CHAPTER V

THE PRESIDENTIAL ADDRESS: ARBITRATION AND ITS CRITICS

BERT L. LUSKIN *

In recent years, the arbitration process has been the subject of attack by snipers, carpers, and ivory-tower critics. The criticism has generally been of a destructive rather than a constructive nature. When called upon to offer a workable substitute for the grievance and arbitration procedure, critics have loftily suggested that problems involving the interpretation and application of the provisions of a collective bargaining agreement can best be determined by a court or a government agency rather than by an arbitrator.

The critics of the arbitration process have generally pointed with horror to isolated instances of so-called abuses. They have cited examples of undue delay, inflexibility, and excessive costs. They have given wide publicity to the bizarre and unique case that makes good reading but is not representative of the typical grievance that has real meaning to the parties.

The house that doesn't burn down isn't news. The general public is led to believe that arbitration concerns itself primarily with the oddball case, and no effort is made to publicize the fact that literally thousands of grievances are filed every year that involve the interpretation and application of basic and fundamental provisions of the collective bargaining agreement.

Many collective bargaining agreements that now exceed 200 printed pages evolved from one-page recognition agreements that made no reference to wages, hours of work, or other conditions of employment. Present collective bargaining agreements require

* President (1967–1968), National Academy of Arbitrators.

constant interpretation and application of provisions relating to vacations and vacation pay, holiday pay, pension plans, classification structures, incentive plans, work jurisdiction, overtime distribution, seniority, call-in pay, reporting pay, scheduling procedures, and various other types of clauses that control the relationship between companies and their employees.

Over the years, arbitrators have developed a unique expertise in the labor relations area. They have served in manufacturing enterprises, service industries, and the public sector. They are fully aware of the history and the circumstances which led to the inclusion of the various provisions of a collective bargaining agreement. There are more than 100,000 collective bargaining agreements in effect in this country that provide for arbitration as the terminal point of the grievance procedure. The parties have developed their own system of private jurisprudence and have determined for themselves the procedures that will be followed in the administration and application of their agreements.

The arbitrators who have served the parties for many years have been able to adjust to a variety of procedures that range from the highly informal type of arbitration to proceedings similar to those found in a court room. The arbitrators have been able to accommodate to the desires of the parties and to conduct the hearings along the lines that the parties themselves have developed over the period of years.

Although the costs of administration of the arbitration procedure have increased substantially in recent years, statistics recently developed by the American Arbitration Association indicate that the average per-diem fees of arbitrators have not increased commensurate with the increase in other costs and the corresponding increases in fees of members of other professions. I will let those statistics speak for themselves.

Arbitrators and the administrative agencies have constantly strived to expedite hearings, reduce the time lag between hearings and awards, and devise ways and means to reduce the volume of cases that find their way to arbitration. Where the parties insist upon the services of some of the older and better-known arbi-

trators, they must expect to encounter delays in setting cases for hearings and further delays in the issuance of awards.

Many grievances are filed in anger and disappointment and are dropped when they are reviewed in an atmosphere of sober reflection. A considerable number of grievances are filed as a result of a failure of communication. The unwillingness of some members of supervision to take the time to explain the reasons for a decision that affects a particular employee or a group of employees can lead to the filing of a grievance that could have been avoided. A distressed grievance procedure can have a serious impact on the effectiveness of the arbitration process. Where the parties have failed to take necessary steps to reduce the use of arbitration to manageable limits, they contribute to a condition that can hamstring the grievance procedure through sheer force of numbers.

The unprecedented growth of the use of the process in recent years has created many problems. The number of trained arbitrators has not grown proportionately with the increase in the use of the process. That problem has concerned the American Arbitration Association, the Federal Mediation & Conciliation Service, and the National Academy of Arbitrators. In recent years we have joined together to establish programs designed to train persons who appear to have the basic qualifications necessary to serve as arbitrators. Although the programs have not achieved the hoped-for results, we will continue our efforts to increase the number of arbitrators who can attain the degree of acceptability required to serve the parties under present-day collective bargaining agreements with all of their complex ramifications.

The therapeutic value of arbitration cannot be underestimated. In some cases, a grievant will never be satisfied that his complaint has been given thoughtful consideration unless the grievance procedure has been fully utilized and an arbitration hearing is actually conducted. Arbitration hearings generally are held on the site or in the immediate geographic area of the plant. Employees and members of supervision either observe the arbitrator on the property or are fully aware of the fact that arbitration hearings are being held. In many instances, the arbitrator is called upon to view the area in question, and frequently an on-site inspection can resolve a serious fact dispute quickly.

Every experienced arbitrator has, at one time or another, exposed himself to conditions of an unusual nature. Arbitrators have visited iron-ore mines several thousand feet under ground and have ridden trucks to the bottom of open-pit copper mines. They have been passengers in dump trucks that approached the edge of sheer drops. They have ridden in the cabs of engines and have observed the testing of equipment in deserts where the temperature reached 120 degrees. They have walked across slippery, greasy conveyors and have climbed to the tops of cooling towers, high above ground level. They have flown in the cockpits of airplanes on test flights and have inspected high-voltage motor rooms and power stations. They have entered boiler rooms and have approached tanks containing hydrochloric acid in order to rule upon issues involving specific factors in job-classification grievances. They have done all these things in order to draw valid conclusions based on actual experience rather than embellished testimony or arguments advanced by the advocates. What is most important, however, is that the employees and members of supervision were aware of the fact that the arbitrator was sufficiently interested to come down and view the operation or the condition that led to the filing of the grievance in the first instance.

Alternatives to Arbitration

American industry spends several billion dollars each year for new plant construction, new operational techniques, and the automation of manufacturing systems and processes. Problems will arise concerning elimination of classifications, establishment of new classifications, reassignment of working forces, establishment of new rates of pay, establishment of new incentive plans, the manning of new facilities, problems of work jurisdiction, and the attendant dislocation of members of the working forces.

Where the parties do not provide a framework for the resolution of industrial problems by means of the grievance and arbitration procedure, the only alternative would be strikes or the submission of disputes to the National Labor Relations Board. In recent years, the Board has indicated that such issues may come within the purview of Section 8(d) and may require complete agreement between the parties before required changes may be implemented. The arbitration process has provided a means whereby lengthy

litigation can be avoided and the employees can be completely protected. At the same time, the companies can implement their programs without undue delay and harassment.

For the most part, all of those problems have been and are being resolved by means of supplemental agreements between the parties or by the use of the grievance and arbitration procedure where contract provisions provide that form of remedy. The use of the arbitration process is a very small price to pay for the guarantee of the continuity of industrial peace during the life of a collective bargaining agreement.

During the last two years, a liaison committee of the Academy has engaged in a continuing dialogue with the Board. We have held meetings on a regional basis and have discussed the position of the Board with respect to the grievance and arbitration procedures and the positions generally adopted by the arbitrators who function under the grievance and arbitration procedures of collective bargaining agreements. While we have not seen eye to eye at all times, the exchange of ideas has proved to be of great value to the Board and to the members of the Academy. The Board and the General Counsel have indicated a desire to continue the liaison and dialogue with the Academy, and we will join wholeheartedly in accepting the invitation to continue our open and frank discussions in those areas that are of common interest to the Board, to the arbitrators, and to the interested public.

The Academy traditionally has opposed the concept of statutory compulsory grievance arbitration or the compulsory arbitration of the terms and provisions of new collective bargaining agreements. It is hard to believe that any person who has an intimate knowledge of grievance and arbitration procedures could logically contend that labor courts or an expanded Board can deal effectively with grievances involving the interpretation and application of provisions of a collective bargaining agreement.

Anyone in this room who has ever practiced law will agree very quickly that any process that includes an appeals procedure will inevitably create a climate of delay and procrastination. The direct and indirect costs of appeals from decisions of the Board or a labor court would be incalculable. Grievances would accumulate into

an insurmountable backlog and would inevitably lead to internal unrest and wildcat strikes. That could prove to be catastrophic to the interests of management and labor alike.

The substitution of labor courts for the present-day system of voluntary arbitration would prove to be a cruel hoax on the American public. Statutory prohibitions do not necessarily mean that strikes can be abolished by law. That fact has been established not only in this country but in other countries that have attempted to achieve industrial peace by law rather than by voluntary adherence to agreements reached between the parties by means of the collective bargaining process.

There are a number of situations where the parties have developed a procedure for the arbitration of terms and provisions of a new agreement. Those procedures have proved successful primarily because the parties built in their own guidelines, established their own frameworks, placed a limitation on the type of unresolved issues that could be submitted to arbitration, and were then able to select their own arbitrators.

We should have no illusions concerning the impact of legislative restraints on collective bargaining. The compulsory arbitration of the terms and provisions of collective bargaining agreements will inevitably lead to governmental price, profit, and wage controls. The proponents of a legislative or judicial system as a substitute for the arbitration process seem to believe that a labor court would prove to be a panacea for the resolution of all types of labor disputes. That is a naive approach to the facts of life and is about as logical as the medicine man's claims for snake oil as a cure-all for human ailments.

Proper Role of Arbitration

When the grievance procedure is made to function as it was originally designed to do, the number of grievances submitted to arbitration will be relatively few in number. That is a highly desirable aim and goal. It is incumbent upon the parties to examine their procedures and to make certain that the arbitration process never becomes a substitute for the orderly use of the grievance procedure to resolve the problems that arise during the living-with-the-contract stage.

There will always be grievances that simply cannot be resolved by the parties and must be settled by the arbitration procedure. We are well aware of the fact that certain issues are political or face-saving in nature. The very facts of industrial life may, on occasion, require that certain decisions be made by an arbitrator rather than by agreement between the parties. Those kinds of situations cannot be characterized as an improper use of the arbitration procedure. A referral to arbitration may open a closed line of communication and may very well result in withdrawals or settlements that could not otherwise be accomplished.

Arbitrators do not generally substitute their judgment for that of the parties. Arbitrators do not generally engage in direct mediation nor do they generally lecture the parties or indicate displeasure with the wording of a particular provision of the agreement. Arbitrators have generally heeded the admonition of the parties and have respected the language of controlling provisions of the agreement.

An arbitrator is selected not merely because of attributes of fairness and integrity. He must, of course, possess those qualities, but he is selected by the parties primarily because he understands the fundamental provisions of collective bargaining agreements. He can bring to the hearing a wealth of unique experience and a sense of objectivity that permits him to view an issue within the framework of the agreement and with complete impartiality, since he is removed from the emotion-packed atmosphere that may prevail between the parties.

He is aware of the fact that the parties are engaged in a continuing relationship which does not necessarily depend for its continuity on the outcome of a single decision. The experienced arbitrator is well equipped to interpret effectively agreements that are poorly drawn, as well as those agreements that are hammered out by management and union representatives who are eminently qualified to do a masterful job of draftsmanship.

Any profession is subjected to criticism because some of its members have demonstrated a lack of competence or have failed to adhere to the established standards of ethical conduct. That is true of lawyers, doctors, dentists, academicians, members of the judiciary, and many other professional groups. A man who serves

as an arbitrator in several cases is not, in my judgment, an arbitrator as we understand the term. He becomes an arbitrator, entitled to professional status, only after he has served in that capacity for a substantial period of time and has achieved a reasonable degree of acceptability.

Legislation designed to erode the right of international unions to control the affairs of their local unions has, in the long run, hurt management far more than it has hurt the international unions. International unions must have the right to exercise a measure of control over the grievance and arbitration procedures of their local unions. Where the international union becomes powerless to act, a company may find itself at the mercy of uninformed, overly militant local union officers who may refuse to follow the grievance and arbitration policies enunciated by their international union.

Dealing With Distressed Grievance Procedures

In recent years, I have had occasion to become involved in efforts made by some companies and unions to review their grievance procedures and to reduce vast numbers of grievances to manageable limits. A classic example comes to mind. An analysis of a particular situation indicated that several thousand grievances were pending at various stages of the grievance procedure in a number of districts of a major company. Arbitration hearings were being held on grievances that had been filed from two to four years preceding the hearing dates. Awards were being issued from six months to more than a year after the hearings. In some instances, the arbitrators had to wait up to five months for the receipt of transcripts of testimony.

The matter became the subject of full, candid, and complete discussion among local union presidents, staff representatives, company staff attorneys, and top officials of the international union and management. A number of remedial steps were adopted. Court reporters were ordered to deliver their transcripts within two weeks of the completion of hearings. Additional arbitrators were utilized to assist the umpire, and all districts were afforded as many hearing dates as they required. Union staff representatives made a concerted effort to screen all cases awaiting

arbitration. Company representatives examined and analyzed every grievance awaiting arbitration and met with local union committees and staff representatives on a continuing basis. Grievance committeemen and line supervision were instructed to make a mutual effort to resolve grievances before referring them to higher levels of the procedure. The arbitrators agreed to attempt to issue awards within 30 to 60 days of the conclusion of hearings.

The results can only be described as dramatic. Hundreds of grievances have been resolved by means of withdrawal or settlement following the issuance of a representative number of awards. The grievance procedure is now operating on a current basis. Where necessary, grievances can now proceed to arbitration within a matter of weeks or months after they have been filed. The efforts of local union officers, staff representatives, industrial relations representatives, and company attorneys can now be channeled into programs designed to reduce or eliminate grievances at their source or to dispose of them in the preliminary steps of the grievance procedure. The effect on production, the earnings of employees, and the savings to the parties in time and money simply cannot be calculated.

A similar procedure was followed between a company in northern Minnesota and the same international union. Within one year after the parties adopted a similar program, the parties were able to dispose of 490 pending grievances. Only seven grievances were actually arbitrated. The arbitrator in that case issued awards to the parties within 30 days of hearing, and the awards were used by the parties as guides for the disposition of dozens of other grievances.

Where parties arbitrate on an *ad hoc* basis, their problems may be quite different. It is incumbent upon the parties to analyze their problems and if there is an unusual backlog of grievances awaiting arbitration, they can obtain assistance from the Federal Mediation & Conciliation Service or from the Labor Management Institute of the American Arbitration Association. In any event, the arbitration process can function only if the parties indicate a willingness to make their grievance procedure work and if the arbitrators cooperate with the parties and follow the rules of the AAA and the FMCS for the issuance of awards within the required time limits.

Arbitrator's Accountability

The arbitrator functions in a glass bowl. The conduct of the hearing is closely observed by sophisticated, knowledgeable advocates. An arbitrator who exhibits a lack of understanding of the process and who fails to conduct a hearing in an orderly fashion will usually find himself unacceptable to the parties for a subsequent hearing. The *ad hoc* arbitrator has no tenure; an umpire has limited tenure, and nothing is so impermanent as the permanent arbitrator. The arbitrator is selected by the parties either directly or through the offices of the AAA, the FMCS, or state mediation agencies. His decisions are read and reread, not only by the parties, but by hundreds of company and union representatives who have access to his awards through their own systems of distribution. Awards that are not based upon logical, sound interpretation of the provisions of the agreement will very quickly make the arbitrator responsible unacceptable to companies and unions alike.

Sophisticated companies and unions do not keep a box score. They are primarily concerned with the quality of decisions. The companies and unions which submit a dispute to arbitration have complete freedom of choice in the selection of the arbitrator. The arbitrator is almost never foisted upon the parties. We are all aware of the fact that unions and companies, and those who represent them, effectively utilize their private pipelines of information. An arbitrator's reputation precedes him, and a series of poorly reasoned or poorly written decisions will very quickly read that arbitrator out of the profession. Major companies and major unions have their own "don't use" list. That is a fact of life, and those arbitrators who have achieved a substantial degree of acceptability, either on a local or a national basis, have done so through sheer merit and quality of performance, and for no other reason.

Conclusions

I know of no process that has been as honorably administered as the arbitration process. The arbitration process requires that an arbitrator make his decision without fear or favor. An effort to compromise a grievance by departing from the clear and unam-

biguous language of the agreement inevitably results in making both parties unhappy. The knowledgeable, sophisticated advocate will respect an arbitrator who indicates by his decision that he will interpret a provision as the parties wrote it and not on the basis of what he thinks the parties should have done in the first instance.

The parties have much to learn from an articulate, logical, well-reasoned opinion that accompanies an award. The award must be completely understood by the workers and members of supervision, as well as by the attorneys for the parties. Arbitration awards have had a substantial impact on the collective bargaining process, and arbitration awards have served to require the parties at times to redraft provisions that were found to be ambiguous in nature and which did not clearly serve to set forth what the parties had originally intended that provision to convey.

All of us—management, labor, arbitrators, academicians, and agency administrators—are deeply concerned with the problems that beset the parties. We are aware of the fact that undue delays serve to deny justice, and excessive costs can only inhibit the use of the process. We are all aware of the problems facing small companies and small unions, and it is imperative that means be found to provide those parties with the opportunity to use the arbitration process within the limits of their ability to bear the necessary costs.

The arbitration process must at all times remain flexible and adjustable to the needs of the parties. Where necessary, the arbitration process should be refined and distilled. With all of its admitted imperfections, the arbitration process has made a substantial and essential contribution to the well-being of management and labor.

The National Academy of Arbitrators will continue to carry out its principal purposes and aims to establish and foster high standards and competence among those engaged in the arbitration of industrial disputes on a professional basis. We have adopted canons of ethics to govern the conduct of arbitrators, and we have promoted and will continue to promote the study and understanding of the arbitration of industrial disputes. We have provided a forum for the proponents as well as for the critics of the arbitration process, and we will continue to accept and be guided

by criticism of a constructive nature, designed to improve the administration of the grievance and arbitration procedure. We deeply and sincerely believe that no workable or worthwhile substitute has been advanced that can adequately govern the day-to-day relationships between companies and unions.

Management and labor and the arbitration profession owe a tremendous debt of gratitude to the pioneers among us who remained on the firing line for so many years. Men of the integrity and ability of Aaron Horvitz, Harry Platt, Ralph Seward, William Simkin, Joseph Stashower, David Cole, David Wolff, Saul Wallen, Father Brown, George Taylor, Harry Shulman, and so many others have set the standards of competence, ethics, and dedication for all of the members of this Academy.

I would like to conclude these remarks with a statement made by Arthur Goldberg in an article written for the *Industrial Union Department Quarterly* in 1959:

> There are many difficult problems connected with arbitration of labor-management disputes. Unions have the major responsibility in solving them. We cannot watch the process undermined. We ought not to contribute to loose, if clever, talk of a nature likely to undermine the whole process.
>
> The fact is that arbitrators have made an enormous contribution to labor-management relations, to union stability, and to the welfare of American workers. The arbitration method is not used by labor because of fear of strikes but because we know that arbitration is the most beneficial way to settle unsolved disputes.

I am confident that those among you who represent management share that view.