

THE DUE PROCESS PROTOCOL: GETTING THERE AND GETTING OVER IT

BY
ARNOLD M. ZACK*

My purpose is to provide a foundation for our discussions during the next two days by recounting the initiation of the Protocol idea, the development of the Protocol itself, the goals of the participants, several of whom are here, and our shared surprise at its survival and the near icon status that it has achieved in the intervening years. I conceived it as a rather modest undertaking to protect the credibility of labor management arbitration and to provide guidance to National Academy of Arbitrators (NAA) arbitrators, and did not view it as the paradigm for workplace dispute resolution.

My first exposure to the problem of due process in employment arbitration occurred in 1994. Until 1994, my career focused exclusively on union management arbitration. I had never done employment arbitration and, in fact, never have since then. I was not aware of the *Gilmer* decision.¹ In the spring of 1994, I read a series of articles by Margaret Jacobs² on the use of mandatory arbitration for statutory disputes in the securities industry. Her stories alerted me to industry-designated arbitrators, the absence of written opinions, the exclusion of employee counsel or representation, and the surrender of the right to go to court or to trial by jury. One accused management harasser referred to arbitration as an “industry fraud,” and a “rigged game,”³ with assurance of being exonerated from such charges.

During 1993 and 1994, the Commission on the Future of Worker-Management Relations, under the Chairmanship of John T. Dunlop, was exploring employment arbitration and related issues. Dunlop

* President, National Academy of Arbitrators, 1994-95.

1. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

2. Margaret A. Jacobs, *Required Job-Bias Arbitration Stirs Critics*, WALL ST. J., June 22, 1994, at B5 [hereinafter Jacobs, *Required Job-Bias Arbitration*]; Margaret A. Jacobs, *Men's Club: Riding Crop and Slurs: How Wall Street Dealt With a Sex Bias Case*, WALL ST. J., June 9, 1994, at A1 [hereinafter Jacobs, *Men's Club*]; Margaret A. Jacobs, *Little Diversity Found on Panels for Security-Firm Arbitration*, WALL ST. J., April 1, 1994, at B3.

3. Jacobs, *Men's Club*, *supra* note 2, at A1.

showed me a copy of the Fact Finding Report of the Commission which highlighted the controversy over employer imposed arbitration systems.⁴ I was concerned about the impact that programs labeled as “rigged” or “fraud” would have on the credibility of our historically scandal free labor arbitration, and on the reputation of the NAA members who did most of that union management arbitration. That was of particular concern given the news reports that 100 companies had already developed employment arbitration procedures, with a prospect that “within 5 years half of all employees nationwide will be required to arbitrate discrimination claims.”⁵ The Dunlop Commission’s Final Report stressed the need to have fair, expeditious and inexpensive resolution of workplace statutory disputes, by neutrals of the parties’ own choosing, using both mediation and arbitration.⁶ In my naiveté, I suggested to Dunlop that there ought to be a way to extend the negotiated due process protections of union management arbitration to this expanding non-union setting. Dunlop, in his true academic style, taunted me into trying to write a proposal for assuring such protections. I poured over jointly negotiated collective bargaining agreements to pull out what I considered to be basic concepts of procedural fairness and sought to adapt these due process protections, as well as assurances of adherence to statutory standards, for implementation by employers in their union free systems. I worked with Thomas Kochan, a member of the Dunlop Commission, and he submitted our proposal to the Commission.

At that time I was serving as President of the National Academy of Arbitrators. Concerned about a possible conflict of interest, I secured permission of the NAA Executive Committee to pursue the effort as the representative of the Academy. On August 3, 1995, I spoke at the annual meeting of the Labor and Employment Law Section of the American Bar Association (ABA), and presented a Proposal for Arbitration of Statutory Employment Claims. Max Zimny and Chris Barecca, co-Liaisons to the Arbitration Committee of the Section, embraced my suggestions and proposed the development of a multi-party task force of “users” to pursue the proposal. They identified and assembled the individuals, representing

4. COMM. ON THE FUTURE OF LABOR-MANAGEMENT RELATIONS, U.S. DEPTS. OF LAB. & COMMERCE, FACT FINDING REPORT 117-19 (May 1994).

5. Jacobs, *Required Job-Bias Arbitration*, *supra* note 2, at B5.

6. COMM. ON THE FUTURE OF LABOR-MANAGEMENT RELATIONS, U. S. DEPTS. OF LAB. & COMMERCE, FINAL REPORT §4 (1994), *available at* <http://www.dol.gov/_sec/media/reports/dunlop/section4.htm>.

key institutions, who made up what came to be called the Due Process Task Force. As we know the participants were the American Arbitration Association (AAA), ABA, American Civil Liberties Union, Federal Mediation and Conciliation Service, NAA, National Employment Lawyers Association and Society of Professionals in Dispute Resolution (now Association for Conflict Resolution).

We met monthly from September through May at the offices of the American Arbitration Association to develop consensus on what we all believed would be a fair system for resolving such statutory conflicts in a non-collective bargaining environment. In April 1995 I took the rewrites of the various sections drafted by Task Force members and melded them into a single document, with the title Due Process Protocol. Our Task Force members agreed on all elements of what constituted due process once an arbitration was underway. But we were at loggerheads over the initiation of the process, the triggering event, i.e., whether the process should be pursuant to a pre- or post- dispute agreement to arbitrate. In our effort to avoid abandoning the whole undertaking and with unanimous conviction that however initiated, the due process standards we proposed should be put into place, we agreed to disagree on the introduction. Thus we agreed that whether mandated or started voluntarily, the other elements of the Protocol should thereafter be guaranteed.

On May 9, 1995 we met to sign the document and thereafter all the organizations involved voted to endorse it. It was significant that the Task Force participants representing important yet often competing, and combating constituencies in the employment arena, unanimously agreed on the components. The survivors of that process can testify that there were indeed heavy negotiations throughout our monthly meetings and frequently in between, but we did reach agreement.

When it came to ratification by the sponsoring institutions most sought to reopen discussions to achieve certain changes. The Task Force members who reported the Protocol back to their institutions, as I did to the NAA meeting on May 26, 1995, all took the position that it was impossible to unscramble the egg, and that each institution had to vote on endorsement of the Protocol in its entirety, either up or down. And that, I suppose, was the most important accomplishment of our endeavor, that although some of the institutions had designated representatives to the Task Force with little awareness of what might come of the venture, all did in fact

endorse it.

It was in June 1997, under the Presidency of George Nicolau, that the NAA took an institutional position on voluntarism that I had been unable to secure in the negotiations within the Task Force. The NAA Policy Statement then adopted, and still in effect with some modification in 2007,⁷ read as follows:

The National Academy of arbitrators opposes mandatory employment arbitration as a condition of employment when it requires waiver of direct access to either a judicial or administrative forum for the pursuit of statutory rights.

The Academy recognizes that, given current case law, Academy members may serve as arbitrators in such cases. However, members should consider and evaluate the fairness of any employment arbitration procedures in light of the Academy's "Guidelines on Arbitration of Statutory Claims Under Employer-Promulgated Systems."

All the Task Force members will acknowledge that the Protocol does not contain all the protections and assurances that each of us as individuals would have liked to include, but the achievement of agreement on the components of the document did mark a substantial step forward in providing due process protections in procedures where many such protections had been lacking. All this occurred before onslaught of litigation which has peppered this field. It is important to remember that our objective had been to encourage employers, with total control over the shaping of their respective systems, to adjust their processes to provide what the Tasks Force members (representing the universe in employment arbitration field) considered to be elements of fundamental fairness.

We had no idea of what would transpire thereafter, or that what we anticipated to be advice to employers would become a standard to be considered by a wider audience. The critical first step in the effort toward recognition of the validity of the proposals inherent in the Protocol was the decision of William Slate, President of AAA, to convene a Conclave on Employment Arbitration in Washington, D.C. on September 22-23, 1995. Slate, who had personally endorsed the Protocol, secured formal endorsement by the AAA Board by phone, and a number of the Task Force members then took part in the conference discussing due process issues in employment

7. See NATIONAL ACADEMY OF ARBITRATORS, POLICY STATEMENT ON EMPLOYMENT ARBITRATION at < http://www.naarb.org/due_process/due_process.html > (May 27, 2007).

arbitration and the ramifications of the Due Process Protocol. That was quickly done and the conference went forward. As a consequence of that undertaking, the AAA hanged its rules to preclude its administration of any employer promulgated employment arbitration system which did not conform to the requirements of the Due Process Protocol. Although the AAA on its own had previously refused to administer employer promulgated systems which deprived employees of the right of representation, it otherwise held that it would administer agreements to arbitrate without delving into the balance of power between signatories or the content or requirement of such agreements. Thus by requiring employer clients to adjust their internal ADR procedures to qualify for AAA administration, it took a giant step toward our goal of increasing the fairness within employer crafted systems. The AAA then undertook to establish selection committees including Task Force members to help select arbitrators and mediators, demographically diverse as required by the document, to serve on regional panels to arbitrate and mediate such cases. Thereafter, arbitrator Sara Adler and I spent two years at monthly meeting at various offices of the AAA to train those arbitrators, and mediators.

That landmark commitment of the AAA has indeed changed the profile of employment arbitration in the United States. While we do not know the precise numbers of systems in place or employees covered thereby, AAA Vice President Robert Meade estimated several years ago that some 6,000,000 employees were working under systems administered by the AAA conforming to the standards of the Protocol.⁸ Since then other major providers of arbitrators in employment arbitration have endorsed the Protocol and committed themselves to administering employment arbitration procedures only if conforming to the standards of the Due Process Protocol. The number of employees in AAA administered plans has probably grown, as have the number of programs

During the last twelve years, the Protocol has had a varied impact. Numerous institutions have adopted it, although there is no monitoring institution to determine the breadth of its use, adherence to its terms by employers who have adopted it, or the number of employees who are subject to the employer adopted procedures. The

8. See Elizabeth Hill, *Due Process at Low Cost An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 780 (2003) (citing interview with Robert Meade).

Protocol has been cited often in articles, studies, and court decisions. John Dunlop and I even wrote a book on it, *The Mediation and Arbitration of Employment Disputes*.⁹

This raises the question of whether the Due Process Protocol was a one time happening whose time has passed or whether it was indeed a significant threshold event for the future of workplace arbitration. The 1994 Wall Street Journal report that within five years employer promulgated systems would spread to cover half the country's employees certainly was wrong.¹⁰ That hasn't happened. I thought for sure that unscrupulous employers, not willing to submit cases to Protocol-adhering designating agencies, would set up their own private appointment agencies. I don't think that has happened. The evidence shows that the number of cases has probably dropped from the 2,000 the AAA talked of in the first year, and when one separates out the vice-president, executive, level supervisory employment arbitrations, the number of employer required arbitrations has actually dropped even more. When one looks to the statutory issues taken to arbitration the number has dropped even further. AAA Vice President Frank Zotto told me last month that the AAA did some 500 statutory cases last year, down from some 1,500 in the early years after the Protocol. A number of companies self-administer their own systems, but I for one think the number of cases is much less than we thought would arise. There have been a declining number of cases that rise to the surface in employment arbitration and the NAA membership is already getting a good share of those cases. There doesn't seem to be very many people, neutrals or advocates, who are doing these cases, let alone willing to be bound by NAA Guidelines or NAA Code of Professional Responsibility.

On the other hand, the Protocol has created standards of fairness in an arena that had lacked such protections. It has stimulated a good deal of research and assessment as to an idealized system. Certainly there are other standards of fairness that we could have included and that probably should be established to assure that employment arbitration is as fair as the union and management players seem to believe collective bargaining arbitration is. Richard Bales landmark paper in 2005 focused on twenty weaknesses in the Protocol that

9. JOHN T. DUNLOP & ARNOLD ZACK, *THE MEDIATION AND ARBITRATION OF EMPLOYMENT DISPUTES* (999).

10. See Jacobs, *Men's Club*, *supra* note 2, at A1.

should be remedied.¹¹ Many of those considered in that paper were the subject of Task Force discussion and the wording of the Protocol reflects the compromises that were reached. Others were not of pressing significance, considering that our audience was the employers and that the courts had not yet really come to grips with the content of such systems. Certainly we ought to, at the very least recognize that Judge Harry Edwards in the *Cole v. Burns International Security Services*¹² has set a new standard endorsing and mandating management's full payment of the arbitrators fees,¹³ contrary to our feeble attempt to replicate the labor management system by trying to insulate the arbitrator from potential bias in favor of the deep pocket reuser of arbitrator services.¹⁴

But the reality is that the Protocol was developed when the topic was largely off screen, at a time when employment arbitration had not gained significant footing, by a group of individuals negotiating on their own, concepts of fairness without direction from their designating institutions, and with a resulting document that was the product of a group dynamic that can not now be replicated. Our real goal was less to make sure there was fairness in employment arbitration than it was to make sure that labor management arbitration was not diminished in union and management credibility and esteem by unscrupulous practices in the employment field.

Bales recognized that in noting that the Protocol came at an early stage in the litigation of employment arbitration structure.¹⁵ The Protocol is a result of many compromises by most of the players who viewed an expanding field of employment arbitration and sought to focus on what they viewed as the most significant prospects for assuring its fairness and credibility. Not all of the players are still with us, not all the institutions remain involved in employment arbitration and the experience of the intervening decade has placed too many of its elements under a glaring light that would become the focus of much more intense discussion by those who are now much more active players in the arena.

11. Richard A. Bales, *The Employment Due Process Protocol at Ten: Twenty Unresolved Issues and a Focus on Conflicts of Interest*, 21 OHIO ST. J. ON DISP. RESOL. 165 (2005).

12. 105 F.3d 1465 (D.C. Cir. 1997).

13. *Id.* at 1485-86.

14. See A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP § C(6) (May 9, 1995), available at <http://www.naarb.org/due_process/due_process.html>.

15. Bales, *supra* note 11, at 197.

We did try to reconvene the group to flesh out the mediation components of the Protocol in June 2002 at an ABA meeting in San Diego. At that session those signatories who were present agreed that it was impractical to reopen the Protocol for reconsideration of the mediation components without opening up all Protocol provisions to reexamination and renegotiation, with the expected risk of never being able to secure the closure we surprisingly achieved in May 1995. So we disbanded with regret at not being able to strengthen the mediation components of the Protocol.

That highlights the most significant risk of suggesting a reopening and renegotiation of the Protocol at this time. The visibility given to it and to the field of mandatory employment arbitration in the intervening years has raised so high the stakes of reconsideration that it is safe to say that if reopened, it could never be reclosed with unanimity. Our disagreement on pre- or post-disputes was an indication, even back then, that not all of us could agree on everything. The passage of time and the increased focus on the components of due process in employment arbitration, which is now embracing contractual as well as statutory issues, makes that unanimity even more unlikely.

Nonetheless the Protocol, even with its acknowledged limitations and though even perhaps outdated as Bales asserts,¹⁶ has set a base line for workplace fairness, serving as the guide for the AAA which seems to be administering most of the arbitrated cases, and as a benchmark for other designating agencies entering the field. As long as the courts continue to endorse employer created systems with minimal review of their due process components, the Protocol, thanks to its nominal acceptance by several major arbitrator designating agencies will continue to provide a measure of workplace fairness that seems to be of little interest to the courts. Should the courts become more acute or sensitive in their examination of such systems as a replacement for fundamental access of employees to courts and statutory workplace protections, then perhaps we will see closer attention paid to the fundamental rights of employees to workplace due process, including the threshold issue of whether such systems are in fact voluntary when imposed as a condition of hire or continued employment. The concept of Gilmer as a stockbroker being told that his commitment to the employer's ADR system was a voluntary

16. *See id* ("Perhaps the most significant shortcoming [of the Protocol] is that it is quickly becoming outdated.").

choice in lieu of working elsewhere, has always struck me as unreasonable when every brokerage firm subscribed to the same system and his voluntary alternative was to move into some other career.

The Protocol is perhaps outdated. Perhaps it is not prescient as to the looming problems of court enforcement of employment arbitration, but it is not capable of change and apparently ineffective in drawing the courts to rejection of lopsided arbitration agreements. It is certainly not a vehicle for assuring employees working in covered enterprises access to the nation's judicial and statutory protections. It may, however, be better for employees bound to such systems compared to the days before they had such systems and were forced to costly resort to the courts for workplace protection, but it is still, in my mind a tilted playing field, hardly what the Supreme Court called for in the *Mitsubishi* decision¹⁷ as simply an "alternative means of dispute resolution."¹⁸

So much for how we got to the Due Process Protocol, an accident of history, and to my point of view, as good as we could have done. I don't think it can be reopened. I don't think it needs to be. It is the province of the courts to assure that such one-sided agreements do not deprive citizens of their statutory rights and protections. The NAA and even all the institutions which were party to the Protocol have never been called upon by the employment law community to establish standards, or to monitor the field of employment arbitration. If we want to go beyond the Protocol to make those procedures more just, then perhaps we should pursue a program of educating the participants in the new systems. The suggestion that the NAA open its doors to neutral employment arbitrators to imbue them with our standards misses the point. Those arbitrators are still free to join our ranks if they meet our case load requirements, and our members continue to do a good bit of that outside work.

The greater need, I suggest, is to raise the standards of those with whom we are less comfortable, but who seem to be doing the bulk of the work. According to the AAA, the majority of employment arbitration is done by arbitrators who are also working as advocates. They are the ones who may benefit from training and counseling on the importance of adherence to NAA standards of fairness. If the purpose of the Protocol, including the component of mediator and

17. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

18. *Id.* at 626-27.

arbitrator training, was to upgrade sensitivity to due process fairness, we should find a way of reaching those who are doing the majority of the work. That could be accomplished by our offering and encouraging training programs, or our encouraging and cooperating in the establishment of a new organization of those arbitrators. Our insistence that arbitrators be “neutral” (even assuming that an arbitrator whose sole income comes from the employer side is indeed “neutral”) is unrealistic when the disputants prefer advocates as arbitrators. We must take the world as it is, not how we want it or how the union management community created it for us.

Organizations represented in the Task Force were largely labor-management institutions seeking to protect “our” arbitration from being tarred by unfair and one-sided procedures in the employment arbitration field. The Task Force members represented organizations which endorsed collective bargaining and negotiated arbitration procedures. They sought to negotiate and reach agreement consistent with their respective ideals to set standards of fairness in employment arbitration despite what some of us viewed as the courts’ efforts to lighten their dockets by equating individual employee power with that of the corporation in creating such agreements to arbitrate. But it is as it is and I suggest that it may be time to get over it.