CHAPTER VI

MAKING ARBITRATION WORK: A COLLOQUIUM

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The initial discussions about arranging this particular session centered about the criticisms expressed during the past year about (1) the arbitration process being too expensive; (2) too much delay in making the arbitration decision; and (3) the arbitration process becoming too legalistic.

These might be called the housekeeping problems involved in arbitration and the panel will talk a bit about them. But we would like to spend most of our time in discussing the role of arbitration in relation to the developing industrial relations environment.

I don't believe very much needs to be said about the costs of arbitration or the delays in decision-making, because I don't believe they are basic problems. Nor can they become so. I don't know of any profession where there are so many checks and balances upon the practitioners as there are in arbitration.

The prime requisite for practicing arbitration is that a man continue to be mutually acceptable to the disputants. There is thus a built-in restraint, which is unique, since if delays are too great and if expenses too excessive, any one party can decide not to use an arbitrator again. I thing this built-in protection in the arbitration process should effectively deal with expenses and delays. There are far more important professional questions to consider.

I am on a one-man crusade to drop the use of the term "legalistic approach," and other cliché-like terms. The terms do not epitomize the process and cause endless and needless discussions. Consider the "legalistic approach" used by arbitrators to connote "no mediation" in arbitration. I checked recently with a highly esteemed Common

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Pleas Judge, asking him, "In this legalistic profession in which you serve such an important role, how many cases do you try to get settled by agreement, by a meeting of minds in your chambers?" He said, "About ninety percent or so." This is doubtless not typical. But, ours is a meeting-of-the-minds civilization.

The concern recently expressed about a "creeping legalistic trend" in arbitraton relates to the overuse of formal procedures – overuse in the sense that it may impede the consideration of equities in a hearing and also the clear understanding of the problems by the laymen whose interests are involved.

Too many people look upon arbitration as if every case were a Supreme Court proceeding. They seem to expect that the criteria of a legal system applicable to a Supreme Court case should also apply to grievance arbitration. Many arbitrations are more akin to Magistrate's Court cases. May I suggest that in many areas, including arbitration, the process of decision-making centers not so much upon "how to arrive at any answer" as upon "how to define a problem." Depending upon basic policies and selected assumptions, as well as the relative importance assigned to an array of facts, the same collective bargaining problem will be quite differently perceived as between companies and industries. Compare, for example, how differently the same problem may be fashioned in the needle trades as compared with the electrical manufacturing industry. The right to be different is important in an enterprise system. Private enterprise, of which collective bargaining and voluntary arbitration are parts, may be most usefully considered not just in institutional terms which tend to emphasize rigid and inflexible procedures, but as the basis of an important democratic freedom, the right to choose alternate assumptions, objectives, and procedures. It is the right to use different premises and varied procedures which is important. Perhaps it is the failure of labor and management representatives to exercise this right that underlies the tendency to make increasing use of "legalistic procedures" in order to fill the gap.

Beyond what have here been called housekeeping problems, I think our broader concern in "Making Arbitration Work" has to do with the question: What is the role of arbitration in the developing labor-management relationship? Our broad concern, I should think, is in ways of resolving industrial conflict. This is the area in which arbitrators work. Of course, in a democratic society such as ours conflict is recognized as inevitable. At any cost, a great protection in a democratic society is the right of dissent. Indeed, in our national labor policy definite steps were taken over the years to augment the

right of employees, and their power, to dissent from the proposed terms of their employment. Dissent is encouraged but democratic responsibility requires that differences be amicably resolved. Out of many conflicts, of course, there have come constructive developments.

Not only has the right to dissent been recognized but also the essentiality of the power to reject. Thus, there is a faith that differences can be voluntarily resolved in our meeting-of-minds civilization. These ideas prevail, not just in labor relations, but they permeate every one of our private enterprise institutions. We hold to the idea that people with diverse points of view can and will voluntarily accommodate these views.

This is the democracy in which people of different concepts, different hopes, and aspirations may, despite their differences, link arms and go down the road together toward a common objective. Far be it from me to suggest that this is the way it always works. In labor relations, as in other aspects of this world, a full democracy is a goal and not yet an achievement.

"Compromise" is not necessarily a dirty word. Not if it is part of a persuasive process of permitting people of diverse views to combine their efforts toward achieving a common objective. There are democratic countries in which particular minority points of view seem to be aggrandized to the extent of making it impossible to achieve compromise or accommodation. There is evidence that this can render a nation weak and impotent and can result finally in a trend toward greater centralized power.

We know by now, I think, that the kind of democracy which is our goal in the United States, where the power to dissent has been made very important, will work only if there are self-imposed rules on the use of power so acceptable as to develop what I like to call a *consent to lose*. Consent to lose, under procedures voluntarily and mutually acceptable, is vital in a democracy such as ours.

Great use is made in many areas of the principle of majority rule to resolve a conflict. There is evidence that it operates most effectively and constructively if it develops a consent to lose in the minority.

In the labor relations area, the strike is supposed not only to get agreement but also to develop a consent to lose. This is not always the case but the "agreement" is nevertheless critical. It is the misgivings held about the agreement and the accompanying mental reservations which give rise to a great number of difficult grievances. We seem to believe that by the exercise of economic pressure, i.e. arbitrament by relative economic force, a better "consent to lose" is developed

than by other methods for resolving differences. After a strike, the company decides to open the plant with whatever reluctance, and people do choose to go back to work with whatever misgivings. If there has not been a real meeting of minds, however, economic and other pressures can continue in different form.

Many doubts are being raised about the effectiveness of strikes in resolving differences over the terms of employment. These doubts are in the minds of workers who do not see the necessity for undergoing a periodic joust, as well as in the minds of many managements. Especially is the strike suspect when the results can often be anticipated within a narrow range. This fact certainly provides food for thought. It seems to me that the public can't "see" the strike without wondering if "there isn't a better way" of resolving labor-management conflict over conditions of employment.

When I first began working in the labor relations field, the general interest was in the gaining of an agreement, that is, in the fact of agreement. More and more now there has come to be a public interest in the quality of the labor agreement, as distinct from the fact of agreement. This interest is being expressed, for example, in the attempt of governmental agencies to enunciate a national wage policy, which would serve as a uniform standard for bargaining or as a restriction upon the latitude of negotiators. Perhaps this can be expressed as a national policy that wage increases be restricted to the increases in productivity. It is very difficult to define such productivity, or measure it. And it is very difficult to select the assumptions to be used as respects the applicability of productivity to wages. For example, which measure should be applied – industry-wide, nationwide or what-have you?

Probably one of the greatest underlying factors which collective bargaining has to encompass – the greatest challenge to the process – is the difficulty of reconciling national planning objectives with the retention of the private decentralized decision-making system, and this goes not only for wages but it goes for prices as well.

Those of you who are general economic theorists will agree, I would expect, that our private decentralized decision-making system, including wage determination, is based on the assumption that market forces will restrict the latitude of those who make private decisions, and provide sufficient restraint to protect the public interest. In other words, the public interest will be automatically taken care of as parties seek their own self-interest. But to degrees that are arguable, less frequently does the market make the decision and more often does the private decision make the market. It is not surprising then for the

public to express a greater interest in the quality of the decisions that are made, if it is true that there has been a shift of power from the market to management and labor.

Some of you might have noticed, in the brief article I recently prepared for *United States News and World Report,* the propounding of this hypothesis: Will collective bargaining, in the years ahead, tend to be conceived as a three-party process instead of a two-party process? In other words, is this a way of gaining some recognition of the public interest? Let me add that the hypothesis was related to so-called public emergency disputes.

Indeed, this kind of thinking is implicit in the agreement which the Steelworkers made with the Kaiser Corporation, in which so-called public representatives (though selected by the parties) were to meet with the parties, and, in a sense, represent a public interest in the policy deliberations of the parties with the duty to make recommendations in certain specific areas.

In quite another way, this same point of view is emerging in considerations being given to a re-examination of the exact nature of the wage determination. One who reads the public statements of the General Electric Corporation on this matter, for example, can scarcely fail to be intrigued by the implicit, if not explicit, questioning of whether or not the wage determination process involves a reconciliation of only the interests of management and labor. It is more broadly concerned as a process in which there has to be a reconciliation of numerous other interests involved, such as the supplied, the shareholder, the management, the community, and so forth. It is then reasoned that only management is in a position to make this multifaceted accommodation. There are other important companies which would isolate wage determination as a process separate and distinct from other interests. There are managements, for instance, who would entirely exclude "ability to pay" considerations from wage determinations. These differences reflect what was said earlier about collective bargaining as a means to secure freedom as distinct from its formal institutional aspects.

The difficulty with this broad analysis, in my judgment, is in supporting the view that management has been delegated the representational responsibilities of these other interests which are all so conflicting, even though they are not formally represented as is the labor interest. At least, at the moment we do not conceive of the management function in such broad terms. I suppose one could argue strongly that the community interest, for example, is represented by

those whom we elect to Congress. In itself, this has implications which are obvious.

In any event, there is presently a retesting of many of the basic ideas of collective bargaining and of the nature of the wage determination process itself. In the midst of these growing uncertainties about basic assumptions there is also, it seems to me, a need for a re-analysis of arbitration and its role.

I am not so sure that the arbitrators really have very much to do with fashioning the nature of the arbitration process. The quality and nature of the arbitration of grievances, it seems to me, is inevitably determined by the kind of collective bargaining which exists in a plant. I do not believe there can be effective arbitration if the collective bargaining relationship is ineffective. Of course, effective collective bargaining procedures vary all over the lot, and so do good arbitration procedures. These reflect our freedom to work out our own destinies as we see fit. There are instances, particularly in the *ad hoc* arbitration, I think, where the arbitration case is essentially a continuance of the struggle about whether or not there should be collective bargaining. I know of one or two situations where collective bargaining relationships are particularly frustrating because neither party wants to settle issues by agreement. They battle in the grievance procedures over containment of the union and the preservation of management prerogatives, while the union seeks to gain day-by-day what it couldn't get during contract negotiations.

Arbitration as it is practiced is not simply a process for resolving honest-to-goodness differences between the parties to a continuing cooperative relationship. There are other situations in which collective bargaining can best be compared to the exchange of diplomatic notes between nations. I leave to your judgment where this might have recently occurred and where what is termed collective bargaining is much nearer to a process of challenge and response than to a joint-determination process.

If there is a collective bargaining relationship operated as a form of challenge and response, it really doesn't make sense to talk about arbitration as a process for ironing out honest-to-goodness differences between the parties by participation in what used to be called industrial self-government.

Let us get back to what seems to be a public dissatisfaction with the strike as a means of resolving industrial conflicts over contract terms, grievances, and jurisdictional disputes. It seems very significant that the labor unions, long jealous of their autonomy and the sanctity of these jurisdictional lines, are being compelled by the force of public

opinion, as well in the interest of their own survival, to work out some sort of machinery for the use of mediation and arbitration of disputes in this area of the jurisdictional strike. The difficulties of doing so have become apparent, but so has the need for doing so.

Maybe the time will come when the strike as a means for resolving most of these problems will be looked upon as the pow-wow of economic civilization.

Finally, let us get back to the interest of the public in the quality of decisions. The idea that economic might makes economic right is suspect. It is suspect in terms of the resulting impact on the public as well as the equity of its results. These kinds of changes do occur. The rejection of the idea that economic might makes economic right occurred early in the development of grievance procedures. There was a time when the unions struck over grievances when the company had a lot of orders for nearby delivery. This was the time to strike. If business was slow, however, and if there was a big inventory on hand, the company could then retrieve the concessions earlier made. Work rules came in and out like the tides and disciplinary policy became "loose" or "tough" with changes in the business cycle.

I suppose, fundamentally, the theory of economic might has been dominant only because of the belief that political arbitrament is less desirable than economic power arbitrament. But, that need not mean that the parties themselves are unable to develop their own approaches just as they did so constructively in developing grievance arbitration as a substitute for strikes.

No one can say whether or not we are going to move in the direction of tripartite negotiations, enhanced mediation activities by the Government, or recommendations by fact finding boards. But, there is a considerable re-evaluation of ideas going on. I agree very much with Allan Dash in his hope that some day this National Academy of Arbitrators will really come to grips with some of these broad, fundamental questions and perhaps even give some leadership to discussions in these areas. We get too cliché-ridden when we consider the problems that really matter.

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I guess it has been pretty well established and everybody understands it that basic to our arbitration process in labor-management

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relations is voluntarism; and in order for the parties to be willing to volunteer, and that is what we are doing in effect, the system must satisfy them, must satisfy both of them. If either of them is dissatisfied, we run into trouble.

As an individual I have been a most ardent advocate of voluntary arbitration in labor-management relations for many, many years, have participated in it and have been responsible in some measure for introducing it into contracts where it did not previously exist.

But there are rumblings setting in that I think it would be well for us to discuss. I would prefer discussing this, not as a labor representative talking to arbitrators, but as one man to others who are all interested in the continuation and maintenance and expansion of the arbitration process.

Mention has been made of the cost of arbitration. Dr. Taylor has said that it has a sort of self-governor. Well, the self-governor goes toward the question of the choice of arbitrator. If his costs are too high, or if he is unsatisfactory, there is a self-governor: You just don't use him again.

This, however, is not our problem. I was frankly alarmed when I read last year the article in the *IUD Digest,* which talked about our "avaricious arbitrators." It reminded me a little bit about collective bargaining where, in order to achieve your purpose, you set forth situations which are horror cases and say this is the norm. We are all accustomed to hearing horror cases at the bargaining table to establish a point, and there are horror cases to illustrate arbitration fees and arbitration costs, but this is only one part of the arbitration problem.

Arbitrators, on the whole, are fair and equitable in setting their fees. They attempt generally to be fair in determining the amount of time they put in on the case and what the fee should be, and, although we do have situations where arbitration costs are beyond reason because of arbitrator's fees, either by way of the per diem or because they take too much time in the handling of a case or because they lose control of a case so that it drags too long in hearing, as I say, this is only one part of the problem.

The other part of the problem, however, goes to what unions can do and what managements can do to reduce arbitration costs; and, fundamental to the entire problem, regardless of who may be responsible for the high cost of arbitration, is the fact that there are situations, at least on the union's side of the ledger, where our people cannot afford the arbitration process.

In our union, the UAW, we took this under consideration about

two and a half years ago. We talked to the American Arbitration Association, we talked to members of the National Academy, and we decided there was too much talk and not enough study. There was a great deal of heat and too little light, and, as a result, last January, we undertook to send out a questionnaire to a limited number of local unions in the immediate geographical area surrounding Detroit to find out what are the cost problems in the handling of arbitration cases and to determine where the problem lies. From the answers to this questionnaire we hoped we could find the way to correct the problem.

Well, to give you some examples, I brought along some answers to the survey.

Here is an Amalgamated Local Union, which has over 150 units, averaging from 20 people to perhaps 1,000 people each. The Amalgamated Local Union, under our setup, is responsible for handling arbitration costs that are incurred in any one of its units, so that if a unit of 30 people has a number of arbitration hearings, the cost is borne by the total Amalgamated Union. In the entire year of 1958, this union handled only seven arbitration cases out of over 150 contracts. This is quite a remarkable record. The cost of the cases was $3,084.27 for fees and expenses of the arbitrators, and $182.79 for the cost of case preparation, calling out witnesses, and so on.

The comment submitted by the local union is that small units having arbitration cases become a financial liability to the local union. The question is: In the best interests of the local union, and in consideration of its financial stability, how long can the Amalgamated Local Union continue to pay these kinds of arbitration fees (even though they are holding down the number of cases going to arbitration), before they come to a point where they say, "We are just as well off without having arbitration; we will go the route of driving it out of our contract."

And I want to mention something about that, in terms of the Detroit area.

We have an instance in which one local president noted: "We had one arbitration case in the entire year of 1958, and that case, including fees, expenses of witnesses, preparation, secretarial help, photostats, cost us $1,300.96"—one case. This is the "horror" example I mentioned earlier, obviously not the norm. He goes on to say: "Arbitrators have other sources of income, and, as a rule, this job is a sideline." Of course, I don't think, among this professional group, that is necessarily true. But I think what he said to himself

was: "How can the local union afford this sort of thing?" By the way, this is a rather small local union with, of course, a meager income from dues.

We have another reply to the questionnaire in which the president of the local union says: "When our employment is normal, which in our case should be 900 members, it appears we can afford arbitrating cases worthy of arbitration; when our employment drops to 400 or 500, then we find it a heavy drain on our funds." This local union, with a membership of 700 people at the time, had only one arbitration case for the entire year.

Another local union, with only 146 members, says, "The cost is so great that a local as small as ours cannot afford arbitration." And his answer to, "Have you gone to arbitration?" is: "No."

So the problem is not necessarily, who is to blame for arbitration costs? Our problem is that for small local unions (and, mind you, in an International Union such as ours, the bulk of our local unions are small ones, not large ones), arbitration costs today have come to the point where they cannot really afford arbitration.

Yesterday I was in the South and I visited with a local union where they are having this problem. Arbitration there has become an evil. They haven't been able to resolve their problems in collective bargaining, so arbitration is being used to replace it. I have a pet theory that a local union is merely a reflection of the management with which it has a contract, and in this case I believe the collective bargaining relationship is a reflection of what management is doing. We have a problem of a small local union, with 51 cases set for arbitration. The company insists that every case must be heard individually on a separate day by a different arbitrator, and they won't budge from that point of view. There are eight discharges, all for the same reason, at the same time, under the same circumstances, but each must be heard separately by a separate arbitrator on a separate day, at a cost of approximately $500 each to the local union.

The local union says, "We can't afford this. The company is using the arbitration process to make us financially bankrupt. Can the International Union pay for it?" Well, as a representative of the International Union, my answer was, "No, because, if we start paying for this, the next thing you know, *we* will be bankrupt."

But how do we settle this problem? What is the answer? The answer in this particular situation, obviously, lies not in the field of arbitration but in the proper use of collective bargaining. But

in other situations it *is* in the area of arbitration, and we are pleading, really pleading for the brains of the National Academy of Arbitrators, of the American Arbitration Association, of the Federal Mediation and Conciliation Service, to be pooled to attack this problem, to show us how to get it settled, because we have not found the answer.

Now, if I had the time, I could go into each and every aspect of the arbitration process that affects ultimate cost, the questions involving transcripts, post-hearing briefs, duration of hearings, all these things, which go toward the problem of costs, and we could discuss them at great length, but we haven't yet arrived at any real conclusions.

In our union, we are planning in the near future—we had planned to do this earlier but the pressure of other business did not permit—to invite arbitrators within the immediate area of Michigan to just sit down around a table with us and talk it through and see what ideas they have to meet this problem.

Why? Because what is happening is a growing unrest among small local unions concerning their arbitration clause. If they cannot use arbitration economically and effectively, they will no longer volunteer to have arbitration. At that point there will be a drive directly contrary to what we have been doing for the past twenty years, and that drive will be to get rid of arbitration clauses and go back to the jungle.

Now, in small local union situations with small plants, the jungle is not nearly as offensive to the membership as it is in a multi-plant corporation of the size of General Motors, Ford, Chrysler, North American Aviation or Douglas. In Detroit there are some leaders in our union today who are taking the position that unless local unions can afford arbitration, they will strive to withdraw arbitration from the contract and settle their grievance disputes across the table or on the picket line as we did in 1937, 1938 and 1939.

This is a danger. This in my opinion is going in the wrong direction. One answer, of course, is to find the way to make arbitration possible for all who want it.

I recall last year during the discussion of this problem of arbitration costs, the Academy said it planned to undertake some studies in this respect. We would be very interested to learn what the results of the study are, because it is our opinion that only when this matter is thoroughly and comprehensively studied, when the facts are laid out in the open, can we begin to find solutions, rather than talk about these things in a vacuum.

There is another problem that is disturbing us and we think the arbitrators can help considerably with regard to it. Although unions generally today have become more and more stable, we have, I believe, greater turnover in manpower at the International Union and local level than is normally true of management. In our Union for instance, when we undergo a layoff, as we did a year and a half ago, and again last year, there is the requirement for readjustments. Then, as we expand, on the basis that perhaps there is an increase in revenue, we must bring people back or hire anew, directly from the plant level. In any event, we are constantly beset with the problem of training international representatives.

Now, to a great extent, the job of an international representative, at least in our union, is to see to it that the routine problems that occur day by day on the plant floor are properly handled, and that is done largely through the grievance procedure. He negotiates a new contract once a year, once every two years, or so, but his day to day job is one of grievance handling. The question of handling cases before the arbitrator is becoming more and more vital and important because arbitration is becoming an extension of the collective bargaining process. We have to have highly trained people to do this job.

In our union, large as it is, we do not have the facilities for training the numbers of people necessary to handle this properly, and I think that a successful training program whereby we can develop a sort of "professionalism" in the handling of grievances, in the seeking out of facts and details, in the ability to present cases in arbitration, or at lower steps of the grievance procedure, will go far toward reducing ultimate costs to our local unions.

We don't have the facilities to do this kind of job, and I would like to throw out for consideration by the Academy the possibility that training courses be established through the auspices of the Academy at a fee, in which you, who are expert in this particular field—how to dig out facts, how to prepare a case, how to argue a case—can hold classes for representatives sent by various unions for this purpose.

Now, there are universities that hold two-day seminars. The American Arbitration Association holds two- or three-day seminars. These are all helpful. The "students" hear the speeches and participate in the workshops, but you cannot train people for this work in two days or three days. It takes the same kind of training to know how to prepare and present cases as it does to learn any

other art. One doesn't learn such an art in just a couple of days, in 16 hours of sitting in a room and listening to people talk, or participating in a workshop or engaging in a model arbitration hearing.

The program should be carefully prepared and should be a course of some duration, in which all the various aspects related to the whole question of grievance handling can be properly covered.

I believe that if there is the time and if there is the inclination, the Academy can play a major role in making arbitration a more workable instrument by establishing training programs of this nature.

There is a little thing that has been happening recently in the field of arbitration that I did not want to overlook discussing with you.

If you have noticed, the BNA, in the past couple of years, has set up a new index heading. It is called, "Lie Detector Tests," the use of the polygraph in labor-management arbitration. There have been discussions concerning this at IRRA meetings, and I am sure there have been discussions among arbitrators around the country about it. We have been contemplating, in our International, although it has not been done yet, sending a directive to our local unions to notify the companies that they will not agree to use polygraphs in the handling of labor-management arbitrations. This is just another form of escapism, in our view, using the path of least resistance.

The use of the polygraph has not been approved by the courts, and in some States it has been directly forbidden by the courts. As far as we are concerned, the polygraph is another way of attempting to measure human beings with a ruler. We react to it just as we react toward the time study man who comes along with his little stop watch and his little piece of paper and sets a study on a man to determine how much effort he has to put forth to earn his money; and then, when there is a speed up dispute at the bargaining table, we shove it all aside and say, "Let's bargain, fellows."

So when it comes to the use of these lie detector tests, we tend to do the same thing. We have inquired about them. They have not been proven scientifically sound, nor accepted legally. This is something for arbitrators to consider. In the event that the use of the lie detector should become prevalent as a means of settling labor-management disputes, its most frequent use would be in discipline cases. Since discipline cases represent 30 per cent of the arbitration cases in the country today, I would suggest that the work of arbitrators might be reduced by 30 per cent—if the polygraph

becomes a widely accepted and widely used instrument. We are opposed to it, and we think that any arbitrator worth his salt will not permit the use of polygraph tests in an arbitration hearing.

There are some arbitrators who have said, "I will disregard any results coming from a lie detector test in this case," but then, as is usual in arbitrators' opinions, there is dictum, and you get the "ifs." "If this happens . . .," "If that happens . . .," then, "Maybe it can be used." All you need is a few "ifs," and, before you know it, the "ifs" become absolutes, and it becomes an acceptable instrument. We are opposed to it and we think it detracts from the process of arbitration and the very reason for arbitration.

There is one further item which goes perhaps toward a criticism of what is happening in the field of arbitration. Maybe we could call it the danger of moving in the direction of *stare decisis* among arbitrators and their opinions. There seems to be a tendency more and more to freeze arbitration, both procedurally as well as with respect to ideas and principles. The reliance on precedent is not altogether bad, and I would be the last one to say there should be no reliance on precedent. As a matter of fact, in spite of the many who say, "Look, let's get rid of the use of precedent in arbitration, it isn't doing us any good," it is nevertheless here, it will stay, and if I know human beings, we won't get away from it. Certainly, however, there is the need for greater realization and acceptance of the dynamics of the collective bargaining instrument, and arbitration is an extension of that instrument.

There is the need for trying to get away from following the path of least resistance, from using the technicality—what was it? the subjunctive "or"?—from using this as the basis for deciding an issue so vital to people. If a worker is going to be laid off, this is not a matter of a comma or a semi-colon to him. This is a matter of bread and butter, this is a matter of whether his wife and kids are going to eat, whether he will have the job or will not have the job. The semi-colon that makes the difference in the meaning of language is absolute Greek to him at that point.

It seems to me that rather than taking the path of least resistance—and, by the way, that is what the lie detector is—there should be a development of new ideas and new concepts in the field of arbitration. It is dynamic. It is dynamic because it deals with human beings, not merely with words. Every time an arbitration decision is written which rests solely on the bare meaning of words, on the use of semantics, on the fine distinction of a punctuation mark, it

detracts from the recognition of the human values that created the contract between the parties.

A contract is made up of heart, it is made up of struggle, of the lives of workers who are willing to fight for what goes into it and of managements who are willing to withstand the workers' will. We must recognize that we are dealing with something that is human and alive and ever-changing and not something which is cold and sterile. I don't know really how this can be handled as a total problem of arbitration, because, if ever I have come to know a group of people in the same occupation who are, in their own right, individuals, *per se,* it is the arbitrators. I can just imagine that in your "for members only" session, the democracy that prevails can out-do any UAW membership meeting.

But I do think that there is room for the discussion and the development of new ideas in the field of arbitration. I think arbitrators can exercise more control over the arbitration process. Now that they are well established and well accepted (despite these rumblings that I have mentioned) they should exert leadership in these matters, just as they should give firmer direction to procedural arrangements in the handling of an arbitration hearing.

I think there has to be a greater showing on the part of arbitrators, that they, in fact, exert influence on the arbitration process, and that they can give a certain leadership to the parties; that they can talk to unions and managements alike about new concepts and new ideas which the parties should be thinking about in their collective bargaining relationships.

An arbitrator can be a powerful catalytic agent, and I can think of any number of arbitrators in this room, particularly within my own ken, one sitting on my right, who was just such a catalytic agent in one of the major contracts in our country. It has worked, and it can work. I think arbitrators should put aside the fear that exists about asserting themselves just because essentially, they are creatures of the parties and creatures of the contract, and represent themselves as having come into their own, as having control of arbitration hearings and be just a little more forceful and forthright in their opinions.

On the whole, it would appear to me that the field of arbitration is yet very young. It has years of growth ahead of it, and expansion into fields which, as of today, have been pretty much closed to it.

I listened with a great deal of interest to what Allan Dash had to say, and I think there is a lot of room for deep thought and

considerable discussion by those most familiar with the whole process of arbitration. Really, arbitration is just on the threshold. There are various areas in the collective bargaining relationships between managements and unions which arbitration has not touched and with which it will, in fact, as the years go by, come in contact. I am sure at the point where that is done, if the wisdom of arbitrators is pooled in discussions such as this, we will find that arbitration in future years will be an even more stabilizing factor in relationships between managements and unions than it has been to date.

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The history of the settlement of disputes between men is long. In general, settlement methods have divided themselves into the primitive law of the jungle and the civilized law by reasoned decision. Arbitration belongs to the latter category.

Among individuals the jungle method is quick—and cheap. There are no delays and there is no transcript. Cain and Abel had a dispute—of a sort. Jehovah was pleased with the sheepherder Abel's offering of a fat lamb, but not pleased with farmer Cain's offering of fruits of the ground. Perhaps Cain's offering was spinach. Obviously Jehovah was not a vegetarian. In any case the frustrated Cain up and slew Abel. That ended that dispute.

Even this crude settlement would not have been permanent except for the intervention of Jehovah, who "set a mark upon Cain lest any one finding him should kill him." Cain was condemned to live on land rendered barren wherever he might pass. Thus deprived of an agricultural life, Cain, as tradition has it, founded the first city—an early case of adjustment to technological unemployment.

Self-help did not end with the early case of Cain and Abel, preserved from the prehistoric myths in the Book of Genesis—perhaps the first transcript. In fact the cause of the duel in which Aaron Burr killed Alexander Hamilton in 1804—upwards of six thousand years at a minimum after the Cain and Abel affair, if one takes Archbishop Ussher's chronology—is not unlike the biblical episode. Hamilton had frustrated Burr's hopes for popular favor—the United States presidency and later the New York governorship. Burr demanded an explanation from Hamilton for charges against his character. Hamilton quibbled; then pistols at ten paces and Burr's

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bullet ended that case. But as Jehovah banished Cain to the Land of Nod, so American society ostracized Burr for the remainder of his dreary life.

It is curious how slowly men have developed institutions for settlement of disputes and curious also that the development has come so unevenly. For example, there is the case of Moses sitting at the Judgment Seat beside the largest well at Kadesh, the desert oasis where the children of Israel had paused to reorganize after the hectic escape from Egypt. Thomas Mann draws from biblical sources an account of the tribulations of this early—about 1200 B.C.—judging. Moses' people, so recently out of slavery, had great difficulty with the concept of justice. "They thought that where the rights flowed everyone must get his rights; they would not and could not believe that a man was getting his rights even when he was judged in the wrong and had to go away with his nose out of joint. Such a man, of course, cursed himself for not having settled the quarrel with his opponent in the natural way, with a stone, when the result might have been quite different. Only slowly did they learn from Moses that such ideas were not in harmony with the invisibility of God, and that nobody got his nose put out of joint who was adjudged upright by the law, for that the law was always both beautiful and austere in its holy invisibility, no matter whether it pronounced a man in the right or in the wrong." A difficult concept even today—three thousand years later—as some arbitrators have learned to their sorrow.

The story never fails to intrigue us: how there were too many cases for Moses; how the Judgment Seat was overrun; how, as Thomas Mann puts it, "They clustered around him from morn to eve and there was no end to it"—an early instance of flooding the grievance procedure. Jethro, Moses' brother-in-law by one account, came to advise Moses to appoint upright, judicious men to be judges over a thousand, a hundred, over fifty, over ten. This was pushing grievances back to the floor for settlement. Of course there was the right of appeal.

Moses established an enlightened and comprehensive grievance procedure thirty centuries ago. Yet two thousand years later our own English ancestors practiced very crude methods of judging. For example, a suspected witch was stripped naked, cross-bound, the right thumb to the left toe and the left thumb to the right toe, then cast into a pond or river. If the water "received her," that is, if she sank, she was innocent; but if she floated, she was guilty. Some of our methods of determining the validity of a contemporary

time study are scarcely more precise. In any case, as every arbitrator knows, incentive systems are often considered a form of witchcraft. Many an industrial engineer gets crossbound—thumbs to toes—by the grievance procedures. Again, as every arbitrator knows, there are many ways, other than drowning, to tie an incentive system into knots. In the forthcoming revision of the late Sumner Slichter's classic book the result is called a "demoralized incentive system."

I take great comfort from these analogies between ancient and modern times. History and the myths before history furnish rich resources for the making of comparisons and the detection of identities. One can keep a slightly firmer grip on sanity if he knows that others before him have had similar troubles. There is comfort in the realization that man in the million years since he gained an erect posture and acquired the rudiments of speech has relived his experiences many times. Education in one of its important aspects consists in the constant dredging up of data from the past for clues as to the direction of the future.

There is useful case material for labor relations in the account of the building of Valhalla Godhome. The Germanic legends of the Nibelungenlied are sometimes associated with Atilla, King of the Huns, who died 453 A.D. Wotan had engaged two giants, Fafnir and Fasolt, to build a home for the gods—a majestic burg high in the clouds. There was no objection to this outside contracting because the gods themselves lacked the skills to build the castle. They had only the imagination to dream of the splendor which the giants were engaged to bring into reality. The analogous case is that of a new product and process passing from the research department, the gods, to the production line—the giants.

Wotan has promised to deliver to the giants as payment for the dream city the goddess Freia, whose golden love apples have been keeping the gods young—a point Wotan had overlooked in the pressure of collective bargaining. Many a plant manager, sweating under a hastily made local agreement, will find himself sympathizing with Wotan as I unfold this ancient tale.

As the giants are approaching for their pay, Fricka, wife of Wotan and sister of Freia, is reproaching him for the bad bargain, just as many a home office director of industrial relations has often second-guessed the long-suffering plant manager. But Fricka soon learns that Wotan is not planning to keep his bargain and that he is depending upon Loki, the God of Intellect, Argument, Imagination, Illusion, and Reason (shall we say, for short, General Counsel?) to get him out of it.

The giants come soon enough; and Freia flies to Wotan for protection against them. Their purposes are quite honest; and they have no doubt of the gods' faith. There stands their part of the contract fulfilled, stone on stone, port and pinnacle all faithfully finished from Wotan's design by their mighty labor.

Then there happens what is to the giants an incredible, inconceivable thing. The god begins to shuffle. About this episode Bernard Shaw, to whom I am indebted for this folklore, as employed by Richard Wagner in the four music-plays called the Ring of the Nibelungen, says, "There are no moments in life more tragic than those in which the humble common man, the manual worker, leaving with implicit trust all high affairs to his betters . . . first discovers that they are . . . unjust and treacherous." The shock drives a ray of prophetic light into one giant's mind, and gives him a momentary eloquence. In that moment he rises above gianthood and warns the Son of Light that all his power and eminence of priesthood, godhood and kingship must stand or fall with the unbearable cold greatness of incorruptible law. In other words, "You are not going to tear up our contract."

In the midst of the wrangle Loki comes at last, excusing himself for being late on the ground that he has been detained by a matter of importance. Lawyers are always like that—so much business. Some arbitrators, too. When pressed to give his mind to the matter at hand and to extricate Wotan from his dilemma, Loki has nothing to say except that the giants are evidently altogether in the right. The castle has been duly built. He has tried every stone of it and found the work first-rate. There is nothing to be done but to pay the price agreed upon by handing over Freia to the giants.

The gods are furious. Wotan declares that he consented to the bargain only because of Loki's promise to find him a way out of it. But Loki says no: he has promised to find a way out if any such way exists, but not to make a way if there is none. General Counsel is always an honest man. It is just that sometimes he seems otherwise when his arguments become devious. Loki protests that he has wandered over the whole earth in search of some treasure great enough to buy Freia back from the giants; but in all the world he has found nothing for which Man will give up Woman. Many a labor expert has searched and failed to find anything for which a union will give up some treasure as precious as is Woman to Man—say, an incentive system with loose standards.

In describing his world-wide search for a way out of the bargain,

Loki has mentioned a dwarf with a hoard of gold, a magic helmet, a ring which gives him naked, arbitrary power, and millions of slaves working in the bowels of the earth—under the Taft-Hartley injunction—to make more and more wealth. This gives the giants an idea. They will take Freia away, but Wotan can buy his way out of the bad bargain if he brings the gold to the giants. Now I shall cease drawing every possible analogy and hasten to the end of the tale. My audience, however, will have no difficulty in interpreting—each in his own way, of course—the allegory.

Freia and the love apples gone, the gods begin to wither—like a high-cost plant. The situation is desperate. Wotan and Loki search out the dwarf, Alberich, and his gold. Loki cajoles the dwarf into a demonstration of the magic powers of the helmet. When the dwarf at Loki's challenge changes himself into a toad, Wotan quickly puts a foot on him.

Alberich, now in captivity, gives up the gold, helmet and ring for an impoverished freedom. Wotan summons the giants for the payoff. But now it is the giants' turn to shuffle. They are loath to let Freia go—"not unless," they say, changing the bargain, "there is enough gold completely to cover her" and thus banish from their sight the image of the love which they have agreed to give up for gold.

But however cunningly Loki spreads it, there is not enough gold to cover the goddess. The glint of her hair is still visible to the giant Fafner and so the magic helmet must go to cover that. But then the giant Fasolt can still catch a beam of Freia's eye through a chink and the giants demand the ring to close the chink.

Here Wotan balks. He wants that ring which gives him power unbridled by reason, compromise, or law—management's prerogatives. The other gods, dying for lack of love, plead with him to no avail. He stands on his last offer. Then the voice of the First Mother of life comes to him—she who before the gods, before the giants or the dwarfs, had the seed of all of them in her bosom. Erda rises from her sleeping-place in the very heart of the earth and warns Wotan to yield the ring. He obeys, and all sense of Freia is cut off from the giants. Of course there is a difference in sex between Erda and the Vice President of the United States, but you can see what is running through my mind.

The story does not end happily. Fafner and Fasolt each having paid the full price—the loss of Freia—for the gold, disagree over the division. They automatically look to Wotan to arbitrate, but he refuses to live up to his management responsibilities, as Dr. George

Taylor would put it, and so the gold-rich, love-poor giants must fight it out. Fafner batters Fasolt to death.

The rich giant has no need for the money. He would have been better off with a fringe benefit. The ring is useless to him because he has no taste or aptitude for political power—just bread and butter unionism. And so he piles the gold in a cave. With the helmet he changes himself into a dragon and devotes his life to guarding the gold—ignorant of the risks of devaluation.

And now the epilogue, as Shaw and Wagner extracted it from the myth: The gods were shocked by Fafner's brutal killing of Fasolt, but soon forget their horror in the joy over Freia's return and their restored youth and beauty. Donner, the Thunder god, springs to a rocky summit and calls the clouds as a shepherd calls his flocks. They come at his summons; and he and the castle are hidden by their black legions. Froh, the Rainbow god, hastens to his side. At the stroke of Donner's hammer the black murk is riven in all directions by darting ribbons of lightning; and as the air clears, the castle is seen in its fullest splendor, accessible now by the rainbow bridge which Froh has cast across the ravine.

In the glory of this moment Wotan has a great thought. With all his aspirations to establish a reign of noble thought, of righteousness, order, and justice, he has found that day that there is no race yet in the world that quite spontaneously, naturally, and unconsciously realizes his ideal. He himself has found how far godhead falls short of the thing it conceives. He, the greatest of gods, has been unable to control his fate; he has been forced against his will to choose between evils, to make disgraceful bargains, to break them still more disgracefully, and even then to see the price of his disgrace slip through his fingers.

On every side he is shackled and bound, dependent on the laws of Fricka and on the lies of Loki, forced to traffic with dwarfs for handicraft and with giants for strength, and to pay them both in false coin. After all, a god is a pitiful thing. But the fertility of the First Mother is not yet exhausted. The life that came from her has ever climbed up to a higher and higher organization. From toad and serpent to dwarf, from bear to elephant to giant, from dwarf and giant to a god with thoughts, with comprehension of the world, with ideals. Why should it stop there? Why should it not rise from the god to the Hero? to the creature in whom the god's unavailing thought shall have become effective will and life, who shall make his way straight to truth and reality over the laws of Fricka and the lies of Loki with a strength that overcomes giants

and a cunning that outwits dwarfs? Yes: Erda, the First Mother, must travail again, and breed him a race of heroes to deliver the world and himself from his limited powers and disgraceful bargains. This is the vision that flashes on him as he turns to the rainbow bridge and calls his wife to come and dwell with him in Valhalla, the home of the gods.

The myth is a sad one. Every principal character, except Freia, who after all does nothing—like some vice presidents, of companies—is deluded and defeated: Alberich ensnared in his own magic; Fafner first murderer and then slave to his useless gold; Wotan, even in his new hope for a race of heroes free of the limits of law, doomed to ultimate frustration. The dream of the heroic, of some transcendent good and greatness which will free man from the littleness of life is an old one, older than Wotan, a dream that will not die. But it is a dream and in it there is no substance. The Garden of Eden was not for man.

But the business of life is mostly humdrum. Law and judging, accommodation and compromise, dispute and settlement—these are the processes by which we make intractable life in some measure tolerable. Disorderly, unpredictable, inconstant life—man would die of it but for the little procedures by which he binds himself to a modicum of decency and good manners. And even these are not enough unless there be also charity—love, which in the myth neither the gods nor the giants knew fully how to keep.