In the shadow of the Golden Gate Bridge and its accompanying friendly environs, the National Academy of Arbitrators met in San Francisco for its Sixtieth Annual Meeting from May 24 through 27, 2007. Under the leadership of Program Chair Chris Knowlton and President Dennis Nolan, the theme was “Arbitration 2007: Workplace Justice for a Changing Environment.” The Sixtieth edition of The Proceedings reflects presentations and discussions during plenary and break-out sessions of the Annual Meeting.

Academy President Dennis Nolan provides a focal point in his Chapter 1 Presidential Address for exploring the scope and shape of contemporary dispute resolution in a workplace buffeted by shifting economic trends. In “Workplace Justice: The Incremental Crisis and its Cures,” President Nolan offers a provocative and unvarnished assessment of the state of our profession. He chronicles the decline in the U.S. labor movement and, concomitantly, the declining prevalence of labor arbitration. Unlike some commentators who view this development as the result of some possibly reversible forces, President Nolan sees the continuing decline in labor’s fortunes as inevitable. Indeed, he posits that labor’s hey day was an anomaly resulting from a brief corporatist alliance between big government, big business, and big labor that is not likely to be replicated. As labor arbitration declines in importance, President Nolan challenges labor arbitrators to bring their talents as “workplace disputes resolvers” to bear in non-traditional venues. He also challenges the Academy to broaden its mission to represent all qualified neutral workplace dispute resolvers.

Professor David Lewin, Senior Associate Dean and Neil H. Jacoby Chair in Management, UCLA Anderson School of Business, comments on the all-encompassing topic of “Workplace ADR: What’s New and What Matters” in Chapter 2. For two decades Professor Lewin has studied non-union workplace dispute resolution processes and systems where alternative dispute resolution or ADR is used. ADR, he notes, has risen and expanded in the non-union environment with the decline of organized labor. A common feature in these non-union ADR systems is mediation and arbitration. Although employees and employers in non-union settings have criticisms of ADR, he concludes that the increasing and persistent use of mediation and arbitration show that the process works well. Professor Lewin observes that grievance filers in non-union settings do not have significantly different job performance ratings, promotion rates or work attendance rates compared to non-grievance filers during the period leading up to grievance filing and during grievance settlement. One to three years after the grievance settlement, however, the grievance filers do have statistically significant lower performance ratings and promotion rates and supervisors of grievance filers have statistically significant higher involuntary turnover rates. Professor Lewin observes that mediation and arbitration are reactive processes in non-union and union settings and cannot alter the phenomenon of a deteriorating employment relationship.

Chapter 3 presents a new “Quick Hits” format in which a series of short papers present summary information on a variety of important areas. Jane Kow, a San Francisco attorney and consultant, leads off with a top ten list of how not to conduct a workplace investigation. Peter D. Nussbaum, a labor-side attorney, outlines the governing principles applicable to the increasingly important topic of neutrality agreements in union organizing campaigns. Donna M. Ryu, a Professor of Clinical Legal Education at Hastings College of Law, summarizes recent developments concerning gender identity discrimination. Academy Member and Professor James C. Oldham
rounds out this chapter with an interesting historical analysis of the legal status of arbitration during the 1700’s and 1800’s in Maryland and Pennsylvania.

Chapter 4 explores a variety of issues concerning “Sex in the Workplace.” Adam Levin, partner in the law firm of Mitchell Silberburg & Krupp in Los Angeles, presented a paper describing the California Supreme Court’s disposition of a sexual harassment claim brought by a writers’ assistant who worked in the sexually charged environment accompanying the creation of the hit “Friends” television series. The plaintiff alleged that the use of sexual jokes, comments, and expressive gestures by the show’s writers subjected her to sexual harassment. The court ruled that such conduct was not actionable because it was not directed at her because of her gender. The reach of this decision was hotly debated by an accompanying panel discussion. In addition, panel members presented on several other cutting-edge sex-related issues. Maureen Stamp, a labor-side attorney, discussed the new rules concerning Title VII retaliation claims as announced by the Supreme Court in *Burlington Northern v. White*. Kathleen McKenna, a management-side attorney, presented a hypothetical raising issues relating to how the use of communications technology, such as e-mail, can contribute to claims of sexual harassment. Finally, attorney Nathan Goldberg explored some recent cases, including one that he handled, dealing with the complex issue of transgender rights in the workplace.

Chapter 5 delves into the parties’ efforts to answer the topic “How to Have an Arbitration Hearing in One Day or Less.” Seasoned management and labor advocates discussed the topic of cost and time savings in grievance arbitration as well as key elements of a grievance arbitration system that generates efficiencies. Daniel Boone, attorney representing labor, articulates how labor arbitration has become adversarial, rather than an adjudicatory process, which has led labor to query whether the process can enhance the collective bargaining relationship. After summarizing how the *Steelworkers Trilogy* cases form the essence of labor arbitration, Boone observes that the continued use and growth of legalisms undermine the twin goals espoused in the *Trilogy* of efficiency and cost-effective dispute resolution. He urges a return to arbitration as envisioned at the outset (expeditious, informal, low-cost) and offers examples from the private and public sectors where the twin goals have been achieved through implementation of expedited procedures as well as use of permanent tripartite panels. He also details how joint training of advocates in grievance arbitration can transform the collective bargaining relationship. Robert Bonsall, attorney representing labor, identifies key elements used in a grievance arbitration process to achieve the twin goals of efficiency and minimized costs. Bonsall describes the use of “two-on-two panels” where two representatives from each party (but not individuals involved with the grievance) review and attempt to resolve the dispute. Other innovative techniques involve the use of written offers of proof submitted as part of the case-in-chief presentations rather than direct testimony. He indicates that a regular schedule for hearings on a monthly basis with use of a permanent arbitrator issuing bench decisions facilitates the parties’ presentations and enhances the arbitrator’s understanding of their relationship.

Chapter 6 is “New Frontiers: Biometrics Information Technology and Privacy Issues.” Hand scanners, iris scanners, and other biometric measurement techniques are increasingly used by organizations to limit access to designated areas and in lieu of the traditional electronic or “punch-in” time clocks. Samir M. Tamer, Chief Scientist, Ingersoll Rand Recognition Systems, provided a brief history of biometrics and discussed how these systems operate, the nature of the
personal information collected, and the attraction of this technology for employers. Rachel J. Minter, an attorney representing labor, focused on the implementation of this technology in a municipal department in New York City to highlight the reservations and concerns that unions and employees have about the use of biometrics in the workplace.

Chapter 7 represents the first time that the Academy has addressed an evolving and emerging frontier occurring in the world of work -- bullying and mobbing. Academy Member and Professor Lamont E. Stallworth and Dr. Suzy Fox, both with Loyola University of Chicago’s Institute of Human Resources and Employment Relations, distill an in-depth examination of this recognizable phenomenon in their presentation “Workplace Bullying: Another Need for Workplace Justice and the Potential Utility of Mediation, Arbitration and Employer-Sponsored Integrated Conflict Management Systems.” Professors Stallworth and Fox note that workplace bullying is recognized as unlawful in a number of European countries and there is growing legislative criticism of this conduct in the United States. This session shared information about the phenomenon of bullying and mobbing, discussed its economic and emotional consequences, identified relevant case law, investigated the utility of mediation and arbitration to resolve these disputes, and proposed a model Healthy Workplace Act as well as standards for labor and employment arbitrators to use in deciding these cases.

Chapter 8 explores the topic of “Stereotypes in Labor and Employment Arbitration.” Professor Martha West, University of California Davis School of Law, contributes a paper entitled “Avoiding Use of Stereotypes in Labor and Employment Arbitration.” Professor West posits that decision-making by labor arbitrators is influenced by their background and life experiences. She explores this notion in the context of labor arbitration cases involving sexual harassment. She suggests that this is a particularly challenging context for guarding against the unconscious impact of stereotyping because the arbitrators primarily are male and the grievants primarily are males who have been discharged for allegedly harassing female co-workers. Professor West expresses the concern that this gender-based alignment may incline some labor arbitrators to identify more with male grievants than female victims of harassment.

Chapter 9, Airline Arbitration in a Changing Environment, reflects the lively discussion surrounding the changes that are occurring in dispute resolution in the airline industry. Member Josh M. Javits preliminarily addressed the difficulty of negotiating in the post-bankruptcy era and the differing perceptions by the parties that will affect future negotiations. Current circumstances and strategies, Javits notes, show management with high debt loads whereas unions are emphasizing the earnings in the billions by the carriers. Javits states that the National Mediation Board should be involved in every step of the parties’ negotiations through monitoring negotiations and providing innovation solutions in the context of traditional bargaining and interest-based bargaining. ALPA officials’ Bruce York, Seth Rosen and Andrew Shostack summarize the statutory history and framework for airline arbitration and, within that framework, detail the economic turbulence that led to employee concessions and its aftermath effect on labor relations. They maintain that the existing arbitration process does not adequately address employee issues and concerns and offer constructive alternatives such as “med-arb” and grievance mediation in addition to a version of small claims court arbitration to deal with less weighty issues in place at U.S. Airways and a special master process at America West Airlines. ALPA highlights the role that the Academy’s members can play in all of these processes. Jeff
Wall, Senior Director, Labor Relations, Continental Airlines, focused on the business and labor relations challenges facing the industry in general and Continental Airlines in particular. He presents suggestions for the dispute resolution process that aids the parties and observes that the culture of the organizations and commitment of all parties are critical factors in perpetuating a successful dispute resolution process. He concludes with the role that neutrals in labor relations can play in assisting the parties to deal with and move forward through an ever-changing industry in turbulent economic times.

Chapter 10 bears an intriguing title, “Necessity is the Mother of Invention: Reducing the Costs of Disputing – Successes and Failures.” This chapter focuses on efforts by the U.S. and Canadian postal services and their respective unions to come to grips with the high costs and administrative obstacles associated with formal dispute resolution procedures. Lisa Blomgren Bingham, Professor and Director of the Conflict Resolution Institute at Indiana University, Cynthia J. Hallberlin, Chief Ethics & Compliance Officer for U.S. Foodservice, and Denise A. Walker, Deputy Attorney General in the Indiana Attorney General’s Office, authored “Mediation of Discrimination Complaints at the USPS: Purpose Drives Practice.” This article reviews the results of a longitudinal study of employment mediation for civil rights cases at the U.S. Postal Services. The study shows that the USPS’s use of a transformative mediation model (REDRESS) has significantly reduced the incidence of formal workplace disputes while improving the quality of workplace culture. Kevin Rachel, Manager for Collective Bargaining and Arbitration for the USPS summarized a variety of measures that have been adopted to reduce the number of disputes subject to the grievance arbitration process. During the ensuing panel discussion, Michael Gans, General Counsel for the National Rural Letter Carriers Association, described the union’s rigorous screening process with respect to identifying disputes to take to arbitration. Karen Casselman, Director of Labour Relations for the Canada Post Corporation, discussed efforts by the Canada Post to reduce the cost of disputing by means of improving employee engagement and the use of streamlined grievance procedures.

In Chapter 11, R. Theodore Clark, an attorney representing management, addresses the topic of “Interest Arbitration: Something Old, Something New.” Clark discusses several interest arbitration trends of continuing importance, including the seemingly ever-increasing costs of health care insurance, retiree health insurance, the arbitral treatment of “catch-up agreements,” and med-arb arrangements. He then turns to the “something new” arena by discussing the controversial provisions of the proposed Employee Free Choice Act that would mandate interest arbitration for first contracts if negotiation and mediation do not produce a voluntarily executed contract.

Chapter 12 asks the question: “Where is the New Enterprise Wheel?” In contrast to the Supreme Court’s Enterprise Wheel decision which established an explicit standard for the judicial review of labor arbitration decisions, courts operate with far less guidance when asked to review employment arbitration awards. Academy Members and Professors Michael LeRoy and Peter Feuille attempt to gain some perspective concerning the criteria and conclusions of courts reviewing employment awards though an empirical study of fifteen years worth of court decisions. Their study found that while courts are extremely deferential in reviewing employment awards, they do so by applying an abundance of inconsistent judicial review standards. Moreover, the courts are facing a growing docket of post-arbitration appeals which may signal a lack of commitment to arbitral finality. In a panel presentation commenting on the paper, both Sharon Vinick, an attorney who represents employees, and Judith Droz Keyes, an
attorney who represents employers, agree on the importance of finality in employment arbitration proceedings. Vinick adds that arbitral finality makes it all the more important to structure employment arbitration in a manner that is fair to all parties. Keyes, in turn, suggests that some of the traditional assumptions that employers have relied on in preferring an employment arbitration forum may not withstand closer scrutiny.

In Chapter 13, three Academy Members and University of Minnesota Professors – Laura Cooper, Mario Bognanno, and Stephen Befort – present the results of an empirical study in “How and Why Arbitrators Decide Discipline and Discharge Cases.” Analyzing 2,055 discipline and discharge decisions from the State of Minnesota, the authors present data concerning cases, outcomes and correlating factors. In this initial report on a Research and Education Foundation supported effort, the authors pay close attention to testing whether assertions made in The Common Law of the Workplace about what “most” arbitrators do are borne out by the empirical evidence. The paper also contains interesting data concerning how arbitrators handle split remedies in discharge cases, the Seven Tests, and quantum of proof standards. Academy Members Nels Nelson and Theodore St. Antoine provide commentary on the empirical study. Nelson comments on the study’s methodology and suggests some additional methods of analysis for future evaluation of the study’s data. St. Antoine, lead editor of The Common Law of the Workplace, responds to some of the paper’s assertions as to arbitral viewpoints and challenges the authors to take a closer look at their data with respect to the retention of jurisdiction and quantum of proof issues.

In Chapter 14, Member Jacquelin F. Drucker addresses the topic of “Electronic Discovery: How Do Courts Do It? Should We Do It That Way Too?” delivered at the Academy’s September 2007 Fall Education Conference in Miami, Florida. Drucker summarizes the amendments to the Federal Rules of Civil Procedure on electronic discovery and their use in conventional litigation as a foundation for approaches that may be useful in employment arbitration. Although electronic discovery may facilitate searching and producing documents, the rules anticipate the possibility of cost shifting from the responding party to the requesting party. Several court decisions provide analyses, findings and guidance on cost-shifting. She also addresses electronic discovery in employment arbitration with reference to the Due Process Protocol and rules of the American Arbitration Association as well as the role of the arbitrator in the process working with the parties.

Labor History Tour in Chapter 15 by Member Bonnie G. Bogue highlights the walking and bus tour of the famous waterfront and the significant labor disputes that shaped labor-management relations in the maritime industry on the Pacific Coast and San Francisco in particular. Harry Schwartz, Curator, Oral History Collection for the International Longshore and Warehouse Union, led the tour and provided commentary on the causes leading to the 1934 strike, the aftermath of that strike on the maritime industry and interventionist efforts by the Federal Government during the post-1934 strike period. There was an onsite inspection by Academy members of the Ferry Building, the site of the landmark 1934 strike at the waterfront area, and a visual review of the art panels at the Rincon Annex in the old post office building which displays the gamut of workers in California’s development and growth - - Gold Rush miners, Chinese railroad builders, newspaper employees, dockworkers, sailors, vigilantes, and Rosie-the-Riveters during World War II.
Chapter 16 chronicles legislative matters considered by the Academy and various committees. Part I of his chapter contains the December 2006 Interim Report of the New Directions Committee with respect to the long-debated proposal for broadening the Academy’s mission to “accept as members individuals engaged in a range of workplace dispute resolution activities.” Part II chronicles various actions taken with regard to the New Directions initiative, including a resolution approved by a vote of membership at the 2007 Annual Meeting and a new proposal recommended by the Committee’s Governance Working Group which will be considered by the membership at the 2008 Annual Meeting in Ottawa. Finally, Part III contains an amendment to the Code of Professional Responsibility that permits arbitrators to retain remedial jurisdiction even over the objection of one of the parties.

One of the enduring traditions at the annual meeting is the Fireside Chat with a distinguished member of the Academy. In 2007, the Academy chatted with Frances Bairstow, arbitrator extraordinaire in two countries, academic, IR center director, and conference impresario. Frances rose to the top of her field at a time when, in her own words, “there were lots of big brothers, but not a lot of big sisters.” With the recognition and celebration of Frances Bairstow’s remarkable career, there was also the acknowledgement of members earning honorary lifetime memberships, acknowledgement of other members whose years of membership were recognized with heritage-laden Academy mementos and gracious remarks, as well as remembrances of those departed since the 2006 annual meeting and the orientation of newly-admitted members.

This volume is a team effort, not only from the members of the Academy, speakers and panelists at the annual meeting, but also the BNA staff who provide expert guidance in bringing this project to publication. President Dennis Nolan provided an ever-steady hand and encouragement throughout the year as the Academy’s leader culminating in the annual meeting. Program Chair Chris Knowlton dedicated timeless hours and effort to ensure that the program maintained if not exceeded the high standards that members and attendees anticipate and expect. Presenters, speakers, panelists, and participants in the audience continued their discussions and deliberations in the hallways; such interactions contribute to making The Proceedings a source for research and commentary in labor and employment arbitration. As usual, the Academy’s Executive Secretary David Petersen kept us on track and moving forward and the meeting’s Host Committee (chaired by Ken Silbert) arrangements guaranteed that the Bay Area environment fostered a productive and beneficial outcome for all. Not to be outdone, Karen Ertel and Tim Darby at BNA extended professional advice and technical assistance to ensure that The Proceedings continues to maintain its professional stature for the Academy.

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