

CHAPTER IV

ARBITRATION IN THE WORLD TODAY *

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Arbitrator

That is a presumptuous title. I'm going to be very presumptuous. I am going to assert, not that we are individually important people, but that our job as arbitrators has an importance extending far beyond the confines of the contracts we interpret, the grievances we "terminate," or the labor disputes that form the context of our work. Arbitration is only a minor phase of labor relations and a still more minor phase of civilized life. Yet, I submit that as a process it stands in the main stream of man's historical effort to bring reason to bear upon the solution of his problems. It represents a stage in his long effort to create methods of settling disputes that will reflect the basic values and ends of the disputants; that are based upon the search for truth rather than upon the assertion of power; that may take disputes which are in themselves divisive and hence a source of weakness and through their resolution make them a source of unity and strength.

I think it is well that this be asserted. It would be unnecessary and immodest to assert it to the world. But in this gathering, it is well that we assert it to ourselves—that we remind ourselves of the real nature of our job and of its place in the world today.

It has been my experience that by and large arbitrators are pretty humble people. Of course, we all like to play God in the hearing room. When we are writing opinions, we sometimes find it difficult to keep the aura of omniscience from

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coloring our words. But those who smile at the very thought of a "humble" arbitrator have not seen us during the intervening period, when we have returned from the hearing to our office and are sitting alone with the briefs and records of the case before us, staring at that blank wall beyond our desk with the numbing realization that now we must decide.

Arbitration, indeed, is a training school in humility. Those hours when we sit alone with a case, finally and irrevocably confronted with the responsibility of making a decision, are a sure way to discover how limited is our knowledge, how faulty our judgment, how inadequate our capacities as compared to the real requirements of the job, and how baffling is the search for wisdom, truth and justice to which we are professionally committed. But no matter how humble we are about ourselves, let us never be humble about our job or lose sight of its implications in the modern world.

I want to start off with a rather platitudinous statement: That underlying the military and economic conflicts of our time is a deeper and more permanent conflict of ideas. The values and assumptions by which we live—that are so familiar to us that we find it difficult to put them into words—are challenged by other ideas, ideas which are thrown up by the desperate pressures of a maladjusted civilization striving to cure its maladjustments. The implications of this struggle of values and ideas to ourselves and our children and our children's children are such that we dare not fail to participate in it. As arbitrators, we *must* participate in that struggle whether we will or no.

What are these ideas that are challenging our democratic beliefs? I have tried to list some of them, though I am not sure but that each is merely a restatement of the others. I have listed them as follows:

1. The idea that the end justifies the means;
2. The idea that both the truth and the lie have value only as tools and that their relative value in any given situation depends upon their relative effectiveness as tools;

3. The idea that justice is a concept which may be imposed from without rather than created from within;
4. The idea that the path to social improvement involves the suppression rather than the resolution of internal conflict; and
5. The idea that man must have the security of a definite goal and that he does not dare to have only a direction.

I said that these ideas are thrown up by the pressures of a maladjusted civilization attempting to cure its maladjustments. We are under pressure and these ideas are arising among us. They are tempting. They are as enticing as power itself. And I submit to you that the hearing rooms to which we will shortly return will be testing grounds for more than the battle between Management and Union over classifications or wage rates or seniority or discipline. They are among the many testing grounds in which the ideas we cling to and call democracy must meet this challenge.

1. The Idea That the End Justifies the Means

I submit to you that democracy is the political expression of the belief that means are more important than ends, because in the long run the means condition and determine the ends achieved.

This is not the time to take up the philosophical discussion as to whether or not there is any distinction between means and ends. We may recognize that every end is merely a means to a further end, which is in turn a method of reaching still more distant objectives, and so on ad infinitum. But we must also recognize that in the process of deciding upon a course of action, the every day distinction we draw between methods and anticipated results, goals and ways of reaching them, purposes and the processes by which we endeavor to achieve them, has real, practical and, I submit, tremendous importance. Because, I repeat again, in the long run the methods we use determine the results we achieve.

It would be laughable if it were not so serious that some men today should be taken in by the colossally silly idea that you can

create free men by the methods of slavery; that you can develop free minds through the methods of thought control; or that you can build democracy by the methods of dictatorship. I repeat, it is simply silly. Men learn freedom only through being free. Free minds can grow only from the encouragement of free thought. We can build towards democracy in the future only through its practice in the present.

Why is arbitration important in the world today? Because of our decisions? Of course not! Think back over the "important" decisions which you have issued in the last five or ten years—the ones that really turned your hair gray with the responsibility they involved; the ones that caused the most beating of breasts and gnashing of teeth. What has happened to them? They are things of the past. The parties have taken them, have accepted them, or have "complied with" and then rejected them, have adjusted themselves to them and moved on. They have been confirmed or overruled by time.

Arbitration, I submit, is primarily important because of its nature as a *process*. It is a *method* of settling disputes and it derives its importance and its lasting effects from its characteristics as a *method*. It is a method which involves the search for truth, which gives greater effectiveness to reason than to power, and which is created by the parties and is thus—potentially at least—peculiarly responsive to their values and concepts of justice.

Of course, to call it "a" method is a misnomer. One of its characteristics is that it is capable of such variations that, as has often been said, the parties can tailor their arbitration procedures to suit their own special needs. It can be formal or informal, can be conducted as a litigation or as an investigation, can permit or exclude mediation efforts, can have as its prime objective the settlement of the case at hand or the development of precedents and principles for the parties' future guidance. We may each favor some methods and disapprove of others. But they are all important, for, I repeat again, the method used determines the result which will be achieved.

By this I do not mean that the method followed necessarily determines the nature of any particular award or series of awards. I am not talking so much about awards, as about the basic and lasting effect of arbitration on the relationship between the parties and on the way in which they deal with their common problems and disputes. It is this relationship—this sum total of the ways in which the parties deal with each other that we sometimes call collective bargaining—that has long-run importance. Leaving arbitration aside for the moment, I submit that though peaceful collective bargaining, on the one hand, and a long and bitter strike, on the other, may finally produce the same wage adjustment, they do not produce the same result. The way in which the parties will be dealing with each other, the future bargaining methods they will use, the manner in which they will approach the further issues which separate them, will be different even though the immediate dollar-and-cents result is the same. Similarly, I suggest that the long term results of a wage adjustment procured through arbitration will differ from the results of either collective bargaining or a strike and, further, that the long run result achieved through one form of arbitration will differ from those achieved through other methods, even though the awards themselves might be identical. You may arrive at the same interpretation of the seniority clause of the contract, the same ruling on rights to promotion, the same interpretation of the scope of a given wage classification, through arbitration procedures that foster strict and technical interpretation of contract language or through procedures which subordinate language to the practical equities of the plant floor. But though you will have the same award, you will not have the same long term result. The after effects of the decision, its influence upon the future conduct of the parties, its effect upon their collective bargaining, upon the way in which they approach their future problems and disputes will not be the same.

I am not here arguing for any one method of arbitration as against any other. I am only urging the importance of looking at arbitration as a process which has an inevitable effect upon

the larger processes of collective bargaining. Regardless of how much Management and Labor may differ on other questions, there is at least one interest which they have definitely in common. Accepting the inevitability of their disputes and disagreements, they have a joint interest in developing sound ways of dealing with them. They cannot do this if they concentrate on "ends" and disregard "means," if they think only of the awards and ignore the methods by which those awards are produced. For the methods they adopt will inevitably influence, modify and determine the results which they achieve.

2. The Idea That the Truth and the Lie Have Value Only as Tools

We are living in the age of the calculated and deliberate lie—lies made all the more effective as tools by the development of our methods of communication. I suggest to you that belief in democracy involves the belief that in the long run the lie is a self-defeating tool and that the search for truth has value in itself and inevitably leads to a further search for truth.

Arbitration as a method of settling labor disputes has value because it is based upon this search for truth.

I am not talking only about the superficial matter of accurate fact finding, of deciding whether the foreman or the employee is telling a lie, of seeing that all the evidence is in and all the facts developed which are necessary to a sound and informed decision. I am talking also about the deeper truth which underlies and forms the framework of the case immediately at hand—the truth which has to do with the values, the assumptions, the motives and the objectives of the parties. How often do we find, when we talk to the parties informally and casually, that though the facts of the case may be simple and agreed to by both sides, their views as to these deeper truths are as far apart as the poles. How often do we find each side completely understanding the evidence and the contractual argument of the other, but completely misinterpreting or ignoring the unspoken values and standards which guide and determine the other's

actions. It is these "facts-not-in-evidence," these often unspoken arguments, these basic values and assumptions about what is *right* and what is *wrong*, that in the last analysis will determine the attitude of the parties towards an award, just as it determined their attitude during the dispute. It is these things which will determine whether an award solves the problem or merely suppresses it, whether the award is "accepted" or merely "complied with." I suggest that when one is considering the value of any particular method or process of arbitration, one cannot ignore the question of the extent to which that method or process develops these deeper truths. The search for truth in these terms may have no bearing upon the award itself, but it cannot fail to affect the real results achieved.

3. The Idea That Justice Can Be Imposed from Without Rather Than Created From Within

This is the assertion (and one must assume the hope) of all dictators who wish their dictatorship to endure, whether they be cruel tyrants or benevolent paternalists. It is the idea that a system of values may be effectively and permanently handed down and imposed from above. It is the idea which lies behind the use of the lie as a tool—the deeper lie that is the antithesis of the deeper truth.

I suggest that democracy is based upon the belief that an effective concept of justice must be an expression of the values of those to whom that concept is to be applied. Arbitration can be a democratic method of settling disputes because it is created by the disputants themselves, because they can make it into whatever type of process they desire and because, by so doing, they can make it responsive to their own values and concepts of justice.

But here we come to the great paradox of the arbitral process. Arbitration, of course, is resorted to when collective bargaining has failed. The parties turn to a third person and they say to him, "We want you to examine the evidence and listen to our arguments and then 'call it as you see it.'" On the one

hand, then, they want us to be independent, to be impartial, to be guided by "our own lights." On the other hand, if the arbitrator's decision is to be accepted, if the process as a whole is to result in the *resolution* rather than the *suppression* of problems, the arbitrator must be responsive to the values and standards of the parties. He has no alternative—if he does his job honestly and well—but to use his own judgment. But the process will be *creative* only insofar as he is successful in his search for the "deeper truth"—only insofar as he is able to draw from the parties their basic concepts of justice or to work with them in the creation and development of mutually acceptable concepts, rather than sitting back and attempting to impose his own.

Why is it important that this be done? What difference does it make whether an award is an expression only of the arbitrator's values or is an expression of the parties' values as well? The answer lies in our consideration of the fourth of the challenging ideas that confront us today.

4. The Idea That the Path to Social Betterment Involves the Suppression Rather Than the Resolution of Internal Conflict

We are living in an age of fear, an age when men band together to seek strength and tend to regard diversities and differences within a social unit as a sign of weakness that should be eradicated. Democracy involves the recognition that conflict cannot be eradicated and must instead be resolved and that conflict, *if it is resolved*, is a source not of weakness but of progress and strength.

As it is a method of settling disputes, arbitration is necessarily a testing ground for this belief. That is why it is so important to emphasize the nature of the process rather than the individual awards which may result from it. That is the importance of the search for the "deeper truth," of the opportunity which arbitration offers the parties—even when they are deadlocked on substantive issues—to create themselves those

concepts of justice on which the decision will be based. Any arbitral award can clamp the lid on a problem, but only an award which is responsive to the basic values of the parties can resolve the dispute and make it a source of progress and strength.

**5. The Idea That Man Must Have the Security of a
Definite Goal, a Comforting Blueprint of the
World Towards Which He Is Moving and
That He Does Not Dare to Live with Only
a Direction**

One of the difficulties which we always face in explaining democracy is that it has no blueprint. Others may offer a deceptively clear set of goals, a perfected outline of a finished Utopia, and thus turn attention away from the means used to achieve that Utopia, excuse the calculated lie, render plausible the concept of justice imposed from without and justify the suppression of conflicting drives that do not conform to the blueprint. Democracy has no such picture to offer. In its place, it offers only a method; a method which involves the search for truth, the creation of concepts of justice by those to whom the concepts are to be applied and which attempts to resolve conflicts in line with those developing concepts of truth and justice.

Democracy's answer to the problems of the world is similar to that given by the old farmer at the crossroads who was asked by a confused traveler, "Where is X city?" The farmer replied, "I don't know where X city is, but this is the road to it." Democracy doesn't know where lies the city of our dreams or what its streets and houses look like or how it is laid out or precisely what it holds for us. But democracy knows how it intends to get there. Democracy realizes, indeed, that we are not going to find our city at the end of some distant road but that we are continually building it as we go along. It is based on the courageous faith that if the methods of our building are sound, the city will grow as we desire.

Arbitration is one of the methods we are using in the building of this city that will always be a-building and never will be finished. Like democracy itself, it involves a courageous act of faith on the part of Management and Labor. Not faith in us, as individuals! By this time, they know us too well for the fallible human beings that we are. But faith in the method; faith in the possibility that they can make even their disputes an aid in the search for understanding and truth; faith that they can make even a process of third party decision a means whereby they can create and express the basic concepts of justice which will be applied to them; and faith that through this creative process their very disputes may lead to new understanding and new strength.

"Arbitration in the World Today." In many ways, it seems very small and very unimportant. The hearing rooms we are going to are not very imposing—a table in a hotel conference room with a few chairs around it. The decisions we will be making will not greatly affect the course of the world. We may reinstate Bill Jones or uphold his discharge. We may rule that Smith was or was not properly classified or that certain employees should or should not receive call-in pay for coming to work when no work was available. Outside of the immediate parties concerned, the world will take little notice of these things, and the parties themselves will soon move past these decisions towards new problems and, undoubtedly, new disputes. Nevertheless, I submit that when we look deeper, we may discover that in these little hearing rooms we are dealing with the basic intellectual and moral issues of our time.

We are right to be humble, gentlemen, for the importance of the job we are called upon to do is coextensive with the importance of the ideas which are struggling today. And let us also be proud that in our lives we should have the high privilege of participating in that struggle.