CHAPTER 9

CHARGES AGAINST AND CHALLENGES FOR PROFESSIONAL ARBITRATION

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I am grateful to the National Academy for this opportunity to represent the American Arbitration Association on this distinguished dais. But I also think that it is very fitting that I should!

The National Academy, the Federal Mediation and Conciliation Service, and the American Arbitration Association are institutional symbols of the *private–public–professional* teamwork that is a special genius of our American society. Together, our three organizations provide the industrial community with a wide spectrum of third party assistance. Not only are the choices provided by our three organizations many and varied, but all three are also dedicated to constant innovations and flexibility to meet the ever-changing needs of the managements and unions we serve.

The FMCS is the guardian of the public interest. Those of us in this room know, perhaps better than most, that the skills of mediation are not a whistle stop on the road to a "final solution" to the strike. In an industrial democracy, there is no *final* solution, and mediation is the best we have. May I dare suggest in front of an Academy audience that mediation is the highest form of artistry for the impartial?

The Academy is the guardian of the standards and integrity of that comparative handful of professionals who comprise the impartials of our country. Because of the mobility of personnel between governmental and private activity that is so characteristic of the American impartial, the Academy bridges both the private and public sectors of the profession.

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The AAA is not the public, but the private servant of the parties, supplying neutrals only at their request, never on its own initiative as the FMCS must do by statute (in all but its arbitration activities). As such, the AAA must be particularly responsive to the changing needs and desires of the parties—not only because this is the exclusive role for which we were founded, but also because, as in any privately conducted enterprise, our financial support depends upon those who use and understand our role, and our support will continue only as long as we fulfill this role to our clients' satisfaction.

Each of these roles—the public responsibility of the FMCS, the professional standard-setting of the Academy, and the private service of the AAA—contribute to our industrial society. They are collaborative, not competitive, and it gives me pleasure to say that I have had in my brief term of office at the AAA ample evidence to note that Bill Simkin and Syl Garrett would agree with this statement.

I would therefore like to spend these few minutes with you to share some thoughts about the special role of the AAA in this collaborative effort.

Because its services are used only when requested and paid for by the parties, the AAA is a sensitive barometer of labor and management attitudes towards, and particularly critcisms of, the arbitration process. We also receive the comments and complaints of the arbitrators on our Panel.

This gives us an opportunity, and also a responsibility, to communicate these views in a constructive manner, and, of course, also to take to heart and convert into reforms those criticisms and suggestions that are directed toward our own procedures. Here are a few of the charges leveled at arbitration that we can detect from our particular vantage point.

Some Charges Against

There is an increasing concern with the mounting costs of arbitration. The total costs, as you know, are divided into several quite separate segments. Often, however, the distinctions are not clearly made by the parties, and an unfair share of the blame is often heaped on the arbitrators. Let me review with you some of these segments.

First, there is the cost of legal and executive time required of unions and managements in the preparation and presentation of their cases. This is often the largest single item, but it tends to get lost as part of the general salary expenses and legal fees of the parties. Since these have been rising generally, the fact that they are also rising in connection with arbitration is accepted as a normal cost of doing business.

Then there is the volume of cases. This will vary from company to company, and will also vary from time to time within the same company. The statistical evidence indicates, however, that the general trend is upward. Combined AAA and FMCS figures show a 45 percent rise in caseload between 1958 and 1963. During this same span of years employees covered by the collectively bargained agreements, as reflected by total union membership figures released by the Department of Labor, have certainly not increased. It would therefore seem to follow that case load as a percentage of total covered employees has moved upward quite rapidly. Presumably the incidence of cases, and therefore this ingredient in total cost, is controllable by the parties themselves. It has even been suggested that on occasion one party might exercise this control to harass the other.

There has been an increase in the complexity of the cases that go to arbitration and this leads in turn to more time spent in the preparation and presentation of cases by union and company representatives (who, as we have already noted, are compensated at higher salaries and fees). As cases become more complex, there is also a tendency to order transcripts and these, in a long hearing, can be very costly.

The added complexity of the cases, of course, also adds to the burden of the arbitrator, and it is hardly surprising that his charges per case have risen along with the other components.

And finally there are, for those who use the AAA, administrative fees. If I may add at this point a commercial and also share with you one of my dilemmas—our fees have not risen since 1958, and then they only went up $5 per case per party. We are now handling our labor cases at a considerable loss—a loss which was once covered by contributions and membership income. But today the combined membership and case fee income is no longer

sufficient to cover the costs of operating our labor tribunals. I foresee the need to increase our fees in the not-too-distant future.

From this review of the ingredients of total cost, it is not surprising that they have risen and that this rise troubles the parties who must pay them. And, as we have noted, the focus of this concern has been concentrated on the fees of the arbitrators.

The rise in arbitrators' fees per case can also, to use a term in fashion among economists, be disaggregated: the per diem charge which is usually made explicit at the time the arbitrator is selected, and the number of days (hearing plus study) that he charges for the case.

Since 1958 the average per diem fee of arbitrators appointed by the AAA has risen 18 percent. But the ratio of study days to hearing days, contrary to the often voiced complaints of union and management officers, has remained about the same so that the cost *per hearing day* has risen only 14 percent, an increase of slightly less than 3 percent per year for this five-year period. A few examples of apparently excessive study days will be cited over and over again in corridor conversation. These very few instances do a real disservice to arbitrators and arbitration.

I believe that a large element of the parties' resistance to fees where it exists is that of surprise at the time the bill is received. After the award is issued, it is often intellectually and emotionally difficult for the parties to understand why so much study went into it—a simple process of common sense in the view of the winner, tortuous twisting of the facts as seen by the loser.

Some method of establishing the arbitrators' fees should be developed that will remove the element of surprise and will permit the parties to predict with reasonable accuracy *at the close of the hearings* what the bill will be, always recognizing that there must be some flexibility for unexpected complications or ununusually lengthy post-hearing briefs.

There is an interesting analogue between arbitrators' fees and those of doctors. Both are rendered after an unwanted episode is past: illness in one case, a dispute in the other. Both professions minister to matters of vital concern to their clients and let there be no mistake about this: in both cases the *clients want*

no second-best in the professional quality of the service they receive. They want the best and do not wish to trade it for economy's sake.

In the case of medical care, the public's anger over higher costs is also aimed at the professional, the physician, even though his individual fees have become an ever-diminishing share of the total medical bill that includes the new drugs, more complicated laboratory tests, and hospitalization. Yet no one wants a "cheap" doctor.

Doctors across the nation have learned that much of the resentment disappears if two principles are followed: 1) charge fees according to a scale easily understood by laymen; 2) advise patients, *in advance,* of the probable costs of any medical procedure. The doctors learned their lessons the hard way, losing a lot of prestige and good will in the process. Can we in the arbitration profession accomplish the most difficult task known to man: learn by the mistakes of others?

There are other ways for reducing the total costs of arbitration, some more substantial than the largely psychological one of removing the element of surprise from arbitrators' fees.

Arbitrators tell us that hearing days could be greatly reduced if only the parties came better prepared. The AAA holds meetings and seminars (over 100 in 1963) throughout the country for the purpose of instructing labor and management representatives in the art and science of "arbitratormanship." Members of this Academy have been invaluable as faculty volunteers in this activity.

Gratuitous advice, either in the award or in the opinion, can cause consternation. In either instance we are told again and again that "obiter dicta" of this nature destroy the very essence of the award and sometimes create new problems in the company-union relationships or in their next negotiations. For example, an arbitrator ruled for the grievant who allegedly abused his wash-up privileges, but then suggested that since wash-up time was not referred to in the contract, the company could abolish it at will.

While not so important in the eyes of the union and company representatives, we also hear stylistic criticism of some arbitrators'

opinions. Particular reference is made to humor, sarcasm, and ridicule which on occasion irritate the target of the jest and which pours not oil on troubled waters but high octane on smoldering fires.

The parties tell us that in some parts of the country there are not enough qualified arbitrators. Too much time elapses before an acceptable arbitrator can find a free date. The AAA has teamed up with the FMCS and the Academy in such locations where arbitrator shortages exist, in a series of training programs designed to instruct prospective arbitrators and to make the parties aware of both their skills and personal qualifications entitling them to act as impartials.

The parties also complain on occasion about the length of the written opinions. When we recently made an effort to get the parties to waive written opinions in some of their cases, there were almost no "takers." Surely here is one way to reduce the cost of arbitration in many run-of-the-mill cases, if only we could make a simple award acceptable to the parties.

In this connection, the following quote from a pamphlet published in Great Britain in 1952 is of interest. At that time, in England, it had become customary to publish awards without opinions:

> It is sometimes suggested that arbitrators should again publish the reasons for their awards. This misunderstands the nature of the latter. These are less decisions of a scientific or legalistic kind than intuitive judgments as to what is least likely to cause trouble. But there is no reason why arbitrators should not publish periodic reports on such points as "anomalies" their cases have revealed but which they themselves have been unable to remedy . . . which might prove useful information or future guidance to negotiators in the industries directly concerned or elsewhere.[1]

The Challenges For

But the AAA is not primarily a collection depot for complaints. We have a far more constructive role in analyzing our current labor case load—now over 4,000 a year—and trying to anticipate future trends.

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[1] H. A. Turner, *Arbitration, A Study of Industrial Experience*, Fabian Research Series No. 153, p. 26.

There is a new kind of conflict taking place at the bargaining table and in arbitration proceedings. The traditional battles over money and prerogatives continue, but with a new dimension, the outlines of which are just now coming into focus.

Underlying most of the hard-to-resolve disputes is a battle of two ideologies: one rooted in the value of *Individual Initiative,* the other based on *Social Responsibility.*

The advocates of both ideologies maintain their positions with deep conviction and a sense of possessing an ultimate truth. This makes the battle rage all the more fiercely and is a great obstruction to the flow of communication that is so necessary a prelude to agreement.

The advocates of individual initiative have a credo well expressed by the Latin phrase "Laborare est orare"—to work is to pray. Our early colonial settlers found this credo essential to their survival as they faced a continent almost empty of human life and a wilderness to conquer with few mechanical aids. Anyone who worked less than his best and for fewer hours than was humanly possible was a drag on his own and his neighbors' well-being. To the glorification of individual initiative must go a large share of credit for the heights achieved by American industry and our standard of living. It is the mainspring of free enterprise.

Social Responsibility also has ancient religion and ethical roots and is based on a concern for the individual no matter what his station in life or demonstrated ability. But during the expansive years following the industrial revolution, when land to conquer seemed unlimited and commercial expansion knew only one direction—up, the ideal of social responsibility was muted with the vigor and speed of events.

Social responsibility as a national ideal had a revival during the sobering Depression of the 1930's when it became incorporated in the New Deal. Its effect was to temper the belief that individual initiative is all-conquering. The advocates of social responsibility say that much that happens to an individual is beyond his control, that society owes a minimum of food, clothing, shelter, and job opportunity to all its citizens.

There are, of course, very few pure celebrants of individual

initiative or social responsibility. Almost everyone acknowledges the values of both. But, in the paradoxical climate of booming business and rising unemployment, these two ideologies clash and the advocates take extreme positions. Management is apt to talk of unlimited new horizons for soaring standards of living under the forced draft of automated machinery. Labor fears that declining jobs and rising job applicants will make a mockery of the dreams that are promised.

Morris Stone, Editorial Director and Vice President of the AAA, has captured the essence of this clash in his new book *Management Freedom and Job Security*.[2] Through an analysis of several hundred arbitration cases, he traces the threads of this conflict as they weave through many different types of disputes, whether the apparent subject be subcontracting, jurisdiction, work-load assignments, or erosion of the bargaining unit as new machines are introduced. Chapter 2 opens with the opposing ideologies summarized in two quotations:

> The only thing I can say to you people . . . is that the work that is rightfully yours is the work you can do cheaper than somebody else. . . . management representative

> This is important to us . . . when there are people walking the streets and out of a job and they are beating you over the head and say somebody is doing their job, you feel pretty bad about it. . . . union representative

and of course, when in both quotes that "somebody" is "some machine," as is increasingly the case, then the feelings run even higher.

Many of the problems brought to arbitrators today have overtones of these basic conflicts, even those that seem to hinge on more prosaic parts of the contract. To a greater extent than ever before, the comparative handful of men who are the professional core of labor arbitrators—most of whom are members of this Academy—are making daily judgments affecting this great issue of our times: can we reconcile the benefits of automation with the goal of full employment?

It is becoming well recognized that the traditional forums of collective bargaining are not well equipped to find solutions to

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[2] Published by Harper & Rowe, 1964.

these problems. Last minute crisis bargaining under the threat of a strike, so admirably designed to establish a point of settlement between a union demand of 10 cents and a management offer of 7 cents, bogs down when management becomes the demander of the right to introduce a new machine that will eliminate half a bargaining unit and the union is faced with a fight for survival.

When, as so often happens, the roots issue is swept under the settlement rug, only to bubble up later in the grievance machinery, arbitration is no better equipped to supply the answers than was crisis bargaining in the first instance.

The entire industrial relations community is searching for new ways to tackle these complex questions: George Taylor, with customary incisiveness, has called this the third great crisis in collective bargaining in his memory.

The first was the battle for recognition. In the early 1930's it was decided that the strike was not a rational instrument for deciding this question and the institution of NLRB elections was invented.

The second was a realization that the strike was not a rational way to decide disputes under an existing contract, and, by the late 1940's, a clause specifying *ad hoc* grievance arbitration became almost "boiler-plate" language in labor contracts.

Now, as the middle 1960's are approaching, we are realizing that neither the strike nor any of our existing institutional procedures can handle the dilemmas created by many of the problems brought to negotiations, especially those stemming from automation and unemployment. Once again our inventiveness is being taxed.

A New AAA Activity

The AAA has decided to participate in this search. For this purpose we have established a new division. Let me first emphasize what this new division is *not*.

It is *not* a mediation agency. It will not race Bill Simkin and his industrial fire-fighters to any incipient strikes.

It *will not* engage in mediation, by that or any other name, to help resolve conflicts over a new agreement during the renewal negotiations.

This division will be available when asked, along with others both in and out of the government, to help devise institutional settings that will be better suited to find answers to the new order of problems than those that now exist. We do not claim to have originated the continuous bargaining technique, nor are we innovators in this respect. Our contribution will be to follow the original and creative work of industrial relations experimentors, to give that work an organizational form, and to apply the new techniques, where appropriate, to labor-management situations.

It will act as facilitator and secretariat, will find qualified neutrals when required, and will help develop research to assist the negotiators. As this program unfolds, we will expect to draw heavily, of course, on the members of the Academy for our source of neutrals. It is still too soon to predict the life expectancy of this AAA activity, but we have both high hopes and a realistic awareness of the difficulties.

This leads me back, in closing, to my theme of partnership of the FMCS, the Academy, and the AAA. We must put our old skills to work on these new problems, and we must devise new skills. As in any vital profession, "old" arbitrators must both develop and learn new techniques and help train the newcomers to the profession to use these new tools. As our own profession becomes more specialized, we must turn even more than in the past to other professions for assistance—for example, to industrial engineers and actuaries. They in turn must be taught how to apply their talents in the very special circumstances of collective bargaining.

I look ahead with both pleasure and excitement for the opportunity of being partners with you in this task. The nation has much at stake in our success.