots challenged Nicolau's decision and subsequent remedy award in the courts, but the Fifth Circuit upheld his award and the Supreme Court denied certiorari. Mackenzie v. ALPA, 598 F. App. 223 (5th Cir. 2014), *cert denied*, 135 S. Ct. 2896 (U.S. 2015).

original four-party agreement reached in 1997, despite the complexities caused by 9/11.

The concept of seniority-based pilot flow-through to AA has been embodied in several subsequent agreements in the airline industry. It continues at American Eagle's successor, Envoy Air, where both management and labor accept the strategy as a tangible means of career progression.

Delta/ALPA Force Majeure (2001), Bankruptcy (2005), and Interest Arbitration (2007). Although the airlines had been very profitable in the 1995 to 2000 period, after 9/11 and the closure of U.S. airspace for five days, Delta, along with most airlines, invoked the force majeure provisions of its collective bargaining agreement. The carrier claimed the right to reduce staffing as an exception to the agreement's no-furlough clauses. The pilots challenged the carrier's invocation of force majeure in certain instances in a series of cases in the years following 9/11. Richard Bloch, former NAA president, arbitrated the disputes. He found that 9/11 was a force majeure event. However, he set parameters on how long and to what extent the continuing effects of 9/11 should be viewed as excusing compliance with certain contractual provisions.

In September 2005 Delta filed for bankruptcy, along with 22 other airlines during the period 2001 to 2005.[41] Section 1113 of the Bankruptcy Code provides that the debtor in bankruptcy court can seek to reject or modify contractual terms if it can establish that the changes are necessary for the reorganization of the company and if it treats all parties fairly and equitably. A conflict of law issue arose because of the dramatic legal differences between the bargaining process under the RLA and the bankruptcy law process under section 1113. Under the RLA, the NMB controls the mediation process and agreements must be mutually agreed to. Importantly, when the bargaining process is fully exhausted, the parties are eventually released into self-help. By contrast, under bankruptcy law, the judge controls the timing of the process, usually subject to severe time constraints, and allows for unilateral changes approved by the court. However, initially no definitive circuit court decision was rendered on whether a contract rejection by a bankruptcy judge under section 1113 would permit self-help under the RLA. The bankruptcy court held that the status quo provisions of the RLA barred post-rejection strikes until the parties bargained under the RLA and were released.[42]

In a special case, ALPA and Delta Air Lines mutually agreed to remove their section 1113 process from the court's jurisdiction and substitute a panel of three arbitrators to decide whether the section 1113 standards had been met by Delta's last proposal. The panel would either select the company's proposal and reject the contract or side with ALPA and not reject the contract. The parties chose to use three NAA arbitrators—Robert Harris,

[41] The bankruptcies were the result of the lasting impact of 9/11; large cost differentials between the legacy network carriers and the emerging low-cost carriers in the early 2000s; and the spike in oil prices after Hurricane Katrina in late August 2005. AA filed much later, in November 2011, though it obtained union concessions beginning in 2001 in an effort to avoid bankruptcy.
[42] Delta Air Lines, 359 B.R. 491 (Bankr. S.D.N.Y. 2007); *see also* Northwest Airlines v. AFA, 483 F.3d 160 (2d Cir. 2007).

Richard Bloch, and Fredric Horowitz. The panel skillfully engaged in active mediation and adjudication of the issues and succeeded in bringing the parties to a voluntary agreement. As Bloch eloquently stated to the parties at the close of the arbitration hearing: "[T]he obligation to continue the bargaining relationship, to respond meaningfully and responsibly to the needs of the other party, [had] never been more essential and . . . [c]ollective bargaining, it is true, is premised on an adversary relationship, but there's far more to it than that. The parties are in every sense of the word trustees of this relationship." The panel implored the parties to seek a consensual resolution and stressed it would be available to assist in every way possible. Importantly, both the court and creditors accepted the eventual agreement and the Delta pilots ratified it. The Delta/ALPA arbitration process established a pattern that led other pilot groups and carriers forward through the restructuring era in the mid-2000s.

Alaska/ALPA Interest Arbitrations (2001, 2005, and 2012-2013). Beginning in 1974, Alaska Airlines and ALPA agreed to interest arbitration as a backstop for their negotiations, and they have maintained the process ever since. The decision to use interest arbitration was initially part of a back-to-work agreement following a flight attendant strike during which the pilots supported the flight attendants.

Several voluntary agreements were reached subsequent to that agreement, but some also ended up being arbitrated. During each round of negotiations, the parties agreed to a formula for calculating pay rates, generally taking the average pay rates of employees at the other major airlines and applying them to Alaska employees.

In May 2001 George Nicolau issued an interest arbitration award regarding pay for Alaska pilots on the 737-900 aircraft. In 2005, at the height of the post-9/11 bankruptcies that Alaska and Southwest alone among the major airlines avoided, the parties again submitted their dispute to interest arbitration; Richard Kasher served as the arbitrator.

In 2012-2013 Alaska and ALPA agreed to a med-arb process with a single mediator, Joshua Javits. If a full agreement were not reached in mediation, two arbitrators would join the mediator to arbitrate the remaining matters in dispute. A three-arbitrator panel was established with Joshua Javits, Richard Bloch, and Frederic Horowitz. After a weeklong hearing, the panel issued its findings and the award. The central issue before the panel was whether Alaska, which accounted for 5 percent of industry revenues, should pay its pilots the same rates as those being paid by the Big 3 airlines, which each had 20 percent of industry revenues as well as vastly more aircraft, routes and destinations. The panel found: "The evidence in this case warrants a conclusion that (1) this is an enterprise that differs markedly, in various respects, from the larger carriers and that, significantly, (2) that difference has been routinely recognized by the parties themselves."

Within six months of the Alaska finding, two smaller major airline pilot collective bargaining negotiations were settled and ratified, JetBlue and Spirit. This speaks to the nature of pattern bargaining in the airline industry.

Compass/ALPA Med-Arb (2007 and 2012-2013). After its bankruptcy, Northwest Airlines created Compass Airlines as a regional airline. NWA and ALPA agreed to a med-arb process to resolve their

collective bargaining dispute in 2007[43] and agreed to it again for their 2012-2013 round of bargaining.

The 2012-2013 process involved strict timeframes of less than one year in total for direct negotiations, mediation and interest arbitration. This timeframe compares favorably with a typical flight crew negotiation of two or three years.

In the mediation phase, the med-arb (Joshua Javits) helped the parties define the scope of an "issue" and identify the comparative carriers for purposes of setting pay rates. The parties made extensive and successful use of subject-matter experts—small groups to address technical issues such as training and scheduling. Only a few key issues remained at the end of the mediation process, and the parties were not far apart on those. The med-arb issued a decision, which precluded the necessity of a ratification vote.

Continental Airlines Pilots/United Airlines Pilots Retroactive Lump-Sum Allocation (2012). The merger of Continental Airlines (CAL) and UAL required UAL, as the surviving carrier, to reach a joint collective bargaining agreement with the combined pilot group. That joint agreement included a $400 million retroactive lump-sum payment to the combined pilot group. The representatives of the two pilot groups could not agree on the proper allocation of the money, so they agreed to interest arbitration before NAA member Ira Jaffe. The union parties presented extensive analytical and financial data at hearings on November 1 and 2 and asked that a decision be rendered by noon on the following Monday, November 5. Jaffe met the deadline and issued a 26-page decision that considered both the lump-sum payment and retroactive purposes of the money; the pre-joint collective bargaining agreement wage rates of the pilot groups, including the values of work rule trade-offs related to those wage rates; the hours flown by the two groups; the negotiating history; differences in retirement contributions; and an ALPA technical analysis. He concluded that a split of $175 million to the CAL pilots and $225 million to the UAL pilots was fair and equitable. The parties were able to move to the next phase of the merger process, seniority list integration.

ExpressJet/Atlantic Southeast Airlines Interest Arbitration (2020). After nearly 10 years of bargaining and a merger, ASA and the IAM—representing flight attendants—could not reach an agreement following two failed tentative agreements. The parties agreed to submit the dispute to binding interest arbitration before NAA member Charlotte Gold. The arbitration was conducted using the last best offer (i.e., baseball style) interest arbitration process. In March 2020, Gold considered the company's proposal, the union's proposal and the failed tentative agreement, and she selected the failed tentative agreement for the parties' joint collective bargaining agreement.

Seniority List Integration Cases

Airline mergers and acquisitions produce the operational need to integrate seniority lists of all employees at the carriers involved. Following

[43] The agreement is the result of Northwest's bankruptcy restructuring.

AA's acquisition of Trans World Airlines (TWA) in 2001, a number of TWA pilots were stapled to the bottom of the AA pilot seniority list through an agreement between AA and the APA without the participation of TWA pilots, and similar seniority dictates were made without the involvement of the former TWA flight attendants. Congress then passed the McCaskill-Bond Act.[44] This 2007 amendment to federal aviation legislation requires a fair and equitable process for seniority integrations. Although this broad standard became the touchstone for subsequent mergers, especially regarding process, it by no means constituted a substantive roadmap or formula for decisions.

NAA arbitrators have had their work cut out for them in seniority list integration cases. A sampling of the major cases in the last 25 years reveals how the respective arbitrators addressed some of the issues.

Pilot Seniority List Integration Cases. Pilot seniority list integrations are by far the most contentious, because seniority substantially affects pilots' careers in terms of aircraft flown (category), status (captain or first officer), pay, training, schedule (choice of trips), furloughs, and so forth. The internal union conflicts and resentments resulting from the seniority list integration process and resolutions can persist into the future. They have even resulted in changes in union representation on several occasions.

Although the industry has tried to make the pilot seniority list integration process more predictable, many factors have conspired to make integrating thousands of pilots extraordinarily challenging, including the:

- seniority list integrations associated with any prior mergers;
- seniority of the pilots affected; and
- context, including differing unions, the impetus for the merger or acquisition, differences between the merging airlines, and shifting criteria for seniority list integration determinations.

Atlas/Polar (Robert Harris 2006). Atlas Air Worldwide Holdings Corp. (AAWH) was created in February 2001. It held Atlas thereafter and acquired Polar later in 2001, years before the actual consolidation of operations. In a case prior to the McCaskill-Bond legislation, the NAA arbitrator (Robert Harris) found that the date AAWH announced its intended acquisition of Polar, July 2001, was the constructive notice date (i.e., the date after which pilots hired by either airline would be integrated based on their respective date of hire). Harris found that those pilots knew or should have known when hired that eventually they would be working for an integrated airline even though that date was many years before the actual integration of operations. Therefore, the actual integration decision date (November 2006) applied only to pilots hired before the acquisition date of July 2001. The seniority list integration experience, and events related to it, led pilots to replace ALPA with the IBT.

[44] 49 U.S.C. § 42112 (b)(4) (2018). The Act requires that where a merger or an acquisition "results in the combination of crafts or classes that are subject to the Railway Labor Act," the carrier make provisions "for the integration of seniority lists in a fair and equitable manner," including negotiation with union representatives and binding arbitration in covered transactions.

US Airways/America West (George Nicolau 2007). The US Airways/America West case was the first case in which the parties used computer modeling to estimate the future economic consequences to pilots of various integration scenarios. The decision put all furloughed US Airways pilots below most junior America West pilots. It was based on the theory that their nonworking status, coupled with US Airways' dire financial condition at the time of the merger, meant their career expectations were much weaker than those of all America West pilots. This rationale thereby discounted the power of longevity and increased the power of status (captain or first officer) and category (aircraft type). The case led to USAPA replacing ALPA at the merged US Airways, and the new union then refused to implement the Nicolau award. This, in turn, led to extensive, heated litigation over the integration and its effects.[45] The controversy also kept the pilots from the benefits of a new collective bargaining agreement for 10 years or so while other pilot group wages were rebounding. It also led to ALPA changing its merger policy to require arbitrators to take into account multiple factors, such as longevity, status, category and career expectations.

Delta/Northwest (Richard Bloch, Dana Eischen, and Fredric Horowitz 2008). The Delta/Northwest case was decided under the prior ALPA merger policy. That merger policy reduced the impact of pilot longevity and focused on pilot status and category. However, the panel gave credit to the NWA pilot group's greater near-term expected attrition rates. NWA-ALPA's position was that a strict date-of-hire (longevity) approach should be taken. This position was supported by their view of super premium wide body flying of which NWA had proportionately more.

United/Continental (Dana Eischen, Roger Kaplan, and Dennis Nolan 2013). The United/Continental case was the first major case decided under new (i.e., post-US Airways/America West) ALPA merger policy. The Continental pilots' proposal sought the use of longevity alone and excluded consideration of status and category entirely. It also put United pilots who were on furlough at the time of the merger—plus others—at the bottom of the seniority list. United pilots argued, and the arbitrator panel agreed, that the new ALPA merger policy required consideration of longevity as well as status and category. Because the panel gave credit to longevity, contrary to the result in the US Airways/America West seniority list integration case, the decision integrated a substantial number of furloughed United pilots into the ranks of working Continental pilots. The panel also adopted the United pilots' hybrid methodology, a mathematical blend of longevity and status and category values, weighing them at various percentages to produce an integrated seniority list.

US Airways-East (former US Airways)/US Airways-West (former America West)/American (Joshua Javits, Steven Crable, and Shyam Das 2015). Prior to the seniority list integration arbitration, a preliminary arbitration board was established to determine whether APA, as the NMB-certified representative of pilots at the merged AA/US Airways carrier, could and should designate a separate merger committee to represent the interests

[45] *See*, *e.g.,* Addington v. US Airline Pilots Ass'n, 791 F.3d 967 (9th Cir. 2015).

of the former America West pilots in the seniority list integration process. The board held that APA had the authority and that it was proper under the McCaskill-Bond Act, which required a fair and equitable process for seniority integration at merging carriers, for APA to do so.

American/US Airways-East/US Airways-West (Dana Eischen, David Vaughn, and Ira Jaffe 2015). The arbitrator panel declined to use the Nicolau award as the basis for first integrating the East and West pilots and then integrating that group with the American group. Even though this was not an ALPA case—APA represented AA pilots and US-APA represented US Airways pilots—the panel looked to cases decided under ALPA merger policy to structure the award and used the hybrid methodology approach adopted in the United/Continental seniority list integration case.

Alaska/Virgin America (Fredric Horowitz, Steven Crable, and Dennis Nolan 2017). The arbitrator panel used the hybrid methodology, with certain conditions and restrictions. Also, unlike in most seniority list integration cases, meaningful mediation occurred. That mediation resulted in several very constructive pre- and mid-hearing agreements and the narrowing of differences between the pilot groups' respective positions.

Flight Attendant Seniority List Integration Cases. Flight attendants have the same monthly bidding for schedules that pilots do, so seniority affects their daily work lives and compensation to a greater extent than is typical for 9 to 5 employees. However, the application of longevity based on date of hire as the vehicle for seniority integration predominates in union constitutions and agreements. AFA, the leading flight attendant union, interprets its constitution as requiring a straight date-of-hire seniority integration. Moreover, flight attendants do not have the additional status and category aspects of pilot work, so the flight attendant integration process is much more straightforward.

NWA/Delta (Dana Eischen 2008). The NWA/Delta case pitted the pre-merger Delta flight attendants, who had never been unionized, against the pre-merger Northwest Airlines flight attendants, who were represented by a committee led mostly by former AFA union leaders. AFA did not file an application with the NMB to declare the merged carrier a "single carrier," which delayed the proceeding. Disputes occurred about how the list should be constructed, but the critical issue was whether, and to what extent, a McCaskill-Bond seniority list integration proceeding could require the maintenance of rules regarding how seniority can be used.

Although seniority itself is important, the rules governing how seniority is used are what give meaning and consequence to the seniority list. As a nonunion carrier, Delta maintained that it had the prerogative to set and change to a great extent the terms and conditions of employment, including seniority rules. The pre-merger NWA flight attendant committee sought restrictions on how Delta could use seniority going forward. These scope-of-decision issues also brought up questions about prior seniority integrations and any potential vested effects. The decision addressed the scope of what could be addressed by setting the seniority list alone; it did not adjust rules governing how seniority is to be used.

ExpressJet/Atlantic Southeast Airlines (Joshua Javits 2019). The International Association of Machinists and ExpressJet asked a third-party neutral, Joshua Javits, to oversee the seniority integration review process for the flight attendant seniority lists resulting from the merger of ExpressJet and Atlantic Southeast Airlines and affecting approximately 1,000 flight attendants. Fifty-seven protests were filed, and the neutral sent each protestor an individual determination letter regarding his or her protest.

Ground Employee Seniority List Integration Cases. Ground employees include mechanics, fleet service employees, and customer service agents. For these employees, seniority integration by date of hire is the near universal union policy. Specific craft and lead seniority issues may come into play, among others. Yet even these issues are fairly readily resolved by the deference the McCaskill-Bond Act shows to established internal union policy, where the same union represents both groups.

United/Continental (Joshua Javits 2013-2014). The International Association of Machinists and United Airlines retained the assistance of a third-party neutral, Joshua Javits, to help research and make recommendations on the integration of the seniority lists affecting the fleet service, passenger service, and storekeeper employees of pre-merger United Airlines, Mileage Plus, Continental Airlines, and Continental Micronesia. This integration involved tens of thousands of employees.

In late 2013 the neutral issued a report and recommendations to the IAM setting forth the process that was followed and the reasons for his recommendations regarding seniority integration. The initial integrated seniority lists were published for union members' review. Prior to the issuance of that report, employees were afforded an opportunity to submit any comments or concerns they might have related to the seniority integration process. The neutral received and reviewed more than 1,000 comments from employees, and he considered these comments in making his report. In addition, the neutral conducted a fact-finding process in person and by teleconference to receive input from as many of the pre-merger groups as possible. [46]

American/US Airways (Joshua Javits 2016-2017). In a process similar to the one used for the United/Continental seniority list integration case, American/US Airways and the International Association of Machinists/Transport Workers Union retained the assistance of a third-party neutral, Joshua Javits, to help research and make recommendations on integration for the seniority lists for approximately 30,000 US Airways and American Airlines ground employees. More than 800 comments and 1,600 protests were received and answered.

[46] Following the issuance of the neutral's report and the publication of the combined seniority lists, employees were afforded an opportunity to protest their placement on the proposed lists. More than 700 protests were timely filed. Each of those protests was presented to the company, which, together with the IAM, conducted a records review; the information was then reported to the neutral. The neutral sent all 727 protesters an individual decision on their protest.

Alaska/Virgin America (Joshua Javits 2017). The IAM asked a third-party neutral, Joshua Javits, to assist in the integration of the approximately 700 Virgin America employees into the Alaska Airlines' seniority lists for clerical, office, and passenger service employees. As with the other mergers, the neutral used the IAM's long-standing policy of date of entry into classification. More than 200 protests were received as part of this integration process, 106 of which the neutral granted in whole or in part.

NAA's Success in Airline Dispute Resolution

The NAA, as an institution and through its members, has been essential to airline dispute resolution. The RLA, established by the parties themselves, elevates self-governance over litigation and agency jurisprudence, especially compared with the NLRA. The NAA is embedded in the parties' preferred internal dispute resolution processes.

Those dispute resolution processes have addressed the subtle, complex, and urgent issues confronting the airline industry during the last 25 years. Included among these issues are the historic catastrophes of 9/11 and bankruptcies; the industry consolidations following in their wake; and consequent industry responses, such as joint collective bargaining agreements and seniority list integration. NAA neutrals have succeeded in moving the parties forward through these challenges and structural changes, with flexibility, adaptability, creativity, thoughtfulness, expertise, and objectivity.

The NAA has helped stabilize this essential service industry that is so key to the nation's economy. No doubt the organization will continue to help the parties navigate appropriate solutions as the industry struggles to overcome its latest challenge—the COVID-19 pandemic.

Chapter 7

THE U. S. STEEL AND STEELWORKERS BOARD OF ARBITRATION: THE ROLE OF AN ARBITRATION SYSTEM IN A MAJOR INDUSTRY*

Shyam Das

The U.S. Steel and Steelworkers Board of Arbitration originated shortly before the National Academy of Arbitrators was founded in 1947. Like the Academy, it has evolved during the ensuing years. Its history is illustrative of the ways in which parties in a major industry have adapted their arbitration system to changing circumstances and of the significant role arbitration has played in their collective bargaining relationship over the past seventy-five years. From 1997 through 2020 I served as Chair of the Board.

In 1937 U.S. Steel—perhaps surprisingly, given its labor history—agreed to recognize the Steelworkers as the collective bargaining representative for its production and maintenance employees. Later, other groups of U.S. Steel employees—including salaried office and technical workers—also were organized. By 1942 the union had successfully organized most other basic steel industry companies.

The initial grievance and arbitration procedure in the U.S. Steel contract provided for use of ad hoc arbitrators. The entry of the United States into World War II and the need for labor peace during the war led to the creation of the War Labor Board, where many of the founders of this Academy got their first experience in resolving and arbitrating labor disputes. In 1945 U.S. Steel and the Steelworkers agreed to establish a Board of Conciliation and Arbitration. This initial Board was composed of three members—one designated by each party and a neutral chair. The first chair was Herbert Blumer, a well-known and respected sociologist at the University of Chicago and later at Berkeley. Blumer had arbitrated in the steel industry for the War Labor Board. The 1945 contract provided, "The Board shall endeavor to conciliate the grievance…." Failing that, the Board was to proceed to arbitrate the grievance.

It appears that conciliation was not a success. In the next contract, negotiated in 1947, the parties dropped that process, although they maintained the Board's original title until 1952. Blumer was succeeded by Ralph Seward, who later that year went on to become the first president of the Academy. Seward already had substantial experience as an arbitrator—most recently at General Motors (GM), where he became the third GM/UAW umpire in 1944, succeeding George Taylor and G. Allen Dash, another Academy president.

In an excellent paper in the 1964 *Proceedings*,[1] Charles Killingsworth and Saul Wallen set forth the early history of permanent

* This is a slightly revised and updated version of Das's 2015 NAA Presidential Address.

arbitration systems in the United States. One of the two major models was the impartial chairman system, which was well established in the garment and hosiery industries. As they describe it, "An impartial chairmanship is a system for resolving all problems that arise during the life of a contract, utilizing a technique of continuous negotiation, and centering on a mediator who is vested with the reserved power to render a final and binding decision."[2]

The other model was the umpire system, which they note originated in the anthracite coal industry. This was "a system of adjudication of those rights and duties which are recognized by the language of an existing agreement between the disputing parties."[3] The GM umpireship was structured on this model, although Taylor and Dash were more mediation-centered in practice. By the time Seward followed them at GM in 1944, the parties had indicated they wanted to follow the adjudicative model, which Seward was most comfortable with as well.[4]

The U.S. Steel Board in 1947 was still a tripartite board, but as Killingsworth and Wallen report:

> The partisan members were advocates, not principals; their chief function was to win decisions, not to negotiate. Executive sessions of the Board became what amounted to rehearings of the important cases. Draft decisions of the chairman were also discussed at length in many cases. Finally, the partisan members of the board often issued dissenting opinions couched in strong language.[5]

Interestingly, the two party members shared offices with Seward on a full-time basis. Seward described it as "a gold fish bowl, everything I said or did was observed . . . and every discussion we had went back to the parties."[6] He recalled:

> It's one thing to have a three-man Board in interest cases or on some types of grievance cases where you have the liberty to make policy…. [But] I have always been impatient really with three-man Boards in most grievance arbitrations where the issues are clear and you are concerned mainly with the application of language to a problem and this is really just a matter of thinking the case through. At U.S. Steel the three-man Board was immensely helpful in educating me to the nature of the problems and the nature of the parties' long-range disputes and long-range goals. But we got into really ridiculous situations

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[1] Charles Killingsworth & Saul Wallen, "Constraint and Variety in Arbitration Systems," in *Labor Arbitration: Perspectives and Problems, Proceedings of the 17th Annual Meeting, National Academy of Arbitrators* 54 (Mark L. Kahn ed. 1964).
[2] *Id*. at 60.
[3] *Id.* at 61–62.
[4] *Id.* at 64–65; Richard Mittenthal, Interview of Ralph T. Seward, Apr.14, 1977, http://www.naarb.org/interviews/RalphSeward-77.PDF at 21 [hereinafter Seward Interview].
[5] Killingsworth & Wallen, *supra* note 1, at 70.
[6] Seward Interview, *supra* note 4, at 48.

when we were trying to sort of mediate out or negotiate the interpretations which were to be placed on words.

* * *

Somebody had to decide what the word meant and there weren't a lot of choices; it meant this or meant that; and particularly when it [the tripartite Board] took the extreme form which it did, not a three-man Board, but a process of the central office of both sides knowing what was in the propos[ed] drafts, knowing the issues, telling the Board members what arguments they should make to me and then having my replies reported back to them. This kind of thing got, well it was just extremely inefficient and exasperating and, of course, terrifically difficult. [7]

At the end of his two-year term, the Company fired Seward. (The Union had fired his predecessor.) For the next year and a half there was a series of temporary chairs. In mid-1951, the parties retained Sylvester Garrett as chair. Garrett had extensive War Labor Board experience, had been a management adviser in the glass industry, and had been teaching law at Stanford. Garrett would remain as chair until he retired from that position at the end of 1978—an impressive span of almost 30 years. Meanwhile, Seward was selected as umpire at Bethlehem Steel, a position he held for many years.

In the 1952 U.S. Steel contract, the parties eliminated the tripartite system. There no longer were partisan members, although to this day it is called the Board of Arbitration. Garrett, however, instituted a clearance system, with the parties' approval, under which tentative drafts were sent to the parties. Garrett has observed:

In my judgment this has been of almost inestimable value. First, it helps the arbitrator avoid serious error. Second, it permits the arbitrator to delete from the opinion matter which is offensive, misleading, potentially mischievous, or simply unnecessary. Third, it gives the potentially disappointed party an opportunity to absorb the decision, understand it, and talk about it frankly with the arbitrator. Sometimes people will read a decision initially and hobgoblins will arise in their mind—they may construe it to mean something that's not intended at all. By talking it out this can be made clear and sometimes the opinion can be reshaped in order to eliminate a potential misunderstanding. Finally, this procedure provides an opportunity, very frankly, for the parties to settle cases which, in light of what the arbitrator thinks, might be better settled than embodied in a written decision. There also are

[7] *Id.* at 49.

> times when the parties agree on matters to be included in an Opinion so as to be helpful in dealing with future problems. [8]

In his 1964 Presidential Address to the Academy, Garrett discussed what he viewed as the benefits of this system compared to a tripartite board:

> [T]he tripartite board system often has proven too cumbersome, too expensive, too political, or simply too inefficient to enjoy widespread use. Many tripartite boards fail to accomplish sound results simply for lack of enough vision and objectivity on the part of the persons involved. It may be, too, that the formal existence of a tripartite board will exaggerate the adversary approach to arbitration, with each party expecting its representative to bring home the bacon in the important cases by pressuring or mesmerizing the neutral arbitrator.
>
> Most important of all, the neutral arbitrator in the tripartite system usually must obtain the vote of one or the other of the partisan members. This necessity can undermine the leadership role of the neutral and reduce him to bargaining for support of one party or the other. [9]

In the 1950s Garrett dealt with a number of major interpretive issues involving, among other subjects, local working conditions, job classifications, and incentives. [10] The parties jointly developed a comprehensive and hugely successful job classification system, including manuals with specimen job descriptions and classifications, to be used in uniformly classifying the thousands of jobs then in existence so as to eliminate wage-rate inequities. Here the task of the Board was to resolve disagreements that arose in implementing the new program. It issued a series of decisions that largely were followed at other companies both in steel and other industries organized by the Steelworkers, such as the can industry, which had adopted the same job classification procedures. [11]

Until the 1980s, the basic steel companies bargained with the Steelworkers on an industry-wide basis. Negotiations were dominated on the employer side by the larger companies, in particular U.S. Steel, which was about twice the size of the next largest producer, Bethlehem Steel. Economic terms and many other contractual provisions were bargained on this basis and

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[8] Francis X. Quinn, Interview of Sylvester Garrett, Mar. 13, 1980, http://www.naarb.org/interviews/Garrett-80.PDF at 15 [hereinafter Garrett Interview].

[9] Sylvester Garrett, "The Presidential Address: Some Potential Uses of the Opinion," in *Labor Arbitration: Perspectives and Problems, Proceedings of the 17th Annual Meeting, National Academy of Arbitrators* 114, 121 (Mark L. Kahn ed. 1964).

[10] For an excellent and detailed discussion of the job classification and incentive issues, *see* Jack Stieber, *The Steel Industry Wage Structure: A Study of the Joint Union-Management Job Evaluation Program in the Basic Steel Industry* (1959).

[11] These decisions are collected in Herbert L. Sherman, Jr., *Arbitration of the Steel Wage Structure: Guides, Principles and Framework for the Settlement of Job Description and Classification Disputes and Related Problems* (1961).

then subsequently adopted by additional smaller so-called "me too" Steelworker-represented companies. As Dick Mittenthal has noted:

> [This] gave arbitration a critical role in steel labor relations. Because the CBAs were written in general language which could more easily be embraced by the industry as a whole, there was ambiguity. And there was a need to apply this general language to concrete problems. All of that was left to the grievance procedure and, absent agreement by the parties, to arbitration…. And predictably, there were far more cases arbitrated in steel than in other basic industries. [12]

A quick glance at BNA's Labor Arbitration Report volumes in the 1950s shows a heavy concentration of Steelworker decisions, the largest number of which are U.S. Steel cases. Starting in 1950, the Steelworkers contracted with a publishing firm, Pike and Fischer, to review all steel arbitration awards and to summarize, digest, and publish those Pike and Fischer independently deemed noteworthy. Until sometime in the early 1990s, Pike and Fischer issued a monthly bulletin containing the selected awards and annually updated its digest. At the Steelworkers' request, the Pike and Fischer editors also prepared a Steelworkers Handbook on Arbitration Decisions in 1960. The third and final edition was published in 1981. This hornbook was based on the published awards and was designed to be used by union representatives and advocates, but it also proved useful for management personnel and arbitrators.

This reflected the importance placed on arbitration precedent in the steel industry—not just at a single company. And there was a clear pecking order. As Mittenthal writes: "The awards of Sylvester Garrett at United States Steel and Ralph Seward at Bethlehem Steel, extraordinary men with long service in this industry, were given special consideration." [13]

The clearance procedure instituted by Garrett was invaluable when the Board dealt with such difficult and important issues as local working conditions (which were seen by companies as infringing on management rights) and incentives, both major sticking points for the parties. The Board resolved many issues that the parties had not been able to work out in negotiations—not through interest arbitration, but by deciding grievances when the contract, due to lack of agreement, was silent or ambiguous. Garrett, whom Dick Mittenthal—himself a giant in our profession—described in his 2008 memoir as "in my opinion the most talented arbitrator the profession has produced," [14] expounded later:

> So when people talk about an arbitrator not *adding* to a contract, I have to laugh. I didn't *alter* their agreement, I didn't *change* anything in their agreement, but my numerous interpretations certainly *added* detailed meaning to their agreement. And they knew it and wanted it that way, if we can judge retrospectively. And I have a

[12] Richard Mittenthal, *A View from the Middle of the Valley* 58 (2008).
[13] *Id.* at 59.
[14] *Id.*

> feeling that that word "add"—which is in the boiler-plate phrase which typically limits the jurisdiction of an arbitrator—is perhaps mischievous. At least it may carry a connotation which is less than helpful. Any meaningful interpretive process—judicial or otherwise—inevitably "adds" something to an agreement in the literal sense of that word. [15]

Ben Fischer, long-time director of the Steelworkers Contract Administration Department, addressing the Academy in 1976, stated:

> The role arbitration [in the steel industry] has played during a period of nearly 30 years must be viewed as constructive, if not decisive. It is difficult to estimate the degree to which relaxation of many tensions in collective bargaining relationships has been a by-product of faith in the role of arbitrators. I suspect that many collective bargaining problems and issues have been more or less put to rest or made manageable because arbitrators could be depended upon to make equitable, practical, and competent decisions. Language which might otherwise be fraught with potential perils has been agreed to over the years because the parties were willing to leave interpretation of general provisions to the arbitration process, reasonably confident that common sense would prevail. [16]

Clearly, Garrett alone could not handle all the U.S. Steel cases appealed to arbitration. The contract allowed the chair, in consultation with the parties, to employ one or more assistants "to analyze cases, conduct hearings and recommend decisions." Special arbitrators had been used from time to time on an ad hoc basis to help the Board keep up with its caseload, but starting around 1960, Garrett began to hire a number of full-time assistants who in essence were brought onto the Board as apprentice arbitrators. At Bethlehem, Ralph Seward did the same thing, and some other permanent steel company umpires also utilized assistants.

Among the early assistants at the U.S. Steel Board were Clare ("Mick") McDermott, Alfred Dybeck, and Edward McDaniel. Dybeck ultimately would succeed Garrett and serve as Board chair from 1979 through 1996, after being elevated to associate chair and assisting Garrett in reviewing drafts by the other arbitrators. As the other early assistants left the Board and the caseload continued to grow, a second generation of assistants was hired in the mid-to-late 1970s. These included Helen Witt, James Beilstein, and myself, and somewhat later David Petersen and Elizabeth Neumeier. At times, additional arbitrators with vastly different levels of experience were utilized on an ad hoc basis because of the sheer number of cases. Some were deemed sufficiently qualified to be assigned to any case, others only to more routine discharge and discipline cases or simple contract disputes such as

[15] Garrett Interview, *supra* note 8, at 14.
[16] Ben Fischer, "Updating Arbitration," in *Arbitration of Interest Disputes, Proceedings of the 26th Annual Meeting, National Academy of Arbitrators* 62 (Barbara D. Dennis & Gerald G. Sommers eds. 1973).

overtime assignments. Both Garrett and Dybeck, with the parties' full support, sought out both women and African Americans to serve as assistants and ad hoc arbitrators.

I would like briefly to describe what it was like being an assistant or associate chair, positions I served in from 1977 to 1990. We were retained, usually on three-year contracts, at a fixed salary. We were provided office space and secretarial help at the Board's offices in Pittsburgh. We were given extensive tours of steelmaking facilities from coke ovens to finished product. We did not need to worry about having enough work. Indeed, even when there were as many as five assistants working at the Board, they could not always keep up with the caseload, which in some years was as high as 700. After a year or two at the Board we were allowed to handle a limited number of outside cases for other parties, which gave us the opportunity to develop broader acceptability. The cachet of being part of Garrett's, and later Dybeck's, "stable" gave us a definite leg up. We constantly discussed our cases and experiences. Many of us became good friends. If Garrett, or later Dybeck, was in town, he frequently corralled the others in the office and took us out to lunch. We learned much more than we realized at those convivial lunches. (That was back when cocktails still were consumed at lunch. Postprandial productivity suffered as a consequence.)

Until sometime in the 1990s, assistants typically were scheduled once a month for four consecutive days of hearing at or near the location of one of the company's plants, which at one time ranged from New England to California, although they were concentrated in what now is called the Rust Belt—from Philadelphia west through Pittsburgh and Cleveland to Gary and Chicago and south to Birmingham. (I should add that until the bottom fell out of the steel industry in the 1980s, we flew first class. Garrett observed that top Company and Union officials did that, and it would be unbecoming for us not to do so.) We might hear as many as eight cases in those four days—many without transcripts. It was grueling, but exciting. The parties provided prehearing briefs with copies of the grievance records. Post-hearing briefs were extremely rare. At one time—alas, no longer—it was not uncommon to socialize with the advocates you were spending the week with. The Company was represented by arbitration attorneys from headquarters in Pittsburgh. The Union advocates almost always were local staff representatives, not lawyers.

When I heard my first cases, I was in my early 30s—and looked much younger, or so I thought. Some of the participants at the hearings must have wondered what I was doing deciding cases that were of great import to them. At least at the outset, I may have had little credibility in my own right. But what I did have was the institutional credibility of the Board of Arbitration. Everyone knew that the assistants were carefully selected by the Board chair and top party representatives and that every decision issued by the Board had to be reviewed and approved by the chair.

Garrett did not encourage discussion of a case before I drafted an opinion, but he would offer advice on how to improve the draft and invaluable insight into what the case really was about. He also would discuss the relevant precedents—most of which he had authored. Sometimes, not often, the result needed to be changed. Always there was praise for what I had done well and encouragement. I got the same later from Al Dybeck. I could not have asked for two better mentors and leaders.

There was one other aspect of our apprenticeship that I am not aware existed anywhere else. Earlier I discussed the clearance or review system instituted by Garrett back in 1952. Draft Board awards were circulated to the parties, and not infrequently one or the other of the party representatives would ask to discuss a draft decision. (Up until the late 1970s, even discharge and discipline cases were handled in this fashion, although it then was decided that discussing such cases was too problematic in terms of possible allegations of collusion.) Periodically, review sessions were held in the chair's office. Garrett or Dybeck, of course, would handle discussion of their own decisions and also those of the ad hoc arbitrators, but the assistants individually were called in and expected to fend for themselves when their cases were up for discussion. The party representatives were not shy about questioning the accuracy or rationale of a draft they disagreed with. I cannot say this was a pleasant experience, but it honed my ability to think on my feet. More important, it spurred me on to write the best draft decision I could, in part because I knew I might have to defend it in one of those sessions. If it looked like the discussion was becoming too uncomfortable, Garrett or Dybeck usually would step in and bring the discussion to a close, indicating there could be no other sound result than what I had reached in my decision, although perhaps certain findings or language might best be excised or revised. Almost never was the bottom line changed. That was not the purpose of this review system.

The steel industry in the United States today is substantially diminished in relative size and importance in contrast to what it once was. (In 1955 U.S. Steel was the second largest private employer in the country with almost 270,000 employees. As of December 31, 2019, its domestic workforce was about 17,000.[17]) Nonetheless, it remains an important and vital part of our manufacturing economy. As the industry has changed, so have the "hot" issues submitted to arbitration and, indeed, the operation of the Board itself. Job security issues long have been a primary focus of collective bargaining in steel and other manufacturing industries. When domestic steel production underwent drastic reductions in the 1980s, in part because of cheaper imports, the union placed primary emphasis on reining in subcontracting, particularly of maintenance and repair or reconstruction work done both inside and outside the plant.

Back in 1951, when the contract was silent on subcontracting, Garrett issued a seminal decision holding that management's right to contract out work was subject not only to its obligation not to discriminate against the Union but also to an implied obligation under the recognition clause of the agreement to "refrain from arbitrarily or unreasonably reducing the scope of the bargaining unit."[18] Garrett stated:

> What is arbitrary or unreasonable in this regard is a practical question which cannot be determined in a vacuum. The group of jobs which constitute a bargaining

[17] *See* Douglas A. McIntyre, "America's Biggest Companies, Then and Now (1955 to 2010)," Sep. 21, 2010, updated Mar. 21, 2020, https://247wallst.com/investing/2010/09/21/americas-biggest-companies-then-and-now-1955-to-2010/; U.S. Steel Corp. 2019 Annual Report (Form 10-K), at 43.

[18] National Tube Co., Case No. N-159, II Steel Arb. 777, 779 (Garrett 1951).

> unit is not static and cannot be. Certain expansions, contractions, and modifications of the total number of jobs within the defined bargaining unit are normal, expectable and essential to proper conduct of the enterprise. Recognition of the Union for purposes of bargaining does not imply of itself any deviation from this generally recognized principle. The question in this case, then, is simply whether the Company's action . . . [in contracting out work] can be justified on the basis of all relevant evidence as a normal and reasonable Management action in arranging for the conduct of work at the Plant. [19]

Contracting-out disputes in the steel industry continued to be decided on a case-by-case basis under the principles set forth in that decision, as well as parallel decisions by arbitrators at other steel companies, until 1963. Then the parties adopted the first set of provisions expressly addressing contracting out. Those provisions dealt only with work performed by contractors within a plant, but in a preface the parties agreed that they had "existing rights and obligations with respect to various types of contracting out." Those implied rights and obligations remained the arbitral touchstone for contracting-out disputes over work performed outside the plant and other contracting-out issues not specifically covered in the agreement.

In the early 1980s, the Union filed a huge number of grievances as it saw its jobs dwindling together with an increased use of contractors by the Company in an effort to reduce costs and remain competitive. In 1986—by which time industry-wide bargaining had ended [20]—the union succeeded in negotiating considerably stronger and more comprehensive protection against subcontracting with all major producers other than U.S. Steel. Following a six-month work stoppage, the U.S. Steel parties reached a settlement with the assistance of then-former Board Chair Garrett, which included most of the provisions sought by the Union. [21] These new contracting-out provisions were extremely detailed, running to multiple pages of the contract, and spawned many grievances that filled much of the Board's docket over the next 15 years.

Among the changes was the institution of an expedited procedure designed to permit arbitrations to be scheduled, heard, and decided—when possible—before the work in dispute was performed. At some other steel companies where this procedure was invoked relatively infrequently, it worked more or less as intended. At U.S. Steel, however, the sheer volume of expedited appeals soon overwhelmed the Board's ability to process these cases in strict accordance with the contract. Moreover, because of the time constraints, these expedited cases—which constituted the majority of contracting-out disputes—were excluded from the clearance system that had proved beneficial to the parties and the Board, even though some were among

[19] *Id.*

[20] The Experimental Negotiating Agreement, in effect from 1974 to 1984, under which the industry and the Union agreed to use interest arbitration in the event they were unable to reach an agreement, also had ended.

[21] On its part, the Company obtained the Union's agreement to specified manning reductions, which in some cases came before Board arbitrators for final determination.

the most important cases to the parties and might have involved significant interpretive issues.

By the time the parties negotiated their next agreement in 1991, there were some 8,000 grievances pending arbitration. While certain types of contracting-out disputes were heard expeditiously because the agreement required a decision before the Company could contract out the work, other contracting-out matters languished indefinitely. Moreover, non-contracting-out grievances, except for discipline and discharge cases, were so far back in the pecking order that—as one former top Company executive later put it to me—there was little hope that they would be heard while the issues raised were still relevant to anyone.

In an effort to alleviate this situation, the parties implemented two changes to the arbitration process in 1991. They adopted an experimental grievance screening procedure under which the parties could agree to present a grievance record to a designated screening arbitrator with a brief explanation of their respective positions. The screening arbitrator then would announce, in effect, an advisory bench decision that had no precedential value. The parties were not required to follow the recommendation, and if the grievance proceeded to regular arbitration, it was to be heard by a different arbitrator. Obviously, this was not designed for important cases, but it placed a premium on the credibility of the screening arbitrator; so it was no surprise that Garrett was chosen for the job. The parties also hired Joseph Sharnoff, who had substantial experience arbitrating cases at Bethlehem Steel, to assist Chair Dybeck in processing contracting-out cases at the Board. Both these mechanisms were relatively short-lived, but they reflected the parties' ability and desire to adapt the arbitration process to deal with exigent circumstances.

In 2003, after the bankruptcies of Bethlehem and several other major steel producers, U.S. Steel acquired the assets of National Steel Corporation. In order to obtain those plants in bankruptcy, the Company had to reach a new collective bargaining agreement. The Union already had negotiated a considerably revised contract with ISG, a firm that purchased Bethlehem in bankruptcy as well as the assets of other liquidated steel companies. This ISG contract became the basis, with some modifications, for the 2003 U.S. Steel agreement. Major changes affecting local working conditions, job classification, and incentives significantly reduced grievances on those issues, but new contracting-out provisions kept Board arbitrators busy for several years.

In 2008—just before the great recession—the parties entered into a new contract in which, on an experimental basis, the contracting-out provisions of the contract were suspended in return for established base force manning levels and substantial overtime opportunities for maintenance workers. The parties seem to have agreed they were spending too much time, effort, and money on contracting-out disputes, and that there had to be a better way to achieve their respective goals. Notably, they also included provisions for utilizing interest arbitration—on a final offer basis—to resolve disputes as to whether and to what extent the agreed base force manning levels should be increased during the term of the contract and over competing layoff minimization plans to be implemented prior to layoff of employees.

The parties' collective bargaining relationship, including the use of arbitration, clearly has evolved and adapted to changing circumstances.

Today they have a notably more cooperative relationship—which of course makes sense in the context of the changes that have transformed the industry in recent decades.

As a result of this evolution and other changes in the industry, the Board's workload has been reduced, although arbitration still plays an important role in the parties' relationship. Since 1997, there have been no assistants employed at the Board. The Chair has been assisted by a number of experienced arbitrators—there are now two, although there have been as many as five—whom the parties agree to use on a year-to-year basis to hear cases on up to two days a month and to recommend decisions.

Chapter 8

LABOUR ARBITRATION IN CANADA AND CANADIANS IN THE NAA

Kenneth P. Swan

Labour Arbitration in Canada

Introduction

Readers of the collection of the Academy's wisdom prepared for its fiftieth anniversary could be forgiven for thinking that labour arbitration (although not spelled that way in the text) north of the "world's longest undefended border," as we then still innocently supposed the dividing line between our countries to be, was much the same as labor arbitration (spelled that way) south of that line.[1] The Index to *NAA: Fifty Years in the World of Work*[2] indicates there are references to arbitration and arbitrators in Canada on only three pages.

On page 15, the reader would have learned that Canada had established a regime similar to the Wagner Act by a wartime order-in-council, later enacted by statute in 1948, but that the main differences were that many Canadian jurisdictions had established arbitration as a mandatory process for resolving disputes arising from a collective agreement, and that the earliest arbitrators were not industrial relations specialists or lawyers but retired or even active judges.

On pages 36 and 37, a paragraph in the text and a footnote discussed the membership of leading Canadians in the NAA beginning in 1955, but added little more of substance apart from an observation quoted from a 1991 *Chronicle* article to the effect that, "as a general statement … grievance arbitration in Canada is essentially the same as in the U.S.A." This general statement is the more remarkable when considered against the complete article, the contents of which it really does not reflect.[3] A footnoted reference to "one of the most concise explanations of the Canadian arbitration system,"

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[1] This contribution is written unapologetically in "Canadian." While I have worked around some usages to avoid perplexing U.S. colleagues, changing the spelling of "labour" would require the renaming of dozens of statutes, the tribunals established under them, and the officials who administer them. Where possible, I have omitted multiple citations to Canadian sources apart from the official reports, and included citations to CanLII, a free public collection of judicial and tribunal decisions, as well as statutes and other material. While its coverage is not universal, I have included all available citations to that source as they will be more readily available for U.S. readers at www.canlii.org.

[2] Gladys W. Gruenberg, Joyce M. Najita & Dennis R. Nolan, *National Academy of Arbitrators: Fifty Years in the World of Work* 425 (1997), a history of the Academy's first half century.

[3] McLaren, R.H., "Grievance Arbitration in Canada: *Vive la différence*," *The Chronicle*, October 1991, at 4. I have corrected the title as printed to put the accent in the correct place. Many thanks to Katie Griffin at the NAA Operations Centre for finding this article and certain demographic data for me.

a contribution by H.D. "Bus" Woods to the 1968 *Proceedings,* [4] omits to note that Woods described a system with many differences from the U.S. model.

Woods, a formidable presence in Canadian industrial relations, started with his own observation of "the similarity of the two systems," but his second paragraph began "a closer examination reveals very important differences." This chapter will explore those differences, but it will also relate how professionals with similar skills and training operate two different structures for dispute resolution but often reach similar conclusions and apply similar principles. Since *Fifty Years* included little of substance on this subject, I begin at the beginning.

The space and time available for this discussion restrict the level of detail possible. To make the chapter more manageable, I have engaged in generalizations and impressionistic assertions that should not be encouraged elsewhere but are essential here. My intention was to introduce U.S. readers to the intricacies of arbitration and arbitrators in Canada, not to attempt a comparison of all aspects of the two systems, and certainly not to present a definitive description of arbitration in Canada. That is a task for someone with much more time and space.

The Constitutional Model

Given that the Canadian Constitution has purported since 1867 to assign residual legislative authority to the federal level rather than to the provinces, it is somewhat surprising that so small a share of legislative influence over labour relations has been assumed by the Parliament of Canada. The reason is a generally discredited constitutional decision in 1925 of the then highest court of appeal for Canada, the Judicial Committee of the Privy Council of the United Kingdom, the details of which can be ignored here. As Woods notes:

> Relatively speaking, the American system is centralized under federal rather than state authority. The reverse is true for Canada, where each province has jurisdiction over practically the whole of the mining, industrial, and commercial sectors of the economy, leaving interprovincial and international businesses such as telecommunications, railway, shipping, air transport, and a few other areas to the federal authority.
>
> Each province has a complete paraphernalia of agencies such as labor relations boards and conciliation or mediation services. Of course, each has full constitutional authority to legislate within its own jurisdiction. It might be expected that there would be a confusing hodge-podge of public policies; and to a certain extent this is true. But, for reasons which can only be explained by a study in depth of the evolution of policy for about 70 years, there is a Canadian pattern which, while not universally

[4] H.D. Woods, "Public Policy and Grievance Arbitration in Canada," in *Developments in American and Foreign Arbitration, Proceedings of the 21st Annual Meeting, National Academy of Arbitrators* 19 (Charles M. Rehmus ed. 1968).

applied across the country, is distinctly different from the American pattern. [5]

In the intervening six decades, much the same patterns have been preserved, although the contents of those patterns have altered, in part through legislative amendment but also through judicial intervention.

Woods restricted his analysis to the issues arising from grievance arbitration, and I shall do the same. He noted that the singular feature of the Canadian arbitration models was that grievance arbitration was mandatory in almost all jurisdictions (now all) [6] as a part of the trade-off of an established and enforceable dispute resolution mechanism for the "peace obligation," the prohibition of industrial action during the course of a collective agreement.

While earlier commentators may not have foreseen the impact of this difference, it will become clear that the mandatory nature of grievance arbitration has been a significant factor in leading arbitration in Canada along a different path than in the US. The statutory nature of grievance arbitration in Canada has produced a system influenced by the public nature of the process. As will appear, this difference has been reflected in a sense that arbitrators been given an inherent jurisdiction, and that there is a firm distinction between the jurisdiction of arbitrators and the jurisdiction of the courts, with priority to arbitration in disputes arising from a collective agreement.

By judicial intervention, a doctrine has arisen that assigns jurisdiction to arbitration in any dispute arising out a collective agreement, even if a court might have a basis for a claim of shared jurisdiction. While this approach sometimes means that an employee will have no remedy at all if the first choice of forum was faulty, the cumulative effect of the jurisprudence is to assign broad authority to arbitration to resolve workplace disputes.

Partly through judicial decisions and partly through statutory amendment, arbitrators have also accumulated a broad jurisdiction to interpret and apply "employment related" statutes, as well as the general law, including common law and equitable remedies, again to the exclusion of the courts, although sometimes with a shared jurisdiction with other administrative tribunals.

Finally, the public nature of grievance arbitration means that awards are required to be filed with government authorities and are then available to the public. Far from being a private process as in the U.S., grievance arbitration in Canada is open and public, and is subject to increasing pressure to remain transparent, through the application of "open court" principles.

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[5] *Id.* at 20 -21. There are thus eleven private sector arbitration regimes. The northern territories, Yukon, Northwest Territories and Nunavut, are covered for collective bargaining purposes by the federal legislation. The Supreme Court of Canada approved this application in Canada Labour Relations Board et al. v. Yellowknife, [1977] 2 SCR 729, 1977 CanLII 230 (SCC). Some of the underlying statutory provisions on which this judgment is based have been amended, but none of the territories has enacted collective bargaining legislation, and the Canada Labour Code still contains language that permits its application.

[6] Only Saskatchewan did not, at the time of both the Woods and the McLaren articles, have a statutory requirement to resolve collective agreement disputes by arbitration. That has since been amended.

These developments have created, in my view, a very different arbitration process in Canada from the U.S. model. Those differences, which operate at the structural level, are explored in greater detail below.

Arbitral Authority in the Canadian Model

The expansion of arbitral authority took some time to emerge from a relatively conservative application of the law by the judges, serving and retired, who were Canada's original arbitrators. Once the federal legislation governing the appointment of judges was amended to limit outside activities,[7] the development of a profession of labour arbitration began. Among the original members were academics, and lawyers of an academic bent, who began to push the boundaries to create more room for innovation in dispute resolution.

The background to the development of a statutory model of arbitration was that, in English common law, a collective agreement was unenforceable at law; the only remedy for a breach was to strike or lock out. This doctrine was imported to Canada in 1931 in another dubious decision of the Privy Council, which again need not be dignified by further details. The adoption of a statutory model circumvented the common law approach but required elaboration to discover the extent of the new arbitral authority.

While there are many examples, the process is best illustrated by the *Polymer* case.[8] An illegal strike had taken place, as was determined by a board of arbitration, and the employer sought damages. The union objected that arbitrators had no jurisdiction to award damages in such circumstances, essentially because the collective agreement did not provide for such a remedy. The board of arbitration, chaired by Professor Bora Laskin, later an NAA member and ultimately Chief Justice of Canada, noted that this was not a question of jurisdiction, but of what authority an arbitrator acting within jurisdiction had to remedy a breach of the collective agreement.

The majority award included the following analysis of the effect of the statutory mandate to resolve grievances by arbitration:

> As a matter of history, collective agreements in Canada had no legal force in their own right until the advent of compulsory collective bargaining legislation. Our Courts refused to assume original jurisdiction for their enforcement and placed them outside of the legal framework within which contractual obligations of individuals were administered. The legislation, which in the context of encouragement to collective bargaining sought stability in employer-employee relations, envisaged arbitration through a mutually accepted tribunal as a built-in device for ensuring the realization of the rights and

[7] For constitutional reasons, superior court judges in Canadian provinces are appointed and paid by the federal government, while the provinces establish, fund and maintain the courts in which they perform their duties. The terms of the appointment are established by federal legislation, and an amendment to restrict outside paid activities ended most participation by judges in arbitration.

[8] Polymer Corp. v. Oil, Chemical & Atomic Workers (Collective Agreement Grievance), [1959] O.L.A.A. No. 1, 10 L.A.C. 51.

> enforcement of the obligations which were the products of successful negotiation. Original jurisdiction without right of appeal was vested in boards of arbitration under legislative and consensual prescriptions for finality and for binding determinations. In short, boards of arbitration were entrusted with a duty of effective adjudication differing in no way, save perhaps in the greater responsibility conferred upon them, from the adjudicative authority exercised by the ordinary Courts in civil cases of breach of contract. That the adjudication was intended to be remedial as well as declaratory could hardly be doubted. Expeditious settlement of grievances, without undue formality and without excessive cost, was no less a key to successful collective bargaining in day-to-day administration of collective agreements than the successful negotiation of the agreements in the first place. Favourable settlement where an employee was aggrieved meant not a formal abstract declaration of his rights but affirmative relief to give him his due according to the rights and obligations of the collective agreement. [9]

The majority went on to hold that it had authority to provide a remedy for any breach of the collective agreement, since there could be no right without a remedy as a matter of law. This outcome directly contradicted an earlier decision in another case by one of the "judge" arbitrators. Eventually, the award was upheld by the Supreme Court of Canada. [10] It is the reasoning, rather than the outcome, that is remarkable, since it carved out a place for arbitration far larger than the parties could have achieved without the statutory mandate.

Two decades later, the Supreme Court of Canada cemented the notion of exclusive arbitral authority in a case that came to it from the courts, and not from an arbitrator. In *St. Anne Nackawick Pulp & Paper v. CPU,* [11] a court faced with an action for damages for an unlawful strike, that is one contrary to the "peace obligation" forbidding strikes during the currency of a collective agreement, doubted its jurisdiction to determine damages arising from a breach of an agreement. The court declined jurisdiction, was upheld on appeal, and the Supreme Court ultimately upheld that decision.

The Court noted that the unlawful strike was both a breach of the collective agreement and of a statute, the labour relations legislation which required the collective agreement provision. It also noted that a court had issued an interlocutory injunction to end the strike. The decision concluded that a court had jurisdiction to issue such an injunction to ensure that the law was obeyed, but that it had no jurisdiction to entertain an action for damages:

> What is left is an attitude of judicial deference to the arbitration process. . . . It is based on the idea that if the courts are available to the parties as an alternative forum, violence

[9] At paragraph 9 of O.L.A.A.
[10] Imbleau v. Laskin, [1962] S.C.R. 338**,** 1962 CanLII 3.
[11] [1986] 1 SCR 704, 1986 CanLII 71 (SCC).

> is done to a comprehensive statutory scheme designed to govern all aspects of the relationship of the parties in a labour relations setting. Arbitration ... is an integral part of that scheme, and is clearly the forum preferred by the legislature for resolution of disputes arising under collective agreements. From the foregoing authorities, it might be said, therefore, that the law has so evolved that it is appropriate to hold that the grievance and arbitration procedures provided for by the Act and embodied by legislative prescription in the terms of a collective agreement provide the exclusive recourse open to parties to the collective agreement for its enforcement. [12]

The courts were not always so receptive to arbitral expansiveness. In the *Port Arthur Shipbuilding* decision, [13] the Supreme Court of Canada upheld a lower court decision overturning an arbitration award in which employees had given the employer just cause for discipline, but the discharge imposed was found to be excessive, and a suspension should be substituted. The result was that every jurisdiction in Canada amended the arbitration provisions in the labour relations statute to overcome the result of the Court's decision. While the precise language differs, the Ontario provision is illustrative:

> (17) Where an arbitrator or arbitration board determines that an employee has been discharged or otherwise disciplined by an employer for cause and the collective agreement does not contain a specific penalty for the infraction that is the subject-matter of the arbitration, the arbitrator or arbitration board may substitute such other penalty for the discharge or discipline as to the arbitrator or arbitration board seems just and reasonable in all the circumstances. [14]

This interaction between statutory amendment and judicial determination is a significant feature of the development of arbitral authority in Canada. Sometimes legislatures have acted to reinforce a judicial decision, sometimes to overturn one.

Perhaps the high water mark of the Supreme Court's doctrine of exclusive arbitral authority is the *Weber v. Ontario Hydro* case. [15] An employee was suspected of malingering while on sick leave, and private investigators were retained, who gained access to the employee's home on a pretext. He was disciplined and his sick pay was terminated. His union filed multiple grievances, but he also started an action in the courts claiming damages for several torts, including trespass, and also under the Canadian Charter of Rights and Freedoms, our constitutional "bill of rights" which

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[12] *Id.* at paragraph 20, CanLII.
[13] Port Arthur Shipbuilding Co. v. Arthurs, [1969] S.C.R. 85, 1968 CanLII 29. The arbitrator, Harry Arthurs, is another towering presence in Canadian labour law. He was a member of the NAA from 1967 to 1980.
[14] Statutes of Ontario, 1995, c. 1, Sched. A, s. 48 (17).
[15] [1995] 2 SCR 929, 1995 CanLII 108.

expressly provides for remedies to be determined by a "court of competent jurisdiction."

The employer moved to strike out the court proceedings.

The Supreme Court decided unanimously that the tort proceedings were properly within the exclusive jurisdiction of an arbitrator, and that the arbitration proceedings had been settled. Therefore, the court proceedings were without jurisdiction and were struck out. The Court considered that the available jurisdictional options were total concurrent jurisdiction between the courts and arbitration, overlapping jurisdictions where matters beyond the usual scope of arbitration could be taken up by the courts, or exclusive jurisdiction for arbitrators of collective agreement disputes. The Court adopted the exclusive jurisdiction model:

> The final alternative is to accept that if the difference between the parties arises from the collective agreement, the claimant must proceed by arbitration and the courts have no power to entertain an action in respect of that dispute. There is no overlapping jurisdiction.
>
> On this approach, the task of the judge or arbitrator determining the appropriate forum for the proceedings centres on whether the dispute or difference between the parties arises out of the collective agreement. Two elements must be considered: the dispute and the ambit of the collective agreement.
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> In considering the dispute, the decision-maker must attempt to define its "essential character" …. The fact that the parties are employer and employee may not be determinative. Similarly, the place of the conduct giving rise to the dispute may not be conclusive; matters arising from the collective agreement may occur off the workplace and conversely, not everything that happens on the workplace may arise from the collective agreement…. Sometimes the time when the claim originated may be important…. In the majority of cases the nature of the dispute will be clear; either it had to do with the collective agreement or it did not. Some cases, however, may be less than obvious. The question in each case is whether the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement. [16]

A slim majority of the Court also held that arbitrators were, like other statutory tribunals created by a legislature or Parliament, capable of being "courts of competent jurisdiction" to grant remedies under the Charter "provided they have jurisdiction over the parties and the subject matter of the dispute and are empowered to make the orders sought."

[16] *Id.* at paragraphs 50-52, CanLII.

Needless to say, so broad an assignment of jurisdiction to arbitrators frays at the edges from time to time, but the *Weber* decision is still central to the authority of arbitrators to engage in a broad range of dispute resolution.

Interpretation and Application of Statutes

In the meantime, the courts considered the authority of arbitrators to interpret statutory law. The conservative approach to arbitral authority would have limited arbitrators to the four corners of the collective agreement, but the existence of labour standards legislation, and later other legislation bearing on the employment relationship and thus the interpretation of collective agreement provisions, began to lead arbitrators to extend their authority to consideration of the meaning of those statutes. In *McLeod v. Egan*,[17] the Supreme Court of Canada overturned an arbitration award which applied employment standards legislation relating to maximum hours of work, which could in some cases be exceeded with the consent of the employee or the employee's agent. The majority decision found that the arbitrator had erred in law on the face of the award in finding that the union had consented to excess overtime on the employee's behalf by entering into a management rights clause that broadly granted the employer the right to schedule work. Bora Laskin, by this time Chief Justice of Canada, in a concurring decision, agreed with the outcome, but granted some grudging authority of arbitrators to interpret statutes:

> No doubt, a statute like a collective agreement or any other document may present difficulties of construction, may be ambiguous and may lend itself to two different constructions neither of which may be thought to be unreasonable. If that be the case, it nonetheless lies with the Court, and ultimately with this Court, to determine what meaning the statute should bear. That is not to say that an arbitrator, in the course of his duty, should refrain from construing a statute which is involved in the issues that have been brought before him. In my opinion, he must construe, but at the risk of having his construction set aside by a Court as being wrong.

This decision led to a certain amount of confusion thereafter as to exactly what an arbitrator was to do with a statute when it related directly to the issues to be arbitrated. The solution was found again in statutory reform, this time as part of an extensive overhaul of the British Columbia legislation in 1973. A New Democratic Party[18] government had replaced a long serving and much more conservative government, and with the encouragement of its union supporters set out to replace the legislation the previous government had enacted to govern collective bargaining. The replacement was a "root and branch" operation, affecting all aspects of the statute, but the provisions

[17] [1975] 1 S.C.R. 517, [1975] 1 R.C.S. 517, 1974 CanLII 12.

[18] To avoid the risk of offence, I will explain simply that the NDP is a political party at the left of the Canadian political spectrum, at times with considerable union support. The election of an NDP government has led to progressive amendments to labour statutes in other provinces as well, often reversed in whole or in part when a more conservative government replaced it.

relating to arbitration were particularly interesting, as they purported to codify the best of the emerging jurisprudence on arbitral authority while eliminating the worst. [19]

The issue of statutory interpretation was dealt with in a new provision:

> For the purposes set out in section 82, an arbitration board has the authority necessary to provide a final and conclusive settlement of a dispute arising under a collective agreement, and without limitation, may
>
> …..
>
> (g) interpret and apply any Act intended to regulate the employment relationship of the persons bound by a collective agreement, even though the Act's provisions conflict with the terms of the collective agreement …. [20]

Similar provisions have been enacted in some, but not all, other provinces. Where there is no such provision, there does not seem to be a drastic change in the treatment of statutes. The provision seems to have been meant to be only an assurance that an arbitrator would be able to deal with the entirety of a dispute, not merely the collective agreement aspect of it. As will appear, the courts have themselves moved in the same direction, toward a "one-stop shopping" approach to grievance arbitration.

In the *Parry Sound* case, [21] arbitrator Paula Knopf, an NAA member and Vice-President in 2020-21, had disposed of a preliminary objection to jurisdiction in a situation where an employee was terminated immediately after returning from a pregnancy leave, but during her probationary period. The collective agreement provided that termination during a probationary period was not subject to the grievance and arbitration procedure. Human rights legislation and employment standards legislation prohibited, in different ways, discrimination on the basis of sex, including on the basis of pregnancy and taking pregnancy leave. The award rejected the argument that an arbitrator had to establish independent jurisdiction under the collective agreement to deal with the subject matter of the dispute before invoking the Ontario version of the provision quoted above.

A majority of the Supreme Court of Canada upheld the award, finding that the substantive rights and obligations of employment-related statutes are incorporated into collective agreements by the statutory provision, and that an arbitrator had an independent jurisdiction to interpret and apply the human rights legislation, even though a remedy might have been available through a human rights tribunal. Interpretation and

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[19] The architect of the new legislation was Paul Weiler, a professor at Osgoode Hall Law School in Toronto, who became adviser to the new government and the first Chair of the new Labour Relations Board, and later a visiting professor and then a permanent member of faculty at Harvard Law School. Weiler had been a prolific arbitrator in Ontario and was a member of the NAA from 1970 to 1984. The story of the amendments is set out in Paul Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (1980). Chapter 3 deals with the arbitration provisions.

[20] Now Labour Relations Code, RSBC 1996, c. 244, section 89(g).

[21] Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324 (O.P.S.E.U.), [2003] 2 S.C.R. 157, 2003 SCC 42 (CanLII).

application meant the authority to provide a remedy under the statute as well, an important factor since human rights legislation in Canada often includes individual remedies such as aggravated or punitive damages, and systemic remedies aimed at promoting human rights in the particular workplace.

But the Court appears to go further. It suggests that the statutory provision only reinforces what was stated in *McLeod v. Egan*[22] and that the existence of such a provision is not essential to the incorporation of employment-related statutes into the collective agreement. Subsequent decisions in lower courts and academic commentary reinforce this view.

Further complication of the principle established in *Parry Sound* resulted from a decision coming to the Court from Québec. Because matters of private law in that province are governed by a civil law model, arbitrators and the courts have drawn both procedural and substantive rules from the *Code civil du Québec*[23] rather than the common law principles applied in other provinces. In *Isidore Garon Ltd.*[24] and a companion case, the Court dealt with two arbitration awards under two separate collective agreements which considered, in the context of a business closure, two issues of the application of statutes. In question was the extent to which general provisions in the *Code civil* about the termination of an employment contract on reasonable notice, and more specific provisions in labour standards legislation, could be invoked to modify a provision in one of the two collective agreements (the other was silent on this point) limiting the right to notice of permanent lay-off.

The Court was split 4-3; the majority concluded that not every provision of general law was incorporated into collective agreements for arbitrators to apply, but only those "compatible" with the collective nature of the unionized workplace. The minority would have found that arbitrators had authority to apply any general law, subject only to the requirement in the *Code civil* and in the labour relations legislation that a collective agreement must comply with provisions relating to public order.

These developments were the subject of a discussion at the 2013 Vancouver Annual Meeting of the NAA, where it was compared with the *Pyett*[25] decision in the U.S. Supreme Court. Chapter 14 of that year's proceedings included a contribution by Randi H. Abramsky, NAA Toronto, who has arbitrated on both sides of the border and provided as a part of her discussion an excellent personal comparison of the practice of arbitration in each country, which has been extremely helpful in preparing this chapter.[26]

The role of the Supreme Court of Canada in the expansion of arbitral authority has also been the subject of discussion at NAA meetings. The 2008 Proceedings included an excellent review of the developments to that date by Professor Denis Nadeau of the University of Ottawa, which expands

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[22] *Supra* note 17.
[23] S.Q. 1991, c. 64.
[24] Isidore Garon ltée v. Tremblay; Fillion et Frères (1976) inc. v. Syndicat national des employés de garage du Québec inc., [2006] 1 SCR 27, 2006 SCC 2 (CanLII).
[25] 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009).
[26] Randi H. Abramsky, "The Adjudication of Statutory Claims: The Canadian Experience," in *Arbitration 2013: A Tale of Two Countries, Proceedings of the 66th Annual Meeting, National Academy of Arbitrators* 292, 309, 312 (Matthew M. Franckiewicz et al. eds. 2014).

significantly on subjects touched on above.[27] And the 2013 Proceedings provided the view from the other side in the Keynote Address of the then Chief Justice of Canada, Beverley McLachlin.[28]

Judicial Review

The other side of the coin of expanded jurisdiction though judicial action was the possibility of increased judicial scrutiny of the way arbitrators played with their new toys. Judicial review has always been a matter of concern for administrative decision makers, not least because of the unpredictability of how it might be exercised. Early legislative attempts to control judicial review in labour matters included the use of "privative clauses," statutory prohibitions on judicial review in any of its common law guises, which proved to be essentially useless against courts with a zeal to ensure that labour adjudication suited their views of the rule of law and justice, to such an extent that Bora Laskin, in his professorial role, wrote a 1952 article in the Canadian Bar Review subtitled *"*The Apparent Futility of Privative Clauses.*"*

Onto this rather messy beginning, the Supreme Court began to impose some discipline. Professor Nadeau, in his 2008 paper,[29] commented that writing a summary of that process was a daunting task. I propose here to provide a summary of his summary, more daunting still. I do so with brief reference to two cases discussed by Nadeau, and one that was decided after his paper was written. I then discuss the latest version of the Court's notion of deference, decided in 2019.

In the *New Brunswick Liquor Corporation* case,[30] the Court was dealing with a public sector labour relations board, not an arbitrator, and noted that the board had been assigned responsibility to interpret the statute under which it had been created. The Court rejected the notion that in interpreting a statute the board had to be held to a standard of correctness. It also rejected an approach to judicial review that divided a decision into preliminary or collateral matters, and treated them as essentially jurisdictional in nature, thus justifying the intervention of a court. Rather, the Court created a standard that resonated for years:

> Put another way, was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?

The "patently unreasonable" test was thus promulgated as the standard by which administrative decisions must be judged. It was applied to arbitration awards with various degrees of enthusiasm, although the *McLeod*

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[27] Denis Nadeau, "The Supreme Court of Canada and Grievance Arbitration: A Persistent Vision of Legal Integration," in *Arbitration 2008: U.S. and Canadian Arbitration: Same Problems, Different Approaches, Proceedings of the 61st Annual Meeting, National Academy of Arbitrators* 9 -13 (Patrick Halter, Paul D. Staudohar & Jerrilou Cossack eds. 2009).

[28] Beverley McLachlin, P.C., "Labour Arbitrators and the Courts: An Evolving Relationship," in *Arbitration 2013: A Tale of Two Countries, Proceedings of the 66th Annual Meeting, National Academy of Arbitrators* 35 (Matthew M. Franckiewicz et al. eds. 2014).

[29] *Supra* note 27.

[30] C.U.P.E. v. N.B. Liquor Corporation, [1979] 2 SCR 227, 1979 CanLII 23 (SCC).

v. Egan warning that if arbitrators were to interpret statutes, they might be held to a standard of correctness sometimes led to that more stringent test being applied to statutory interpretations, and even to "questions of law," a concept of considerable elasticity. Considerable attention was directed to the exceptions to the patently unreasonable test over the years.

This lasted until 2008, when the Court decided *Dunsmuir,*[31] another public service legislation case from New Brunswick, but this time involving a decision of a grievance adjudicator about an employee not covered by a collective agreement. The Court noted that three standards of review had been invoked: correctness, reasonableness, and patent unreasonableness, and that judicial review had been in a constant state of evolution over the years. The Court criticized the patently unreasonable standard on the basis that it would be unpalatable to require parties to accept an irrational decision because it was not irrational enough. The Court concluded that "reasonableness *simpliciter*" was the appropriate standard which, if met, would lead a court to defer to the decision.

It is interesting that the Court also set out factors which would assist in determining whether the reasonableness test would apply to any particular finding of a decision maker. The existence of a privative clause would be persuasive but not conclusive, because of the inherent jurisdiction of reviewing courts. A discrete, special administrative scheme in which the decision maker had particular expertise was another; notably, labour relations was the only example of such a scheme mentioned. Finally, the nature of the question being determined might lead to the application of the correctness standard, as where a question of law of central importance to the legal system and outside the special expertise was being answered, although determination of a question of law that did not achieve that standard would be dealt with on the reasonableness standard.

Two interesting developments in the Court's jurisprudence have arisen subsequent to the discussion at the 2008 NAA Annual Meeting. The first was *Nor-Man,*[32] a judicial review of an arbitration award that invoked the common-law or equitable remedy of estoppel, based on the union's long-standing acquiescence in an interpretation of the collective agreement that the arbitrator found to be wrong. The Manitoba Superior Court applied a reasonableness test; the appellate court applied a correctness test to the arbitrator's application of the principles of the general law. The Supreme Court unanimously concluded that reasonableness was the appropriate standard:

> [44] Common law and equitable doctrines emanate from the courts. But it hardly follows that arbitrators lack either the legal authority or the expertise required to adapt and apply them in a manner more appropriate to the arbitration of disputes and grievances in a labour relations context.

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[31] Dunsmuir v. New Brunswick, [2008] 1 SCR 190, 2008 SCC 9 (CanLII).

[32] Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals, [2011] 3 SCR 616, 2011 SCC 59 (CanLII). Paragraph references are to CanLII.

> [45] On the contrary, labour arbitrators are authorized by their broad statutory and contractual mandates — and well equipped by their expertise — to adapt the legal and equitable doctrines they find relevant within the contained sphere of arbitral creativity. To this end, they may properly develop doctrines and fashion remedies appropriate in their field, drawing inspiration from general legal principles, the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievances of which they are seized.

This decision would seem to establish a high-water mark for the independent authority of arbitrators to interpret and apply collective agreements in the context of the general law, both statutory and common law, with a generally free hand while enjoying deference from the courts. Of course, such a conclusion would be too simple, and would leave administrative law experts with little to do. To avoid such a vacuum, the Court has had one more shot at defining what reasonableness means, although not in a labour arbitration context.

At the end of 2019, the Court dealt with a decision of the Canadian Registrar of Citizenship, cancelling the citizenship status of a Canadian-born individual, in *Vavilov*.[33] The Court recognized that "*Dunsmuir*'s promise of simplicity and predictability in this respect has not been fully realized," and set out to provide more simplicity and predictability. Whether that noble aim was achieved has been the subject of much spilled ink and hot air ever since. The Court did add a delicious metaphor to administrative law, gleaned from earlier cases, that reasonableness review is not "a line-by-line treasure hunt for error." This is not the place to add to the commentary. I shall only venture the firmly held but here unsupported opinion that not much will change, for better or for worse, in relation to judicial review of arbitration awards.

The Weiler amendments to the British Columbia legislation described above[34] included a novel approach to review of an arbitration award. Section 98 of the legislation permits an arbitrator to refer any question of the interpretation of the legislation or an issue of labour relations policy to the Labour Relations Board for resolution. Section 99 provides for a party to seek review of an arbitration award by the Labour Relations Board on the basis that a party has been or may be denied a fair hearing, or that the award is inconsistent with the principles expressed or implied in the Labour Code or other labour statute. Finally, section 100 gives a residual jurisdiction directly to the Court of Appeal (not the superior courts) to resolve any question of general law "unrelated to a collective agreement, labour relations or related determinations of fact," and not assigned to the Labour Relations

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[33] Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 (CanLII). The back-story to this decision is fascinating, although having nothing to do with labour arbitration. The respondent Vavilov was the Canadian-born son of two deep-cover Soviet agents who came to Canada to establish an identity that they would later use when they moved to the U.S. to conduct espionage, at least until they were caught.
See https://www.nytimes.com/2019/12/19/world/canada/Alexander-Vavilov-canadian-citizenship.amp.html.

[34] *See supra* notes 19 and 20 and accompanying text.

Board under section 99. Other jurisdictions did not rush to adopt this approach, as they did many of the other Weiler reforms.

Public Nature of Labour Arbitration in Canada

A major consequence of the development of a statutory basis for arbitration is that the process is public, not private. Awards are required to be filed with an office or agency of the Ministry or Department of Labour of each jurisdiction, and they are completely public once that has taken place.

There have been at least three full-service commercial publishers of labour arbitration awards, offering access to all, or a substantial proportion of, the output of Canadian arbitrators over many decades. These services have offered various value-added features, such as electronic searches, digests or summaries, headnotes and keyword indexing, but essentially they reproduce the awards of arbitrators for consumption by the public, or at least that part of the public that has access to a subscription. CanLII, a free-access website, provides access to at least the more recent decisions of arbitrators in every jurisdiction. There are newsletters from unions, law firms, academics, and employer organizations providing a more targeted view of what arbitrators are writing and deciding. There are three major textbooks on labour arbitration, plus another on evidence and procedure in arbitration, all updated with varying degrees of attentiveness. This is augmented by a similar structure for reporting French-language awards from Québec, as well as a complementary analytical literature in French. A Canadian arbitrator thus must decide cases in public, for a wide audience.

While arbitrators have some regard for privacy concerns, whether personal privacy or the institutional interests of unions or employers, there are limits to the extent that such concerns can be implemented. The Supreme Court of Canada has developed an "open-court" doctrine that appears to apply to labour arbitration, although it is usually expressly followed only by public sector adjudicators, particularly in the federal sector. An example of the extent to which this doctrine has been internalized by tribunals is found in the recent *Olynik*[35] decision of an adjudicator in the federal public service tribunal. Even a plausible case for anonymization to avoid the possibility of personal danger because of internet activity was found insufficient in that case.

The interplay between privacy concerns and access to justice, including access to information about how justice is being dispensed, has still to be worked out in Canada. Arbitrators can choose their words carefully and can suppress some details without attracting censure from the courts, but privacy concerns still attract less attention than they deserve, in my view, particularly when awards can be searched on-line without charge.

Procedural Differences

There are other differences between the two countries, particularly at the procedural level. One of the most significant is the greater prevalence of mediation in Canada. To some extent this was propelled by arbitrators who recognized that a voluntary resolution was always more valuable that

[35] Olynik v. Canada Revenue Agency, 2020 FPSLREB 80 (CanLII).

one imposed from outside. In addition, however, several provinces have enacted provisions that permit mediation to take place without risk of losing jurisdiction if unsuccessful. The Ontario provision is typical:

> (14) An arbitrator or the chair of an arbitration board, as the case may be, may mediate the differences between the parties at any stage in the proceedings with the consent of the parties. If mediation is not successful, the arbitrator or arbitration board retains the power to determine the difference by arbitration. [36]

All provincial labour legislation and the federal statute as well include a list of procedural requirements and powers. Requirements typically include the obligation to file a copy of the award with the designated authority and may also provide time limits for the completion of an award following the hearing, with provisions for consent to extend those limits, and with processes for "encouraging" a tardy arbitrator to issue an award. Typically, however, an arbitrator does not lose jurisdiction for delay, and such a result would be counterproductive.

Authority to issue oral awards or awards without reasons at the request of a party is a common feature, with a requirement that reasons be provided thereafter. The authority to issue interim decisions and orders is also usual, sometimes with a limitation on certain kinds of orders, such as an order for reinstatement of a discharged employee pending arbitration.

Arbitral powers include such procedural matters as the power to require provision of particulars (details of more general allegations required to permit a party to respond) and produce documents, thus permitting a form of discovery. Control of the process includes authority to compel witnesses and require them to testify under oath or affirmation, and to administer oaths and affirmations, as well as to fix hearing dates and locations. More important are exemptions from the formality of judicial decision-making. Arbitrators typically have a discretion to accept and rely on evidence even where it would not be admissible in a court of law. A little-used provision permits an arbitrator to enter any premises where work is being done or people are employed, to inspect those premises, and to interrogate any person in relation to matters in dispute in the arbitration.

Arbitrators also are granted discretion to relieve against time limits or other procedural restrictions, on such terms as appear just. The discretion to substitute disciplinary penalties, and the authority to grant and assess damages have been discussed above.

Some provinces have adopted the British Columbia model described above and have given arbitrators instructions to determine the real substance of matters in dispute and not to be bound by a strict legal interpretation of the issues.

Quite apart from the statutory differences, there are other procedural differences among Canadian jurisdictions, as may also be the case among regions in the U.S.. In British Columbia, for example, the role of the Labour Relations Board in resolving issues of labour relations policy often leads to

[36] S.O. 1995, c. 1, Sched. A, s. 48 (14).

reliance by arbitrators on one or another of the Board's pronouncements, rather than following arbitral consensus. In Québec, there are more dramatic differences, quite apart from the language in which hearings are conducted and awards are written (hearings and awards in French are also a feature of the federal sector and New Brunswick, where French is an official language, and Ontario, where it has a more limited official status). I have referred to the role of the *Code civil du Québec*, which is perhaps more central than is the common law in the other provinces on both procedural and substantive matters. There is also a practice in disciplinary cases, seen nowhere else in Canada, for an employer to call the disciplined employee as one of its witnesses, often the first, thus permitting a kind of discovery or deposition of the grieving individual.

Canadians in the NAA

Personalities

Since the Canadian content in *NAA: Fifty Years in the World of Work* was mostly limited to a discussion of participation by Canadians in the NAA, I have devoted some of this chapter to an update on the personal aspects of NAA membership. I have referred above to the NAA affiliation of some of the individuals quoted or referred to, beginning with H.D. "Bus" Woods.[37] Woods was a formidable presence in Canadian Industrial Relations, formerly the Director of the Centre for Industrial Relations at McGill University, and later Dean of Arts and Sciences at the same institution. He was the Chair of the federal Task Force on Labour Relations, which reported in 1868. He was one of the first two Canadian members, joining in 1955 along with Jacob Finkelman, another stalwart. Woods was also the first Canadian President of the NAA, in 1976.

Many Canadian members have had distinguished records of service to the NAA, but the Presidency is, of course, the pinnacle of achievement. The second Canadian President was J.F.W. "Ted" Weatherill, in 1995. He was followed by Michel G. Picher in 2008 and Allen Ponak in 2015. As this is being written, President-Elect Susan L. Stewart is to assume the Presidency in 2021.

Bora Laskin, although never President, was admitted in 1963, and is said in *Fifty Years* to have remained an NAA member even during his tenure as Chief Justice of Canada. This assertion was based on interviews with others, but in fact the NAA records show that he remained a member until his death in 1984, while still Chief Justice.

I have attempted to mine the oral history interviews of these and other members to provide some detail for the discussion that follows about the role of Canadians in the NAA, and the extent to which arbitration in our two countries is interactive, despite the differences of structure and policy discussed above.

[37] *See supra* note 4. While this spelling of his nickname seems to be the preferred one, it is pronounced "Buzz."

A very interesting effect of the differences between the two countries is the extent to which the jurisprudence has grown apart over the years. In the *Polymer* award[38], Bora Laskin observed that he had been presented with "a number of arbitration cases in both Canada and the U.S. and to several Court decisions in the U.S." I recall when beginning practice in the 1970s that some U.S. cases were presented from time to time, and some Canadian awards relied on U.S. precedent. My impression is that this has long since ceased to be the case.

A very unscientific survey of NAA members using the e-mail list elicited only one response affirming having been presented with Canadian authorities in a U.S. arbitration, and a smattering of incidents of U.S. authorities in a Canadian arbitration. Possibly because of the differences identified above, there is now very little engagement on a doctrinal level between the two countries. An exception to this is some industry-specific jurisprudence, such as seniority list integration after airline mergers, where precedents are traded back and forth.

The same survey revealed that very few arbitrators active in one of the two countries have been appointed to arbitrate in the other. There are some individual exceptions to this finding, which I discuss below, but cross-border arbitration is rare to the point of invisibility. No doubt there are reasons relating to immigration issues which militate against such activity.

In a "Fireside Chat" in 2009,[39] Ted Weatherill recalled that he had done a few arbitrations in the U.S. some years before, and that he recalled "carpet-bagging American lawyers" appearing in arbitration proceedings in Ontario. I also recall the occasional U.S. attorney, usually appearing on behalf of the parent company of a local branch plant, and the occasional human resources person from head office as well, but that was also in the 1970s. Weatherill was interviewed by John Kagel, who noted that he had done arbitrations in British Columbia, and he confirmed that in response to my survey. Whether there are other examples of what might be called "casual" cross-border arbitration, there are likely to be few. More formal cross-border activity is, however, somewhat more common.

Perhaps the most frequent engagement of arbitrators and counsel across the border was prompted by the National Hockey League and Major League Baseball. Both contract arbitrators and salary arbitrators were appointed from both countries, and attorneys from both countries were involved. This too is an exception to the general rule that while that border may be undefended, it is only marginally permeable.

The possibility of more formal cross-border arbitration practices is illustrated by three current arbitrators who have established practices in both countries. Randi Abramsky (NAA Toronto), Margo R. Newman (NAA Toronto and Chicago) and Sylvia Skratek (NAA Vancouver and Seattle) all began arbitrating in the U.S., and established themselves again after moving to Canada for personal or family reasons. From a Canadian point of view,

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[38] *See supra* note 8.

[39] "Fireside Chat with J.F.W. 'Ted' Weatherill," in *Arbitration 2009: Due Process in the Workplace, Proceedings of the 62d Annual Meeting, National Academy of Arbitrators* 421 (Paul D. Staudohar et al. eds. 2010).

they are simply respected Canadian arbitrators, and from the U.S. point of view they are equally respected American arbitrators. They appear each to have separate practices in two countries but operated by the same individual. The conclusion that can be drawn from their success is that, while there may be structural differences between the two systems, and procedural differences in how hearings are conducted,[40] grievance arbitration involves the same personal qualities and professional skills on both sides of the border.

These three were preceded by Frances Bairstow in an earlier generation, whose career took the opposite direction. After beginning a career in industrial relations in her native United States, mostly as an economist and educator but on the fringes of arbitration, she relocated to Canada for family reasons, eventually winding up at McGill University and working for "Bus" Woods at the Centre for Industrial Relations, first in an administrative position and then as an academic. She began arbitrating in Canada in 1962 and became a member of the NAA in 1972. She eventually succeeded Woods as Director at the Centre, and influenced generations of students, including former NAA President Allen Ponak. While still in Montreal, she expanded her practice into the New England area, and after retirement moved to Florida, where she established anew her arbitration practice.[41] As have her current successors, she demonstrated that professional qualifications and talent will work equally well in either country. The structure and the procedures may differ but the job is essentially the same.

Canadian Region

That conclusion about the underlying identity of the job of arbitrator appears to account for the continuing attraction of the NAA for Canadian arbitrators. There was traditionally no real professional advantage to NAA membership in Canada: inclusion on panels or being named in collective agreements does not flow from membership, as it appears to do in the U.S. Inscription on a provincial arbitrators list, which usually results in listing on the federal list as well, is sufficient, along with personal reputation, to found a career. That has changed somewhat through sports arbitration; both the hockey and baseball arbitration regimes require NAA membership. Yet Canadians continue to apply for membership, usually encouraged to do so by more senior colleagues who are already members. That the two systems differ does not detract from the close professional ties provided by the NAA.

Perhaps surprisingly, the Canadian Region of the NAA is the only national organization of labour arbitrators in Canada. Ted Weatherill recounted that the Region was founded by presidential fiat in 1974, and he was its first Chair, with a membership of eleven.[42] From the beginning, the Region used its meetings to bring together arbitrators from across the country,

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[40] Randi Abramsky has provided a comparative review of arbitral practice in the two countries as part of her Proceedings article cited *supra* note 26. Margo Newman provided another comparison in her introduction to "Comparative Arbitral Outcomes," in *Arbitration 2008*, *supra* note 27, at 241. All three have provided interviews and correspondence to assist in preparing this chapter.

[41] An interview of Frances Bairstow by Joyce Najita in 1994 is available at www.naarb.org>interviews>FrancesBairstow.

[42] *Supra* note 39 at 430-31.

NAA members or not. He noted that the advent of Fall Educational Meetings diminished the appetite for a separate regional meeting, and that the practice of scheduling a Canadian session at the Annual Meeting (which is open to nonmembers) replaced them. More recently, regional meetings have been organized again, and have been well attended. They have served the purpose of bringing arbitrators of all experience levels together on a national basis to permit the dissemination of professional and ethical considerations to everyone practicing arbitration. They may also have served, along with open attendance at NAA Annual Meetings, to assist in recruiting new members for the Canadian Region.

Perhaps the most important demonstration of the power of the Canadian Region came when an Ontario government, of a less progressive stripe, decided in 1998 that interest arbitration in the public sector (much of which has been prohibited from striking for decades) would result in outcomes more favourable to the government purse if arbitrators were drawn not from the pool of established grievance arbitrators, but from a new selection of retired judges, a remarkably backward-looking idea given the early history of arbitration in Canada.

Two major unions with considerable representation in the health care sector decided to challenge the move by bringing an application for judicial review of such appointments of persons as arbitrators on the basis that they were not "qualified to act" as required by the legislation, having no expertise in labour relations or interest arbitration and no demonstrated acceptability to both parties, as would be confirmed by membership on the provincial list, which was overseen by a tripartite committee. The union was unsuccessful at the application stage but succeeded at the Ontario Court of Appeal. The government appealed to the Supreme Court of Canada.

At that stage, the possibility of intervention in the appeal became a problem. The Supreme Court was reasonably hospitable to public interest interventions, but the problem arose from the situation that the obvious intervenor, the Ontario Labour-Management Arbitrators Association, was not entirely immune from the accusation that it was only trying to preserve income opportunities for its members. As President of the OLMAA at the time, I was reluctant to have the positions we could reasonably put forward be dismissed on the grounds of perceived self-interest. One of the allegations against the Minister of Labour (the nominal respondent, since he had appointed the contested persons) was that he, and the government, had a "significant financial interest" in the outcome; it was too easy to turn that allegation against OLMAA. In addition, a part of the record in the case came from correspondence between the Minister and OLMAA. After some agonizing, a solution emerged: the intervenor would be the National Academy of Arbitrators (Canadian Region).

Apparently because NAA policy requires that the organization be represented by a member when it seeks *amicus curiae* status, Michel Picher agreed that he would act as counsel for the Region at the Court. This was an unaccustomed role for Michel,[43] but one he was eager to assume as an active

[43] His recollection of these events is recorded in "Fireside Chat with Pamela Picher and Michel Picher," in *Arbitration 2013*, *supra* note 28, at 439. An indication of how rare such an appearance was for Michel is that, as he notes, *id.* at 454, he had to borrow my formal court attire to appear. Fortunately, it had suffered little wear at my hands.

member of both the NAA and the Region. He sought approval from the national office of the Academy, and then President John Kagel approved the intervention. Thus, it was not just the Canadian Region, representing arbitrators from across Canada, that was intervening; it was the Academy representing arbitrators across two countries. [44]

In the result, by a 6-3 majority, the Court denied the appeal, although for narrower reasons than those of the Court of Appeal [45]. At this point, the Court was still applying the "patently unreasonable" test in judicial review, and that was the standard which it applied to the Minister's exercise of discretion in appointments. This was the outcome:

> 183 I accept as correct the Minister's February 2, 1998 statement that the [statutory] process must be "perceive[d] . . . as neutral and credible". I also accept that neutrality, and the perception of neutrality, is bound up with an arbitrator's "training, experience and mutual acceptability" … I conclude as well that the Minister's approach was antithetical to credibility because he excluded key criteria (labour relations expertise and broad acceptability) and substituted another criterion (prior judicial experience) which, while relevant, was not sufficient to comply with his legislative mandate even as he, in his February 2, 1998 letter, defined his mandate.
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> 184 Speaking broadly, "the perspective" within which the [legislation] was intended by the legislature to operate …. is to secure industrial peace in hospitals and nursing homes. The [legislation] imposes a compulsory yet mutually tolerable procedure (if properly administered) to resolve the differences between employers and employees without disrupting patient care. In that context, appointment of an inexpert and inexperienced chairperson who is not seen as broadly acceptable in the labour relations community is a defect in approach that is both immediate and obvious. In my view, with respect, having regard to what I believe to be the legislative intent manifested in the [legislation] the Minister's approach to the … appointments was patently unreasonable.

The Court rejected the argument advanced by the unions at the Court of Appeal (but which the Region intervention did not support, and from which the unions retreated) that retired judges presented a problem of institutional bias. The Court overruled the Court of Appeal on this point and noted that some retired judges might well possess both labour relations expertise and be broadly acceptable in the labour relations community. Further challenges to continuing arbitrations, therefore, had to be on a case-

[44] The Factum of the NAA (the equivalent of an "*amicus* brief") is available at www.naarb.org/amicus-briefs/.

[45] C.U.P.E. v. Ontario (Minister of Labour), [2003] 1 S.C.R. 539, 2003 SCC 29 (CanLII). Paragraph numbering is from CanLII.

by-case basis. Arbitrators were not concerned about this aspect of the decision. The conclusions set out in the quoted paragraphs were everything that we could have asked for.

Bolstered by this successful outcome, when the *Vavilov* case[46] came to the Supreme Court the National Academy of Arbitrators itself, not just the Canadian Region, intervened. It was joined by the Ontario Labour-Management Arbitrators Association and the *Conférence des arbitres du Québec*, the two largest provincial associations. All three organizations were represented by Susan L. Stewart, President-Elect at the time of writing. Unlike the previous intervention, where the Canadian Bar Association was the only other intervenor, *Vavilov* attracted a staggering 31 intervenors, including four provincial attorneys-general. It was clearly the place to be for an organization with a central interest in judicial review such as the NAA.

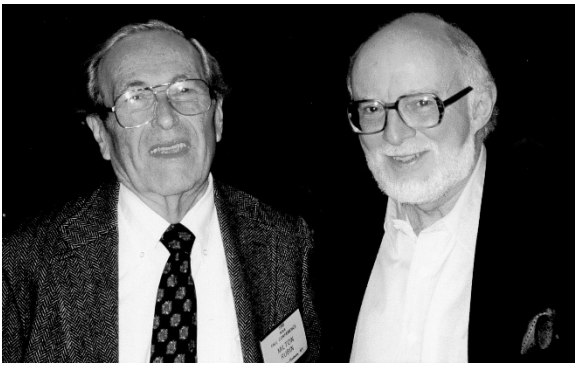
Conclusion

Despite the differences in our structures and procedures, arbitrators on both sides of the border have far more in common than those differences might suggest. We share pride in our profession and in our ethical standards, and we share the same goals for the parties to collective bargaining. We will have worked and studied together for most of the 75 years this volume and its predecessor describe, and I hope for the next 25 years as well. I expect that the centennial edition of this publication will come to similar conclusions.

[46] *Supra* note 33.

Jane Devlin, Gil Vernon, Paula Knopf, and Allen Ponak

Michel and Pamela Picher



Milton Rubin and J.F.W. Weatherill

Chapter 9

NEW DIRECTIONS: THE ACADEMY'S ENCOUNTER WITH EMPLOYMENT ARBITRATION

Dennis R. Nolan

The Academy was under some stress by the time it approached its fiftieth birthday in 1997. As successful as its first half century had been,[1] union membership had been declining since the mid-1970s both in absolute numbers and as a percentage of the workforce. The number of labor arbitrations naturally dropped proportionately.[2] Those trends had little immediate effect on the Academy because parties selected established arbitrators to hear what cases they had. Eventually, however, the overall decline in arbitration combined with other factors to shrink the Academy's membership and threaten its future. Existing Academy members aged and began to stop arbitrating, while the decline in work made it more difficult for newer arbitrators to meet the Academy's membership standards. Finally, as traditional labor arbitration, Academy members' bread and butter, declined, new forms of workplace dispute resolution (particularly individual nonunion employment arbitration) arose and expanded.

This chapter describes the Academy's reactions to those developments during the 1990s and early 2000s. The culmination was the most contentious issue in the Academy's history, a struggle over amending the Academy's governing documents to broaden the scope of the Academy's activities.

Readers should know that this is a personal recounting by someone who was deeply involved in the debates and decisions. It therefore reflects my own contemporaneous understandings of the events. I began drafting this memoir shortly after the 2008 Annual Meeting in Ottawa in which the Academy voted to adopt the proposed changes. The substance was completed in early 2009; subsequent changes have mainly been for clarity and style.

I begin by summarizing the rise of individual employment arbitration prompted by the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*[3] I then detail the Academy's first efforts to investigate the impact of employment arbitration on our work and our organization before the creation of the New Directions Committee (NDC) in 2005. The bulk of the chapter describes the NDC's procedures and recommendations, the opposition to those recommendations, and the Academy's ultimate decisions.

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[1] See Gladys W. Gruenberg, Joyce M. Najita & Dennis R. Nolan, *The National Academy of Arbitrators: Fifty Years in the World of Work* (1997).

[2] Dennis R. Nolan & Roger I. Abrams, "Trends in Private Sector Grievance Arbitration," in *Labor Arbitration Under Fire* 42, 47-52 (James L. Stern & Joyce M. Najita eds. 1997).

[3] 500 U.S. 20 (1991).

The Rise of Employment Arbitration

The catalyst for modern employment arbitration and the Academy's encounter with that field of dispute resolution was a lawsuit brought by stockbroker Robert Gilmer against the company that had terminated him, Interstate/Johnson Lane. The New York Stock Exchange had long required brokers to agree to arbitration of disputes with their employers. Although aimed primarily at disputes over customers' accounts, the wording of the arbitration agreement was broad enough to cover routine employment disputes. Gilmer signed that promise when he registered with the NYSE in 1981.

In 1987 Interstate/Johnson Lane terminated Gilmer. He filed an EEOC charge, then a lawsuit in 1988. His employer sought to force the suit into arbitration pursuant to his NYSE registration agreement. Gilmer prevailed at the district court but on appeal the Fourth Circuit compelled arbitration.[4] On May 13, 1991, the Supreme Court affirmed the Fourth Circuit's decision and opened the new field of employment arbitration.[5] Most readers of this book are familiar with the case and for immediate purposes the details are not critical. In brief, however, the Supreme Court held that the Federal Arbitration Act applies to contracts such as the one Gilmer signed with the NYSE.

The Academy's Initial Reactions

*Appointment of the Beck Committee***.** Before the *Gilmer* decision there was little if any discussion within the Academy about employment arbitration because there was so little of it. The first Academy leader to spot employment arbitration's significance was Howard Block. When Howard became President-Elect of the Academy in 1989, he asked members of the Board of Governors for suggestions about what he might accomplish during his term. Mike Beck of Seattle did not do any nonunion employment arbitrations himself but had talked with younger members who had. He suggested that Howard look into alternative labor dispute resolution issues. Howard liked the idea and in May of 1990, as he was about to become President, he asked Mike to chair a special committee on that subject. He asked the committee to examine the nascent field of employment arbitration and recommend possible Academy action.

Burdened with the unwieldy name of the Committee on the Academy's Role, If Any, With Regard to Alternative Dispute Resolution Procedures, the group first become known as the "If Any" Committee and then the Beck Committee after its chair. President Block's charge to the committee showed that the Academy was beginning to realize the potential significance of employment arbitration:

> In recent years, an increasing number of Academy members have been asked to serve in cases involving: (1) arbitration of grievances in unorganized plants; (2) mediation of grievance and interest disputes; and (3) wrongful termination. It is time, I think, to determine

[4] Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195 (4th Cir. 1990).
[5] *Supra* note 3.

> whether the Academy can play a constructive role in one or more of these areas. In particular, I have in mind the consideration of the practical and ethical questions confronted by our members as well as the additional training and education that might be indicated in order to broaden a labor arbitrator's basic skills in these areas.

The Beck Committee began a long investigation that soon led to a survey of the membership about the nature of their work. Slightly over 200 members responded to the survey. About 28 percent of those who replied had already performed at least one arbitration involving employees covered by the National Labor Relations Act or other collective bargaining laws, but not yet represented by a union. About 17 percent, some of whom were also in the first group, had decided cases involving supervisory or managerial employees not subject to unionization.

The Committee submitted a preliminary report to the Board in May 1992. Because the Committee had originally been established for only two years from its creation in 1990, President Tony Sinicropi extended its life for an additional year. The Committee solicited members' written comments and conducted an open forum at the October 1992 Fall Educational Conference (FEC). Even though employment arbitration was still new, many members already had strong feelings on the subject and expressed those feelings both in their written comments and at the open forum.

The Sinicropi Address. President Block's 1991 presidential address (delivered too soon after the Supreme Court's *Gilmer* decision to assess its significance) alluded to the possibility of using arbitration as a forum for resolution of disputes under a federal unjust-dismissal statute that he advocated. The first thorough discussion of employment arbitration in a presidential address, however, was President Sinicropi's address in May of 1992. With a year to consider the *Gilmer* decision, Sinicropi presciently recognized what it could mean for the Academy and its members. His address forthrightly called for the Academy to take a leadership role in the development of employment arbitration. The last paragraph of his Introduction stated the urgency he felt: "We cannot postpone for a moment engaging and beginning to resolve the important issues that the future presents for our profession and the National Academy of Arbitrators."[6]

The Beck Committee Report and Its Results. The Beck Committee submitted its final report to the Board in 1993. It recommended a "significantly broader" role for the Academy in nontraditional workplace dispute resolution. The Committee was surprisingly far-sighted. It recognized that the phrase "labor-management" in our governing documents referred solely to collective bargaining relationships. The report then said it was time to change that limited focus:

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

> However, today, the evolving nature of the field to include employment relations and the increasing activity of our members in that arena have convinced the Committee that a broadening of our role is warranted.

The Committee therefore recommended adding the phrase "and employment" after "labor-management" in Article II of our Constitution. Article II states the Academy's purpose. Adding those two words would overnight have changed the Academy from a labor arbitrators' professional association to an academy of labor and employment arbitrators. The Committee wrote that if the Academy's role were expanded to include employment arbitration, "then the Code should be revised to include coverage of our members performing these arbitrations."

Referring to the sensitivity some members had expressed about moving beyond collective bargaining, the Committee emphasized:

> [T]here is no intent to abandon our basic role. By leaving in place the phrase "labor-management," our focus as an organization shall remain on collective bargaining. We merely recommend that the Academy's purposes be expanded to include employment disputes beyond the collective bargaining context.

The report compared its recommendation to the then-recent name change of the ABA's Section on Labor Law to the Section on Labor and Employment Law.

The Beck Committee did not recommend any change in our membership standards because it believed the Academy should continue to be a society of those whose acceptability was demonstrated by joint selections of labor and management. Anticipating a change that would be adopted only after a recommendation from another committee many years later, the Beck Committee noted that the Membership Committee always considered the totality of a member's experience, and said that one's experience "manifestly includes" nonunion ADR activities. Still, there was an inherent contradiction in the Committee's approach. It sought to incorporate employment arbitration into an Academy composed of arbitrators elevated only by their labor-management arbitration experience. That might produce an Academy *for* employment and labor arbitrators but only *of* labor arbitrators.

The Board of Governors adopted the Beck Committee's report. When it came time to recommend changes in the Constitution, however, the Board, by then under a new President, David Feller, was less adventuresome. Rather than recommend changing the Academy's statement of purpose to apply equally to labor arbitration and employment arbitration, the proposal it sent to the membership for a vote at the 1994 Annual Meeting merely added "employment disputes" to a later phrase about promoting "study and understanding."

Subsequent Academy Actions

The Beck Report and related events contributed to some significant developments.

Constitutional Amendment. In 1994, the year following the Beck Committee's final report, the Academy amended its Constitution to provide for the "study and understanding" of employment disputes. It did not attempt to extend Academy jurisdiction to cover employment arbitration, much less welcome employment arbitrators into its ranks. In short, the Academy agreed to study employment arbitration but not to make it one of the Academy's purposes.

That same year, Walter Gershenfeld delivered a paper calling for exactly what the Beck Committee decided *not* to recommend — that is, that the Academy should fully incorporate the field of employment arbitration.[7]

Code Amendment. The Academy also amended the Preamble to the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes so that it would apply to nonunion arbitration cases. Because it did not change any substantive Code provisions, however, the Code did not (and still does not) address any of the peculiar ethical problems raised by employment arbitration. Today's Code thus covers employment arbitration like an ill-fitting coat. Moreover, because the mechanism for interpreting and enforcing the Code is the Academy's Committee on Professional Responsibility and Grievances, there is no way to apply it to nonmembers.

*Programs***.** Program committees for the Fall and Annual Meetings began to include more sessions dealing with nonunion employment disputes.

*Due Process Protocol***.** In 1995 a blue ribbon committee of advocates and neutrals, under the prodding and leadership of former Academy President Arnold Zack, adopted a document titled "A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship." While extremely limited in scope (applying, for example, only to statutory disputes) and content (it was silent on many of the most important procedural and remedial questions), the Due Process Protocol did establish some fundamental requirements for a fair employment arbitration system. Because major designating agencies like JAMS and the AAA later incorporated the Protocol into their own rules, it has had a salutary effect on the process. The Academy also endorsed the Protocol.

Policy Statement and Guidelines for Members. In 1996 President George Nicolau and President-Elect Milt Rubin appointed a committee to draft a policy statement on mandatory arbitration agreements imposed by employers on their nonunion employees as a condition of employment, as well as a set of guidelines for arbitrators who handled such cases. The Special Committee on Employment-Related Dispute Resolution, chaired by Michel Picher and often referred to as the Picher Committee, submitted its recommendations to the Board in 1997. The Board adopted the recommended Statement of Principle in May of that year. The key language was this statement: "The National Academy of Arbitrators opposes mandatory employment arbitration as a condition of employment… for the

[7] Walter J. Gershenfeld, "New Role for Labor Arbitrators: Part I. Will Arbitrators' Work Really Be Different?" in *Arbitration 1994: Controversy and Continuity, Proceedings of the 47th Annual Meeting, National Academy of Arbitrators* 275 (Gladys W. Gruenberg ed. 1995).

pursuit of statutory rights." Recognizing that the Supreme Court had upheld the legality of those agreements, however, the Board did not attempt to prevent members from serving under the agreements the Statement declared improper. Instead, it recommended that they consider the Picher Committee's Guidelines on Arbitration of Statutory Claims Under Employer-Promulgated Systems.

The Academy adopted the Policy Statement and the Guidelines at its annual meeting that year. Jack Clarke and I were the only ones to speak against the Policy Statement. We both argued that it was inappropriate for the Academy to condemn predispute arbitration agreements as unfair and still permit members to handle cases under that system.

The Academy's opposition to predispute arbitration agreements had no discernible effect. With consistent court support, employment arbitration continued to spread.

The Cornell Survey. In 1998 the Academy asked the Picher Committee to undertake a survey of Academy members about their professional activities, specifically including nontraditional employment dispute resolution activities. The Academy engaged the Cornell/PERC Institute on Conflict Resolution to conduct a survey about members' demographics and arbitration activities. The product was *The Arbitration Profession in Transition: A Survey of the National Academy of Arbitrators* (2000). The response rate was extraordinarily high (86 percent of those eligible to participate) and the results were therefore relatively reliable. Of interest in this discussion is the report's finding that nearly 46 percent of Academy members had completed at least some employment arbitration cases and another 33 percent would accept such cases if they included adequate due process protections.

Quo Vadis

Employment arbitration continued to grow in numbers and importance in the 1990s, just as labor arbitrations were declining and the Academy's membership seemed to be shrinking. Although the Academy supported or created useful documents relevant to employment arbitration like the Protocol and the Guidelines, it still did not claim any authority to represent employment arbitrators.

Fortuitously, the Program Committee for the 1999 Annual Meeting chose the theme of *Quo Vadis*. When that committee began its work in 1997, I proposed a paper examining whether the Academy should embrace employment arbitration, even to the extent of counting employment cases toward our membership requirements. The committee accepted my proposal and gave me the keynote spot in the members-only day of the meeting.

My paper, "The National Academy of Labor and Employment Arbitrators?" answered its titular question with a firm but qualified Yes.[8] While Academy membership was one of the major reasons for that conclusion (membership had fallen from its 1989 peak of 702 to just 633 at

[8] Dennis R. Nolan, "The National Academy of Labor and Employment Arbitrators?" in *Arbitration 1999:* Quo Vadis, *The Future of Collective Bargaining and its Impact on Dispute Resolution, Proceedings of the 52d Annual Meeting, National Academy of Arbitrators* 52 (Steven Briggs & Jay E. Grenig eds. 2000).

the time I spoke), I was also concerned that the Academy would lose much of its influence if it limited its activities to a shrinking field and that it would forfeit the opportunity to shape the development of a new and growing field. I tried to capture some of Tony Sinicropi's urgency (this was seven years after the Sinicropi address and the Academy had still not even cracked its door to employment arbitration) by quoting his "not a moment to lose" remark and concluding that we should "move quickly and decisively toward becoming a National Academy of Labor and Employment Arbitrators."[9]

While generally well received, my paper did not provoke the broadening of the Academy's scope that I had hoped. The division within the Academy over the topic of employment arbitration remained wide. Small wonder then, that the Supreme Court did not accept the Academy's opinions about employment arbitration.

In 2000 the Academy submitted an amicus brief opposing predispute arbitration agreements in *Circuit City Stores, Inc. v. Adams*,[10] a case involving the meaning of Section 1 of the Federal Arbitration Act. That section excludes from the FAA's reach "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[11] The question before the Court was whether the word "commerce" in Section 1 meant "commerce" in the modern sense, which would cover almost the entire workforce, or in the older sense, which would apply only to those engaged in the transportation of goods or persons. By 2000 virtually all circuit courts to rule on the question had adopted the narrower version of the exclusion. Nevertheless, the Academy weighed in on the side of the broader interpretation.[12] The Academy's position would have limited *Gilmer* to those few cases like Gilmer's where the arbitration agreement came from some source other than the contract of employment.[13] The Supreme Court instead sided with the circuit courts and did not even mention our arguments.[14]

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[9] *Id.* at 76.

[10] 532 U.S. 105 (2001).

[11] 9 U.S.C.§1 (2018).

[12] President Ted St. Antoine was doubtful about whether the Academy should take a side in that battle, given the differing opinions of our members. He asked David Feller to make a presentation to the Executive Committee supporting an amicus brief on Adams's side and Tim Heinsz and me to oppose the submission of a brief. This was at the 2000 Annual Meeting. I thought that Tim and I had the better argument — not on the merits of predispute arbitration agreements but rather on the inappropriateness of taking a position on a controversial issue without any indication of a consensus within the Academy. At first it seemed as if we were going to win with three of the Executive Committee's five votes. The Committee took a lunch break, however, and on return voted 3-2 to submit the brief. Not for the first time, David proved to be a very effective advocate. The two of us were no match for him, even in the limited confines of an Academy Executive Committee meeting.

[13] Ted asked David to let Tim and me review his draft brief before he submitted it. The draft he sent us would have been a stimulating law review article but it was an odd choice for this case. It emphasized an idiosyncratic idea that David had long held, namely, that labor arbitration should be governed by the FAA rather than Section 301 of the Taft-Hartley Act. That didn't have anything to do with the case, and we told him so. The brief he submitted to the Court, 2000 WL 1357773, dropped that argument, but it was still unsuccessful. Even David's incomparable advocacy skills could not sway the Court into opposing the spread of employment arbitration.

[14] An aside: at one point during this process, I told David that I was pretty sure we were on the losing side of the argument. I used the phrase "I'll bet you a dollar to a doughnut." He faxed

The Fleischli Committee

President James M. Harkless, serving in 1998-99, was opposed to employment arbitration but knew that the issue was critical to the Academy's future. In February 1999 he appointed a Special Committee on the Academy's Future to be chaired by George Fleischli. Before announcing the new Committee, President Harkless consulted with his next two successors, President-Elect Ted St. Antoine and President-Elect nominee John Kagel. The Committee's work would take longer than the remaining four months of his term, so it was important to have the participation of his successors. He charged the Committee with answering this question:

> Whether to expand the Academy's membership to those who act as arbitrators mostly in cases involving employment disputes arising outside the labor-management field; and if so, how?

In 1999 hardly anyone — perhaps no one — arbitrated mostly in the nonunion employment field. There were still very few employment arbitration cases in those pre-*Circuit City* days, so no one could make a living that way. Moreover, even if there were any such people, admitting them would be a radical departure from Academy practice. The only possible answer the Committee could return would be No. A narrower question on which there could be some serious debate would have been whether to count some employment arbitration cases toward our usual numerical standards for membership. But that was not an option for the Fleischli Committee.

Although a new investigation on the model of the Beck Committee was long overdue, I was initially disheartened by the new Committee's composition. The Committee's members included many of our brightest members, but none of them, so far as I knew, actually practiced employment arbitration. Thus a group of talented but very traditional labor arbitrators were to determine whether the Academy should encompass a field with which they had no practical experience — and they were to do so with a charge that posed only the most extreme option. A much better way to proceed would have been to appoint a committee representing both those who did and those who did not practice employment arbitration, and to give them a more open-ended charge.

Nevertheless, the Committee did a thorough job. Its most useful activity was to survey NAA members by mail and phone. Because most of the Committee's work was conducted after my 1999 talk, it drafted the survey more broadly than the narrow question posed by President Harkless. In addition, the Committee Chair published an article in the Academy's *Chronicle* in 2000, to alert members to breakout sessions sponsored by the Committee at the 2000 meeting in San Francisco. About 125 members participated in those discussion groups.

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back — he didn't use email at the time — to suggest that we raise the stakes to a baker's dozen. I agreed. When the Court ruled against Adams in March of 2001, I promptly faxed David to say that my favorite doughnuts were cinnamon from Dunkin' Donuts. He didn't reply, but when I checked into my room at the hotel for our 2001 Annual Meeting, I found a big surprise — literally big: thirteen *boxes* with a dozen cinnamon doughnuts in each. I spent the first part of that meeting walking around the lobby trying to give away doughnuts. But I digress.

Given the wording of the Committee's charge and the background of its members, I was not surprised when, in November 2001, the Committee answered President Harkless's question by recommending that the Academy "should not expand its membership to include those who act as arbitrators mostly in cases involving employment disputes arising outside the labor-management field." That was the inevitable No answer to President Harkless's question. The Committee did offer one modest suggestion that at least moved in the right direction. It recommended that the Board direct the Membership Committee to "give such weight as it deems appropriate" to applicants' other labor relations experience including, as one factor among several, employment arbitration — a sort of "extra credit," if you will. The Board adopted that recommendation, and the Membership Committee followed that direction for several years.

The OPC and the Creation of the NDC

The OPC. Although the Fleischli Committee and the Board took a tiny step toward employment arbitration, they did not resolve the bigger issue. Although I had given up thinking that the Academy would ever exercise real leadership in the field of employment arbitration, another opportunity arose in a very circuitous way. After a pair of Board retreats in 2002 and 2003, the Board concluded that the Academy needed to engage in strategic planning.

Because the Board itself had no strategic planning expertise, President Richard Bloch, President-Elect Walter Gershenfeld, and President-Elect nominee George Fleischli created a special committee devoted to that task in 2003. The Operational Planning Committee (OPC), chaired by Bill Holley, reviewed prior Academy reports dealing with its organization and future and considered a variety of threats and opportunities. Because declining membership was one major concern, the OPC debated whether to revise our membership criteria to encompass nonunion forms of employment dispute resolution. The OPC reported to the Board at the 2004 Fall Educational Conference (FEC) in Austin. President Fleischli submitted the OPC's report to the membership in November of that year and asked for written comments. The Board would consider the report and members' reactions at a Board retreat in April 2005 and at the Board's next meeting at the May 2005 Annual Meeting in Chicago.

For our purposes, the most important part of the OPC report was its discussion and recommendations on membership criteria. The Committee summarized three possible approaches, which it labeled the "Natural Equilibrium Model" (essentially allowing the Academy's size to settle wherever it would), the "Growth Model" (which would seek to increase membership by counting nonunion ADR work toward our membership criteria), and the "Maintenance of Membership Model" (which would take lesser steps, not including counting nonunion work, in an effort to stabilize membership in the 600-650 range). The OPC opted for the middle road.

The OPC report prompted some significant discussion within the Academy. Among other things, Barry Winograd and Jeff Tener wrote opposing articles in the *Chronicle*, Barry arguing that we should take a more aggressive approach than the OPC recommended, Jeff defending the OPC recommendation. Their articles framed the debate that would take place at

the next Board retreat in April 2005. Sometime during the 2004 FEC, President Fleischli, President-Elect Margery Gootnick, OPC Chair Holley, Secretary-Treasurer David Petersen, and I discussed the OPC's recommendations on membership criteria over breakfast. George concluded the discussion by stating that he would try to develop a compromise proposal for the Board's consideration at the retreat. His President's Corner column for the Spring 2005 *Chronicle* printed the result.

Read with the aid of hindsight, George's proposal seems modest. He suggested lengthening the time period for reaching "50-and-5" (50 cases in five years) from five years to ten "while employed as a *full time neutral* in the labor relations field or employment relations field" (original emphasis). "Full time neutral" would include employment arbitration work. It would not count employment arbitration cases directly but would allow full-time neutrals who did employment arbitration (or other forms of neutral employment-related work) extra time to accumulate the necessary number of labor cases. The proposal offered no benefits to part-time arbitrators. As before, cases other than traditional labor arbitration cases could be counted only for extra credit. Nevertheless, that proposal indicated that George was keeping an open and creative mind in trying to work through this controversial issue. That helps to explain what happened the next month.

The April 2005 Board Retreat. As the President-Elect designate, I was invited to the Board's April 2005 retreat at O'Hare Airport in Chicago. The first day of the retreat focused on the OPC's recommendations on governance, meetings, and outreach. While reaching a consensus to accept some of the less controversial recommendations, the Board disagreed with the more important parts of the OPC's work. Because the retreat was not a formal Board meeting, the Board took no action then. It left action on the OPC report for the Annual Meeting in Chicago, but by that time the Board's attention had moved on, and the OPC report remained in limbo.

On the second day of the April retreat, the Board's discussion turned to question of nonunion ADR work. The discussion went on for quite some time. Gradually a clear consensus developed to reject the OPC's Maintenance of Membership model. The next group of three presidents (President Fleischli, President-Elect Margery Gootnick, and I) caucused during a break and concluded that the Board needed to create a separate group to investigate whether and how the Academy could incorporate employment arbitration into our jurisdiction. Creating a committee is often a way of putting off difficult problems. In this case it was a way to solve a difficult problem that had troubled the Academy for 15 years. We agreed that Jeff Tener and Barry Winograd would be an excellent team as co-chairs because they complemented each other neatly in terms of their original and widely perceived positions on the question as well as in their backgrounds and personalities.

So it was that we went back to the Board at the end of the retreat and announced our intention to appoint a committee that would work for two or three years to present specific proposals for broadening the Academy's reach. We promised to present the Board with a formal resolution stating the committee's charge.

May 2005: The First Board Endorsement. The three presidents exchanged many emails after the retreat in an attempt to draft a resolution for Board approval in May. After much tinkering, we presented this draft charter to the Board at the May 2005 Annual Meeting. The task of the New Directions Committee (NDC) would be:

> To review and make recommendations regarding any changes in the foundation documents, policies and practices of the Academy that will be necessary in order to expand the membership – consistent with fostering the highest standards of integrity, competence, honor and character – to include as members neutrals who, as a significant part of their activities, hold hearings and issue written decision in order to resolve workplace disputes.

This was the key: in some fashion we would finally begin to incorporate employment arbitration work. The Presidents intentionally avoided the limiting phrasing used by President Harkless years before: we would not seek to include those who practiced "*mostly* in cases involving employment disputes"; we would instead seek those who do employment arbitration "as a significant part of their activities," which presumably would mean that most would primarily be labor arbitrators. The Board discussed the resolution and unanimously adopted it.

The Work of the New Directions Committee

Communications and Member Participation. Jeff Tener and Barry Winograd grabbed the reins and raced ahead. One early NDC decision was to maximize transparency and participation through frequent reports to members, public forums at the Annual Meeting and FEC, discussions at regional meetings, emailed requests for comments, and *Chronicle* articles. Despite this announced plan, some people felt they did not know what was going on. When the first NDC emails went out, the criticism was that the unofficial listserv reached less than half the members. When committee messages were sent on the official Academy mail list, which reached almost 80% of our members, the criticism changed to "many members don't read emails," even though we arranged to use snail mail to anyone who preferred that method of communication. (None did.) In addition, the major background documents, drafts, and reports were all posted on a website that was available to all members. The complaints continued even after it became obvious that the greater danger was that members would be overloaded with information.

In addition to the interactive nature of the email communications and meetings, the NDC was broadly democratic in another way. The Committee decided to create working groups on several specific issues such as membership standards and Academy governance. Membership in those working groups was open to any member who wished to participate. Many did so, especially on the largest and most active group, the membership standards working group chaired by Margie Brogan. The collected email discussions of that working group provide the most comprehensive analysis

of membership issues related to nontraditional dispute resolution that one could possibly wish for.

Reflections on the Public Debate. Without exception, so far as I can recall, all postings and public statements by NDC supporters and the large majority of those by opponents were informed, accurate, relevant, and polite. The debate at the 2006 FEC in New Orleans was almost the epitome of serious, well-reasoned, and professional discussion of a complicated issue. That was truly a high point in the history of the Academy's self-examination.

Naturally there were also a few low points in the online discussions and in some regional meetings. Even in those places, however, most members were nothing less than cordial and professional. The passion of the opposition was surprising. The original proposals were repeatedly weakened, yet NDC opponents were just as adamant as they were at the start of the debate. This puzzled me for some time. After much reflection, I think I understand some of the main factors motivating the most vigorous opponents.

First, the issue of employment arbitration meant more to those members than the merits or demerits of the NDC recommendations would justify. Many members' self-identity was inextricably tied up with their traditional labor arbitration work. They came out of labor arbitration backgrounds and made their living for decades working in that field. Any suggestion that labor arbitration was declining or that some neighboring field was growing must have been interpreted as a reflection on their professional choices, if not on their professional competence.

Second, some members believed that employment arbitration was an anti-union management tool. That criticism was exaggerated — the vast majority of employees covered by employment arbitration agreements were never going to be unionized in the foreseeable future — but it resonated with many members. Understandably, though, they feared employment arbitration as a threat to unions and, in turn, to traditional arbitration.

Third, employment arbitration was proving to be exceptionally lucrative. The market for employment arbitrators reflected the fact that these cases would otherwise have been in litigation. Parties were used to rates charged by their lawyers in court or before administrative agencies. Many employment arbitrators, in fact, were practicing employment lawyers, not full-time neutrals. Employment arbitration cases often required legal skills and knowledge that not all labor arbitrators possessed.

Employment arbitrators therefore charged substantially higher rates than labor arbitrators. Many of those who saw a future for themselves in that new and remunerative market supported the NDC initiatives. Most NDC supporters were lawyers who would have little trouble working in a new area. Many of the NDC opponents, in contrast, were not lawyers and thus realized they would not likely be selected for statutory cases.

Finally, there was an understandable generational overlay in the debate. Many but by no means all of the NDC opponents were very senior members who had known no other form of dispute resolution during their careers. Many but by no means all of the NDC supporters were less senior members who had already encountered nontraditional dispute resolution procedures during their careers. With many exceptions on both sides, newer members tended to support the NDC recommendations, while the oldest members opposed them.

Psychological and emotional reactions may have combined with ideology and perceptions of self-interest to raise the temperature in the debate beyond that of a normal Academy policy dispute. If so, this was not the first time. Looking through the Academy history, one can find similar dynamics in the debates over the adoption of the Code of Professional Responsibility, which replaced an earlier and much looser set of ethical rules, and over the elimination of the Code's advertising and solicitation bans. In each case, opponents thought that something they valued dearly was under attack.

Strategies

NDC Supporters. The ultimate goal of the NDC was to revise our Constitution and By-Laws as needed to incorporate nontraditional forms or workplace dispute resolution — in short, to accomplish pretty much what the Beck Committee had recommended in 1993. Proponents initially shared, I think, a somewhat naive strategy: we would spend a lot of time consulting, discussing, and drafting in order to come up with a fair and comprehensive proposal that we would then present to the Board and the membership for decision.

For example, Jeff and Barry first proposed that we present amendments to our governing documents to the membership at the 2007 Annual Meeting in San Francisco. Amendments require a two-thirds majority, however, so I was reluctant to go that route. Although I believed a majority would quickly support a well-drafted proposal to broaden the Academy's scope, I couldn't see how we could get a two-thirds majority in a relatively short period of time. Nevertheless, I trusted their judgment and reluctantly went along.

Just at that point, some of the most active opponents added a "cart before the horse" argument to the earlier theme of "nobody wants this change." They asserted that it was improper to bring proposed amendments to a vote before there was evidence that the concept itself had widespread support in the Academy. But if members didn't want the changes, all they would have to do would be to vote them down in San Francisco. Splitting the decision into two votes wouldn't change the ultimate decision. As will be seen, however, that attack on the NDC process backfired: it ultimately enabled the NDC to gather the necessary super-majority.

The new argument presented us with tactical advantages in surrendering to the demand for voting on the concept at the 2007 Annual Meeting in San Francisco and then, if a majority approved the resolution, voting on the amendments themselves at the 2008 meeting in Ottawa. First, it would show once again that NDC supporters were sincerely interested in addressing members' concerns. Second, and more practically, a resolution would only require a simple majority and supporters would find it much easier to obtain that majority than a super-majority. Third, putting off the final vote for a year would give us that much more time to round up the needed votes. Fourth, a majority vote in San Francisco might sway some undecided voters in Ottawa. If they believed that a majority wanted the changes, they might go along with that majority rather than deprive it of the required super-majority.

So the NDC announced that it would propose a general resolution to the Board for possible presentation to the membership at the San Francisco

business meeting. If and only if that resolution passed, we would draft the necessary amendments to the Constitution and By-Laws for a vote in Ottawa. That is exactly what happened. Acceding to that demand did not mollify even the individuals who made it. To the contrary, once the NDC submitted its draft resolution to the Board, some of the same people criticized it as being too general!

One other NDC strategy was far less successful. Because the NDC was really interested in winning over waverers, we tended to look for compromises whenever sincere objections arose — tinkering with the procedure, reducing the number of countable employment cases, and so on. Barry spotted the risk in that approach long before I did. We were bidding against ourselves, he noted, because the opposition was not willing to consider any serious compromise. Nevertheless, Jeff and I favored each compromise in the belief that each would be the one that would cause opponents to grab our hands and strike a deal.

Most of that bidding against ourselves occurred well before the first crucial vote in May 2007. Before the New Orleans FEC in October 2006, Dan Nielsen floated a compromise that was in fact a large concession. It would have cut down the credit for employment arbitration work and mixed those cases together with several forms of labor-related but nontraditional dispute resolution such as fact-finding and railroad arbitration. This evolved into a more elaborate joint proposal by Dan and Marty Malin at the FEC. The practical effect was to reduce the impact employment arbitration and other nontraditional work could have on an applicant's qualifications for membership. Reluctantly, most of the NDC group agreed to that proposal. Only Barry Winograd tried to slow down the concession process.

Looking back, I think Barry was right. No matter what we offered, we never succeeded in convincing any of the leading opponents to make a counter-offer, let alone reach a compromise. No matter what we conceded, opponents simply went on to a different argument without making any concessions in return. Going down that road had two harmful consequences for the NDC. One was that we used our ammunition too early in the battle. Had we kept more in reserve, we might have been able to make a big last-minute offer when opponents might be worried about the vote and more inclined to compromise. The other was that the final proposal was so shriveled that it would make much less of an impact even if it were adopted. Against this is the risk that if we had not made concessions along the way, we would not have reached the required majorities.

From my perspective, the main goal was to secure the Academy's commitment in principle to extending jurisdiction over employment arbitration. The details were far less important. That is why I was willing to urge adoption of the compromise proposal, weak as it was.

NDC Opponents. The opponents' strategies and tactics too were a mixed bag. Leaving aside the obviously unproductive ones — the demonizing of employment arbitration, the ad hominem attacks — some other strategies were more effective. The best was the appeal to authority. Several of the most active NDC opponents were themselves highly respected members. In addition, before the San Francisco vote opponents obtained the signatures of sixteen former presidents on a letter opposing the NDC process. Posted on the unofficial listserv on September 17, 2006, the letter included

very big names indeed — Ben Aaron, Jack Dunsford, Dick Mittenthal, Bill Murphy, and more. In essence, opponents said, the resolution had to be a terrible idea or else these respected leaders would not oppose it so strongly and so publicly. Members who were not familiar with the issues and evidence or who had no strong feelings one way or another were particularly likely to be influenced by the distinguished list of signatories.

There is no question that the presidents' letter stuck a serious blow to the NDC efforts. We debated how to respond. One way would be to round up our own list of presidents who supported the initiative. That wouldn't have been effective because the list would have been much shorter and would mainly consist of much junior former presidents. Another tack would be to point out that many of the signatories were elderly and non-practicing and had nothing at stake in the future of employment arbitration. We rejected that approach both because we greatly respected the signatories and because making that argument would bring us close to the level of argument that repelled us when the opponents used it.

Besides, the letter was posted far too early in the debate for maximum effect. September 2006 was twenty months before the final vote in Ottawa. By then members would have absorbed it as just one more among many arguments. Releasing the letter much later, say a few days before the vote, would have been far more powerful.

In addition, instead of urging members to vote against the resolution, the letter urged that an unspecified someone — the Board, perhaps, or the NDC itself — should just "withdraw … from the undertaking at this stage." Calling for an immediate halt in the NDC process seemed extreme. The letter was a good tactic but poorly executed.

After some discussion, the NDC decided not to address the presidents' letter directly, but rather address the substantive issues raised in the presidents' letter as opportunities arose. That proved to be wise. In the event, we were able to bring around many of the signatories at the second vote, and their change of mind did us more good in 2008 than their initial opposition did us harm in 2007.

Opponents thought they had struck gold with a different procedural gambit. They argued, in a variety of ways, that a decision like this should only be made by the membership at large rather than by those who attended the San Francisco meeting. We should instead, they claimed, provide for absentee voting.

Though this argument had a democratic veneer, its flaws were apparent to anyone who thought about the matter.

First, our rules provide for membership decisions to be made at the Annual Meeting. Second, the Committee on Academy Governance (also known as the Aaron Committee) had investigated the possibility of absentee voting and recommended against it; the membership had adopted that Committee's report at the 1992 meeting. Thus any change might require a constitutional or by-law amendment, and at least a preliminary vote of those attending an Annual Meeting.

Then there were the substantive problems: Apart from those who miss a particular meeting for personal or other reasons, the most interested and knowledgeable members are likely to be in the audience. A large number of those who do not attend a particular meeting have little connection with

the Academy and are far less likely to know the issues and the evidence, or to care much about the Academy's direction. Moreover, the main reason for voting at a meeting is so that participants can hear all of their colleagues' final arguments and views before making a decision. Voting at home before the meeting obviously does not allow that.

The push for absentee voting never gained the traction NDC opponents hoped. Some members thought we should delay any decision on the NDC proposals until after we completed another review of the wisdom of absentee voting. Others suggested that we should arrange for video conferencing for the large majority of the members who could not or chose not to attend the meeting. The Board rejected those suggestions and the entire proposal soon faded away.

Right from the beginning, some opponents worried about the possible impact of the NDC proposals on our relationships with our union clients. Others asserted that the Academy would lose respect and Academy members would lose business. There was no evidence of such a risk other than anecdotes about conversations with anonymous union lawyers. The concept was always a bit far-fetched. Hardly anyone other than Academy members and applicants has any idea what our current admission rules were.

Nevertheless, the fear of a negative reaction from advocates was real enough that several members vigorously stated in the NDC's forum at the 2006 Annual Meeting that we should survey advocates in some fashion to make sure we would not be hurting ourselves. Following that meeting, the NDC asked Sara Adler, Chair of the NDC's External Relations Working Group, and a few others with good advocate contacts, to tactfully sound out leading advocates whose views and discretion they trusted. This was not anything like a public or scientific survey, but the results were clear enough to eliminate our concerns. Sara found absolutely no evidence that counting employment arbitration cases for membership purposes would "dilute our brand," as some members had argued. Union leaders naturally disliked nonunion arbitration, but the most common attitude among union lawyers seemed to be that employment arbitration was established and a part of the dispute resolution business. In fact, some union lawyers had already begun to represent individuals in employment arbitrations. Perhaps more significantly, the advocates had no idea what our current standards were.

Finally, there was a tactic that I term moral blackmail. Others put it more simply: "If you don't do it my way, I'll take my ball and go home." One distinguished former president repeatedly threatened to resign from the Academy if his colleagues dared to adopt the NDC's recommendations. One or two others implied the same without being quite so definitive. In the event, no one resigned from the Academy during or after the NDC process. The threat was empty.

The Course of the Debate

None of us on the NDC had anticipated the vehemence of the anti-NDC members. We were therefore shocked when a couple of regions adopted resolutions opposing the NDC recommendations, even with the various compromises we had made. The vehemence of the opposition was more troublesome than the fact or the numbers. Some NDC supporters and uncommitted members even considered dropping the initiative rather than

foster or tolerate division of the Academy. At one point in the Fall of 2005, after encountering concerns at regional meetings I addressed as President-Elect, I seriously considered giving up the effort. Barry again provided crucial support. He wanted to slow down the compromise proposal and to gauge support for the basic NDC resolution. He contacted a number of well-informed but uncommitted members and discovered a reservoir of support that we had not been aware of.

Because of his work, I overcame my pessimism and we continued to work until the New Orleans FEC in 2006. The lively, polite, and closely balanced debate at that meeting left us with some optimism that we might have majority support by the time of the planned vote in San Francisco seven months later. Ironically, by this time Barry himself was burning out. He began to take a smaller role in the NDC effort, letting Jeff chair the Committee on his own.

The First Vote: San Francisco, 2007

The NDC's interim report to the Board in December 2006 proposed this resolution to be voted on in San Francisco:

> Resolved: The Academy should broaden its mission to accept as members individuals engaged in a range of workplace dispute resolution activities, subject to the following:
>
> 1. All applicants to the Academy must continue to: (a) have a substantial core of final and binding labor-management arbitration activity involving collective bargaining relationships; and, (b) maintain in all aspects of their practice the highest standards of integrity, competence, honor and character.
> 2. The Academy should include as members neutrals who, as part of their activities, in addition to having a substantial core of final and binding labor-management arbitration activity, hold hearings and issue written decisions in order to resolve other types of workplace disputes.
>
>   (a) To carry this out, the Board of Governors should adopt appropriate policies for the Membership Committee to give countable status to decisions that are based on impartial appointments and fair procedures consistent with due process, including decisions such as those rendered in employment arbitration, advisory arbitration, fact-finding, and independent civil service proceedings.
>
>   (b) In reviewing a potential member offering other types of decisions, the Academy should continue to utilize a numerical threshold when considering an application, while also considering the variety, character and relative difficulty of an applicant's

arbitration experience, the diversity of parties served, and evidence of professional growth.

3. The Board of Governors is directed to present for membership approval at the next Annual Meeting any changes in our governing documents that will be necessary to accomplish this objective.

The Board considered the wording and voted unanimously in January 2007 to recommend adoption of the resolution by the membership in San Francisco. Many members had raised valid questions about what passage of the NDC resolution would mean in practice. After all, its phrasing was very general. Rather than telling people to wait and see, the Board decided that it needed to provide some specifics. Reaching a consensus on specifics was no easy task.

Not for the first or last times in the NDC process, new players stepped up at a critical time. This time Marty Malin and Dan Nielsen revised Dan's October proposal on membership standards. The result was a proposed implementation that was at once complicated, modest, and fair, albeit much less ambitious than most of us on the NDC had sought. Their proposal stated that if the membership adopted the NDC resolution in San Francisco, the Board would direct the Membership Committee to apply this standard:

> The Membership Committee shall apply, as a threshold for considering an application for membership, a minimum of five years of experience as an arbitrator, and 60 written decisions in a time period not to exceed six years, at least 40 of which must be countable labor-management arbitration awards. In addition to the labor-management arbitration awards, up to 20 decisions in the field of workplace disputes resolution (including, for example, advisory arbitration, fact-finding, and teacher tenure and civil service cases under statutes or rules closely analogous to traditional arbitration) shall be countable in accordance with the standards established by the Membership Committee. No more than 10 countable workplace disputes resolution decisions shall involve employment arbitration pursuant to an individual contract, handbook, or other agreement between an employer and an employee who is not represented by a labor organization.

It would be a Rube Goldberg device but it had something for everyone. To meet the complaint that counting employment cases would lower the criteria for membership ("dilute the brand" or abandon our "gold standard," as some opponents put it), the proposal increased the threshold number of cases from 50 to 60. To accomplish the objective of giving credit for employment arbitration work, the proposal allowed applicants to count 10 such cases toward the new threshold. To recognize other nontraditional forms of labor dispute resolution, the proposal allowed applicants to count as many as 20 such cases toward the threshold, including advisory arbitration, fact-finding, and civil service cases. The Board adopted the proposal as its planned implementation should the NDC resolution pass. Once the Board

went on record, the San Francisco vote would test the Board's planned implementation as well as the general principle of expansion.

That set the stage for the first battle.

The entire 2007 business meeting, after conclusion of certain essential reports and ceremonies like the admission of new members, was devoted to the NDC resolution. We were scheduled to end the debate around noon so that members could have lunch before the afternoon sessions. As President, I presided. I had consulted with our parliamentarian, Herb Marx, about all the procedural matters that I thought might come up so that we could prepared to address them according to *Robert's Rules of Order.*

All was in place, or so I thought. The last ceremonial item before the NDC moved its resolution was to award Lifetime Membership status to Ben Aaron, one of the few surviving founders of the Academy and one of its most respected members. He asked for an opportunity to make a few remarks. I expected him to make the typical comments about how much the Academy meant to him and so on. Instead, he made a blistering attack on the substance of the NDC resolution and the Board's implementation commitment. On the other hand, he praised the NDC process, describing it as scrupulously fair and completely transparent and democratic.

As soon as the NDC moved adoption of the resolution, a steady stream of members lined up at the microphones to offer their opinions. The debate was wide-ranging, intense, sometimes impassioned but always completely professional. So many people spoke on both sides that it was impossible to discern a majority in any direction. The arguments were not new to anyone who had been following the debate, but it felt different to hear them in person, all at one time.

Well into the debate, one member offered a substitute motion. He proposed maintaining the traditional requirement of 50 traditional labor arbitration cases in five years but adding the Board's proposed policy (60 cases in six years, 40 of which had to be traditional labor arbitrations and no more than ten of which could be employment arbitrations) as an alternative option for applicants. This was a step toward the NDC — indeed, the first and only proposal made by NDC opponents — but it came far too late in the game. The original NDC proposal had repeatedly been weakened with no response from opponents, so NDC supporters had no reason or wish to give up any more. Moreover, the substitute was unacceptable in one other respect. It would make those who did employment arbitrations jump a higher hurdle, 60 cases rather than 50. The essence of the NDC proposal was to provide the same threshold number (60 cases) for all applicants.

The debate and vote on that motion was a proxy for the main issue. Everyone who had followed the debate knew that the choice was between making a significant policy change and an insignificant one. To my surprise, a large majority voted against the alternative on a standing vote. There was no official count because the result was obvious, but I'd estimate that nearly two-thirds voted No. Some of those who voted against his substitute might have had problems with its wording or might have wanted a chance to vote on the main motion, but most, I thought, rejected the alternative because they favored the NDC resolution.

The debate on the main motion could have ended then, but many members had not yet spoken. We therefore had another hour's worth of

discussion. I could see that many members were leaving to catch their flights home. One member suggested ending the debate but did not formally call the question, so the debate continued. Finally one member did call the question and the group ended debate by the required two-thirds vote.

The motion to call the question occurred just as Dick Mittenthal was about to get his turn at the microphone. He made a point of personal privilege and asked that as a very senior member with a great interest in the subject, he should be allowed to speak despite the vote. I could not bear to cut him off, so I asked for and received the meeting's unanimous consent to allow him to speak. Like Ben, he made an emotional appeal to reject the NDC resolution. I'm sure he had a big impact on those who might still have been undecided.

Between the departure of many members who had opposed the substitute motion and the impact of Dick's remarks, the final vote was smaller and closer than it would have been if we had voted on the main motion immediately after defeating the substitute. The final vote was 72 in favor of the resolution and 65 opposed, a small majority of just under 53%. The NDC survived to fight the next year.

As the resolution directed the Board to "present for membership approval at the next Annual Meeting any changes in our governing documents that will be necessary to accomplish" the objectives of broadening the Academy's mission and giving "countable status" to employment arbitration cases. That put the ball back in the NDC's court and gave it another, steeper hill to climb at the next meeting.

The Second Vote: Ottawa, 2008

Jeff Tener was by this time the sole Chair of the NDC. He was therefore in overall charge of drafting the necessary amendments to the Academy's governing documents. At this point, George Fleischli stepped up. Although he had started the NDC while he was President, he ended up voting against the NDC resolution in San Francisco. He was thus in a good position to reach out to both sides.

George and the other members of the NDC's Governance Working Group found that only a few words needed to be added to the Constitution and By-Laws. Article II of the Constitution, which stated the Academy's objectives, needed a reference to "workplace disputes" other than traditional labor arbitration. The By-Laws needed a provision allowing the membership to count nontraditional cases as described in the Board's January 2007 resolution and a statement in Section 6 that representing employees or management in nonunion workplace disputes was inconsistent with the neutrality required for membership in the Academy. The NDC favorably recommended George's proposals to the Board in its final report on August 30, 2007.

The Board debated the recommendations at the 2007 FEC in Miami. One problem with the proposals was that they would have the effect of immediately banning members from doing any employment dispute work that could be interpreted as advocacy. Several members had helped draft fair employment arbitration plans. Others had served as expert witnesses when employment arbitration agreements were challenged in court. A couple had represented individuals in employment arbitrations, usually pro bono. At the suggestion of Chris Knowlton, the Board added a grandfather provision to

permit present members to continue to do that sort of work. The grandfather clause replicated what the Academy had done when it first adopted the ban on labor-management advocacy in 1976.

There was nothing shocking about the NDC proposals. They were the minimum required by the Academy's vote in San Francisco. If one voted for the NDC resolution, one should logically vote for the proposed amendments implementing that resolution. The amendments, though, represented the last chance for NDC opponents to block expansion of the Academy goals. They also represented the opponents' best chance, because adoption required a two-thirds vote rather than San Francisco's bare majority. As modest as the proposals were by this time, I doubted they would pass. Most other NDC members seemed to feel the same way. None predicted victory.

This time, though, the online debates before the meeting were less numerous and less emotional. There were some restatements of the old arguments, but for the most part everyone knew where they stood and why. Among the repeated arguments was the refrain that the final vote should be by mail. That went no further than it had the previous year, for the same reasons. One new element was that the final vote would occur in Ottawa. Some NDC opponents complained that Ottawa was too far away and too expensive for many members so that some people who wanted to vote on the measure wouldn't be able to do so. The NDC originally planned to have the only vote in San Francisco and adopted the two-stage process only because some opponents had objected that voting in San Francisco would put the cart before the horse. They should, however, have noticed that the vote in San Francisco commanded the Board to prepare amendments for a vote at the next Annual Meeting — that is, in Ottawa.

Undoubtedly more Canadians would attend the Ottawa meeting than a meeting within the United States, particularly because Canadian Michel Picher would take over as President at the end of that meeting. Canadians would thus form a higher percentage of attending members than usual. Canadians do not have employment arbitration as we know it, so they don't have the same stake in the subject as their U.S. colleagues. Making that argument, though, ran the risk of offending Canadians by suggesting that NDC opponents didn't trust them to vote correctly or didn't value their votes.

By this time Barbara Zausner was President. Although she had consistently supported the NDC process, she worked most effectively in her low-key way behind the scenes rather than in public. She was probably more responsible than anyone for encouraging George Fleischli and George Nicolau to support the compromise proposal. That in turn, as I will explain in a moment, resulted in getting most of the former presidents who had opposed the San Francisco motion to switch sides and support the NDC in Ottawa.

Barbara ran the Ottawa meeting with a firm but fair hand. The first motion, by Amedeo Greco, was to defer the vote for another year. Because I was pretty sure the NDC proposals would fall short of the necessary two-thirds, I didn't care much about where the vote would take place. On the one hand, defeating the proposal in Ottawa would save us an extra year of work and worry. On the other hand, perhaps something would happen over the

next year to improve our chances. As a result, I was initially inclined to support the delay.

I was finally persuaded to vote against Amedeo's motion by something I should have focused on earlier. The San Francisco resolution expressly directed the Board to present amendments "at the next Annual Meeting" — that is, in Ottawa. Deferring a vote would thus contradict the membership's procedural decision. In addition, some people attended the Ottawa meeting precisely so they could vote on the amendments. Suddenly delaying the vote would surely offend them. Some NDC opponents thought they had enough votes at the Ottawa meeting to kill the proposals, so even they had no reason to delay a decision.

In any event, the motion was overwhelmingly defeated. While arguing for it, however, one strong NDC opponent implied that Canadians shouldn't vote on the amendments because the changes wouldn't directly affect them. He did not intend to offend our Canadian members, but the way he phrased his argument did exactly that. Several Canadians later told me that they made up their minds to support the amendments in reaction to his statements.

The debate on the merits of the proposed amendments was short. Everyone who cared to had already stated their views, most of us several times. So many people had said so much in San Francisco and elsewhere that there was little need to say more now. When someone suggested separating the proposals, which would have opened up each part of the delicately balanced compromise to rejection, Barbara ruled that they were a package and had to be voted together. Thus opponents lost their last chance to pull the compromise apart. The prevailing feeling in the room, it seemed to me, was something like "let's get this over with."

George Fleischli contributed the most important new argument during the debate. After the Board had recommended his proposed wording of the amendments, he went to work on the sixteen former presidents who had so forcefully come out against the 2007 NDC resolution. I don't know what he said to them, but he must have been awfully persuasive. One of his early calls was to Ben Aaron, who had used his receipt of Lifetime Membership in San Francisco to make an emotional plea against the NDC recommendation. Ben not only approved George's words, he called several of the others to urge their support as well. In the end, George was able to announce at the Ottawa meeting that thirteen of the sixteen now recommended adoption of the amendments. Even Dick Mittenthal, whose concluding remarks in San Francisco against the NDC resolution were so compelling, was willing to work for a compromise for the good of the Academy. Bill Murphy had only a few months to live and asked to be excused from participating on either side. Only two of the sixteen remained adamantly opposed. Sadly, Ben Aaron himself died before the meeting. George's announcement of the former presidents' support proved even more powerful than the original letter.

The vote counting this time was even more careful than in Chicago. There were two vote counters, each with a mechanical clicker for recording numbers. On the first vote, their numbers differed slightly so the group voted again. Once more, their counts differed slightly, so once more we voted. I was sitting next to Barry at the time. He seemed as pessimistic as I was about

the result. When we saw a large number of people stand to vote Yea and a much smaller number stand to vote Nay, we looked at each other with astonishment. I think he had the same thought as I did at that moment: "We might just have done it!"

And indeed we had. On the third vote, 114 members voted, so the magic number for the bare two-thirds majority was 76. After receiving the agreed tally from her vote counters, Barbara announced that 78 members had voted in favor and 36 against. A quick mental calculation showed that the amendments received the two-thirds majority with two votes to spare. Had just three people voted the other way, the NDC's three years of work would have been for naught.

The end result was nowhere near as dramatic as we had hoped when we began the NDC initiative. The final compromise on membership standards was particularly disappointing because it was so limited. Nevertheless, the most important part of the entire effort remained intact: we amended our Constitution and By-Laws to incorporate nontraditional forms of employment dispute resolution into the Academy's reach. That candle alone was worth the price of the game.

Reflections on the 2007 and 2008 Results

Victory, they say, has many parents, failure none. That is particularly true with the two close votes on the NDC proposals. Because just a few votes made the decisive margins, many factors contributed, each of which could have been decisive.

First among the reasons, I am convinced, is the incredible work done by so many supporters, beginning with the Board of Governors and officers from 2005 through 2008 and continuing through the members of the NDC and its working groups.

Special credit goes to those who spotted a need at a crucial time and came forward to fill it. That group included George Fleischli on several occasions; Marty Malin and Dan Nielsen, who found a way to provide the specificity about the resolution's implementation that some members had demanded, while at the same time preserving the most important parts of the reform initiative; Sara Adler, who helped to defuse the suggestion that our labor clients would punish us for addressing employment arbitration; and leaders like Walt Gershenfeld, Margery Gootnick, Michel Picher, Ted St. Antoine, and Barbara Zausner, whose interventions repeatedly demonstrated that the NDC enjoyed consistent presidential support.

Even with those members' contributions, I give the lion's share of the recognition to those who led the NDC itself, particularly its co-chairs, Barry Winograd and Jeff Tener, and the head of its Membership Standards Working Group, Margie Brogan. Sara Adler (who chaired the External Affairs Working Group) and Bill Marcotte played crucial roles at precisely the right times. All of them are great leaders in the Academy. It is sweet and fitting that many of the NDC leaders have gone on to hold higher office, Sara, Margie, and Barry as presidents and Jeff as vice president. Margie's immediate reward, though, was to chair the Membership Committee at the moment when it had to figure out how to apply the somewhat vague standards adopted by the Board. Unsurprisingly, she did an amazing job.

Developments After the New Directions Committee [15]

Application of New Membership Standards. Following the adoption of the new constitutional standards for Academy membership, the chairs of the Membership Committees that first had to apply those criteria were Margie Brogan, Sarah Garraty, Howell Lankford, Susan Mackenzie, Bill Marcotte, and Susan Meredith. These chairs were surveyed about the practical effects of the new standards. Perhaps surprisingly, especially in light of the heated debates about counting employment (nonunion) arbitrations, one chair expressed the initial consensus that "allowing the counting of different workplace disputes had a more significant impact upon admissions to the NAA than the 10 employment cases allowable." [16] It was pointed out that practically none of the early post-NDC applicants had close to as many as ten cases.

Only with the more recent set of applications, in 2020-21, did a few candidates have the maximum number of employment arbitrations allowed. One can speculate about the reasons. Although surveys indicate that employees are subject to mandatory arbitration in over half of American workplaces, [17] the actual number who get to arbitration may be smaller than realized. Perhaps it took time for word to get out that the NAA was counting employment arbitrations toward qualifying. Many employment arbitrators are also partisan advocates and thus are not eligible for Academy membership. In any event, it would be ironic if the pitched battle over this one qualification may have had the more important practical effect of promoting other grounds for admission and of extending more broadly the reach of Academy involvement.

Modifications of 1997 Policy Statement Opposing Mandatory Arbitration. In 1997 the NAA through the Board of Governors flatly stated that it "opposes mandatory employment arbitration ... for the pursuit of statutory rights." [18] By 2009 the Academy had softened this position to saying that "voluntary arbitration is always preferable," and "it is desirable for employees to be allowed to opt freely, post-dispute, for either the courts and administrative tribunals or arbitration." [19]

Amendments of Guidelines for Employment Arbitration. Along with the 1997 Policy Statement opposing mandatory arbitration in principle, the NAA recognized the reality of its lawful existence under Supreme Court rulings in *Gilmer* and subsequent decisions, as noted earlier. [20] Accordingly, the Academy adopted Guidelines on Arbitration of Statutory Claims under Employer-Promulgated Systems. [21] Amendments were adopted to these

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[15] Theodore J. St. Antoine contributed the remainder of this chapter.

[16] Margie Brogan, email of September 21, 2020, on file with the author.

[17] Alexander J.S. Colvin, "The Metastasization of Mandatory Arbitration," 94 *Chi.-Kent L. Rev.* 3, 23 (2019).

[18] National Academy of Arbitrators, "Statement on Condition of Employment Agreements," in *Arbitration 1997: The Next Fifty Years, Proceedings of the 50th Annual Meeting, National Academy of Arbitrators* 312 (Joyce M. Najita ed. 1998).

[19] National Academy of Arbitrators, "Policy Statement on Employment Arbitration" and "Guidelines for Employment Arbitration" (May 20, 2009), https://naarb.org/employment-arbitration-policy-and-guidelines/.

[20] *See supra* text following note 7, "Policy Statement and Guidelines for Members."

[21] *Id.*

original Guidelines in 2007 and 2009. Among the most important changes or additions were these: [22]

> 1. The title was changed to Guidelines for Employment Arbitration and their coverage was no longer limited to statutory claims. It was extended to the arbitration of contractual rights (under employee handbooks and oral commitments) and other common law claims.
>
> 2. Fairness of the arbitrator-selection process was amplified by advising arbitrators contemplating an appointment to ask themselves: "Did both parties have a meaningful selection opportunity?"
>
> 3. In a provision that would become increasingly important, members were advised to consider the following in deciding whether they should take a case: "Any restrictions on class or group actions to the extend these might hinder particular grievants in pursuing their claims, especially where the monetary amount of each individual claim is relatively small, or hinder the vindication of the public purpose served by the particular claim." [23]
>
> 4. Special attention was paid to cases involving a pro se claimant.
>
> 5. Special attention was paid to the need for a record (an audio tape instead of an expensive transcript?) in statutory cases that were likely to be subject to judicial review.

The Second Set of Guidelines for Mandatory Employment Arbitration. In May 2008 Academy members amended the NAA Constitution and By-Laws to authorize establishing standards for persons who decide "workplace disputes," including employment arbitrators. In June 2011 President Roberta Golick, in conjunction with Immediate Past President Gil Vernon and then-President-Elect Sara Adler, appointed a Committee to Draft a Code of Professional Responsibility for Employment Arbitrators. Regular Committee members included Jack Clarke, Sharon Henderson Ellis, George Fleischli, Ed Krinsky, Susan Mackenzie, Martin Malin, Dennis Nolan, John Sands, Susan Stewart, Jeff Tener, and Barry Winograd, with Ted. St. Antoine as Chair. The "three Presidents" were *ex officio* members.

St. Antoine appointed Martin Malin and Dennis Nolan as chairs of drafting subcommittees to parallel the provisions of the two halves of the existing Code of Professional Responsibility for Arbitrators of Labor-Management Disputes (the Labor Arbitration Code). An initial decision was not to seek the participation of other neutral bodies like the AAA, FMCS, or JAMS at the outset, but for the Academy to complete a first draft before considering inviting others to provide input. Several committee members opposed proceeding without other interested groups, as had been done with the Labor Code and the Due Process Protocol. The majority view was that it

[22] *See supra* note 19.
[23] *See infra* text at notes 34 and 35.

made sense to determine sentiments within the Academy first, especially in light of the considerable controversy recently generated over the New Directions project.

As intended, much of what became the second set of Guidelines mirrored the structure and contents of the existing Labor Code. Those included provisions on an arbitrator's qualifications and responsibilities to the profession, responsibilities to the parties, responsibilities to administrative agencies, prehearing conduct, hearing conduct, post-hearing conduct, and post-award conduct. Many provisions were self-evident and conventional, such as those requiring that an arbitrator be impartial and competent to handle the particular case, ensure all parties due process, and avoid any undue delay. A few of the more significant or divisive strictures were the following:

> 1. An arbitrator must not accept an appointment if selected from a panel unilaterally formed by one of the parties. Some argued this was too restrictive if all the panelists were established, reputable persons (*e.g.*, all Academy members).
>
> 2. Written disclosure requirements for arbitrators are very extensive and continue throughout the arbitration proceedings if new grounds for disclosure come to light. They cover all personal, social, professional, financial, or other interests related to a party, representative, or known witness. The broad rules of states like California were influential here.
>
> 3. An arbitrator must decline an appointment if there is a conflict of interests, even if all parties waive any objection.
>
> 4. Arbitrators may accept or decline parties' invitation to mediate, or even suggest it themselves, but there must be clear rules in advance about ex parte communications (allowable) and about the further role of the arbitrator if the matter is not resolved in mediation.
>
> 5. Arbitrators must inform an unrepresented party that they are neutral and not representing either party. They may explain the arbitration process to the *pro se* party, although they must not assist either party in the presentation of its case.
>
> 6. An arbitrator "must make a reasonable effort to address and follow public law whenever public law is at issue in a case." Some strongly urged that arbitrators should or could stick to applying the parties' contract and that this provision on public law authorized courts to introduce a new ground for vacating an arbitrator's award. The Guidelines themselves state: "They do not establish new or additional grounds for judicial review of arbitration awards."

7. Arbitrators should not decide a case on a rationale no party has argued without returning to the parties for their views. Some questioned this ban, pointing out that appellate courts frequently decide cases that way.

8. One party may be made solely responsible for all arbitral fees by law, agency rules, or agreement of the parties. [24]

9. Post-award clarification of the merits is not permitted unless all parties agree but an arbitrator may retain remedial jurisdiction to resolve disputes about the interpretation or implementation of the *remedy* provided by the arbitral award.

10. Arbitrators may not voluntarily participate in legal proceedings for enforcing an award.

Major Changes in the Drafting and Approval Process. Probably the assumption of most of the Drafting Committee was that its product would supersede the earlier set of Guidelines and would be a binding, enforceable code like the Code for Labor Arbitrators. Perhaps there would be a separate enforcement body instead of the Academy's Committee on Professional Responsibility and Grievances (CPRG), or perhaps the CPRG would add employment arbitrators to its membership.

It turned out there was strong opposition to the proposed code, both within the Drafting Committee and within the Board of Governors. There were various reasons, including some of the arguments on particular issues mentioned above. Some committee members felt that Academy members subject to such a code would be at a competitive disadvantage with nonmember arbitrators who were not thus limited. Within the BOG there seemed considerable sentiment to the effect that Academy members already had, with existing Guidelines and the many state regulations, more than enough constraints on wrongdoing. In any event, there were two major compromises: (1) the proposed code, which presumably would have been enforceable like the Labor Code, was reduced to a second set of nonbinding Guidelines and (2) the new set of Guidelines was limited to *mandatory* employment arbitrations imposed as a condition of employment. (The original set of Guidelines eventually covered — and still covers — *all* employment arbitrations, mandatory or otherwise.)

With those compromises, the NAA Board of Governors in May 2014 formally approved what had acquired the rather cumbersome title of Guidelines for Standards of Professional Responsibility for Arbitrators in Mandatory Employment Arbitration. [25]

Applicability of the Labor Code to Employment Arbitration. When the second set of Guidelines was deprived of any binding effect, several NAA members expressed great concern that the Academy would have no disciplinary power over members who engaged in misconduct as *employment* arbitrators. Hearing this, Past President George Fleischli stated he had been

[24] This is contrary to the Due Process Protocol, but the Protocol was undercut on this point by the decision in Cole v. Burns Int'l Security Svcs., 106 F.3d 1465, 1482 (D.C. Cir. 1997).

[25] For the full text, *see* https://naarb.org/guidelines-for-standards-of-professional-responsibility-in-mandatory-employment-arbitration/.

involved with adding provisions to the *Labor* Arbitration Code that were intended to make persons covered by the Code as labor arbitrators also subject to it when they serve as employment arbitrators. Express language did make that Code applicable to e*mployment* arbitrations as well as to traditional union-management labor arbitrations. Indeed, earlier in this chapter Dennis Nolan declares very matter-of-factly: "The Academy also amended the Preamble to the Code of Professional Responsibility so that it would apply to nonunion employment arbitration."[26] The wording in the Preamble and Scope of Code could hardly be more explicit about coverage: "individual employment contract," "implied or explicit individual employment contract," "procedures established by employers to resolve employment disputes under personnel policies or handbooks," "the other arbitration and related procedures described in the Preamble."[27] The revised initial Guidelines (2009) also state, suggesting an interrelationship: "They supplement the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes."[28]

Nonetheless, a number of Academy members do not realize, or oppose the position, that the Labor Code is applicable to employment arbitration. The chief legal officer of the American Arbitration Association, the NAA's partner in Code enforcement, was similarly disbelieving when the matter was broached with him. In nonunion employment arbitrations, the AAA now applies its own Employment Arbitration Rules and Mediation Procedures[29] as well as the Employment Due Process Protocol.[30] Apparently the Academy's Committee on Professional Responsibility and Grievances (CPRG), which would have the relevant jurisdiction, has never had occasion to rule on the question of the Labor Code's applicability to employment arbitration. Of course, as Dennis Nolan has remarked, the Labor Code is an "ill-fitting" garment there. It "does not address any of the peculiar ethical problems raised by employment arbitration."[31] But it is better than nothing. Most arbitrator violations in any context are neither subtle nor unique to the type of arbitration. They are crass and mundane, such as not getting out a decision for months past a deadline, or not disclosing a disqualifying personal association. Almost any set of governing rules would be applicable to such offenses.

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[26] *See supra* text following note 7, "Code Amendment." For other views *see supra* ch. 2, Dan Nielsen, "The Challenge of Self-Regulation: Ethical Standards in Arbitration."
[27] *See* https://naarb.org/code-of-professional-responsibility/.
[28] *See supra* note 19.
[29] *See* https://www.adr.org/sites/default/files/EmploymentRules_Web_2.pdf.
[30] *See* https://naarb.org/due-process-protocol/. For the Academy's role in creating the Due Process Protocol, *see* Gladys W. Gruenberg, Joyce M. Najita & Dennis R. Nolan, "Due Process Protocol," in *National Academy of Arbitrators: Fifty Years in the World of Work* 285-88 (1997).
[31] *See supra* text following note 7, "Code Amendment."

Amicus Briefs

Over the years the NAA has filed about ten amicus briefs with the U.S. Supreme Court, most written by David Feller but others by James Feldman, Matthew Finkin, and Ted St. Antoine.[32] The majority of the briefs dealt with traditional union-management issues and the Academy's batting average was most impressive. Three cases involved nonunion employment or consumer arbitration, and there the Academy fared much less well.

1. *Circuit City Stores, Inc. v. Adams.*[33]
2. *AT&T Mobility LLC v. Concepcion*[34]
3. *Epic Systems Corp. v. Lewis.*[35]

These cases involved a combination of a mandatory arbitration clause with a waiver of the right to bring a class or group action. In *Concepcion*, a consumer case, California courts had held the combination unconscionable and invalid. The U.S. Supreme Court reversed. In a 5-4 decision, it ruled the Federal Arbitration Act's support for arbitration preempted state law and held the class-action waiver was valid.

The three cases in *Epic Systems* were employment cases, and the NLRB and some federal courts of appeals distinguished *Concepcion* on the grounds that Section 7 of the National Labor Relations Act guarantees *employees* the right to engage in "concerted activities." In its amicus brief the NAA argued that "collective statutory claims presented in employment arbitration can be heard as simply, flexibly, informally, and expeditiously as these very same claims are commonly heard in labor arbitration," and that "the presentation of all these individual claims *would* produce a genuine 'procedural morass.'" The U.S. Supreme Court nonetheless held (5-4) that the class-action waiver required of employees was valid. The FAA provides for the enforcement of individual arbitration agreements according to their terms, said the Court, and there was no showing that either the FAA or the NLRA provides otherwise for employees. The dissent, by Justice Ginsburg, insisted that the history, text, purposes, and long-standing construction of the NLRA protected employees' concerted activity like a class-action arbitration claim.

The Common Law of the Workplace: The Views of Arbitrators (1998, 2005)

Background. As stated earlier, employees may now be subject to mandatory arbitration agreements in over half of American workplaces.[36] The possibility of such a development was foreseen by Arnold Zack when he was President of the NAA in 1994. He was concerned that in many of these nonunion employment arbitrations the arbitrator would be someone from a commercial litigation background, unfamiliar with the practices and procedures of the workplace. Zack therefore proposed that the Academy

[32] *See generally infra* ch.10, Barry Winograd, "The Academy's Amicus Briefs."
[33] 532 U.S. 105 (2001) (discussed *supra id.*).
[34] 563 U.S. 333 (2011).
[35] 138 S.Ct. 1612 (U.S. 2018).
[36] Colvin, *supra* note 17.

sponsor a book setting forth the views of established labor arbitrators on accepted principles of employer-employee relations.

Zack's proposal did not meet with universal acclaim within the Academy. As revered a figure as Benjamin Aaron worried that such a work could become a *vade mecum*, with its "rules" being followed too mechanically by the uninitiated without sufficient attention to the critical importance of differing fact situations. Another objection was that respected arbitrators often disagree on interpretive or evidentiary issues, and the Academy should not take an institutional position on such divisions. Other critics felt that the relationship of an arbitrator to a particular set of parties was highly personal and they would want the judgment of that individual regarding their specific dispute, not some generalized formulaic determination.

These concerns were taken seriously and resulted in some adjustments. Perhaps most significant, it was decided that when reasonable differences of opinion existed among reputable arbitrators, those disagreements would be recognized. There was a flat disavowal of any effort to promulgate definitive rules. Proponents of the project further pointed out that many veteran arbitrators rarely submit their decisions for publication, and the media frequently focus on the bizarre or sensational case rather than the basic and routine. A book reflecting consensus positions on common issues would offset those misconceptions. Ultimately, a majority of Academy members sided with the view that the experience of a half century had yielded some generally accepted approaches toward frequently encountered problems, and that these insights were worth sharing.

*Authors and Subjects***.** President Zack was chiefly responsible for selecting the NAA members who wrote and edited the two editions of *The Common Law of the Workplace: The Views of Arbitrators* (1998, 2005). The chapter titles and the authors were as follows for the second edition (little changed from the first edition – essentially an updating):

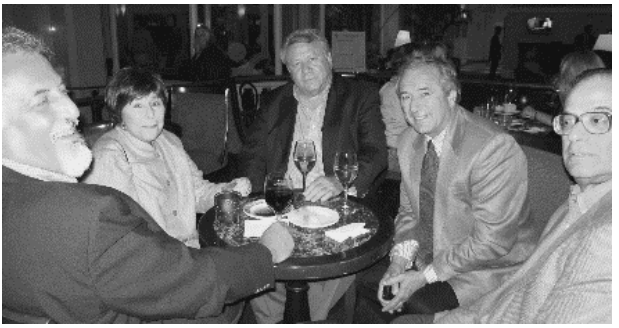
1. Practice and Procedure. John Kagel
2. Contract Interpretation. Carlton J. Snow
3. Management and Union Rights: Overview. Gladys W. Gruenberg
4. Job Assignments. Susan R. Brown
5. Seniority. Calvin W. Sharpe
6. Discipline and Discharge. Gladys Gershenfeld, chapter editor
   (a) Standards for Discipline and Discharge. Dennis R. Nolan
   (b) Due Process in Discipline and Discharge. James Oldham
   (c) Discrimination as Misconduct or Basis for Mitigation. Susan T. Mackenzie
   (d) The Troubled Employee. Janet Maleson Spencer
7. Wages and Hours. Timothy J. Heinsz and Terry A. Bethel
8. Safety and Health. Mark Thompson
9. Fringe Benefits. Shyam Das
10. Remedies in Arbitration. Marvin F. Hill, Jr.

Appendix. Titles of NAA Proceedings, 1994-2004

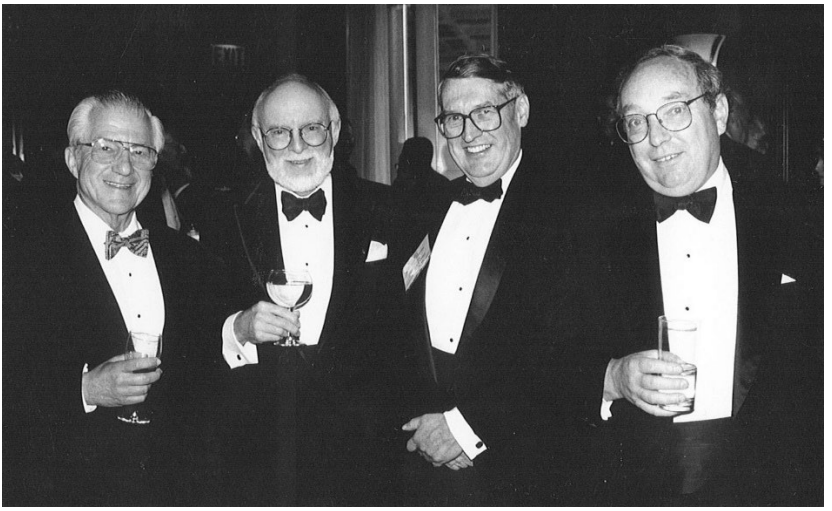
Index. Jacquelin F. Drucker

The first edition of the publication had a Presidential Advisory Group, chaired by Richard Mittenthal. Its members were Benjamin Aaron, Howard S. Block, Dallas L. Jones, Clare B. McDermott, Anthony V. Sinicropi, Arthur Stark, and Rolf Valtin. Each chapter draft was reviewed by two members of this Advisory Group. The Editor and Chair of the Common Law Project was Theodore J. St. Antoine.

Impact. The Common Law has been widely regarded as a clear, concise, and reliable guide to the arbitration principles applicable in resolving workplace disputes. Perhaps ironically, however, its greatest use may not be where President Zack thought such a reference work was most needed, namely, in the relatively novel, uncharted area of nonunion employment arbitration. While *The Common Law* has undoubtedly been helpful there, published decisions in traditional union-management cases show that a large number of labor arbitrators also find it a readily accessible and authoritative aid in their work.



Edward Krinsky, Margery Gootnick,George Fleischli, Michel Picher, and Amedeo Greco



Howard Block, J.F.W. Weatherill, Theodore St. Antoine, and John Kagel

Gladys and Walter Gershenfeld

Barry Winograd, Ross Kennedy, Joan Dolan, and Jeffrey Tener

Margery Gootnick and Arnold Zack

Chapter 10

THE ACADEMY'S AMICUS BRIEFS: ADVOCATE FOR THE INSTITUTION OF ARBITRATION

Barry Winograd

Introduction

The Academy's filing of briefs *amicus curiae* with courts in the United States and Canada demonstrates its objective of promoting and protecting the institution of arbitration and, in so doing, advancing a judicial understanding of arbitration as a means of resolving disputes. This objective contrasts sharply with the notion that the Academy is a trade organization with a narrow focus on the income of its members.

For many years the Academy's amicus filings have been written by a small number of members, principally in academic positions, subject to approval by the organization's leadership. Currently this aspect of the Academy's work is overseen by its Amicus Brief Advisory Committee (ABAC).

The Academy's general goals, which its amicus filings have highlighted, are described in a statement by former President Byron Abernathy in 1983:

> The dominant commitment of this Academy throughout its history has been to the advancement of arbitration, not to the advancement of arbitrators. That essential ingredient of true professionalism. . . -- a sense of responsibility for advancing socially desirable goals lying outside and beyond one's personal or group interests -- has motivated this Academy. [1]

The Academy's governing documents do not refer specifically to amicus briefs. However, the Academy's Constitution provides that one purpose is "to promote the study and understanding of arbitration of labor management disputes, other collectively bargained dispute resolution arrangements, and procedures used to resolve other types of workplace disputes." [2] Amicus briefs are an important Academy activity fulfilling this purpose.

The organization's Bylaws authorize the Academy's president to appoint special and permanent committees to further the purposes of the organization. ABAC members are appointed for three-year terms to monitor

[1] Abernathy, "Presidential Address: The Promise and the Performance of Arbitration: A Personal Perspective," in *Arbitration -- Promise and Performance, Proceedings of the 36th Annual Meeting, National Academy of Arbitrators* 1, 13 (James L. Stern & Barbara D. Dennis eds. 1983), https://naarb.org//proceedings/pdfs/1983-1.pdf.

[2] NAA Constitution and Bylaws, Article 2, Section 1, https://naarb.org/constitutions-and-by-laws/.

important court cases and third-party inquiries about possible filings, and, where appropriate, to recommend an amicus submission.

The Academy did not have a formal amicus committee until one was formed in the early 2000s. Previously, a few individuals, usually law professors, conferred about possible submissions. One key figure, David Feller, represented unions in U.S. Supreme Court and other appellate litigation before becoming a law professor and an arbitrator. He also became an Academy president. During Professor Feller's years in the Academy, he was a lead or contributing author for seven amicus filings.

According to George Fleischli, a past Academy president, an amicus committee was officially established during his presidential term in 2005-06. The initial chair was Calvin Sharpe, a member from Ohio and a professor at Case Western Law School. Subsequent chairs also had law school faculty: Terry Bethel (Indiana), Dennis Nolan (South Carolina), Barry Winograd (Berkeley), Stephen Befort (Minnesota), and Martin Malin (Chicago-Kent).

The amicus committee has usually numbered about a half-dozen members, most often drawn from academic ranks. In the past decade or so, the principal author for Academy amicus contributions has been Matthew Finkin, a law professor at the University of Illinois.

For many years the amicus committee operated without formal guidelines. Initially, as recalled by Dennis Nolan, a memo outlining the general nature of the committee's work was drafted in the 1990s by Alex Elson, a member from Chicago. About 2006 Sharon Ives, a member from Wisconsin, drafted procedural guidelines for the committee. A few years later, when Professor Nolan was the ABAC chair, a subcommittee led by Professor Sharpe developed guidelines largely in their current form.

The ABAC Guidelines provide that the committee makes a recommendation to the Academy's Executive Committee when a filing is deemed worthy. The Guidelines specify several factors to be taken into consideration:

> (a) whether the Academy has a significant interest in a case before the court, (b) whether there is consensus on a viewpoint to advocate in the case, (c) whether Academy resources are available for drafting the submission, and (d) whether the likely impact of the submission warrants the expenditure of resources. [3]

The Guidelines include a detailed analysis for how each of these factors should be weighed, including questions related to the subject matter of the dispute, cost, timing, and availability of personnel.

Overall, the Academy has submitted eighteen amicus briefs. These have largely addressed cases pending before the U.S. Supreme Court. Two of the amicus briefs, known as interventions, have been written for the Supreme Court of Canada. Four of the filings have been in lower appellate U.S. courts, and two were in state courts. With few exceptions, all the

[3] Amicus Brief Advisory Committee Guidelines, as amended, https://naarb.org/documents/ABACGuidelines_Amended2015FEC.pdf .

Academy's amicus briefs have been written by its members. [4]

Arbitral Finality and Limited Judicial Review

The Academy's submissions have advanced a few main themes. In substantial part, the submissions have built upon U.S. Supreme Court decisions that provide the foundation for modern labor arbitration under collective bargaining agreements. These cases, known as the *Steelworkers Trilogy*, bear a direct connection to Academy history. [5] The lead litigator for the Union in those cases was Professor Feller, the author of several Academy amicus briefs. [6]

One of the main themes advanced by the Academy has been preserving the special relationship of the courts to labor arbitration. The Academy's first amicus brief was in *AT&T Technologies.* In that case, the Supreme Court in 1986 affirmed a lower court's conclusion that a grievance over layoffs was arbitrable, while clarifying, in accord with the *Trilogy* and the Academy's view, that a judicial order compelling arbitration should not be denied unless there was an express exclusion from arbitration. [7]

Another example was the 1997 brief in *Bruce Hardwood Floors.* [8] In that case, the Academy supported review by the U.S. Supreme Court of an appellate line of authority that applied a broad approach touching on the merits of arbitrator decision-making. The lower court had reversed a discipline remedy ordered by an arbitrator instead of adhering to the finality of the arbitrator's determination. Review was denied by the Supreme Court.

Within a few years, the Academy's emphasis on protecting finality was affirmed in the *Garvey* case. [9] At issue was the Ninth Circuit's reversal of an arbitration award rejecting the salary claim of a major league baseball player. The *Garvey* decision followed the precise path proposed by the Academy, that is, a *per curiam* summary reversal of the appellate decision, without full briefing or oral argument. In doing so, the Court adopted the

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[4] The following footnote references to the Academy's amicus submissions include the case name and court citation, a link when available for online reference with Westlaw, and notation of the principal authors and year the brief was filed. Links to the briefs also are available on the Academy's website, https://naarb.org/amicus-briefs/.

[5] Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960); Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

[6] See William P. Murphy, "How the Trilogy Was Made," in *Arbitration 1994: Controversy and Continuity, Proceedings of the 47th Annual Meeting, National Academy of Arbitrators* 327 (Gladys W. Gruenberg ed. 1994), https://naarb.org//proceedings/pdfs/1994-327.pdf.

[7] AT&T Technologies v. Communications Workers, 475 U.S. 643 (1986): https://1.next.westlaw.com/Document/Id93782926beb11d8b376ab6b13abf9f8/View/FullText.html?listSource=RelatedInfo&list=Filings&rank=2&docFamilyGuid=Ic8251020721911d7b0409d11d16b6b13&originationContext=filings&transitionType=FilingsItem&contextData=%28sc.Search%29 (Feller 1985).

[8] UBC Southern Council of Indus. Workers Local 2713 v. Bruce Hardwood Floors, 103 F.3d 449 (5th Cir.), *cert. denied*, 522 U.S. 928 (1997): https://1.next.westlaw.com/Document/Id7d00ef5f8b711d8b38b85238391ed10/View/FullText.html?listSource=RelatedInfo&list=Filings&rank=6&docFamilyGuid=Icc099320e79211d7b09febd84702131b&originationContext=filings&transitionType=FilingsItem&contextData=%28sc.DocLink%29 (Feller 1997).

[9] Major League Baseball Players Assn. v. Garvey, 532 U.S. 504 (2001): https://www.westlaw.com/Document/Iebc7ea67f84c11d8b80a9f6d63ee1f3d/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0 ([Feller 2001).

Academy's position, based on *Enterprise Wheel*,[10] that judicial review of an arbitration award was designed to be final, and courts should not second-guess factual findings and evidentiary rulings.

Several years later, in a brief written for the Sixth Circuit in *Michigan Family Resources*,[11] the Academy again urged adherence to a limited scope of judicial review of an arbitrator's decision. The court considered an arbitrator's possibly erroneous reading of contract language. In the absence of fraud or a conflict of interest, and as long as the arbitrator was "arguably construing" the collective agreement, the arbitral award was to be enforced.

The intersection of limited judicial review and public policy was addressed in two amicus filings. In the first, the *Misco* case, the Supreme Court, in accord with the Academy, stated that rejection of an arbitrator's award based on public policy was confined to circumstances tied to law, and could not be based on disagreement with factual findings or evidentiary rulings.[12]

The public policy issue was addressed again in *Eastern Associated Coal*.[13] The Supreme Court's decision, consistent with the Academy's position, reaffirmed the principle of arbitration finality. In doing so, the Court rejected the employer's public policy objection to an arbitrator's reinstatement of a heavy equipment operator after a positive drug test. For the Court, the correct issue for analysis was whether, under public law, the parties themselves could contract for the outcome directed by the arbitrator, and not whether the employee's conduct was improper. This position had been set forth a few years earlier in a law review article by Ted St. Antoine, a professor at the Michigan Law School and co-author of the amicus brief.[14]

The special character of labor-management grievance arbitration was considered in depth in *City of North Las Vegas* by the Nevada Supreme Court. The Academy, and later the court, rejected an individual grievant's claim that the arbitration decision in his case was improper because the arbitrator owed a duty to disclose service on a different arbitration panel.[15] In reaching its decision, the court drew upon the ethical premises of the Code of Professional Responsibility developed by the Academy, the Federal Mediation and Conciliation Service, and the American Arbitration Association.

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[10] Steelworkers v. Enterprise Wheel & Car Corp., *supra* note 5.

[11] Michigan Family Resources v. SEIU Local 517M, 475 F.3d 746 (6th Cir. 2007) (en banc): https://www.westlaw.com/Document/I52267e9563b011dbb29ecfd71e79cb92/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0. (Bethel 2006).

[12] Paper Workers v. Misco, 484 U.S. 29 (1989). David E. Feller and William P. Murphy filed a brief for the Academy urging reversal.

[13] Eastern Associated Coal Corp. v. United Mine Workers, 531 U.S. 57 (2000): https://www.westlaw.com/Document/I42d02fe16bf111d88a96cfc70562955d/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0 (Feller & St. Antoine 2000).

[14] 531 U.S. at 62, citing St. Antoine, "Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny," 75 *Mich. L. Rev.* 1137, 1155 (1977). As the Court succinctly stated, "For present purposes, the award is not distinguishable from the contractual agreement." 531 U.S. at 62.

[15] Thomas v. City of North Las Vegas, 122 Nv. 82 (2006): https://naarb.org/documents/CityofNorthLasVegasvThomas.pdf. (Hawley & Sharpe 2004); not in Westlaw.

Another facet of protecting labor arbitrator decision-making arose in the context of a neutrality agreement to determine union recognition. In *Unite Here Local 355 v. Mulhall*, the Academy contended a federal court went too far by permitting a legal action to challenge a voluntary recognition procedure that included an arbitration remedy and that already had resulted in an award.[16] After briefing and oral argument, the Supreme Court found that the petition for review had been granted improvidently.

The Academy's interest in protecting the arbitration process is evident in one of its few amicus filings outside the field of labor and employment law. In *Moore v. Conliffe,* an Academy brief concurred with the California Supreme Court's application of the "judicial privilege" extending statutory tort immunity to an expert witness deponent in a private contractual arbitration involving the professional liability of a health care provider.[17]

Beyond the area of labor arbitration under collective bargaining agreements, a principal theme in the Academy's filings has been protecting the integrity of the arbitration process in the context of nonunion employment relations.[18] This became increasingly important for the Academy as mandatory arbitration procedures for statutory civil rights and discrimination claims emerged as a condition of employment in the nonunion workplace following the *Gilmer* decision of the U.S. Supreme Court in 1991.[19] That decision extended a jurisprudential trend that emerged in the 1980s expanding the reach of the Federal Arbitration Act.

After *Gilmer,* two actions by the Academy place in context the attention paid by the organization to mandatory arbitration. In 1995 the Academy joined other organizations representing neutral, employer, and employee groups in adopting a Due Process Protocol.[20] The safeguards spelled out in the Protocol included protection in arbitration of statutory remedies, limited pretrial discovery, and bilateral selection of qualified neutrals. These thematic principles were raised by the Academy in later amicus submissions.

Nonunion Employment Arbitration

The first Academy brief in a nonunion employment case was in *Duffield*.[21] In that proceeding, the Academy and the Ninth Circuit opposed the mandatory arbitration of statutory civil rights discrimination claims. In its brief, the Academy viewed the arbitration procedure established by a

[16] Unite Here Local 355 v. Mulhall, 571 U.S. 83 (2013): https://www.westlaw.com/Document/Id52cbc3b0e7811e38348f07ad0ca1f56/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0 (Finkin & Winograd 2013).

[17] Moore v. Conliffe, 7 Cal. 4th 634 (1994) (brief by Gentile & Drapkin); not in Westlaw.

[18] *See generally supra* ch. 9, Dennis Nolan, "New Directions: The Academy's Encounter with Employment Arbitration."

[19] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

[20] *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship* (1995), https://naarb.org/due-process-protocol/.

[21] Duffield v. Robertson Stephens, 144 F.3d 1182 (9th Cir. 1998) (Feller & Weckstein 1997). The Ninth Circuit's rejection of mandatory arbitration for statutory claims was an exception nationally, and was overruled in a later Ninth Circuit decision, EEOC v. Luce, 345 F.3d 742 (9th Cir. 2003).

securities organization as lacking fundamental fairness, citing among other terms the arbitrator selection procedures, the imposition of forum fees, and the absence of an explanatory opinion permitting effective judicial review.[22]

Soon after, in *Universal Maritime,* the Supreme Court adopted a view that had been advanced by the Academy.[23] In that decision, the Court rejected mandatory arbitration of a statutory discrimination claim for an employee otherwise covered by collective bargaining agreements, unless the parties had negotiated a clear and unmistakable waiver authorizing individual arbitration by the union of a statutory claim.

A year later, in *Hooter's of America*, a mandatory employment arbitration procedure was challenged in a Fourth Circuit case.[24] In particular, the Academy objected to an employer-selected arbitration panel, a position ultimately taken by the court of appeals.

Another Academy brief was submitted in *Circuit City.*[25] That case concerned language under the Federal Arbitration Act that excluded "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[26] As described below, Academy leaders were not of one mind in approaching the dispute. In the end, the Academy's submission offered a construction of the exclusionary phrase in the FAA that distinguished between salaried employees who would be subject to the FAA, such as officers and managers, and other employees who were "workers" as the word traditionally was understood. Those workers, in the Academy's view, should be excluded from FAA coverage, a result that would have sharply limited the scope of *Gilmer*. The Supreme Court, however, did not agree with this interpretation, and instead read the statutory exclusion narrowly as applying only to transportation employees.

The Academy revisited the clear and unmistakable waiver doctrine in its amicus filing in the *Pyett* case.[27] The Academy's position favored the

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[22] As noted in the Academy's brief, a resolution in 1997 states: "The National Academy of Arbitrators opposes mandatory employment arbitration as a condition of employment when it requires waiver of direct access to either a judicial or administrative forum for pursuit of statutory rights." Periodically since 1997, the Academy also has adopted guidelines for arbitrators in handling mandatory arbitration cases. *See, e.g., Guidelines for Standards of Professional Responsibility for Arbitrators in Mandatory Employment Arbitration* (2013), https://naarb.org/guidelines-for-standards-of-professional-responsibility-in-mandatory-employment-arbitration/.

[23] *Wright v. Universal Maritime Service Corp*., 525 U.S. 70 (1998): https://1.next.westlaw.com/Document/Ie096ec616bf011d8836ebb813d20b266/View/FullText.html?listSource=RelatedInfo&list=Filings&rank=14&docFamilyGuid=I81a0603071cb11d7a07084608af77b15&originationContext=filings&transitionType=FilingsItem&contextData=%28sc.Default%29 (Feller 1998).

[24] Hooters of America v. Phillips, 173 F.3d 933 (4th Cir. 1999): https://www.westlaw.com/Document/Ic78c4a3a664b11d8bb43a2b363faa3d0/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0 (Weckstein 1998).

[25] Circuit City Stores, Inc. v. Adams, 532 U.S. 106 (2001): https://www.westlaw.com/Document/I53c489916bed11d8a7668c955f4269ea/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0 (Feller 2000).

[26] 9 U.S.C. § 1 (2018).

[27] 14 Penn Plaza v. Pyett, 556 U.S. 247 (2009): https://1.next.westlaw.com/Document/I66d6726c490f11ddbc7bf97f340af743/View/FullText.html?listSource=RelatedInfo&list=Filings&rank=9&docFamilyGuid=I66d6726d490f11ddbc7bf97f340af743&originationContext=filings&transitionType=FilingsItem&contextData=%28sc.Default%29 (Finkin, Winograd & Oldham, 2008).

preservation of individual statutory arbitration claims from waiver under collective bargaining arbitration procedures. The Court's position differed and upheld a finding of a negotiated waiver.

Class action issues also have been the subject of Academy briefs dealing with whether mandatory arbitration agreements could require a waiver of collective actions. In *AT&T Mobility*, a consumer arbitration, the Academy objected to compelling an individual arbitration proceeding based on a compulsory waiver of class actions that was contrary to governing state law.[28] The Supreme Court's view was otherwise. The *AT&T Mobility* amicus brief was prepared by an outside attorney who assisted the Academy, without charge, and consulted with the Academy's Amicus Brief Advisory Committee (ABAC).

More recently, in *Epic Systems*, the Academy opposed class and collective action waivers related to wage and misclassification claims under federal law.[29] The Academy, the National Labor Relations Board, and individual plaintiffs argued that class claims constituted protected, concerted activity under the National Labor Relations Act and the Norris-LaGuardia Act. As described by the Academy, such claims could proceed in both arbitration and in litigation and could not be subject to a waiver of the employee rights. They were comparable to class claims or "policy grievances" that have long been heard in traditional labor arbitration proceedings. The Academy's brief argued that rejection of its view could result in procedural morass of repetitive individual claims, an outcome that is unfolding as predicted.[30]

Canadian Cases

In addition to amicus submissions in U.S. courts, the Academy has filed briefs, known as interventions, in the Supreme Court of Canada. In *Canadian Union of Public Employees*, the issue concerned who could serve as the chair of an interest arbitration panel appointed by a government minister to resolve a hospital labor dispute.[31] Consistent with the eventual decision, the Academy urged that it was an error for the minister to appoint retired judges as arbitrators by disregarding a statutory mandate requiring experienced and impartial labor arbitrators. Michel Picher, a leading member of the Academy in Canada and later president of the organization, was given leave to offer oral argument to the court.

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[28] AT&T Mobility v. Concepcion, 563 U.S. 333 (2011): https://www.westlaw.com/Document/Icb1d1098d2d911df952c80d2993fba83/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0 (Feldman 2010).

[29] Epic Systems Corp. v. Lewis, 138 S.Ct. 1612 (U.S. 2018): https://1.next.westlaw.com/Document/I6bb44b8a82c711e79822eed485bc7ca1/View/FullText.html?listSource=RelatedInfo&list=Filings&rank=18&docFamilyGuid=I6bb44b8b82c711e79822eed485bc7ca1&originationContext=filings&transitionType=FilingsItem&contextData=%28sc.Default% (Finkin 2017).

[30] *See, e.g*., Abernathy v. DoorDash, Inc., 2020 WL 619 (U.S. Dist.Ct. N.D. Cal. Feb. 10, 2020) (order to compel arbitration; fees required of company on claims by over 5,000 individuals), https://1.next.westlaw.com/Document/I6c0103304cc711eab6f7ee986760d6bc/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default).

[31] Canadian Union of Public Employees v. Ontario (Minister of Labour), 2003 SCC 29: https://naarb.org/documents/MinistryofLabourforOntariovCanadianUnionofPublicEmployeesandServiceEmployeesInternationa_000.pdf (Picher 2002).

More recently, in the *Vavilov* case, judicial deference to the decision of an administrative tribunal was deemed subject to a presumption of reasonableness, with reversal limited to the incorrect application of law or breach of jurisdictional limitations.[32] *Vavilov* was a non-labor administrative law dispute, but, as the Academy observed in its intervention, judicial review in labor arbitration cases falls within a similar limited scope.

Disputed and Rejected Filings

There are few references to the Academy's amicus filings in other sources of the organization's history. Two references should be highlighted, however, as they reflect internal disagreement that is not commonly found in the Academy's decision-making about amicus briefs. In one, Ted St. Antoine, then the Academy's president, described how, after extensive discussion by the Board of Governors, the Academy approved a *Circuit City* filing prepared by Professor Feller.[33] Professor St. Antoine, also a former union-side Supreme Court advocate, did not share a view that the exclusionary text of the FAA should be broadly construed to bar FAA coverage. He also believed, on pragmatic grounds, that a more limited reading of the text would support greater employee access to an arbitration remedy.

Professor Nolan also recalls that debate, and his opposition to the Academy's filing.[34] Professor Nolan did not see a sufficient consensus for an Academy position favoring a broad FAA exclusion. He also believed that the law under the FAA had moved in a direction away from the position advanced by Professor Feller. Professor Nolan correctly predicted that the Academy's position would not prevail.

On one occasion, the Academy's Executive Committee rejected an ABAC recommendation to file an amicus brief. The case was pending in the Second Circuit and concerned the football commissioner's discipline of player Tom Brady.[35] The ABAC urged that the commissioner was not acting as a neutral arbitrator under the labor agreement, and therefore should not be given deference under *Enterprise Wheel* and later cases, such as *Garvey*. In opposing a filing, the Executive Committee observed that neither party to the litigation had argued this position, and instead deferred to the contractual language that had been treated as an arbitration by the parties.

The rejection in the *Brady* case was premised, in part, on the ABAC Guidelines as then written, which limited the Academy to taking a position on an *"issue"* raised by a party. Neither party in *Brady* had raised the issue. Following this discussion, the ABAC Guidelines were amended slightly to clarify that the Academy could file an amicus brief if the organization had a *"significant interest"* in a case before a court.

On another occasion, the amicus committee declined to recommend an amicus filing because of the limited time and resources available to prepare a filing. That case, *Rent-A-Center v. Jackson*, concerned delegating to an arbitrator, rather than to a court, a decision on whether an arbitration

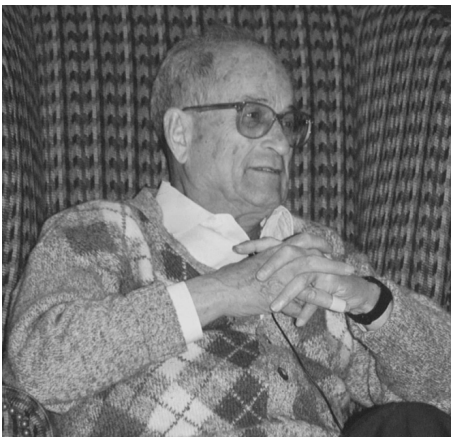
[32] Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65.
[33] St. Antoine Interview at 22-25, https://naarb.org/interviews/TheodoreAntoine.PDF.
[34] Nolan Interview at 20-23, https://naarb.org/documents/DennisNolanbyBarryWinograd.pdf.
[35] National Football League Management Council v. National Football League Players Ass'n, 820 F.3d 527 (2d Cir. 2016).

agreement was unconscionable.[36] About a dozen Academy members eventually signed an amicus brief filed on behalf of "Professional Arbitrators and Scholars."

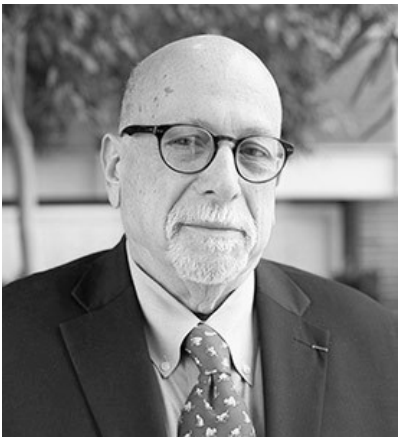
Conclusion

What can we say about the Academy's amicus submissions? The organization is volunteer-based, and thus it is not always easy to find a member ready and willing to work on high-level appellate litigation. This limitation also arises in an organization with members who hold opinions that sometimes diverge shapely. Still, although there were no amicus briefs between 1947, when the organization was founded, and the *AT&T Technologies* brief in 1984, the Academy since then has expressed its views every year or two. Perhaps this shift over many years is explained by changes in the field of labor and employment law, with old policies dissipating and new ones emerging. Perhaps, too, with an organization on more solid footing after decades of work, the Academy is confident of its role as both a friend of the court and an advocate for the institution of arbitration.

[36] Rent-A-Center West v. Jackson, 561 U.S. 63 (2010): https://www.westlaw.com/Document/Ib8819326436d11df9988d233d23fe599/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0 (Professional Arbitrators and Scholars, Russell 2010).



David Feller



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Chapter 11

EDUCATION AND TRAINING IN THE NAA

Elizabeth C. Wesman

Introduction

This chapter covers four categories of education and training in the arbitration process. It begins with a brief history of the educational efforts by NAA members and the Board of Governors during the Academy's first fifty years. Second, the chapter traces the development of training programs for current NAA members, including what have become known as Skills Enhancement Workshops (SEWs), usually held at the beginning of Annual Meetings and Fall Education Conferences. Third, programs are reviewed dealing with the education and training of non-NAA arbitrators and of NAA members' interns, including those offered by non-NAA agencies. The fourth area is the training of advocates, which has taken place during national and regional NAA meetings. There is also a look at the offerings of other organizations such as the Federal Mediation and Conciliation Service (FMCS) and the Labor Arbitration Institute, which recruit NAA members as presenters for advocate training. Finally, I review recent and ongoing developments in education as the NAA moves forward into a changing new arbitration world.

As early as 1950 the Academy had a Research and Education Committee. The Committee was formed partially in response to the exhortation of a distinguished speaker, Edwin Witte, then Chairman of the Economics Department at the University of Wisconsin, at the first NAA meeting on January 16, 1948. At that meeting, Witte urged: "[The NAA's] fundamental purpose should be the advancement and improvement of labor arbitration, in the interests of better labor-management relations and public welfare."[1] In a report included in the very first volume of the *NAA Proceedings*, the Research and Education Committee declared: "Any profession worthy of the name devotes a great deal of attention to the training of practitioners in the field."[2] The Committee concluded its report by stating, "In the opinion of this committee, it is most fitting that the Academy, the professional society of arbitrators, should make training for arbitration one of its major concerns."[3] In 1996 that Committee, which then included such revered NAA members as Lewis Gill, Mark Kahn, Jean McKelvey, and Rolf

[1] Quoted in James Oldham, "Our Fifty-Year Past: Rummaging and Rumination," in *Arbitration 1997: The Next Fifty Years, Proceedings of the 50th Annual Meeting of the National Academy of Arbitrators* 31, 35 (Joyce M. Najita ed. 1998).
[2] "Report of the Committee on Research and Education: Education and Training of Arbitrators," in *The Profession of Arbitration: Selected Papers from the First Seven Annual Meetings of the National Academy of Arbitrators 1948-1954* at 171, 173. (Jean T. McKelvey ed. 1958).
[3] *Id.* at 171.

Valtin, filed a report on the "Replenishment of Professional Arbitrators," which was also included in the *Proceedings*.[4]

It was not until 1985, however, with the presidency of John Dunsford and the persistent support of such NAA luminaries as Sylvester Garrett and Arnold Zack, that the Research and Education Foundation (REF) was established as a nonprofit entity separate from the NAA itself. Impetus for the designation of the REF as a foundation originated with NAA member Alex Elson, who had earlier proposed that structure to the Board of Governors. The Board adopted the suggestion and Elson became the first REF president. Arnold Zack was appointed vice president, and he succeeded Elson as president.

Since its founding, the REF has supported academic research regarding such timely topics as bias in arbitration and the extent of delay in arbitration. It has also supported the development of educational materials. Highlights include "A Labor Arbitration Case Study: The Suspension of Nurse Kevin," which is a realistic mock arbitration video designed for both higher education classes and advocate training, and "The Art and Science of Arbitration." The latter is a 50-mimute documentary featuring such highly regarded arbitrators as Frances Bairstow, Harry Edwards, Roberta Golick, James Harkless, George Nicolau, and Theodore St. Antoine.[5] In recent years, the REF has had an increasing role in NAA member education, sponsoring speakers at the Fall Education Conferences by offering honoraria and travel expenses to those non-NAA speakers who can address specific concerns of Academy members.[6]

The REF also provided seed money for the commencement of the Arbitration Information Website. The website, ArbitrationInfo.com, officially came online in 2015 and is discussed at greater length below.

Education of NAA Members and Advocates

Member Training

The last twenty-five years have found the NAA far more involved in the education and training of its members, new nonmember arbitrators, and advocates than when the Academy assembled a volume in 1997 to celebrate its fiftieth anniversary. Despite that volume's lack of coverage of the topic, education has been a priority of many members of the NAA since its founding in 1947. During the early years, programs were run under the auspices of the NAA by such leading figures as Jean McKelvey, Eva Robbins, Peter Seitz, and Theodore St. Antoine. Many current women members of the NAA received their earliest practical training through Jean McKelvey's programs geared to bringing women into the field of labor arbitration and giving them a good foundation in the "nuts and bolts" of an arbitration practice.[7]

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[4] "Replenishment of Professional Arbitrators: Report to the Membership," in *Labor Arbitration: Perspectives and Problems, Proceedings of the 17th Annual Meeting, National Academy of Arbitrators* 317 (Mark L. Kahn ed. 1964).

[5] "Research and Education Foundation: Celebrating 35 Years," *The Chronicle,* Spring 2020, at 15-18.

[6] *See generally* https://naarb.org/how-to-apply-for-a-grant/.

[7] Thanks to Arnold Zack for sharing his historic narrative on the early days of new arbitrator training. As a fortunate beneficiary of Jean McKelvey's program, I am grateful for the reminder.

In addition to the efforts of the Research and Education Foundation, training has recently been offered for current NAA members at Annual Meetings of the Academy and (until 2019) the Fall Education Conferences (FECs). Training for advocates has also been offered at most recent Annual Meetings, usually just prior to convening the general meeting. NAA members have been involved in programs to train new nonmember arbitrators as well as advocates through the American Arbitration Association, the Federal Mediation and Conciliation Service, the National Association of Railroad Referees, and the Labor Arbitration Institute. The remainder of this chapter deals with each of those teaching opportunities separately. In addition, there has been an upsurge in one-on-one mentoring of new arbitrators, both formally and informally, by many NAA members. A specific goal has been the increasing of racial, ethnic, and gender diversity among arbitrators, to better reflect the realities of the labor-management community.[8]

A major effort to offer NAA members educational opportunities and an open forum to discuss challenges all members face was provided for many years by the Fall Education Conferences. FECs were open only to NAA members and their interns. With the rare exception of a particularly relevant guest speaker, FECs were limited to NAA-member session leaders and panelists.[9] The formal FECs began in 1985, and in part replaced the educational efforts of NAA Regions. Nonetheless, many Regions, including those of the Southwest Rockies, the Southeast, and the Pacific Northwest, continue to have active arbitrator and advocate education at their annual regional meetings. The FECs were held over the course of a weekend, with full-day Saturday and half-day Sunday sessions at each meeting.

FECs offered programs led by NAA members on handling difficult evidentiary issues, effective award writing, dealing with subpoena requests, and managing scheduling and case records. On the latter problem, for example, NAA Arbitrator Mark Lurie developed an elaborate Excel spreadsheet for keeping track of the status of cases from tentative scheduling to submission of pre- and post-hearing briefs, travel and incidental expenses, award writing, and billing. He shared the program with the Academy membership gratis. Many NAA members now use the spread sheet and value the orderliness with which it tracks our cases and keeps our records. More recently, an FEC session supported by the REF dealt with "easing into retirement," a subject that also received coverage in an issue of the Spring 2020 *Chronicle*.

The last FEC meeting was held in Savannah in 2019. The NAA Board of Governors, in a move approved by the membership, voted to combine the training aspects of a members-only education conference with the Annual Meeting. The aim was to increase attendance by members at the Annual Meeting, while preserving what was recognized as valuable opportunities for "in-camera" education in the FEC members-only environment. In the wake of the COVID-19 pandemic and postponement of

[8] For a fuller discussion of these efforts, see *supra* ch. 3, Homer C. La Rue & Alan A. Symonette, "Arbitrator of Color," and ch. 4, Kathryn VanDagens, "Women and the Academy."

[9] I owe a special debt of gratitude for assistance with the history in these sections of the chapter to Arnold Zack, for his voluminous and crystal-clear historic memory, and to Kathleen Griffin, for her above-and-beyond research into the NAA program archives.

the 2020 Annual Meeting, the NAA has yet to assess the effectiveness of that new format.

Besides the members-only FECs, the Academy since 1995 has offered on a relatively regular basis a Skills Enhancement Workshop (SEW). An early one, presented prior to the FEC in 2002, was devoted to introducing members to the latest developments in technology applicable to an arbitration practice. Later SEWs have dealt with objections during a hearing, decision writing skills, and the basics of employment (nonunion) arbitration. Other sessions focused on arbitrating in particular industries, such as airlines and the financial industry. These programs have been well attended and have given members a further opportunity to hone their arbitration skills surrounded only by NAA colleagues.

Additional opportunities for arbitrator training are provided by organizations outside of the National Academy of Arbitrators. One such program is the Federal Mediation and Conciliation Service's Institute for Conflict Management. As noted on the FMCS website: "Programs provide participants the opportunity to interact with and learn from experienced practitioners…[including] private sector arbitrators."[10] The programs are regularly staffed by NAA members and focus on specific areas of labor and employment arbitration.

Advocate Training

In addition to offering training and education to NAA members, the Academy in the early 2000s began offering a pre-conference workshop on arbitration advocacy skills for labor and management advocates. Programs varied between full-day and half-day presentations, depending upon the topics offered. Formats included lectures, case studies, and "red light, green light" sessions.

The stated goal of the advocacy workshops was to help advocates on both sides of the table hone their preparation and presentation skills to increase the efficiency and effectiveness of an arbitration hearing. The workshops, whose faculties consist of NAA members and experienced advocates, are attended by both labor and management advocates and are particularly geared to advocates new to the field of labor arbitration. Examples of some of the topics covered include "Opening and Closing Statements," "Nature and Role of Objections in Arbitration" (2003 Annual Meeting), "Communicating Your Case to the Arbitrator" (2004 Annual Meeting), and "Emerging Problems in Evidence" (2009 Annual Meeting).

The American Arbitration Association (AAA) also offers educational programs for both arbitrators and advocates. Besides arbitration workshops, frequently staffed by NAA members, the AAA holds an annual National Labor Conference. The Association has an "On-Demand" Library offering video training, and an extensive "Bookstore," which includes volumes on labor arbitration and mediation, as well as a *Handbook of Employment Arbitration*.[11]

In addition to the AAA and FMCS programs, the Labor Arbitration Institute, based in Minnesota and headed by Peter Dahlen, offers workshops

[10] *See* https://www.fmcs.gov/services/education-and-outreach/fmcs-institute/.
[11] *See* https://www.aaaeducation.org/home.

around the country geared to giving both experienced and new labor and management advocates a one-day or two-day "immersion" course in labor arbitration and labor law. The classes are taught by NAA members and cover such topics as rules of evidence, due process, and contract interpretation.

Education and Mentoring of New Arbitrators and Interns

At the Thirteenth Annual Meeting of the NAA, Arnold Zack presented a report on "An Evaluation of Arbitration Apprenticeships." Noting the "advancing age" of the founding NAA membership, he expressed his concern: "As far as is known, no specific program has been set forth for expanding the corps of currently available arbitrators, or for the selection and training of successors."[12] He then went on to describe the sporadic and infrequent availability of mentorship or apprentice relationships among the NAA membership. At the time he found only eight NAA members in a mentoring or apprenticeship relationship. Some apprentices were working and paid full-time and others part-time. But many had little contact with labor and management advocates and that limited their likelihood of being selected as arbitrators themselves. By contrast, for those apprentices who were introduced to the parties or who served as hearing officers during their apprenticeships, acceptance as arbitrators by the parties was relatively rapid. Their practices grew quite well following their internship periods.[13]

Zack concluded his report by suggesting some ways of furthering "the ultimate objective of training competent arbitrators in the same manner that companies, unions and professions now train their replacements."[14] Among those recommendations were "the formulation of a policy endorsing the concept of apprenticeship as the most effective means of training competent arbitrators," and "the development of a clearing house where individuals interested in entering arbitration could obtain information as to the nature of, and qualifications for, apprenticeships."[15] As was noted earlier, many programs of the kind urged by Zack, both formal and informal, were initiated by NAA members in the 1970s and early 1980s. Some of these were official NAA-sponsored workshops. Others were the projects of NAA members who took it upon themselves to become resources for new arbitrators, enabling them to polish their skills and eventually become Academy members.

Article 1.C.4 of the *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes* provides: "An experienced arbitrator should cooperate in the training of new arbitrators."[16] To the Academy's credit, individual members, NAA Regions, and other organizational bodies have taken that standard to heart and have provided mentoring and training programs for new arbitrators. This helps them sharpen their skills and in time become members of the NAA, thus bringing in the much-needed "new blood" that keeps any organization vibrant and

[12] Arnold Zack, "An Evaluation of Arbitration Apprenticeships," in *Challenges to Arbitration: Proceedings of the 13th Annual Meeting, National Academy of Arbitrators* 169 (Jean T. McKelvey ed. 1960).
[13] *Id.* at 171-172.
[14] *Id*. at 175.
[15] *Id*.
[16] *See* https://naarb.org/code-of-professional-responsibility/.

current. There is no dispute that the percentage of unionized labor, particularly in the private sector of the economy, is declining. Recently even public sector unions have been decimated by some states' legislation. However, three countervailing factors suggest there is still room for new arbitrators. First, the median age in the National Academy of Arbitrators is now above 60 years of age. Second, nonunion employment arbitration appears to be a growing segment of our profession. Third is the growing interest in sharing our experience internationally with other countries seeking to develop a robust labor-management arbitration system.

In the June 2020 *NAA Newsletter*, former President Margaret Brogan presented an update on the Outreach Committee's training and mentoring initiatives for newer arbitrators, "with a goal to increasing diversity and inclusion in our profession."[17] Among the ongoing efforts she noted were an arbitrator training day, led in February 2020 by Beber Helburn as part of the Southwest Rockies Region, and the Newer Arbitrator Salon jointly created by the Mid-Atlantic and DC/Maryland Regions.[18] In addition, many members of the Academy offer one-on-one mentoring relationships on a regular basis to new arbitrators – several of whom have now become NAA members.

Among the non-NAA efforts are the FMCS ongoing programs on "Becoming a Labor Arbitrator" (BALA) and the National Association of Railroad Referees (NARR) program offered in the late Spring of 2015. The NARR program's goal was to introduce new arbitrators and arbitrators new to the railroad industry to the processes and traditions of dispute resolution under the Railway Labor Act. Although it was held only once, many of the graduates have become successful NARR referees and a few have already become new members of the NAA.

The FMCS arbitrator training programs are run twice a year and participation in the programs reduces the standard requirement for aspiring arbitrators to be listed on the FMCS roster. For example, attending arbitrators need provide only one arbitration award rather than two for admission to the FMCS arbitration roster. Moreover, attendees who have completed the BALA course can apprentice to an NAA arbitrator. Since 2019 apprentices are expected to attend at least three hearings with a NAA member arbitrator-mentor and write up a mock award for the mentor's review and critique for at least two of those cases.[19] NAA members constitute the faculty for the arbitration presentations of the BALA courses, which consist of 35 classroom contact hours.[20]

[17] Margaret Brogan, "Outreach Committee Update," *NAA Newsletter*, June 2020, at 3-5.
[18] *Id*. at 4.
[19] *See* https://www.fmcs.gov/services/education-and-outreach/fmcs-institute/becoming-labor-arbitrator/.
[20] *Id*.

ArbitrationInfo.com Website [21]

At the 2013 Annual Meeting in Vancouver, British Columbia, a committee of five presidents (former and current) discussed establishing an NAA-sponsored and NAA-supervised website to serve as a resource to educate students of labor arbitration generally and journalists in particular regarding labor arbitration. In a letter to then-President James Oldham, former President Gil Vernon suggested that such a website should contain, among other things: "A basic primer or FAQ's on arbitrations and arbitrators,…lists of educational resources,… and treatment of 'hot' or current issues in arbitration." [22] That letter was in large part the culmination of many discussions among NAA members, both formal and informal, of the popular media's interpretation and misinterpretation of the part that arbitration plays in labor-management disputes. The bottom line was a proposal to educate students of labor arbitration and journalists writing on labor-management arbitration issues, as well as to provide a reference resource for the labor relations community as a whole.

At the 2015 FEC the Research and Education Foundation Directors agreed to approve a grant for "seed money" to establish an arbitration website. It was to be a combined project of the NAA in partnership with the University of Missouri. Past President Kathleen Miller headed the NAA advisory committee, and Professors Robert Bailey and Rafael Gely of the University of Missouri Law School as well as students at the University of Missouri's School of Journalism, were instrumental in the construction of, and final launch in 2015 of, the ArbitrationInfo.com website. Past President Gil Vernon and Professor Gely were the site's original editors. The site includes an extensive glossary of arbitration terms and definitions, a section of Frequently Asked Questions (FAQs), seminal articles on labor arbitration, and current arbitration news with introductions or comments by NAA members and University of Missouri Law School students.

In the five years since the ArbitrationInfo.com website's launch, subscriptions to the site have increased each year and the site has received favorable feedback from journalists and academics. The feedback from journalists has been uniformly positive. Professor Gely, with the assistance of his students, also monitors media coverage of labor arbitration and refers journalists to the website to assist them in ensuring the accuracy of their coverage. In addition, a special committee to oversee the website was approved by the Board of Governors. Committee members contribute articles of their own and provide scholarly commentary on select media articles, as well as on judicial and federal administrative decisions affecting labor arbitration and labor relations.

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[21] All credit for the details in this section goes to former Presidents Shyam Das, Kathleen Miller, and Gil Vernon, and to NAA member Rafael Gely, with thanks. For the website itself, *see* https://law.missouri.edu/arbitrationinfo/.

[22] Letter from former President Gil Vernon to then-current President James Oldham, October 8, 2013.

Outlook for the Future

In keeping with its dedication to the education of members, nonmember arbitrators, and advocates, the NAA clearly needs to continue a ramped-up effort on its part. As noted above, several NAA Regions have vibrant education programs. Those programs enable new arbitrators and advocates who might find attendance at an Annual Meeting financially burdensome or inconvenient an opportunity to learn from NAA members in their geographic area. The labor-management environment is evolving, and education is the key to remaining "relevant" in that environment.

A recent example of the NAA's response to a rapidly changing environment was the establishment of a Video Conferencing Task Force (VTF) to educate members on the challenges and promise of conducting hearings via video conferencing rather than in person.[23] That education became vital during the recent Covid-19 pandemic and is likely to continue for the foreseeable future. Following a joint NAA and FMCS training video in April 2020, the VTF offered several training videos to assist members in setting up and running video conference arbitration hearings. In response to ethical questions raised by video conferencing, the NAA Committee on Professional Responsibility and Grievances issued Opinion No. 26, dealing specifically with the challenges facing the arbitrator (and advocates) in a video-conducted hearing.[24]

In the quarter century since publication of *Fifty Years in the World of Work,*[25] the NAA has made a serious and very successful effort to become a source of timely, high quality education for NAA members, non-NAA arbitrators, labor and management advocates, and the general public. It is a tribute to the founding members that the organization has made these efforts, and a credit to all NAA members that they have been so willing to support them in a variety of ways, all to the great benefit of the labor relations community. And there is no sign that those efforts will not continue and expand to meet the challenges inherent in the changing practice of arbitration in the next twenty-five years.

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[23] *See* https://naarb.org/latest-news/.
[24] *See* https://naarb.org/wp-content/uploads/2020/04/CPRG-Advisory-Opinion-26-4.2020.pdf.
[25] Gladys W. Gruenberg, Joyce M. Najita & Dennis R. Nolan, *The National Academy of Arbitrators: Fifty Years in the World of Work* (1997).

Chapter 12

THE ACADEMY AND THE FTC

Richard I. Bloch

Shortly after I became President of the NAA in 2002, David Petersen, the newly elected Secretary-Treasurer, advised me that the Federal Trade Commission (FTC) was "after us." Prior to that bombshell, Dave and I had met on several occasions to anticipate the standard needs of the Academy in the upcoming year. Meeting sites, committee chairs, finances, and a host of other normal, if daunting, issues had been the subject of our discussions. But this agenda item was very different and the source of immediate and considerable concern. The FTC was alleging the Academy's Code of Professional Responsibility, which contained, among other things, a ban on arbitrator advertising, violated the law. The Agency's complaint stated, in relevant part:

> Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq,* and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the National Academy of Arbitrators…, a corporation, has violated and is violating the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint, stating its charges as follows:
>
> ***
>
> PARAGRAPH 6:
>
> Respondent NAA, acting as a combination of its members, and in agreement with at least some of its members, has acted to restrain competition by restricting advertising and solicitation by its members.
>
> PARAGRAPH 7:
>
> The combination and agreement alleged in Paragraph 6, consists of respondent NAA adopting and maintaining provisions in its *Code of Professional Responsibility for Arbitrators of Labor – Management Disputes* and *Formal Advisory Opinions* that restrain Arbitrators from engaging in truthful, non-deceptive advertising and solicitation, regardless of whether such advertising or solicitation compromises or appears to compromise Arbitrators' impartiality.

PARAGRAPH 8:

> The acts or practices described in Paragraphs 6 and 7 restrain competition unreasonably and injure consumers by depriving consumers of Arbitrators' services for labor – management disputes of truthful, non-deceptive information and of the benefits of free and open competition among Arbitrators.

PARAGRAPH 9:

> The combination, agreement, acts and practices described above constitute unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act, as amended, … such combination, agreement, acts and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief herein requested.

The relief requested by the Government was for the Academy to discontinue its ban on advertising.

The debate over whether professionals could advertise was by no means new. Bar associations had for years prohibited attorney advertising, as had other professional groups until the Supreme Court's 1977 decision in *Bates v. State Bar of Arizona*[1] upheld a lawyer's right to advertise services. As a result, the FTC sought to ensure the demise of advertising bans by issuing a host of similar citations to various organizations. Those included the American Arbitration Association (AAA), which, along with the Federal Mediation and Conciliation Service, had drafted and co-signed the Academy's Code of Professional Responsibility.

The FTC's demand was that we remove the ban, and that we codify our acquiescence by signing a consent decree that would require filing a compliance report annually for 20 years.

The American Arbitration Association, for its part, flatly refused the Government's demands. In response the FTC dropped the matter against the AAA, in my view not because of a change of heart, but because it recognized it could achieve its goals by pursuing smaller, and far more financially vulnerable, organizations like ours. That point was made abundantly clear to me in the first of our series of negotiations during the latter part of 2002 when, during one of the early meetings with the Agency, I suggested we would have to let the courts decide the question. The FTC representative smiled condescendingly and advised that the first thing they would do would be to subpoena all our business records from the inception of the organization forward. The burden and expense of responding to discovery demands, I knew, would drain our treasury in no time.

It soon became clear that our efforts to retain the ban should be re-directed toward ensuring the Consent Decree would recognize that the posture of dispute-resolution neutrals is uniquely different from that of advocates. Following negotiations that stretched over a period of months, we

[1] 433 U.S. 350 (1977) (lawyer advertising is commercial speech protected by the First Amendment of the U.S. Constitution).

agreed to remove the ban. However, we were able to persuade the FTC to include language that retained an announced opposition to catering to one party or the other, or engaging in inappropriate solicitations. As a condition of signing the Consent Decree, we insisted, successfully, that the final Order contain the following language:

> PROVIDED FURTHER THAT nothing contained in this Part shall prohibit Respondent from formulating, adopting, disseminating to its members and enforcing reasonable ethics guidelines governing conduct that Respondent reasonably believes would compromise or appear to compromise the impartiality of Arbitrators. Such guidelines shall not prevent Arbitrators from disseminating or transmitting truthful information about themselves through brochures and letters, among other means; provided further, however, that in the event that the NAA determines that the dissemination or transmission of such material may create an appearance of partiality, the NAA may promulgate reasonable guidelines that require, in a manner that is not unduly burdensome, that such material and information be disclosed, disseminated or transmitted in good faith to representatives of both management and labor.

The essence of this proviso is included in the current Code in Section 1.C. [2]

My participation in this unsettling event was, for me, both enlightening and, it should be added, emotional. Except for some five years teaching (while arbitrating) the entirety of my professional career had been as a full-time arbitrator and mediator. To be sure, I had spent many days and nights in negotiating sessions and hearings, but always sitting at the end of the table. As arbitrators, we pride ourselves on the ability to focus on the issues, to search, methodically, for the correct answer, weaving our way through the passions and the posturing of the parties' presentations to fulfill our charge as readers of the contract. But, as party *cum* gladiator, I was just plain angry – incensed at the notion of our Government's having dared to accuse my organization, my friends, my professional home, of breaking the law. As a party, I didn't behave particularly well.

Our retained counsel, a brilliant, savvy woman who had recently left the FTC's General Counsel's office (I suggested to her that she had left to mend her ways) was faced with the task of both pleading our case and dealing with my petulance. I distinctly remember the numerous times she would kick me under the table in a generally vain attempt to secure my better behavior in the meetings. In at least one session, I accused the FTC representative of extortion, confining the Agency's attack to minuscule organizations like ours that couldn't afford the costs of litigation, all for the purpose of putting a personal notch in his belt. Our counsel was even less enthralled when, on another occasion, I told the Agency advocate of my dream that when he was discharged, his case would be heard by an arbitrator

[2] *See* https://naarb.org/code-of-professional-responsibility/.

selected from the yellow pages who handed out branded ballpoint pens at hearings.

The reaction to the advertising question within the Academy itself was also for me a difficult and, in some respects, a personal matter. The debate over whether to advertise was serious and very sensitive. On the one hand there were the long-time senior members of the Academy, many of whom had been founders of the group, who respected the profession of arbitration that they themselves had pioneered and had molded it with a respect verging on reverence. The notion that we would allow ourselves to descend to the level of practitioners hawking their wares publicly threatened, in their view, to degrade the power of a quasi-judicial forum and the desired prescience of a labor-related peacemaker. On the other side were devoted professionals who agreed fully that arbitrators should avoid any activity that could be construed as compromising impartiality but who did not believe all advertising should thereby be banned. Some thought, for example, that individual nonunion grievants, and even small or independent local unions and employers, could benefit significantly from ready access to information about available arbitrators.

I, personally, was of the old school. I was convinced, however, that the FTC's threats to impose widespread discovery demands would bankrupt us in short order. This, taken together with the negotiated proviso cited above, in my view adequately expressed our concerns about the challenges to impartiality and informed my position that, all things considered, we needed to reach an agreement.

My view was not shared by three of my very closest friends in the Academy (therefore, in my life), Benjamin Aaron, Rolf Valtin, and David Feller. Ben was one of the founders of the Academy and one of its first presidents. Rolf and David were also past presidents. All had been generous, caring mentors, cheerleaders, and go-to consultants and confidants to me on matters personal and professional. And all three stood staunchly opposed to my plan to yield to the Federal Trade Commission and to execute the Consent Decree. It was with no joy and no sense of satisfaction whatsoever that I was able to prevail in the final vote of the Academy membership, at the 2003 Annual Meeting in San Juan, to remove our advertising ban and accept the settlement.

As I write this, we are a scant two years shy of having “done our time.” To my knowledge, we have served the consensual sentence without incident. I will concede that the world of dispute resolution has been neither demeaned nor diminished by the availability of reasonable self-promotion and I remain convinced that, financially, this was a dispute that needed to be resolved consensually, short of litigation.

However… in the final analysis, while I continue to believe any advertising is antithetical to the neutral posture of an arbitrator, and while I still conclude that, on balance, settlement was the more prudent course, I have always harbored the nagging thought that if the three of my favorite giants, who had given birth and vitality to the organization, were willing to fight the good fight, perhaps I should have joined them in leading the rebellion.

Chapter 13

TECHNOLOGY

Mark I. Lurie

Historical Developments

In 1997, the year of the National Academy's 50th anniversary, four communications technologies were introduced: broadband internet transmission, image-capture (CMOS) chips, white light-emitting diodes (LEDs), and cellular telephony. During the ensuing quarter-century, those technologies would revolutionize professional and social communications, change the ways in which the parties to arbitration proceedings communicated, and give rise to new conflicts requiring arbitration. An examination of those changes best starts by recalling how things were at that 50-year mark.

In 1997 an arbitration case assignment – from the American Arbitration Association (AAA), the Federal Mediation and Conciliation Service (FMCS), or the parties directly – came to the arbitrator as physical correspondence, delivered by the U.S. Postal Service. The arbitrator's response was also written on paper and physically conveyed. Email service, which had been introduced the previous year by AOL, Hotmail, Lycos, Mail.com, and Yahoo, was as yet unfamiliar and untrusted. Internet service was intermittent, and the chirping of a 56Kbps modem communicating over a telephone line instilled little confidence. A transmission protocol for email attachments was adopted in 1996, but its practical use had to await faster and more confidence-inspiring internet service. In sum, as of 1997, arbitrators, agencies, and advocates remained anchored to paper and its physical exchange from hand-to-hand, with a dollop of mechanized postal sorting.

In 1997 the time required for a 56Kbps modem to "paint" a computer screen meant that the use of online websites was a counterproductive means by which to purchase products and services. Instead, arbitrators traveling to distant hearings often obtained local hotel and restaurant recommendations from a Fodor, Zagat, or American Automobile Association travel guide. Airline ticketing was done by calling an airline desk or a travel agent. (The airlines did not charge for those services, and travel agents' fees were paid by the airlines.) Written itineraries and tickets would arrive in the mail several days later.

Charting a course to drive from the airport to the hotel, from the hotel to the hearing site, and from the hearing site back to the airport was done with a *Rand McNally Atlas*, gas station map, or "Triptiks" from the American Automobile Association. Online programs such as *MapQuest* were still a year off, and commercially available GPS devices were four years away.

A telephone pager (a.k.a. "beeper") provided communications accessibility; public phone booths were everywhere. For early adopters, a 2G flip-phone or Razr phone might put you in instant contact, provided that

you were in a location that had a signal. The phrase "can you hear me now" became a cliché; "airplane mode" was an unknown term.

If an arbitrator packed a camera, it might have been a 35mm point-and-shoot. The cost per photo was about 40 cents, counting the film, negative development, and printing. In 1997 a digital camera like the Minolta Dimage, cost $300 and had a resolution of 320 x 240 pixels (less than 1% of the resolution of 2020 smartphone cameras). Nonetheless, that resolution was suitable for the 800 x 600 pixel capabilities of that year's SVGA monitors. The first cellular telephone that incorporated a camera, the Kyocera VP-210, went on sale in 1999.

Upon arriving at the destination airport, the arbitrator might have been advised by their office that a subpoena pertaining to the next day's hearing had arrived by fax. The arbitrator might have had the subpoena forwarded by fax to their hotel, to be signed and faxed a third time, back to the requesting advocate. The result would be a fax of a fax of a fax, its legibility degraded with each iteration.

A laptop computer for taking notes, like the IBM Thinkpad, cost $2,300. Its battery life was four hours; airports offered few power outlets and airplanes offered none.

Making an audio recording of the proceedings entailed inserting and flipping sequential microcassettes, while noting the order in which they were used. Later, digital transcripts provided easier access to portions of the transcript and, like other digital documents, could be more useful in studying and drafting decisions. The first commercially practical voice dictation program, Dragon Naturally Speaking, was first released in 1997.

By the early 1990s, many arbitrators had migrated from typewriters, longhand, or dictation to a secretary to word processors, sometimes augmented by voice dictation. The predominant word processing program was then WordPerfect. But the incompatibility of WordPerfect with a new release of Microsoft Windows gave Microsoft's Word an advantage. Instructions in how to use Word were contained in the 700-page Microsoft *Office 97* manual, termed "documentation." YouTube and online video tutorials did not then exist. Today Word predominates, although WordPerfect is still preferred by many in the legal profession.

By 1997 inkjet and laser printers had replaced dot matrix, yielding higher quality text while operating more quietly. Arbitration decisions usually were mailed. For the AAA, that meant mailing six copies plus a case report; for FMCS cases the advocates might be sent two copies each, with a printed R-19 case report going to the FMCS.

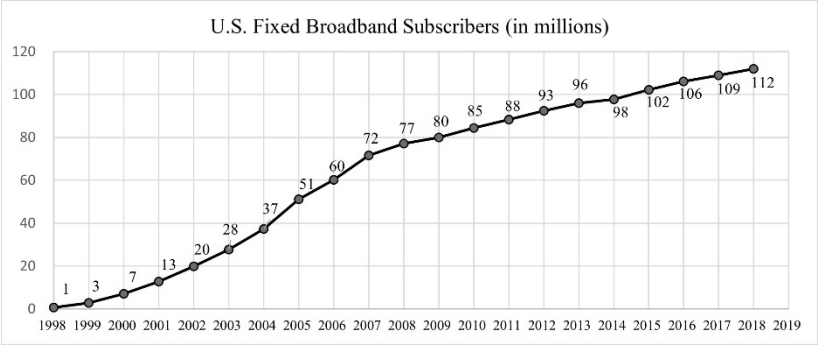
Accounts receivable were tracked using either a spreadsheet or a basic accounting program, such as Quicken. And past-due accounts were dunned by phone and in writing via the U.S. mail. Arbitrators who had maintained paper calendars migrated to Google Calendar, Apple Calendar, Microsoft Outlook Calendar, or to the calendars that came with custom website packages. Or they adopted a Case Management Program created for Academy members, which tracks cases from their initial scheduling through the receipt of payment and expense accounting.

As of 1997 the National Academy's Code of Professional Responsibility prohibited advertising and solicitation. Few arbitrators carried

business cards, and none anticipated that one day arbitrators would have websites describing their credentials and experience.

In 1997 the speed of written communications was that of the mail truck, the processing and distribution center, and the letter carrier or package delivery person. Pick-ups and deliveries were once a day. But in that year commercial broadband service debuted with transmission rates that made email attachments possible. The advantages of attachments – convenience, immediacy, negligible cost, and a permanent transmission trail – were too compelling to be ignored. Seemingly overnight, email (with attachments) became the accepted means of written communications among employers, employees, unions, arbitrators, advocates, assigning agencies, the government, and the public at large.

By the National Academy's three-quarter-century mark, technology had transformed documents from physical objects to digital files transmittable at nearly the speed of light, at essentially no cost, and to one or many recipients. Documents that once were stored in file folders could be saved on submicroscopic RAM or in the cloud, and at insignificant cost. The entire text of the *Encyclopedia Britannica* could be stored 64 times over on a solid-state memory card the size of a thumbnail that cost less than $10. Envelopes, letterhead, stamps, file cabinets, Rolodex cards, staples, three-ring binders, and report covers became anachronisms. The AAA and FMCS started sending case assignments as pdf email attachments, to which arbitrators responded by email. Scheduling letters, motions, rulings, briefs, exhibits, transcripts, and the arbitration decision and arbitrator's invoice were sent by email attachment. Subpoenas were emailed, digitally signed and returned in minutes, regardless of where the arbitrator was at the time. An arbitrator receiving an AAA appointment letter and oath might use a pdf-editing program such as Nitro Pro, Adobe Acrobat or PDF Architect 6 to digitally extract the oath page, type entries (for example, proposed hearing dates), insert a digital signature, and return the document, all without using paper, envelopes, or postage.



Source: FCC

Broadband also changed the ways arbitrators make their travel arrangements. In 2002 airlines stopped paying travel agencies commissions for airline bookings, and now they redirect travelers to their websites. The flying consumer has become in essence an unpaid booking agent, with the associated burdens but also with the benefits of greater control over routing, timing, seating, and cost selections. Rental car and hotel reservations have

become quicker and easier to make. Free online services such as Expedia, Travelocity,[1] Yelp, and Google Hotels offer hotel reviews that are more current and accessible than those of printed travel books. And Open Table (which facilitates making a reservation), Zagat, Yelp, Google Maps (which displays the restaurants near you), and TripAdvisor furnish restaurant reviews.

Online free mapping services spelled the demise of printed road atlases. Prior to 2000, the U.S. military did not allow commercial GPS devices to be sufficiently precise for use by the public but in that year that constraint was removed. Garmin, Magellan, and Navman offered competing lines of GPS that rendered printed maps obsolete.

Broadband service also changed the economics of book publishing and distribution. For many works, the printed page became antediluvian. The *Encyclopedia Britannica* ceased print publication in 2010. Similarly, the *Proceedings of the National Academy of Arbitrators*, the annual hardback recording meetings of the National Academy of Arbitrators and published by BNA for 60 years, had its last conventionally bound printed volume in 2019. The *Proceedings* feature authoritative commentary and research pertaining to arbitration in labor management relations. More than a decade earlier, the Academy had acquired the digital rights to the *Proceedings* from BNA and published all the annual volumes online. The *Proceedings* remain available at the National Academy's website.[2] Also available at that website is *ArbitrationInfo*, a website offering comprehensive, current, noncommercial, and neutral information about arbitration in the workplace. *ArbitrationInfo* was created by the National Academy and the University of Missouri School of Law's Center for the Study of Dispute Resolution.[3]

The development of image-capture silicone chips paralleled that of other integrated circuits[4] and enabled the development of economical document scanners. The marriage of such scanners with optical character recognition software permitted arbitrators to scan and store exhibits as "searchable" pdf files, in which text could be readily found, copied, and pasted without retyping.[5]

Future generations will find it remarkable that there was a time when, in order to receive a phone call, the recipient had to be near a particular wall-wired telephone at the moment the call was made. In the United States, cellular telephone service was introduced in 1983 with the shoe-sized

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[1] Expedia acquired Travelocity in 2015.

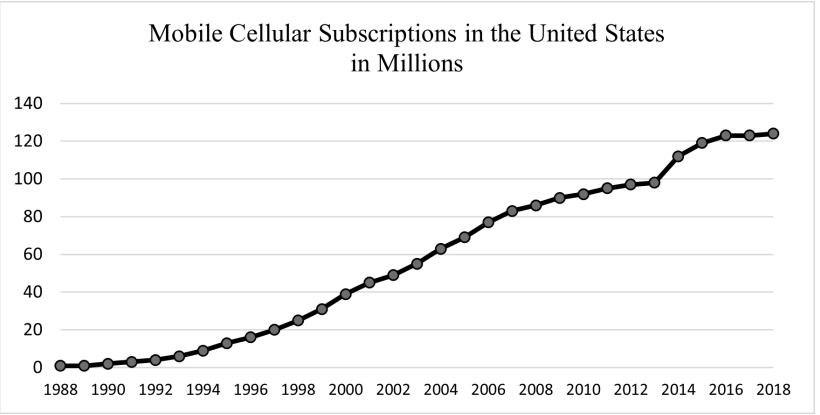
[2] *See* www.naarb.org.

[3] The website was made possible by a grant from the NAA Research and Education Foundation, which was founded in 1985 to further the educational and training purposes of the National Academy of Arbitrators. *See generally supra* ch. 11, Elizabeth C. Wesman, "Education and Training."

[4] Gordon Moore, CEO of Intel, predicted in 1965 that the number of components per integrated circuit would double annually. In 1975 he increased the interval to every two years. His prediction has come to be known as "Moore's Law."

[5] With digitized exhibits, a computer file folder automatically displays exhibits in the order of their exhibit numbers. Since each exhibit has a file name, the task of identifying an exhibit has been simplified. An arbitrator with a "paperless" office need no longer refer to an exhibits list to ascertain an exhibit number, and then sort through a pile of documents for that number. Scanned exhibits were immediately accessible, occupied no file drawer space, and were portable.

Motorola DynaTAC 800x.[6] Verizon became the first major U.S. carrier to offer wireless broadband 3G service in 2002[7] and, with it, cellular telephone high-speed internet access.[8] By 2015 the number of households with cellular telephones and with no landlines exceeded the number of households with landlines.[9]



Source: World Bank, Mobile Cellular Subscriptions in the United States [ITCELSETSP2USA], retrieved from FRED, Federal Reserve Bank of St. Louis, https://fred.stlouisfed.org/series/ITCELSETSP2USA (October 4, 2019).

In 2007 Steve Jobs combined cellular telephony, broadband, CMOS sensors, and LCD touch screens into a sleek, light-weight, palm-sized instrument that he named the iPhone. It was the first "smartphone": a device with most of the capabilities of a computer in a gizmo that could fit into a pocket or purse. Other manufacturers copied Apple's design and smartphones proliferated, replacing GPS units,[10] voice recorders, and cameras (both photo and video) and other devices.

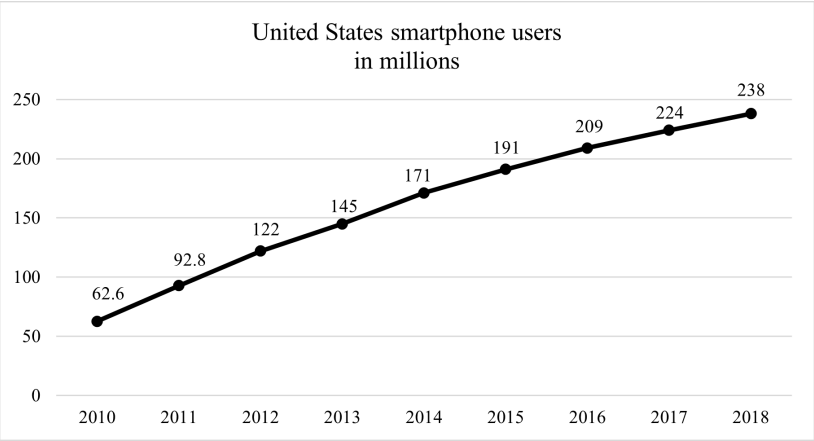
[6] The DynaTAC cost about $4,000 (equaling $10,000 in 2020), had a 30-minute talk time, took 10 hours to charge, and was serviced by an unsecured 1G network, meaning that people could listen in. Nicknamed "The Brick," the DynaTAC made its movie debut in the 1987 film *Wall Street*.

[7] Mobile phone terminology: 1G is Analog cellular; 2G is Digital cellular; 3G is mobile broadband; 4G is 3G times 500; and 5G is 4G x 100.

[8] 3G featured encryption and data and text messaging, and some 3G phones offered rudimentary touch screens for features such as a calendar, address book, and email.

[9] Source: The Centers for Disease Control's 2018 biannual *National Health Interview Survey of Households*.

[10] Google coalesced its mapping program with GPS, satellite images, street photos, and real-time traffic information to produce the Google Maps routing program. Another GPS program, Waze, developed in Israel and acquired by Google, used the street locations of its users and the drivers' voluntary traffic reports to calculate the shortest driving times.



Source: Statista.com

Smartphones became a means for making and changing plane, train, car, and hotel reservations, and for storing and displaying boarding passes and receiving travel notifications. Free voice-recording apps, such as Voice Recorder Pro, enabled arbitrators to record tens of hours of high-resolution audio in a single, uninterrupted track. Important testimony by witnesses could now be quickly located by noting the recording start time of the hearing, and the times at which the pertinent testimony was given.

New technologies introduced new opportunities for conflict in the workplace and thus new issues to be arbitrated. In researching this chapter, the author read approximately 450 arbitration decisions[11] dealing with, among other things, computer hacking, keystroke and login tracking (including HIPAA violations), biometrics, body cameras, cell phones, GPS and location tracking, surveillance cameras, social media (including Facebook, Instagram, Twitter and email), and computer and internet misuse and malware. In the remainder of this chapter, the author has selected for consideration a few topics that he believes are of widespread special interest.

Video Recording and the Use of Body Cameras in Law Enforcement

Police body cameras and the ubiquity of personal smartphone cameras have affected the conduct of law enforcement officers, and the investigation and disciplining of police misconduct. In practice (as gauged by statistics), the prevalence of video recording has constrained officers to use force less frequently, less vigorously, and later in encounters, and in doing so may also have created greater risks for officers' safety. According to a 2016 study of 2,000 law enforcement officials in the United Kingdom and the United States, those who wore body cameras were 15 percent more likely to be assaulted on the job than those who did not.[12]

State laws vary about whether police bodycam videos are public records. For those states in which they are, prejudicially selective video

[11] The author thanks Bloomberg Law for making its database available, and also thanks those members of the National Academy of Arbitrators who furnished decisions for this chapter.
[12] Will Aitchison & Dan Swerdlow, "The Continuing Dilemma of Police Body Cameras: The Police Perspective," in *Boundaries and Bridges, Proceedings of the 71st Annual Meeting, National Academy of Arbitrators* 229, 233 (Timothy J. Brown ed. 2019).

extracts (for example, the writhing of a tasered suspect) broadcast on the news or over public media have sometimes made it appear that an officer acted maliciously, even though the use of force may have been justified under the circumstances. Such a public perception can harm the reputation of law enforcement agencies and subject their employees to unwarranted scorn and public hostility.

On the other hand, video recordings can reveal when police action, including deadly force, has been unwarranted, most perniciously in cases of invidious discrimination. In June 2020 George Floyd, an African American, was killed when an arresting officer pressed his knee onto the prone man's neck for over nine minutes, despite Floyd's repeated pleas, "I cannot breathe." Three other officers stood by without intervening. All this was recorded on video, which sparked worldwide protest demonstrations and led to public demands, including U.S. congressional bills, for police reform.

In arbitration proceedings body camera recordings are compelling evidence of an officer's use of force. Actions taken or words spoken in the heat of the moment, when seen through the cold hindsight of the video record, may appear excessive. Nonetheless, bodycams have also had the salutary effect of clearing many officers of charges of wrongdoing. [13]

The wearing of bodycams can be seen as a condition of employment and in some jurisdictions, it has been deemed a mandatory subject of bargaining. [14] In other jurisdictions body cameras have been held a core element of the law enforcement enterprise, and management need negotiate only the impact of their use. For example, the Florida Public Employees Relations Commission ruled that under Florida law, given the many substantial advantages of using body cameras, their use is a management right. [15] Where body cameras have been adopted, policies have varied as to whether they must always be on, or may be turned on and off as determined by the officer. Always-on cameras greatly intrude into the officer's privacy

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[13] *Id.* at 237.

[14] *Id*. at 240.

[15] The following is an excerpt from PERC Final Order 17U-270, Case No. CA-2017-012, issued October 18, 2017, confirming the recommended decision of a PERC Hearing Officer:

> Florida Statute [___] requires public employers and employee organizations to bargain over 'wages, hours, and terms and conditions of employment of public employees within the bargaining unit.' Conversely, a public employer can 'determine unilaterally the purpose of each of its constituent agencies, set standards of services to be offered to the public, and exercise control and discretion over its organization and operations,' also referred to as management rights. When a decision involves a management right, only the impacts of the decision, not the decision itself, are mandatorily negotiable….

The following is the relevant portion of the Hearing Officer's decision:

> As noted in my factual findings, the implementation and utilization of BWCs [body-worn cameras] increase transparency, accountability, helps to identify training opportunities, and provide more procedural justice. Using BWCs will help with public sentiment and lack of trust in law enforcement. BWCs will increase accountability of officers, but also with the members of the public who officers interact with because people will behave more professionally when they know they are being recorded. Additionally, the BWCs will enhance the JSO's ability to identify criminal behavior and collect evidence. I conclude that a public employer's initial decision on whether to implement BWCs is a management right under Section 447.209, Florida Statutes. Therefore, the decision itself is not a mandatory subject of bargaining.
>
> Hearing Officer's Recommended Order, Case No. CA-2017-012, July 28, 2017.

and can also capture the identity of persons for whom such identification is prohibited, like juvenile sexual assault victims and hospital patients. On the other hand, when an officer has the responsibility to turn the camera on and has not done so at the time of alleged misconduct, questions arise as to whether the failure was justified. Did events happen too quickly and spontaneously to begin recording? Was the officer negligent or was the omission intentional?

Even when officers are not equipped with body cameras, the knowledge that citizens may be recording their actions has chastened both the officers who are engaging with the public and the officers who may be witnessing the engagement. The Floyd case, mentioned earlier, was the most publicized of several occurrences where officers were charged with criminal offenses.

When an officer is shown a video before making a statement, that viewing can jog one's memory of the details of the incident. This is especially useful in deadly force cases, where the emotional impact of the event may induce "critical incident stress" fogging the officer's memory.[16] Also, an officer's recollection seldom perfectly matches a video. Viewing the video first avoids innocently inconsistent statements – statements that could result in impeachment and an officer being designated an unreliable "Brady officer." (The trustworthiness of a Brady officer's testimony in a criminal case will be clouded by the prosecution's mandatory disclosure of the officer's "Brady" status, that is, a sustained record for lying in an official capacity.[17])

A majority of law enforcement agencies allow officers to view videos before making their statements. The Police Education Research Forum (a city police department think tank) endorses that approach. In use-of-force cases, police unions are seeking 48- or 72-hour intervals between the officer's viewing of the video (with the right of union consultation during that interval) and the officer's making a required statement.[18] The ACLU does not favor the pre-statement viewing of videos.[19] As of 2018 six states had statutes on the subject: five allowed the pre-statement viewing of videos; the sixth forbade it.[20]

Relevant Arbitration Decisions

- A police officer was charged with physical abuse of a detainee. Officers on the scene were not wearing body cameras but testified that when interviewed within an hour of the incident, they had felt compelled to fully and accurately report what they had witnessed, not only because it was their professional duty but also because they knew that citizens at the scene might have taken videos on their smartphones. In fact, no citizen videos were proffered.[21]

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[16] "Critical incident stress" describes the cognitive, physical, emotional, behavioral, and spiritual reactions of people who experience psychologically disturbing events in the course of their jobs.
[17] Brady v. Maryland, 373 U.S. 83 (1963).
[18] Will Aitchison & Dan Swerdlow, *supra* note 12, at 246.
[19] *Id*. at 243.
[20] *Id*. at 244.
[21] Unreported case by an NAA member.

- A bodycam recording showed that it was not unreasonable for an officer to use an unauthorized hold – a carotid restraint – in order to subdue a deranged and agitated individual. [22]
- A recording of an imminent threat (clenched fists, shifting, dropping a leg, staring) was found to justify a grievant's use of a taser on the suspect. [23]
- An officer's accidental discharge of his weapon, which sent a round into the ground, was recorded on his bodycam. After viewing the recording, the arbitrator found the officer had maintained his weapon at a safe angle and sustained his grievance. [24]
- A San Francisco Bay Area Rapid Transit Police Officer used his bodycam to clandestinely record a private meeting with his superior. Such a recording would have violated department rules. The arbitrator found that the number of manual steps required to accomplish the recording rendered the grievant's explanation – that the recording had been unintentional and accidental – implausible. The arbitrator denied the grievance of a two-week suspension. [25]
- An officer failed to activate his bodycam, asserting that he believed the activities at the scene were noncriminal. Based upon the totality of the evidence, the arbitrator found the officer failed to prove that defense and ruled the nonactivation was just cause for discipline. [26]

The Right of Public Employees to Speak Their Minds Using Social Media

Under federal case law, if the content of a public employee's speech is a subject of public concern, and if on balance the employee's right to speak outweighs any adverse effects of that speech on the efficient functioning of the employer's business, the speech is protected. Three arbitration decisions are presented here. The first two find the employee's speech was protected and the third rules that it was not.

During an election campaign for county sheriff, the grievant, who was a deputy sheriff, posted to Facebook his claim that the county had not conducted medical training for six years. That statement was not true and resulted in the grievant's being issued a written reprimand. He grieved and, in a 2016 decision, Arbitrator Stephen F. Befort ruled in relevant part as follows:

> The Supreme Court in *Connick v. Myers* established a two-part test for determining when a public employee's speech is constitutionally protected. *Connick v. Myers*, 461 U.S. 138 [1 IER Cases 178] (1983). First, the speech must pertain to a matter of public concern. Second, the employee's right to comment on a matter of public concern must be balanced against the public employer's

[22] City of [__], Texas, 2019 LA Supp. 4663703 (E. DeWayne Wicks 2019).
[23] [Employer], 2019 LA Supp. 4664759 (Kay A. Kingsley 2019).
[24] [Employer], 2017 LA Supp. 200978 (E. DeWayne Wicks 2017).
[25] San Francisco Bay Area Rapid Transit Dist., 137 LA 1066 (William E. Riker 2017).
[26] [Employer], 2018 LA Supp. 4651572 (Christopher H. Shulman 2018).

> interest in promoting the efficient functioning of the employer's employment responsibilities…
>
> The Supreme Court has held that an employee who is speaking in furtherance of official duties is not speaking as a citizen and that such speech is not protected. *Garcetti v. Cellabos*, 547 U.S. 410 [24 IER Cases 737] (2006). [P]ublic employee speech is not protected if it is made with "knowing or reckless falsity." *Pickering v. Bd. of Educ*., 391 U.S. 563 [1 IER Cases 8] (1968).
>
> Speech is a matter of 'public concern' if it relates to a political, social, or other community concern as opposed to only the internal functioning of the public sector workplace. *Connick v. Myers,* 461 U.S. at 147-48. [Here]… the Deputies' comments about medical training go beyond the internal functioning of the Wright County Sheriff's office in two respects. First the comments were communicated as political commentary in the context of a contested election. Second, the statements expressed opinions upon the community-relevant issues of law enforcement and public safety. This is speech on matters of public concern. [27]

Arbitrator Befort concluded the deputy had spoken as a citizen; his duties as a deputy sheriff had not pertained to either medical training or to serving as a county spokesperson. Arbitrator Befort also ruled that, because the deputy had sincerely believed that medical training had not been furnished, his Facebook posting was not a "knowing and reckless falsity." Applying the *Connick v. Myers* balancing test, Arbitrator Befort found little evidence that the grievant's comments had engendered public unhappiness or disrupted the county's services. He sustained the grievance.

In a second, unpublished decision by National Academy member Robert B. Moberly,[28] the grievant teacher posted online (on her own time, in her own home, and using her own computer) opinions about standardized testing, charter schools, teacher performance pay, and expanded learning times. The grievant's readers included the parents of students. The School District responded by transferring the grievant and issuing her a directive to avoid comments that "may give [the] perception of a negative impression of the district and/or the profession of education." The arbitrator cited the Supreme Court in *Lane v. Franks*:[29]

> [T]he First Amendment protection of a public employee's speech depends on a careful balance 'between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees….' [P]ublic

[27] Wright County [Minn.], 136 LA 1449 (Stephen F. Befort 2016).
[28] Orange County School Bd. (Robert B. Moberly 2016.)
[29] 134 S. Ct. 2369 (U.S. 2014). *Lane v. Franks* in turn cited Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

> employers may not condition employment on the relinquishment of constitutional rights.

Applying the two-step approach described above in the Befort decision, the arbitrator first determined that the teacher had spoken as a citizen on a matter of public concern – a prerequisite for First Amendment protection – as opposed to having spoken about matters within the scope of her official duties.[30] And, second, the arbitrator determined that the School Board had not proven an adequate justification for treating the teacher differently from any other member of the public, that is, there was no evidence that her posts disparaged the Board, her supervisors, coworkers, parents or students, or that they negatively impacted her work. The decision stated:

> [T]he Arbitrator has carefully weighed Grievant's interest as a citizen in speaking on matters of public concern against the District's interests in maintaining efficiency. The Arbitrator finds that the District's efficiency was affected very little or not at all by Grievant's speech, and that Grievant's interest in being able to speak as a citizen about public concerns such as mandatory testing and other education issues is very strong. Accordingly, Grievant's strong interest in being able to speak as a citizen on matters of public concern prevails over the District's little or no harm to its efficiency.

Compare those decisions to the 2018 decision by Arbitrator Kenneth P. J. Latsch in *Prosser School District*,[31] in which, on a national day of protest against federal immigration policy, many students remained home. The grievant, an assistant school librarian, upon returning home that evening, posted the following to her Facebook page:

> I had an absolutely great day today. Lots of grade school kids stayed home today for the immigrants protest. I loved it. Sure alleviated the overcrowding at school. No out of control kids, like it should be going to school. Like school should be. I hope they can do it again soon.

The School District transferred the grievant to an office assistant position in another school, which transfer was deemed a disciplinary action. The Union asserted that the grievant's posting was within her First Amendment rights. Arbitrator Latsch found, "The comments caused disruption within the workplace and further caused the Employer to deal with a great deal of community outrage." He denied the grievance.

In another 2018 First Amendment decision, the grievant, a police officer, participated in a neo-Nazi, white supremacist rally while off duty. During that rally, an individual drove his vehicle into a crowd of people, killing one and injuring nineteen. The grievant posted the following to a

[30] Contrast, *e.g.*, case workers complaining about the size of their caseloads.
[31] 138 LA 1289 (Kenneth J. Latsch 2018).

friend's Facebook page: "Hahahaha love this, maybe people shouldn't block roadways." When objections to that comment were posted, the grievant responded with this:

> Actually…I've been hit by a shitbag with warrants but who cares right you ignorant brat live in fantasy land with the rest of America while I deal with the real danger.

His posting attracted news media attention, after which the police department received emails, phone calls, and letters from irate members of the public. The department's 911 service was "inundated" with angry callers, and fellow officers were exposed to public anger. Arbitrator Loretta T. Attardo denied the grievance of his discharge, observing that the grievant engaged in "substantial misconduct that adversely affect[ed] the public interest by impairing the efficiency of the public service" and that the posts were not First Amendment protected speech because, even assuming that they had addressed a "matter of public concern," the harm they inflicted upon the Department outweighed their negligible informational value. [32]

Social Media Evidence in Other Discipline Cases

Social media grievance disputes most often pertain to discipline for off-duty misconduct and require, as an element of just cause, a material adverse impact on the employer's business. That impact, or *nexus*, may be (1) the fostering of an unfavorable public perception of the employer or its product, (2) impairment of customer relations, (3) impairment of the employee's working relationship with his or her coworkers, or (4) the employee's disqualification to remain employed.

The features of social media that have made it an overnight success – its immediacy, accessibility, ease of use, and ubiquity – can amplify the damage done to the employer's business. A moment of abandon or a thoughtless word, as well as intentional misconduct – things that might once have gone unnoticed – can be captured, stored, retransmitted, and amplified by the news media. [33] The following are examples of online postings that had significant disciplinary repercussions. In some instances, the act of posting was itself the reason for discipline.

Cases in Which Social Media Postings Contradict the Validity of Claimed Sick Leave

The grievant, a car servicer for the Chicago Transit Authority [CTA], held a license to referee boxing matches. A CTA manager saw a Facebook posting of the grievant refereeing a bout on a day for which the grievant had claimed sick leave. Further investigation revealed the grievant had refereed boxing matches or had traveled to matches on additional days for which he had claimed sick leave. The CTA terminated his employment. The Union grieved arguing, "Traveling to fights in Mexico and Argentina

[32] [Employer], 2018 LA Supp. 4654797 (Loretta T. Attardo 2018).

[33] Even employees' voluntary, off-duty postings of personal information or thoughts – too eagerly shared via blogs, web pages, Facebook, tweeting, etc. – can become grounds for discipline. As of 2020 there is no prevailing "reasonable suspicion" standard for employers to monitor employees' online presences.

was not inconsistent with [the Grievant's] documented need for relief from workplace anxiety and sleep problems." The Union further asserted the grievant was not aware of the expectation that he seek permission to engage in an activity that he clearly regarded as a hobby and which did not provide him with any real income beyond enabling him to occasionally travel for the purpose of refereeing. Arbitrator Aaron S. Wolff found the Union, which bore the burden of proving the grievant had been sick or disabled on the dates claimed, had produced "no probative evidence" to support its case. [34]

Similarly, in *Zimmer Surgical*,[35] the grievant furnished the Company with a "disability certificate" stating he was "totally incapacitated" by back pain. During the very shift hours that the grievant was off work for that disability, a photo posted to Facebook showed him to be in no apparent discomfort while hosting a dinner party at a local winery. The Union argued there was no evidence the grievant had behaved contrary to the limitations imposed by his treating physician. Arbitrator Lynette A. Ross found the grievant had misled the Company about his condition, and denied the grievance over his termination.

The grievant, a Utilities Department employee for Georgia-Pacific Consumer Products, LLC, won a fishing tournament on a day when he had called in sick. The tournament organizers posted the awarding of his prize on Facebook. When confronted, the grievant admitted that he had called in sick in order to participate in the tournament. He was fired for dishonesty. The contractual provision under which the Grievant was fired specified that dishonesty *on Company premises* was a dischargeable offense. Arbitrator Samuel J. Nicholas, Jr. found that, "Irrefutably, the Grievant was not on Company premises when he fabricated the reason for his desired absence…." Arbitrator Nicholas reinstated the grievant, but without back pay. [36]

Postings from a grievant's smartphone to his Facebook page showed him to be actively engaged at the racetrack on the day he was claiming absence due to illness. Arbitrator Bethel observed:

> Grievant's explanation of how his wife took his cell phone to the track on March 10, and then posted entries on his Facebook page was not credible. [His wife] had her own cell phone and her own Facebook page, so it makes little sense...." [37]

Cases in Which Social Media Postings Reveal Off-duty Conduct That Is Inconsistent with a Standard of Conduct Associated with the Position

In *L'Anse Creuse Public Schools*,[38] a teacher with an excellent performance record attended a private party during her summer break. At the party, she posed with a mannequin in ways that suggested she was performing sexual acts, including oral sex. Without the teacher's knowledge or consent, photos were taken of her, then immediately posted online, and then reposted

[34] Chicago Transit Authority, 135 LA 1579 (Aaron S. Wolff 2015).
[35] Zimmer Surgical, Inc., 137 LA 1734 (Lynette A. Ross 2017).
[36] Georgia-Pacific, 139 LA 1062 (Samuel J. Nicholas Jr. 2019).
[37] U.S. Steel Tubular Prods., 2014 LA Supp. 167725 (Terry A. Bethel 2014).
[38] 125 LA 527 (William Daniel 2008).

(they "went viral") throughout the school district. Arbitrator William Daniel found the District lacked just cause for termination:

> [H]ere the grievant was involved in an acknowledged adult activity of a salacious nature, however it did not directly involve either the school or her capacity to teach. For this reason, the arbitrator must find that the employer would not have had just cause for terminating her employment or otherwise disciplining her.

In *Warren City Board of Education*, [39] a male public school teacher was discharged when his estranged wife posted photos of him holding his member in a suggestive manner. The images were viewed by members of the local community and the story was further advanced by the news media. Arbitrator Thomas R. Skulina denied the grievance over the teacher's termination, observing that grievant's former wife had warned him she was going to post the photos and he had not endeavored to stop her.

Cases in Which Social Media Postings Revealed On-the-job Performance Deficiencies

A school custodian's claim that he had not left work early and that the school's timekeeping system had failed to record that he had "punched out" at his regular time was belied by a Facebook post that placed him in another state at the time. [40]

A citizen videotaped and posted to Facebook a cemetery groundskeeper driving his riding mower fast, making "doughnuts" in the turf, and colliding with and damaging a tombstone. The Union's arguments included that the citizen had posted the information on Facebook in a biased manner; that is, in order to bring attention to himself. Arbitrator Marsha Saylor found the video to be definitive evidence that the grievant had been grossly negligent and denied the grievance over his suspension. [41]

Cases in Which the Content of an Employee's Postings Was Injurious to the Employer's Business

The grievant, a Sewer Commission employee, while at home during his off-hours, posted a racially disparaging joke to a Facebook page that included other racist jokes. The grievant's own Facebook page identified him as a Commission employee. The Commission received expressions of concern about the grievant from the public, and the grievant was issued a disciplinary suspension. The Union asserted *inter alia* that the grievant had believed that the Facebook jokes site was private. Arbitrator Sharon Henderson Ellis denied the grievance, noting:

> Yes, the Grievant thought he was posting to a private Facebook page, but as long as other people were also on that site it could not be entirely private; that is, the

[39] 124 LA 532 (Thomas R. Skulina 2007).
[40] [___] Public Schools, 2019 LA Supp. 4663696 (David J. Wenc 2019).
[41] AFSCME Council [__], 2018 LA Supp. 465910 (Marsha Saylor 2018).

> Grievant could not assume that others 'belonging' to that page would not make public the jokes posted there. [42]

A different result about "private" Facebook posting was rendered by a National Academy member in *Wireless Telephone*.[43] In that case, the grievant was a wireless phone store employee who recorded on his smartphone the rantings and threats of an irate customer, and then posted the recording via Snapchat to four recipients. The recipients included his girlfriend and a former store employee. The grievant also sent a copy to the assistant store manager. The grievant was discharged for violating the Company's prohibitions against (1) using personal media accounts for Company business and (2) disrespecting a customer's business relationship and privacy. The arbitrator found there was not just cause for the termination:

> In today's world, where most people think they are the center of the universe, especially those who are young and spend much of their time on social media, it is second nature for them to record everything that goes on, and to send it to others. To [the Grievant's] credit, he did not send the video to his entire list of "friends," only to four people, but [the Grievant] made a mistake by sending the video to others, and by adding the words "Dude is so done" to the picture of the customer standing next to a police car. But, in light of the customer's threatening behavior in the store, [the Grievant's] offense pales in comparison. Although [the Grievant] should not have sent the video to anyone, the customer engaged in threatening behavior, and it is understandable that the nature and excitement of the situation would affect [the Grievant's] judgment.

After a police officer cited the grievant's wife for driving under the influence, the grievant, a City firefighter, posted statements about both the officer and the Police Department to his Facebook page. Arbitrator M. Zane Lumbley described the statements as "offensive, intimidating, hostile, derogatory, disparaging, bullying, disrespectful and, most importantly, threatening." The decision followed:

> In my view, it is inarguable that this course of conduct necessarily would impede the ability of the Grievant to work alongside the [Police Department] as firemen are frequently and indisputably required to do in responding to fires, medical emergencies, vehicle accidents and other calls. Thus, I cannot fault the Employer for choosing the penalty of termination. [44]

[42] Sewer Commission, 2018 LA Supp. 4642835 (Sharon Henderson Ellis 2018).
[43] An unpublished 2019 decision by a member of the National Academy of Arbitrators.
[44] City of Ada, Okla., 134 LA 702 (M. Zane Lumbley 2014).

Offensive Social Media Content Pertaining to Race and Sex

In *Brown-Forman Cooperage*,[45] a Caucasian employee was discharged for posting an ugly racist and threatening Facebook response to an African-American employee's own racist and threatening post. Some of the Caucasian's Facebook followers were African-American coworkers. The Union argued the case lacked nexus because the posting was made while the grievant was off-duty and "was not related to the Company in any way." Arbitrator Mitchell B. Goldberg found the disruption the grievant had caused in the workplace was evident, and "…there was a rational basis for the decision based upon the evidence in this record."

In another Facebook case, the grievant was discharged for harassment after posting to her Facebook account a lengthy and sexually explicit libel about a coworker. The grievant's Facebook account included 200 "private" friends, five of whom worked for the Employer. Arbitrator Roumell sustained the discharge, noting the grievant's "friends" were free to repost the libel in the workplace, and that her actions "…can lead to only one conclusion: that [she] was intending to intimidate and create a hostile, offensive work environment for [her fellow employee]." Roumell added:

> [E]ven if the Facebook setting is private, arbitrators have recognized that there is no expectation of privacy if there are friends, as in this case who were employees, who could make the posting available in the workplace. See, *Air Tran Airways*, 131 LA 254, 261 (Goldstein, 2012). The fact is there is no basis to set aside the discharge when [the Grievant] chose to post a derogatory posting when she admitted she had no evidence of the facts alleged. Thus, [the Grievant's] actions can only lead to one conclusion: that [she] was intending to intimidate and create a hostile, offensive work environment for [her fellow employee]." [46]

Social Media Posting Impeaching the Poster's Subsequent Testimony

The grievant was issued a final written warning for having called a fellow employee "a fag." In addition to the testimony of that fellow employee, two supervisors testified they heard the targeted employee ask, "Did you just call me a fag?" To which the grievant had replied: "What are you going to do about it?" The grievant testified those three witnesses were lying, adding that he would not use the word "fag" because he had a gay relative and understood that the term was offensive. To impeach the grievant, the Company introduced a copy of his Facebook page, on which a friend of the grievant had posted this statement: "You are right. [The targeted employee] is a fag." The grievant had posted in reply, "Yup. Exactly." Arbitrator Melissa H. Biren denied the grievance.[47]

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[45] 138 LA 255 (Mitchell B. Goldberg 2017).
[46] [Employer], 2016 LA Supp. 205126 (George T. Roumell 2016).
[47] [Employer], 2018 LA Supp. 4656361 (Melissa H. Biren 2018).

Cases in Which Grievants Assert Someone Else Made the Improper Posting

The grievant was discharged for sending sexually explicit and offensive texts on his Facebook page. The page included a photo of the grievant wearing a company shirt. It was tagged to the company's Facebook page and the posting was made from an employer-furnished computer. The grievant testified he had not password-protected the computer and that someone else with access to it had made the posting. After receiving hearsay evidence in support of that claim, the arbitrator found "there [was] insufficient proof that the messages were sent by [the Grievant" but also found the grievant had failed to protect the Company's reputation by eschewing password protection. The arbitrator reduced the grievant's termination to a suspension.[48]

In similar cases arbitrators have ruled that a text or posting emanating from an employee's computer, phone, or tablet will be presumed to be by the employee, unless proven otherwise.

In November 2014 a 12-year-old African American youth was brandishing a toy (but realistic) pistol at members of the public. When instructed by a police officer to raise his hands, the youth instead removed the pistol from his waistband. He was immediately shot and killed by the officer. In February 2016 a City EMS paramedic posted the following to his Facebook page:

> Let me be the first on record to have the balls to say [that the youth] should have been shot and I am glad he is dead. I wish I was in the park that day as he terrorized innocent patrons by pointing a gun at them walking around acting bad. I am upset I did not get the chance to kill the little criminal fucker.

During the arbitration hearing on his termination, the grievant asserted that he hadn't posted the text, that a friend had, and that he could not disclose the friend's identity due to the confidentiality code of Alcoholics Anonymous. He further argued there was no nexus between the off-duty posting and his employment by the City because the text would be viewed only by his 250 "friends." Arbitrator Robert C. Stein noted that, under AA's confidentiality policy, "Anonymity is not a cloak protecting criminal or improper behavior...," and the grievant did not disprove that he himself had made the offensive posting.[49] Quoting an earlier arbitration decision, Arbitrator Stein also rejected the notion that the grievant's audience would be limited to his 250 friends:

> [A]ny notion of privacy in today's social media [is] illusory, because each recipient [has] the potential to send or advance that same message to his/her own friends or chosen recipients, including [the] media.[50]

[48] [Employer], 2018 LA Supp. 4645355 (Mark J. Glazer 2018).
[49] [Employer], 2018 LA Supp. 4642857 (Robert C. Stein 2018).
[50] Vista Nuevas Head Start, 12-2 Lab. Arb. Awards (CCH) P 5707 (William Daniel 2011).

Video Surveillance

As the cost of video surveillance equipment, including cameras and recording storage, has plummeted, its presence in the workplace has proliferated. The use of video surveillance is deemed lawful if done for a legitimate business purpose (for example, to monitor employees' safety and performance and to guard against theft and vandalism), provided that the surveillance does not intrude into union activity or into those workplace areas in which privacy is reasonably expected, such as restrooms and changing rooms. For audio recording, the privacy exclusion generally extends to employee lounges and cafeterias. Federal law, state law, and common law all contribute to the basic ground rules governing video surveillance. They require that notice be given, which can be satisfied by having the surveillance cameras readily visible to those being recorded.[51] Workplace video surveillance is a mandatory subject of bargaining,[52] and so the contractual permissibility of such surveillance rarely arises in the grievance context. Rather, video and audio evidence is most often encountered in the arbitration of disciplinary actions.

Time-stamped video recordings can provide conclusive evidence whether an employee was on the premises during normal working hours. They are often proffered for that purpose.

Surveillance video recordings showed that the grievant, an HVAC Mechanic, left work early and was absent for a total of 7½ hours over an eight-day interval. Arbitrator Michael W. Metzler observed:

> The only evidence important to my Award is that related to the Employer's claim of [the Grievant's] leaving the building for the day before the end of his scheduled shift.
>
> The Employer's [video] evidence is clear [that the Grievant departed] early on the eight days [and that] no reason would be acceptable unless he could show he sought or received permission.
>
> I agree that once Engineering Co. discovered [that Grievant] was leaving before the end of his shift and committing time theft, it could no longer place trust in the employee to perform Engineering Co.'s duties and responsibilities to its client.[53]

Video recordings can also furnish more persuasive evidence than eyewitness testimony that a particular act of misconduct took place. In two unrelated and unpublished decisions, an NAA member paused the video playback to acquire "screen captures" at crucial moments. In the first case, in which a police officer asserted that a third party had blocked his view when a fellow officer committed battery on a civilian, the frame-capture showed that

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[51] Under federal law and in some states, an audio recording can be made with the knowledge and consent of only a single participant to the conversation.

[52] Colgate-Palmolive Co., 323 N.L.R.B. 515 (1997).

[53] Engineering Company, 2018 LA Supp 4640807 (Michael W. Metzler 2018). *See also* Central Valley School Dist., 136 LA 1587 (Christopher Miles 2016); YRC Freight, 136 LA 50 (Andrea L. Dooley 2015).

the grievant had an unobstructed line-of-sight of the offending officer and was looking directly at the officer. [54] In the second case, the screen-capture image froze the moment that the grievant, a special-needs student teaching assistant, inflicted physical pain on an autistic child. The inclusion of that image in the decision made obvious what a thousand words might not have. [55]

Sometimes the workplace under surveillance is a moving vehicle. A recurring safety problem with bus and train operators is violation of the prohibition against their using personal communications devices, such as cell phones, while their vehicle is in motion or while picking up or dropping off passengers. Federal Department of Transportation regulations prohibit the use of cell phones while driving commercial vehicles, and some governmental bodies prohibit not only their use but also their physical possession.

In *Greater Cleveland Reginal Transit,* [56] the Agency's work rule specified the penalty of termination for a first offense. An on-board surveillance video showed that the grievant, a train operator, had her cell phone powered on and in her possession at the time of an accident. The Union argued that because Agency supervisors sometimes called operators on their cell phones, the operators' phones were "work tools" whose possession should not have subjected the operator to discipline. Arbitrator Jerry A. Fullmer disagreed, noting the Agency had not required its operators to possess cell phones. If operators elected to have them in their possession while on the job, they had a duty to comply with the safety regulation that required phones to be stored in a separate bag that was not on the operator's person.

On the other hand, when a bus driver was caught on the bus "DriveCam" video using his cell phone to call in an important (but nonemergency) notice to the dispatcher, Arbitrator James M. Darby reduced his termination to a suspension based on several factors, no one of which was identified as decisive. Those factors were that the purpose of the call had been to expedite riders; the employer had not given its drivers notice of a new "zero tolerance" policy; other drivers, having committed the same infraction, had been issued suspensions after the employer had allegedly implemented its "zero tolerance" policy; and the grievant had expressed remorse, indicating that he was unlikely to repeat the offense. [57]

In another case, Arbitrator Robert J. Rabin narrowly construed a New York State prohibition against use ("holding a portable electronic device while viewing, taking or transmitting images"). Arbitrator Rabin concluded that the prohibition excluded looking at a cell phone for the sole purpose of ascertaining the time:

> The narrower reading of the rule would only prohibit the use of the cell phone for those functions that are normally associated with cell phone use, such as texting, sending emails, talking on the phone and surfing the web. Those activities potentially involve far more

[54] School Dist., AAA 01 17 *** (2018).
[55] [___] County, AAA 32 390 *** (2014).
[56] 137 LA 1146 (Jerry A. Fullmer 2017).
[57] [Employer], 2016 LA Supp. 199428 (James M. Darby 2016).

> concentration and distraction than simply telling the time, and are activities that we commonly worry about when we see somebody using his phone while driving….
> We generally interpret statutes narrowly in criminal cases because the stakes of being convicted are so drastic. But we like to say in our business that being discharged is the workplace equivalent of capital punishment, so we should apply the same approach of interpreting rules narrowly. [58]

Arbitrator Rabin reduced the employee's termination to a one-month suspension.

A trucking company's digital camera recorded both the driver and the road ahead, saving the recording from eight seconds before to four seconds after a significant g-force event. The grievant driver, distracted by his computer tablet, drifted from the center lane of a three-lane highway to the shoulder of the left lane; next "veered" right and drifted across the three lanes to the right shoulder; then drifted left across three lanes to the left shoulder; and finally drifted back to the right shoulder, where his truck and trailer overturned. The Company's disciplinary policy called for progressive discipline except for "gross negligence." Arbitrator John P. DiFalco found that the Grievant had not been grossly negligent because the Company had not proven the dictionary definitions of gross negligence: "reckless disregard or blatant indifference" or "extreme or reckless negligence." Arbitrator DiFalco reduced the driver's termination to the first step of progressive discipline: a "written verbal counseling." [59]

Video Surveillance in Workers Compensation Cases

Surveillance video recordings made in the workplace can confirm or disprove claims of on-the-job injury. Examples of the latter cases in which a video showed that a claimant had not caught his foot in an entrance turnstile; [60] that the claimant had not struck his knee against a large electrical cable coil; [61] and that a bus driver, who claimed that his seatbelt had caused injury to his neck and back during an evasive maneuver, was in fact not wearing his seat belt at the time. [62]

Video surveillance is commonly used outside of the workplace to prove workers compensation claimants have engaged in activities inconsistent with their medical limitations. These video recordings are generally made when the employee is out-of-doors where there is no expectation of privacy or need for notification that a recording is being made. Such videos are taken clandestinely. Here are examples:

The grievant, claiming total disability, was captured on video at a water park, repeatedly climbing 80 steps to the top of a water slide and sliding down on a large rubber tube. Asked why in view of his medical restrictions

[58] [Employer], 2016 LA Supp. 205025 (Robert J. Rabin 2015).
[59] [Employer], 2019 LA Supp. 4664758 (John P. DiFalco 2019).
[60] Kraft Heinz Foods, 139 LA 1648 (Jerry A. Fullmer 2019).
[61] U.S. Steel Corp., 2014 LA Supp. 167729 (Terry A. Bethel, 2014).
[62] [Employer], 2013 LA Supp.150452 (Ralph H. Colflesh 2013).

he had ridden the water slide, the grievant answered, "Because in physical therapy I was told that swimming is the best thing that I can do." [63]

The grievant sustained a lumbar strain. While he was on temporary total disability for pain in his back, a video recording was made of his playing football. The video was reviewed by the employer's physician, who reported the following:

> [The Grievant] …was able to run, twist, bend, dive, strike other players, perform somersaults and to various degrees roll on the ground after attempting to catch a pass. In one sequence, [the Grievant] caught a touchdown pass and jumped high in the air "chest bumping" a teammate.

Arbitrator Thomas R. Skulina denied the grievance over the employee's termination. [64]

In certain workers compensation cases where surveillance videos are offered to show that the employees were misrepresenting their conditions, the videos often record that the claimant had not done so:

A video recording of the grievant putting siding on his house was the grounds for termination of his employment for workers compensation fraud. Arbitrator Matthew M. Franckiewicz, viewing the video recording, opined:

> The essence of the discharge decision, as stated in the July 19, 2018 termination letter, was that [the Grievant] had all along been misrepresenting his medical condition and his ability to perform more strenuous work….
>
> To the extent that the Company claims that the video shows that [the Grievant's] medical restrictions were, from the start, a sham excuse to avoid more strenuous duties, I find the contention lacking in merit. At most the video evidence shows that the Grievant had greater shoulder strength and range of motion in July 2018 than he had in January 2017. Such does not warrant the inference that the earlier restrictions were unnecessary at the time.. [65]

An employee underwent surgery for lateral epicondylitis (tennis elbow) and was thereafter out of work on workers compensation. Viewing surveillance videos of the grievant's activities at home, the Company's Chief of Occupational Medicine concluded they were inconsistent with the description of his condition that the grievant had given his health care providers. The Company discharged the grievant based upon that conclusion. The grievant's occupational therapist disagreed with the Chief of Medicine, and provided his treatment notes in which the therapist had encouraged the grievant to increase his activities at home, notwithstanding that the grievant had told him, "someone had been monitoring activities at home and [he was]

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[63] [___] Transit, AAA 33 300 **** (Mark Lurie 2008).
[64] Greater Cleveland Regional Transit Authority, 138 LA 1565 (Thomas R. Skulina 2018).
[65] [Employer], 139 LA 904 (Matthew M. Franckiewicz 2019).

fearful of doing more at home." The Company urged Arbitrator Ann R. Gosline to give deference to the Chief of Medicine's conclusions. She declined:

> "I find that deference is not warranted in this case, where the evidence shows that [the Chief of Medicine's] opinion was based on incomplete information and erroneous assumptions. Contrary to the Company's argument, I do not view [the Grievant's] activities as significantly inconsistent with [his] reports of his condition to his health care providers or inconsistent with the limits and advice they gave to him."

Arbitrator Gosline ordered that the Grievant be reinstated with full restitution. [66]

Technology-Derived Evidence in Disciplinary Actions

The Fabrication of Computer Evidence

In one arbitration decision, the "date modified" attribute of a pdf file was offered to show that the grievant, a police officer, could not simultaneously have been having sex while, at the same date and time, he was working on a department document. The arbitrator took judicial notice that the "date modified" value of a document can be retroactively set to any date and time by changing the system setting of the computer and then saving the document. The arbitrator deemed the "date modified" reading to be of no evidentiary value. He found the fact that the grievant, who had extensive computer experience, made the specious argument had not improved his credibility by doing so. [67]

Phone Records That Impeach

The grievant, a police officer, denied having known a woman he was pursuing romantically. At a subsequent disciplinary interview, he was presented with copies of phone records that showed that he had made numerous telephone calls to her during the interval he was denying having known her. The grievant attempted to correct his first response:

> Q Our phone record indicates that [the woman] and yourself spoke 11 times before and 35 times after this traffic stop. Can you explain?
>
> A Yes, Okay, from my first interview until now, obviously I've had time to think about and whatnot. I did know [her] before my traffic stop.

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[66] [Employer], 2018 LA Supp. 4635853 (Ann R. Gosline 2018). For other decisions in which video surveillance recordings were found not to have proven workers compensation fraud, *see* Graphic Packaging Int'l, 134 LA 369 (Aaron S. Wolff 2014); Mound View Health Care, 129 LA 1562 (Matthew M. Franckiewicz 2011).

[67] Unpublished decision by a National Academy member in 2013.

> I probably known her maybe a month before. I'm not exactly sure. [68]

Global Positioning System (GPS) Evidence

Employer-issued phones and vehicles equipped with Global Positioning System (GPS) can track and record employees' locations in real time, including the speed of travel and intervals while not in motion. The following are some examples of GPS in operation.

The GPS record of the grievant's vehicle diverged from the electronic entries of hours worked he had posted to the Company's dispatch system, and proved that he had engaged in personal activities when he claimed he was working. [69]

GPS readings that show an employee's vehicle stopped in a remote area for an hour or more have been offered to prove that the employee was not working. [70] In one case, visual observation confirmed that he was sleeping.

An employer parked at a building supply store for 33 minutes even though he had no business reason for being there. [71]

Data from the police department's GPS-based vehicle tracker were used to prove the grievant, a police officer, had attempted to develop a personal relationship with a woman (a member of the public) while acting under the guise of his official police duties. The grievant spent "an inordinate amount of time" driving by and parked near the woman's residence during the hours that she normally left for work. Said the arbitrator:

> While it is true that the locations were within [the Grievant's] assigned patrol area, when considered in the context of his other conduct, the evidence strongly suggests that Appellant was either waiting for [the woman] or hoping to cross paths with her. [72]

HIPAA

Over the past 25 years medical record-keeping has transformed from paper to digital storage. The Health Insurance Portability and Accountability Act (HIPAA) [73] set national standards to protect medical records and personal health information. The Act set maximum fines for noncompliance (in 2020) of about $60,000 per event. Criminal penalties can also apply. In general, arbitrators have ruled that accessing HIPAA-protected information for no valid medical reason is a dischargeable offense, whether or not the information obtained is then shared. Thus, when a nurse failed to protect a patient's privacy by logging out of her computer, and then a second person accessed the patient's records for no valid business reason, the arbitrator upheld her termination. An aggravating factor was that the Grievant had

[68] [Employer], 2017 LA Supp. 201114 (M. Scott Milinski 2017).
[69] Century Link, 138 LA 1861 (Jerry B. Sellman 2018).
[70] [Employer], 2013 LA Supp. 14840 (Howard Eglit 2018); Genesis Alkali, LLC, 139 LA 878 (John P. DiFalco 2019); [Employer], 2018 LA Supp. 4651542 (Donald D. Dettman, 2018).
[71] [Employer], 2013 LA Supp. 148401 (Howard Eglit 2018).
[72] An unpublished opinion of a National Academy member in 2007.
[73] Pub. L. 104-19, 110 Stat. 1936 (1996).

engaged in an "ongoing and intentional" violation of the hospital's code of conduct.[74]

Exceptions are sometimes made when the accessing is accidental, is done in good faith, is reported quickly, and no harm ensues. The following cases address such extenuating circumstances.

The grievant, a medical secretary, was terminated for using her pass code to access her husband's private medical records. Arbitrator Charlotte Neigh reduced the discharge to a written warning, observing:

> There is good reason to believe that the Grievant was truthful when she said she could not remember having accessed the records… The Grievant had no
>
> improper motive for accessing the records, no confidential information was disclosed, and no harm resulted.[75]

A termination of a medical coder was overturned where the employer failed to give notice of the HIPAA prohibitions to employees and the grievant credibly testified she had been unaware of such prohibitions.[76]

Misuse of the Employer's Computer System

Misuse of a computer system can include hacking the system to obtain confidential data, visiting unauthorized websites, downloading unauthorized programs or content (both of which risk malware and ransomware infection), installing unapproved software, and viewing pornography or other manifestly inappropriate content that is an inherently improper use of a computer system. Such conduct is a potential theft of work time, and the visibility of the content itself may create a hostile work environment. Examples follow.

The grievant was observed using the internet and "closing down screens" as soon as a supervisor entered his work area. In fact the grievant was utilizing a security "hole" – one that inadvertently had been created in the computer system – to access confidential Company documents and information. Keystroke tracking software revealed the grievant had been accessing the Company records for over six months. The Union argued no Company policy prohibited such hacking. Arbitrator Hyman Cohen opined:

> [Grievant's]…unauthorized misuse of the computer for a period of 6 to 8 months in accessing sensitive, confidential and privileged management documents, files, folders and information has caused an irreparable breach in his relationship with the Company. Since the Grievant's motive for his activities of 6 to 8 months cannot be merely explained under the guise of curiosity, he has failed to rebut the inference that his motive did not arise from ill will, since he knew or should have

[74] [Employer], 2016 LA Supp. 205082 (Philip Dunn 2016).
[75] Group Health Plan, 115 LA 1352 (Charlotte Neigh 2001).
[76] Clark County Dep't of Admin. Svcs., 2005 LA Supp. 111403 (Alonzo M. Fields, Jr. 2005).

> known as a reasonable person that his activities did not serve any legitimate purpose of the Company. The Grievant's activities also seriously interfered with the direction, control and supervision of employees which are traditional management prerogatives. [77]

The grievant had frequently logged onto the Company's internet. An examination of his online history revealed he had downloaded pornography. The grievant claimed that these results had been caused by involuntary "pop-ups," but Arbitrator Gregory P. Szuter concluded the sites could not have been accessed and the pornography downloaded except as a result of an intentional search:

> Grievant could not explain, and did not try to explain, how his user ID was associated with the sites except through his own access. The Internet fingerprint of these downloads were all from one blog, which means it is an interactive site. The snapshots of those downloads were hard core pictures, giving no indication of advertising or e-mail. The…size of the files indicate the download was longer, perhaps three times, than normal process. This could have only been from an intentional search from Grievant's user ID. The Arbitrator is convinced Grievant made those searches. He may have immediately deleted them when he observed the content because he found them hard to look at, but the substantive offense is the retrieval not the viewing of the pornography. [78]

In a similar case the arbitrator sustained the discharge of a 25-year employee with an unblemished work record for spending substantial time circumventing the employer's firewall and viewing and downloading pornography. The arbitrator stated:

> [T]he use of excessive amounts of work time for activities unrelated to work duties is a type of misconduct that does not require progressive discipline.
> [The Grievant] ... may have subjected the [public employer] to computer viruses and possible sexual harassment law suits. More significantly, [the Grievant's] misconduct constituted substantial and repeated neglect and failure to properly perform his duties, i.e., he received pay for a substantial amount of time during which he did not perform his duties. [79]

Keystroke software revealed that the grievant, a police officer, had conducted lewd online conversations using a department computer. The grievant asserted the conversations were private instant messages with her

[77] Hoosier Energy Rural Elec. Coop., Inc., 116 LA 1043 (Hyman Cohen 2001).
[78] BASF Catalysts, LLC, 129 LA 571 (Gregory P. Szuter 2011).
[79] Unpublished decision by a member of the National Academy of Arbitrators in 2017.

"girlfriend," but the keystroke log revealed a larger audience. Arbitrator Skonier declared:

> While it is true that there were no written policies regarding use of the police computers, and apparently other officers and the then-Chief used these computers for personal matters, the Grievant's conversations were, at times, lewd and inappropriate on a public computer…. [80]

While restoring a locked computer screen, a supervisor inadvertently revealed how to generate a screen menu that included a prompt to print a report of company passwords. The grievant surreptitiously printed out that report and used it to change his access rights to the highest level, giving himself control of the operating system. He used that access level to repeatedly enter and change company data, as a "joke." When discovered, he was discharged. The Union argued no policies or work rules gave the grievant forewarning that he would be discharged for his actions. Arbitrator Thomas S. Levak ruled, "What Mr. Z did was the equivalent of stealing the keys to his employer's locked office and secretly breaking in, then altering records and making a copy of the keys for himself." [81] Arbitrator Levak cited a well-accepted principle:

> [T]here are some kinds of activities that every employee should know will not be tolerated on the job. For misconduct of this kind, 'forewarning' or 'foreknowledge' is given by common sense, rather than by any specific written rule or explicit verbal direction. [82]

Covid-19 and Video Conferencing

As this chapter is being written, the world is experiencing its first major pandemic since the 1918 flu. Originating in Wuhan, China in November 2019, the virus was given the official name of "Covid-19" [83] and made its first significant appearance in North America in February 2020. Fearing the epidemic would overwhelm the capacities of hospitals to furnish treatment, state and local governments issued shelter-in-place orders in March. Schools and non-essential businesses closed, while businesses and government agencies that were essential to public health and safety remained open, albeit sometimes with reduced staffs. Self-isolation continued from February through the end of May 2020, by which date the virus had caused over 100,000 deaths in North America.

The impact of Covid-19 on infected individuals ranged from nothing to multi-system failure and death, with the primary determinant being age. While statistically the virus had little effect on the young, it could be lethal to those over 65 years of age.

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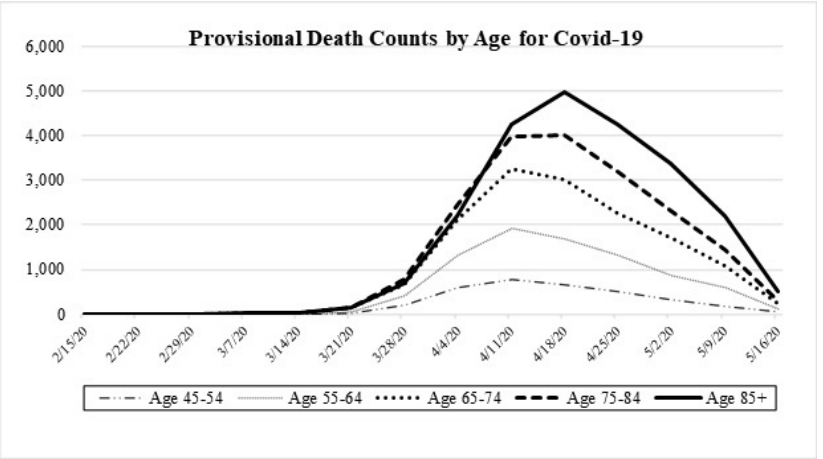
[80] [___] Township Police Dep't., 2011 LA Supp. 149856 (John M. Skonier 2011).
[81] Ernst Home Center, Inc., 1993 LA Supp. 112697 (Thomas S. Levak 1993).
[82] Adolph M. Koven & Susan L. Smith, *Just Cause: The Seven Tests* 28 (2d ed. 1992).
[83] The Covid-19 nomenclature was by the World Health Organization.



Deaths involving coronavirus disease 2019 (COVID-19), pneumonia, and influenza reported to NCHS. [84]

The fatality rate increased sharply with age: [85]

Age	Death Rate
80+	14.8%
70-79	8.0%
60-69	3.6%
50-59	1.3%
40-49	0.4%
30-39	0.2%
20-29	0.2%
10-19	0.2%
0-9	0.0%

In the spring of 2020, most members of the National Academy of Arbitrators were older than 65, and understandably were reluctant to conduct hearings in person. Many employers' and unions' representatives shared the same reluctance. On March 13, 2020, the AAA posted this notification:

> Parties, arbitrators, mediators and others involved in scheduled hearings must promptly raise with each other and the AAA-ICDR any concerns about their participation resulting from limitations on travel imposed or urged by governmental and regulatory authorities. Sensitivity to individuals who are at a higher risk of COVID-19 must be taken into consideration when considering alternative hearing arrangements.

The AAA went on to offer its video conferencing facilities and assistance, and reassured arbitrators and advocates that video conferencing

[84] Provisional death counts are based on death certificate data received and coded by the National Center for Health Statistics as of the date of analysis and do not represent all deaths that occurred in that period.

[85] Source: Report of the World Health Organization-China Joint Mission on Covid-19.

would allow for the full and fair hearing of the cases, while saving travel time and expenses. Ten days later, the AAA suspended the offer of its teleconference facilities until at least April 17.

Video conferencing had been discussed by Academy members over the prior two decades, but gained greater visibility at the NAA's 2019 Fall Education Conference in Savannah, Georgia, when Homer C. La Rue [86] presented a prescient paper on the subject in which he provided both historical context and a practical assessment of the video conference process. On the day that the AAA sent out its first Covid-19 notice, March 13, 2020, NAA President-Elect Dan Nielsen asked three Academy members, Homer La Rue, Jeanne Charles, and Joan Dolan, to organize a task force to train Academy members in the use of video conferencing. That group assembled a Videoconferencing Task Force that by March 18 had written a primer on the subject, copies of which were transmitted to all Academy members. [87]

On April 2, 2020 the Task Force, in partnership with FMCS Director of Arbitration Arthur Pearlstein, conducted a webinar titled "Videoconferencing for Arbitrators" that was viewed by about 425 persons. The webinar gave an overview of how a hearing would be conducted using the ZOOM video conferencing service. Between April 27 and May 15, the Task Force conducted six online training sessions in the use of the Zoom videoconferencing service. [88] The Task Force also consulted with the Academy's Committee on Professional Responsibility and Grievances (CPRG) in the latter's drafting of NAA Opinion No. 26, which addressed an arbitrator's authority to order a videoconference hearing over the objection of one party. Members of the National Academy formed ad hoc video conferencing practice groups, and more than 150 arbitrators self-certified on the FMCS's roster that they were competent to host a video arbitration hearing. [89] The AAA and the FMCS each published guides to the conduct of such hearings.

A snapshot survey of subscribers to the National Academy's mailing list that was conducted between May 22 and 24, 2020, showed that NAA members had started to schedule and conduct video conferenced hearings. [90]

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[86] Homer C. La Rue, now NAA President-Elect, was then serving as an Academy vice president and as a member of its Board of Governors. He is Professor of Law at the Howard University School of Law, where he teaches and directs the Howard Law ADR Program.

[87] The Task Force was comprised of Jeanne Charles, its Chair; Co-Chairs Joan Dolan and Homer La Rue; and members Christopher Albertyn, Christopher Cameron, Brian Clauss, Doug Collins, Tia Denenberg, Keith Greenberg, Lisa Kohn, James Lundberg, Luella Nelson, Kenneth Perea, Sylvia Skratek, Andrew Strongin, Kathryn VanDagens, Jeanne Vonhof, and Betty Widgeon.

[88] The training session subjects were breakout rooms, settings, handling exhibits and documents, witness issues, prehearing conversations introducing the parties to video hearings, and how to prepare for the hearing, and what to do if things go wrong.

[89] The number included non-NAA members.

[90] May 22, 2020 survey of Academy members scheduling of video-conferenced hearings. Sixty-nine United States NAA members and two Canadian members responded.
The Canadian members' video hearing numbers were appreciably higher than those of the U.S. members. As of 2020 video conferencing has been in regular use in Canada, and many of the cases were expedited. Of the 69 U.S. members, six reported that they had not offered video conferencing; 63 reported that they had. The chart below shows the number of video-conferenced hearings held and to be held by those 63 respondents from April 1, 2020.

Whether video conferencing will gain acceptance, wane, or be abandoned once the Covus-19 threat passes remains to be seen.

Summation

National Academy member Luella E. Nelson has mused that George Orwell was an optimist.[91] As of this year – 2022 – the physical locations, words, and actions of employees are being recorded by myriad technologies: keystroke tracking, door badge swipes, biometric readers, video cameras (stationary, body-worn, and in the hands of third persons), credit card purchases, and GPS trackers. Seemingly private text and images transmitted over the internet are in fact not secure, but are being captured, saved, and rebroadcast. It is an understatement to say that technology has narrowed the realm of employee privacy.

In the future, as the rate of technological innovation inevitably accelerates, notions of privacy that prevailed in 2022 will be remembered as quaint. New managerial tools, such as facial recognition, desktop DNA sequencing, and lie detection through biometric reading augmented by artificial intelligence, will present arbitrators with unfamiliar genera of evidence to weigh for admissibility, relevance, and reliability. Then, as now, arbitrators will be expected to exercise sound reasoning and judgment in construing and applying the terms of collective bargaining agreements to the realities of a brave new world.

Video-conferenced hearings held after April 1, 2020 or scheduled as of May 24, 2020

Arbitration		**Mediation**	
No. of respondents	No. of hearings	No. of respondents	No. of hearings
27	0	49	0
11	2	8	1
3	3	4	2
7	4	1	3
8	5	1	7
2	6		
2	7		
1	9		
1	11		
1	12		

[91] George Orwell, *Nineteen Eighty-Four* (1949). *See also* Aldous Huxley, *Brave New World* (Heritage Press ed. 1974).

Chapter 14

THE FUTURE OF THE ACADEMY

Barry Goldman

Human beings want to feel that they are on a power walk into the future, when in fact we are always just tapping our canes on the pavement in the fog.

Mark Lilla, *The New York Times, M*arch 22, 2020

Some of the omens are propitious. Trump has been defeated. The Democrats have control of both houses of Congress. The Democratic Party platform says the right things about necessary changes in labor law and policy. Biden's new Labor Secretary shows real promise. Perhaps we have reached an inflection point, a point at which "a change in the direction of curvature occurs."

On the other hand, the long-term direction of curvature does not look good. Union density is down. Case filings are down. The Supreme Court is anti-union.[1] State legislatures are worse. The political system has been captured by the oligarchy. Income and wealth inequality are more grotesque than at any time since the Gilded Age. The workplace has been fissured by subcontracting and franchising, by the platform-based gig economy, and by systematic misclassification of employees, all designed to keep wages low and prevent workers from organizing. Gerrymandering, voter suppression, dark money, and *Citizens United*[2] conspire to preserve the status quo. And the Supreme Court has moved so far to the right that Chief Justice Roberts is the swing vote.

Since work on this book began, more than 700,000 Americans have died from Covid-19. But at least, as of this writing, we are dying at a slower rate. Vaccines exist, but we have no idea how many more will die before they can be administered. We don't know how effective vaccines will be against mutations of Covid-19. And, as of this writing, for reasons too depressing to contemplate, we don't know if we can count on enough Americans agreeing to get vaccinated.

There are 10 million fewer jobs today in the United States than there were before the pandemic began. Hunger is up. Domestic violence is up. Suicide and drug overdose deaths are up. We don't know the extent of the economic damage the pandemic will do. Will we have the V-shaped recovery some are predicting, or the persistence of unemployment levels not seen since

[1] *See, e.g.*, Janus v. AFSCME Council 31, 138 S.Ct. 2448 (U.S. 2018). Overruling long-established precedent, the Court held (5-4) agency-shop agreements in the public sector violate the First Amendment by requiring nonmembers to subsidize speech by a union. Justice Kagan dissented, joined by Justices Ginsburg, Breyer, and Sotomayor.

[2] Citizens United v. Federal Elections Com'n, 558 U.S. 310 (2010). Overruling multiple precedents, the Court held (5-4) the First Amendment forbids limiting political speech because the speaker is a corporation. Justice Stevens dissented, joined by Justices Ginsburg, Breyer, and Sotomayor.

the Great Depression? And if there is a lasting depression, will it lead to increased labor militancy and pressure for a new New Deal, or will it expand the reserve army of the unemployed, crush what is left of the labor movement, and put downward pressure on wages and conditions of employment?

Even if we knew the answers to these questions, we would have no clear path to a confident prediction about the future of the labor market. Even with a Democratic President and a Democratic Congress, given the health crisis and the economic crisis, there is little reason to believe labor law reform will be near the top of the new Administration's agenda. And even if it were possible to know with precision what future labor law will look like, we would be a long way from being able to predict the future of the Academy.

The pandemic and the resulting economic damage are the two central factors in any analysis of the future of the labor market. And a year before this writing neither one existed.

In the summer of 2020, we experienced a level of "civil unrest" not seen since 1968. The police murders of George Floyd, Breonna Taylor, and countless others drove an unprecedented number of Americans into the streets. Some cops took a knee and marched with the protesters. Others fired tear gas and rubber bullets. There was arson and looting. There was the brutality of a militarized police. There were conspiracy theories of every description. The following winter we saw a mob of fanatics break into the Capitol building, smear excrement on the walls, and beat a police officer to death. Some police officers behaved heroically. Others posed for selfies with the rioters.

Under the circumstances, it's understandable that the new Administration may have priorities other than labor law reform.

Still, people whose job it is to think about these things have been thinking about them. Some scholars see the promise of a future in which the relationship between labor and capital moves closer to the European model of sectoral bargaining. In a sectoral bargaining system, all the workers in an industrial or employment sector enjoy the same broad array of rights and protections regardless of who employs them. There is no competition between employers over wages and conditions and no race to the bottom. It is an attractive vision.

There is renewed interest in some quarters in the elusive "just cause" discharge statute. There is the tantalizing idea of minority unions. Workers at Google have begun organizing a union, affiliated with CWA, that will be open to all Google employees of all crafts, even contractors. The possibilities are heady.

If attractive visions and heady possibilities were horses, scholars would ride.

Some activists see promise in the recent spate of strikes among nurses, teachers, and others and in the notion of "bargaining for the common good." It's hard to be opposed to the common good, but the relationship between those strikes and the future of the Academy is, shall we say, rather an attenuated one.

Additionally, for our purposes here, it's important to point out that a move to sectoral bargaining or a universal just cause rule would likely lead to replacing private labor arbitrators like us with salaried labor court judges. That might be a vast improvement for the American working class, but it

would be bad news for those of us who like what we do and the way we do it. Changes in the state of labor law in the United States, even if they mean improvements in the rights and protections of working people, would not translate directly into improvements in the lives of labor arbitrators. No one who has achieved sufficient general acceptability to have been admitted into the Academy looks longingly at the professional life of a government hearing officer.

Inside the Academy, other changes are taking place. The requirements for admission have been relaxed but membership applications are still down. Total membership is down. The number of meetings has been reduced. There are plans to reduce the size of the Board of Governors. We are shrinking.

Would anyone counseling a young person today recommend labor arbitration as a career?

In theory at least, there is a core set of jobs that can't be off-shored and can't be automated – jobs that require the physical presence of a human being. That core is getting smaller as artificial intelligence and robotics get better, but let's take that as a starting point. Some of the people in those jobs either have a history of collective bargaining or can be persuaded to organize. If they have or can get collective bargaining agreements, those agreements are likely to contain grievance procedures that conclude with arbitration. If all that is true, those people will need arbitrators. If there are arbitrators, they will have an interest in associating with one another. And there will continue to be a need for the kind of education, ethics guidance, codes of conduct, and enforcement the Academy has traditionally provided to arbitrators and the amicus guidance it has provided to courts. Consequently, the Academy, as the premier association of labor arbitrators, is likely to survive in some form for some indefinite period of time. Probably.

Changes in the labor market and labor law are not the only variables in the equation. Now that we know how easy it is to conduct hearings on Zoom wearing our bedroom slippers, how eager will we be to get back to in-person hearings? And how eager will the parties be to subsidize our airplane flights, hotel rooms, restaurant meals, and rental cars?

There is also the possibility of change in the Academy itself. If the Academy is an organization of labor arbitrators, its future will follow the path of labor arbitration, whatever that may be. If the Academy defines itself more broadly, as an organization of workplace dispute resolution professionals, say, then its possible future paths will broaden correspondingly. This discussion has already commenced, and there are, not surprisingly, strong feelings on both sides. Some of our members see the writing on the wall and urge that the Academy expand its scope or risk shriveling to irrelevance. Others see expansion as dilution and urge the Academy to remain true to its historical roots in arbitration under collective bargaining agreements. For those members, if retaining that focus means we become a smaller organization, so be it. The difference may be generational. Some of us can afford to be pure. Others still need to obey what Yeats called "that raving slut who keeps the till."

Besides the external political situation and our own internal organizational changes, there is another consideration that has to enter our thinking about the future of the Academy. The Academy is not just a

professional organization whose members get dressed up and go to dinner together once a year. We have other organizations for that. For many of us the Academy plays the role the law firm does for lawyers, or the department faculty does for academics. Academy members are some of our closest colleagues and our dearest friends. We hear cases alone, and we write decisions alone, but Academy membership gives us a tribe. Members of this tribe understand parts of our lives no one else can grasp. Like why we spend so much time staring vaguely at the ceiling. For many of us, the Academy is less an organization we belong to than a part of who we are. As we tap our canes in the fog, the future will have to reflect that fact as well.

Appendix A
Officers, Governors, and Committee Chairs 1997-2022

	1997-1998	1998-1999	1999-2000	2000-2001	2001-2002
President:	Milton Rubin	James M. Harkless	Theodore J. St. Antoine	John Kagel	James J. Sherman
Vice Presidents:	George R. Fleischli	Dana Edward Eischen	Tim Bornstein	Tim Bornstein	Jack Clarke
	Gladys Gershenfeld	George R. Fleischli	Dana Edward Eischen	Jack Clarke	Claude Hubert Foisy
	Gladys W. Gruenberg	Gladys Gershenfeld	Francis X. Quinn	Francis X. Quinn	Dennis R. Nolan
	John Kagel	Helen M. Witt	Helen M. Witt	Barbara Zausner	Barbara Zausner
Secretary Treasurer:	William H. Holley, Jr.	William H. Holley, Jr.	William H. Holley, Jr.	William H. Holley, Jr.	William H. Holley, Jr.
Board of Governors:	Daniel F. Brent	Steven Briggs	Steven Briggs	Sara Adler	Sara Adler
	Steven Briggs	Susan R. Brown	Susan R. Brown	Susan R. Brown	Patricia Thomas Bittel
	Shyam Das	Shyam Das	Gerry L. Fellman	Janet L Gaunt	R. Douglas Collins
	Gerry L. Fellman	Gerry L. Fellman	Janet L. Gaunt	Joseph F. Gentile	Joseph F. Gentile
	Roberta Golick	Janet L. Gaunt	Elliott H. Goldstein	Elliott H. Goldstein	Stephen L. Hayford
	Sharon K. Imes	Elliott H. Goldstein	Roberta L. Golick	Stephen L. Hayford	Ira F. Jaffe
	Edward B. Krinsky	Roberta L. Golick	Stephen L. Hayford	Ira F. Jaffe	Anita Christine
	Richard H. McLaren	Edward B. Krinsky	Susan T. Mackenzie	Susan T. Mackenzie	Knowlton
	James C. Oldham	Richard H. McLaren	Joyce M. Najita	Joyce M. Najita	Susan T. Mackenzie
	James F. Sass	James C. Oldham	Michel G. Picher	James J. Odom, Jr.	Joyce M. Najita
	Richard L. Verity	Richard L. Verity	Richard L. Verity	Allen Ponak	James J. Odom, Jr.
	Gil Vernon	Donald T. Weckstein	Donald T. Weckstein	Donald T. Weckstein	Allen Ponak
	George Nicolau, *Ex-Officio*	Milton Rubin, *Ex-Officio*	James M. Harkless, *Ex-Officio*	Theodore J. St. Antoine, *Ex-Officio*	Calvin William Sharpe
					John Kagel, *Ex-Officio*

Chairs					
Academy Liaison to the Task Force on ADR in Emp. Arb.:*	Arnold M. Zack	Arnold M. Zack	Arnold M. Zack	Arnold M. Zack	Arnold M. Zack
Ann. Mtg. Costs and Attendance:		Nicholas H. Zumas	Nicholas H. Zumas		
Annual Mtg. Host:	Donald T. Weckstein (1998)	Paul Barron (1999)	Barry Winograd (2000)	James J. Odom, Jr. (2001)	Kathleen Miller (2002)
Annual Mtg. Prog.:	Tim Bornstein (1998)	Jack Clarke (1999)	James C. Oldham (2000)	Norman Brand (2001)	Michael Prihar (2002)
Arb. Assistance:	Edward B. Krinsky	Michael H. Beck	Michael H. Beck	Michael H. Beck	
Archivist:				James R. McDonnell	James R. McDonnell
Auditing:	Allan S. McCausland	Lois A. Rappaport	Lois A. Rappaport	Lois A. Rappaport	Edward A. Pereles
Awards & Pubs.:			Joseph M. Sharnoff		
Chronicle:	Andria S. Knapp	Sara Adler	Bonnie G. Bogue	Bonnie G. Bogue	Bonnie G. Bogue
Continuing Edu.:	Anita Christine Knowlton	Patricia Thomas Bittel	Patricia Thomas Bittel	Alan A. Symonette	Alan A. Symonette
Cont. Reg. Edu.:	Margery F. Gootnick	Margery F. Gootnick	Stanley T. Dobry	Stanley T. Dobry	Stanley T. Dobry
CPRG:	Reginald Alleyne	Reginald Alleyne	Reginald Alleyne	Dana Edward Eischen	Dana Edward Eischen
DALC:	Helen M. Witt	Arthur Stark	Walter J. Gershenfeld	Walter J. Gershenfeld	Walter J. Gershenfeld
Fall Meeting Host:	James J. Odom, Jr. (1997)	Mark Berger (1998)	Claude Hubert Foisy (1999)	David A. Petersen (2000)	Frances Bairstow (2001) Mark R. Sherman (2001)
FMCS Focus Group:				Walter J. Gershenfeld	Walter J. Gershenfeld
Future Meetings:	David A. Petersen	David A. Petersen	David A. Petersen	David A. Petersen	Steven Briggs
History:	James R. McDonnell	James R. McDonnell	James R. McDonnell		
HLM:	Howard D. Brown	Howard S. Block	William P. Murphy	William P. Murphy	William P. Murphy
Int. Studies:	Benjamin Aaron	Benjamin Aaron	Alvin L. Goldman	Alvin L. Goldman	Alvin L Goldman
Issues in Emp.-Related Disp. Res.:	Michel G. Picher	Michel G. Picher	Michel G. Picher		

* Named "Academy Liaison to the Task Force on ADR in Employment and the Alliance for Education in Dispute Resolution" from 2000-2001.

Law & Leg.:	Elliot H. Goldstein	Robert T. Simmelkjaer	Robert T. Simmelkjaer	Robert T. Simmelkjaer	Mitchell B. Goldberg
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[†] Named "Technology and the New NAA" from 1997-1998.

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‡ Carlton J. Snow passed away November 2005.

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RUAA:	Timothy J. Heinsz	Timothy J. Heinsz	Stephen L. Hayford	Stephen L. Hayford	
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Legal Affairs:	Patrick Hardin	Patrick Hardin	Calvin William Sharpe	Calvin William Sharpe	Calvin William Sharpe
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Meeting Attendance:			Daniel J. Nielsen	Daniel J. Nielsen	
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†† Renamed Future Sites 2011-2012
‡‡ Name changed to Statutory Disputes in Arbitration Committee in 2011-2012.

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Outreach:					Walt De Treux
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Technology:	Kenneth Paul Swan	James B. Dworkin	James B. Dworkin	James B. Dworkin	
Tribunal Appeals:	George R. Fleischli	George R. Fleischli	George R. Fleischli	George R. Fleischli	George R. Fleischli
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[§§] David A. Petersen was named President posthumously in 2018.

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Annual Mtg Prog.:	Elizabeth C. Wesman (2018)	William McKee Maretta Comfort Toedt (2019)	Daniel G. Zeiser (2020)	Paul Roose (2021)	Jasbir Parmar (2022)
ArbitrationInfo.com:	Elizabeth C. Wesman	William McKee Elizabeth C. Wesman	Robert Gary Bailey Elizabeth C. Wesman	Elizabeth C. Wesman Robert Gary Bailey	Elizabeth C. Wesman Robert Gary Bailey
Auditing:	Kathryn A. VanDagens	David R. Williamson	Richard D. Fincher	Randi E. Lowitt	James C. Oakley
Bloch Committee:	Richard I. Bloch				
Bloch Report Imp.:		Paula Knopf	Paula Knopf	Paula Knopf	
Canadian Labour Relations:				Susan L. Stewart Christopher J. Albertyn	Christopher J. Albertyn Kenneth P. Swan
Chronicle:	Daniel G. Zeiser	James S. Cooper	James S. Cooper	James S. Cooper	James S. Cooper
CLE:	Fredric R. Dichter	Fredric R. Dichter	Fredric R. Dichter	Fredric R. Dichter	Fredric R. Dichter
Continuing Edu.:				Daniel Zeiser	Daniel Zeiser
CPRG:	Daniel J. Nielsen	Susan L. Stewart	Susan L. Stewart	Jeanne M. Vonhof	Jeanne M. Vonhof
DALC:	Joshua Javits	Joshua Javits	Joshua Javits	Barry E. Simon	Barry E. Simon
DEIB Coord.:				Timothy S. Taylor	
Emp. Arbitration:	Jacquelin F. Drucker	Jacquelin F. Drucker	Jacquelin F. Drucker	Thomas F. Gibbons	Thomas F. Gibbons
Fall Meeting Host:	Robert B. Moberly (2017)	I.B. Helburn (2018)	Katie Durham (2019)		
Fall Edu. Prog.:	Barry Winograd (2017)	Amedeo Greco (2018)	Jeanne M. Vonhof *** (2019)	Daniel G. Zeiser (2020)	
Federal Sector:				M. David Vaughn	Mark Travis
Future of the *Proceedings*:		Stephen F. Befort Laura J. Cooper Howard G. Foster Paul F. Gerhart Stephen L. Hayford	Robert A. Grey	Robert A. Grey	Robert A. Grey

*** Last Fall Education Conference was held in Savannah in 2019.

Future Sites:	James J. Odom, Jr.				
General Counsel:				Theodore J. St. Antoine	
History:	Nancy Kauffman	Nancy Kauffman	Nancy Kauffman	Nancy Kauffman	Nancy Kauffman
HLM:	James C. Oldham	James C. Oldham	James C. Oldham	James B. Dworkin	James B. Dworkin
Int. Studies:	Christopher J. Albertyn	Christopher J. Albertyn	Christopher J. Albertyn	Christopher J. Albertyn	Christopher J. Albertyn
Internal Grievances:				Kathleen Miller	Kathleen Miller
Intra-Org. Grievance Policy and Process: [†††]		Elizabeth C. Wesman	Elizabeth C. Wesman	Elizabeth C. Wesman	Elizabeth C. Wesman
Legal Affairs:	Jan Stiglitz	Jan Stiglitz			
Legal Rep.:	Sara Adler	Sara Adler	Luella E. Nelson	Luella E. Nelson	Luella E. Nelson
Media and Comm. Strategy:					Andrea L. Dooley Sylvia Skratek
Membership:	Sarah Kerr Garraty	Howell L. Lankford	Howell L. Lankford	Howell L. Lankford	Howell L. Lankford
Membership Standards:		Sarah Kerr Garraty	Sarah Kerr Garraty	Sarah Kerr Garraty	
NMO:	Jules Bloch	Jules Bloch	Jules Bloch	Andrew M. Strongin	Andrew M. Strongin
Nominating:	Jeffrey B. Tener	Richard Adelman	Laura J. Cooper	Randi Hammer Abramsky	Shyam Das
Online *Proceedings*:	Robert A. Grey	Robert A. Grey	Robert A. Grey		
Outreach:	Margaret R. Brogan	Margaret R. Brogan	Margaret R. Brogan	Margaret R. Brogan	Margaret R. Brogan
Parliamentarian:	Jane H. Devlin	William A. Marcotte	William A. Marcotte	William A. Marcotte	William A. Marcotte
PEDS:	Timothy D. W. Williams	Timothy D. W. Williams	Timothy D. W. Williams		
POLC:	Fredric R. Dichter	Fredric R. Dichter	Elizabeth Neumeier	Elizabeth Neumeier	Elizabeth Neumeier
Public Sector Init.:			Kathryn A. VanDagens		
Proceedings Editor(s):	Timothy J. Brown (2018)	Howard G. Foster (2019)	Richard N. Block (2020)	Robert A. Grey (2021)	
Regional Activities:	Kathy L. Eisenmenger	Kathy L. Eisenmenger	Richard Adelman	Richard Adelman	Richard Adelman

[†††] Renamed Internal Grievances Committee 2019-2020.

Strategic Advisor:					Martin H. Malin
Supplement to "Fifty Years in the World…":	Barry Goldman	Barry Goldman	Theodore J. St. Antoine	Theodore J. St. Antoine	Theodore J. St. Antoine
RCI Organizing:				Homer C. La Rue Alan A. Symonette	Homer C. La Rue Alan A. Symonette
Remote Meetings:				Paula Knopf	
Sp. Cmt. on a Strategic Plan to Achieve DEIB:				Christopher J. Albertyn	Christopher J. Albertyn
State and Local Public Sector:				Thomas J. Nowel	Thomas J. Nowel
State of the Prof.:				Kathryn A. VanDagens	Kathryn VanDagens
Technology:				Keith D. Greenberg	Keith D. Greenberg
Transitions Project:				Edward B. Krinsky	Edward B. Krinsky
Tribunal Appeals:	Roberta L. Golick	Roberta L. Golick	Roberta L. Golick	Edward B. Krinsky	Edward B. Krinsky
VTF:				Jeanne Charles	

Appendix B
NAA Research and Education Foundation
Officers and Directors

Officers	1997-1998	1998-1999	1999-2000	2000-2001	2001-2002
President:	Mark Thompson	Shyam Das	Shyam Das	Michael Beck	Michael Beck
Vice-President:	Joyce M. Najita	Susan T. Mackenzie	Susan T. Mackenzie	Timothy J. Heinsz	Timothy J. Heinsz
Secretary-Treasurer:	William H. Holley, Jr.	William H. Holley, Jr.	William H. Holley, Jr.	William H. Holley, Jr.	William H. Holley, Jr.
Directors:	Michael H. Beck	Michael H. Beck	Sara Adler	Sara Adler	Sara Adler
	Howard D. Brown	Howard D. Brown	Michael H.Beck	Terry A. Bethel	Terry A. Bethel
	Shyam Das	Phyllis E. Florman	Terry A. Bethel	Shyam Das	Shyam Das
	Phyllis E. Florman	James M. Harkless	Howard D. Brown	Joan G. Dolan	Joan G. Dolan
	James M. Harkless	Timothy J. Heinsz	Phyllis E. Florman	Joseph F. Gentile	Joseph F. Gentile
	Timothy J. Heinsz	James E. Jones, Jr.	James M. Harkless	James M. Harkless	James M. Harkless
	James E. Jones, Jr.	Allan S. McCausland	Timothy J. Heinsz	Sharon K. Imes	Sharon K. Imes
	Christine Ver Ploeg	Lois A. Rappaport	Sharon K. Imes	Mark L. Kahn	Mark L. Kahn
	Edward B. Krinsky	Calvin William Sharpe	James E. Jones, Jr.	Susan T. Mackenzie	Susan T. Mackenzie
	Susan T. Mackenzie	Anthony V. Sinicropi	Allan S. McCausland	Allan S. McCausland	Allan S. McCausland
	Anthony V. Sinicropi		Calvin William Sharpe	Calvin William Sharpe	Calvin William Sharpe
	Calvin William Sharpe		Anthony V. Sinicropi	Anthony V. Sinicropi	Anthony V. Sinicropi
	Jack Stieber				

Officers	2002-2003	2003-2004	2004-2005	2005-2006	2006-2007
President:	Sara Adler	Sara Adler	Mario F. Bognanno	Mario F. Bognanno	Lisa Salkovitz Kohn
Vice-President:	Joan G. Dolan	Joseph F. Gentile	Joseph F. Gentile	Gladys W. Gruenberg	Gladys W. Gruenberg
Secretary-Treasurer:	David A. Petersen	David A. Petersen	David A. Petersen	David A. Petersen	David A. Petersen
Directors:	Michael H. Beck	Terry A. Bethel	Sara Adler	Tia Schneider Denenberg	Mario F. Bognanno
	Terry A. Bethel	Mario F. Bognanno	Terry A. Bethel	Joseph F. Gentile	Tia Schneider Denenberg
	Steven Briggs	Steven Briggs	Steven Briggs	Paul F. Gerhart	Janet L. Gaunt
	Joseph F. Gentile	Paul F. Gerhart	Paul F. Gerhart	Gladys W. Gruenberg	Paul F. Gerhart
	Paul F. Gerhart	Margery F. Gootnick	Margery F. Gootnick	Anita Christine Knowlton	Dallas J. Jones
	Margery F. Gootnick	Gladys W. Gruenberg	Galdys W. Gruenberg	Lisa Salkovitz Kohn	Anita Christine Knowlton
	Gladys W. Gruenberg	Timothy J. Heinsz	William H. Holley, Jr.	Homer C. La Rue	Homer C. La Rue
	Timothy J. Heinsz	William H. Holley, Jr.	Sharon K. Imes	William A. Marcotte	William A. Marcotte
	William H. Holley, Jr.	Sharon K. Imes	Anita Christine Knowlton	Nels E. Nelson	Nels E. Nelson
	Sharon K. Imes	Lisa Salkovitz Kohn	Lisa Salkovitz Kohn	Edward A. Pereles	Edward A. Pereles
	Mark L. Kahn	William A. Marcotte	William A. Marcotte	Joseph M. Sharnoff	Joseph M. Sharnoff
	William A. Marcotte	Joseph M. Sharnoff	Joseph M. Sharnoff	Rosemary A. Townley	Rosemary A. Townley
	Alex Elson, *Ex-Officio*	Gerald E. Wallin	Gerald E. Wallin	Gerald E. Wallin	Gerald E. Wallin
		Alex Elson,*Ex-Officio*	Alex Elson, *Ex-Officio*	Alex Elson, *Ex-Officio*	Alex Elson, *Ex-Officio*

Officers	2007-2008	2008-2009	2009-2010	2010-2011	2011-2012
President:	Joseph M. Sharnoff	Joseph M. Sharnoff	Anita Christine Knowlton	Anita Christine Knowlton	Anita Christine Knowlton
Vice-President:	Lisa Salkovitz Kohn	Lisa Salkovitz Kohn	Allen Ponak	Allen Ponak	Allen Ponak
Secretary-Treasurer:	David A. Petersen	David A. Petersen	David A. Petersen	David A. Petersen	David A. Petersen
Directors:	Mario F. Bognanno	Mario F. Bognanno	Timothy J. Buckalew	Timothy J. Buckalew	Robert Gary Bailey
	Tia Schneider Denenberg	Tia Schneider Denenberg	Tia Schneider Denenberg	Tia Schneider Denenberg	Patricia Thomas Bittel
	Janet L. Gaunt	Janet L. Gaunt	Peter Feuille	Peter Feuille	Timothy J. Buckalew
	Dallas J. Jones	Marcia L. Greenbaum	Marcia L. Greenbaum	Marcia L. Greenbaum	Peter Feuille
	Anita Christine Knowlton	Dallas J. Jones	Paula Knopf	Paula Knopf	Marcia L. Greenbaum
	Homer C. La Rue	Anita Christine Knowlton	Dennis R. Nolan	Dennis R. Nolan	Paula Knopf
	William A. Marcotte	Edward A. Pereles	Martin H. Malin	Martin H. Malin	Martin H. Malin
	Edward A. Pereles	Allen Ponak	Edward A. Pereles	Edward A. Pereles	Donald S. McPherson
	Rosemary A. Townley	Janet Maleson Spencer	Alan A. Symonette	Alan A. Symonette	Kathleen Miller
	Gerald E. Wallin	Alan A. Symonette	Elizabeth C. Wesman	Elizabeth C. Wesman	Dennis R. Nolan
	Alex Elson, *Ex-Officio*	Gerald E. Wallin	David R. Williamson	David R. Williamson	Alan A. Symonette
		Gladys W. Gruenberg, *Ex-Officio*	Barbara Zausner	Barbara Zausner	Elizabeth C. Wesman
			Gladys W. Gruenberg, *Ex-Officio*	Gladys W. Gruenberg, *Ex-Officio*	David R. Williamson
					Barbara Zausner
					Anita Christine Knowlton, *Ex-Officio*

Officers	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017
President:	Allen Ponak	Allen Ponak	Elizabeth C. Wesman	Elizabeth C. Wesman	Catherine Harris
Vice-President(s):	Robert Gary Bailey Elizabeth C. Wesman	Elizabeth C. Wesman	Catherine Harris	Catherine Harris	Richard D. Fincher
Secretary-Treasurer:	David A. Petersen	David A. Petersen	David A. Petersen	David A. Petersen	David A. Petersen
Directors:	Patricia Thomas Bittel	Robert Gary Bailey	Robert Gary Bailey	Robert Gary Bailey	Robert Gary Bailey
	Linda S. Byars	Patricia Thomas Bittel	Patricia Thomas Bittel	Patricia Thomas Bittel	Patricia Thomas Bittel
	Peter Feuille	Linda S. Byars	Linda S. Byars	Linda S. Byars	Linda S. Byars
	Marcia L. Greenbaum	Peter Feuille	James B. Dworkin	James B. Dworkin	James B. Dworkin
	William H. Holley, Jr.	Marcia L. Greenbaum	Peter Feuille	Peter Feuille	Charles P. Fischbach
	Paula Knopf	Catherine Harris	Richard D. Fincher	Richard D. Fincher	George R. Fleischli
	Martin H. Malin	I.B. Helburn	I.B. Helburn	I.B. Helburn	I.B. Helburn
	Donald S. McPherson	William H.Holley, Jr.	William H. Holley, Jr.	William H. Holley, Jr.	Philip A. LaPorte
	Kathleen Miller	Paula Knopf	Sharon K. Imes	Sharon K. Imes	Shelia G. Mayberry
	Dennis R. Nolan	Martin H. Malin	Paula Knopf	Paula Knopf	Edward A. Pereles
	Alan A. Symonette	Dennis R. Nolan	Martin H. Malin	Martin H. Malin	Mariann E. Schick
	David R. Williamson	Alan A. Symonette	Susan L. Stewart	Susan L. Stewart	Susan L. Stewart
	Anita Christine Knowlton, *Ex-Officio*	David R. Williamson	David R. Williamson	David R. Williamson	Alan A. Symonette
		Anita Christine Knowlton, *Ex-Officio*	Anita Christine Knowlton, *Ex-Officio*	Anita Christine Knowlton, *Ex-Officio*	Anita Christine Knowlton, *Ex-Officio*

Officers	2017-2018	2018-2019	2019-2020	2020-2021	2021-2022
President:	Catherine Harris	Richard D. Fincher	Richard D. Fincher	Alan A. Symonette	Alan A. Symonette
President-Elect					Jeanne M. Vonhof
Vice-President(s):	Richard D. Fincher	Philip A. LaPorte	Alan A. Symonette	John C. Alfano Jeanne M. Vonhof	John C. Alfano Sheila G. Mayberry
Secretary-Treasurer:	Walt De Treux	Walt De Treux	Walt De Treux	Walt De Treux	Walt De Treux
Directors:	Christopher J. Albertyn	Christopher J. Albertyn	John C. Alfano	Richard Bales	Richard Bales
	Linda S. Byars	John C. Alfano	Richard Bales	Lisa C. Charles	Lisa C. Charles
	James B. Dworkin	James B. Dworkin	James B. Dworkin	Sharon Henderson Ellis	Jules I. Crystal
	Charles P. Fischbach	Sharon Henderson Ellis	Sharon Henderson Ellis	George R. Fleischli	Rafael Gely
	George R. Fleischli	Charles P. Fischbach	Charles P. Fischbach	Rafael Gely	Keith D. Greenberg
	I.B. Helburn	George R. Fleischli	George R. Fleischli	Keith D. Greenberg	Philip A. LaPorte
	Philip A. LaPorte	Shelia G. Mayberry	Shelia G. Mayberry	Philip A. LaPorte	Jasbir Parmar
	Shelia G. Mayberry	Edward A. Pereles	Edward A. Pereles	Sheila G. Mayberry	Rosemary Pye
	Edward A. Pereles	Mariann E. Schick	Mariann E. Schick	Jasbir Parmar	Andrew M. Strongin
	Mariann E. Schick	Susan L. Stewart	Susan L. Stewart	Edward A. Pereles	David Weinberg
	Susan L. Stewart	Andrew M. Strongin	Andrew M. Strongin	Andrew M. Strongin	Elizabeth C. Wesman
	Alan A. Symonette	Alan A. Symonette	Jeanne M. Vonhof	David Weinberg	Betty R. Widgeon
	Jeanne M. Vonhof	Jeanne M. Vonhof			George R. Fleischli, *Ex-Officio*

Appendix C
Annual Proceedings

Date	Annual Mtg.	Title	Editor
1998	51st	ARBITRATION 1998: THE CHANGING WORLD OF DISPUTE RESOLUTION	Steven Briggs Jay E. Grenig
1999	52nd	ARBITRATION 1999: QUO VADIS?, THE FUTURE OF ARBITRATION AND COLLECTIVE BARGAINING	Steven Briggs Jay E. Grenig
2000	53rd	ARBITRATION 2000: WORKPLACE JUSTICE AND EFFICIENCY IN THE TWENTY-FIRST CENTURY	Steven Briggs Jay E. Grenig
2001	54th	ARBITRATION 2001: ARBITRATING IN AN EVOLVING LEGAL ENVIRONMENT	Steven Briggs Jay E. Grenig
2002	55th	ARBITRATION 2002: WORKPLACE ARBITRATION: A PROCESS IN EVOLUTION	Charles J. Coleman
2003	56th	ARBITRATION 2003: ARBITRAL DECISION-MAKING: CONFRONTING CURRENT AND RECURRENT ISSUES	Charles J. Coleman
2004	57th	ARBITRATION 2004: NEW ISSUES AND INNOVATIONS IN WORKPLACE DISPUTE RESOLUTION	Charles J. Coleman
2005	58th	ARBITRATION 2005: THE EVOLVING WORLD OF WORK	Stephen F. Befort Paul F. Gerhart
2006	59th	ARBITRATION 2006: TAKING STOCK IN A NEW CENTURY	Stephen F. Befort Paul F. Gerhart
2007	60th	ARBITRATION 2007: WORKPLACE JUSTICE FOR A CHANGING ENVIRONMENT	Stephen F. Befort Patrick Halter
2008	61st	ARBITRATION 2008: U.S. AND CANADIAN ARBITRATION: SAME PROBLEMS, DIFFERENT APPROACHES	Patrick Halter Paul D. Staudohar
2009	62nd	ARBITRATION 2009: DUE PROCESS IN THE WORKPLACE	Patrick Halter Paul D. Staudohar
2010	63rd	ARBITRATION 2010: THE STEELWORKERS TRILOGY AT 50	Mark I. Lurie Paul D. Staudohar
2011	64th	ARBITRATION 2011: VARIETIES OF THE ARBITRATION EXPERIENCE	Nancy Kauffman Mark I. Lurie

2012	65th	ARBITRATION 2012 OUTSIDE IN: HOW THE EXTERNAL ENVIRONMENT IS SHAPING ARBITRATION	Matthew M. Franckiewicz Nancy Kauffman Richard N. Block
2013	66th	ARBITRATION 2013: A TALE OF TWO COUNTRIES	Matthew M. Franckiewicz Nancy Kauffman William A. Marcotte Richard N. Block
2014	67th	ARBITRATION 2014: THE TEST OF TIME	Charles Feigenbaum Rose F. Jacobs Susan Grody Ruben Mary Ellen Shea Jan Stiglitz Katherine J. Thomson
2015	68th	ARBITRATION 2015: PRIVACY, TRANSPARENCY, LEGITIMACY	Mark Thompson
2016	69th	ARBITRATION 2016: ARBITRATION IN PRACTICE	Stephen L Hayford
2017	70th	ARBITRATION 2017: THE NEW WORLD OF WORK	Timothy J. Brown
2018	71st	ARBITRATION 2018: BOUNDARIES AND BRIDGES	Howard G. Foster
2019	72nd	ARBITRATION 2019: THE FUTURE OF WORK	

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