

# THE ART & SCIENCE OF LABOR ARBITRATION



The history. The process. The challenges.



A STUDY GUIDE TO ACCOMPANY  
**THE ART & SCIENCE OF LABOR ARBITRATION**

The College of Labor and Employment Lawyers and  
the National Academy of Arbitrators Research and Education Foundation.

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## INTRODUCTION

Labor arbitration is used throughout the world, but nowhere is it used as pervasively as in the United States and Canada. In the United States it is rare to find a collective bargaining agreement that does not contain a grievance procedure incorporating arbitration as the terminal step. In Canada every collective bargaining agreement contains a grievance and arbitration procedure as mandated by statute, all awards must be publically filed, and strikes and lockouts are prohibited during the term of the collective bargaining agreement.

As originally conceived in the private sector, arbitration is a private and voluntary process that leads to a final and binding decision that resolves a dispute. Significantly, labor arbitration is a consensual process, and with the exception of mandatory arbitration laws governing some public employees, labor arbitration occurs because parties have agreed to arbitrate.

Because arbitration is the creation of the parties, it can take many different forms, and collective bargaining agreements reflect a wide array of arrangements relative to coverage, structure, procedure, scope of arbitral authority, and *ad hoc* (case-by-case) versus permanent arbitrator systems. Yet, despite the variations that appear in negotiated arbitration procedures, a constant is that the relationship between the contracting parties is a continuous one. In other words, the parties that negotiate agreements that provide for binding arbitration almost always have an ongoing association. Moreover, grievance arbitration is viewed as an extension of collective bargaining because, as was emphasized in the *Steelworkers Trilogy*, even the most skilled drafters cannot anticipate all of the problems that can arise during the term of a collective bargaining agreement. The collective bargaining agreement is part of an attempt to

establish a system of workplace self-government, the gaps in which “may be left to be filled in by reference to the parties of the particular industry and of the various shops covered by the agreement.” *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 580-81 (1960). The labor arbitrator is chosen for his/her knowledge of “the common law of the shop” and for his/her ability to bring to bear considerations which “may indeed be foreign to the competence of the courts. . . .The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.” *Id.* at 581-82).

The *Steelworkers Trilogy* is said to have ushered in the “Golden Age” of labor arbitration. While judicial deference may vary depending on the nature of the case and the federal circuit in which an arbitration award is reviewed, it is still fair to say that labor arbitration is a respected and time-honored process of resolving workplace disputes.

*The Art & Science of Labor Arbitration* looks at the history of labor arbitration in America and reflects on the reasons as to why the process is still so widely used. It also focuses on the arbitrators, or “peacemakers,” who are regularly retained by parties to hear and resolve the disputes that arise daily among management, workers and union representatives. Unlike many teaching films, *The Art & Science of Labor Arbitration* is not a skills-building film that shows how to prepare and present a case. To the contrary, it consists of a series of very personal interviews with some of the most esteemed arbitrators in the profession who are also members of the National Academy of Arbitrators.

The topics covered by the film include why arbitration has become the preferred dispute resolution technique in the unionized sector of the economy and how arbitrators



conceptualize the process. The arbitrators who are interviewed share their thoughts about the hearing process, what they expect of advocates, the factors influencing credibility determinations, and how they approach the task of writing their decisions. What emerges is a picture of a highly talented, thoughtful, and committed cadre of professionals who care deeply about the responsibility of running a fair hearing, writing a well-crafted decision, and “getting it right” so that they not only bring finality to a dispute but also do no damage to the parties’ relationship.

The arbitrators in the film are sensitive to what parties expect of the process. They emphasize their belief that disputants want a “no nonsense experience,” “fast turn-around,” and an arbitrator who keeps control of the process. But beyond the skills that are necessary to preside over a hearing and write an award, all of the interviewees emphasize the individual traits and personal styles that they bring to their practices and which influence their acceptability as neutrals. A theme running through the film is the importance of courage – the ability to withstand pressure even when the stakes are high, the parties are demanding, and the risks of being not selected in future cases are obvious. Several arbitrators talk about the importance of not pandering to parties, avoiding the temptation to orchestrate a mutually acceptable result, and rejecting the notion of balancing the number of wins and losses between labor and management. Any neutral who adopts that style is destined to have a short career as an arbitrator because experienced advocates, while eager to win cases, also know when a decision is not supported by the record evidence or the collective bargaining agreement. They may hold a grudge for a while in response to an adverse award, but the arbitrators interviewed

in the film who address this issue emphasize that strict impartiality and intellectual honesty almost always pay off.

The personal insights that are revealed in the film are moving. Particularly touching are the reflections of the women and minority members of the National Academy of Arbitrators who share stories about the difficulty they experienced breaking into a field that historically was closed to anyone who was not white, male, and middle-aged. Their dedication, perseverance, and courage not only set examples for young arbitrators today, but for everyone who seeks to get ahead in the world of work.

*The Art & Science of Labor Arbitration* gives the viewer great insight into arbitrators, not just as contract readers, but as unique practitioners who value the trust that the parties place in them. While all arbitrators strive to approach their cases with open minds and a commitment to be faithful to the record evidence, they are also human beings with feelings and personal backgrounds. As one interviewee put it, “Everything we have experienced and viewed has some influence.” Perhaps that is why parties are so covetous of their right to select their arbitrators. They know that arbitrators have different attitudes, strengths, and skills, and they value the chance to choose those whose styles and views are most compatible with their own. This opportunity to pick the judge is a unique aspect of arbitration, and the arbitrators interviewed in the film express a keen awareness of the parties’ right to terminate their services. Getting fired comes with the turf, and as one of the interviewees commented in quoting arbitral legend Ralph Seward, “You’re not a professional arbitrator until you’ve been fired.” By the same token, the fact that arbitrators routinely make hard decisions, and are

retained and reused by parties time and time again, is testament that what matters most is honesty, impartiality, and strong analytic ability.

*The Art & Science of Labor Arbitration* offers a rare look at a process that has withstood the test of time and, in particular, the neutrals who make it work. One comes away from the film very aware that labor arbitration has not been successful just because it is a good dispute resolution procedure, but also because the arbitrators who are the custodians of the process cherish it, and through hard work and commitment, have earned the respect and confidence of the labor-management community.

## **FOUNDATIONS OF MODERN LABOR ARBITRATION**

Consider a typical dispute that might arise under a collective bargaining agreement. The agreement lists paid holidays, including Memorial Day, and provides, “Employees shall be paid eight hours of straight time holiday pay for each of the listed holidays provided that the employee works the last regularly scheduled day prior to the holiday and the first regularly scheduled day after the holiday.” An employee is injured on the job on the Wednesday of the week prior to Memorial Day and is seen at a clinic contracted by the employer to treat employees injured on duty. The doctor tells the employee to remain off the job through the end of the week and writes a release that the employee may return to work the following Tuesday, i.e. the day after Memorial Day. As a result, the employee does not work on the Friday prior to the Memorial Day weekend, i.e., the last scheduled workday prior to the holiday. The employer denies the employee holiday pay and the union claims this breaches the collective bargaining agreement because the employee stayed off work following the instructions of the doctor who was under contract to the employer.

The union could bring a lawsuit for breach of contract but the amount of money in dispute, eight hours of straight time pay, would not justify the expense. More than likely, the union would resort to self-help to extract the holiday pay from the employer, threatening to strike or engage in a lesser job action. Employers typically do not wish to risk strikes or other job actions disrupting their businesses during the term of the collective bargaining agreement. Neither do employees want to lose wages in a strike. Most unions would also prefer to have a vehicle other than a job action to resolve low dollar value claims that arise during the term of a contract; they do not want to have to threaten to strike over every incident that arguably violates the collective bargaining agreement. Consequently, it is very common for unions and employers to agree that there will be no strikes or other interruptions of work during the term of the labor agreement and that disputes over interpretation and application of the contract will be handled through a grievance procedure culminating in arbitration.

The availability of grievance and arbitration procedures also often facilitates the ability of the parties to reach agreement on the terms of the labor contract. Consider, for example, a provision commonly found in collective bargaining agreements that vacancies will be filled based on qualifications but, where qualifications are relatively equal, the position will be awarded to the more senior applicant. The parties agree on such language even though they probably disagree on the appropriate mix of seniority and qualifications. The employer emphasizes “equal” in the phrase “relatively equal” and regards this as a very narrow concept. The union emphasizes “relatively” and regards this as a very broad concept. However, whether this philosophical disagreement will ever result in disagreement in practice is highly speculative. The employer may opt to select the senior applicant every time or when the employer selects a

junior applicant, the senior applicant may not protest. Therefore, it makes no sense to let a theoretical disagreement impede the reaching of agreement on the terms of a new labor contract. The grievance and arbitration procedure allows the parties to postpone refinement of the language “relatively equal” to case-by-case negotiation through the grievance procedure with the understanding that if they cannot agree what the term means in a given case, they will abide by their mutually-selected arbitrator’s interpretation and application of the provision.

The availability of grievance and arbitration procedures also enables the parties to write general principles into their collective bargaining agreement where refinement to specific situations would not be practical. Consider the subject of discipline and discharge. Most unions and employers are able to agree that employees will be disciplined or discharged only for just cause. Refining that general standard into a detailed code of conduct with corresponding penalties for specified instances of misfeasance and malfeasance is usually impractical. Although some parties choose to have a table of penalties for anticipated infractions, even then, it is impossible to anticipate every act or failure to act that might be cause for discipline and all of the surrounding circumstances that might affect the level of discipline to impose. The grievance and arbitration procedure allows the parties to agree to the general just cause standard and defer refining it to case-by-case negotiation through the grievance procedure with the understanding that if the parties are unable to agree, they will abide by the resolution decided by their mutually-selected arbitrator. Thus, grievance arbitration is a continuation of and plays a vital role in the parties’ collective bargaining process.

The first documented grievance arbitration in the United State occurred in 1871 when the Committee of the Anthracite Board of Trade and the Committee of the Workingmen’s

Benevolent Association selected Judge William Elwell of Bloomsburg, Pennsylvania to resolve the parties' disputes over strikes and discharges. During the early part of the twentieth century, employers and unions in the apparel, entertainment, coal and railroad industries settled disputes by arbitration. General Motors and the United Auto Workers agreed to settle unresolved grievances by arbitration in 1937.

Concerned that strikes could interrupt production vital to the war effort during World War II, President Franklin Delano Roosevelt created the War Labor Board. The War Labor Board encouraged parties to include grievance arbitration provisions in their collective bargaining agreements and when parties resisted, the Board frequently ordered it. By 1944, 73% of labor agreements provided for arbitration of grievances. Today, the practice is nearly universal.

Section 203(d) of the Taft-Hartley Act of 1947 declared, "[f]inal adjustment of a method agreed upon by the parties . . . to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." Section 301(a) provided, "Suits for violation of contracts between an employer and a labor organization . . . may be brought in any District Court of the United States having jurisdiction of the parties . . ." In *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), the Supreme Court interpreted Section 301 as a mandate for the federal courts to develop a common law of collective bargaining agreements and laid down a core principle of that common law: the agreement to arbitrate is the *quid pro quo* for the agreement not to strike.

Thus, in the private sector, arbitration substitutes for workplace strife during the term of the labor agreement and is part of the parties' continuing collective bargaining process. In the public sector, however, most jurisdictions prohibit strikes. Indeed, it is a felony for an

employee of the federal government to go on strike (and there are many former air traffic controllers who have felony convictions to prove it). Even in the handful of jurisdictions that recognize a public employee right to strike, strikes are prohibited during the term of a collective bargaining agreement. Many public sector jurisdictions require collective bargaining agreements to have grievance and arbitration provisions.

Thus, in the public sector one cannot say that grievance arbitration literally is a substitute for strikes and in many jurisdictions one cannot say that it is something literally created by the agreement of the parties. However, in the public sector, grievance arbitration still serves as part of the parties' continuing collective bargaining process. The arbitrator may derive authority from a statute as well as the parties' labor agreement, but the arbitrator always derives authority from the parties' mutual selection of that arbitrator to resolve the specific dispute at issue, just as in the private sector.

## **ARBITRATION VERSUS MEDIATION**

Arbitration is a method of dispute resolution in which parties to a dispute submit their controversy to an impartial person or panel for a final and binding decision. In this process, the arbitrator renders a decision based on the evidence and arguments presented by the parties at the arbitration hearing.

With respect to labor-management relations, two basic forms of arbitration are most often used. Grievance arbitration, also called "rights" arbitration, is used to resolve disputes relating to the interpretation or application of an existing collective bargaining agreement. Most labor agreements contain grievance procedures consisting of several steps in which an attempt is made to resolve the dispute prior to resorting to arbitration, and only if a grievance

remains unresolved following presentation and discussion in the grievance process is it submitted to arbitration.

“Interest arbitration,” on the other hand, is used to resolve disputes relating to the future terms and conditions of a labor agreement. These disputes do not turn on an alleged violation of an existing contract, but rather, on the wording to be included in the contract itself. Interest arbitration is usually preceded by an impasse in contract negotiations between the parties. The process may be invoked voluntarily, but most often it occurs because it has been mandated by state and federal laws that require this form of arbitration in the public sector when parties have reached an impasse in the negotiation of a collective bargaining agreement.

Arbitration is an adjudicative process, and while formal rules of evidence and legal procedure are relaxed in labor-management arbitration, the process results in a final and binding decision, enforceable in court, unless the parties have agreed that the arbitrator will render only an advisory award.

In contrast to arbitration, “mediation” is a process by which a neutral third party assists disputants in reaching an agreement, rather than deciding the dispute. In labor-management relations, mediation can be used to assist a union and employer in resolving a bargaining impasse; it can also be used for the resolution of grievances arising under a contract. A mediator seeks to facilitate agreement by fostering communication between the parties, clarifying and framing the issues, exploring new areas of discussion, setting the pace of negotiations, providing focus, making suggestions for mutually acceptable solutions, encouraging compromise, and managing the tone of negotiations. Because each case is unique, a mediator generally has to decide whether and when to meet separately and jointly with the



parties. Whereas it is improper for an arbitrator to have *ex parte* communication with parties, a mediator will often meet privately with each party in caucus and will shuttle back and forth between them, presenting proposals and counter-proposals for consideration. Unlike an arbitrator who is expected to decide the outcome of a dispute, a mediator cannot force the parties to agree to a settlement. Moreover, recommendations made by a mediator are not binding, but are merely suggestions as to how to resolve a dispute.

Both arbitration and mediation are valid and important methods for the resolution of labor-management disputes, and depending on the nature of the dispute and the degree of compulsion that the parties either desire or that the law requires, one process may be preferable to the other.

The key distinctions follow. In arbitration, parties relinquish control to an impartial third party who settles a dispute by determining their rights and obligations pursuant to contract and/or law; the arbitrator's task is to decide the issue and bring closure; the focus is narrow and generally limited by defined rules and procedures; hearings are formal and evidentiary; decisions are based on evidence, contract terms, and law; and there is often a "winner" and a "loser." In mediation, parties retain control over the outcome; the neutral's function is to assist the parties in defining the issues and exploring possible resolutions; the potential for compromise is determined by the parties; negotiation is facilitated; participants have flexibility to determine the ground rules and to communicate directly with each other and the mediator; and the process is "low risk" to the extent that it avoids a mandated result.

Not surprisingly, a hybrid alternative dispute resolution process called "med-arb" has been used to resolve certain disputes. It begins with mediation, and if mediation does not

produce an agreement, the mediator becomes the arbitrator with the consent of the parties after disclosure of potential ethical issues. The arbitrator then resolves the dispute through the hearing and decisional processes. Clearly, med-arb gives the parties an opportunity to reach an assisted voluntary agreement, but also provides finality if conciliation does not result in a settlement; However, it is a process that has to be used with care. Typically, in the mediation process the parties will be candid and share confidential information. Should mediation fail to result in a settlement, it may be very difficult for the neutral to switch roles and serve as arbitrator with disinterest and impartiality, particularly if the parties have “bared their souls” and have exposed positions which would not normally come into a hearing record. Nevertheless, some parties relish the med-arb process and will select neutrals who likewise enjoy the opportunity to use their mediation skills and, if necessary, their arbitral power, to resolve a dispute.

Many arbitrators also serve as mediators and vice versa. Certainly, there are qualities and skills that they share, most particularly the ability to be impartial in any given case to which they are assigned. Other personality traits that many arbitrators and mediators have in common are the capacity to work alone, the ability to see all sides of an issue, a sensitivity to both the overt and underlying issues in a dispute, possession of confidence in one’s own judgment, a deep understanding of the dynamics of labor-management relations, and a willingness to work in often tense situations with parties who resent and distrust one another. Arbitrators and mediators who switch roles often enjoy the two sides of their professional lives, relishing their work as adjudicators in some cases, but also enjoying the challenge of serving as

conciliators in situations where they can assist parties to craft their own destiny instead of having one imposed.

The differences between arbitrators and mediators, however, are as notable as the similarities. Whereas arbitrators must maintain an arm's length relationship with parties during the pendency of a case, and avoid any conduct that would create the appearance of partiality, mediators work closely and often on an *ex parte* basis with disputants. In their capacity as conciliators and facilitators they need to have insight into the personalities and power structures behind a dispute, express empathy for the disputants and their positions, think creatively to search out new ways of settling a dispute, possess a keen sense of timing, and be ready to work long hours and "hang in" with the parties because the process of resolving an impasse is frequently time consuming and unpredictable.

Arbitrators must bring strong analytical skills to their work, particularly in regard to reading and interpreting complex contractual and statutory terms. They should also be skilled writers because their reputations as competent adjudicators depend, in part, on their ability to craft opinions that are clear, comprehensible, and grammatically correct. They also need to be assertive and to manage their hearings in such a manner that, regardless of the outcome, both parties will feel they were heard and that the process was fair.

A mediator also needs to keep control of the mediation and exert a positive influence on the climate of the negotiations. However, in contrast to an arbitrator, a mediator does not necessarily have to be a proficient writer or a wordsmith. Moreover, unlike an arbitrator who must write a decision that draws its essence from the labor agreement and may have to withstand judicial scrutiny, as well as a critical reading by the parties, a mediator is not as

concerned with objective fairness or the correctness of a settlement as he/she is with its acceptability. It is not essential that the mediator consider the terms of a settlement desirable, whereas an arbitrator always strives to write a decision that is arguably the correct, or just, interpretation of the labor agreement.

Not surprisingly, teaching law, economics and other subjects, and the practice of law are the occupations that often precede entry into the field of arbitration. Moreover, many arbitrators continue to teach at universities and law schools or maintain some involvement in the practice of law while pursuing a practice as a labor arbitrator. Both teaching and law enable a would-be arbitrator to have neutrality, visibility, and availability, all of which enhance the probability of selection. Individuals with management, government, and union experience are also represented among the ranks of arbitrators, but they are fewer in number, and it may take them longer to gain acceptability, especially if their background is advocacy for labor or management.

Mediators may also have formative experience in teaching, but less often in law. A significant number of mediators have been union members or officers at one time, and others have held managerial positions. Many mediators are full-time employees of government agencies, such as the Federal Mediation and Conciliation Service, or any number of state agencies that provide neutral dispute resolution services in both the private and public sectors.

### **THE IMPACT OF THE *STEELWORKERS TRILOGY***

With the passage of the Wagner Act in 1935, Congress determined that it is our national policy to encourage collective bargaining as the preferred method to promote industrial self-governance and industrial peace. During WWII, the War Labor Board was created to avoid or

resolve industrial strife by encouraging arbitration and to recognize the awards of arbitral tribunals. In 1947, Section 301 (a) of the Taft-Hartley Amendments to the basic labor statute authorized federal courts to enforce the terms of collective bargaining agreements and provided a basis for the creation of substantive federal law. Before the passage of Section 301 (a), the law surrounding the enforcement of collective bargaining agreements, particularly the specific enforcement of the grievance arbitration provisions of the agreement, was confusing and uncertain. In 1957, the Supreme Court in the *Textile Workers v. Lincoln Mills*, 353 U. S. 448 (1957), ruled that an arbitration provision in a collective agreement was specifically enforceable by the federal courts, thus ending the confusion and uncertainty.

In 1960, the Supreme Court decided three monumental cases (collectively known as the *Steelworkers Trilogy*), all of which advanced the cause of labor arbitration. The first, *United Steelworkers of America v. American Manufacturing. Co.*, 363 U.S. 564 (1960), determined that courts must refrain from considering the merits of a grievance when the parties have agreed to submit all grievances to arbitration. Judicial consideration of the merits would usurp the role of the arbitrator. The presumption is that the parties wish the arbitrator to determine whether they agreed to arbitrate certain disputes. Thus, the courts will enforce the contractual promises to arbitrate. The second, *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), held that courts should construe arbitration clauses as broadly as possible, so that all grievances will be submitted to arbitration, unless there is no reasonable interpretation which allows it. The Court said that a court must order arbitration unless it can be said with “positive assurance” that the parties did not intend to arbitrate. The third case of the trilogy, *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593

(1960), held that courts should enforce an arbitration award as long as the arbitrator's decision “draws its essence” from the collective agreement.

These three seminal cases had an undeniably significant impact on the role and importance of labor arbitration in the American legal system, and firmly established arbitration as the preferred means of settling labor disputes. In choosing to exercise a high level of judicial restraint regarding the decisions of labor arbitrators, the Court signaled its approval of an internally contained form of self-governance created by contract between labor and management. There has been near complete judicial deference to arbitrators by the courts in the wake of the *Steelworkers Trilogy*. As a result of this judicial support, labor arbitration has become the norm for handling labor grievances. In the United States, contracts that do not provide for final and binding arbitration of grievances are rare and in Canada they do not exist because grievance arbitration is required by statute.

As a consequence of the decisions in the *Steelworkers Trilogy*, labor arbitration, in the words of one commentator, “passed from an awkward step-child of the courts to their favorite off-spring. With the Supreme Court in the lead, the federal courts lent their considerable support to arbitration agreements, to the arbitration process, and to the enforcement of resulting arbitration awards.” Laura J. Cooper et. al., *ADR In The Workplace* 17 (2d ed.2014).

The benefits of labor arbitration are quite evident, and the impact of the *Steelworkers Trilogy* continues today. Courts, by and large, are unwilling to second guess the decisions of arbitrators unless they have clearly exceeded their scope of authority in interpreting collective bargaining agreements. As recently as March 5, 2014, in *BG Group, PLC v. Republic of Argentina*, 134 S. Ct. 1198 (2014), the Supreme Court reaffirmed its presumption in favor of

submitting disputes to arbitration and its unwillingness to review the decisions of arbitrators.

This case was particularly notable in that it dealt with a treaty between sovereign nations rather than a collective bargaining agreement between labor and management, and yet the Court applied the reasoning of the *Steelworkers Trilogy* just as forcefully. There are no signs that this trend will change anytime soon, and we can reasonably expect that arbitration will maintain its place of primacy in the foreseeable future.

## **THE ARBITRAL PROCESS**

Most collective bargaining agreements contain a grievance procedure permitting one or both parties to file a written grievance alleging a violation or misapplication of its terms. In cases involving discipline or discharge, the term in dispute is usually “just cause,” “good cause,” or merely “cause.” The grievance procedure typically includes steps involving progressively higher levels of management and union officials at which the grievance will be discussed, and if it is not resolved or withdrawn, the aggrieved party may submit the dispute to binding arbitration. Almost all grievance procedures contain time limits and other procedural prerequisites for the submission of the grievance to arbitration.

The arbitration process normally starts with the filing of a demand, in writing. The contract may also include an organization to administer the process and provide for the selection of the arbitrator, for instance, through the American Arbitration Association or the Federal Mediation and Conciliation Service. The demand typically states the issue(s) on which the arbitrator’s decision is sought. Many times the arbitrator does not see the demand until the start of the arbitration hearing. The wording of the demand, as well as the submission that

most parties stipulate at the outset of the hearing, states the nature of the dispute and frames the arbitrator's authority.

*Ad hoc*, or single case, arbitrators are used with great frequency in labor arbitration. They are chosen to hear only a specified grievance or group of grievances. One advantage of *ad hoc* arbitration is that it allows the parties to choose a different arbitrator for each case and to pick particular arbitrators with special qualifications for certain cases. This type of arbitration also permits the parties to assess the performance of the arbitrator after each case. A possible disadvantage of this temporary type of system is that *ad hoc* arbitrators may lack familiarity with the parties, their collective bargaining agreement, and their industry.

In contrast, parties to a labor agreement may elect to use a permanent arbitrator, or "impartial umpire," for a specified period of time. The parties may also agree on a panel of arbitrators from which a selection is made for each case. The arbitrators on these panels are generally chosen on a rotating basis or by some other mutually acceptable method. While the choice is more limited than in the *ad hoc* arrangement, permanent arbitrators have the opportunity to become familiar with the parties, their contract, processes, and preferences about the role of the neutral. This familiarity can lead to speedier hearings and greater confidence in the outcome of the process. On the other hand, parties may select an arbitrator and panel of arbitrators that do not entirely meet their expectations and then find it difficult or awkward to make a change until the contract expires. There is also the risk that a permanent arbitrator may become too familiar and attempt to impose his or her judgment where it is not desired, or worse, try to "split the baby" in writing decisions so that, over time, there is the



appearance that each party is winning enough decisions for the arbitrator to remain acceptable to both parties.

Still another arbitration system often written into agreements is tripartite in nature, either on a temporary or permanent basis. Parties selecting this structure are interested in making certain that their arguments are clearly and vigorously presented to the neutral arbitrator and that the neutral arbitrator understands the intricacies and complexities of a particular industry. This occurs because each party appoints its partisan “arbitrator,” and the third, or neutral chairperson, is selected by mutual agreement. While tripartite arbitration can be cumbersome and expensive, the participation of party-appointed members of the panel can strive not only to bring about a favorable outcome for their side, but also to influence how the arbitrator writes the decision, i.e., what arguments to highlight, what issues to de-emphasize, etc. One of the advantages of tripartite arrangements is that they frequently enable the neutral arbitrator to hold executive sessions, or off the record discussions, with the party-appointed members with the objective of working out a mutually satisfactory award.

Parties spend a lot of time learning about arbitrators and trying to select neutrals in whom they will have confidence. The selection criteria most often cited include: educational background, experience and training, reputation for impartiality and fairness, skill in managing hearings, ability to write a well-reasoned opinion, prior decisions in similar cases, and availability and willingness to travel. Undisputedly, arbitrators have to possess the core knowledge, training, and integrity that will make them acceptable to a wide variety of employers and labor organizations. However, they also need to have certain personality traits and competencies that will make them successful practitioners in a field that often is very

lonely and demanding. The will to be resolute in the face of pressure; the ability to work alone; the discipline to produce decisions that are timely; the capacity to craft opinions that are understandable, intellectually honest, and well-written - all of these skills are critically important if one is going to become an acceptable arbitrator.

There is no such thing as the “perfect” arbitrator. Arbitrators, as other professionals, come with a variety of personalities, backgrounds, and styles. Fortunately, parties to labor agreements also vary dramatically in their styles, preferences, and expectations for the arbitration process. Moreover, while there may be legal limitations on what is substantively arbitrable under certain labor agreements, particularly in the public sector, for the most part parties have great freedom to fashion arbitration systems to meet their particular needs and to select the type of arbitrators with whom they are most comfortable.

It is often said that while the arbitrator controls the hearing, the parties own the process. That is true. Indeed, the arbitrator is expected to manage the hearing so that both parties have the opportunity to present their cases in accordance with applicable rules, procedural requirements, and evidentiary standards. But parties have great influence on whether the arbitrator will preside over the hearing in a very formal and legalistic way, or will be more informal and relaxed with respect to legal procedure and the rules of evidence. The arbitrator also needs to be mindful as to whether the parties have an interest in using the hearing for mediation or prefer a strictly adjudicative approach. Frequently, parties who use a permanent umpire expect the neutral to attempt to mediate the dispute or hold behind-the-scenes conferences to help them reach a compromise or, at least, to gain a better understanding of the issues personalities and circumstances underlying a dispute. But this is

not a universal attitude, even where a permanent arbitration system is in place. Some parties have no interest in using the arbitration hearing for conciliation, and they insist that the arbitrator remain in an “arm’s length” relationship with them, stick tightly to the judicial role, and refrain from making suggestions for settlement.

In managing a hearing, the arbitrator must also decide whether to be a passive or active hearing officer. Arbitrators have often debated whether they should ask questions during the hearing or be content with what the parties present, even if there are obvious deficiencies in the amount, quality, and/or clarity of the testimony and evidence. Most arbitrators believe that they should ask questions when there is a need for clarification, particularly if they wait until the parties have finished questioning the witnesses. The risk is in being too aggressive in interrogating witnesses or posing questions that appear to make the case for one party or the other.

All good arbitrators understand that hearings should be run with efficiency and objectivity. But, the arbitrator has to be wise enough to know when and how to adapt his or her style to the needs and preferences of the parties. The bottom line is that in serving as a hearing officer, the arbitrator must often use a variety of approaches, depending on the terms of the applicable contract and the expectations and experiences of the parties. The parties need to walk away from the process believing that the arbitrator not only understood their contentions and carefully analyzed the issues in a well-reasoned decision, but also that the arbitrator ran the hearing in a manner that afforded both parties the chance to be heard and that was consistent with their mutual intentions.

## **VARIANCES IN THE ARBITRATION PROCESS**

As noted above, there are two varieties of labor arbitration: interest arbitration and rights arbitration. Interest arbitration involves the determination of contract terms when the parties are unable to agree on the terms to go into the labor agreement. Rights arbitration involves the interpretation and/or application of existing contract language. Both varieties of arbitration may take different forms. Examples below are not intended to be exhaustive.

### **Interest Arbitration**

Employees of the federal government and state and local government employees in most states are prohibited from striking. Even in the few states that recognize a public employee right to strike, strikes by law enforcement and firefighters are almost universally prohibited. Although there is some use of interest arbitration in the private sector, it has been used more extensively in the public sector as a substitute for the right to strike.

There are three methods that have been used to resolve issues in dispute. The first, or more traditional method, has been for the arbitrator to review the evidence and make a determination based on his or her best judgment. Some issues, such as dues checkoff, require a yes or no determination. Wages would require a determination of a figure bounded by the last offers of the employer and the union, but not excluding a figure somewhere between the two extremes. A second method restricts the arbitrator to select either the employer's offer or the union's offer on an issue by issue basis so that the arbitrator could, for example, select the employer's offer on wages but the union's offer on certain fringe benefits. A third method, final offer package arbitration, restricts the arbitrator to a selection of one party's final offer to

the exclusion of the other party's final offer, theoretically forcing both parties toward the middle in an attempt to provide a realistic offer that will gain the arbitrator's approval.

Criteria to be considered by the arbitrator are often set by statute. They typically include comparative wages and benefits in other similar jurisdictions, comparative wages and benefits for similar occupations, the wages and benefits received by the employer's other employees, especially those who are represented in collective bargaining, the political jurisdiction's ability to pay, cost of living and recent wage increases.

A unique form of final offer interest arbitration is used by major league baseball owners and players, essentially for players who have 3-6 years of service, although players with more than 6 years of service may go to salary arbitration with the club's agreement. This is a highly structured process involving a panel of three neutral arbitrators. Each side has one hour to present its case in chief and 30 minutes to present a rebuttal. While not written into the process, it is not unusual to extend the process for an additional approximately 10 minutes of sur-rebuttal. The panel then has 24 hours in which to reach a decision on whether the player will receive the club's last offer or the player's last demand. The arbitration panel is not allowed to explain the decision either in writing or orally. The decision is communicated by the chair of the arbitration panel filling in the missing salary figure in the copy of the player's contract that has been given to the panel.

While interest arbitration cases are critical in the life of the parties involved, they occur very infrequently. Federal Mediation and Conciliation Service (FMCS) statistics for fiscal year 2013 show 31 arbitration cases involving new or reopened contract terms (interest arbitration) and 2093 arbitration cases involving the interpretation or application of existing contract terms.

Thus interest cases comprised just under 1 ½% of the total FMCS caseload for the fiscal year. It should be noted that FMCS data understate the overall use of interest arbitration because, in many states, interest arbitrators are appointed by a state public sector labor relations agency rather than FMCS.

## **Rights Arbitration**

Variations in rights or grievance arbitration procedures often involve the use of expedited procedures, but may involve other aspects of the procedures as well. As a base point, a traditional arbitration procedure most often involves a single arbitrator, may or may not involve a court reporter recording the testimony and arguments, can end with written post-hearing briefs or with oral arguments and places no limits on the length of the hearing. FMCS statistics for fiscal year 2013 show that briefs were filed in 1,654 of 2,124 cases (78%) and that transcripts were taken in 991 of 2,124 cases (47%). Usually arbitration clauses require the parties to split evenly the arbitrator's professional fees and expenses, but some provide that the party losing party pays the entire fee.

The parties control the precise procedures they will follow and variations abound. For example, the 2012 Internal Revenue Service—National Treasury Employees Union National Agreement II contains three possible procedures: (1) Conventional arbitration may involve multiple-day hearings, a court reporter and, with rare exceptions, post-hearing briefs. (2) Expedited arbitration is used for a variety of issues set forth in the labor agreement. Arbitrators are encouraged to mediate, must produce a decision within 30 days after the hearing and are limited to four pages. Transcripts and post-hearing briefs are not allowed. (3) Streamlined hearings are almost always telephonic and exclude a transcript and briefs. Arbitrators are

expected to try to mediate a settlement and to issue a bench award followed by a summary of no more than two pages if the grievance goes to a hearing. For all three procedures, if the grievant substantially prevails (as determined by the arbitrator), the IRS must pay 75% of the arbitrator's fees and expenses. The split of fees and expenses is 50/50 if the IRS substantially prevails.

The Postal Service and American Postal Workers Union (APWU) have a current agreement that provides for what is called District Level and Expedited arbitration depending on the issue. Transcripts are almost unheard of in district level cases and prohibited in expedited cases. Briefs are prohibited in district level discipline cases unless there is mutual agreement, but allowed in contract interpretation cases. Arbitrators have 30 days in which to render an award. Briefs are prohibited in all expedited cases and it is expected that hearings will not last longer than a day. Bench awards are allowed in expedited cases, and written awards are expected within 48 hours. Arbitrators are not paid study time, i.e. for the time spent considering the issues and writing the award, for expedited cases.

The Postal Service has contracts with the National Association of Letter Carriers and the National Postal Mail Handlers Union that provide for regular and expedited arbitration. Similar to the APWU contract, these contracts have an expectation that there will be no transcript and that oral closing argument will be the norm. Arbitrators have 30 days to issue a regular award and 48 hours for an expedited award. All three of these labor agreements provide for a 50/50 split of the arbitrator's fees and expenses in all cases. The Postal Service and the Mailhandlers also have agreed to a stipulated hearing whereby a joint grievance file, joint exhibits and written arguments are mailed to an arbitrator for a decision.

The Postal Service contract with the National Rural Letter Carriers' Association provides only for regular arbitration. Transcripts and briefs are to be the exception, with the arbitrator given 30 days to render an award. Unlike the other postal contracts, the parties have agreed that the loser will pay 100% of the arbitrator's fees and expenses.

The airline industry, unlike most arbitration procedures, uses tri-partite panels. Arbitration panels involving pilot cases generally include the neutral chair and two pilot union and two employer members. Panels in cases involving other airline bargaining units usually include the neutral chair and one representative each from union and management.

American Airlines and Transport Workers Union Local 501, a New York City based fleet service local, have a regular and expedited procedure for discipline cases. Discharge cases go to the regular procedure, which involves a tri-partite panel, no transcript and oral summation. Non-discharge disciplinary cases involve an expedited procedure with a three-hour limit on the hearing, after which the arbitration panel confers and the neutral chair completes a one-page form that states the issue and the outcome, including an award if the grievance is sustained. The form is then returned to the parties at the hearing. Other industries use variations of this expedited procedure.

The railroad industry has a unique arbitration procedure that is an appellate procedure rather than a *de novo* hearing, unlike almost all other arbitration procedures. An employee believed to have violated one of the employer's operating or conduct rules is required to attend an investigation, which is an on-property hearing conducted by a member of rail management. The employee may be represented by a union official and is allowed to cross-examine management witnesses and to present witnesses and exhibits. The hearing is transcribed. If



discipline is issued, there are several rounds of written appeals. If management denies the appeals, the case may be appealed to an arbitrator (referee in railroad parlance). The referee receives the case file consisting of the transcript and exhibits, the written appeals and denials and, possibly, briefs written by the parties. In some instances there is a hearing in which several different cases are considered, with representatives of each party stressing the strengths of their cases and, possibly, the grievant making a statement on his/her behalf. It is possible that the hearing will lead to voluntary resolution of the appeal. The representatives of the employer and the union, with the referee, make up the arbitration board, with a majority vote necessary for an award to be finally adopted.

In addition to the variations above, parties have developed pre-arbitration procedures to try to avoid arbitration entirely. At one time, AT&T and the Communications Workers of America used a hybrid mediation-arbitration procedure to resolve grievances, but they abandoned the process. IRS and the NTEU used med-arb to resolve disputes over higher-graded duties, with telephonic mediation. For about ten years the FAA and National Air Traffic Controllers Association used an arbitrator in an informal process to advise what the outcome would be if the case actually went to arbitration. IRS and NTEU currently use a process whereby non-attorneys attempt to settle grievances over a restricted range of issues, with unresolved grievances going before an arbitrator with restricted hearings and bench decisions. In the Province of Alberta, Canada, the United Food and Commercial Workers Union and a major supermarket submit unresolved grievances to an experienced arbitrator who gives an oral recommendation on the likely outcome of the case if it were to go to arbitration. In this

pre-arbitration step, many grievances are considered in a single day. If the recommendations do not produce a settlement, a different arbitrator subsequently hears the case.

## **Value**

The various procedures represent industry practices and the parties' beliefs as to what works best for them. For example, all baseball salary arbitration cases are heard and decided in February so that the players and clubs know what the salaries will be before the start of spring training. The advantages of the various expedited procedures are numerous: eliminating transcripts, limiting hearing time, eliminating post-hearing briefs and limiting an arbitrator's written product. These procedures save money and reduce the time between when the case is heard and when an award is issued.

## **ARBITRATION'S VALUE BEYOND RESOLVING THE IMMEDIATE DISPUTE**

While the primary goal of labor arbitration is to determine which side prevails in a labor dispute, the advantages of the process are many and varied. To begin with, labor arbitration serves to prevent strikes and encourage economic stability, as arbitration clauses typically are accompanied by no-strike; no-lockout provisions. Thus, employees voluntarily surrender their right to strike in exchange for having their grievances considered by an impartial third party. Because strikes and lockouts can be very burdensome for all parties involved, this is a very important advantage. Regardless of which side prevails, workplace peace can be maintained much more readily through arbitration.

Labor arbitration also serves the interests of efficiency and judicial economy, as the arbitration process is typically much faster than litigation, and it prevents the courts from

getting bogged down with the high volume of labor disputes. It is also much less costly. The entire arbitration process can sometimes be completed in a matter of days or weeks as opposed to the months or years that litigation can take. With grievances being considered and dealt with on a more efficient basis, the parties are better able to maintain a more stable and less contentious relationship. With the courts free of these numerous labor disputes, more judicial attention can be devoted to other matters to which the judiciary is better suited.

Additionally, labor arbitration has often been praised for its reliance on a more focused expertise, as labor arbitrators are typically more knowledgeable about the relevant industry than judges. Having a substantial amount of practical knowledge of the "common law" of the relevant industry can be invaluable when attempting to determine the most effective solution to a labor dispute. A collective bargaining agreement is sometimes likened to a statute which should be interpreted in the context of the industry to which the parties belong, and arbitrators are well equipped for this type of interpretation, as they typically have significant experience and expertise in the industry.

Even beyond the advantages of efficiency and good decision-making, courts have recognized that arbitration has a therapeutic and analgesic value in that it allows for parties to have a fair hearing regarding even frivolous claims. Complaining parties may not realize their complaints lack merit. Arbitration gives them an opportunity to be heard and to feel that they have been taken seriously by the arbitrator and the opposing party. It also exposes them to the opposing party's position. Even the process of preparing a case for hearing can have a salutary effect by forcing parties to focus carefully on the language of their agreement and the credibility of their evidence.

Sometimes, the resort to arbitration allows one or both parties to resolve knotty internal political issues. In addition, judgments are usually complied with much more quickly and voluntarily in the context of arbitration than in that of litigation, because the parties have voluntarily submitted to the process. Only rarely is it necessary to seek judicial enforcement of an arbitration award.

It is true in some labor arbitration systems, particularly where there is a large bureaucracy administering the procedure or there is an inadequate budget allocated for a smooth functioning operation, that the reality falls short of the ideal described above. Even if the operation of the arbitration system is less than fully efficient, however, it still provides significant advantages over the use of the courts for the resolution of these issues.

Because of all of these advantages, both parties to a labor dispute are likely to have more confidence in the outcome of arbitration than they would have in a judicial decision. The value of arbitration, therefore, lies not only in its ability to produce a good decision, but in the way in which this decision is likely to be received by the parties. This is a benefit that makes arbitration a very effective method of resolving labor disputes, and helps to maintain harmony between employers and employees. This is a harmony which benefits society as a whole.

## **BECOMING A LABOR ARBITRATOR**

The decrease in union membership, particularly in the private sector; maturation of union-management relationships and economic realities in a global industrial society have led to a decrease in arbitration cases and has made entry into the field of labor arbitration more difficult. Nevertheless, there are time-honored ways in which new arbitrators have been able to emerge. While there has been a decrease in formal training courses, some still exist. Pre-

eminent is the week-long Federal Mediation and Conciliation course offered periodically, taught by NAA members. Those who complete the course get credit for three arbitration awards, which is important because the FMCS requires the submission of five awards issued by the applicant (practice awards do not count) with an application for inclusion on the panel of labor arbitrators. More information can be found at [www.fmcs.gov](http://www.fmcs.gov).

The American Arbitration Association (AAA) maintains a panel of labor arbitrators. Anyone wishing to be added to the panel must be nominated by another panel member. The application will require 12 references: four from management, four from unions and four from other arbitrators. Unlike FMCS, AAA does not require applicants to have already decided any cases. Additional information may be found on the AAA website: [www.adr.org](http://www.adr.org).

The New York State Bar Association, Labor and Employment Law Section, has maintained an Arbitrator Mentoring Program for over 20 years. Those with substantial experience in labor-management relations may apply. If accepted, individuals will work with four NAA mentors. Trainees will attend arbitration hearings, take notes, receive copies of all exhibits and write a hypothetical Opinion and Award. The hypothetical award will be discussed after the mentoring arbitrator has issued his or her Opinion and Award. Those who successfully complete the program are introduced to the Labor and Employment Law Section at the annual January meeting, usually attended by 500-600 people, have their resumes and contact information published in the Section's Quarterly Newsletter sent to more than 2,300 Section members and are nominated to the AAA National Labor Panel, with completed applications receiving expedited processing. Former Program Administrator and NAA Member John Sands

has noted that ten current NAA members are graduates of the mentoring program. The Province of Ontario, Canada, has a similar program.

Individuals may come into the practice of labor arbitration through prior neutral or partisan work in labor relations. This might include work for the National Labor Relations Board, the Federal Labor Relations Authority, FMCS, state labor relations authorities or boards often concerned with public sector union-management relations, and other agencies that employ hearing officers. Management labor relations and human resource management officials and former union officials who have developed reputations for integrity have been able to make the transition to neutral labor arbitration work. This is also true for attorneys who have represented partisan interests and who have decided to become arbitrators.

These individuals have often developed informal mentoring relationships with arbitrators with whom they have worked in the past. Such relationships may develop somewhat along the lines of the New York State Bar mentoring program, to include attendance at hearings, the writing of hypothetical awards, discussions of all aspects of an arbitration practice and introduction to practitioners who select arbitrators and/or present cases.

Academicians have used the expertise gained in their specific fields of study as stepping stones into the labor arbitration field, with or without mentors. Law school faculty, particularly those teaching courses related to labor law and business school and economics professors who teach labor relations, human resource management, business law courses, and labor economics are most likely to become arbitrators, although other disciplines are not excluded.

In the railroad industry the National Mediation Board (NMB), the federal agency that administers the Railway Labor Act, maintains a roster of railroad neutrals. Information may be

obtained from the NMB's website, [www.nmb.gov](http://www.nmb.gov). In the past the Union Pacific Railroad Company and the United Transportation Union have co-sponsored orientation sessions to familiarize otherwise experienced arbitrators with the railroad industry and railroad arbitration. This provides a possible route into arbitration work in an industry in which arbitrators are often drawn from former railroad management and union officials. Arbitrators seeking to become acceptable in the railroad industry should consider joining and attending the meetings of the National Association of Railroad Referees.

AAA and FMCS require that arbitrators on their rosters not engage in any advocacy work in labor relations. Many other agencies impose a similar requirement. Membership in the National Academy of Arbitrators also is contingent on no labor relations advocacy. Indeed, Academy members cannot belong to law firms that engage in labor relations advocacy, even if the member him or herself does no advocacy work.

## **HURDLES FACED BY WOMEN AND PEOPLE OF COLOR**

The DVD features two of the pioneering African American arbitrators, Harry Edwards and James Harkless, and two of the pioneering women arbitrators, Frances Bairstow and Roberta Golick. Throughout much of the twentieth century, women and persons of color faced two major barriers to becoming successful arbitrators.

No one graduates from school and becomes a labor arbitrator. There are no entry level labor arbitrator positions. Most become labor arbitrators after years of experience as union or management advocates, as neutrals with labor boards or mediation agencies, or as academics teaching labor law, labor relations or labor economics. For much of the twentieth century, this pipeline was predominantly white and male.

However, even the most outstanding labor board employee or the most outstanding advocate or the most highly regarded teacher and scholar will not succeed as a labor arbitrator without one essential quality – acceptability. Acceptability refers to the likelihood that a union and an employer will select a particular arbitrator to hear a case. A primary source of the arbitrator’s authority and legitimacy is his or her mutual selection. Consequently, would-be arbitrators are vulnerable to the overt and implicit biases of the persons making the selections. When those selectors were overwhelmingly white and male, it was not surprising that the arbitrators they selected were overwhelmingly white and male.

There is much greater awareness today of workforce diversity. The arbitrator pipeline has also changed. The percentage of female law and graduate students has risen dramatically, along with increased racial and ethnic diversity (albeit less so than gender diversity). Programs developed aimed at women and people of color, encouraging them to become arbitrators. As the pipeline grew more diverse, so did the selectors and so did the workforce as a whole. These factors worked to ameliorate the barriers to women, African Americans and Latinos becoming successful arbitrators. Today, white males remain a majority in the membership of the National Academy of Arbitrators but there has been a major increase in the number of women arbitrators. The number of black and Latino arbitrators has increased but at a much slower pace. The same barriers continue to work to exclude other demographic groups. There are few Asian or Arabic arbitrators, for example, perhaps because there are few such persons in the pipeline of labor lawyers and labor relations advocates.



## **LABOR ARBITRATION'S BROADER IMPACT**

The North American arbitration approach has also spread to other countries. Under the leadership of Past NAA President Arnold Zack, the labor arbitration model has been adapted to form the Due Process Protocol for Mediation and Arbitration of Employment Disputes, providing standards of fairness for dispute resolution procedures in non-union workplaces.

Ralph Seward, a founding member of the NAA and its first President (1947-1949) established a dispute resolution system for the hotel industry in Bermuda, with arbitration later extended to interest and rights disputes for all government agencies in that country. Past NAA President Richard I. Bloch traveled to South Africa in 1984—a trip that resulted in the development of mediation and arbitration and related training systems. A number of NAA members have been involved in helping to build a tripartite structure for resolving disputes involving white employers and black trade unionists. South Africans trained in dispute resolution helped write a new constitution using the new tripartite structure as the model. The Commission for Conciliation, Mediation and Arbitration is modeled on the American-Canadian dispute resolution process introduced by NAA members to South Africa.

NAA Members Robert Gorman and Arnold Zack served as judges on international administrative tribunals. Mr. Gorman has served on administrative tribunals of the International Arbitration Court, the International Monetary Fund, the International Labour Organization of the United Nations and the World Bank, where Mr. Gorman served for 27 years as one of seven judges. Mr. Zack conducted the initial training of arbitrators associated with the Cambodian Arbitration Council, emphasizing ethics standards for their work as mediators and arbitrators. NAA members Susan Brown and Allen Ponak serve on the international

advisory committee for the Cambodian system ([www.arbitrationcouncil.org](http://www.arbitrationcouncil.org)). While Saudi Arabia does not approach the well-developed dispute resolution system found in North America, NAA member Thomas Kochan, a Past President of the International Industrial Relations Association, is a current advisor to the Saudi Arabian government. NAA member Richard McLaren has been a member of the arbitration panel for international sports, helping decide high profile drug cases in the Tour de France.

NAA members have influenced and continue to influence consideration and development of equitable workplace dispute resolution models by serving as visiting professors abroad, by involvement in international organizations and by going abroad to train mediators and arbitrators in a number of foreign countries.

## **THE ARBITRATORS IN THE DVD**

Brief biographies of those with speaking roles in the DVD are presented below in the order of their appearance.

- **Arvid Anderson** earned an undergraduate degree in Labor Economics and, after WW II, a law degree from The University of Wisconsin. After his graduation from law school in 1948, Mr. Anderson worked as Secretary and Commissioner of the Wisconsin Employment Relations Board (later known as the Wisconsin Employment Relations Commission) until 1967. During his tenure Wisconsin became the first state to pass a comprehensive collective bargaining statute for public employees. From 1968-1987 Mr. Anderson served as the first Chairman of the New York City Office of Collective Bargaining. After his retirement from the OCB, Mr. Anderson served as arbitrator for hundreds of public and private sector cases, retiring in 2008. He also served as a member of the Secretary of Labor's Task Force on Excellence in State and Local

Government and has been a long-time member of the Local Government Bargaining and Employment Law Committee of the American Bar Association. In 2009, the American Bar Association established the Arvid Anderson Public Sector Labor and Employment Attorney of the Year Award in honor of his lifetime of work. He is a Past President of the National Academy of Arbitrators, a member for over 50 years and a member of the College of Labor and Employment Lawyers.

- **George A. Nicolau** served as a navigator in WW II before graduating from the University of Michigan in 1948 and Columbia University Law School in 1951, thereafter serving as a union lawyer until 1962. Mr. Nicolau began arbitrating in 1969 and was the Impartial Chairman in Major League Baseball from 1986-1995. He has served in similar capacities in Basketball and Indoor Soccer and currently serves as Impartial Chairman in Hockey. He also serves as System Board Chair for major airlines and their pilots, flight attendants and ground personnel and is an arbitration panel member in theater, film, broadcasting, communications, maritime and transportation. An Impartial Member of the New York City Board of Collective Bargaining since 1987, Mr. Nicolau also has been Industry Chair for the League of Voluntary Hospitals and SEIU, Local 1199 since 1993.

Mr. Nicolau has been President of the Society of Professionals in Dispute Resolution and President of the National Academy of Arbitrators, a member of the Board of Governors of the College of Labor and Employment Lawyers and serves as Vice Chair for the U.S. Branch of the International Society for Labor and Social Security Law. Awards include the Distinguished Service Award of the American Arbitration Association in 1987, the Lifetime Achievement Award of the Peggy Browning Fund in 2011 and a Proclamation in recognition of his public

service in which then Mayor Michael R. Bloomberg declared April 4, 2012 George Nicolau Day in the City of New York.

- **Alan A. Symonette** was introduced to labor relations as a “page” in a Chicago law firm. After graduating with a B.A. from Swarthmore College in 1976 and earning his J.D. in 1979 from Villanova University School of Law, Mr. Symonette worked for the NLRB, Region 4 in Philadelphia. He joined the private sector as an attorney with Atlantic Richfield Company in the early 1980s and worked for other companies thereafter before becoming an arbitrator under the guidance of other Philadelphia arbitrators in 1988. Mr. Symonette is a member of the National Academy of Arbitrators and The College of Labor and Employment Lawyers, where he serves on the Board of Governors. He has been a member of a 1999 delegation to South Africa sponsored by the U.S. Department of State, South African Commission on Conciliation, Mediation and Arbitration, the American Arbitration Association and the ILO. Mr. Symonette has been named a Pennsylvania Super Lawyer annually since 2006 and was a Peggy Browning Fund Honoree in 2014.

- **Roberta Golick** is a graduate of Barnard College and Boston University School of Law. She began her career in 1974 as the first female and youngest mediator in the 100-year history of the Massachusetts Board of Conciliation and Arbitration. In the early 1980s, she left the Board with a growing private arbitration and mediation practice and was admitted to the NAA in 1984. Today she maintains a full-time national and New England arbitration/mediation practice, with service on a White-House appointed Emergency Board tasked with recommending terms to resolve a nationwide freight railroad dispute. Ms. Golick is a Past President of the NAA and a Fellow of the College of Labor and Employment Lawyers. She has

received the prestigious Cushing-Gavin Award, given to a neutral for “Excellence in Labor Relations, Exemplifying Moral Integrity, Professional Competence and Community Concern.”

- **James Harkless** earned his A.B. degree in History from Harvard University in 1952 and his J.D. degree from Harvard in 1955. After serving as a law clerk and an associate in a Boston area union-side law firm, Mr. Harkless took a position as General Counsel for the U.S. House of Representatives Labor & Education Committee. From 1962-1964 Mr. Harkless was the first African-American appellate court attorney in the office of NLRB General Counsel. Following other government and private consulting positions, in 1970 Mr. Harkless was hired as arbitrator and associate umpire for Bethlehem Steel Company and the United Steelworkers of America. Additional arbitration work came from the Federal Mediation and Conciliation Service, the American Arbitration Association and the National Mediation Board as well as from permanent arbitrator positions with private companies, federal agencies and their unions. Mr. Harkless served on Special Railroad Emergency Boards in 1972 and 1974 as the result of Presidential appointments. In 1990 he was appointed as a member of the Foreign Service Grievance Board. He served as a consultant on arbitration to a South African government commission in 1998. He is a Past President of the National Academy of Arbitrators, the first African-American President in the organization’s history, and an honorary fellow of the College of Labor and Employment Lawyers.

- **Theodore W. Kheel** (1914-2010) grew up in New York City, graduated from Cornell University in 1935 and from Cornell Law School in 1937. In 1938 Mr. Kheel joined the legal staff of the NLRB and later worked for the War Labor Board. In 1946 he was named Deputy Director of New York City’s new Division of Labor Relations, becoming the Director a year later. Mr.

Kheel went into private practice a year later and in 1949 was named impartial arbitrator for the city's private transit authority. In 1956 Mayor Wagner named Mr. Kheel arbitrator for the citywide transit authority—a position he held for 33 years. Mr. Kheel's New York Times obituary characterized him as "New York City's pre-eminent labor peacemaker from the 1950s through the 1980s," noting that he was "not only. . .New York's leading mediator, he was also its premier arbitrator, deciding more than 30,000 disputes ranging from whether the city's plans to introduce a new bus service violated the transit union's contract to whether a worker should be suspended because he was seen walking his dog on a day he had called in sick."

- **Frances Bairstow** (1921-2013) was a pioneering arbitrator and mediator whose career spanned both sides of the U.S. – Canada border. She grew up in Racine, Wisconsin where her father was local chair of the International Typographers Union. A graduate of the University of Wisconsin's Industrial Relations program, she began her career with the War Labor Board in Washington, DC. After marrying a Canadian film maker, Ms. Bairstow moved to Montreal in the 1950s, first working as research economist for the Canadian Pacific Railroad and then joining the McGill University Industrial Relations Centre. She began arbitrating in 1962 under the tutelage of two prominent Canadian arbitrators, initially in Canada and then in the U.S. northeast. As she once put it, at the time there were a lot of big brothers in arbitration, but not a lot of big sisters. In 1972, Ms. Bairstow became one of a handful of women admitted to the National Academy of Arbitrators, serving on every important NAA committee as well as the Board of Governors. After retiring from McGill, she moved to Florida and was soon arbitrating throughout the southeast in industries as diverse as bottling plants, telecommunications,

police, airlines, and Disney World. She arbitrated well into her late 80's. She was a wonderful and generous colleague who inspired a generation of women arbitrators.

- **George H. Cohen** is a graduate of Cornell University and received his law degree from Cornell University School of Law in 1957. He also has a LLM degree from Georgetown University Law School. Prior to entering private practice, Mr. Cohen served as an appellate court attorney with the NLRB. From 1966-2005 Mr. Cohen was a senior partner at Bredhoff & Kaiser in Washington, D.C. The firm specialized in representing private and public sector labor organizations in a wide variety of industries. Mr. Cohen has argued five landmark cases before the United States Supreme Court as well as over 100 cases before appellate and federal district courts. He was in solo practice as a mediator between 2005 and October 8, 2009, when he was sworn in as the 17<sup>th</sup> Director of the Federal Mediation and Conciliation Service. Mr. Cohen resigned from FMCS in 2013 and was the National Academy of Arbitrator's Distinguished Speaker at the 2014 Annual Meetings in Chicago, IL.

- **Arnold M. Zack** (BA Tufts 1953, LLB Yale 1956, MPA Harvard 1961) former President of the Administrative Tribunal of the Asian Development Bank, is a mediator and arbitrator of labor management disputes who teaches at the Labor and Worklife Program at Harvard Law School. He was Co-Chair of the Due Process Task Force that produced the Due Process Protocol for Mediation and Arbitration of Employment Disputes, former President of the National Academy of Arbitrators, has taught Dispute Resolution at Yale Law School and has served on six Presidential Emergency Boards including two on which he served as Chair. He is the author or co-author of twelve books on dispute resolution and international labor issues and has served as a consultant to the International Labor Organization, the International Monetary Fund, and

to numerous national governments. Among his awards are the Distinguished Service Award and the Whitney North Seymour Medal of the American Arbitration Association, the Pioneer Award and the Willoughby Abner Award of the Association on Conflict Resolution, the 2008 LERA Inaugural Fellow award and the Cushing-Gavin Award of the Archdiocese of Boston. He has been a Wertheim Fellow and Fulbright Scholar, and is a member of the College of Labor and Employment Lawyers.

- **Richard I. Bloch** received his B.A. from Dartmouth College in 1965, his J.D. from the University of Michigan in 1968 and his M.B.A. from the School of Business Administration at the University of Michigan. Work with Russell Smith, Theodore St. Antoine and Roben Fleming while in law school strongly influenced Mr. Bloch to ultimately pursue a career as a labor arbitrator. His first job after law school was as an associate with the firm of Seyforth, Shaw, Fairweather and Geraldson in Chicago. Mr. Bloch served for eight years as a member and then Chair of the U.S. Department of State's Foreign Service Grievance Board and has served as a permanent arbitrator in a wide variety of industries, including broadcasting, airlines, transit and professional sports. He has been a member of the faculties at the University of Michigan Graduate School of Business and the University of Detroit Law School. Since 1974 Mr. Bloch has on occasion served as an Adjunct Professor at George Washington University Law School and at the Georgetown University Law Center. He is co-author, with Arnold Zack, of several texts on arbitration and the author of numerous law review articles on the subject. Mr. Bloch is a past Executive Secretary/Treasurer and a Past President of the National Academy of Arbitrators.
- **Theodore J. (Ted) St. Antoine** is a graduate of Fordham College and the University of Michigan Law School, where he was editor-in-chief of the Law Review. After practicing labor



law in Washington, D.C. for seven years, Mr. St. Antoine joined the Michigan Law School faculty in 1965 and served as Dean from 1971-1978. He is currently the James E. & Sarah A. Degan Professor Emeritus of Law at the University of Michigan.

Past positions include Secretary and Council Member of the ABA Labor and Employment Law Section and Chair of the Michigan Bar Association's Labor and Employment Law Section. Mr. St. Antoine has served on the American Arbitration Association's Board of Directors and has received the Association's George W. Taylor Award for his contributions to collective bargaining. He drafted the Model Employment Termination Act for the Uniform Law Commissioners. Mr. St. Antoine has chaired the Michigan Attorney Discipline Board, the United Auto Workers Public Review Board and the UAW-GM Legal Services Plan.

Mr. St. Antoine is co-editor of a leading labor law casebook, now in its twelfth edition and editor of the National Academy of Arbitrators' publication, *The Common Law of the Workplace: The Views of Arbitrators*, now in its second edition. He has been a visiting professor at Cambridge, Duke, George Washington, Illinois and Tokyo Universities and has taught at the Salzburg Seminar in American Studies. A labor arbitrator for over 40 years, Mr. St. Antoine is a Past President of the National Academy of Arbitrators and a member of the College of Labor and Employment Lawyers.

- **The Honorable Harry T. Edwards** was appointed to the United States Court of Appeals for the District of Columbia Circuit in 1980. He served as Chief Judge from 1994 until 2001. He is now a Senior Judge on the Court, and also a Professor of Law at the NYU School of Law, where he teaches courses in federal appellate practice and the art of appellate decision-making. Between 1970 and 1980, Judge Edwards taught labor law, collective bargaining, and

negotiations as a tenured member of the faculties at the University of Michigan Law School and the Harvard Law School. He practiced labor law in Chicago with Seyfarth, Shaw, Fairweather & Geraldson from 1965 to 1970. He received a B.S. degree from the School of Industrial and Labor Relations at Cornell University in 1962 and a J.D. degree with honors from the University of Michigan law School in 1965. His mentor at Cornell was the late Professor Jean McKelvey; and his mentor at Michigan was the late Professor Russell Smith. Both were instrumental in helping Judge Edwards establish an arbitration practice during the 1970s.

Judge Edwards has served as Co-Chair of the Forensics Science Committee at the National Academy of Sciences; Chairman of the Board of Directors of AMTRAK; a member of the Board of Directors of the National Institute for Dispute Resolution; a member of the Executive Committee of the Order of the Coif; a member of the Executive Committee of the Association of American Law Schools; and a member and Vice President of the National Academy of Arbitrators. He is currently a member of the Committee on Science, Technology, and Law at the National Academy of Sciences; the American Law Institute; the American Academy of Arts and Sciences; the American Judicature Society; and the American Bar Foundation. He has been a recipient of the William B. Groat Alumni Award from Cornell University; the Whitney North Seymour Medal presented by the American Arbitration Association for outstanding contributions to the use of arbitration; the Robert J. Kutak Award presented by the American Bar Association Section of Legal Education and Admission to the Bar; and a number of Honorary Doctor of Laws degrees.

Judge Edwards is the coauthor of five books, including LABOR RELATIONS LAW IN THE PUBLIC SECTOR; HIGHER EDUCATION AND THE LAW; THE LAWYER AS A NEGOTIATOR; and COLLECTIVE BARGAINING AND

LABOR ARBITRATION. His most recent book, EDWARDS, ELLIOTT, & LEVY, FEDERAL STANDARDS OF REVIEW, was published by Thomson Reuters in 2013. He has also published scores of articles and commentaries dealing with legal education, the effects of collegiality on appellate decision-making, the pitfalls of empirical studies that purport to measure and characterize judicial decision-making, judicial process, federalism, comparative law, legal ethics, judicial administration, professionalism, labor law, equal employment opportunity, labor arbitration, higher education law, and alternative dispute resolution.

- **George P. Shultz** earned a bachelor's degree in Economics from Princeton University in 1942 and, after service in WW II, a Ph.D. in Industrial Economics from M.I.T. in 1949. After teaching at M.I.T., Mr. Shultz joined the University of Chicago, Graduate School of Business in 1957 as Professor of Industrial Relations, becoming Dean in 1962. In 1955 Mr. Shultz had served on President Eisenhower's Council of Economic Advisors. During 1969-1970, Mr. Shultz was Secretary of Labor in the Nixon administration. Thereafter, Mr. Shultz became the first Director of the Office of Management and Budget (OMB), leaving OMB to become Secretary of the Treasury from June 1972-May 1974. In 1974 he left public service to join the Bechtel Group. In July 1982 Mr. Shultz returned to government service and served as Secretary of State for 6 ½ years during the Reagan Presidency. Mr. Shultz is one of only two individuals to have held four cabinet positions. He has published numerous books and articles, has received many honors, including the Presidential Medal of Freedom and has been awarded honorary degrees from at least 16 universities in the United States and abroad. He is an Honorary Life Member of the National Academy of Arbitrators.

Three other arbitrators appear in the film. Walter De Treux is shown conducting an arbitration hearing, Margaret Brogan is engaged in a simulated mediation-arbitration, and Allen Ponak is shown interviewing Frances Bairstow.

- **Margaret R. Brogan** earned her B.A. degree from St. Joseph's University in Philadelphia and her J.D. degree from Villanova University School of Law, the latter in 1980. Following law school, she became a Field Attorney with the NLRB until 1986 when she began arbitrating. Since 1990 she has been a full-time labor and employment arbitrator, now with experience in professional sports, airlines, transit, health care, schools, manufacturing, municipal workers and uniformed employees. Permanent panel appointments include professional baseball and hockey, United Parcel Service and the Teamsters in Northern California, the City and County of San Francisco and the SEIU, FAA and the National Air Traffic Controllers Association, Amtrak and the FOP, American Airlines and both the APFA and the TWU, American Eagle and the AFA, Southwest Airlines/Air Tran and the AFA, various school districts and others. Ms. Brogan is a member of the National Academy of Arbitrators and the College of Labor and Employment Lawyers. She has been an Adjunct Lecturer at St. Joseph's University and currently is an Adjunct Lecturer at the University of California, Berkeley School of Law.

- **Walter De Treux**, a graduate of Penn State University and Temple University Law School, has been active in the labor-management field since 1982. His arbitration work encompasses the public and private sectors and includes grievance and interest arbitration as well as mediation. He is on the arbitration panels of the Federal Mediation and Conciliation Service, the American Arbitration Association, the Pennsylvania Bureau of Mediation, the New Jersey

Public Employee Relations Commission, the Delaware Public Employee Relations Board and the National Mediation Board. Mr. De Treux is also a permanent panel member on several public and private sector grievance panels. He is a member of the National Academy of Arbitrators and has served on the NAA Board of Governors.

- **Allen Ponak** has a B.A. from McGill University, a Master's from Michigan State University and a Ph.D. from The University of Wisconsin Industrial Relations Research Institute. He has been arbitrating and mediating labour and employment disputes in Canada since 1985. He has taught at the University of Calgary and at the University of Saskatchewan and has been President of the Canadian Industrial Relations Association. Mr. Ponak is chair of the editorial board of the journal *Relations Industrielles*. As a member of the National Academy of Arbitrators, he has served on the Board of Governors, as Vice-President, as Chair of the Canadian Region and as President of the NAA Research and Education Foundation. He became NAA President-Elect in 2014 and will serve as President in 2015-2016.

## **THE SPONSORING ORGANIZATIONS**

- **The College of Labor and Employment Lawyers** (<http://www.laborandemploymentcollege.org/>) was founded in 1995 on the 60th anniversary of the National Labor Relations Board and the 30th anniversary of Title VII and Executive Order 11246. The College began as a non-profit professional association honoring the leading lawyers nationwide in the practice of Labor and Employment Law. It has now evolved to become an intellectual and practical resource for the support of our profession and our many audiences. The primary purpose of the College is

recognition of individuals, sharing knowledge and delivering value to the many different groups who can benefit from its value model.

Three lawyers, Stephen E. Tallent of Washington, DC, Charles A. ("Butch") Powell, III of Birmingham, Alabama and Don MacDonald of Denver, Colorado played a strong role in the establishment of the College. With the support of numerous Section members, the American Bar Association's Labor and Employment Law Section voted to assist in the establishment of the College and sponsored the installation of the inaugural class of elected Fellows in Orlando, Florida in August of 1996.

The "Art & Science of Labor Arbitration" is part of the College's Video History Project. In 1999, under the direction of founding Fellow Steve Tallent, The College of Labor and Employment Lawyers embarked on a project to develop a video library dedicated to the history of labor and employment law. The premise of the library — to create a repository of oral histories culled from significant employment law topics or events — was meant not just to protect the past, but to serve the future as well.

By filming distinguished individuals who played a significant role or who had an opportunity to observe a milestone event relating to labor and employment law, the video history project has the potential to be a vital and important component of the history of the labor and employment law movement. Ultimately, the library will serve to enhance CLE programs and as a historical resource for law schools and schools of industrial relations, as well as state and local bar associations. The range of possible uses is only limited by the scope of imagination and the quality of the product.

Carol M. Rosenbaum - winner of 2 Emmys and 16 national awards - produced all of the College's Video Project interviews. She also wrote and produced *The Art & Science of Labor Arbitration* and all of the College's other documentaries. <http://www.carolrosenbaum.com/>

• **The National Academy of Arbitrators** (<https://www.naarb.org/>) was founded in 1947 as a not-for-profit honorary and professional organization of arbitrators in the United States and Canada. Members are chosen by involved parties to hear and decide thousands of labor and employment arbitration cases each year in private industry, the public sector and non-profits in both countries. Admission standards are rigorous in keeping with the goal of establishing and fostering the highest standards of integrity and competence. Academy members are governed by an enforceable Code of Professional Responsibility.

The Academy's purposes are educational and fraternal. As a friend of the court, the Academy has participated in appellate litigation in both the United States and Canada where major issues affecting the institution of arbitration are involved. It also works cooperatively with sister organizations such as government agencies, professional organizations, institutions, and learned societies in the field of labor-management and employment relations.

The Academy's Annual Meetings are open to all who wish to attend and feature speakers who are labor-management and employment relations practitioners, arbitrators, judges, government officials, and law school and university professors. Papers presented at the Annual Meeting are published by BNA in *The Proceedings*, which are available free of charge and in a searchable format on the Academy's website ([www.naarb.org](http://www.naarb.org)).

• **The NAA Research and Education Foundation** (<http://naarb.org/grants.asp>) was founded in 1985 to further the charitable and educational purposes of the National Academy of

Arbitrators. The REF underwrites projects that promote understanding, competence, and integrity in the field of labor and employment arbitration.

Through the years, the REF has supported a variety of education, training and research activities. The results of these efforts have appeared in articles, monographs, books, guides and electronic and other media, and been presented and discussed at trainings, conferences, and symposia.

### **AN ADDITIONAL RESOURCE**

Instructors may wish to couple *The Art & Science of Labor Arbitration* with a video of a labor arbitration hearing. *The Suspension of Nurse Kevin* is available through Penn State University. Produced by Penn State's School of Labor and Employment Relations, with financial support from the National Academy of Arbitrators Research and Education Foundation. "Using a case written and enacted by actual union and management practitioners and an experienced arbitrator, the film replicates, to the greatest degree possible, the experience of observing an arbitration hearing. Shot in a documentary style, the film enacts an arbitration hearing involving the suspension of an employee for insubordination." The video is available from Penn State. It may be ordered at <http://ler.la.psu.edu/store>.





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