CHAPTER 1

PRESIDENTIAL ADDRESS: PROTECTING NAA STANDARDS IN THE WORLD OF ADR

ARNOLD M. ZACK*

I start this Presidential Address with two commitments. The first is in response to an admonition from Ben Rathbun to make Academy history by being the first President to *not* begin his speech with the statement that: "I have reviewed all the prior Presidential Addresses...." Fulfilling that commitment has been easy. I have sat through every single Presidential Address since 1957, when I was an intern to Saul Wallen. I have heard all but the first 10 and am heartened to recall frequent references to these being trying times for the National Academy of Arbitrators (NAA) and for arbitration.

The second commitment, made recently to Dick Mittenthal, was that my oral Presidential Address will take no more than 20 minutes. This recitation will be within that promise. You can pick up the full text at the Registration Table where three California redwoods have made the ultimate sacrifice to contribute to your luncheon comfort.

I want to spend my time talking about the nagging problem with the world of alternative dispute resolution (ADR), as the outside world calls it, or alternative labor dispute resolution (ALDR) as the NAA has chosen to label it. We have faced and discussed that question extensively over the past few years, and I personally believe we made the correct decision in continuing our role as monitors of the labor-management relationship. But even as we adhere to that standard, we cannot ignore the reality of that enormous and overwhelming ADR universe and the impact it has on our little corner of it. Although we have not surrendered to its onslaught, neither can we avoid its continuing inroads into our arbitral universe.

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First, there appears to be a growing tendency to incorporate by reference into the collective bargaining agreements requirements to abide by statutes such as the Americans with Disabilities Act (ADA), Age Discrimination in Employment Act (ADEA), and the Family and Medical Leave Act (FMLA). Such language seeks to resolve employment-related disputes quickly, less expensively, and by a judge of the parties' own choosing, outside the machinery of the administrative agencies and the courts. The traditional sidestepping of external law by confining ourselves to the four-corners-of-the-contract rationale becomes harder and harder as the parties place before us requirements of interpretation and application of the ever-increasing range of employment-related statutes. At the same time the courts increase their scrutiny as to whether or not our decisions conform to public policy, and we begin to face the question of whether our traditional make-whole remedies do in fact bring finality to disputes in which the employee may exact a substantially greater remedy through resort to courts. Unions as well as employers face new problems in determining whether in the light of the external alternatives the labor-management arbitration forum provides full protection of employee legal rights, whether the duty of fair representation has been met, and whether the arbitration forum does provide a final and binding award on such issues.

Second, there is the issue of whether the restrictions on our statute-reading authority imposed by *Alexander v. Gardner-Denver Co.*[1] will be overshadowed by the Supreme Court's wholesale endorsement and enforcement of arbitration awards under the Federal Arbitration Act (FAA) in *Gilmer.*[2] In the former, the courts have retained jurisdiction over issues of law, while respecting the labor-management arbitrator's determinations of fact. But in the *Gilmer* case and its progeny, the courts have treated even employer-created, condition-of-employment and nonnegotiated arbitration procedures as justifying deferral under the FAA. Even under the Ninth Circuit's *Prudential Insurance Co.*[3] case, such preemployment commitments to arbitrate may be acceptable as long as they are knowingly entered into. The stance of the Judicial Conference encouraging use of ADR and the flood of new employment protection statutes, without a commensurate increase in the size or budget of the judiciary, call for a reality check. Can the courts

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[1]415 U.S. 36, 7 FEP Cases 81 (1974).
[2]*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 55 FEP Cases 1116 (1991).
[3]*Prudential Insurance Co. of Am. v. Lai*, 42 F.3d 1299 (9th Cir. 1994).

continue a bifurcation where they decline to defer finality to arbitrators of negotiated arbitration systems, while accepting as final, judgments rendered under systems unilaterally imposed by one side—the employer? Is the national policy of encouraging and enforcing collective bargaining agreements under the National Labor Relations Act to be as strong as the national policy of enforcing arbitration agreements under the FAA?

A third focus of change is the always pressing problem of the self-interest of the arbitrators. For many of us who have grown up (and grown old) within the NAA, our role continues to be the same as it was at the founding in 1947. We arbitrate labor-management disputes. We have been employed to assure tranquility as functionaries in the ongoing relationship between unions and employers. We are there solely to interpret and apply the *parties'* agreement, and to do equity only within the authorization that their agreement has given us. For nearly 50 years our role in the structure has been limited to how we as individuals should function in the context of the parties' collective bargaining institution, and it has not extended to how that institution should change. We are, in fact, relatively powerless in any efforts to change the institution. We can decide and control the lives of others, but not the process of arbitration. That remains properly within the control of the parties who negotiate the agreements to arbitrate, who select us, and who ask us to resolve those issues that they have agreed to submit to us. We intone that it is the parties' process, that we are a creation of the parties, and that our range of roving is within the four corners of the labor-management agreement. That's a rather self-limiting role, particularly in an era of declining trade union membership that is shrinking from 34 percent of the work force in the 1950s to some 16 percent now. Clearly, our membership is frustrated by our shrinking institutional universe. As that continues, we hear the world proclaim the benefits of arbitration as a panacea for the overcrowded dockets of the courts and the swamping backlogs of the government employment discrimination agencies, and even proclaim arbitration as the hope for workplace equity through universal adoption of termination-at-will arbitration procedures. We also see a growth of employer-promulgated arbitration but distrust its motivation.

Many in our labor-management family view employer-promulgated dispute settlement as a hostile, if not antiunion, institution. Some of these systems may be motivated by union-avoidance, but some are also developed in a good-faith effort to resolve disputes

where employees have not opted for unionization, and some are to resolve issues such as discrimination that might otherwise be taken to endless and costly court litigation. Regardless of the motivation, resort to employer-promulgated arbitration is an increasingly common phenomenon. Arbitration is certainly in greater focus in new legislation than it has ever been. Most recent rights legislation encourages the use of ADR, specifically arbitration, to bring about early resolution to statutory enforcement issues.

The call for arbitration outside the confines of collective bargaining is heard particularly by our newer generation of members who have joined us in the past 20 years or so. For many of these members who have not come into the NAA through the early private-sector labor-management relationship, the NAA represents the best and most qualified professional neutrals, a group of respected, independent, thoughtful, and above-reproach neutrals whose primary responsibility is to provide a forthright and equitable resolution to disputes between employers and employees. That role, many in this group feel, can be honestly carried out for the benefit of employees regardless of whether or not they are unionized. They view the arbitrator's involvement as the only means by which workers, organized or not, can secure fair treatment. We find ourselves in a burgeoning world of ADR where the potential of arbitration for over 100 million workers dwarfs our collective bargaining world of 15 million.

Those divergent views of whether we should stick to the labor-management paradigm or, alternatively, endorse our members venturing into the world of ADR have been heard clearly and respectfully within the NAA for the past few years. We have debated the issue for several years under the auspices of the Committee to Consider the Academy's Role, If Any, With Regard to Alternative Labor Dispute Resolution Procedures—the Beck "If Any" committee. It is not necessary to take sides or to hold one view as better, more valid, more likely to prevail, or a better prescription for the future than the other. We have taken the decision to stay on course, allowing our members to continue doing as they wish in nonunion arbitration settings.

I am clearly in that camp. I personally think the decision to continue to confine our scope to the labor-management realm was correct, and it is indeed the only realistic choice we could have made given our genesis and evolution as the custodians of the labor-management relationship. I do not think, however, that we can deny the impact on the NAA of this burgeoning external ADR

market. It is a market that is exploiting "us" and by that, I mean exploiting not only the arbitrators, but the collective bargaining partners as well.

The fourth pressure ADR imposes on us is the increasing risk that the respected labor-management arbitration procedure will lose its credibility in the face of unilaterally imposed arbitration. Arbitration as we know it is being diluted, if not abused. When the rest of the world talks about arbitration, they are talking about our arbitration—union, management, neutral—and the legacy that has been handed down to us as practitioners of labor-management arbitration. Our arbitration results from a negotiated trade-off between parties of comparable power where one party surrenders the right to wildcat strike, in exchange for the other party's commitment to comply with final and binding arbitration awards. "Our" arbitration means standards of integrity and credibility that we maintain for the parties and society through the tenets of our Code of Professional Responsibility, our procedures for membership selection, and our programs of continuing education to increase the competence of our members.

This growing embrace of arbitration by that outside world should come as no surprise. Its popularity is in large measure due to the credibility and acceptability to society that has been established by *our* brand of labor-management arbitration. Not only have we been for half a century the only arbitration game in town, but all three participants in that system deserve credit for having maintained labor-management peace over the past half century. Even if the public may view us solely through the prism of baseball final offer arbitration, at least it has come to recognize arbitration as an acceptable and fair procedure for resolution of disputes. Our reputation for a clean, scandal-free process is what has led the legislatures and the judiciary to urge its usage. But our arbitration is being hijacked, and our good name is being exploited. The arbitration that's being touted is not *our* arbitration.

It is painful to read the articles in the *Wall Street Journal* and elsewhere[4] where the term arbitration is applied to internal procedures created not through the parity of labor-management negotiating power that we know, but imposed by the employer's unilat-

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[4] *See* Schmitt, *More Lawyers First Seek Arbitration for Internal Disputes*, Wall St. J., Aug. 26, 1994, at 18; Jacobs, *Required Job Bias Arbitration Stirs Critics*, Wall St. J., June 22, 1994, at B2; Swoboda, *Employers Find a Tool to End Workers' Right to Sue: Arbitration*, Washington Post, Sept. 18, 1994, at H8.

eral edict. In those systems, such as are utilized in the securities industry, the employee is required to promise to arbitrate unforeseeable statutory violation claims as a condition of getting a job. With that surrender of the right of access to the courts may also come a deprivation of the right to counsel or representation, and certainly there is no grievance procedure to provide discovery or access to evidence. And with that, the case is heard by other employers serving as arbitrators unilaterally selected and paid for by the employer, trained by "putting the new boys with the old boys." Is it surprising that even the defendant in one such case "bragged that he could influence the industry process: He had served as an arbitrator himself. Arbitration is 'industry fraud' and a 'rigged game.'"[5]

Nor should it be surprising that that label some day may be transferred to our type of "clean" arbitration. That seems to be the ironic and unintended consequence of our remaining outside that arena.

So, if the NAA is sticking to the tradition of labor-management arbitration, why should we, the NAA, unions, and management mess with the ADR quagmire?

I believe it is crucial for the protection of the credibility of arbitration under collective bargaining agreements and for the credibility of the NAA, our members, and the parties to the labor-management relationship, that we take action. We must undertake to counter the perception that arbitration is "rigged," and to assure that claimants under such employer-promulgated schemes are accorded due process protections and provided fair treatment, as well as to strive for the goal that the process of arbitration, theirs as well as ours, is regarded as equitable with adequate due process protections.

We, on both sides and at the end of the table, have the experience, the perception, the know-how, and the credibility to clamor for due process standards of employment dispute resolution to assure the continuing acceptability of our own process. It is desperately needed, not only in our own self-interest, but to bring fairness to this troubled and enormous universe of ADR. Ironically, it is a universe that the unions have helped create by their endorsement of such universally protective legislation as the ADA, ADEA,

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[5]Jacobs, *Riding Crop and Slurs: How Wall Street Dealt With a Sex-Bias Case*, Wall St. J., June 9, 1994, at A6.

Civil Rights Act of 1991, and FMLA, protecting the more than 100 million workers of the work force whether unionized or not.

Again, I must stress that this is not solely an NAA responsibility or mission. By "we," I mean the tripartite community of labor-management arbitration. All three parties must protect against the erosion of the credibility of the labor-management institution of arbitration.

So, if we do have a stake, what role should we be playing?

The first step is to point the way to a more reasonable and equitable system. That is what is recommended in the report of the Dunlop Commission, to replicate some of the fairness and safeguards of due process that are negotiated into arbitration agreements in the collective bargaining arena. And that is what has occupied a Task Force that was established to pursue the project. Together with the union and management leadership of the Employment and Labor Law Section of the American Bar Association (ABA), the American Arbitration Association, Federal Mediation and Conciliation Service, Society of Professionals in Dispute Resolution, American Civil Liberties Union, and National Employment Lawyers Association (the plaintiff bar group), we have been occupied since last August formulating what we all believe to be a fair system for arbitration of employment issues. I am pleased to report that we have at last reached unanimity on what we consider to be a procedure with due process protection for that arena. The Protocol was signed by the 12 participants on May 9, 1995. It has been endorsed by the union and management representatives of the Employment and Labor Law Section of the ABA. It has been presented to Secretary Reich in his effort to expedite dispute settlement within the U.S. Department of Labor and independent statutory agencies.

I won't bore you with reading the entire protocol. It is attached to my paper. [The protocol appears in Appendix B.]

It includes:

- the development of a qualified roster consisting of neutral arbitrators (lawyer and nonlawyer) and experts in discrimination, including training requirements for both groups;
- the right of employee representation, ideally with employer subsidy;
- the right of discovery and to take depositions;
- joint selection of the arbitrator through neutral agencies;
- shared payment of the arbitrator's fees;

- the right of arbitrators to fashion the same awards and remedies as would the courts; and
- standards for scope of review by statutory agencies and the courts.

Only on the issue of whether the commitment to arbitrate should be made pre- or post-dispute did we fail to reach accord. But we reached agreement on the content of the procedure once it is initiated.

We believe the half century of arbitration practice and precedent has created an "ethos" of employment dispute resolution that can provide guidance to those in this new field of employment disputes. It does not commit the NAA or its members to undertake such work. We continue to be an organization of labor-management arbitrators. Our members continue to be free to arbitrate in noncollective bargaining arrangements. But we now have a standard that should guide them in assuring that the arbitrations they conduct provide due process.

While procedural matters may be the initial focus of such procedures, we are all aware not only of the burgeoning of arbitration of discrimination matters, but also concerned more broadly with the increasing prospects of statutory termination-at-will arbitration looming in the future. Even if they wanted to use us, our small group of 700 could hardly meet the demands of that 100 million potential invokers of arbitration. A new army of arbitrators will be needed.

We certainly have much to offer these new decisionmakers from our labor-management bank of experience. And they, new to that role, will ideally seek guidance to assure fairness, both procedurally and substantively.

So this leads me to the second subject of my talk. Last month, in cooperation with the two prospective NAA Presidents, J.F.W. Weatherill and George Nicolau, we launched a group to undertake the codification of our law of the shop under the leadership of Vice President Theodore St. Antoine. Certainly, there are numerous publishers surviving on the dissemination of arbitration awards, but the published awards, by virtue of the restriction of the Code, present only those cases that the parties agree to have published: The tendency, either because of the needs of the publishers seeking new or different "law" or the disinterest of the old hands in whether or not their awards are published, has been a perceptible veering away from conventional tenets of arbitration. As a consequence, the collected wisdom of our founding fathers and the

giants of this field, who in the early days published to provide guidance to the parties in this new field of industrial law, has been seriously diluted.

We believe a reexamination of the law and the issuance of a "restatement"-type document would serve several valuable purposes. First, it would provide continuity to our educational efforts in our 17 regions and at our fall educational meetings and provide a focus at our annual meetings for our membership on the issues inherent in the various facets of a prescribed topic (discipline and discharge, vacation and leaves, seniority, promotions, management rights, etc.).

Second, it would provide a guide to decisionmaking for the newer and next generation of labor-management arbitrators, in and out of the NAA, and for advocates of unions and management, standards to consider when arguing cases.

Third, it would provide a similar set of benchmarks for those handling employer-promulgated arbitration, as advocates or arbitrators. Even if such guidance is taken only in the field of procedural fairness or due process, it will help to protect us all and ensure fairer employee treatment. And if the ADR employment field expands into the termination-at-will arena, it may provide valued guidance in assuring due process and fairness in that troublesome area as well.

Finally, such a codification will provide a valued documentation of the NAA's role over the past 50 years as monitor of the parties' relationship. That statement of the law of the shop will provide an incredibly valuable tool for students and the study of labor arbitration in this era, even if one buys the argument that the practice of labor arbitration is declining. In recent years, as union membership has dwindled, and as reports have spread of less resort to arbitration and arbitrators, some have forecast that when the history of labor relations is written, there will be a footnote stating that in the second half of the 20th century, there was a thing called labor-management arbitration. I don't believe that prognosis is valid.

It is hoped that labor-management arbitration will continue to survive, even thrive, to the extent that parties incorporate into collective bargaining agreements requirements that the employers adhere to expanding statutory requirements and that claims of violation of those rights be resolved through the grievance and arbitration procedures, thereby avoiding resort to, and relitigation of, such issues in the courts.

The format may change. Unions may begin to represent more employees in currently nonunionized enterprises, and arbitration may even become a much more acceptable and credible institution in nonunionized settings. I am not much into crystal balls, but these two projects may help to make a difference.

In summary, the NAA has produced in the area of ALDR two innovations. In the Task Force Protocol, we hold out to those involved in the resolution of statutory employment issues the standards of due process that have made labor arbitration a hallmark of equity, integrity, and credibility. Let us hope that the statutory agencies and the courts will demand no less in employer-promulgated arbitration. In the second, we are trying to establish this code of the law of the shop as a standard to be considered, if not followed, in the expanding universe of employment arbitration. Both, we hope, will leave a legacy that should do the NAA, the arbitrators, unions, and management proud, not only reflecting the contributions we have all made in assuring tranquility in the collective bargaining arena, but also for the contribution we hope to make to fairness and equity for the 100 million workers who so far have missed their chance at unionization.

AMERICAN ARBITRATION ASSOCIATION®

Employment Due Process Protocol

The following protocol is offered by the undersigned individuals, members of the Task Force on Alternative Dispute Resolution in Employment, as a means of providing due process in the resolution by mediation and binding arbitration of employment disputes involving statutory rights. The signatories were designated by their respective organizations, but the protocol reflects their personal views and should not be construed as representing the policy of the designating organizations.

Genesis

This Task Force was created by individuals from diverse organizations involved in labor and employment law to examine questions of due process arising out of the use of mediation and arbitration for resolving employment disputes. In this protocol we confine ourselves to statutory disputes.

The members of the Task Force felt that mediation and arbitration of statutory disputes conducted under proper due process safeguards should be encouraged in order to provide expeditious, accessible, inexpensive and fair private enforcement of statutory employment disputes for the 100,000,000 members of the workforce who might not otherwise have ready, effective access to administrative or judicial relief. They also hope that such a system will serve to reduce the delays which now arise out of the huge backlog of cases pending before administrative agencies and courts and that it will help forestall an even greater number of such cases.

A. Pre or Post Dispute Arbitration

The Task Force recognizes the dilemma inherent in the timing of an agreement to mediate and/or arbitrate statutory disputes. It did not achieve consensus on this difficult issue. The views in this spectrum are set forth randomly, as follows:

Employers should be able to create mediation and/or arbitration systems to resolve statutory claims, but any agreement to mediate and/or arbitrate disputes should be informed, voluntary, and not a condition of initial or continued employment.

Employers should have the right to insist on an agreement to mediate and/or arbitrate statutory disputes as a condition of initial or continued employment.

Postponing such an agreement until a dispute actually arises, when there will likely exist a stronger re-disposition to litigate, will result in very few agreements to mediate and/or arbitrate, thus negating the likelihood of effectively utilizing alternative dispute resolution and overcoming the problems of administrative and judicial delays which now plague the system.

Employees should not be permitted to waive their right to judicial relief of statutory claims arising out of the employment relationship for any reason.

Employers should be able to create mediation and/or arbitration systems to resolve statutory claims, but the decision to mediate and/or arbitrate individual cases should not be made until after the dispute arises.

The Task Force takes no position on the timing of agreements to mediate and/or arbitrate statutory employment disputes, though it agrees that such agreements be knowingly made. The focus of this protocol is on standards of exemplary due process.

B. Right of Representation

1. Choice of Representative

Employees considering the use of or, in fact, utilizing mediation and/or arbitration procedures should have the right to be represented by a spokesperson of their own choosing. The mediation and arbitration procedure should so specify and should include reference to institutions which might offer assistance, such as bar associations, legal service associations, civil rights organizations, trade unions, etc.

2. Fees for Representation

The amount and method of payment for representation should be determined between the claimant and the representative. We recommend, however, a number of existing systems which provide employer reimbursement of at least a portion of the employee's attorney fees, especially for lower paid employees. The arbitrator should have the authority to provide for fee reimbursement, in whole or in part, as part of the remedy in accordance with applicable law or in the interests of justice.

3. Access to Information

One of the advantages of arbitration is that there is usually less time and money spent in pre-trial discovery. Adequate but limited pre-trial discovery is to be encouraged and employees should have access to all information reasonably relevant to mediation and/or arbitration of their claims. The employees' representative should also have reasonable pre-hearing and hearing access to all such information and documentation.

Necessary pre-hearing depositions consistent with the expedited nature of arbitration should be available. We also recommend that prior to selection of an arbitrator, each side should be provided with the names, addresses and phone numbers of the representatives of the parties in that arbitrator's six most recent cases to aid them in selection.

C. Mediator and Arbitrator Qualification

1. Roster Membership

Mediators and arbitrators selected for such cases should have skill in the conduct of hearings, knowledge of the statutory issues at stake in the dispute, and familiarity with the workplace and employment environment. The roster of available

mediators and arbitrators should be established on a non-discriminatory basis, diverse by gender, ethnicity, background, experience, etc. to satisfy the parties that their interest and objectives will be respected and fully considered.

Our recommendation is for selection of impartial arbitrators and mediators. We recognize the right of employers and employees to jointly select as mediator and/or arbitrator one in whom both parties have requisite trust, even though not possessing the qualifications here recommended, as most promising to bring finality and to withstand judicial scrutiny. The existing cadre of labor and employment mediators and arbitrators, some lawyers, some not, although skilled in conducting hearings and familiar with the employment milieu is unlikely, without special training, to consistently possess knowledge of the statutory environment in which these disputes arise and of the characteristics of the non-union workplace.

There is a manifest need for mediators and arbitrators with expertise in statutory requirements in the employment field who may, without special training, lack experience in the employment area and in the conduct of arbitration hearings and mediation sessions. Reexamination of rostering eligibility by designating agencies, such as the American Arbitration Association®, may permit the expedited inclusion in the pool of this most valuable source of expertise.

The roster of arbitrators and mediators should contain representatives with all such skills in order to meet the diverse needs of this caseload.

Regardless of their prior experience, mediators and arbitrators on the roster must be independent of bias toward either party. They should reject cases if they believe the procedure lacks requisite due process.

2. Training

The creation of a roster containing the foregoing qualifications dictates the development of a training program to educate existing and potential labor and employment mediators and arbitrators as to the statutes, including substantive, procedural and remedial issues to be confronted and to train experts in the statutes as to employer procedures governing the employment relationship as well as due process and fairness in the conduct and control of arbitration hearings and mediation sessions.

Training in the statutory issues should be provided by the government agencies, bar associations, academic institutions, etc., administered perhaps by the designating agency, such as the AAA®, at various locations throughout the country. Such training should be updated periodically and be required of all mediators and arbitrators. Training in the conduct of mediation and arbitration could be provided by a mentoring program with experienced panelists.

Successful completion of such training would be reflected in the resume or panel cards of the arbitrators supplied to the parties for their selection process.

3. Panel Selection

Upon request of the parties, the designating agency should utilize a list procedure such as that of the AAA or select a panel composed of an odd number of mediators and arbitrators from its roster or pool. The panel cards for such individuals should be submitted to the parties for their perusal prior to alternate striking of the names on the list, resulting in the designation of the remaining mediator and/or arbitrator.

The selection process could empower the designating agency to appoint a mediator and/or arbitrator if the striking procedure is unacceptable or unsuccessful. As noted above, subject to the consent of the parties, the designating agency should provide the names of the parties and their representatives in recent cases decided by the listed arbitrators.

4. Conflicts of Interest

The mediator and arbitrator for a case has a duty to disclose any relationship which might reasonably constitute or be perceived as a conflict of interest. The designated mediator and/or arbitrator should be required to sign an oath provided by the designating agency, if any, affirming the absence of such present or preexisting ties.

5. Authority of the Arbitrator

The arbitrator should be bound by applicable agreements, statutes, regulations and rules of procedure of the designating agency, including the authority to determine the time and place of the hearing, permit reasonable discovery, issue subpoenas, decide arbitrability issues, preserve order and privacy in the hearings, rule on evidentiary matters, determine the close of the hearing and procedures for post-hearing submissions, and issue an award resolving the submitted dispute.

The arbitrator should be empowered to award whatever relief would be available in court under the law. The arbitrator should issue an opinion and award setting forth a summary of the issues, including the type(s) of dispute(s), the damages and/or other relief requested and awarded, a statement of any other issues resolved, and a statement regarding the disposition of any statutory claim(s).

6. Compensation of the Mediator and Arbitrator

Impartiality is best assured by the parties sharing the fees and expenses of the mediator and arbitrator. In cases where the economic condition of a party does not permit equal sharing, the parties should make mutually acceptable arrangements to achieve that goal if at all possible. In the absence of such agreement, the arbitrator should determine allocation of fees. The designating agency, by negotiating the parties' share of costs and collecting such fees, might be able to reduce the bias potential of disparate contributions by forwarding payment to the mediator and/or arbitrator without disclosing the parties' share therein.

D. Scope of Review

The arbitrator's award should be final and binding and the scope of review should be limited.

Dated: May 9, 1995

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Arbitration in Practice

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Contents

Preface

ARBITRATION of labor-management disputes has come to be accepted as an essential element of national labor policy and as a viable, voluntary procedure for conflict resolution. Arbitration has thrived in the private sector for nearly fifty years. It has expanded into the public sector and is now being adapted to resolve disputes in fields other than labor-management.

This volume has been compiled in response to the needs of both new and experienced arbitrators. Despite the expanding use of arbitration, there is a tendency for those who use the system to turn to the more experienced "old timers" as their arbitrators. Many of the new arbitrators entering the profession have little insight into the standards that have guided the profession over the years.

Arbitration, unlike law, medicine and other professional callings, has had no requirement of continuing education. The result is a dearth of written material for training new arbitrators, upgrading the skills of practicing arbitrators, or showing the parties how arbitrators think. Experienced arbitrators may reflect on how their individual cases fit into the larger patterns of conflict resolution. Unfortunately, too few take the time, or are willing to make the time, to share these thoughts with others. Some have written papers or volumes on labor relations subjects, often intended for a broader audience than those who actually participate in arbitrations. Few arbitrators have had any opportunity to write informally for other arbitrators or for

practitioners on the substantive or procedural issues one confronts in daily practice.

Although this book has value as a training tool for new arbitrators, it has a larger purpose. Experienced arbitrators, practitioners, and students in arbitration courses will profit from the insights and philosophy offered by these practitioners. The diversity of approaches presented here underscores the strength of this private judicial procedure, the survival of which is testimony to the voluntary support it has achieved and maintained within the labor relations community.

The chapters here present informed, yet informal insights from a number of experienced arbitrators into their methods of dealing with various arbitration problems. They were adapted from speeches made during a training program for new arbitrators conducted at the University of Michigan Law School in 1975 by the Institute of Continuing Legal Education, under the auspices of General Electric Company and the International Union of Electrical Workers, and with cooperation from the American Arbitration Association and the Federal Mediation and Conciliation Service. At the suggestion of Ted St. Antoine, then dean of the law school, I edited the transcript, presented the edited versions of their presentations to the speakers for revision, and put together this collection. In the case of Richard Mittenthal, who used a speech presented previously to the National Academy of Arbitrators in 1960, it was decided to reproduce the more comprehensive original paper. We thank the Bureau of National Affairs for permission to publish that paper.

The authors sought to retain the informality of their oral presentations in recognition that they deal with subjective attitudes toward various elements of the arbitration process. This volume is not intended as an academic or legalistic survey of arbitration. It seeks to present a relaxed view of the substantive and procedural problems considered by arbitrators to be important issues and an explanation of how they deal with those issues.

A number of the authors discuss the role of arbitration in our society; others focus on problems arising during the conduct of the arbitration hearing. Contributors of the latter portion of the book examine substantive issues considered by arbi-

trators on the merits or specific aspects of the decision-making process.

I gained a good deal of insight from the preparation of this volume, and for this I am indebted to my colleagues who have contributed their work and especially to Ted St. Antoine for stimulating this project. I also want to thank these friends in a more personal way: for still being around, for still being active, and for still being devoted enough to their profession to labor with me on the revision of these chapters.

National Academy of Arbitrators

The Common Law of the Workplace

The Views of Arbitrators

Second Edition

Theodore J. St. Antoine

Editor

The Bureau of National Affairs, Inc., Washington, D.C.

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PREFACE TO SECOND EDITION

The authors and editors of this work believe we achieved the major goals we set ourselves when we produced the first edition six years ago. We saw value in providing a brief, reliable summary of the leading arbitral principles developed over the first half century of the National Academy of Arbitrators. We especially hoped that less-experienced arbitrators and advocates would profit from the lessons of the past—not that they would feel bound by any rigid body of established rules but that they could build on the accumulated experience of the profession in meeting the new and different problems they now face.

The response to our first edition has been rewarding. Even veteran arbitrators and advocates tell us they have learned from its pages. And talks with the newcomers to the field indicate that most have used our text much as we intended, as a point of departure and not as a terminus of analysis, in dealing with the particular cases before them.

Even in the short space of the last decade or so, significant changes have occurred. Ethics in arbitration has received more attention. External law has become accepted, even if sometimes uneasily, as grist for the arbitrator's mill. Drug use and violence in the workplace are increasing problems. These and other developments are duly noted in our new edition. We of course have also updated citations to court and arbitration decisions and secondary authorities throughout the volume.

Note: Throughout this volume, the *Proceedings of the Annual Meetings of the National Academy of Arbitrators* are cited as "NAA," preceded by the meeting number and followed by the page number. (A list of the *Proceedings* volumes and their titles is provided following Chapter 10.) In each chapter, authorities cited repeatedly are referred to only by authors' surnames after the first reference, for example, "Elkouri, at __" for *Elkouri and Elkouri: How Arbitration Works, Sixth Edition.*

Lastly, we have responded to the one major criticism of the first edition by adding an Index.[1]

Yet perhaps continuity rather than change is the larger theme of this work. All conscientious arbitrators remain loyal to the concept that the contracting parties' intent, as best we can discern it, lies at the very heart of our endeavors. Our strongest desire is to have this volume assist its readers in fulfilling that intent. Like the first edition, however, this revision in no way constitutes an official set of positions of the National Academy of Arbitrators.

We close with a personal word. Since the first edition, two of our authors—Timothy Heinsz and Carlton Snow—died suddenly at tragically early ages. In addition we lost two of our most esteemed senior colleagues, Anthony Sinicropi and Arthur Stark, who were members of the Presidential Advisory Group. We miss all four deeply.

Theodore J. St. Antoine*
Chair, Common Law Project

[1]For her work on the Index, we are indebted to Jacquelin F. Drucker, Member, National Academy of Arbitrators, New York, New York.

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PREFACE TO FIRST EDITION

The grievance and arbitration system may well be collective bargaining's foremost contribution to the American workplace. To the employee it means freedom from arbitrary treatment. To the employer it means a peaceful resolution of disputes that could otherwise lead to work stoppages and lost production. The labor arbitrators of the United States and Canada find much satisfaction in the role they have played in this process.

In 1997 the National Academy of Arbitrators celebrated its fiftieth anniversary. In part to commemorate that occasion, and in part to further its ongoing educational efforts, the Academy decided to produce a volume that would attempt to sum up some of the leading arbitral principles developed over the last half century.

Labor and employment arbitration is expanding into new areas. Statutory claims and individual employee rights are two striking examples. Inexperienced arbitrators are entering the field. There is a need to pass on the lessons that have been learned in traditional union-management arbitration, both to benefit the newcomers and to prevent an erosion of standards that could tarnish the reputation of the whole profession.

Many veteran arbitrators rarely publish their decisions, and too often media attention focuses on the bizarre or sensational case rather than the basic and routine. Good encyclopedic treatments of arbitration exist, but a crisp, authoritative overview of the subject would seem more immediately useful to the fledgling arbitrator or advocate.

We are definitely *not* trying to set forth definitive rules. A large segment of arbitral decisionmaking depends on the contractual relationship of particular parties, and the judgment of the particular arbitrator they have selected to resolve their specific dispute. Indeed, this is so true that some persons, quite understandably, have doubted the wisdom of a project like the present one. Nonetheless, many of us believe that the experience of the past half century has yielded some generally accepted approaches toward commonly encountered problems,

or at least some widely recognized alternative ways of thinking about them. We feel this is knowledge worth sharing. When reasonable differences of opinion exist among reputable arbitrators, we shall do our best to point those out.

On a personal note, I can remember how comforting it was for me as a novice arbitrator to hear some of the giants of an earlier generation explain their divergent philosophies. It was liberating to realize there was a range of respectable positions on many issues—and also reassuring to learn in advance where the minefields lay.

For readier comprehension, we have divided the material into short black-letter statements, usually followed by more extensive commentary. This does not mean that extra weight should be given to the items in boldface. The individual authors chose how to organize their own chapters and no collective judgments were made that certain matter should be highlighted as more central or better accepted than the rest.

Despite the value we think readers will find in this outline of the "common law of the workplace," as seen in the decisions and writings of numerous arbitrators, it is vital to emphasize what the volume is not. As the Board of Governors of the National Academy of Arbitrators has formally declared, the views expressed are in no way an "official" pronouncement of the Academy. They most definitely are binding on no one. They should be treated as no different in kind from the ideas espoused in the articles in the Academy's annual *Proceedings*. It would be a sorry perversion of our purposes, for example, if any party tried to have a court overturn an arbitration award just because its rationale was contrary to something contained in these pages.

Having said that, the 16 authors and editors who are responsible for this volume would like to acknowledge with gratitude all the help and support we have received from various Academy members. The planning and execution of the project engaged the attention of four Academy presidents [Arnold Zack, J.F.W. (Ted) Weatherill, George Nicolau, and Milton Rubin] during their terms. Eight former presidents went over at least one chapter each with a fine-tooth comb, and were not hesitant with their comments and suggestions. Selected portions of early drafts dealing with some of the most controversial issues were placed before the entire membership attending three different general meetings as well as some

regional meetings of the Academy. The resulting criticisms—and there were many—have been carefully considered. So, while neither official nor binding in any respect, this volume is presented with the hope it will reflect and enhance the best traditions of the arbitration profession.

Theodore J. St. Antoine
Chair, Common Law Project

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