CHAPTER 11

PROCEDURE AND CREATIVITY

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I

One surveying the public discussion of collective bargaining after an interval of three years is struck by the persistence of the misgivings about the future of collective bargaining. The doubts range from those of the disappointed unionist to the latent pressure for compulsory settlement of major labor disputes which lies only a little below the surface, ready to break out if the unprecedented three-year record of labor peace should be interrupted by major strikes. Secretary Wirtz, in an address to the Academy a year ago, although he spoke from a deep attachment to free private collective bargaining and with firm conviction of its ability to meet the challenge, nevertheless felt compelled to describe the present as "a holding period" in which free private collective bargaining "is being given its last clear chance." [1]

The concern so widely felt doubtless arises from the realization that both the current environment of collective bargaining and the most pressing needs of wage earners are radically different from those to which collective bargaining was a response. Not only individual firms but the national economy is less free to chart its own course without regard to world markets. The composition of the work force is altogether different, and with the increasing proportion of skilled and technical jobs, I suspect, comes an altogether different industrial psychology. The national economy is more closely knit—or else we understand its interrelationships the better—so that what happens in one industry causes immediate concern in other sectors. Chiefly for this reason, but

* Solicitor General of the United States.

1 W. Willard Wirtz, "The Challenge to Free Collective Bargaining," *Labor Arbitration and Industrial Change* (Washington: BNA Incorporated, 1963), p. 296.

also partly because the material welfare of the average industrial worker has improved, there is greatly diminished public tolerance for strikes as a method of resolving labor disputes. Job opportunities and job security are now the most pressing needs. Wage increases and supplemental benefits have taken a secondary position. Putting the point most broadly, the industrial revolution of the nineteenth century, followed by the methods of mass production in the twentieth, is now yielding to a new scientific and technological revolution.

What assurance have we that collective bargaining, which flourished and met human needs in one environment will not prove as unsuited to the new era as the dinosaur or saber-toothed tiger, or the Greek city-state, and likewise pass from the scene? And anyway, why should anyone who lacks a vested interest in it worry about preserving collective bargaining?

I find the answer to both questions in the extraordinary creativity of collective bargaining. By collective bargaining we mean, I take it, the resolution of industrial problems between the representatives of employers and the freely designated representatives of employees acting collectively, with a minimum of government dictation. The particular form of procedure is unimportant. What collective bargaining, in this sense, has produced in the satisfaction of human needs, both spiritual and material, strikes me as far more important than figures for man days lost, or not lost, in strikes—even though the record is extraordinarily good from that point of view.

It is worth dwelling one moment longer upon the creativity of collective bargaining for it is both a reason for preserving it and an assurance of its capacity for adaptation. One should not lightly discard creative institutions in times of revolutionary change.

The extraordinary accomplishments of collective bargaining in the thirty years since the establishment of the first National Labor Relations Board are all too easily forgotten. It is hard to think of any institution that has accomplished so much in the short span of 25 or 30 years, and this is true whether one measures accomplishment by the static standard of industrial peace or the more important criterion of accomplishment in meeting the needs of men.

Take first the simply stated but vital goal of establishing a rule of law in the mine, mill, and factory—the substitution of a rule of law for the arbitrary and capricious power of the boss. Men have few greater concerns than this kind of justice. What equal example is there of extending a rule of law—both substantive rights and duties and also the machinery to administer them—into so large an area of human life affecting so many people within so short a time. Nothing less has been done by collective bargaining through the rules it brings into the shop and the industrial jurisprudence being made and administered through grievance procedures and arbitration.

Nor do I overlook the creativity of collective bargaining in meeting workers' needs. The annual improvement factor was no mean accomplishment. Much more striking perhaps are the solutions to the problems of sickness and old age that were worked out beginning with the Bethlehem Steel Company pension plan. In the final analysis, what counts the most is the capacity of collective bargaining to create such substantive measures for meeting the human needs of industrial workers without unduly impairing management's capacity to manage.

Most striking of all has been the ability of collective bargaining to create new and varied procedures for solving problems as they arise to vex industrial relations and its ability to adapt its form to meet novel situations. That power of creative adaptability, which is challenged today, is plainly demonstrated by the record.

Grievance arbitration in its manifold variations is one illustration. The War Labor Board furnishes an example upon a national scale. The varieties of negotiation procedure and conciliation and mediation afford others. In a quite different field one thinks of the "no raiding" pact and the National Joint Board for the Settlement of Jurisdictional Disputes in the Building and Construction Industry. The Upholsterers and Automobile Workers Public Review Boards might have stimulated similar measures in other unions if Congress had only been willing to encourage self-regulation. More recently, we have seen devices like the human relations committees at Kaiser and United States Steel Corporation.

It is a familiar complaint that man's progress in creating social and governmental institutions lags too far behind scientific and

engineering genius. In industrial relations there has been no lack of success in creating institutions of cooperation and self-government. The pertinent question is not whether collective bargaining can survive—it has—but what can be done to enhance its creativity. A good way to begin answering that question is by asking why collective bargaining has been so creative.

II

One is tempted to say that collective bargaining has been creative because it has been free; but such an answer is more a declaration of faith than an explanation. The strong industrial base upon which collective bargaining rests—the productivity of American industry: its financial structure, its engineering and management, mass consumption and distribution and the skill of its laborers—was prerequisite; but we had all that before 1930.

One source of creativity, I suggest, is the fact that collective bargaining invites the collision of vigorous and aggressive minds. Will Davis used to quip that "Creation is the product of consent, except in cases of rape." But to get fire, one strikes flint and steel. Out of conflict are born the sparks of creation.

Surely a second source of creativity in collective bargaining is its capacity for adaptation. Collective bargaining has worked best when it proceeded upon the principle that even the seemingly insoluble human problems will yield, sooner or later, if suitable machinery for their consideration can be established. We have been extraordinarily successful in creating that machinery, as I have sought to show. Part of the importance of procedure lies in the usefulness of getting people to recognize the existence of a problem, and then to sit down and give it time and attention. As John Dunlop said of the National Joint Board for the Settlement of Jurisdictional Disputes in the Building and Construction Industry—

> The most fundamental thing that the Board has done has been to serve as a forum in which representatives of the industry spend time and are compelled to understand and study their problems.

But there is more to it than that. Problems that would yield to one procedure are often insoluble by another. Men who can use one set of tools cannot handle another. One industry can proceed

in one fashion but not another. Furthermore, the procedure followed—the character of the forum established—can enlarge or restrict the opportunities for creativity. May not our concern for collective bargaining generally have led us to pay too little attention to the unique individuality of each industry in terms of collective bargaining procedure and to the creativity, or lack of it, inherent in particular procedures as applied to individual industries? In addition, there is much to be said for the proposition that insight into the nature of a problem—and that requires understanding of the particular industry—is as important in establishing the procedure for attacking the problem as it is in evolving the solution.

For twenty years or so those who shaped the forms and procedures of collective bargaining were writing on a clean slate. There was more room in which to write. They were not hampered by such rules as that the writing must run from left to right and from the top to the bottom of the page. Today we have settled ways of doing things which may or may not be adapted to new conditions. Collective bargaining means one thing to a railroad man, to the seaman another, to the steel industry a third, and something different in the construction industry. There is danger, I think, that we may mistake particular forms of collective bargaining for the essential reality; that we may adhere to a particular form too rigidly under circumstances to which it is unsuited, and then mistake the unsuitability of the particular variant for a failure of collective bargaining itself. The challenge to free collective bargaining is a challenge to its adaptability.

Miss Frances Perkins had her own "nifty" with which she delighted to startle visitors, "I love chaos. Chaos is so productive." With a bit of luck we can avoid chaos but we need the cast of mind that chaos produces. The new environment requires study of the current utility of our familiar procedures, industry by industry, asking in each instance whether it is the best adapted to the creation of new solutions to the new human problems of a new industrial revolution.

III

Arbitration is one of the procedures that ought to be examined closely from this point of view. Is it a creative institution? If so,

how creative? Are there limits on its function? We need to examine grievance arbitration to be sure, but more especially arbitration and all similar methods of adjudicating disputes that arise outside the framework of a collective bargaining agreement. Arbitration is essentially a method of procedure looking to the formulation of issues and their submission to adjudication by an independent tribunal. From this standpoint the conventional distinction between arbitration of disputes arising in the administration of a collective bargaining agreement and arbitration of the terms of a new agreement is unimportant. Any difference between voluntary and compulsory arbitration is also irrelevant. Indeed, we should have compulsory arbitration in the front of our minds, for when labor courts and compulsory arbitration are pressed upon the community, a key question ought to be whether this procedure is adapted to producing constructive solutions to the major problems of management and labor. Moreover, while a third party decision is an essential ingredient of arbitration, we may classify as methods of adjudication essentially like arbitration all such procedures as those before a railroad emergency board that look to the trial of issues between adversaries followed by an adjudication, even though the decision is not binding.

IV

Concentrating upon the procedures of adjudication, of which grievance arbitration is the prime example, should we not say that the task here partakes largely of the nature of maintenance and improvement rather than new construction? Manifestly, this is a relative matter. The procedures of arbitration will bear a lot of improvement. The principal difficulties coming to my attention stem from the fact that an arbitration proceeding is always conducted as if it affected only two parties, the employer and *the union*. Under the best of circumstances the patent falsity of this pretense sometimes taxes the conscience of a sensitive arbitrator who sees that his award will bear heavily upon a man or woman who is not even there to be heard. The pretense borders upon the absurd when, far from being solely an issue between an employer and one union, the major part of the problem is that two unions representing different groups of employees are arrayed on opposite sides of a question.

The plainest example is afforded by disputes over work assignments, seniority or bargaining rights between two unions representing abutting bargaining units with a boundary dispute between them. Such a case went to the Supreme Court this winter in *Carey* v. *Westinghouse Electric Corp.*[2] The Court was dismayed by the inadequacy of arbitration between Westinghouse and the International Union of Electrical Workers as a method of determining whether IUE or the Federation of Salaried Employees had jurisdiction over certain laboratory workers. It allowed two-party arbitration to proceed, though demonstrably inadequate, only because it offered some hope of progress and judicial interference offered none. No one who suffered as I did under 30 minutes' criticism of the inadequacies of the procedure could possibly take the decision as a signal to go on as before.

The wage arbitrations involving the crew of the atomic powered ship *Savannah* furnish another illustration. Two crafts were represented by two different unions. One of the principal issues was whether the wage differential between the crafts should be widened or narrowed. The first arbitrator, having one union and the employer before him, rendered an award that fixed the differential regardless of what might be awarded by the second arbitrator. The second arbitrator not unnaturally refused to proceed. Perhaps the upshot was inevitable under existing forms of procedure, for if the first arbitrator had not established the differential, he would perforce have yielded the power to the second. Still, the result was that the basic issue was adjudicated in a proceeding involving only one of the two unions and the second arbitrator was rendered *functus officio*. Assuming that two arbitrators and two proceedings are sometimes necessary where there are two unions, we ought to be able to work out some device for bringing them together before the final decision is rendered.

In short, it is time to recognize procedurally that arbitration often is concerned not with contract rights solely between A and B, but with rules that will be a general law of the plant and must be made and applied by all those in the community affected. The maritime industry took such a step forward last Friday in the agreement between the Marine Institute, the National Maritime Union and the Marine Engineers Beneficial Association, which

[2] 55 LRRM 2042.

bridges the gap and prevents collision between their individual systems of arbitration.

V

Whatever procedural changes and improvements are devised, arbitration and similar methods of adjudication are likely to work best when they do not seek to be creative upon too large a scale. Conversely, they seem hardly suited to creating new solutions to novel problems.

In this respect the relationship of grievance arbitration to the broader aspects of collective bargaining seems fairly analogous to the relationship of the judge to the legislature. Judges must, and do, make law. Over a period of years we can look back and see that the judges have stood old rules upon their heads in order to meet the human needs of a different era, and in times of swift and revolutionary changes judges make new law at breath-taking speed. Even the most activist judge will acknowledge, however, that he must not permit himself the flights of imagination open to the legislature. He must keep his roots in the law as it is. His choice is limited, and his creativity interstitial. The judiciary, with the help of the bar, can reform court procedure but they cannot abolish the courts and substitute some new system for administering justice, even in the areas in which the utility of a judicial procedure is most questionable. The arbitrator's orbit is similarly restricted.

The fundamental reason is the same in each instance. The judge's role is limited because his decrees will command acceptance only when he can truthfully say that they are bottomed not upon his personal mandate but upon the command of a law that binds that judge as well as the litigants. As Judge Learned Hand once put it—

> His authority and his immunity depend upon the assumption that he speaks with the mouth of others: the momentum of his utterances must be greater than any which his personal reputation and character can command, if it is to do the work assigned to it—if it is to stand against the passionate resentments arising out of the interests he must frustrate.

And so it is with arbitrators. A demigod—a Harry Shulman—has the experience, the moral integrity, and the powers of per-

suasion to command acceptance of an award just because he says it is right, although even such decrees would lose the power to command acceptance if they appeared too often as personal edicts, however wise. For the most part, nevertheless, grievance arbitration awards derive their power from the assurance that they are rooted not in some individual's judgment but in the collective agreement and the law of the plant.

VI

The inherent limitations on the room for creativity in arbitration give no cause for concern in dealing with controversies arising under a collective agreement, but if I am right in suggesting that arbitration and similar procedures of adjudication whether voluntary or compulsory, are often ill-suited to resolving problems in labor-management relations requiring a high degree of creativity, that—to engage in a metaphoric mutation—is a "horse of a different feather."

Consider the pattern of collective bargaining in the railroad industry as an example. Is it not fair to say that the whole process is geared to litigation and adjudication? A wage movement or change in the rules is initiated by serving formal notices that are subsequently interpreted with all the rigor of common law pleading. Important movements are quickly channeled for national handling with the result that any proposal for a change must be approved by all the railroads and many unions, and can only be put into effect upon a nationwide basis. There is no room for experimentation. The negotiators are forced to play for the highest stakes, with the most cumbersome of constituencies. Furthermore, since an emergency board hearing lies just over the hill, the protagonists in that forum—the lawyers and expert witnesses—must take early control of the negotiations. The issues are then formulated for an emergency board; they are presented through witnesses, elaborate exhibits with cross-examination, and a formal transcript. We should not overlook behind-the-scenes negotiations, but the atmosphere of litigation and adjudication hangs over every step. The award is an adjudication on the record. Though not final, that adjudication dominates the subsequent negotiations.

I wonder whether there may not be some relationship between this procedure and the sense of frustration that hangs over collective bargaining in the railroad industry. May not the mode of the collective bargaining have something to do with the fact that the system of pay for the operating crafts dates back half a century with little change; whereas the steel industry was able to rationalize its wage structure after World War II, and has recently produced such interesting ideas as the current plan at Kaiser. The railroads, both management and labor, face extraordinary problems of modernization, including the rapid loss of job opportunities under mergers and automation. I should suppose that altogether new answers were the only solution. Is there any reason to suppose that even the ablest of men, with the greatest good will, can find them through the formal methods of adjudication.

I do not know the answers to these questions. A number of forces must be at work. But the method of adjudication has five characteristics that seem to me to deter creativity and, therefore, tend to make it less suitable, all other things being equal, to solving the major industrial problems resulting from the radically new conditions that collective bargaining faces today.

In the first place, the method of adjudication encourages, if it does not require, the formulation of issues on which decisions can be rendered one way or another or by a compromise between the extremes. The formulation of issues seldom invites going outside the established framework. The most creative ideas, on the other hand, often come simply from looking at old data from a point of view outside the accepted framework. Copernicus, it could be said in caricature, was just a crazy old man who thought of himself as being on the sun instead of on the earth. Einstein's theory of relativity apparently required a similar ability to get outside the established intellectual structure and look at time and motion from no fixed point of view. New ideas may be proposed to an arbitrator but they rarely evolve during the proceeding.

Second, the method of adjudication puts the proceeding into the hands of those who prepare evidence, briefs, and oral argument. Their job is not to create but to persuade the tribunal of the correctness of something already offered.

Third, the lawyers and expert witnesses need materials from which to build their case. This forces them to look to existing points of reference. If I can be forgiven another example from the railroad industry, the same exhibits presenting the same statistical comparisons beginning in 1919 have been presented to arbitrators and emergency board for years, if not decades.

Fourth, the lawyers and expert witnesses are not alone in their need for fixed points of reference. The adjudicator, whether he be arbitrator or member of a board charged with making recommendations, is under enormous pressure to find objective standards by which to justify his award. The fact that he makes the award is rarely enough to command acceptance. As I suggested earlier, ordinarily it must have its roots in something outside the judge—if not "law" or a voluntary agreement, then at least in past relationships, the practice of other industries, an established relationship between existing industries, or something similar. Is it not fair to surmise that an arbitrator, even if he had the materials, would be slow to award some major new departure carrying no recommendation except his personal assertion that it looked like a good idea? To put the point another way, all other things being equal, is not arbitration likely to be more satisfactory when you are following an established pattern than when you are breaking new ground? I suspect that a survey of the industries and unions which arbitrate disputes over the terms of new agreements would bear out this observation.

Fifth, I very hesitantly suggest that the pressing issues of today and tomorrow require solutions upon a larger scale and cooperation by more parties, including government, than can be conveniently accommodated within the framework of adjudication. Automation is the obvious example.

The restrictive characteristics of adjudication in voluntary arbitration or before an emergency board would be intensified in compulsory arbitration. The arbitrator to whom the parties freely submit their dispute starts with a vote of confidence. His award has elements of acceptability based upon advance consent. One who makes recommendations can run risks impermissible for a tribunal that renders a binding adjudication. We are therefore doubly unlikely to find in any compulsory method of adjudication

the creativity which has been the great virtue of collective bargaining and which the new industrial revolution so urgently requires.

VII

In closing I must add the words of caution necessary to prevent misinterpretation by those with a passion for over-simplification.

First, no one should suppose that I am deprecating the use of voluntary arbitration to resolve some kinds of disputes over the terms of new agreements, or even its use in some industries to resolve all such disputes. Any such conclusion would be diametrically opposed to the thrust of my observations, for my central aim is to emphasize the need of scrutinizing industry by industry, the suitability of different procedures to various kinds of disputes. There are a good many issues—wages may now be one—which are amenable to adjudication on the basis of fairly well-established standards and require no great creativity. There are probably industries in which the central problems are not novel. And an arbitrator with the confidence of the parties and an understanding of the need for flexibility in procedure can doubtless shape a standing power of decision in such a way as to avoid many of the limitations imposed by the procedure of adjudication.

Second, although I have expressed some skepticism about the creativity of the procedures of collective bargaining followed in the railroad industry, I must emphasize that they are not inherent in the Railway Labor Act. Nothing in the Act requires an Emergency Board to follow the method of adjudication. *A fortiori* nothing requires the parties to proceed with a view to adjudication almost from the moment their notices are given. It would be quite within the statute to reshape the whole pattern of bargaining and nature of emergency board proceedings.

Third, it should be unnecessary to add that I would not have the temerity to suggest to this audience any skepticism about the use of the so-called "neutrals" or "public members." Doubt is not a forecast of technological unemployment. On the contrary, it seems rather plain that independent third persons are likely to prove increasingly valuable in collective bargaining. They are more important today than yesterday, and perhaps may be still more important tomorrow, because of the necessity for keeping

the public interest in the forefront of all important collective negotiations. This is not a matter of controls or guidelines but simply of focusing upon the implications resulting from the interrelationship of all parts of the economy.

Again, there are many industrial problems that a given industry cannot resolve without cooperation with the outside world, including the government, and in finding a method of expressing the joint concern of management and labor toward the outside world, a third person may prove especially useful. The experience of the building and construction industry furnishes an obvious example.

Finally—and to return to the central theme—the third party neutrals are often experts in procedure—perhaps because we don't even understand the substance—and if I am right in thinking that the constant review and development of new modes of procedure is a key to creative collective bargaining, then that kind of experience and knowledgeability must continue to play an important part in making industrial democracy work.