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ARBITRATION 2010
THE *STEELWORKERS TRILOGY* AT 50

PROCEEDINGS OF THE SIXTY-THIRD ANNUAL MEETING NATIONAL ACADEMY OF ARBITRATORS

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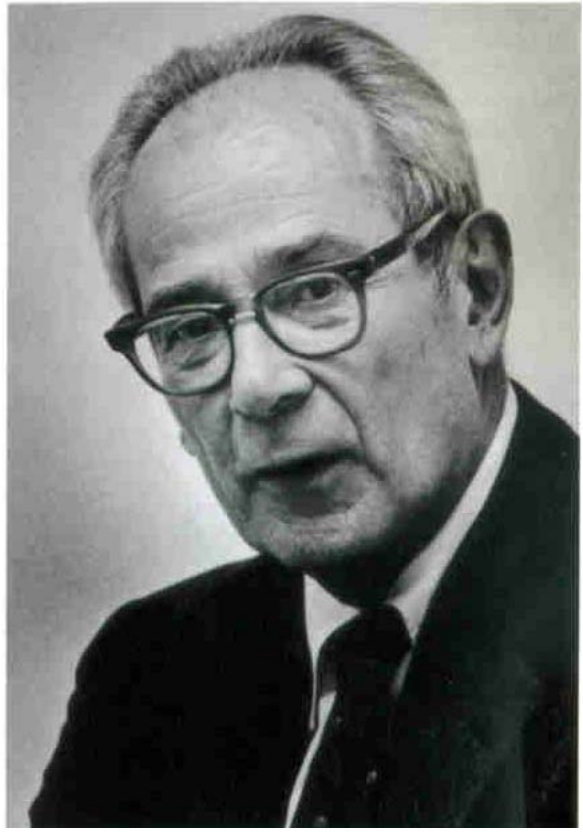
This volume is dedicated
to the memory of

Walter J. Gershenfeld

IN MEMORIAM

W. Willard Wirtz: 1912–2010



Bill Wirtz, one of that small group of remarkably able people who in 1947 formed the National Academy of Arbitrators, died in April 2010. He was 98, and I think he was the last surviving Founder. It is accurate to say that all who ever knew Bill Wirtz regarded him as a standout in all he ever did.

Bill was a Midwesterner who attended Beloit College and went on to Harvard Law School. He made Law Review—though one of our own, Archie Cox, beat him out for Law Review President.

Hired by then-Dean Wiley Rutledge (later a Supreme Court Justice), Bill became a Law Professor at the University of Iowa. He later taught at Northwestern University—and there among his students were John Paul Stevens, the recently retired Supreme Court Justice, and Bernie Kleiman, who would become the Steelworkers' General Counsel.

Bill came to Washington in 1942 to work for the Board of Economic Warfare. He entered our field unexpectedly and as a novice to it—when he ran into fellow law school academician Lloyd Garrision, by then the Executive Director of the War Labor Board, who asked him to come over to work for the WLB. At the WLB, Bill rose to the positions of General Counsel and Public Member. As we all know and gratefully acknowledge, WLB alumni were the nucleus in the formation of the Academy.

Bill was active as an arbitrator upon his return to Chicago and the law professorship at Northwestern, but his outside activities soon veered into various roles in government. For Chicago Democrats at the time, interest in government meant working for the elections of Paul Douglas for Senator and Adlai Stevenson for Governor. Bill became closely associated with Stevenson as a member of the gubernatorial cabinet, as a speechwriter and adviser in both of Stevenson's campaigns for the presidency (1952 and 1956), and as a partner in the law firm of Stevenson, Rifkind and Wirtz (about which Stevenson would later say, "I regret that I have but one law firm to give to my country").

Bill returned to Washington with the onset of the Kennedy presidency. Arthur Goldberg, the Steelworkers' former General Counsel, had become Secretary of Labor and asked Bill to join him as Under Secretary. Bill became Secretary of Labor when Goldberg went to the Supreme Court, and he served as Secretary of Labor for the rest of the Kennedy presidency and throughout the years of the Johnson presidency.

At the end of that time, there came the truly wonderful "Evening with Jane and Bill" at the Statler in Washington—a huge

party at which Bill shone both in humor and in graciously giving way to incoming Secretary of Labor George Shultz (also one of our own). "Jane" was an appropriate part of the title for the evening: She and Bill met at Beloit; were married for 68 years until her death in 2002, and they were soul mates and active partners in various liberal causes.

Bill and Jane chose to stay in Washington following his years at the Labor Department. In the last three decades of his working life, Bill ran a law office in D.C. and taught at the Law School of the University of San Diego—giving him the chance, aside from spending the winter months in San Diego's favorable climate, to be active in the two roles he liked best: teacher and defender of the public interest.

Bill Wirtz was one of our giants as a writer and original thinker. His "Due Process of Arbitration," delivered at the 1958 Annual Meeting in St. Louis, was a mammoth piece of work. As shown by subsequent discussions of the touchy areas Bill had uncovered, the paper was one of seminal importance. It contains the answers or leanings to some of the questions by a number of our then prominent members (for whom Bill had constructed an extensive survey). Still today, it is a paper well worth reading or rereading.

Bill had become Secretary of Labor by the time of our 1963 Annual Meeting in Chicago. He addressed us in the then-featured role of Annual Dinner speaker. It was a classic Wirtz performance—sustained, rollicking humor at the beginning followed by a timely, serious message. He delighted us, and we repeatedly interrupted him with uproarious laughter, as the many malaprops he had collected over the years were repeated by him with inordinate skill. As to the serious message, Bill took on the proposal of the esteemed Bernard Baruch to establish a Court of Labor–Management Relations as the means to eliminate the era's costly strikes. Bill opposed it on a number of thoughtful grounds, but he warned that the collective bargainers had to do better to keep the public from moving in.

At the Atlanta meeting in 1992, we were treated to a session whose three participants were among our all-time best—Bill Murphy as introducer and Robben Fleming and Bill Wirtz separately in the role of fireside speaker. Bill was 80, and near the beginning of his speech, he stopped to apologize, "If you find me referring unduly to these papers I am shuffling, please understand that I've gotten to the point where I don't speak even to my wife except from notes—for fear of saying either too much or too

little." Also in that speech, there was an example of the word twisting which was a Wirtz specialty—"My future is behind me." There then came a series of observations about government, including, "Cabinet meetings are part of the kabuki dance of democracy; nothing is ever done there, nor can anything be done when 30 people gather in a room for an hour and a half; but the country reputedly sleeps better at night if there's a story in the paper that the cabinet considered something at a meeting that day." He talked about defeats of liberal causes in his years as Secretary of Labor. They originated, he said, not with the Republicans but with the economists who relentlessly expressed their concerns for inflationary consequences. "A liberal economist is an oxymoron," he commented, excepting four (Alice Rivlin among them). He added another observation: "In the 1960s, the media had not yet gone into the garbage collection business. That made a whale of a difference in trying to run a government."

In the 1980s and 1990s, Bill chaired a committee which administered the rules governing the Steelworkers' quadrennial elections of the Union's officers and district directors. Because rulings might have to be against top USWA brass while the overseeing operation was being funded exclusively with USWA monies, someone once raised a question as to the committee's capacity to act impartially. Bill came up with this retort: "We are belligerently neutral."

Like countless others, I had long known of Bill Wirtz but had not really known him. That changed when he asked me to work with him on these elections. It allowed me to see in action an incredible combination of strength and wisdom in dealing with the heated accusations which are sometimes generated by union politics. It also allowed me and my wife to gain Bill's and Jane's friendship—among the great privileges of our lives.

But it was not just the celebrated scholarship or the problem-solving capacity or the steadfast moral standard that shaped this man. It was his extraordinary zest for enjoying life, for maintaining a nonstop curiosity and interest in the world around him. His golden years were not lazy ones.

A few years ago, he subscribed to the Teaching Company college courses on DVD. He followed Redskins football with partisan concern. Books cluttered the table next to his chair, most of them ordered from Politics and Prose, his favorite bookstore. When those books got too heavy to be held by hand when recovering from back surgery, he cut them into three or four parts. He wrote

his memoir—brief, to the point, and beautiful in sentiment and language; he lunched regularly with friends, who loved his stories and his cheerful company; and, in the last year, he founded a political discussion group at his retirement community.

Secretary of Labor Hilda Solis spoke at the memorial service. She said this:

> As President Johnson's general in the "War on Poverty," he initiated dozens of programs to help at-risk youth, older workers and the unemployed. . . .
>
> One of his most important tasks during his tenure was implementing Labor Department anti-discrimination regulatory responsibilities under the Civil Rights Act of 1964.
>
> 40 years after he left office, a Latina and daughter of immigrants sits in his chair. . . .I want to thank him for that.

—Rolf Valtin

IN MEMORIAM

Robben Wright Fleming: 1916–2010

Robben W. ("Bob") Fleming, President of the Academy in 1966 and an Honorary Life Member, died on January 11, 2010, in Ann Arbor. He was 93.

Bob was a natural-born leader, but the patient, mediating type rather than the aggressive trailblazer. He will be most widely remembered as the unflappable President of the University of Michigan during the turbulent period of student protests over the Vietnam War and minority enrollment in the late 1960s and the 1970s. One student leader of the campus rebellion loudly remonstrated, "President Fleming, you and I are simply not communicating!" Bob responded imperturbably: "Not at all. We are communicating perfectly. We simply don't agree."

Yet Bob had an uncanny capacity to understand other persons' points of view. He never let his resistance to the campus protesters' disruptive tactics keep him from recognizing the fairness and justice of some of their demands. That led ultimately to a compromise on affirmative action—a 10 percent goal but no quota—and the opening of the University of Michigan to a whole generation of minority students.

A key insight into Bob's personality came when he was asked how *X*, a good friend, was doing as the new head of another university. Bob explained that things now seemed to be going reasonably well but that *X*'s economizing had resulted in a rocky start with many faculty and students. Then a puzzled look crossed Bob's face and he said, with utter seriousness, "You know, I don't think *X* really *likes* confrontations!"

A tough-minded realist in many ways, Bob believed most people conform to the roles they are given. He once invited a few faculty members to have dinner with Walter Reuther, then President of the UAW. Bob and Reuther had just returned from separate trips to Yugoslavia at the time of Marshal Tito's Communist regime. In keeping with Party doctrine, the workers were running the plants. "But to me," Bob laughed, "they seemed to be acting just like a bunch of American capitalists!" Reuther did not disagree.

Bob's leadership qualities should not let anyone overlook his outstanding abilities as a classroom teacher and his very fine academic scholarship. He had students on the edge of their seats as the led them through the pros and cons of the famous *Hildreth* case, in which a union allowed an employer to terminate half a small workforce in order to save the jobs of the other half when an insider thief could not be identified. And Bob's book, *The Labor*

Arbitration Process, may well be the most thoughtful, balanced, and comprehensive yet concise work we have on arbitration procedure.

Bob Fleming was born in Paw Paw, Illinois, on December 18, 1916, and he never lost those small-town roots. He graduated from Beloit College and Wisconsin Law School. After helping to end one major strike for the War Labor Board, he became an Army lawyer in 1942 and set up civil governments in captured European cities. After the war Bob headed the industrial relations centers at Wisconsin and Illinois before becoming Chancellor of the University of Wisconsin. Following his 1968–1978 presidency at Michigan he was President of the Corporation for Public Broadcasting for two years. He also returned as Interim President at Michigan in 1988.

Bob married his college sweetheart, Sally, in 1942. They were a model pair and yet hardly identical in tastes. Sally was a devotee of classical music and Bob dutifully attended concerts, but he confessed he often dozed off. It will surprise some Academy members and not others to learn that for relaxation Bob loved nothing better (after golf) than romping on the floor—"sandwiching"!—with his son and two daughters when they were children and later on with his grandchildren, and regaling all of them with what his family described as "wildly outlandish" stories.

Theodore J. St. Antoine

IN MEMORIAM

Dallas Lee Jones: 1920–2010

Dallas Lee ("Whitey") Jones accomplished much in his 89 years, with little or no fanfare. It was somehow typical of this quiet, modest (but not always retiring) man that most Academy members did not learn he had died in April 2010 until nearly six months later. Yet for seven years, from 1983 to 1990, Dallas was Secretary–Treasurer of the Academy and in 1993–94 he was the President. Although he may not have been well known to younger Academy members, anyone who dealt with him during his years in office recognized him not only as a highly efficient administrator but also as a tough-minded, decisive individual concerning policy matters that he cared about.

Also typical of Dallas was his presidential address in 1994. He devoted it to the Academy as an institution, especially its role as educator. Only a single sentence made an oblique reference to his own role: "While I was teaching, I always had a good representation of law students in my classes." Even that sentence was intended to support his prediction that future arbitrators would tend to be lawyers, and that some new means would have to be found to provide them with an understanding of the institutional aspects of unionism and collective bargaining because classes like his were a thing of the past.

Instead of talking about himself in his presidential remarks, Dallas extolled the contributions of some 20 other named members of the Academy to its educational mission. Dallas pointed to the annual *Proceedings* as "the most visible result of this educational effort." He stressed that "these volumes reflect the changing moral, social, economic, and legal environment from the 1940s to the present." Dallas then provided a thumbnail history of the Academy's efforts to promote an understanding of the arbitration of labor–management disputes. He traced the formulation of arbitral concepts in the early years and the Academy's later response to more concrete developments like the rise of public-sector unionism, drug abuse, the duty of fair representation, race and sex discrimination, and employment arbitration outside the collective-bargaining context.

Last year I had the privilege of interviewing Dallas about his landing on Omaha Beach in Normandy on D-Day "+ 1" (he insisted I note the "+ 1") in June 1944. We talked for a good part of the day about his experiences in the Allied drive through France and into Germany. Yet Dallas never mentioned that he was twice awarded the Bronze Star. Nearly all his emphasis was on others: the sprawled bodies covering the Normandy beaches, the "inde-

scribable, unbearable" sight of emaciated victims rescued from concentration camps, and the American women who Dallas felt "should have received much greater honors for their role in World War II, both at home and in the military."

Dallas Jones was born on November 23, 1920, in Detroit, Texas (no-nonsense Dallas did not suggest his birthplace had any subliminal influence on his ultimate geographical destination). But June 6 (D-Day) had a highly personal meaning for Dallas. On that date in 1942 he married Irene Hamer. All who knew them realized it was a union of soul mates. Dallas's nonprofessional life revolved around his family, and included fishing, reading, and traveling the world with Irene.

Dallas had tried to enlist right after Pearl Harbor but was rejected because of a supposed heart murmur. A year later he was drafted. After the War, Dallas attended Augustana College in Rock Island, Illinois, and then earned his Master's and Ph.D. in Labor History at Cornell. Dallas began teaching at the University of Colorado Business School in Boulder. In 1956 he made one last move to the University of Michigan's School of Business, where he was professor and chair in the Labor and Industrial Relations Department. In Ann Arbor Dallas became an avid fan of Wolverine football and basketball.

Along with another Academy President, Russell Smith of the Michigan Law School, Dallas was an early exponent of empirical research. The two collaborated on several valuable articles dealing with such topics as the way the National Labor Relations Act's duty to bargain operates in actual practice. During his long career Dallas also became one of the most trusted and respected labor arbitrators in his area.

Dallas Jones would not have seen himself as a shining star in the Academy firmament or in the world of labor arbitration. He was simply one of those solid, devoted, totally dependable individuals who are the indispensable backbone of any organization.

Theodore J. St. Antoine

IN MEMORIAM

Walter J. Gershenfeld: 1925–2010

The outpouring of tributes for Walt Gershenfeld on the NAA mail list reflected the esteem and affection he held among his Academy colleagues. Common themes expressed were Walt's openness, friendliness, hard work, and devotion to the NAA.

I, too, admired Walt. I became part of his orbit 44 years ago when I first arrived in Philadelphia and was soon invited to dinner at the Gershenfeld's house. I became one of many who not only enjoyed Walt and Gladys's hospitality but also became part of their family. It did not take me long to learn that Gladys was an equal partner in all that Walt undertook.

For 30 years Walt and I were colleagues at Temple University. Walt was known as a brilliant teacher, an effective leader of the Faculty Senate, and an ambitious administrator. He was beloved and respected by students and received the Lindback Award for outstanding teaching.

Walt's encouragement of others went well beyond the classroom. I was one of many he helped to establish an arbitration career and to become a member of the NAA. Besides participating in many AAA and FMCS programs, Walt was instrumental in instituting a training course for new arbitrators, which was conducted by NAA members and held at the regional AAA office.

Walt believed deeply in the efficacy of arbitration and mediation. He wrote as well as practiced extensively in these areas. In his last years, he and Gladys spearheaded revision of a training booklet on arbitration designed for shop stewards and lower level management. While his main efforts were directed at improving labor relations, he brought his problem-solving skills to many other situations and to communal organizations. For Walt, no problem was insoluble, and Walt always had a solution.

Walt had a devotion to and pride in the NAA that few could match. His contribution to the organization was recognized by his election as president in 2003. Even thereafter Walt remained engrossed in NAA affairs. His concerns about the organization were genuine. He wanted to protect its integrity and reputation; he wanted it to grow and prosper. Some may have had reservations about his recommendations, but no one questioned his sincerity and good intentions. It was not surprising to learn that Walt together with Gladys had been nominated for Honorary Membership in the Academy.

Walt readily shared with others all that was on his mind. He had wide-ranging interests, from symphony orchestra concerts to horse racing, from local politics to international relations, from

art exhibits to health-care reform, from Jewish subjects to mystery books. I was never sure what the next topic of conversation would be. I smiled, and sometimes groaned, at Walt's jokes and puns. I was sure I would always learn of the accomplishments of his three sons and their wives as well as those of his six grandchildren. And if I did not hear from Walt directly, I could turn to one of the Philadelphia newspapers to find another of Walt's many letters to the editor.

Walt was one of the most warm, most engaging, and most optimistic people I have ever met. He also exemplified the teaching of Rabbi Shimon ben Gamliel, as quoted in the Ethics of the Fathers: "On three things the world is sustained—on truth, on judgment, and on peace, as it is said (Zechariah 8:16), 'Speak the truth to one another, render in your gates judgments that are true and make for peace.'"

Everyone in the Academy knows of the close personal and professional relationship of Walt and Gladys. It is difficult to think of one without the other. May their cherished memories of Walt provide comfort to Gladys and to sons Joel, Neil, and Alan.

Joseph Loewenberg

Remembering Walt Gershenfeld

[Ed. Note: The following is a reprint of Jay Goldstein's eulogy at Walter Gershenfeld's funeral service.]

Thinking of Walt as we gather to celebrate his life is a meaningful opportunity because Walt was about community, many communities. We all knew him as a good man, a beloved father and husband, an outstanding arbitrator and mediator. It is worth taking a moment to reflect on the irony of his passing during the Jewish holiday of Purim, itself a celebration of the struggles and triumphs of courage and commitment. The story of Purim chronicles the saving of a community through the loyalty, courage, and compassion of individuals for people they loved and people they hardly knew. It's also a time when we remember that the future of a community can depend on the presence, *or absence*, of a single gesture. Surely these are the elements we most love about Walt. Even as he struggled with declining health in recent years, Walt Gershenfeld lived every day thinking of, and giving to, others.

These principles of loyalty, courage, and compassion, the story line of Purim, are also integral to the life story of our friend and

my mentor, Walter Gershenfeld. They are found throughout the magnificent partnership between Walt and Gladys that flourished for well over half a century. Together they raised a remarkable family and yet always found the time to open their home and hearts to many of us. All of us gathered here today and countless others around the nation and indeed the world have been graced by the way in which Walt lived his life, shared his intellect, and cared for old friends and new.

Undoubtedly, we have all shared many warm and meaningful moments with Walt. I was fortunate to start my relationship with him early in life. I immediately grasped the enormity of Walt Gershenfeld's intellect and charisma when I came to Temple University as a freshman in 1964. He was a Professor and Associate Dean of the Business School when I arrived. Having to interrupt college for military duty, Dean Gershenfeld put his arm around me, as he did many times thereafter, and reassured me that there would be a place at the University when I returned from the Service. I did, and it was.

And so began my 45-year relationship with a superb teacher, guiding force, and scholar. Like many of you, I was challenged, inspired, and comforted by his warm embrace. Throughout that time and lingering still, he is the reminder of a life well lived; my teacher, my mentor, my friend.

Among Walt's greatest joys and talents was his special way of challenging young and even not so young, minds. He compelled you to explore your own potential and led you toward the right path. He compelled us all to confront ethical dilemmas even when the decisions were difficult and uncomfortable. He was no ordinary man but a larger than life figure. The depth of his intellect allowed him to quickly grasp the totality of every situation and act upon it with dispatch and gentility. Walt found solutions with great judgment and compassion. He was a great arbitrator and invaluable friend.

Walt was always there to help someone or some cause, and gave of himself freely and generously to countless individuals in ways too numerous to recount. I suspect that each one of us can recount very special, very personal ways in which Walt touched upon and, in so doing, improved our lives. Walt's critical and insightful mind was matched only by his warm wit. I could try and recount his best stories and yet never do them justice, nor deliver them in quite the same way Walt told them. Walt's humor and especially his timing were impeccable. He could take any story, even ones which were

almost off-color and make them appropriate to be told anywhere, and he did so with the grace, style, humility, and wit that would have permitted him to quit his day job and start a career in stand-up comedy! Soon after his passing, during and after this service; numerous people will recount their favorite 'Walt Gershenfeld' story . . . but Walt did it best and that memory must never fade.

I will think of Walt when I reflect on the following words by A. J. Stanley, writing many years ago about the *Success of a Man:*

> He has achieved success who has lived well, laughed often and loved much . . . who has gained the respect of intelligent men and the love of little children; who has filled his niche and accomplished his task; who has left the world better than he found it, whether by an improved poppy, a perfect poem or a rescued soul; who has never lacked appreciation of earth's beauty or failed to express it; who has always looked for the best in others and given the best he had; whose life was an inspiration; whose memory, a benediction.

Jay Goldstein

REMEMBRANCES

Following the tradition established by prior editors, we remember our departed colleagues, active and standing members, whose deaths have been reported since the publication of the 2009 Proceedings

Remembering

Charles J. Coleman Sr.

Charlie passed away on January 21, 2010. A longtime Academy member, he worked for a Philadelphia company with Walter Gershenfeld, forming a friendship lasting over 50 years. Charlie earned a master's degree from Cornell's ILR School and a doctorate at SUNY-Buffalo. He was an active academic who authored six books and many articles and served as editor of the *Journal of Individual Employment Rights*. Most recently, he was Professor Emeritus at Rutgers University—Camden, where he helped build the business school. As an active arbitrator, Charlie issued over 1000 decisions and participated in numerous NAA programs. He was the father of five children and grandfather of six. In later years, Charlie became a thespian with major roles in the theater. (Based on the *Chronicle* Remembrance of Walter Gershenfeld.)

Jim Martin

A long-time Academy member, Jim passed away on October 28, 2009, at age 82. He had a remarkable life as a father of ten children, a seaman, and an arbitrator. Few have sailed across the Atlantic with a crew of eight children and not many have issued more than 3000 awards, one of which provided a $9 million remedy. Jim was a man of great integrity who, for several years, hosted NAA chapter meetings at the Chicago Yacht Club. Irish to the core, he was devoted to God, country, and Notre Dame. (Based on the *Chronicle* Remembrance of James Cox.)

Lionel Richman

Lionel died on March 8, 2010, at his home in Toluca Lake, California. He was 87. Born in New York City, he served in the Coast Guard during World War II, after which he earned a degree at Southwestern University Law School. He was one of the premier labor side attorneys in Southern California. Upon retiring from advocacy, Lionel became a much sought after arbitrator. He was admitted to the Academy in 1982 and served on several committees. He also taught at the University of California, Riverside, and Whittier and Beverly law schools. Lionel had many and varied interests, ranging from theater and arts to American Indians. (Based on the *Chronicle* Remembrance of Jerilou Cossack.)

Stanley Schwartz

A well-regarded member of the Academy's Mid-Atlantic Region, Stan passed away on October 2, 2009. He worked for the late Walter Powell in industrial relations at International Resistance Company, along with Charles Coleman and Walter Gershenfeld. It is rather unusual that a relatively small company produced four Academy members. Stan was widely known for his work with the Philadelphia Survey group and the Philadelphia IRRA. He became an industrial relations director and earned a doctorate from Temple University. He taught at Rider University and introduced a wide IR curriculum. (Based on the *Chronicle* Remembrance of Walter Gershenfeld.)

PREFACE

Philadelphia, the "city of brotherly love," with its landmarks of Americana, was the site of the National Academy of Arbitrators' Sixty-Third Annual Meeting from May 26–29, 2010. Program Chair Bonnie G. Bogue and President William H. Holley Jr. led the meetings, along with Host Committee Chair Walter De Treux. The theme was "Looking Back and Looking Forward on the 50th Anniversary of the *Trilogy*." This edition of *The Proceedings* contains papers and discussions presented during plenary and breakout sessions of the Annual Meeting. *The Proceedings* seek to provide an unparalleled source of information about labor and employment arbitration for reference by students, academicians, advocates, and neutrals.

In keeping with Academy traditions, *The Proceedings* begin with recognition and honors to past Presidents and members deceased since the 2009 annual conference.

Next, *The Proceedings* present the Presidential Address in Chapter 1. President William H. Holley Jr. was introduced by his longtime friend and NAA member, James J. Odom Jr. Like President Holley, Odom is an Alabama favorite son, whose wit and humor shown through in the introduction.

President Holley's paper is titled "Lessons Learned in Arbitration and Within the Academy: 50 Years After the *Steelworkers Trilogy*." He manages to combine the humorous style of Jack Benny with the wisdom of King Solomon. The latter's biblical connection is apt, because Holley is the author, along with Kenneth M. Jennings, of what has become a kind of bible for labor scholars. Their book, *The Labor Relations Process*, is now in its tenth edition. It should also be noted that Bill Holley ably served as Executive Secretary–Treasurer of the Academy from 1996–2002, and is currently a professor emeritus at Auburn University.

Of particular interest in Holley's paper is what has happened to the arbitration process since the three decisions by the U.S. Supreme Court in 1960, commonly known as the *Trilogy*. In assessing this topic, he corresponded with several Academy members to get their impressions of what changes have occurred and what has remained the same. Responses from the likes of Richard Mittenthal, Arnold Zack, Rosemary Townley, and David Petersen

indicated to Holley that arbitration is little changed a half century later and remains an important source of justice in the workplace.

Holley also provides pearls of wisdom from Academy colleagues and his own experience on how to become an arbitrator, conduct a hearing, and write a decision. (Avoid bench discussions! Don't quit your day job.) He touchingly closes with a letter to the Academy expressing what membership has meant to him.

Chapter 2 is the Distinguished Speaker Address by Steven Greenhouse, Labor and Workplace Correspondent from the *New York Times*. Over the past decade, workers' wages have been stagnant, income inequality has increased, and domestic manufacturing jobs have vanished. In his current book, *The Big Squeeze: Tough Times for the American Worker*, Mr. Greenhouse examines the causes of these trends, and the effects that they have had on working families, including the deterioration of reliable and secure retirement plans. Mr. Greenhouse provides an overview of his book and offers insights into a journalist's obligation to fully report the statements of conflicting factions (notwithstanding the perceived validity or veracity of those statements) and to trust that informed readers will draw the correct conclusions.

Chapter 3, "The *Trilogy* at 50—Foundations for the 21st Century," features three papers by distinguished panelists. In its landmark 1960 *Steelworker Trilogy* decisions, the U.S. Supreme Court concluded that the Taft-Hartley amendments to the National Labor Relations Act considered arbitration to be the *quid pro quo* for the collective bargaining agreement's no-strike provisions. The *Trilogy* decisions established arbitration as a means of resolving agreement disputes, and also directed that judicial deference be given arbitrators' rulings. In "A Half Century of the *Steelworkers Trilogy*," William B. Gould IV surveys the judicial history that preceded the *Trilogy*, and the subsequent application and expansion of the *Trilogy* principles, including the arbitration of disputes arising under external law (most recently, the Supreme Court's ruling in *14 Penn Plaza v. Pyett*); the duty to bargain when the employer changes form, ownership, or identity; the judicial review of awards; and the relationship between the jurisprudence pertaining to grievance arbitration and that pertaining to interest arbitration. Gould is professor emeritus at Stanford University's law school and former chair of the National Labor Relations Board.

W. Daniel Boone is a labor-side attorney with Weinberg, Roger & Rosenfeld in Alameda, California, and a frequent contributor to

The Proceedings. His paper, "*Steelworkers Trilogy:* Collective Bargaining as the Foundation for Industrial Democracy and Arbitration as an Integral Part of Workplace Self-Government," emphasizes the importance of industrial democracy and provides numerous examples of how this concept has been promoted by the *Trilogy*. Industrial democracy is shown to emanate from collective bargaining and the right to join unions, as provided in the National Labor Relations Act. Boone's paper is divided into two main areas: (1) review of the intellectual, legal, and historical context of the *Trilogy*; and (2) assessment of the role that union advocates play in helping to revitalize the labor movement through arbitration. His analysis is sprinkled with teachings from elder statesmen such as Harry Shulman and David Feller, as well as contemporary interpreters of the *Trilogy*. His own views are prominently displayed as well.

The third paper in Chapter 3 is by Andrew M. Kramer, an attorney for Jones Day in Washington, D.C. In "Fifty Years After the *Steelworkers Trilogy:* Some New Questions and Old Answers," he assesses the practical impact of the recent U.S. Supreme Court decision in *14 Penn Plaza v. Pyett*, finding that the arbitration clause in that case is not typical and is unlikely to become commonplace. Kramer also examines how the Supreme Court's reliance on Section 301 of the Labor–Management Relations Act led up to the *Trilogy* and later decisions that remain influential. He notes that more recent decisions, including *Pyett*, clearly provide that statutes may be enforced in arbitration, and he rejects the notion that arbitrators lack the competence to interpret statutory claims.

In Chapter 4, "Are the Parties Being Served? Ensuring a Just Process Through Effective Communication," the authors note that in writing an arbitration decision, an arbitrator sorts and prioritizes the complexities of the parties' stories and, most importantly, attempts to persuade the parties of the wisdom of the decision. John I. Laskin from the Court of Appeals for Ontario, Canada, and George Thomson, Senior Director, International, of the National Judicial Institute of Canada, address the importance of the arbitrator furnishing clearly comprehensible rationale for his or her conclusions. The authors proffer three touchstones: the decision must be written in accessible language; it must be accountable to the parties; and its reasoning must be transparent. Modesty of prose is recommended, meaning that the arbitrator should resist the temptation to make grand pronouncements or

to write great literature. Arbitrators serve the parties best when they communicate with them clearly, concisely, and quickly.

Chapter 5 is a paper from George H. Cohen titled "FMCS as Proactive Labor–Management Facilitator." Cohen is Director of the Federal Mediation and Conciliation Service and a frequent presenter at Academy meetings. He emphasizes the oftentimes difficult problem of first contract negotiations and how mediation can assist the parties in reaching agreement. Although Cohen acknowledges that there is no simple fix that a mediator can provide in these situations, one point that stands out is the necessity of cultivating relationships in advance of bargaining. He discusses private-sector examples where a training program was successful in building bridges to agreement, such as ArcelorMittal with the Steelworkers Union, and Kaiser Permanente with a coalition of unions. Cohen also highlights several training projects underway with federal agencies and their labor organizations.

The topic of Chapter 6 is "The Canadian Auto Workers-Magna International, Inc. Framework of Fairness Agreement: A U.S. Perspective." NAA member Martin H. Malin examines the historic agreement between the CAW and Magna International, the largest employer in the Canadian automotive industry with 18,000 hourly production employees who manufacture parts and components for General Motors, Ford, and Chrysler. Malin discusses how the 2007 agreement commits Magna to investing in new products and processes, providing training, and treating employees fairly. For its part, the CAW commits to assisting the company in sourcing, enhancing employee cooperation, and facilitating relationships with customers. Malin also assesses controversy that had arisen over some provisions of the agreement, such as substitution of interest arbitration for the right to strike.

In Chapter 7, "Arbitration in the Airline Industry: System Boards of Adjustment," Thomas J. Kassin and Sarah L. Fuson from the law firm of Ford & Harrison in Atlanta, focus on key elements of an effective grievance procedure. Under the Railway Labor Act, airlines are required to establish boards of adjustment as part of their collective bargaining agreements. Typically, these boards consist of an equal number of management and union-selected representatives. Kassin and Fuson explain idealized procedural features and present interpretations by the federal courts. The authors note that in situations requiring a neutral to resolve a deadlocked board, there is sometimes an arrangement for a per-

manent arbitrator. But often arbitrators are selected from a panel list provided by the National Mediation Board.

Chapter 8, "Public Sector: Innovative Approaches to Public Sector Dispute Resolution," presents two papers. In the first, "Taking a Walk on the Wild Side: Over a Decade of Expedited Arbitration in the Ontario Electricity Industry," Christopher M. Dassios, General Counsel for the Power Workers' Union, analyzes a decade of experience with expedited arbitration in Ontario's electricity industry. Prior to adoption of the new system there was a backlog of about 3000 grievances for a bargaining unit of 14,000 workers. Dassios explains the principles of expedited arbitration as it has evolved in Ontario and sets forth the objectives that the parties sought. He notes that the results have been impressive, with a considerable reduction in extant grievances. Grievances that once languished for years are now resolved in weeks.

The other paper in Chapter 8, "Designing Justice: Legal Institutions and Other Systems for Managing Conflict in the Public Sector and Beyond," is by Lisa Blomgren Bingham, Professor of Public Service at Indiana University. Her principal themes are (1) introduction of the field of institutional analysis and design; (2) description of dispute system design (DSD), which has application to managing grievances in private industry and the public sector; and (3) survey of scholarly discussions on systems for managing conflict. She notes that historically, organizations have reacted to conflict rather than systematically planning how to manage it. DSD is viewed by Bingham as a way to manage conflict by focusing on interests rather than rights or power. For example, she presents different systems—single and multistep—that culminate in mediation or perhaps assistance from an ombudsperson, with the possibility of ultimate resolution by arbitrators. These approaches to the management of dispute resolution are seen to apply to nonunion situations.

Four papers by prominent Academy members are presented in Chapter 9, "Search for the Truth: The 'Active' Arbitrator—Exploration of New (or Different) Initiatives." In the first paper, "What Is an Arbitrator's Role in the Hearing Process?" Amedeo Greco examines the arbitrator's role in the hearing. He explains the "active" approach in which the arbitrator considers the hearing as a continuation of collective bargaining and seeks to foster that process. Activism by arbitrators is available because they have broad discretion in how to conduct a hearing. On the other hand, Greco notes that activism is restrained because arbitration is a very

conservative process. The parties expect to be free to present their cases as they choose and not be subject to unwanted interference by the arbitrator. Nonetheless, Greco favors an active approach in hearings and presents a persuasive rationale for doing so: (1) prior to commencement of the hearing, an arbitrator can informally seek to achieve efficiency in how the hearing is conducted, e.g., getting the parties to stipulate to undisputed facts; (2) inquire of the parties whether they wish for the arbitrator to retain jurisdiction in the event of a dispute over remedy; and (3) trying to make hearings more "user-friendly" by, for instance, using tact in explaining to witnesses the need for sequestration.

In his paper, "Search for the Truth: The 'Active' Arbitrator—Exploration of New (or Different) Initiatives," Ira F. Jaffe approaches the "search for the truth" in terms of his own anecdotal experience. He examines selected examples of situations he has encountered to illuminate what he perceives as the relevant goals of the arbitration process. For example, Jaffe identifies certain steps that arbitrators may wish to take to ensure that the record is adequately developed to permit an appropriate decision. He notes the need to oversee a fair and transparent process that engenders trust in the outcome of the case. Particularly valuable are Jaffe's insights into situations that commonly or uncommonly arise. Numerous hypotheticals are shown to illustrate his objective thought processes in arriving at how to deal with knotty problems presented during the hearing. A series of vignettes are posed and resolved, providing interesting and enlightening lessons on "how to do it."

Legendary arbitrator Richard Mittenthal provides readers with practical insights in his paper, "Arbitral Initiatives: A Brief Overview." He notes that while arbitrators often appear to be "passive," circumstances inevitably drive them to take initiatives. For example, Mittenthal typically requests in advance of the hearing a copy of the collective bargaining agreement, the grievance, and written responses to the grievance. This activism is justified by wanting to be more aware of the case to be better prepared for the onset of the hearing. During the hearing itself, Mittenthal monitors the provision of too much information, such as repetitive testimony that can unnecessarily burden the record. He will also initiate clarification of statements or arguments to achieve a fuller understanding of the dispute. Another useful piece of advice is to be sensitive to situations in which mediation might be appropriate

as a way to explore settlement of the dispute. In other cases, Mittenthal occasionally considers requesting posthearing briefs from advocates who are prepared to make closing oral arguments.

In the next paper, "The Arbitrator as Grievance Mediator in Canada: A Growing Trend," Academy member Michel G. Picher explores the role of the arbitrator as a grievance mediator. After reviewing ways in which the arbitration process has changed over the years—less reliance on tripartite boards and more on single arbitrators—the author identifies the recent trend of the parties requesting that the arbitrator become involved in mediation of the dispute. Picher finds this change to be especially pronounced in Ontario. He conducted an informal survey of arbitrators from several Canadian jurisdictions to determine how often single arbitrators and tripartite boards were asked by the parties to mediate. He notes that in some situations mediation is mentioned in the statutory law as an alternative to grievance arbitration, e.g., Manitoba, Ontario, and British Columbia, but not in Nova Scotia, Quebec, or Alberta. Picher's survey divided arbitrators into four regional groups: Ontario, Western Canada, Maritime Canada, and the United States. His findings show that mediation is used over 50 percent of the time in Ontario, with lower but nonetheless significant rates for the other geographic areas.

Chapter 10 is titled "The Battle of Expert Witnesses in Labor and Employment Arbitration: Does Expert Testimony Help or Hinder the Process." The utility of expert witnesses is explored by NAA Members Margaret R. Brogan and John E. Sands, and attorneys for labor and management, respectively, Alan B. Epstein and John A. DiNome, in a panel discussion. Attorney Epstein posits that, because plaintiffs (grievants) have the burden of proof in contract cases, they need all the help they can get, and that expert witnesses, testifying within their fields of competence, can provide valuable elucidation to the arbitrator. Under prevailing state and federal rules, discretion is accorded the arbitrator as to the admission of expert testimony and, of course, the arbitrator has discretion on the weight to be accorded it. Attorney DiNome, from the law firm of Reed Smith in Philadelphia, responds that unions most frequently proffer the opinions of expert witnesses in discipline cases, in which the employer bears the burden of proof. He notes that the selection of a knowledgeable arbitrator generally obviates the need for an expert witness, but the experts can be useful in limited circumstances, such as the rebuttal of oppos-

ing expert testimony, the interpretation of toxicology and similar reports, and in computer usage forensics. Arbitrators Brogan and Sands describe the considerations they make when presented with expert testimony and the practices they employ to make the best use of such witnesses while maintaining the integrity and effectiveness of the arbitration process.

Three monographs are also presented in this chapter. In "Practical Tips for the Use and Consideration of Expert Testimony in Arbitration," Arbitrator Margaret R. Brogan furnishes practical advice in the presentation of expert opinion in both labor and employment dispute arbitration. She opines that, in the appropriate circumstances and with fair notice given to the other party, a qualified expert can assist the arbitrator in gaining a better understanding of the evidence but that care must be exercised to ensure that the use of expert witnesses does not impede or derail what is supposed to be an expeditious proceeding.

In "Using Expert Witnesses in Arbitration: A Management Perspective," management attorney Karl A. Fritton, partner in the Philadelphia law firm Reed Smith, outlines both the matters that management should address when presented with a union expert witness and points out that a management expert witness can furnish useful factual data on subjects such as drug testing, medical qualifications, computer forensics, and mitigation of damages and workplace conditions. Attorney Fritton offers suggestions about how to approach the use of such testimony and presents illustrative scenarios dealing with expert polygraphers, medical experts, and religious discrimination and sexual harassment experts.

In "A View From the Plaintiff's and Union's Perspective: The Use (and Misuse) of Expert Witnesses in Labor and Employment," labor attorney Alan B. Epstein from Spector Garden & Rosen in Philadelphia presents practical guidance in the use of expert testimony, including the "flexible" test for qualifying the validity of the scientific evidence of expert witnesses under Rule 702 (per *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993)). Attorney Epstein concludes that the case law following *Daubert* and the amendment of Rule 702 in 2000 favors the acceptance of expert testimony.

In Chapter 11 the topic is "Invited Papers: Three Insightful Views of What Arbitrators Do." In the first paper, "Four Ways of Looking at an Arbitrator: Autobiographical Perspectives on the Profession," NAA member Dennis R. Nolan writes an analytical

review of four recent autobiographies of distinguished members of the Academy: Benjamin Aaron, Jim Jones, Richard Mittenthal, and Arnold Zack.

Ben Aaron's *A Life in Labor Law* is described by Nolan as more of a memoir than a full autobiography. It does not include much personal retrospective about his early life and education. Following a stint with the War Labor Board, Aaron quickly rose to prominence in the Academy in the late 1940s. He served as president in 1962–1962 at the age of 47. However, as Nolan reports, Aaron became disenchanted with the Academy. He was particularly sensitive to the bifurcation of arbitrators for whom arbitration was a "calling" and those who viewed arbitration as a "job." Aaron identified with the former group, consisting of fellow academics who served as part-time arbitrators. He also took a strong stance against advertising by arbitrators, and thought that arbitrators who did employment cases compromised the integrity of the Academy.

A View From the Middle of the Valley: Memoirs of Richard Mittenthal is next reviewed by Nolan. Mittenthal joined the Academy in 1958 at age 31, just four years after his first arbitration. In his book he discusses some of the parties who appointed him impartial umpire, including, among others, the Steelworkers, UAW, NALC, John Deere, Caterpillar, U.S. Steel, and the U.S. Postal Service. Along the way, Mittenthal wrote a seminal paper on past practice that was published in the *Michigan Law Review*. Nolan recounts the many ways in which Mittenthal has served the Academy, including his presidency.

Nolan next reviews *Arnold Zack: From A to Z*. He calls this the "most exhausting" book he has read in years, because it is tiring just to read about all of Zack's activities. The peripatetic Zack has traveled the globe, and his teaching, lecturing, articles, and books are truly extraordinary. Nolan tells us that Zack joined the Academy in 1962 at age 30 and is a former president.

Jim Jones's book, titled *Hattie's Boy: The Life and Times of a Transitional Negro,* is the fourth book reviewed by Nolan. Jones grew up in the South during the Jim Crow era and rose to become a law professor at the University of Wisconsin. Jones does not devote many pages to arbitration or his membership in the NAA. Nolan tells us that Jones's book is more concerned with racial issues and the many changes that time has wrought since his youth.

The second invited paper in Chapter 11, "Personality and Time Delay Among Arbitrators," is by Daphne Taras, Dean of the Edwards School of Business at the University of Saskatchewan; Piers Steel, Associate Professor at the Haskayne School of Business, University of Calgary; and Allen Ponak, NAA vice president and Professor Emeritus at the University of Calgary. Their topic is "Personality and Time Delay Among Arbitrators." Of special interest in the paper is analysis of the elapsed time between arbitration hearings and the rendering of awards. Data was gathered from nearly 2000 Canadian cases issued after 2002, and a questionnaire was completed by 30 Canadian arbitrators. Using a sophisticated methodology for analyzing the collected data, the authors find that personality is a crucial factor in determining the amount of time that arbitrators take to make decisions. Personalities of arbitrators tend to match the job demands. The study finds that arbitrators are, as a group, exceptionally hard working nonprocrastinators.

The third invited paper in Chapter 11 is by NAA member Robert J. Rabin and is titled "Judicial Review of Awards in Mandated Employment Arbitrations: Are We Getting It Right?" This paper explores situations in which an employee is required as a condition of employment to submit statutory claims to arbitration. Rabin presents an extensive review of court decisions which shed light on agreements to arbitrate statutory claims, such as the U.S. Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane.* The author considers a number of cases in which courts placed a mandated arbitration award under scrutiny. This examination found a handful of cases in which arbitrators reached questionable conclusions of law. Rabin illustrates these and other situations with case studies of court reviews and observations that can be drawn from the studies. He does not anticipate legislation that would abolish mandatory employment arbitration but makes several proposals that might be considered by Congress in the event that it decides to address the subject.

Chapter 12 is a panel discussion on the topic of "Abandon Ship! Or Not? Dilemmas of Mid-Case Recusal." In this chapter, NAA member Shyam Das, labor attorney Robert D. Mariani from Scranton, PA, and management attorney Richard M. Goldberg from Hourigan, Kluger and Quinn in Kingston, PA, address the issue of recusal by examining hypothetical cases. One hypothetical deals with the arbitrator's possible financial interest in the out-

come and examines the weighing of such factors as the materiality and directness of the interest and, especially, the appearance of partiality that the grievant may perceive from the mere fact that the arbitrator deemed it necessary to make the disclosure. If such a perception is unreasonable but the Union asks for recusal, should the arbitrator accede to the request? Under the NAA's *Code of Professional Responsibility*, recusal seems required: "After appropriate disclosure the arbitrator may serve if *both parties* so desire" (emphasis added).

The panel examines the difficulties posed by expressions of undue familiarity and friendship between the arbitrator and a single advocate, the arbitrator's gratuitous expression of the merits of a party's case, and an arbitrator's unsolicited undertaking to mediate a dispute that the parties have selected the arbitrator to arbitrate, any of which might justifiably warrant a request for recusal. On the other hand, the panel also acknowledges that some demands for recusal are made for the purpose of intimidation of the arbitrator or for the purpose of tactically repositioning the arbitrator's attitude toward one party, and some demands for recusal are held in reserve, pending the advocate's assessment of how his or her case is going. The panel discusses how the arbitrator should respond.

"The Effects of the Economic and Budgetary Crises on Arbitration" is the subject of Chapter 13. This chapter also includes another topic explored by the same panelists concerning "The Implications of *14 Penn Plaza v. Pyett*." Union lawyer Stuart Davidson, from Willig, Williams & Davidson in Philadelphia, asserts that public employers have sometimes "squandered" diminishing tax revenues while simultaneously shifting the economic burden of the recession onto workers through health care "redesigns" (e.g., higher co-pays and diminished benefits), the furloughing of line personnel, pension underfunding, and the adoption of fitness "standards" without corresponding physical training programs. Attorney John A. DiNome responds, on behalf of public employers, that governmental employees are facing financial shortfalls; that taxpayers are suffering the consequences of unemployment; and that the "Tea Party is here," meaning that the public mood is for smaller public service expenditures. Both attorneys cite the city of Philadelphia as a case in point.

Arbitrators Ira Jaffe and Alan Symonette host a discussion of interest dispute resolution in the public sector and with an eye

to the proposed Employee Free Choice Act, in the private sector, including questions of the availability of comparability data for first-contract arbitration and the relevance of compensation disparities between top management and employees on the production line.

The "alternative universe" that ensues from a bankruptcy filing is explored, including the effect of bankruptcy rights on the collective bargaining agreement; the assumption or rejection of the CBA under the provisions of Section 1113 of the Bankruptcy Act; and the priority given to the compensation of the arbitrator. The status of the public sector bankruptcy of the city of Vallejo, California, is discussed.

In *Pyett*, the Court ruled that, if a collective bargaining agreement requires unit members to use the grievance–arbitration procedure to resolve disputes arising under external law—for example, Title 7, the Age Discrimination in Employment Act, the ADEA, or state statutes—that requirement to arbitrate is judicially enforceable. In "Implications of *14 Penn Plaza v. Pyett*," arbitrators and representatives of both labor and management discuss the possible impact of *Pyett* on union representational duties and employees' rights. The incipient effects appear to include the plaintiffs' bar pursuit of collective wage–hour actions and employers' efforts to head off such actions. In the future, unions will have to consider whether they want (and have the financial capacity) to undertake the burden of fair representation for the broad panoply of state and federal employee rights and whether they have the capacity, in the context of a collective bargaining agreement arbitration proceeding, to obtain the discovery that such representation will entail. Furthermore, the courts will need to clarify the explicitness of the agreement language that will warrant the inference that a union has assumed that burden of fair representation in cases of external law.

In Chapter 14, a group of panelists consider the topic of "A Pull at the Heartstrings: How Do Grievants' Personal Characteristics Affect Arbitration Decisions." The moderator is NAA member Daniel F. Brent. He is joined by Academy member Sara Adler; Steven W. Sulfas, an attorney with Ballard Spahr in Voorhees, New Jersey; and Nancy B. G. Lassen from the law firm of Willig Williams and Davidson in Philadelphia. Grievants often come to arbitration hearings with special characteristics, such as limited ability to

speak English, which raises the issue of providing an interpreter. Or a grievant might have a physical impediment like posttraumatic stress disorder. The personal features are almost endless. The panel discusses vignettes that pose difficult questions about what influence grievants' persona may have on the approach of advocates and assessment by arbitrators.

Chapter 15 is the "Fireside Chat with Theodore J. St. Antoine," past Academy president. Another past president, Richard I. Bloch, and his wife, Susan L. Bloch, interviewed Ted about his remarkable career. The Blochs were apt interviewers because they were both law students of Ted's at the University of Michigan. Susan Bloch has gone on to become a law professor herself, at the Georgetown University Law School.

We learn that Ted was born in a small town in Vermont in 1929. After his undergraduate years at Fordham College, he enrolled in law school at Michigan. Armed with his law degree, he worked in the Judge Advocate General's office and later joined a small law firm in Washington, D.C., that represented the AFL-CIO. His career really took off when he became an advocate in two landmark Supreme Court decisions, the *Darlington* and *Pennington* cases. It was an exciting time for Ted because the Landrum-Griffin Act of 1959 and the Civil Rights Act of 1964 were also on the agenda. His remarks about Jimmy Hoffa, John Kennedy, George Meany, and Walter Reuther are fascinating.

Another big career change for Ted occurred when he became a law professor at the University of Michigan. This experience leads to other interesting stories. On a personal note, Ted tells us about his family life with wife Lloyd and their four grown and successful children.

This volume represents a collective effort of Academy members and panelists at the annual meeting. President Bill Holley was an outstanding leader throughout the year. Program Chair Bonnie Bogue oversaw both the big picture and the details in designing and presenting the annual conference with great skill. Host Committee Chair Walt De Treux provided ample opportunities for members and guests to experience Philadelphia's cultural and historic treasures. David Petersen, the Academy's Executive Secretary, was excellent as always in managing operations. Denise Crozier from California State University, East Bay, was a valuable associate in coordinating materials for *The Proceedings*. We are

grateful to Kathleen and Suzanne Kelley from NAA headquarters for all that they do so well. Special thanks to Karen Ertel and Tim Darby at BNA for their advice and fine work in getting *The Proceedings* into book form.

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