CHAPTER I

THE ACADEMY AND PUBLIC OPINION*

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The exercise of critical judgment in the evaluation of any democratic procedure, such as the arbitration of labor-management disputes, presents a difficult problem in objective self-appraisal. Success of the arbitration process cannot be assessed by its practitioners through use of criteria customary in industry, such as lower costs, greater profits, etc. Other standards of judgment must be developed in terms of the "market place" of the labor-management community.

The success of arbitration can be appraised in numerous ways, some of them with short-run significance, others of long-run import. It is natural, first, to focus upon the degrees of success attained in solving problems currently being experienced by the arbitration process. Though some of these problems may finally prove to be superficial, for the *practitioners* (the arbitrators) to ignore all of them simply as expressions of current "gripes" of the *participants* in the process (labor and management) is to encourage the eventual breakdown of the procedure and the substitution of some other form of settling labor-management disputes. While it is incumbent upon the practitioners to take a considered look—to explore the functioning of the arbitration process more deeply so that it might bear the scrutiny of years as the keystone of sound labor-management relations—it is nonetheless important that appraisals of current arbitration problems be conducted so that the process may be constantly corrected, molded and fashioned to attain the goals desired of it by labor and management.

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The National Academy of Arbitrators has been constantly alert to the need to make both current and long-run evaluations of its professional practices. As part of that evaluation, the Academy, in ways not always obvious, has turned its attention inward to determine the degree of success it has attained in strengthening labor-management relations through the arbitration process and in furthering the understanding thereof. One way in which this self-examination has been done in recent years has been through the address made by the President of the Academy at the annual meetings.[1] To date these could not be construed as "State-of-the-Arbitrators'-Union" addresses, but each of them has made a contribution in evaluating the success of the arbitration process and the part played therein by the Academy. Each of the addresses has necessarily placed emphasis upon a limited number of criteria. It is my plan to turn attention to the part the Academy might play as a molder of public opinion and public policy in the settlement of labor-management disputes, to point out areas in which we have been quite successful, to suggest others in which we have been indecisive, and to encourage our attention toward fields within which we might consider further action.

In directing attention to the Academy's potential for molding public opinion and policy as a possible criterion to evaluate our success, I do not mean to suggest that the decisions of labor and management as to the content of their labor agreements are in the first place determined by their respective "feels of the pulse" of public opinion. It seems more likely that they reach those decisions on personal, economic or political grounds and then turn to public opinion, when necessary, to gain support for the decisions already reached.

If things go well with collective bargaining there is scarcely any need for either party to listen to public opinion. But if collective bargaining breaks down, then there are appeals by one or both parties to develop public feelings, to fan public prejudices, and to direct attention to the "evils" of the other party's position while urging the "sanctity" of their own. In major situations publicity departments of unions or companies, or public relations counselors, are used to turn out large quantities of prepared statements, news-

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[1] John Day Larkin, "The First Decade," *Critical Issues in Labor Arbitration* (Washington: BNA Incorporated, 1957).

Paul N. Guthrie, "Arbitration and Industrial Self Government," *The Arbitrator and the Parties* (Washington: BNA Incorporated, 1958).

Harry H. Platt, "Current Criticisms of Labor Arbitration," *Arbitration and the Law* (Washington: BNA Incorporated, 1959).

paper, magazine, radio and television releases and advertisements, questionnaires to employees, to companies, *and even to arbitrators.* Every means possible is often used to line up public fears, loyalties, hostilities and angers for one side or the other. From the reactions of public opinion both sides draw conclusions favorable to them which, in turn, are urged as basic points for the determination of public policy, i.e., the course of action to be taken by the government and its existing agencies.

While public opinion, as developed by the relative propaganda capacities of the parties, does not dictate particular terms of settlement, it may have directing or limiting influences. It may convince the parties that public reaction would support or frown upon a strike; it may encourage or discourage governmental intervention in seeking a strike settlement. It may impose limits on what labor or management leaders feel they can or cannot do at a particular time. Usually public opinion will vary with the nature and extent of the issue, the size of the industry, the reputation of the industry and the Union, the scope and impact of the strike (existent or potential) on the economy of the country, the stage of the dispute, or the extent of attempts by government officials or agencies to intervene.

The development of a "climate" of public opinion and policy conducive to the equitable settlement of labor-management disputes without recourse to major disturbances to our economy, i.e., widespread or frequent strikes, can be greatly enhanced by a public understanding and appreciation of the arbitration process. Thus, it seems to me to be important to consider what this Academy has done, and what it may consider doing in the future, to make the public aware of the values of the arbitration process. I recognize the fact that this Academy does not have the resources to sway public opinion significantly, but we can help to guide and mold that opinion at least in the direction of accepting voluntary arbitration as an equitable solution for settling labor disputes. Surely a proper implementation of the objectives of this Academy should include attempts by the Academy, in cooperation with other interested impartial groups, to encourage opinion toward public support of the arbitration process, to be gained through public comprehension of that process assisted in part by the efforts of the Academy and the cooperating groups and in other part by an understanding press.

Probably our greatest area of success in fashioning public opinion, particularly in the limited part thereof with which we are most vitally concerned, i.e., the labor-management community, has come out of our annual meetings and the publications which have followed

them. The programs of our annual meetings in most part have constituted "a productive union between scholarly research and firing-line experience"[2] of the practitioners and the participants in the arbitration process. They have been a studied mixture of discussions of current interest problems, considerations of long-run trends, workshop studies of substantive issues, research findings, evaluations of practitioners by participants and of participants by practitioners, evaluations of permanent umpireships and contrasts thereof with ad hoc arbitration, and reports of Academy Committees (particularly those on law and legislation, research and education, and on statutory regulation of labor disputes). Selected papers, addresses, discussions and reports from the twelve annual meetings which preceded the present one have been published by The Bureau of National Affairs, Inc., and incorporated in six volumes prepared under the able editorship of Jean T. McKelvey who has added some of her own penetrating evaluation of the programs. The impact of these six publications on the "public opinion" of the labor-management community would no doubt be enhanced by greater distribution, but the increasing number of citations of their contents by scholars and researchers indicates that they are getting into the proper hands where their impact will be far greater than their numbers. In the area of printed publications of meaningful additions to the field of thought and knowledge in the arbitration process, the Academy has made its greatest strides in promoting "the study and understanding of the arbitration of industrial disputes."[3]

Another area in which the Academy has had some salutary impact in directing public opinion toward acceptance of the arbitration process is in the development and acceptance of, and adherence by its members to, canons of ethics covering the conduct of arbitrators. The "Code of Ethics and Procedural Standards for Labor-Management Arbitration,"[4] begun in 1948 and published in 1951, was a joint effort of the National Academy of Arbitrators and the American Arbitration Association. It is a set of ethical concepts and procedural rules drawn from the knowledge and experiences of the NAA members (through its acting Ethics Committee) and of the Committee on Revision of the American Arbitration Association Code of Ethics for Arbitrators, which members of this Academy

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[2] Foreword, by Saul Wallen, to *Arbitration Today* (Washington: BNA Incorporated, 1955).

[3] Extract From The Constitution of the National Academy of Arbitrators, Reprinted in the Academy's Annual Directory.

[4] *The Profession of Labor Arbitration,* Appendix B (Washington: BNA Incorporated, 1957).

and arbitrators designated by the American Arbitration Association are expected to observe if they are to remain members of the Academy or continue to serve as AAA-designated arbitrators.

This code is not a static matter; it requires constant study and occasional revision to meet changes as they occur in the arbitration process. In the light of a number of recent major criticisms directed toward the mounting costs of arbitration, including references to the high daily fees of some arbitrators and the excessive number of days charged for study and preparation of opinions by a far larger number of arbitrators, it seems time that the Academy, the AAA and the Federal Mediation and Conciliation Service consider a rewriting of Part II, Section 1, Paragraph (b) of the code, which reads in part, "Compensation for arbitrators' services should be reasonable and consistent with the nature of the case and the circumstances of the parties." Apparently a growing number of arbitrators (not all of them Academy members) who have little trouble interpreting and applying the meaning of contract provisions constructed by labor and management need direction in interpreting the meaning of the words "reasonable compensation" in their own code of ethics. I am convinced that attempts of this Academy to influence the development of a labor-management community reaction favorable to the use of arbitration requires that we take immediate steps to interpret for our members the meaning of the reference to "reasonable compensation" in the code of ethics. This, among other comparable matters, our Board of Governors has just been asked to consider by our membership through reorganization of the structure of our Academy.

One area in which the Academy's interest in seeking to affect public opinion and public policy in collective bargaining matters, which has changed from a negative to a constructive approach over the past decade, is in connection with the promulgation of legislation dealing with the arbitration of labor-management disputes. At our 1951 annual meeting we adopted a resolution of our Committee on Law and Legislation which recognized that the "subject of legislative regulation of labor dispute arbitration" was one of "obvious interest" to the Academy, but which urged that the Academy "avoid both precipitous and self-serving opposition and hasty approbation of statutory controls."[5] We felt that any action by the Academy in this area might be misunderstood as an attempt by us to avoid restrictions upon our work other than by the parties who employ us. However, we authorized our Committee to proceed with its study

[5] *Arbitration and the Law,* Appendix C (Washington: BNA Incorporated, 1959).

of the subject and to "make recommendations as to the subject of such legislation, irrespective of the position, if any, which the Academy may take on the principle of statutory regulation." This our Committee did in May 1953 but, following the then negative approach, the Committee's report was never acted upon by the Board of Governors or the membership.

At our 1955 annual meeting we passed a resolution to the effect that though we would refrain from taking any official position on the question of whether there should or should not be federal or state statutory regulation of voluntary labor dispute arbitration, we could indicate (through our Law and Legislation Committee), our "judgment as to the desirable content of regulatory statutes." [6] In the meantime, while we were discussing this question over a four-year span, the commissioners on uniform state laws were considering the details of a uniform statute to be known as an "act relating to arbitration and to make uniform the law with reference thereto." In August 1955 the commissioners adopted the wording of such a proposed act, and it was approved by the House of Delegates of the American Bar Association, with the support of the American Arbitration Association through the Association's Law Committee. The Academy's "loss of the ball" to the commissioners, the Bar Association and the AAA in mid-1955 caused us to become a "follower" instead of a possible "leader" in this area of "obvious interest" to our professional lives.

At our 1956 annual meeting we agreed to oppose the enactment of the proposed uniform arbitration act in its then existing form, as it would apply to labor dispute arbitration, and directed our Committee and Board of Governors to prepare and publicize a statement of the Academy "to include specific proposals of changes deemed necessary to make the proposed act acceptable." [7] An initial draft of a statute acceptable to the Committee and the Board of Governors was distributed to the membership later in 1956 with the understanding that a member of the Academy could be designated by our President to appear at any state legislative hearings to present the Academy's views concerning the proper content of any proposed arbitration act.[8]

At a meeting in October 1957 the Board of Governors decided

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[6] *Management Rights and the Arbitration Process,* Appendix C (Washington: BNA Incorporated, 1956).

[7] *Critical Issues in Labor Arbitration,* Appendix C (Washington: BNA Incorporated, 1957).

[8] *Critical Issues in Labor Arbitration,* Appendix C (Washington: BNA Incorporated, 1957).

that the Academy should "recognize that the subject of arbitration legislation is a matter of increasing general interest, and that the Academy has a responsibility to be constructive, rather than simply negative, on this subject."[9] The Board of Governors agreed that "the Academy should discharge its responsibility by developing, promulgating and *proposing* a labor dispute arbitration act, which could be enacted at either federal or state level." The Academy's position had shifted from one of "negative resistance" to an active proposal of appropriate legislation.

At the 1958 annual meeting the Committee on Law and Legislation reported "progress" upon drawing up a draft of a statute which, in view of the *Lincoln Mills* Decision (353 U.S. 448), it urged should be proposed for enactment as a federal statute.[10] It was directed to continue its efforts to draft an act as a possible federal statute—its second attempt to do so.

The second draft of the proposed act was presented at the 1959 annual meeting. Once again, however, the negative argument was advanced that the Academy should not intervene if legislation dealing with arbitration was presented to state legislatures, though individual members of the Academy should feel free to participate as advocates or opponents of such state legislation. The Committee was "invested with authority to proceed to develop an arbitration statute for distribution on behalf of the Academy and to submit its recommendations with respect thereto to the Board of Governors for its action." The Board of Governors was "authorized to take any action necessary to publicize and circulate the draft act and to place its stamp of approval on the act" if it deemed such action advisable. The hope that a statute would be approved at the 1959 meeting to be urged for adoption by Congress "went aglimmering."

A third draft of the proposed act was distributed to the Academy membership late in 1959 in time for consideration at this 1960 annual meeting.*

This review of the nine-year effort of our Committee on Law and Legislation falls far short of reflecting the full scope of the yeoman service of the group of dedicated arbitrator-lawyer members of this Academy who have continued to work in this area despite the apparent lack of interest therein by many of our members.

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[9] *The Arbitrator and the Parties,* Appendix C (Washington: BNA Incorporated, 1958).

[10] *Arbitration and the Law,* Appendix C (Washington: BNA Incorporated, 1959).

* Editor's Note: The text of this third draft can be found in Appendix B of this volume.

But this review should be sufficient to indicate to you the hesitancy of all of us, as an Academy, to assume a position of leadership in an area of major interest to the Academy and one in which we are particularly able to assert such leadership. Certainly continued "marking time" in this area of the Academy's interest cannot be reconciled with its decision at the 1958 convention to adopt one of the recommendations of its "special committee to consider the aims and purposes of the Academy," i.e., "to take what measures we properly can to support legislation (re arbitration) which we consider sound and oppose that which we consider unsound." [11] While we have been warned of some of the pitfalls in advancing our proposed federal arbitration act by one of our most eminent scholar-members, Benjamin Aaron,[12] caution can be observed without yielding leadership to others whose approach to arbitration legislation lacks depth because it does not comprehend the philosophy of contract arbitration espoused by many of the arbitrators who are members of this Academy. Immediate action in this area, to which we have given so much careful consideration, will be a step in the direction urged upon us yesterday by Rolf Valtin that "this Academy's voice be one that speaks out."

An area of public opinion and public policy in the field of labor-management relations that is in as great a state of upheaval and uncertainty as we have faced since the Wagner Act became law, concerns the steps which should, or may, be taken to avoid the tremendous impact on this country's economy of large-scale, lengthy work stoppages. As arbitrators we have followed closely the developments in the 116-day steel strike so recently settled, and have been conscious of the part played by our two Academy members [13] in seeking to bring about a fair and equitable settlement. No doubt most of us fancied ourselves in the "seats of our fellow arbitrators" and had our own pet theories on how that strike could have been settled. Happily for the sake of the final settlement, we were not asked our views as to an equitable settlement, because it is quite obvious that we could not have collectively agreed on the outcome.

With the settlement of the steel strike accomplished, we are hearing and reading at every hand that our legislature can be expected to propound "legislation with teeth" that will eliminate

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[11] Unpublished Report of Special Committee Distributed to Academy Members.

[12] "On First Looking Into the Lincoln Mills Decision," Benjamin Aaron, *Arbitration and the Law* (Washington: BNA Incorporated, 1959).

[13] Dr. George W. Taylor and Dr. Paul N. Lehoczky served as two of the three-man Board of Inquiry designated by President Eisenhower under the Taft-Hartley Law.

the potential crippling effects of large-scale work stoppages. For the past several months we have heard more and more references to "compulsory arbitration" as the process our law makers should adopt to offset the failure of labor and management in mass industries to settle their contract differences through collective bargaining. We have read of some recent warnings against the use of compulsory arbitration, but there have been so many individual, columnist, political and editorial voices raised in its favor that this Academy should consider immediately stating its collective opinion which, I am sure, is one of *complete and certain disapproval of compulsory arbitration.*

Within our membership, we have the most eminent authorities qualified to deal with the use of compulsory arbitration as a process for settling labor-management contract disputes. To name only three, there are Drs. George W. Taylor, John T. Dunlop and Thomas Kennedy. From recent publications of these three philosophers in arbitration can be gleaned criticisms of compulsory arbitration, known to some but not all of you, as follows: [14]

1. It discourages the making of offers and counter offers without which there can be no negotiation. The employer makes no offers for fear they will be used as springboards in arbitration. The Union is not encouraged to accept any offer when, in compulsory arbitration, it is not likely to get less and may get much more. In the words of one of our authorities, "Wage negotiations are stymied by compulsory arbitration (which) is both the cause and the result of the failure of free collective bargaining." [15]
2. Since compulsion will be applied to the settlement of unknown future disputes, both sides tend to list many demands and drop none in negotiations, believing that nothing will be lost if some of the "chaff" is denied in arbitration. Further, it is reasoned that, if the Arbitrators rule against one of the parties on a number of minor issues (the "chaff"), they may be more inclined to favor that party on the major issues in order to appear to be fair.

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[14] George W. Taylor, "Is Compulsory Arbitration Inevitable?", *I.R.R.A. Proceedings,* December 1948.

George W. Taylor, *Government Regulation of Industrial Relations* (New York: Prentice-Hall, 1948).

Thomas Kennedy, "The Handling of Emergency Disputes," *I.R.R.A. Proceedings,* December 1949.

John T. Dunlop, "The Settlement of Emergency Disputes," *I.R.R.A. Proceedings,* December 1952.

[15] Kennedy, *op. cit.*

3. In collective bargaining a dispute over a new contract provision is settled by a meeting of the minds; in compulsory arbitration this criterion disappears and an imposed decision will often dissatisfy both parties.
4. Compulsion makes occasional crises more difficult to resolve since maintaining the position of the government requires the effectuation of an arbitration award, through sanctions in law, regardless of the depth of resentment against the award. The government's compulsion gives government a partisan position in the controversy. Furthermore, as evidenced by experiences under a number of state emergency dispute laws, sanctions may be extremely difficult, if not impossible, to apply.
5. Compulsory arbitration leads to the specification of employment terms by "outsiders" (individuals, boards, government agencies or labor courts) whom the parties cannot select and to whom the parties can give no objective criteria or standards of guidance which may decide fair and equitable conditions of employment for them. Compulsory arbitration procedures cannot be expected to recognize the "meeting-of-the-minds" and "mutual acceptability" criteria that are integral parts of many voluntary arbitration proceedings.
6. If conditions of employment are determined by legislation, agencies set up through legislation, or labor courts, rules may be provided for uniform application to all industries and plants, irrespective of their individual necessities. It would be wholly unrealistic to expect objective criteria of fairness and equity for a specific industry, company or union to be recognized in employment condition settlements imposed by legislation or law. Political power, rather than economic power, will then become the final determinant of employment terms. Effectuation of uniform rules through compulsory arbitration leads naturally to wage controls and price controls, the triumvirate which spells the doom of collective bargaining.
7. Compulsory arbitration tends toward the playing of politics. "It appears to be in the nature of compulsory arbitration that it is impossible to divorce it from politics." [16] Realizing this, the representatives of the larger units on both sides of what should be the collective bargaining table leave that table and turn their attention to pressuring their political representatives or governmental policy-making bodies to act favorably toward their respective positions.

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[16] *Ibid.*

I am sure that most of you can add other criticisms which would support George Taylor's conclusion that "Compulsory arbitration is unthinkable in this country" and is "entirely incompatible with our ideas about the way men should live and work together." Some of us have been given the opportunity to present our views on this and other related subjects to individual congressmen with the possibility that our own views will be made available to interested congressional committees. Others of our Academy, who speak with more authoritative voices, have been asked by the Government for advice in this area. It is my hope that the Academy will consider taking a strong collective stand against the use of compulsory arbitration which can destroy collective bargaining as we have known it for at least a quarter of a century.

As an alternative to compulsory arbitration of new contract issues, this Academy would not be remiss, though it may be accused of being self-serving, if it would urge the parties to reevaluate the use of voluntary arbitration. A segment of our program this year, built around an excellent paper by Morrison Handsaker, has been devoted to directing attention to a "new look" at voluntary arbitration of new contract issues. We have deemed this approach timely because the stirring up of public and legislative opinion by the longest steel strike in history may well cause large labor unions and multiple-company industries to find that frequent or large-scale assertions of economic force are no longer available to them as determinants of their issues. In their own self-interest they may find it necessary to give renewed attention to voluntary arbitration as an acceptable alternative to avoid more stringent governmental controls. Voluntary arbitration is in the collective bargaining tradition—a process that becomes an adjunct to collective bargaining. "It is as far from compulsory arbitration as the difference between the poles." [17]

The steel strike is settled, but the public, press and legislative pressure for something to be done about serious stoppages in major industries has abated only slightly and probably momentarily. Under these pressures, labor and management will have to develop their own procedures to avoid or soften the economic impact of major stoppages, or government intervention through rigorous legislation, compulsory arbitration, or labor courts will do the job for them. Salutary results can arise out of the present threat of government intervention in the settlement of new contract disputes only if the parties voluntarily create their own settlement machinery to make

[17] Taylor, *Government Regulation of Industrial Relations*, p. 26.

such intervention unnecessary. Acceptance of voluntary arbitration is one sure way of avoiding the risks of legislated compulsory arbitration.

It is probable that, in my evaluation of the part this Academy has played, and might play in the future, as a molder of public opinion and of public policy in the settlement of labor-management disputes, I have appeared to be too doctrinaire. If I have, I apologize for the method of my presentation, the "outside wrappings of the package." But I make no apology for the content of the "package," and I urge all of you to disregard the "wrappings" without delay to take a considered look inside. Perhaps you will then agree that this Academy should spur the parties to develop their own voluntary procedures for the settlement of their new contract disputes so that the government will not have to consider intervention which may sound the death knell of collective bargaining by imposing governmental controls over the economic affairs of its citizens in a manner reminiscent of non-democratic nations—past and present.