CHAPTER 2

THE PRESIDENTIAL ADDRESS

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The Academy's self-indulgent custom of scheduling a presidential address at each annual meeting is not without symbolic significance. My theory is that arbitrators, being usually on the receiving end of speeches, derive a certain satisfaction from observing one of their number lecture without interruption to a group of labor and management representatives who, of course, cannot talk back.

Unhappily, the man selected to provide this vicarious pleasure for the group does not fully share in their collective enjoyment, for he bears a heavy responsibility. He is expected to speak briefly (arbitrators, like most other people, soon tire of the sound of any voice but their own) and entertainingly on a subject of general interest; he must not be so exciting as to interrupt the even tenor of the digestive process; yet he must be lively enough to arouse at least the majority of the audience from its normal post-prandial torpor. My position is thus an uneasy one. I confess to feeling just like the student who was once advised by my old law professor, "Bull" Warren, "Look out, boy; you're in shallow water and sinking fast."

In choosing a topic suitable for this occasion I have reluctantly rejected all of the current major issues in our common field of interest as being either too big to be dealt with adequately within the time available or so controversial that any discussion of them immediately after lunch is likely to "angry up the blood," as Satchel Paige would say, and produce a generally dyspeptic reac-

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tion. Instead, I have decided to present a few random remarks about arbitration in action.

Presidential addresses are supposed to carry a "message"; but if there is one in what I am about to say, it is so muted as to be undetectable even by me. I am sure that none of the sophisticates gathered here today shares the naive and romantic notions, born of pure ignorance, that arbitrators customarily deal with major problems in our industrial society, and that each decision is a force which shapes significant policies in labor-management relations. Many of you, however, may incline to the view that practically all of the grievances typically handled in arbitration are of a dull and routine character.

That this latter theory is somewhat exaggerated is suggested by the several decisions I am about to discuss. None of these involves an issue of transcendent importance, nor will any of them be long remembered; but each is sufficiently out of the ordinary to merit the passing tribute of a laugh. The most casual research turned up many more cases that would have served my purposes just as well; so to those of you who regard the case literature of arbitration as boring stuff I suggest that there are still a few gems lying around.

Let me begin, then, by recounting the Case of the Bearded Truck Driver. Here we have a classic example of a battle of wills. The employer relied upon a straightforward, no-nonsense rule which declared: "*Look neat.* Shave daily, wear neat clothes and always wear a smile." The grievant was evidently a man of strong conviction who believed that "He that hath a beard is more than a youth, and he that hath no beard is less than a man." At any rate, he refused to dispose of his hirsute adornment, despite the employer's warning of no beard or no work, and was eventually suspended for his obduracy. The union took the matter to arbitration, charging that the grievant had been disciplined without just cause, and the battle was joined.

The employer had sought to justify the reasonableness of its rule on the ground that "in today's ordinary business activities, bearded employees are highly unusual and give rise to adverse inferences and suspicions," as well as to disparaging comments, such as references to "beatniks." The arbitrator obviously con-

sidered these contentions to be irrelevant, since the evidence showed that the neatness rule had been kept pretty much of a secret from the employees and had not been uniformly enforced; moreover, he found that the grievant had in fact shaved daily in the general vicinity of the bearded portions of his face and had thus literally complied with the rule. "It is not impossible," the arbitrator observed, "for a person with a beard to look neat"; he then added, with just a touch of sophistry, that "there is no necessary incompatibility between having a beard and a daily shave."

Although the arbitrator's decision was based upon sound and familiar principles, his opinion may also be said to have struck a solid blow for bearded individualism against clean-shaven conformity. My only regret is that he made no reference, even by way of dictum, to the unreasonableness of the other part of the rule in question. The thought of a group of truck drivers pursuing their daily rounds with faces set in a fixed smile, unrelieved by even a passing frown of contemplation or scowl of anger, is too painful to contemplate; one is reminded immediately of Malvolio, concerning whom the servant, Maria, sensibly remarked to her mistress, Olivia: "he does nothing but smile: your ladyship were best to have some guard about you, if he come; for, sure, the man is tainted in's wits."

On the basis of the record, however, it must be conceded that our arbitrator stuck to the issues and kept a firm grip on his own emotions, which I like to think were stirred by the bearded protagonist's courageous battle against the Philistines.

By way of contrast, let us now consider the Case of the Unregenerate Wolf. The sordid story is briefly told. Mr. S, the villain, was a married man and the father of a four-year-old tot. One day he went into the office of the company which employed him to pick up his pay check. There he found Miss X, described by the arbitrator as "a young woman, single, in her middle twenties." She was alone. S requested his pay check and engaged X in conversation, "during the course of which," the arbitrator reported, "he put his hand on her person in an unduly familiar manner, persisting in his 'attentions' despite her protests to desist." While he was thus occupied, two company servicemen entered the office and observed what was going on.

This was, however, but the beginning of X's humiliation. What happened next is best told in the arbitrator's own words:

> The situation which the two (2) servicemen encountered was obvious, as was the embarrassment and discomfort of the female employee. Their entrance upon the scene, however, had little effect upon S, who brazenly remained in the office, hovering in close proximity to her desk. Upon the departure of the servicemen, S wasted little time in making his intentions clear with the proposal "how about shacking up with me over the weekend." Incensed and distraught, she demanded that S leave her alone and forthwith exit from the office. S [still bent upon mixing business with pleasure] thereupon picked up his pay check and on his way out attempted to pinch her on the buttocks.

Retribution followed swiftly. After checking into the situation, the company caused S's time card to be removed from the rack; as the arbitrator put it, the company felt that it "had no alternative but to discharge S for his lewd and lascivious molestation of a female employee." The union, taking a more broad-minded view of the incident, challenged the discharge as being too harsh a penalty for the offense. In so doing it unleashed the full fury of the arbitrator's wrath. Casting off even the appearance of objectivity, he sustained the discharge in an opinion of such passionate eloquence that it deserves comparison with Shakespeare's "The Rape of Lucrece." Permit me to quote just one more passage:

> There are no mitigating or extenuating circumstances here discernible which reduce or even tend to reduce the degree of moral culpability in this case or to render the penalty of discharge too severe or improper.
>
> Indeed, the vicious and despicable attempt of the grievant to besmirch the character and reputation of the female employee by the wilfully false accusation during the grievance discussions that "he had propositioned her about nine times before" and "that any girl that wants to be pinched, he would pinch" and "would do the same thing again, if the occasion presented itself," in order to exonerate himself [I have a little difficulty in following the reasoning here, but no matter], is a reprehensible and unconscionable aggravation of the initial molestation of his victim. It requires little exposition to adequately portray the irreparable injury that may have followed this unregenerate attempt to inculcate a haunting and lingering doubt in the minds of management and plant personnel alike as to her "innocence" and "reluctance"

> in the entire episode. Had the grievant succeeded in applying the "brand," his co-worker may have well carried an undeserved scar and memento of the experience through life.

Arbitrators who are bored by their cases and who feel that their literary style is being cramped by the antiseptic conventions of opinion-writing should experience a genuine catharsis from reading the foregoing decision. All the necessary elements are there: pity for the fair victim, terror at the enormity of the crime committed by her foul molester, and a general purification of the soul brought about by the triumph of moral law over the miscreant who dared to violate its sacred commandments. As for the literary style employed by the arbitrator, I will add only that I think its force derives in part from the classical application of the "rule of two" in both the nominative and adjectival senses, by which I mean the use of such phrases as "embarrassment and discomfort," "incensed and distraught," "vicious and despicable," "reprehensible and unconscionable," "haunting and lingering," and so on.

My third example is a case involving the discharge of an airline stewardess following a series of wild escapades which led her employer to the not unreasonable conclusion that she was emotionally unstable. The case is remarkable, however, not for its facts, but because it is one of the few instances I know of in which the arbitrator encountered a witness of such granitic perversity that he felt compelled to set forth a lengthy portion of her testimony—if such it can be called—in his opinion.

The quoted passage is wholly irrelevant to the decision; but one can picture the arbitrator muttering to himself through clenched teeth as he copied it out of the transcript, "I've got to put this in; otherwise, they'll never believe me when I tell them what I've been through." Since misery loves company, and since many of us have been through a similar experience many times, I thought you might enjoy the following blow-by-blow account. I might add, before reading it, however, that although the arbitrator seems to have had the impression that he finally outboxed the witness, I maintain that he didn't lay a glove on her.

The question put to the witness, a supervisor, was whether, in the course of an interview with the grievant, she had asked the grievant to resign. The following colloquy ensued between witness and arbitrator:

WITNESS: We had meetings . . . with Miss X and discussed the problems involved, and the possible action, and observed her reactions at the time.

ARBITRATOR: Did you ask her to resign or not, though?

WITNESS: We discussed the possible——

ARBITRATOR: Why don't you say yes or no and then explain it?

WITNESS: The opportunity to resign?

ARBITRATOR: I mean, if you will just answer yes or no, whether you suggested she resign, and then explain your answer if you choose.

WITNESS: As I said, I will say again——

ARBITRATOR: I just want you to say yes or no.

WITNESS: I gave her—discussed the alternative action that would be taken.

ARBITRATOR: Did you or did you not suggest that she resign, though?

WITNESS: As I said, we discussed the three alternatives——

ARBITRATOR: I want you to answer me yes or no.

WITNESS: Well, they are listed right there, three alternatives——

ARBITRATOR: Did you advise her to resign, though?

WITNESS: We——

ARBITRATOR: Yes or no now. Just answer me yes or no, and then you can say anything you want in explanation. I want to know: Did you suggest to her, advise her, tell her, to resign?

WITNESS: All I did was to discuss the three possible——

ARBITRATOR: Are you telling me: No, you did not do that?

WITNESS: ——of action.

ARBITRATOR: Just answer me now. Are you telling me: No, you did not say that to her?

WITNESS: I am not telling you yes or no.

ARBITRATOR: I have to get this answer from you, you see.

WITNESS: The three possible decisions that would be made——

ARBITRATOR: You are telling me, "No," I think, "that you did not suggest that she resign," is that it?

WITNESS: We discussed the three possible——

ARBITRATOR: Now, you can surely tell me yes or no now. Is it your understanding that what you told her was not suggesting that she resign?

WITNESS: It is possible; it depends on how you take it.

ARBITRATOR: Well, how did you put it? In other words, did you intend for her to get the idea that you were suggesting to her that she resign?

WITNESS: She could have had the opportunity to resign.

ARBITRATOR: Did you intend it, though, in your mind at that time? This is really what I am asking you.

WITNESS: It would have eliminated possibly bringing an awful lot of people and a lot of feelings into it if she had.

ARBITRATOR: You haven't answered my question. Now, would you just answer me. I am not just trying to pin you to the wall or anything [not much!], but I want you to answer me yes or no, whether it was your intention that she should resign at that time.

WITNESS: Well, if I had been in that position I would have resigned, very gladly, if I had been put in this position.

ARBITRATOR: Are you telling me that it was your intention that you thought it would be wise for her to resign?

WITNESS: I think it would have. I would if I had been in that position. I would have resigned because if a lot of people felt this way about me I would want to start off with a clean record and start somewhere else——

ARBITRATOR: Was it your intention to convey to her that feeling?

WITNESS: I gave her the opportunity, if she wished to resign, rather than to follow through with some other action.

ARBITRATOR: All right. I think you have answered my question.

WITNESS: That there were three possible——

My fourth and final case is selected from the rich and rapidly growing literature involving a fringe benefit characterized by one eminent authority as "the monetization of grief," and more particularly described by others as "layaway pay," "burial boodle," "mourning mazuma," etc. In its most typical form the fringe benefit referred to is a leave of absence with pay to attend the final obsequies of a near relative.

The nearness of relationship between the quick and the dead sufficient to make the former eligible to receive his agony allotment has been the subject of intensive—one might say, Talmudic—disputation; indeed, the resolution of this delicate issue requires a thorough familiarity with the Levitical decrees and the various laws relating to affinity and consanguinity. In the England of W. S. Gilbert's time Parliament was still vexed by

> . . . that annual blister,
> Marriage to deceased wife's sister.

Today, arbitrators in this country are similarly troubled by the

question whether an employee is entitled to a lamentation lagniappe for the burial of his divorced wife's sister.

The problem in the case I have chosen, however, involves not the relationship between the grievant and the deceased, but the more fundamental issue of the employer's obligation to pay a bereavement bonus when the qualifying event occurs during the claimant's vacation. A section of the collective agreement, entitled "Leave for Bereavement," provided in substance that if a near relative of an employee died, the employee should be granted three days' leave without loss of pay, provided such three days fell within his regularly scheduled workweek. The grievant's sister died while he was on vacation, and he claimed the right to three day's bereavement leave in addition to his full vacation period. The employer denied the claim on the ground that the agreement contemplated that the bereavement days off must be taken immediately following the departure of the defunct.

Fortunately, the case was submitted to an arbitrator who is widely acknowledged as one of the principal architects of the developing interment tax law. His decision—a model of rigorous analysis—quickly disposed of the seductive illogicalities in the employer's argument and granted judgment for the grievant. As paraphrased by the arbitrator, the employer's contention was that "where a vacation period intervenes between the day of death and the days of bereavement leave claimed, the passage of time is fatal to the claim." In rejecting this line of reasoning the arbitrator pointed out that the employer's position had been undermined by a euphemism. The bereavement clause, he observed, did not "disclose any single or clear objective in the granting of leave excepting to label it 'bereavement'." It did not indicate "whether the leave is intended for funeral purposes, grief purposes, winding-up-the-estate purposes or other objectives."

Sternly facing up to the consequences of this decision, the arbitrator emphasized that the clause was now "open to the possible construction that leave might be taken . . . five or six months or a year or more following a relative's death, without any special justification being shown." To underscore this possibility he cited the union's interpretation of the clause, as follows: "the leave could be taken immediately after a vacation period during which

a death occurred; but, at a later period, only with sound and reasonable justification having been demonstrated for the delay." This, however, was too liberal a construction for the arbitrator; so, by way of dictum, he proposed the following interpretation as "fair and reasonable": "the bereavement pay *must* be taken in the first three days of the employee's regularly scheduled work-week immediately following the vacation period (excluding . . . days of excused absence for sickness or industrial accident, etc.); *provided,* however, that the bereavement leave can be taken at a later period but only upon the showing of good and just cause for the delay."

Surely, there is a moral here. For the sake of brevity, I shall put it this way:

Now come all you employers, listen to me:
Be careful how you pay for that obsequy;
Don't you be afraid to call a spade a spade,
'Cause once he kicks the bucket a man's just plain daid.
Avoid euphemisms; for the cases have shown
The "bereavement" you pay for may be your own.