CHAPTER 5

THE PRESIDENTIAL ADDRESS:

SOME POTENTIAL USES OF THE OPINION

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Each year in the short span of its existence since 1947, the Academy has striven to achieve its avowed objectives with varying degrees of success. One major objective—the promotion of study and understanding of the arbitration process—has met with consistent and tangible success over the years. Most of this is recorded in the published Proceedings of our Annual Meetings.[1] It has frequently been said that the papers presented at our Annual Meetings represent the most significant contemporary contribution to a greater understanding of collective bargaining and arbitration. Even if this accolade is not fully deserved, we still may take pride in the fine quality of our annual programs and know that we are making a major contribution in this area.

At this precise moment we stand between two sessions of a program in which an analysis of arbitration problems and systems, in breadth and depth, is being undertaken by a group of seven men who combine scholarly preeminence with outstanding success as arbitrators and practitioners in labor arbitration. This double session may be the most ambitious single project as yet undertaken at one of our Annual Meetings: the temptation to participate in it personally is so strong as to be irresistible. Thus, the Presidential Address this year will be neither global in significance, nor deeply philosophical, but rather concerned with some bread-and-butter

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[1] See list of the published volumes of the Proceedings of prior Annual Meetings of the Academy on page ix.

aspects of grievance arbitration which perhaps have not yet sufficiently interested the scholars in the field.

While there is almost infinite variety in labor arbitration systems, most have certain basic common characteristics, one of which is the formulation of a written opinion by the arbitrator to accompany his award. It is an interesting phenomenon that use of opinions in labor-management arbitration remains so widespread despite the impressive arguments which can be leveled against the practice. And in commercial arbitration, written opinions are rare.

Over the years, many have inveighed against the writing of opinions, citing a formidable list of sins committed by arbitrators as they perform this seemingly innocent function. Opinions, we are told, are too long, too incomprehensible, too legalistic. Too often the arbitrator indulges a penchant to psychoanalyze, philosophize, or simply to generalize. Some opinions reflect woeful ignorance of critical facts about the company, the union, the collective bargaining relationship, and life itself. Opinions can do great harm to a collective bargaining relationship by absurd interpretations not only of clauses involved in the dispute, but of others dragged in solely to demonstrate either the arbitrator's great diligence or his assumed perspicacity. In short, the arbitrator "multiplieth words without wisdom."

Perhaps worst of all in the eyes of some critics is the fact that opinion writing requires a good bit of time, and so runs up the cost of arbitration. The considerable expense involved in grievance arbitration has been a vexing problem since World War II, particularly for impecunious small companies and local unions. When the arbitration-cost problem was widely discussed at various meetings throughout the country in 1958 and 1959, one recurrent proposal was that opinions be eliminated entirely as a cost-saving device, particularly in simple cases. This move, it was suggested, could drastically reduce the cost of arbitration, since most study time normally is devoted to the preparation of the opinion.

Perhaps the most eloquent expression of this view ultimately was produced by Peter Seitz in his "Open Letter to a Union Attorney," published in the *Arbitration Journal* in 1962, where

he pointed out that although the parties often groused about opinions after their issuance, they almost never asked arbitrators not to write them.

In response to this Seitzian ground swell, the AAA in February of 1963 announced a new procedure whereby the parties could waive a written opinion in any case. In describing this new procedure, the AAA News stated: "Although the parties have never lacked the power to ask the arbitrator not to write an opinion, they practically never have done so, *perhaps because neither side felt comfortable about raising the question with him.*"

A possibly unintended implication in this explanation is that the arbitrator has a greater interest than the parties in the preparation of an opinion—thus, he might be offended if one party or the other, alone, suggested that no opinion be prepared.

The belief that the arbitrator has a strong desire to write opinions, whether necessary or not, is widely held. A personal experience some years ago may illustrate one basis for this belief. I had been working for some months with a talented young associate whose draft opinions were notably short, too full of terse, cosmic generalizations, and quite lacking in the necessary detail to convince the sophisticated reader with a stake in the outcome of the case. One day I ran across a very detailed opinion of another arbitrator, which on its face had been prepared with great care so as to command the utmost respect of the interested parties as a competent professional job. After suggesting that my young assistant read this, I innocently asked him why he thought the learned author had prepared such a careful opinon. The neophyte's answer was prompt: "Oh, that fellow—he was just trying to build up his study time."

I fear this may be a very common reaction to lengthy opinions, particularly when they are not well organized and reasoned. As the parties read through them, they may not always be convinced that we know very much about their labor relations problems, but many have no doubt that we are very keen students of the dollar.

If, in fact, it is the arbitrator who desires that opinions be prepared to enhance his income, it would be reasonable to suppose that the parties would rush to take advantage of the new AAA pro-

cedure to eliminate opinions. According to AAA President Donald Straus, however, the fact is that to date virtually no one has used this new procedure.

Why such disinterest in a technique which, on its face, would seem calculated to speed up arbitration, reduce its cost, and even help solve our training problem by making it possible for established arbitrators to handle more cases? One clue may be gleaned from a case reported as early as the first volume of the BNA Labor Arbitration Reports in 1946. This case was decided by a prominent arbitrator from New York with a pronounced distaste for writing opinions; his preeminence in the field was such that he could safely disdain such a laborious chore. This elder statesman's award was put forward to stand on its own feet, naked and unashamed, undraped by even the skimpiest opinion. But this was a 3-man board. The union member proceeded to festoon the award with an opinion of more than 1,000 words, while the company member unloosed an even lengthier disquisition to establish that major portions of the award not only were unfounded, but calamitous.

This incident seems to suggest that the parties themselves have an institutional need for an opinion in many cases. It is not enough that a case be decided—the bare decision does not carry conviction to the losing party and others affected by the award. Nor does such a decision provide any guidance to the parties for handling future similar problems. In many cases, the decision may not be as important as the reasons which led to it. The assertion "I don't care whether I win or lose the case; it's what's in the opinion that bothers me" embodies no idle complaint. When the parties are faced with nasty problems of incentive administration, job classification, salary administration, supplemental unemployment benefits, or seniority, they must have reasoned answers which are susceptible to future application in formulating their policies.

By these observations, I do not mean to suggest that the arbitrator does not himself have a vital interest in writing opinions. Many cases simply cannot be decided without drafting an analysis which is the virtual equivalent of a complete opinion. And it might come as a surprise to many to know how often an arbitrator may sit down to write an opinion with a clear idea as to what the decision will be, only to conclude, as he prepares and reflects on

the draft opinion, that his first reaction was wrong. Frankly, very few arbitrators like to assume this risk of error; it is part of our stock in trade that, at least in our own minds, we always reach the right conclusion, within the limitations of the parties' presentations. And even where the arbitrator does not need to reduce his thoughts to writing as a tool for reaching sound results, it is important for his own future guidance—as well as that of the parties—that in later years he know why he decided a case as he did. At least this is true where an arbitrator has continuing tenure with the same parties.

In any event, it will hardly be denied that the parties are entitled to the arbitrator's best effort when he prepares his opinion. Their interest in his effectiveness in performing this function is certainly no less than his own. If he is not in this respect grinding their axe, he may be goring their ox.

Dipping into the volumes of arbitrators' decisions which have been published over the years since 1945 reveals a growing refinement of quality and style, particularly among the well-established arbitrators. Many will recall the popular aphorism of earlier years, suggesting that the successful arbitrator was one who had mastered the art of giving the award to one party and the language to the other. Implicit in this perhaps was the notion that the arbitrator's personal acceptability was at least as significant in writing his opinion as was the need to support the award convincingly. Thus, in a case involving propriety of a layoff of a senior employee, where the issue was ability to do a given job, we might find an arbitrator sustaining the grievance, but at the same time writing in his opinion that: "There was clear evidence of conduct by the grievant on several occasions which would have warranted his discharge." One may wonder as to the feelings of such a grievant who wins a few weeks' back pay, because his seniority rights were violated, but only at the price of becoming a sitting duck for later discharge. And how about the foreman who is put on the spot with higher management for having kept a man who should have been discharged?

Another possible manifestation of excessive concern with one's personal acceptability (which seems to be going out of style) is suggested by opinions where the arbitrator purports to have been "forced" reluctantly to a decision by language in the agreement,

which really doesn't seem to control the issue at all. When such an opinion is embellished with a long essay establishing that the contrary result would have followed had the arbitrator's superior insight and conscience been permitted proper play, the effort to curry favor with the losing party may be too transparent to be effective. In seeking refuge in broad and unnecessary interpretations, an arbitrator may give the parties a new dimension under their agreement—one which neither anticipated and which well may be unpalatable to either or both. Perhaps even more distasteful to them is an opinion which tells them what—in the arbitrator's opinion—they should have written into their agreement in the first place to deal properly with the problem.

I do not mean to suggest that the general quality of arbitrators' opinions today is not remarkably good. When our published decisions are compared with the generality of the courts' published opinions, the arbitrators' work does not suffer. This relative excellence doubtless results from the fact that the arbitrator usually is something of a specialist, selected by the parties with care, and always on trial with them.

Thus, I am not concerned with any serious deficiency in the generality of opinions being written today, *as opinions.* Much more important, it seems to me, is the fact that in many collective bargaining relationships opinions are not utilized as fully as they might be to improve the quality of the results achieved in arbitration.

The truth is that even the best arbitrators may produce erroneous or impractical decisions inconsistent with the parties' agreements, or simply fail to effectuate or implement their agreements realistically. No arbitrator ever can know everything that might insure his producing sound decisions. How can he be expected to? Neither party, in truth, always can be counted upon to have all the facts objectively organized, nor the relevant portions of the agreement dispassionately analyzed. And in some cases it simply is not practical for them to make full presentations, until they first know how the arbitrator is disposed to rule on key questions preliminary to (even though more important than) the ultimate questions in the case. In such circumstances, the combined impact of the parties' presentations at a hearing sometimes may result in

misleading the arbitrator. If he has no way of testing the validity of his tentative or preliminary conclusions in a difficult case, he may produce results far less sound than they might have been.

In discussing the functions of the opinion at a Wharton School Conference some years ago, the late Herb Syme cited an opinion illustrating the point. This was in a bus industry case involving discharge of an extra driver. The arbitrator found that discharge was not warranted, but that lesser discipline might be in order. To this end he spelled out in his opinion that the driver should be reinstated "without loss of seniority" but placed at the "bottom" of the extra board. Since this was a rotating extra board, of course, this last provision was unenforceable and meaningless. According to Syme, the parties greeted this portion of the award with laughter and simply ignored it thereafter.

In another case of innocent error, which I indirectly learned about in 1946, there was no laughter. The arbitrator was called upon to classify about two dozen jobs in a small new plant adjacent to several larger plants of the same company, and in which the employees were represented by the same union. Since it was a hard-fought, important, and technical case, the arbitrator retained a firm of industrial engineers (with the parties' consent) to help him develop his decision. In the resultant award the arbitrator set rates for the lower-rated jobs in the new plant at levels close to those requested by the union, while his decision on the higher-rated jobs was very close to the company position. This decision, unfortunately, so compressed the rate structure that there was insufficient spread between the skilled and unskilled jobs. Also, it could not be reconciled with the rate structures in the two adjacent larger plants of the same company. After the parties' anguished outcries had subsided, they negotiated a settlement and junked the decision.

Many of us in this room can multiply illustrations of such fiascos, and what makes them particularly horrendous is that—unlike a trial court's bad decision—there is no appeal. The parties' only remedy may be to repair the damage by agreement—a feat which may be politically impossible once the decision is announced. My principal purpose today, therefore, is to suggest that the parties themselves can play a major role in avoiding such problems and greatly improving the quality of decisions, by participating with

the arbitrator in the formulation of opinions. This is not an entirely new idea, since the possibility that the parties might make such a contribution always has been inherent in the tripartite arbitration board, where the decision can be discussed and the opinion reviewed by the partisan members before issuance. But the tripartite board system often has proven too cumbersome, too expensive, too political, or simply too inefficient to enjoy widespread use. Many tripartite boards fail to accomplish sound results simply for lack of enough vision and objectivity on the part of the persons involved. It may be, too, that the formal existence of a tripartite board will exaggerate the adversary approach to arbitration, with each party expecting its representative to bring home the bacon in the important cases by pressuring or mesmerizing the neutral arbitrator.

Most important of all, the neutral arbitrator in the tripartite system usually must obtain the vote of one or the other of the partisan members. This necessity can undermine the leadership role of the neutral and reduce him to bargaining for support of one party or the other.

The basic value of the tripartite board system, without its potential disadvantages, has been realized in practice in some collective bargaining relationships simply through informal consultation between the arbitrator and the parties. It has been my privilege to serve in several such relationships, the success of which paradoxically may be attested by the fact that they have gone virtually unnoticed by learned commentators. Under such a consultative arrangement, the arbitrator in his discretion circulates draft or partial opinions to specially designated representatives of each party to give them an opportunity to request joint discussion before a final decision is formulated.

The potential value of this technique may be indicated, if only partially, by the results of one such joint meeting some while ago. This was scheduled to discuss drafts in seven cases out of a much larger number which had been circulated, but as to the balance of which neither party felt any need to comment. In one case the discussion revealed that the true basis for the decision was not stated with sufficient clarity; one paragraph of the opinion was revised accordingly. In two other cases, the discussion revealed no basis for improving the opinion or modifying the result. In a

fourth case, it developed that the issue was only a minor aspect of a more significant general problem; it was agreed that decision should be withheld until the general policy question could be considered fully on the basis of a number of other cases in the mill but not heard. In a fifth case, it was agreed that one line of reasoning advanced to support the decision was potentially troublesome and unnecessary; it was deleted. A sixth case was settled when one of the parties decided it preferred not to have a decision in the given case because of its minor importance and the failure of the presentations to deal with an underlying problem of considerable long-range significance. Finally, in the seventh case, the parties agreed that further consideration by their job classification experts was essential in light of the arbitrator's preliminary analysis.

It is not always desirable to circulate completed drafts under such an arrangement. Partial drafts, and even alternate drafts—sometimes reaching opposite conclusions—may provide the best vehicle for exploring complicated problems. Upon occasion, a simple memorandum stating a problem for general discussion will suffice.

It should be stressed that mediation is not, and need not be, an objective in the development of this technique. In one important collective bargaining relationship with which I am somewhat familiar, both parties reject a mediation approach as unsuited to their needs for entirely sound reasons. To adequately elaborate on them would be in itself a major undertaking which I will save for another day. It is significant, however, that the opportunity for a last review and candid discussion with the arbitrator does reveal to the parties that some cases are better settled than decided. And much more important, this procedure gives realistic recognition to the fact that—as George Taylor earlier told us—grievance arbitration is an extension of the collective bargaining process. This is a view most of us must share, at least in the sense that arbitration should produce results consistent with the parties' agreements, and which implement and elaborate such agreements in respect to detailed or unanticipated problems, which simply cannot be treated specifically in negotiations.

I do not mean to suggest that such a consultative relationship between the arbitrator and the parties always is desirable or pos-

sible. In many instances it would be unworkable or positively harmful.

Unless the problems which parties face in arbitration are major in scope and of a continuing nature, it is dubious that they should consider the consultative approach in arbitration. And in no event should this technique be adopted without adequate understanding and support by the top leadership of both parties. Equally essential is a rare combination of character, sophistication, and insight in the parties' representatives who consult with the arbitrator, including a sincere conviction on their part that the parties share a responsibility that their arbitration machinery should produce sound results.

If the parties' representatives are determined primarily to reargue the cases, to berate the arbitrator, or to nit-pick his opinions, much time will be wasted. In my own experience with three such relationships, tactics of this sort have been conspicuously absent.

Finally, the arbitrator must remain in command at all times; his is a leadership role; and that of the parties is consultative only. It is his responsibility to decide, not to haggle and placate.

Recognizing that the consultative technique is no panacea and may not be suited to the needs of many, let me answer one criticism of it—that such consultation is inconsistent with the requirement that arbitration be essentially judicial in nature, and that the informal post-hearing discussions may violate basic concepts of due process. Like so many well-intentioned and plausible efforts to limit flexibility in arbitration, this criticism rests on a false notion as to how our courts actually work. Where a judge must formulate an order or decree to deal with future relations between the parties on sensitive and complicated subjects, he does not hesitate to confer with them in his chambers as to what should be included in the decree. Often counsel will agree on the terms of an order without requiring any conference with the judge, once they know what his decision will be.

In some jurisdictions it is a routine procedure in equity cases for the judge to furnish the parties with proposed findings of fact, rulings of law, and decree or order, so that they have full opportunity to examine the proposed disposition of their case before

definitive action is taken. The parties then may file specific exceptions to given findings, legal conclusions, and portions of the decree. Only after full consideration of these exceptions, including a further hearing, is the ultimate decision issued.[2] Essentially the same procedure is followed by many administrative agencies, as Professor Gellhorn noted in the 1950 Conference on Arbitration at the University of Pennsylvania, when he advocated giving the parties an opportunity to file exceptions to proposed opinions and awards.

If some possibility of abuse exists in relation to informal post-hearing conferences between the arbitrator and the parties' representatives, it must be remembered that the possibility of abuse or unethical practice is present in all arbitration systems. Whatever their arbitration procedure, the parties must finally depend on the integrity and competence of their arbitrator. They can and do jettison those whose work reveals them to be unworthy of confidence.

Thus, I do not believe that there are valid fundamental objections to this arbitration technique. If it is to be rejected, it should be on practical rather than theoretical grounds. Experience suggests that it can be more widely used than it is. In some situations some such approach may be indispensable if sound results are to be obtained. My purpose today, however, is only to outline its more obvious characteristics as a basis for further thought by those who might be seeking means to improve the results which they obtain in arbitration. But perhaps it will not be presumptuous, in closing, to remind you that Kipling once wrote: "We have forty million reasons for failure, but not a single excuse."

[2] For example, see Pa. Rules of Civil Procedure, Secs. 1517-1519, inclusive.