

Supreme Court of the United States

In the Matter of:

Docket No. 14

-----X
COMMONWEALTH COATINGS CORPORATION,

Petitioner,

vs.

CONTINENTAL CASUALTY COMPANY, FIREMAN'S FUND

INSURANCE COMPANY AND A. C. SAMFORD

OVERSEAS, INC.,

Respondents.
-----X

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Place Washington, D. C.

Date October 22, 1968

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

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ARGUMENT OF:

P A G E

Emanuel Harris, on behalf of Petitioner

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Overton A. Currie, on behalf of Respondents

13

REBUTTAL OF:

Emanuel Harris

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- - -

1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 ----- x
4 Commonwealth Coatings Corporation, :

5 Petitioner, :

6 vs. :

7 Continental Casualty Company, Fireman's Fund :
8 Insurance Company and A. C. Samford Over- :
seas, Inc., :

No. 14

9 Respondents. :
10 ----- x

11 Washington, D. C.

12 Tuesday, October 22, 1968

13 The above-entitled matter came on for argument at

14 1 p.m.

15 BEFORE:

16 EARL WARREN, Chief Justice
17 HUGO L. BLACK, Associate Justice
18 WILLIAM O. DOUGLAS, Associate Justice
19 JOHN M. HARLAN, Associate Justice
20 WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

21 APPEARANCES:

22 EMANUEL HARRIS
23 30 Vesey Street
24 New York, New York 10007
Attorney for Petitioner

25 OVERTON A. CURRIE
1405 Fulton National Bank Building
Atlanta, Georgia 30303
Attorney for Respondents

P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 14, Commonwealth Coatings Corporation, Petitioner, v. Continental Casualty Company, Fireman's Fund Insurance Company and A. C. Samford Overseas, Inc., Respondents.

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Harris.

ORAL ARGUMENT OF EMANUEL HARRIS

ON BEHALF OF PETITIONER

MR. HARRIS: Mr. Chief Justice, may it please the Court:

The question involved on this certiorari is the effect of the failure of a third arbitrator in a tripartite arbitration proceeding and a party to disclose prior business relations between them, whether an award made in such a proceeding is invalid under the Federal Arbitration Act.

The act provides that the award may be vacated where the award was procured by corruption or fraud, where there was evidence, partiality or corruption in the arbitrators or either of them, or where the arbitrator is guilty of any other misbehavior by which the rights of any party have been prejudiced.

This case arises out of contact between the petitioner and the respondents. The petitioner was a subcontractor of the respondent Samford for the performance of painting work on five construction projects in Puerto Rico. The respondent Samford was the general contractor.

1 The claim of petitioner was that Samford, although it
2 received payment from the owner for the work performed by the
3 petitioner, failed to make progress payments to the petitioner
4 and, therefore, the petitioner abandoned the work. The claim of
5 Samford is that the petitioner abandoned and stopped the work
6 under contract.

7 The contract provides for arbitration of all disputes.
8 The respondent bonding companies were the sureties on Samford,
9 Miller Act cash bonds. The contract, as I said, provided for the
10 arbitration of disputes and the respondent bonding companies
11 obtained a stay of the suit against them on the Miller Act bond
12 pending the determination of the arbitration.

13 Pursuant to the procedure established by the contracts
14 the petitioner and Samford each appointed one arbitrator. Those
15 two arbitrators appointed an arbitrator by the name of Capacete.
16 The the time the arbitrators were designated and prior to the
17 arbitration proceedings, petitioner's attorney Mr. Romero, made
18 an investigation to discover whether any of the arbitrators had
19 prior business relations with any of the parties and he found
20 none and none of the arbitrators informed him of any such prior
21 relations.

22 He states in an affidavit in the record that if he
23 had known about such private previous relations, he would as a
24 lawyer have objected to the arbitrators' capacity. The respondents
25 state throughout their briefs that no inquiry was made by the

1 petitioner, totally disregarding this affidavit by Mr. Romero,
2 although they devoted about five pages in their brief in an attempt
3 to discredit Mr. Romero's affidavit.

4 Q But he never asked this particular arbitrator?

5 A The affidavit does not disclose.

6 The affidavit says that none of the arbitrators
7 informed him. The affidavit does not say that he asked.

8 Q Didn't that particular arbitrator testify that nobody
9 asked him?

10 A He did. However, it was imbedded in the respondents'
11 brief that Capacete did discuss possible arbitrators with Mr.
12 Romero at the time a vacancy appeared in the Board of Arbitra-
13 tors. As a matter of fact, at that time on the request of Mr.
14 Romero, Mr. Capacete furnished a list of lawyers who knew some-
15 thing about engineering cases and from that list furnished by
16 Mr. Capacete a third arbitrator was designated to fill the
17 vacancy.

18 Now Capacete at that time did not say anything about his
19 prior relations with Samford.

20 Q Do I gather it is your position that there is other
21 misbehavior under the statute?

22 A No, our position is that the arbitrator and the
23 respondents with whom he had business relations were under a duty
24 to disclose these previous relationships.

25 Q Yes, the statute you just quoted to us speaks in terms

1 of certain misbehavior of the arbitrator apart from the position
2 of the contractor, and any duty he may have had. Is it your
3 position that the arbitrator in any event was under an affirma-
4 tive duty or otherwise the duty of misbehavior if he did not
5 disclose these?

6 A No, our position is that the very failure to make dis-
7 closure constitutes misbehavior to the prejudice of the petitioner.

8 Q And this on the part of the arbitrator independently
9 of the other parties?

10 A And also on the part of the respondent because it is
11 actually referring to corruption and fraud.

12 Q Let me put it to you again. Are you submitting to us
13 that without regard to the conduct or the failure of the other
14 party in the arbitration to disclose, it is misbehavior under
15 the statute for the arbitrator not to disclose it?

16 A Yes. And we will go further and say not only was it
17 misbehavior on the part of the arbitrator, but there was a duty
18 on the part of the respondent to disclose these prior relations.

19 Q Where did that duty come from?

20 A It is a matter of law when parties submit their con-
21 troversy to an arbitration board and particularly to a tripartite
22 board, that it certainly is the duty of the respondent to disclose
23 that the third arbitrator, who is supposed to be a neutral arbi-
24 trator, is in fact not a neutral arbitrator.

25 That is within the provisions of the Arbitration Act

1 that the award was procured by corruption and fraud in the con-
2 cealment of the prior relations, so it is within the statute under
3 both provisions that I referred to.

4 Q The First Circuit does not deny that in some circum-
5 stances there may be a duty on the part of the arbitrator to
6 make voluntary disclosures. As I read it, however, it says that
7 it is not clear that in this case a relationship was sufficiently
8 close to establish partiality as a matter of law. Is that
9 right?

10 A That is what the Court of Appeals held.

11 Q In other words the Court of Appeals affirmed a factual
12 determination by the District Court?

13 A That is true. Mr. Justice Fortas, the Court also held
14 that under the circumstances and facts in this case it would be
15 far better if there had been disclosure. That answers the argu-
16 ment of the respondents that the relations between these two
17 parties were remote and isolated and insignificant and insubstan-
18 tial. In other words, the Court didn't hold that these relations
19 were remote, isolated and insubstantial, they held it would have
20 been far better if there were disclosure.

21 That is the whole gist of this cast that this arbitra-
22 tor and the respondent should have disclosed this relation.

23 Now, coming back to my discussion with reference to
24 inquiry ---

25 Q Mr. Harris, what would happen if the arbitrator in good

1 faith forgot and later on remembered?

2 A Mr. Justice Marshall, it would be impossible for this
3 arbitrator to forget this.

4 Q I am talking about in a hypothetical.

5 A In a hypothetical if the circumstances were such as
6 to justify forgetfulness, there might be some excuse or justi-
7 fication for failure to disclose, but not in this case.

8 Q I just say maybe you are going too far in making just
9 a flat rule that if a neutral arbitrator has at any time under
10 any circumstances in the past had any dealings with one of them,
11 that in and of itself is sufficient to upset his decision.

12 A I think you would have to go to the facts in the particu-
13 lar case. I can't conceive of cases where mere failure to dis-
14 close automatically would not disqualify an arbitrator.

15 Q You are not asking for automatic pro se rule, are you?

16 A Not automatic, except under the facts of this case.

17 Now here is the justification made by the respondents
18 in this case. It is undisputed that Capacete made its services
19 to the respondents for which his company was paid. He admitted
20 that. He admitted he never told the petitioner or the other
21 arbitrators about it. In fact, he testified that he had no rea-
22 son to disclose that.

23 Now, in the face of that and referring to the nature
24 of these relations, the respondent went so far as to impose a
25 condition on the petitioner at the time the petitioner was going

1 to fill a vacancy on the Board, that they could appoint a succes-
2 sor arbitrator without objection or without the consent of
3 Samford, subject to the right of Samford to object if the person
4 selected had any interests or involvements in the matters arbi-
5 trated. In other words, and Mr. Romero referred to that situa-
6 tion in the District Court as evidence of a guilty conscience
7 that Samford was making sure that the very situation was not
8 present on our side and then counsel for the respondent says that
9 was a very reasonable and understandable thing to do.

10 Another way it was reasonable and understandable for the
11 respondent to fail to disclose prior relations, but it was not
12 reasonable and understandable for us, the petitioner, to object
13 when we found out what the circumstances in the evidence was.

14 Q Would you say Mr. Harris many years back, it was deep
15 relationships?

16 A It terminated before the year of arbitration, it lasted
17 for five years, from about '59, '58 to '61. It was about five
18 years. One of the points respondents makes with reference to
19 these relations, they say that services rendered ---

20 By the way, these services are on the very project, some
21 of them involved in the arbitration, and they say these services
22 were not rendered by Capacete, but rendered by his company. Well
23 Capacete himself testified that he personally, using the pronoun
24 "I," rendered these services and that he owned this company, which
25 they say carried on his prior transactions.

1 Under examination by respondent counsel, he admitted
2 that he owned 67 percent of the company. Now whether or not his
3 company performed the services or he performed them for the
4 benefit of his company, of course that is no justification for
5 the failure to disclose these relations.

6 If these services were performed by him for the bene-
7 fit of the company, certainly the duty to disclose them arises.
8 He cannot hide behind the cover and say, "I did this for my com-
9 pany, so I don't have to tell the petitioner that I have these
10 prior relations." Also they say only \$12,000 was paid to the
11 arbitrator and his companies for all the services rendered. At
12 what amount does the duty to make disclosure stop?

13 Do the respondents contend that this Court should fix
14 an amount in dollars and cents above \$12,000 or a percentage of
15 income that duty arises? They also say the services rendered
16 by the arbitrator were different than the services rendered by
17 the petitioner, the arbitrator having performed services in con-
18 nection with drilling and investigation of foundation, whereas
19 the petitioner's services were for painting on the very same
20 projects.

21 Could you have a more ridiculous justification or
22 excuse for failing to disclose the relation? Do the services
23 rendered by the arbitrator have to be exactly the same in kind
24 and character as the other party before he is required to disclose
25 disqualifying relations?

1 The respondents in their brief attempt to avoid the
2 facts of concealment with euphemistic phrases that they don't
3 have to volunteer, there is no duty to volunteer information not
4 solicited. The Court of Appeals itself said there was a diffi-
5 cult line between what has to be volunteered and what may await
6 for inquiry, but the Court of Appeals held for this case that the
7 information should have been disclosed.

8 The line that the respondents argue here is that, "We
9 didn't conceal, we just didn't volunteer." I submit to this
10 Court that certainly is no explanation, excuse or justification
11 through the use of semantics to justify the violation of the
12 obligation to disclose.

13 Now principally with reference to Capacete, he was the
14 third arbitrator. He is supposed to be neutral. The Courts have
15 made clear that arbitrators designated by the parties are expected
16 to have relations with the parties, even expected to perhaps
17 favor the parties that designated them. But the neutral arbi-
18 trator is under a stricter standard of impartiality, freedom from
19 bias and prejudice.

20 Certainly this standard requires that when a third
21 arbitrator is chosen, that the least that can be expected of him
22 is that he should disclose facts which show that he is not, in
23 fact and in truth and fact, neutral. The importance of this
24 appears in the record because one of the arbitrators was appointed
25 at the time the vacancy occurred testified that he relied on

1 Capacete, he did not examine each and every document himself, but
2 relied on Capacete for decisions.

3 Who can tell from this record whether the prior rela-
4 tions did not affect his prior relations?

5 Q Was this a unanimous award?

6 A This was. This arbitrator who testified he depended
7 on Capacete is one whose name was on the list given to Mr.
8 Romero by Mr. Capacete. Indirectly Capacete recommended this
9 arbitrator, who said that he depended on Capacete for his deci-
10 sions.

11 That emphasizes the importance of a third arbitrator.
12 The respondents content in their brief that an arbitrator is
13 like a judge. An arbitrator is in a stronger and more important
14 position than a judge. You can appeal from a judge's decision,
15 but there is no appeal from an arbitrator on law or fact, and
16 that is the reason why the position of the third arbitrator in
17 this case is so important, because there is no appeal from the
18 award on questions of law and fact and that is why the stricter
19 standard is required of the third arbitrator than the other
20 arbitrators.

21 The respondents in their brief refer to the magnitude
22 and intensity of heat and active dispute between the parties,
23 including many contested and contradicted contentions and complex
24 disputes. Obviously if you have a failure to disclose, and
25 assuming that Capacete wilfully failed to disclose, then certainly

1 the respondent wilfully failed to disclose.

2 Naturally you cannot find in the record positive evidence
3 to show partiality. The very fact of concealment, which is
4 undisputed in the record, shows the partiality which makes this
5 award vulnerable under the Federal Arbitration Act.

6 Now, if Your Honor please, these respondents say that
7 a setting aside of this award would frustrate the purpose of
8 arbitration, which would be to give final and quick relief. The
9 purpose of an arbitration is to have an honest proceeding. If
10 there is any frustration of that purpose, the respondents them-
11 selves are responsible for the vulnerability and for this tainted
12 award.

13 They have been responsible for the thousands of hours
14 of work that they refer to in their brief and they have subjected
15 the petitioner to the tremendous burden and expense of carrying
16 on an arbitration wholly unaware of the secrecy and the affilia-
17 tion and the tieing between this arbitrator and the respondent.

18 Now withstanding this failure to disclose, these rela-
19 tions and the attempted justification of this failure which abso-
20 lutely doesn't stand up morally or legally, and they say that
21 setting aside this award would frustrate the purpose of arbitra-
22 tion when they are responsible for the facts which result in this
23 frustration.

24 They actually complain in their brief that we didn't
25 pay our share of Capacete's \$3,000.

1 Your Honors, I submit that it is adding insult to
2 injury, that is the only way to describe it. I submit this award
3 is immoral, legally untenable and for this Court to sustain con-
4 tentions that in circumstances like this there is no duty to
5 disclose the prior relations, opens the door to corruption so
6 you could not have an honest arbitration where you had a situa-
7 tion something like this.

8 I submit that under the facts in this case you have a
9 dishonest determination which this Court should not permit to
10 stand. Let me give you an instance, even though it does not
11 positively disclose the partiality, of how the record discloses
12 that there must have been partiality.

13 The total amount of these contracts was \$350,000. They
14 were paid about \$200,000, leaving an unpaid balance of \$140,000.
15 The petitioner claimed \$113,000 for work that had been performed
16 leaving about \$28,000 of uncompleted work. The arbitrators allowed
17 Samford \$158,000 to finish \$28,000 worth of work. Does this
18 record evidence of partiality?

19 I submit that it does. I ask this Court to set that
20 award aside.

21 MR. CHIEF JUSTICE WARREN: Mr. Currie.

22 ORAL ARGUMENT OF OVERTON A. CURRIE

23 ON BEHALF OF RESPONDENTS

24 MR. CURRIE: Mr. Chief Justice and may it please the
25 Court:

1 We do not come today desiring to stand upon any tech-
2 nical legalism, although we do request that the law be applied
3 to our case. We feel that the law in this case will not only
4 produce that which would be a sustaining of this award, but will
5 also do that which is ethical and moral according to the expecta-
6 tions of our society in its highest decision.

7 Inasmuch as there has been some question raised in the
8 more recent escalation of allegations in the briefs and plead-
9 ings of this particular Court at this level, which are new and
10 different from those raised in the lower court, some of which not
11 only reflect on our clients, but the attorneys who have just been
12 admitted to this practice, may I as an officer of this Court
13 invite your deepest questions to the most sensitive areas of my
14 professional practice on what has occurred in this case in any
15 unreserved, unqualified fashion.

16 First of all, the merits of the issue have partly been
17 discussed. May I respond to that and attempt to address this
18 Court and establish that not only were the arbitrators more than
19 justified in their award, but that the procedures followed were
20 all so legal and ethical and proper. The subcontractor is a
21 large painting subcontractor. The record reveals there are three
22 owners, two from New York and one in Puerto Rico. They had three
23 contracts involved in excess of \$350,000, the painting on five
24 contracts. It had over \$9 million worth of work on Government
25 building, the United States Air Force public housing.

1 We have a box here over 18 inches thick of records that
2 were introduced in the Trial Court. It is only part of the evi-
3 dence that established the back charges, every hour of additional
4 work required when the prime contractor had to perform work that
5 the subcontractor did not perform: Painting behind the bushes,
6 buildings had been painted the wrong color, the subcontract
7 required the subcontractor to pay the payments monthly and on
8 time for paints and supplies so there would be no liens against
9 his Miller Act bonds.

10 Instead of that, facilities were turned in by the sub-
11 contractor saying payments had been made to the suppliers and
12 the contractor discovered there were some \$40,000 to \$60,000 of
13 such payments. In short, Your Honor, there is more than abundant
14 evidence in this Court to establish a breach on the part of the
15 subcontractor which provoked the demand by the prime contractor
16 when the sub abandoned the work, even though the contract pro-
17 vided in the event of disputes the work would continue and they
18 would immediately have arbitration, each contractor would appoint
19 an arbitrator and those two would appoint a third and the vote of
20 any two would be a controlling vote that would be binding and
21 forcible in the Courts.

22 They abandoned work contrary to that contractual com-
23 mitment. We appointed Mr. Chapman. We had a Blue Ribbon arbi-
24 tration board. For 30 years he was with the Corps of Engineers as
25 a contracting officer, a graduate engineer. Opposing counsel

1 appointed a lawyer by the name of Mr. Holman. They, in turn,
2 selected Mr. Capacete. We did not select him. Mr. Capacete is
3 a Professor of Engineering at the University of Puerto Rico,
4 60-some-odd percent owner in the largest foundation testing com-
5 pany on the Island of Puerto Rico, and from 1957 the only such
6 construction testing firm on that island, until 1959 one of the
7 two, the largest, and continues to be the largest.

8 Since then Mr. Capacete has become a partner in an
9 architectural firm that does over a million dollars a year in
10 gross volume. He is the senior partner of that firm, a leading
11 engineer, so outstanding that the parties have continually, the
12 petitioner here continually stipulated that he was honorable,
13 competent.

14 We are in this situation, Your Honor. There was a com-
15 plaint filed against us charging many, many things, some 12 or
16 15 grounds to invalidate the award. We thought that this matter
17 had been abandoned by judicial stipulation that the parties had
18 abandoned any contention that they had a ground for complaint.

19 The basis for that is we find in the record and in our
20 brief on pages 38 and 39 we had at least some five or five quota-
21 tions from petitioner's counsel, stating, for example, "Now we
22 don't mean to say that we believe the Chairman acted improperly
23 in any way."

24 Another statement from petitioner's attorney, "I would
25 like the record clear that at no time is Mr. Romero or myself

1 accusing any of the arbitrators with anything fraudulent."

2 Another example, "This is not an allegation of fraud
3 against the arbitrator," and in there are many others that caused
4 the Court to conclude in its finding counsel for the plaintiff,
5 the petitioners disclaimed any intimation of bias, partiality
6 or fraud on the part of the arbitrators involved. He seeks to
7 overthrow the award on the ground that Samford should have
8 informed the plaintiff that the engineering firm with which the
9 arbitrator was involved had in the past done some work for Sam-
10 ford due to the fact that not only plaintiff failed to offer any
11 evidence showing partiality in said arbitrator, it also has
12 expressly disclaimed any such imputation, this objection to the
13 award must be and is hereby overruled.

14 The Trial Court heard this case three times. There
15 were so many objections, there were objections made by the peti-
16 tioner that the the award was void, because the met on Labor
17 Day. There were ten days of testimony. Why did the arbitrators
18 meet on Labor Day? Because two of the owners of petitioner lived
19 in New York and desired to return home and asked that we meet
20 on Labor Day. So at their request and by stipulation of all
21 parties, the arbitrators did us the service of working on week-
22 ends.

23 It was then challenged as being illegal, because it
24 was Sunday work, it was quasi-judicial and therefore there was
25 no jurisdiction for the Board to work on Sunday.

1 Q If there is a question of the law here, I suppose there
2 has to be a contention that in these circumstances an arbitrator
3 has a duty to come forward and make disclosure whether or not he
4 is asked questions or appropriate questions by the other side
5 and that even where you have a unanimous award, there is a per
6 se and an affirmative duty on the part of an arbitrator to come
7 forward with statements of circumstances that may affect his
8 qualification.

9 That is the only issue here, as I see it, isn't it?

10 A Yes, sir, that is correct, Mr. Justice Fortas. There
11 is in that instance the very relevant question that was raised
12 earlier, where is the source of that duty of the arbitrator to
13 volunteer information not sought by the opposition?

14 No. 1, every case that has spoken of such a duty that
15 we have found has arisen where the parties have themselves
16 imposed the duty to speak. Without question if Mr. Capacete had
17 been asked, "Tell me, have you ever done work with Samford, what
18 are your past relations?" and had he misrepresented it, then
19 having made the request for information, the objection would
20 have been preserved.

21 There is no question about that.

22 Q Who suggested Mr. Capacete for this?

23 A The other two arbitrators, Your Honor.

24 Q The other two. Is there anything in the record to
25 indicate who first proposed Mr. Capacete?

1 A No, sir, there is a total lack of information on that.
2 Mr. Holman died, the attorney appointed by petitioner died. Prior
3 to that there had been another arbitrator, a Mr. Ponds, appointed
4 by the petitioner, who resigned. We were having difficulty to
5 get the petitioner to select an arbitrator. Therefore, I wrote
6 a letter.

7 Every contact we had with the arbitrators was by writ-
8 ten letter with copies to all parties. We asked Mr. Capacete to
9 continue to serve when he suggested he had to go to Spain for an
10 engineering institute. We waived the right to go to Court and
11 asked that the vacancy be appointed by the Court since Mr. Holman,
12 who had been appointed by the petitioners, had died.

13 We told them they could appoint anyone they wanted to
14 so long as they didn't have an interest in the litigation. Now,
15 Your Honor, with reference to the question of whether or not an
16 arbitrator had a duty to volunteer any alleged disqualification,
17 the cases cited by petition deal with the American Arbitration
18 Association, which is used when the parties in their arbitration
19 clause refer to it by reference, and the agreement becomes juris-
20 dictional.

21 We all know that an arbitrator has to have authority
22 to decide, must be vested by the agreement of the parties to be
23 bound in everything from the disputes clause in Government con-
24 tracts, the Bianchi Decision, all arbitration grows out of the
25 parties having consented to as a matter of contract to allow a
third person to resolve the dispute and be bound by it.

1 When you impose the condition in there that you will
2 bring forward any information that is disqualifying, that is the
3 equivalent of inquiry. But we have found no case where an arbi-
4 trator either absent inquiry or absent that form of agreement
5 that you will use the standards or you will use the rules of some
6 association's control, any duty imposed on the arbitrator.

7 More important here, even here the parties had expressly
8 stipulated how can we prove anything, what greater proof is there
9 known to man than a judicial stipulation of innocence, actually
10 using the word that Mr. Capacete was guilty of no wrong-doing.
11 They have relieved him, they have ratified this man even in the
12 course of this litigation.

13 They then attempted to shift the burden to the respon-
14 dents.

15 Q Do you think that is a man is called on to act as a
16 judge in a court, if he knew the other side, that he had had
17 close business connections with them, whether there is a statute
18 or not, that it would be his duty to report that? What would
19 you say?

20 A I think, Your Honor, when you indicate close, that the
21 present law dealing with a direct interest, that is more than
22 insubstantial and presents that certainly there should be a duty.

23 Q There is a difference to me in the defense of what was
24 done if you put it on the basis that the claim that he had been
25 associated with them was not substantiated ---

1 A First of all, we submit it was insubstantial, it was
2 not close, it was remote. It was casual, it was over a period of
3 some five years. As the brief makes an analysis, a total amount
4 of some \$12,000 was involved, most of that for another corpora-
5 tion, only some \$2,000 to \$4,000 is involved here and this con-
6 stituted less than if you only include the \$2,000 to \$3,000 over
7 a six-year period, it is less than 1 percent.

8 If you add all \$12,000, it gets down to something like
9 one-tenth of 1 percent of the man's business, Mr. Capacete's
10 gross business.

11 Q The question for us really is what did the Courts
12 below find and in the truth, I think the District Court found
13 that there was no prejudice or bias, in fact, as manifested in
14 the course of the proceedings, No. 1; and No. 2, that they did
15 find the relationship was not sufficiently close to require an
16 arbitrator to volunteer the information?

17 A Yes, sir, that is absolutely correct.

18 Q Did the District Court find that?

19 A In fact, not only did the District Court find there was
20 no imputation of even partiality, much less fraud, but the Dis-
21 trict Court reviewed all the evidence.

22 Q The next question is, did the District Court find that
23 the relationship was not sufficiently close to require the arbi-
24 trator to come forward with a disclosure?

25 A Your Honor, the District Court held that there was no

1 imputation, there is an express disclaimer of any partiality
2 or fraud and then held this: "In closing, I wish to state that
3 the record shows that the arbitrators conducted fair, impartial
4 hearing, that they reached a proper determination of the issues
5 before them, and that the plaintiff's objections represent a s
6 situation where the losing party to an arbitration is now
7 clutching at straws in an attempt to avoid the results of the
8 arbitration to which it became a party."

9 Then the Circuit Court on Appeals, the court, Your
10 Honor, the lower court, I believe, thought as we thought, that this
11 issue had basically been abandoned because the petitioner's attor-
12 ney at the last hearing said, and it is explained in the brief,
13 that the ultimate issue is that they did not have the right to
14 cross-examine and they objected to certain evidence and the
15 arbitrators nevertheless let it in.

16 All three arbitrators testified that they remembered
17 otherwise. So the petitioner's attorneys say it is a matter of
18 credibility. I say I objected and the arbitrators let it in.
19 I say we asked for time and it was not granted.

20 So the Trial Courts asked that the Court reporter tran-
21 scribe the record and after reviewing the record, the three
22 arbitrators' version was sustained. The petitioner asked for
23 Court reporters. They have never paid them. They never even
24 paid their own attorney, who was an arbitrator.

25 We did not mention that they had not paid Mr. Capacete

1 alone.

2 Q Mr. Currie, would the connection with which the arbi-
3 trator in question had with your client be such that they would
4 have to be disclosed under the commercial rules of the Arbitra-
5 tion Association, under Rule 11?

6 A Your Honor, we believe under the Elias Case and the
7 authority of the Gimbels Case, both of which are cited, that
8 they would be held to be insubstantial. It would certainly be
9 a better practice if the information were requested.

10 Q How about the rule on disclosure?

11 A Again in the Gimbels Case, Your Honor, one of the
12 arbitrators was a realtor and Gimbels was a party to arbitration
13 and there was a duty to make such disclosure. There had been
14 business between the firms. Such disclosure was not made and
15 the award was challenged.

16 The Court held that, first of all, the relationship
17 was casual, remote and not direct and continuing and not such as
18 to suggest that there would be a commitment or a loyalty of par-
19 tiality, and therefore it was not of the type that was normally
20 disqualifying.

21 So in that instance holding it would not be disqualify-
22 ing.

23 Q It would normally be disclosed?

24 A I would think under the regulations if our client had
25 been asked or if we had been asked had there been past business

1 relations, we certainly would have revealed it.

2 Q I know but the rule suggests a duty.

3 A That is correct, it imposes that, and in that case,
4 Your Honor, the arbitrator did not do it and it is significant
5 that the Court held that certainly a party to arbitration could
6 suspect that a large real estate firm like the one the arbitra-
7 tor was connected with could have had business connections or
8 business dealings with a business as large as Gimbel's, and there
9 is implied imputation of knowledge, constructive knowledge. And
10 the Elias Shipping Case holds the same ruling that when parties
11 have sufficient knowledge to put them on notice to the possi-
12 bility of some relationship, then they are charged with that
13 notice.

14 Q As I understand, counsel just said this arbitrator had
15 some employment in connection with this project that is here
16 under consideration?

17 A With this arbitrator's firm, Your Honor.

18 Q He owned the firm, didn't he?

19 A He owned 60-something percent of it, a majority stock-
20 holder. They did testing, Your Honor, of sand and cement and
21 soils.

22 Q In connection with this same project?

23 A Not all of it, on two of them. There were five con-
24 tracts. They went out and tested concrete for them and we think
25 the subcontractor who was on all five contracts, who had project

1 superintendents, who had the equivalent of a general manager and
2 an executive vice president down there continually in contact
3 with this contractor, why didn't they testify that they did not
4 know?

5 There is not one iota of proof in any officer of the
6 corporation that they did not know of this other relationship
7 which had occurred more than a year before this arbitration.

8 Q Is the burden on them to prove this or is the burden
9 on your people to show that the arbitrator was not biased?

10 A The burden is completely on them, Your Honor, by uni-
11 versal decision, the one who is attempting to set aside the
12 award.

13 Q No matter what the secret relationship might be between
14 the arbitrator and your side?

15 A The burden would be upon them to show that there had
16 been some disqualifying relationship that they had no knowledge
17 of, just like a mutual mistake or some other fraud and there was
18 no proof offered that the officers of this company did not know
19 this. As you analyze the small Island of Puerto Rico, 35 miles
20 wide, the construction industry there, we charge in our pleadings
21 that they did know or should have known.

22 As I indicated, one reason there is not more proof on
23 this record and I believe a fair reading of the record will
24 reveal that it appeared that this question had been abandoned,
25 as other issues had been.

1 Q Do you mean by that that it is legally not here?

2 A I am saying, Your Honor, that I believe ---

3 Q Just one or the other?

4 A It has legally been surrendered, so there are no
5 grounds to object to here.

6 Q So it is not properly here?

7 A No, sir, they have appealed and certiora has been
8 granted and this Court certainly has jurisdiction and is properly
9 here, but on the merits of the issue. The party, as you review
10 the record, has so stipulated as to the integrity, the absence
11 of misbehavior, and we submit on the merits they have ratified
12 the award and the qualification of the arbitrator.

13 We have used the words that this contractor we repre-
14 sent was going out of business, had not bid on any major construc-
15 tion for some two years and there was nothing about the relatin-
16 ship.

17 Q Are you familiar with Toomey against Ohio?

18 A I am not, Your Honor.

19 Q There this Court, because that judge had a small fee
20 in connection with the case, held that it violated due process
21 for the judge to try a lawsuit. Why shouldn't an arbitrator be
22 up to as high a standard as a judge?

23 A Your Honor, in that connection, Professor Sturgess,
24 who was the dean of arbitration for many, many years, analogized
25 a case cited in our brief that an arbitrator is more appropriately

1 analogized to a jurymen than a judge.

2 Q Suppose he was a jurymen, he knew about lawsuits.

3 A Under the universal fundamental law, as we understand
4 it, Your Honor, a party must ask the disqualifying questions on
5 voir dire. It is a close relation, it is not remote, it is so
6 involving that it almost causes him, by nature of his very inter-
7 est, to be a party-in-interest to the litigation.

8 Q This Court held that the smallest, no matter how close
9 or tight, the slightest interest was enough to be ---

10 A I think it is correct when he has a present interest
11 and a small one, but when it is past and remote ---

12 Q How remote was this, how long back?

13 A By more than a year and some six and seven years, some
14 of it was five years.

15 Q How many years had he been handling cases, the firm?

16 A He had been making concrete porings on a casual and
17 irregular basis from time to time over a four- or five-year
18 period while this contractor was getting started. He was now
19 going out of business. The engineer-architect Capacete had no
20 doubt in many contracts been designated like a contracting offi-
21 cer in Government contracts to serve as the decision-maker, even
22 though he was paid by the owner. Therefore, he should have con-
23 sent on the other party to be bound by decision and that undoubt-
24 edly explains why he didn't recognize there was any duty to
25 volunteer, he was not acting from any corrupt improper motive.

1 Q I am absolutely assured that you would have said I don't
2 want this man to act if they had objected on this ground and you
3 had known he had been represented.

4 A With reference to that and the qualifications of a
5 judge, because certainly this was a proper question, the authori-
6 ties indicate and Professor Sturgess that the parties have no
7 choice, they are summoned and by force of law are compelled to
8 submit their issue to someone and the law says the Government
9 says you shall decide this.

10 But in this case what happened, Mr. Romero was in the
11 Rotary Club with him, lived on the same street, neighbors, went
12 out and talked to him. The record does not show that we had
13 any knowledge that the attorney for the petitioner went out and
14 asked him who do you think I should appoint as an arbitrator?
15 We can find decisions that say that is condemned, and that would
16 upset one.

17 So the parties have set their standards, they have
18 imposed their standards of what constitutes proper conduct.

19 Q Would you say Mr. Capacete was actually not chosen by
20 the parties of a lawsuit, but rather by the lawyers of the
21 parties of the lawsuit?

22 A No, sir, by the arbitrators. We appointed an engineer,
23 this contractor appointed a lawyer to serve as an arbitrator,
24 not his counsel. Those two men selected as arbitraztors. Then
25 their arbitrator died. The parties ratified again the appointment

1 of Mr. Capacete after the subcontractor's attorney, Mr. Romero,
2 went out and talked to him about who should be appointed to
3 follow him. Mr. Romero's father was a leading engineer, the
4 proof shows he knew exactly what Mr. Capacete did, they were
5 neighbors, they were friends. They were in the Rotary Club,
6 that Mr. Romero's father was a good friend of Mr. Capacete.

7 Q Your suggestion is that the petitioner's choice for
8 the Board, Mr. Romero, does the evidence show he knew Mr. Capa-
9 cete had done business with them?

10 A The evidence shows Mr. Romero says he does not know,
11 but the evidence does not show the contractor didn't know. The
12 contractor had project superintendents on these jobs, they had
13 painters, a vice president, a general manager down there in
14 Puerto Rico. They were in constant contact, \$350,000 worth of
15 work is a lot of work to coordinate and the painter was in con-
16 stant contact with them.

17 We are having to argue this case by inference, because
18 we understood and believed the Court understood that the parties
19 had abandoned this.

20 Q Without regard to the other merits of the case, it is
21 a little difficult for me to see how you can say that after five
22 years of occasional employment of this arbitrator, he was finally
23 employed on this particular job and still you say it's remote.
24 That is difficult for me to see the remoteness of it.

25 A Your Honor, it was remote in time in that it was past.

1 Q On the same job, how can you come to the conclusion that
2 it is remote if it is on the same job that is to be arbitrated?

3 A All right, sir, Your Honor, he was making soil tests
4 and they pour concrete. It is unrelated to painting, it did
5 not involve the question the painting.

6 Q I am talking about the remoteness and he worked for
7 you on this particular job after having worked for you for five
8 years on other jobs. How can you say that is remote?

9 A The only answer I can offer, Your Honor, is that the
10 work was that of an independent contractor, irregular, casual,
11 routine testing for which they charged a routine professional
12 fee of breaking concrete blocks, testing sand material, and his
13 work had occurred before this dispute arose and the arbitration
14 occurred. He was not involved on the job there on the painting
15 problems.

16 His work did not cause him to prejudge the case. It
17 is remote in the sense that he was not a witness to the accident,
18 the probe of the painting problem.

19 Q Is it reasonable to assume that petitioner deliberately
20 chose not to make an inquiry, but to rely presumably upon Mr.
21 Capacete's general reputation as a skilled man and as a fair
22 man and in those circumstances there was no duty on Capacete's
23 part to come forward with a disclosure unless in addition to the
24 standards of the Federal Arbitration Act, per se?

25 A Yes, that is a fair summary.

1 Q I think you just answered me, on this record Mr.
2 Romero disclaimed any knowledge of Capacete for respondents.

3 A He disclaims knowledge about these particular past
4 relationships, but in answer to Mr. Justice Fortas' question,
5 I believe he is correct that Mr. Romero knew Mr. Capacete so
6 well that he accepted him, he and his client, as arbitrator,
7 because of their confidence in his professional skill, his in-
8 tegrity, his honesty and his ability, and they were not interested
9 in whether or not he may or may not have had some relation.

10 They didn't even carry enough to inquire. They were
11 so totally confident that he would be fair and confident and they
12 actually came into this Court and repeated and stipulated those
13 very things.

14 Q Do you feel there is any difference in the standards
15 that ought to apply to any of these arguments?

16 A Your Honor, the majority rule is that all three are
17 standing on the same footing, New York departed from that and
18 said they recognize the functional reality that either party,
19 the one they appoint is more partial and the third one is the
20 one that is more neutral.

21 Q You let it be known that in this case your side wasn't
22 interested in the other side replacing its arbitrator with any-
23 one who had any business relationships?

24 A No, sir, anyone who had an interest in the litigation.

25 Q What about this type of a contract?

1 A In this instance it merely said each party would
2 appoint one and those two would appoint a third. Now the law,
3 this is common law arbitration and it would be very similar to
4 that of selecting a jury.

5 Q Your argument is the same standards apply to all three
6 arbitrators when they are appointed as they were here?

7 A Yes, sir. In this instance that the party had an abso-
8 lute right to make inquiry and if there was some disqualifying
9 relationships, they could object and as a matter of fact go into
10 equity court and ask that the arbitration be stayed and the
11 arbitrator removed and the one party be compelled to allow another
12 one to serve.

13 That would not have been necessary at all. The corres-
14 pondence reveals we were trying to get someone.

15 Q Am I correct in recalling that Mr. Romero was asked at
16 some point in this hearing what he would have done, had he known
17 of Capacete's connection with the subcontractor?

18 A Yes, sir, you are correct.

19 Q What was his answer?

20 A His answer was that he would not have objected or
21 probably would not, but he would have given his client the infor-
22 mation for them to decide.

23 Thank you.

24 MR. CHIEF JUSTICE WARREN: Mr. Harris.

25

1 REBUTTAL ARGUMENT OF EMANUEL HARRIS

2 ON BEHALF OF PETITIONER

3 MR. HARRIS: In answer to Mr. Justice Fortas about when
4 the District Court ever made a ruling with respect to refusing
5 to disclose because of closeness of relations, in the opinion
6 of the District Court it is printed in the appendix on 185. The
7 District Court said nothing about that. It did not discuss at
8 all the closeness of the relationships.

9 How can Mr. Currie say we abandoned that issue?

10 With reference to Mr. Romero being a good friend of
11 Mr. Capacete, Mr. Capacete testified that he was a good friend
12 of Mr. Romero, he knew Mr. Romero's father, they belonged to the
13 Rotary Club, and yet Mr. Capacete, acting as the most important
14 judge in this proceeding, would not even tell his good friend
15 about his relations with Samford.

16 I ask Your Honor if that relationship should not have
17 been disclosed between good friends. Would a judge try a case
18 with a good friend as an attorney for one of the parties without
19 disclosing a prior relationship?

20 I submit that is the situation in this case and the
21 award should be set aside.

22 Q Are you suggesting that he should have disqualified
23 himself because he was a good friend of your counsel?

24 A No, not because he was a good friend, but because he
25 didn't tell his good friend what his relations were with Samford

1 and, furthermore, the mere fact that it is arbitrators desig-
2 nated by the parties chose Capacete, does that relieve Capacete
3 from disclosing his relationship because the other two arbitrators
4 picked him? Why, the very fact that the other two arbitrators
5 picked him and that he was employed by Samford should have
6 emphasized his duty to disclose to the petitioner and the peti-
7 tioner's attorney his relations with the very people who coin-
8 cidnetally assume he became an arbitrator for in his proceeding
9 because he was chosen by the other two.

10 Thank you.

11 (Whereupon, the oral argument in the above-mentioned
12 case was concluded.)
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