During the last weekend of May 2011, the members of the National Academy of Arbitrators and members of the labor and employment arbitration community convened in sunny San Diego, California, for the Sixty-Fourth Annual Meeting. It was a year in which economic recession created turmoil for U.S. public employers and their unions; in which social networking presented new challenges to the demarcation of freedom of speech and employees’ duties to their employers; in which increasing political polarization permeated decision-making at the federal level, including at the National Labor Relations Board; and during which an understanding of the practical implications of the Supreme Court’s 2009 ruling in *14 Penn Plaza LLC v. Pyett* emerged. Given these consequential forces in the workplace environment, the theme of the program—“Varieties of the Arbitration Experience”—was apt.

The Committee on the Program was chaired by Margaret R. Brogan and Barry Winograd, Co-Chair, and the Host Committee by Fred R. Horowitz, with Jan Stiglitz serving as Vice Chair. This edition of *The Proceedings* contains papers and panel discussions presented during plenary and breakout sessions of the Annual Meeting and offers an authoritative reference drawn from the experience of those currently engaged in the substance and processes of resolving workplace disputes.

*The Proceedings* begins, as always, with recognition of and honors to past presidents and members deceased since the 2010 annual conference.

The annual meeting marked the conclusion of Academy President Gil Vernon’s term in office, which also coincided with the retirement of our much beloved Director of Arbitration Services for the Federal Mediation and Conciliation Service, Vella M. Traynham. Gil used the occasion of his Presidential Address to recognize the many ways in which Vella brought integrity, diligence, intelligence, and frankness to the office she held, and also her contributions to preserving the fairness of the arbitration process since she assumed the Directorship in 2000. Gil awarded Vella
the first of what will be an annual National Academy of Arbitrators award for service in support of the neutral arbitration of labor management disputes: the David A. Petersen NAA Service Award. The award has been established in recognition of the contribution to the Academy of its Secretary-Treasurer, Dave Petersen. David has tirelessly and selflessly carried out the responsibilities of that position for the past decade.

In his address, in Chapter 1, President Vernon speaks of the importance of preserving the cultural values implicit in collective bargaining: the human dignity of employees, standing together to request consideration in the workplace; the moral obligation of the employer to give commensurately dignified consideration to that request; and the economic freedom of both to say no to a request or to a response. He observes that fairness and neutrality are being challenged, both by polarized political forces and by commercial opportunism, and that the Academy’s members must respond by preserving, to the extent possible, the neutrality and fairness upon which the system of private dispute resolution is premised, and to stress the importance of neutrality (meaning non-advocacy, at any time) and impartiality (meaning having no interest in the outcome of the particular case). Given the conflation of labor, employment, and consumer arbitration in the mind of the public, and abuses that have been committed by ostensibly “neutral” commercial arbitration firms, President Vernon urges Academy members to adhere to and encourage the stringent concepts of neutrality. He suggests that appointing agencies should offer a neutrality option when sending lists and should require the broad disclosure of the representational work of the arbitrators on their panels.

Chapter 2 is the Distinguished Speaker Address by National Labor Relations Board Chairman Wilma Liebman. In “Enduring Values and Persistent Problems: American Labor Law Today,” Chairman Liebman describes the increasingly intense polemic environment in which the Board has recently functioned. That environment first became evident in 2007 with the 60-plus decisions (each of them divided) that the Board issued, and that the labor movement condemned as the “September Massacre.” It continued with Congress’s 2011 attempt to de-fund the Board, the politicization of the Employee Free Choice Act debate, and attrition of the Board to two members by the end of President George W. Bush’s term. Currently, there is disagreement about not only what the National Labor Relations Act is or what national
policy preferences should be but also over legal methodology and judicial philosophy. Competitive pressures have caused labor and management to rely more heavily on alternative or mediated employment relationships, a change that has increased the challenges of enforcing the Act. Additionally, the decline in union membership has meant that the public generally—and judges in particular—are increasingly unfamiliar with the Act and its purposes, one of which is the economic advance of workers through equality of bargaining power, fairness, and social stability.

Chapter 3, “Statutory Rights and Arbitrator Authority: Labor Arbitration After Pyett,” offers assessments of the Supreme Court case that validated CBA compulsory arbitration, rather than litigation, of bargaining unit members’ claims of the violation of statutory rights. In her paper, “Statutory Rights in Labor Arbitration After Pyett,” Kathleen Phair Barnard reviews the Pyett decision, including the CBA language relied upon by the Court; the criteria that the Court set for a CBA waiver of the right to litigate a statutory claim to be enforceable; the ways in which lower courts have viewed the same criteria both before and after the Pyett decision and, with regard to the latter, the important distinction between the waiver of forum and the waiver of substantive rights. Attorney Barnard examines the weight given arbitrators’ awards dealing with contractual claims in subsequent litigation of statutory claims, the union’s duty of fair representation, and the standard of review of an arbitrator’s decision on a statutory claim.

In the panel discussion on Pyett, moderator Homer C. LaRue presents a hypothetical hybrid (CBA-statute) case in which the parties’ CBA contains a Pyett-style waiver of litigation of statutory claims. The participants then discuss their expectations for pre-hearing preparation, including defining the issues and the arbitrator’s jurisdiction, defining the procedures that will be followed, setting the ground rules for discovery (including electronic discovery) and evidence (e.g., specifying that the Federal Rules of Evidence will apply), and ensuring that the arbitrator has experience in the statutory subject matter in dispute and has made full disclosure of any matter that would give the appearance of partiality. The panel members also discuss bifurcation, the handling of interrogatories, dispositive motions, transcripts, and the arbitrator’s and advocates’ fees.

In the third portion of this chapter—“How Much Power Does a Labor Arbitrator Have? What the Latest Court Decisions Mean for Arbitrators, Employers, Unions, and National Labor Policy”—
Lise Gelernter examines the question of whether, with its *Pyett* decision, the Court has effectively changed national labor policy without congressional legislation and, if so, whether *Pyett* is consistent with the 1935 National Labor Relations Act and the 1947 amendments of the Labor Management Relations Act. Ms. Gelernter questions whether the Court has conflated arbitral doctrines, confusing the public policy purpose of labor arbitration, which is to achieve industrial peace, with the goal of commercial arbitration, which is to afford the parties the freedom to choose how they will resolve their contractual disputes. Ms. Gelernter furnishes a critical assessment of historical and recent court rulings and posits that the parties to a CBA might be wise to consider that “pushing the envelope” that *Pyett* represents may yield unintended consequences.

In Chapter 4, Allen Ponak focuses on several cases he has recently arbitrated in Canada dealing with employee use and abuse of the Internet and other new technologies. Titled “Employees in Cyberspace: Meeting the Challenges of the Digital Age,” the paper examines the balance that must be struck between an employer’s interest in efficient operations on the one hand and an employee’s interest in maintaining a separation between his or her work and private life on the other. The subjects examined include employee online surfing for non–business-related purposes, surfing websites that are expressly or implicitly off-limits, and whether different standards should apply if the computer is the property of the employer or of the employee. Arbitrator Ponak also explores limits on the sanctity of personal e-mail, on the right to blog, and the scope of the employer’s right to obtain and use biometric data, such as handprints, to track employees’ activities. He observes that, as technology becomes more sophisticated, the use of expert witnesses will become increasingly valuable.

The second portion of Chapter 4—“Privacy in the Age of Technology”—is a panel discussion in which arbitrators from Canada and the United States explore employer monitoring of employee computer use, including Internet access. Jane H. Devlin serves as moderator, and arbitrators Norman Brand, Alan A. Symonette, Michael Prihar, David R. Williamson, and Chris Sullivan as discussants of six scenarios that, in various respects, probe the limits of employee privacy. The scenarios include Facebook postings of workplace conditions and confidential patient identities, unauthorized viewing of an employee’s smartphone photos, management consideration of online postings pertinent to
the employee’s promotion, monitoring keystrokes per hour and using the data to evaluate the employee, accessing employees’ private e-mail accounts, and investigation of the employer-issued computer and cell phone records to discover employee activities unrelated to employment.

In Chapter 5, the panel discussion “Arbitrating in the Fishbowl—Guppies or Sharks? How Arbitrators Can Speak Publicly” is offered by Canadian NAA members Susan Stewart, James Oakley, Michel Picher, and Ken Swan. They provide examples and advice for when arbitrators speak publicly, which may or may not include speaking directly to the media. Canadian arbitrators are more likely to be faced with media attention, since much of their arbitration is under statute, whereas most arbitration in the United States is private. However, both may have media present when public employees are the complainants or when arbitrators are appointed to public service cases. The panelists relate their experiences with having their words used out of context, and they recommend that their fellow arbitrators not editorialize in awards; they refer the media to the parties for any discussion of an award; and they stay focused on the points they wish to make in broadcast interviews. They remind the audience that the media seeks sensationalism. The panelists also note the difficulty in protecting the privacy of the parties, given current technological advances. The Academy’s intervention in a court case in Canada kept the issue focused on the process by bringing a national—as opposed to a provincial—perspective, and helped to set an important judicial precedent.

The duty of fair representation is explored in Chapter 6. The chapter begins with “Fair Representation and the Attorney-Client Relationship in Labor Arbitration: Dilemmas for Union Counsel,” a paper by Joseph L. Paller Jr. Mr. Paller reviews the case law addressing the often complex relationship of union counsel, the union, and a grievant in labor arbitration. He attempts to answer several related questions: What are a union attorney’s duties when representing union members in arbitration? Is the client the union or the grievant? What are the union counsel’s duties when a conflict arises between the union and a grievant?

Mr. Paller’s paper is followed by the edited transcript of a related session in San Diego with moderator James Oldham and NAA arbitrators Elliott Goldstein, Barbara Zausner, and Paula Knopf; and panelists Harry Rissetto, representing management, and Joseph Paller Jr., representing labor. Hypothetical cases were presented,
audience members provided a show of hands in response, and then arbitrators gave their opinions.

Chapter 7 is a paper written by the late Gerald R. McKay with Anita Christine Knowlton, “Expedited Arbitration: Is It Expedi- tious and Is It Fair?” The paper describes the model designed by Arbitrator McKay that was used through several successive collective bargaining agreements by the parties to Kaiser Permanente contracts in California as well as to contracts governing work on the Las Vegas Strip. The model uses a tripartite panel with two party-arbitrators and one neutral. The unique focus of this model is the way in which it obligates the union and management to take a responsible look at problems at the first level of the grievance procedure and to work together to resolve problems before going to arbitration. Party-arbitrators are part of the decision-making process and provide insight into the context of the problem. The system works with a permanent neutral arbitrator and requires that all evidence be shared prior to arbitration. The goal of the system is to enhance the relationship between the employer and the union so they can solve problems more efficiently and productively.

In Chapter 8, “The Limits of Common Sense: A Social-Psychological Approach to Research on Decisional Biases in Labor and Employment Arbitration,” Professor Eugene Borgida and Assistant Professor Grace Deason consider whether arbitrators may be influenced by the gender and other characteristics of the grievant, or by the arbitrator’s gender, experience, fairness orientation, or political ideology, and suggest that research on the operation of gender prejudice and discrimination can deepen our understanding of gender bias in arbitration decisions. They examine common misconceptions about prejudice and stereotyping, and conclude that a more full and accurate understanding of how race and gender prejudice and discrimination operate in the workplace will allow arbitrators to detect prejudice and discrimination by supervisors when it is present in the facts of a case, and to identify and challenge their own often unconscious and subtle biases.

Chapter 9, “Post-Merger Seniority Rights in the Airline Industry,” examines the integration of seniority rights in U.S. airline mergers and the complexity of the decisions facing arbitrators. Daniel M. Katz sets the stage with his paper, “The Evolution of Employee Seniority Integration Rights in United States Airline Mergers.” This is followed by the transcript of the session with
moderator Richard Bloch and panelists Jeffrey R. Freund, Bruce York, and Mr. Katz. In addition to relating the history of mergers in this industry, they describe technology now being used to assist arbitrators to make decisions on seniority lists that entail more than merely looking at a static current picture.

In Chapter 10, “The Impact of High Speed Rail on Labor Relations and Collective Bargaining,” David Vaughn examines the impediments to the implementation of high speed rail in the United States, the changes in operational processes—and, possibly, ownership—that may attend the transition, and the factors that will likely control the evolution of collective bargaining and labor relations as high speed rail is introduced.

Chapter 11, “Arbitration and the Public Sector’s Economic Crisis—A Tale of Two Cities,” is a panel discussion moderated by Roberta Golick, with panelists Vincent A. Harrington Jr., Martin Gran, and Thomas Kochan. Two of the panelists describe the negotiating scene with the City and County of San Francisco, California, where creative solutions were found that resulted in saved programs and saved jobs. The San Francisco experience has served as a model for public employers and labor working together to resolve tough issues during tough economic times. The third panelist, Thomas Kochan, describes a lengthy and contentious dispute involving the Boston Firefighters that nonetheless yielded new and more flexible ways for labor and management to resolve their disputes.

In Chapter 12, “Revisiting the Elements of Just Cause: The Case of the Missing Money,” Barry Winograd presents a hypothetical dismissal case in which advocates conducted the direct and cross-examination and gave closing arguments. After the abbreviated “hearing,” the panelists—arbitrators and advocates for both management and labor (attorneys and non-attorneys)—indicated how they would decide. Chapter 12 contains a description of what took place during the session and furnishes a summary statistical analysis of the audience survey that was conducted. A training program incorporating the chapter and an accompanying DVD were developed.

Chapter 13, “Workplace Bullying—The New Violence?,” includes both a panel discussion and a paper. The panel discussion was moderated by Sara Adler, the presenter was Dr. Gary Namie, and the responders were Van Goodwin, Ami Silverman, and Carlos Perez.
The panel discussed a range of types of workplace bullying and the impact on those bullied. Bullying, in various forms, may occur between co-workers, by employees of management, and by management of employees. Dr. Gary Namie traces the history of workplace bullying from the 1980s and through several countries, and identifies relevant literature on the topic. He began the Workplace Bullying Institute in the late 1990s and has undertaken to make such behavior illegal. Ms. Silverman discusses NLRB cases in which some forms of speech that would have been considered to be bullying in other forums, were deemed to have been protected concerted speech. She alerts arbitrators that the Board will more closely scrutinize whether arbitrators are addressing statutory issues.

Mr. Perez also offered a paper—“Dealing With Employers Who Behave Badly”—in which he described a common situation of bullying by a supervisor, and the limited efficacy of litigation, arbitration, and mediation in attempting to address the problem. Mr. Perez notes that, in the presence of a union or employment contract, due process can be the antidote to bullying because the employer has the burden of proof of employee misconduct. However, requiring an employee to endure that process can, in itself, be bullying behavior. Mr. Perez describes a program developed in California by teachers—for teachers—called “Survive and Thrive,” and discusses the possibility of future legislation to address this behavior in the workplace.

In Chapter 14, the invited paper by Arnold Zack—“Elusive Workplace Dispute Resolution in China: Less Than Meets the Eye”—offers perspective on the continuing reports of strikes and labor unrest in China and examines the potential impact of unrest in North Africa and the Middle East on China. Professor Zack describes the history of Chinese labor relations from 1949 to the present, including the effect of the 2008 recession in bringing China’s labor problems to the world’s attention. He states that understanding the labor relations scene is relevant to understanding the political future of China.

Chapter 15 is the Fireside Chat with Ted Jones. Ted was interviewed by his former student and NAA member Chris Knowlton. Appropriately for the Academy, Ted has both a Canadian and American background. During this conversation, he recounted his coping with recurrent tuberculosis in the early years of his professional life, his experience as an educator, and his years as a television judge on the programs Traffic Court and Day in Court.
He described some of his “outlier” philosophies and practices as an arbitrator, and how he came to be the founding editor of the Chronicle.

The Proceedings represents the collective efforts of members of the National Academy of Arbitrators and other panelists who participated in the 2011 annual meeting. Margaret R. Brogan and Barry Winograd co-chaired the meeting, assembling a mélange of timely topics and excellent presenters, including an address by NLRB Chairman Wilma Liebman. Fred Horowitz, Chair of the Host Committee, did an excellent job of making the attractions of the fabulous San Diego area accessible to those in attendance. And, as always, the Academy’s Executive Secretary, David Petersen, managed the financial and contractual logistics of the program with dedication and expertise. It was entirely fitting that the Academy inaugurate an annual award in his name. Academy President Gil Vernon concluded his term in office with the competence, dignity, and humor that were his hallmark. We are grateful to Suzanne Kelly and Kathleen Kelly Griffin, at the Academy’s national offices, for their tireless and capable work, and to Karen Ertel and Tim Darby at Bloomberg BNA, for their advice and expertise in bringing this volume of The Proceedings into publishable form.

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