CHAPTER II

THE APPLICATION OF INDUSTRIAL JURISPRUDENCE TO EMERGING CONFLICT AREAS

I. COMMUNITY CONFLICT AND FAIR EMPLOYMENT PROBLEMS

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I am truly honored today to be addressing this gathering of the nation's experts in the field of labor arbitration. You and I have, of course, an area of common concern and involvement—arbitration. That alone would make you an appropriate audience for these remarks. However, it is doubly appropriate that I speak to you today, for not only are you experts in arbitration, but you are also, by virtue of your skills and experience, experts in human relations. It is this dual expertise of yours—arbitration and human relations —that I shall speak to.

When I first began preparing these remarks, I had two different trains of thought. One was to discuss the Center for Dispute Settlement and the role that labor arbitrators can play in developing and extending the principles of third-party dispute settlement into the area of community conflicts. The other was to discuss the problems you face in cases with racial overtones when the national policy favoring collective bargaining comes into conflict with the national policy of equal rights and opportunities for all races and ethnic groups. This second train of thought was prompted by my previous experience as a member of the Equal Employment Opportunity Commission and before that as a private attorney whose practice included many civil rights cases.

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At first blush, I thought I would have to choose one or the other. As I continued to put my thoughts to paper, however, it became clear that one subject led right into the other. Therefore, I shall begin by discussing one of these two trains of thought, then develop the other, and finally discuss their conjunction.

Third-Party Dispute Settlements in Community Conflicts

If asked to give a brief descriptive sketch of America today, most of us, I suspect, would include as a dominant characteristic the pervasive divisiveness among Americans. No large nation can be expected to think with one mind, or to speak with one voice. Our differences today, however, are much deeper and broader than can be blamed simply on the size of our population. We find not merely differences of opinion, but outright conflict—struggles between races, between classes, between generations, between students and schools, between citizen and government, and the list goes on. I will not argue whether today's divisiveness has reached a level unknown before in our history, or whether it only seems greater than in the past. Nor will I analyze and ascribe causes.

What I would like to do, however, is to point out and consider what seems to be a fairly common theme among all the clashing and dissident voices in this cacophonic chorus. It is a theme that is not anchored to any point or area on the political scale from left to right, nor is it peculiar to any racial or ethnic group, nor can it be pinned down on an economic scale from rich to poor, nor is it a function of age. This common—indeed ubiquitous—theme is simply this: Each man wants to play a part in shaping his destiny and in protecting and furthering his interests. In short, he wants to participate.

This is hardly surprising in a free country. As President Nixon said in his inaugural address, "The essence of freedom is that each of us shares in the shaping of his own destiny."

Black power, black control of black communities, is certainly a variation on this theme, but so is the appeal of George Wallace, grounded as it is upon the cry of local control.

The other side of the coin is the desire of those who now have decision-making power to retain it. Few people with power will

relinquish it willingly, but the militancy of the dissenters continues nonetheless. Something must give. As the late Judge Marion Beatty said in his Labor-Management Arbitration Manual, "Man seldom has the patience to persuade when he has the power to enforce, but when power becomes equal he will negotiate."

In classing all protests, demonstrations, and general discontent under the rubric of disputes over decision-making power, I have been guilty of some oversimplification. Many disputes do not directly concern power. Sometimes, for example, the protesters couldn't care less who makes the decision so long as the actions or output of their opponents is expanded or modified in their favor, such as to give them more money, better services, or fairer procedures. Other disputes are simply protests over particular acts that are thought to be unfair or illegal, in which the desired result is simply a redress of the particular grievance.

Such oversimplification, however, is not fatal to my point. Note two things about the disputes I have just mentioned. First, each is amenable to settlement with the help of an arbitrator, mediator, or other third-party impartial. Second, while these disputes do not directly raise the issue of who should make decisions, each one of them, if not satisfactorily resolved, is likely to lead to a more fundamental demand that the protesters have a voice in the way things are run.

It is almost a truism to say that the many conflicts dividing America today are, in significant part, problems of human relations—one of your areas of expertise. No further elaboration on this point should be necessary. We at the Center for Dispute Settlement are concerned with the relevance of arbitration, as well as other techniques of conflict resolution, to these problems.

Look at our divided society. As the "outs" continue to press the "ins," those holding the reins will make one of two responses. They can, of course, try outright repression. But such a response has little likelihood of success and great, almost absolute, likelihood of harming the free society of which our politicians so often boast.

The alternative to repression is compromise. Power, to some extent, will have to be shared. And it must be an actual, not a rhetorical, sharing of power. Illusory steps in this direction can

only gain a little more time until the disaffected and oppressed begin again, probably even more militantly, to press their demands.

The genuine sharing of power can take many forms. Perhaps the least likely would be a direct surrender of power. What is more likely, I believe, is a compromise, one in which power is shifted not from one opponent to another, but to an impartial middleman acceptable to both sides. Such a change in overall power relationships can be partially achieved by similar changes in the way that individual disputes are resolved—that is, by using arbitration and other third-party settlement techniques.

I put this forward not so much as a prediction of the inevitable, but as a possibility. It is, however, a very promising possibility, for it offers much in the way of achieving a domestic detente in American society. Let me explain why I think this is so.

Conflict between different groups can be of two kinds: (1) general opposition and antagonism, or (2) specific disputes between members of each side. While the general conflicts are often broad and ill-defined or imprecise, specific disputes are not. They offer particular issues which many times can be negotiated, or mediated, or in fact arbitrated.

The attraction of these methods of resolving disputes, especially when decision-making power is an issue, is that each in some way involves the participation of the parties—both parties—in the decision-making process.

You are all more familiar than I am with the transformation of labor relations in this country from an unstructured, often bloody struggle to the generally routine and peaceful resolution of differences within a definite framework of prescribed procedures. It is true that the parallel between pre-Wagner Act labor disputes and the various conflicts besetting us today is hardly a perfect one. The absence of laws corresponding to the Wagner Act is one difference. Nevertheless, the similarities are strong enough to suggest the appropriateness of applying to our present problems some of the same methods that have worked to bring peace in the labor field.

Let me give a few illustrations of how arbitration can be used in a typical urban dispute. The problems of tenants in slum proper-

ties are well known, and their grievances are voiced with increasing frequency in picket lines, rent strikes, and other demonstrative action. A major reason for this resort to direct action is the failure of public officials, including judges, to protect the tenants as zealously as they seem to guard the landlords. But even landlords, while they still generally prevail in the courts, are having their difficulties. Some licensing authorities and prosecutors, for example, are beginning to enforce minimum housing standards, and some judges are questioning the validity of leases on properties not maintained at the standards required by law. From the standpoint of both landlord and tenant, therefore, greater voice in the selection of the decision-makers who serve to resolve their differences is desirable. Arbitration offers each disputant the opportunity to participate in the selection of the impartial. There is, after all, nothing so unique about a rental agreement as to preclude arbitration. Indeed, the number of leases that contain arbitration clauses is increasing, especially where tenants are organized.

A second example is one that contains, in its facts and issues, strains of many of the kinds of disputes that are daily receiving headline treatment. In fact, if it also involved a protest against the war, it could well be dubbed "a dispute for all seasons."

This case is an actual dispute between the students and the administration of a manpower development training center in a major city. Some of the issues closely parallel those of a labor dispute over working conditions and the lack of satisfactory grievance machinery. Some of the issues are those typical of most school and college conflicts—specifically, course content and a student demand for a voice in setting the curriculum. These, in turn, relate to the quality and, indeed, the sincerity of federal job training programs.

Bad relations between the students and the administration had been smoldering for at least two years. Threatening to close the skill center down, the students demanded the right to participate in structuring a grievance procedure to be used in resolving 200 existing complaints and all those arising in the future. Previous threats to strike had turned out to be little more than bold bluffs, but there was no doubt in the minds of school officials that the present student body was ready and able to carry out its threat. A

strike would undoubtedly shut down the school, thereby disrupting its entire operation and endangering its chances for future funding.

After being asked to intervene, however, the Center was able to help persuade the disputants to submit existing individual grievances to arbitration by a three-man board. This panel would consist of one representative each from the students and the administration and one neutral chosen by the parties from a list compiled by the Center. There has also been a tentative agreement to establish a permanent procedure to handle student grievances, the final step of which would be arbitration.

In another, more recent school dispute, a member of the AAA panel was appointed to arbitrate a student-administration dispute at Wilberforce University in Ohio.

These examples illustrate how we at the Center are trying to prove the effectiveness of using third-party impartials to resolve community disputes. Not all such disputes are as easy as the simple landlord-tenant dispute over rent or repairs. Perhaps at the other end of the spectrum in terms of size and complexity is the student and faculty strike at San Francisco State College, where Ronald Haughton and I served in a mediating capacity and where Ron continues to do so. There are many other examples, such as the fight over local control of the schools in New York City, and consumer and merchant disputes over the quality of the goods that are sold or terms of payment. Still other community disputes involve various federal, state, and local programs, such as urban renewal, public housing, the many OEO projects, and, more recently, the Model Cities program.

Reconciling Collective Bargaining and Fair Employment Policies

Before going any further into the concept of resolving community disputes with techniques used successfully in the labor and commercial fields, let me go back and pick up my other principal train of thought.

I begin with an arbitration opinion written a few years ago. In San Francisco, following civil rights demonstrations, the Hotel Association of that city signed an agreement with CORE, the NAACP, and several other groups. Called the "1966 Civil Rights

Agreement," it provided for reinstatement of certain strikers, job reassignments, increased hiring and promotion of minority-group workers, and arbitration of future fair employment disputes by the city's Human Rights Commission. The union affected by this agreement, which it was not party to and had had no part in negotiating, was not at all happy with it. Therefore, it filed a grievance, claiming that the existing labor contract gave the union the exclusive rights to bargain over the matters that were included in the "Civil Rights Agreement."

As you may recall, the arbitrator upheld the union's argument, but we need go no further into the merits of the issue raised by that particular case. The point is, of course, the issue itself—collective bargaining rights pitted against legitimate efforts to achieve fair employment.

The grievance against the San Francisco Hotel Association was no sport case. The same issue is posed whenever civil rights or other groups press for and obtain agreements from employers to revise their practices in order to equalize or expand the job opportunities offered to minority groups.

Related issues are raised whenever black caucuses or other separate employee organizations are formed within a bargaining unit. Examples are found in several UAW locals, among the Transport Workers in Chicago, and among policemen in many cities. Such racial or ethnic group caucuses are increasing, especially but not exclusively among public employees.

Traditionally these and similar situations pose to arbitrators the narrow issue of interpreting the contract's definition of the phrase "exclusive bargaining agent." But at stake is the broad problem of reconciling the policy arguments for collective bargaining and for fair employment that support each side. The arbitration profession cannot remain isolated from this great issue.

Impasse Resolution

And now let me bring my two lines of thought together.

Among the many community disputes that the Center hopes to handle are those arising out of the Model Cities program. The statute establishing the Model Cities program requires "wide-

spread citizen participation in the program, maximum opportunities for employing residents of the area in all phases of the program, and enlarged opportunities for work and training."

To implement this requirement, the unions in the AFL-CIO Building and Construction Trades Department have adopted guidelines concerning the employment of local residents on the demolition and rehabilitation construction work in each Model City program.

On the one hand, the building trades unions are those in which minority groups have found membership especially hard to achieve. On the other hand, many residents of Model Cities areas are from minority groups. Both the statute and the agreement are sufficiently indefinite as to admit of many conflicting interpretations.

One need not be a sage, therefore, to predict that disputes will arise between local residents, unions, and contractors over whether particular employment practices meet either the statutory requirement or the terms of the implementation agreement. In some cases local residents will be the initiating party, but in others grievances may be brought by union members over the increased work opportunities being offered to nonmembers. It takes little imagination to see that the issues involving both labor and race relations will be many.

Many of you, and others as well, will be called upon to help resolve these disputes, bringing to bear your full skills as experts both in arbitration and in human relations. As in the case involving the union grievances over the Civil Rights Agreement, you will be faced with the national policy extending from the late thirties and the forties favoring collective bargaining and the national policy of the fifties and sixties favoring equal rights and opportunities for all races. That these two policies are sometimes antithetical may at first seem surprising—the labor movement, after all, has lobbied long and hard for civil rights. But one of a union's prime missions is to protect and further the position of its members. Unfortunately that position has sometimes been achieved at the expense of blacks, Mexican-Americans, American Indians, Puerto Ricans, or other minority groups. I hasten to add that the unions are not always to blame for this. Sometimes employers were the guilty parties, and very often it was simply the

general discrimination of our society that quite effectively caused deprivation even without individual acts of prejudice.

Nevertheless, whether deliberately or not, to maintain the status quo can be to perpetuate the barriers to equal employment opportunity. This is, incidentally, a good example of one of the kinds of racism the Kerner Report talked about—the racism of institutional patterns that have incorporated and now still reflect the previous outlook and practices of prejudiced individuals.

This problem of reconciling conflicting national policies is not an easy one to solve. It was not easy for me as a member of the Equal Employment Opportunity Commission, and it is even tougher for you as arbitrators, for your function is the essentially conservative one of interpreting the existing labor contract.

Nevertheless, it is not a problem that you can easily run from. The Center for Dispute Settlement is working—with some success, I might add—to have Model Cities agencies adopt arbitration clauses or other forms of impasse resolution to handle these and other disputes. The arbitrability of such issues, however, is not simply a theory dependent upon our persuasiveness. Many of these and similar issues could well come before you through the normal grievance procedures already included in the collective bargaining agreements of the contractors and unions involved.

Contribution of Experts

Let us now consider how you can participate and contribute to resolving the kinds of conflicts that divide American society today. These issues may confront you, in your traditional role as labor arbitrators, as I have already indicated. But beyond that, many of you are also educators, advisers, consultants, mediators, and even government appointees. In each of these capacities there is an opportunity to use your general expertise in human relations and your specialized knowledge of labor relations. It is quite likely, for example, that some of you may be called upon to mediate a dispute—to help community, labor, and management groups to negotiate an agreement or, at an earlier stage, perhaps just to get the disputing parties to sit down and begin to negotiate.

The Center for Dispute Settlement has established a Community Disputes Settlement Panel from which third-party impartials will be chosen for community disputes in much the same way as arbitrators are now chosen from the AAA's Labor Panel. I hope that many of you will be on that panel.

We will also be establishing local panels to serve each community in which a neighborhood dispute settlement office is opened. These local panels will service such cases as landlord-tenant and consumer-merchant disputes. The bulk of the panel members will be people living or working in that very community, many of whom have no training as impartials (though many, no doubt, have acted as such without being aware of it).

There is a need, therefore, for trained and experienced impartials such as yourselves to work as teachers in the training courses we will be offering in cities throughout the country. These will be modelled after the course designed by the Center and offered for the first time at Federal City College in Washington, D.C. The first class of about 30 community leaders was graduated just this month.

As you teach community leaders, of course, you also will be learning from them the kind of background knowledge that will make you especially valuable in settling community disputes yourselves.

The benefit of academic research and analysis will also be available to aid everyone in this new area of dispute settlement. It has been the intention of the Center for Dispute Settlement from the very start to try to bridge the gap between the best thinking in the universities and the needs of the practitioners in the field. This is a two-way street—bringing theories to those in the field, and reporting the experiences of the practitioners to the theoreticians for analysis and further refinement of their ideas.

That this will, in fact, be a two-way street is evidenced by the man who heads the academic team that will work with the Center. He is Ron Haughton, a skillful practitioner who, as you know, is certainly not an "ivory tower" theorist. He will be assisted by Professors Louis Ferman and W. Ellison Chalmers of the University of Michigan. In addition, Robert Stutz of the University of Connecticut heads our New England Plan for government employee collective bargaining, and Wayne Horvitz, as our consult-

ant on collective bargaining, will coordinate the Center's activity in this field throughout the country.

Through personal involvement as impartial or as teacher, and through our research, your arbitration expertise is broadened, your profession expanded. This should not be belittled, for just as your labor-management experience is not directly transferable, say, to commercial arbitration, neither is it sufficient for settling community disputes. As an impartial in a community dispute, you will be challenged to achieve a resolution without the bitterness and disruption that characterized, for example, the teachers' strike in New York over decentralization of the public schools. As is true in labor-management disputes, you will be most successful when you are creative and innovative, especially in developing alternatives that satisfy both the demands of one side and the objections of the other. You will need the patience to listen to strident, even offensive, rhetoric and then to translate it for the opposing side into language that they can understand and will be willing to listen to.

Much of this may sound easier to say than to do, but none of it is impossible. You have vast personal resources to draw upon—your knowledge, your experience, your expertise, your skill, diplomacy, and sensitivity.

I do not deny that settling community disputes is challenging, but it is a challenge that excites rather than frightens, that offers promises rather than threats. And it is a challenge I am sure we can meet.

Discussion *—

MR. MARK L. KAHN: Mr. Jackson, in many instances the criteria of the Equal Employment Opportunity Commission involve issues relating to religious discrimination in which it is my hope that they would find the matter I had found not to be a violation, to be a violation. So I don't see where the problem is.

MR. JACKSON: All arbitrators don't have that attitude in application to particular cases. The question is whether it is your interpretation that the provision of the collective bargaining agreement

* The following is an edited version of the transcript of the discussion following Mr. Jackson's presentation.

relating to a specific practice was in fact a violation of the Equal Employment Opportunity Act. We have found many times that arbitrators, in attempting to interpret Title VII, have held the provision and the practice not to be violative of Title VII.

MR. KAHN: I don't think that arbitrators may properly substitute themselves for the appropriate commission and authority in interpreting a contract. What do you think about that?

MR. JACKSON: I generally agree with you, except that there are some situations where you almost have to. You recall the cases involving stewardesses on airlines, as to whether or not the provisions on marriage restrictions were in violation of Title VII. That issue and others must have been resolved by 30, 40, or 50 arbitrators. Although most of the awards appeared to agree with the Commission, not all of them did; and, as you know, in the case involving the Braniff Airlines, the arbitration award ended up in court where the issue of Arbitrator Bothwell's interpretation was raised.

We have constantly been confronted with arbitrators interpreting Title VII and these kinds of provisions of the collective bargaining agreement, and whenever we have felt their interpretations were wrong, we have so found and attempted to resolve the conflict on the basis that we were the ones to whom the statute gave the opportunity and the initial responsibility to interpret the statute.

CHAIRMAN MANN: My question goes to this issue: In industrial labor relations, when an arbitrator is called in, there is always a common practice—that is, the enterprise. I am wondering if your experience in the areas of neighborhood and school disputes has been that it does not appear, on the surface at least, that there is any common struggle against the continuation of the enterprise.

MR. JACKSON: I think in most of them there is a common attitude toward the enterprise. I recognize, of course, that you have the situation at San Francisco State where it appeared that in the end the demonstrators were equally concerned with disruption for the sake of disruption.

While there will always be a handful in student strikes seeking disruption for the sake of disruption, that is not the purpose of the majority. Strikes are seldom initiated by those seeking to disrupt; most often they are initiated by black students. Sometimes the dis-

rupters take over, sometimes they support them, and sometimes they are able to alter the direction and methodology of the confrontation.

We have felt, however, that generally you will be able to find a sufficiently responsible leadership that will respond to efforts to resolve the conflict. This is the hope we have. Otherwise, we really are in deep trouble.

I will only say this: Generally speaking, you will find a common desire to save the institution, but to modify it in such a way that it better serves the needs of students, both for quality and for education.

MR. SEYMOUR STRONGIN: You referred to problems and challenges and differences of skills and community tensions, but I think it would be helpful if you could elaborate on the problems of leadership on the side of community groups. There is a problem here of transferring skills. Another problem we have to face is the framework within which we operate. There may be other equally fundamental differences that we need to know if we ever get into this.

MR. JACKSON: This is a very difficult issue. You will find various degrees of expertise and abilities in the communities, in their attempts to solve their problems. Many of these people may have had no formal training. They know what their community should look like. They know how to avoid being fooled by rhetoric designed to persuade them that they will be better off if they accept what is offered to them. You must remember that they have a history and tradition of denial that has prepared them pretty much to know what they do not want; and, generally speaking, the negotiation is handled by the black lawyers and those who represent the NAACP and other groups.

As to the students, let me add to what was said by our Chairman. I find these students to be generally of a far higher calibre at their age than we were at their age. We have done a better job of distributing to them at a much earlier age the education and all the technological changes that have been made over the last few years. They sit down and bargain, but in many instances they don't want to do that. They contend that an issue is not negotiable. You will find them extremely sharp; they are much tougher than students were

when we were going to school. I think you will find that those who are leading the strikes in most instances are not 18- or 19-year-old spotty-faced kids who belong in a student council somewhere. They know that the student council no longer serves the needs of students. They are either juniors or seniors of the undergraduate school, or they are in the graduate school. They are working. They have, in most instances served their two- or three-year hitch in the military. They are seasoned, hard people, tough and bright, and you find them a worthy adversary, even though they have never previously been in any kind of formal conflict or formal negotiation. I have found them to be the equal of many of the top negotiators of the major industries of America where I used to conciliate cases for the Equal Employment Opportunity Commission. I find them, partly through the acquisition of information but primarily through their determination to secure their goals, to be far more determined than any group in America today. That is probably because they have a perception of what the relationship between people *should* be. They see what it *is,* and they are determined to change it. Because of this determination, plus their worldliness, they are worthy adversaries in any kind of negotiation.

They will not be trapped, nor will they want to follow all the judicial rules and regulations that the AAA or that you generally follow. In many instances they will not use Roberts' Rules of Order, but will develop rules as they go along. When they sit down and talk, they will say, "If you don't want to talk, we'll just go back to the picket line and keep people out of the building," or do this or do that. They understand that it is the rules themselves that are responsible for their problems, so they'll throw out the rules you have been working by.

That is the first thing you will meet. That happened in Detroit, where it was necessary to determine what the rules of the game would be in order to resolve the conflict. That mediation led to a tripartite panel, with the school administration and the students on it. Finally they agreed to a third party. So I don't find that lack of formal training in dispute resolution has frustrated the school strike. What has frustrated us, as I hope you will gather from what I have said, is that in many instances what you will do is not arbitrate in the traditional sense at all, but engage in what I prefer to call conflict resolution. You won't have that sharp de-

lineation that you are accustomed to. You will find that you will oftentimes be serving in the way they will let you serve, and they may let you serve in a combination capacity. You will have to determine whether or not your working that way will lead to a resolution of the conflict, or whether you should try some other way. It really challenges your imagination to become involved in the resolution of this kind of conflict.

I will say this to those of you who like the challenge or are concerned with the continuing conflict we have and the orderly way of resolving conflict: You will find this is an interesting opportunity.

MR. STRONGIN: In my first question I was referring to the fact that we are dealing with leaders who can speak for a constituency with reasonable effectiveness. That has been breaking down too in labor relations.

MR. JACKSON: I have not found that to be a problem at all. The most disciplined groups are to found on the campuses. Your problem is that the leadership has too much authority. Sometimes you have to develop ways of impressing them.

MR. STRONGIN: The other part of the question was the idea of having a basic document that sets forth the living conditions within which we operate.

MR. JACKSON: In the school disputes you generally have a basic document—the student-government constitution. The first thing they do is discard that for discussion.

In the community disputes, you have the Civil Rights Act. Generally you won't have a document unless the workers are represented by a union, in which case you have the collective bargaining agreement. They will say, "We don't feel ourselves bound by that in any way." However, you are right—there is no specific document that spells out relationships or how you should seek to resolve a particular conflict. You have to structure the negotiation, based on your careful analysis of the issues, of what they really want, and of what the parties are using to negotiate. So you can't serve only as an arbitrator in the judicial sense of the word because, in addition to issuing the award, you will often be helping the parties to refine and define the issues of the controversy. It is challenging.

A VOICE: What about the problem of finality? All the people here are accustomed to dispute settlements because of the unattractive alternative. In a situation such as Detroit, the parties agree to a tripartite panel. I would like to know what you think the result will be if the community involved in the dispute is not satisfied with the final resolution of the panel.

MR. JACKSON: That is a very difficult question. We don't know the answer yet. We do believe, from the few situations we have been involved in, that in some cases we will have trouble because of a challenge by the group that initially brought about the confrontation, or the charge that one side or the other is violating or not honoring the agreement or that the agreement doesn't go far enough to resolve their grievances.

I can only say that the extent to which the parties can reasonably be assured of avoiding future disputes will be determined by the extent to which the arbitrator or mediator has built in machinery for avoiding conflict and managing the new conflict. One of the things to do in the process is, in effect, to mediate a new structure for handling grievances.

What we have done in the colleges is to develop a new procedure for a certain class of students to present and resolve their grievances; we have established a new system of communication between the students and the administration that short circuits the normal campus procedures, so that the issues can immediately get through to the college or the university administration rather than go through the faculty, the council of deans, and so on. So we are structuring a new constitution for resolving the grievances that these parties can anticipate will occur in the future.

You will be required to establish, by agreement or some other instrument, some kind of vehicle for resolving grievances that are likely to result. When you do that, in place of a finality, you will perhaps be decreasing the likelihood of future efforts to disrupt the institution.

A VOICE: I happen to be the alumni representative on the board of trustees of a fairly large university with about 38,000 students. The Douglass Association has made certain demands on the university administration, some of which are obviously impossible to

achieve, and one would think they would know these demands are impossible to achieve. The university has had tutors throughout the state interviewing students in high schools, and in the course of the year they found 100 additional students who could qualify to enter the university. Nevertheless, the Douglass group has made the demand that 2,000 black students be admitted in the spring term. How would you accept that type of technique?

MR. JACKSON: A very good question. It is not unusual, in the experience of many of you in your day-to-day arbitrations, to hear labor unions make demands that, if granted, would bankrupt the company. It seems to me that when you are confronted with that type of issue, you draw on your expertise to handle it. They might say, "Any black student or any Liberation Front student who applies for admission will be admitted, regardless of qualification," while you know very well that in most states there is some kind of qualification requirement.

What the students are going to say is that the qualification standards you use are racist and they will no longer be bound by them; they recognize that in many instances these standards are embodiments of statutes or are creations of a board of trustees who have been given the authority by statute to make such qualifications, and they know that presidents of universities get their grants based on that thinking. So, insofar as the particular parties to that dispute are concerned, it would be impossible of solution.

One of the things you have been able to do and have done all the time in labor cases is to talk to the disputants and listen to them and find out what they really mean by their demands. When the demand that "all black students will be admitted to universities without qualification" was taken literally, the university feared that it would be inundated by some black, brown, or yellow hordes out there in California; of course it already had a waiting list, so the problem seemed totally impossible of resolution. But once you began to identify the category of students that was of major importance to them, you found out that, first, they were talking about those students who had graduated from high school but were not able to get into college; and second, they were talking about those students who, equated with their own class rating and not with all the schools in a particular community or through-

out the state, would have qualified for admission. But they felt these students were being mistreated when they were compared with students from schools offering a higher quality education which they had had no opportunity to obtain and, therefore, were denied admission.

So when you begin to analyze what they are talking about, you find, as we did, that of the 10,000 students a year that normally feed into San Francisco State College from the high schools and junior colleges, about 80 percent come from the six junior colleges or the high schools of the Bay Area. If you project and consider all the black students and the other Liberation Front students, you find you are talking about only 600 students; *all* black students or *all* brown students are not the point at all. Therefore, what appears to be a demand impossible of resolution is, in fact, possible of resolution.

A VOICE: As soon as you start setting standards for specific groups, regardless of qualification requirements, aren't you, in effect, practicing discrimination?

MR. JACKSON: In one sense you will find, as you have found in your labor arbitrations, that what the parties are likely to agree to is what their political muscle permits them to attain or yield to. There are always ways of accommodating demands without violating the law or the constitution. It just takes a little imagination in developing the formulation. I didn't have any difficulty at all in developing a formulation that would prevent the parties from being accused of statutory or constitutional violation. It is a question of the attitude you bring to analyzing the demand and the resolution of the demand.

Just as in the Equal Employment Opportunity Commission, when Judge Lester ruled in the Asbestos Workers case involving Local 153 down in New Orleans, this kind of accommodation is not a major barrier at all to people who want to do something. For example, the judge closed off all union membership admissions. The reason he did so was that in the local's 80-year history, there had never been a black person admitted. So he said, "No white person can come in until this is done." Now they have one black and one white coming in alternately until the list is completed. The ruling took away from the membership committee the right

to say who should come into the union. The court didn't find that unlawful at all.

In the *Philip Morris* case, the court found it not at all unlawful to permit all black workers to come into those categories where they had been previously prohibited. The court said: But for the fact that they were black, they would have been in; those white persons were in the line specifically because they were white, and black persons were not in line specifically because they were black. The Congress did not intend that. Now you have to move them in on an equal basis. So on the legality and constitutionality of the various approaches in remedying discrimination that exists, it comes down to this: Are you prepared to go along with the national policy, and will you create remedies that will eliminate discrimination? I don't think you should find yourself hung up on this question.

MR. ARNOLD ZACK: I have a question of acceptability in the dispute centers. Most of the people here, you may have noted, are white. That is convenient for acceptability in labor-management relations. But I wonder what thought you have given to the problem of acceptability of white neutrals in disputes involving the white establishment and the black world, and also in the ghettos. Is there a problem of acceptability there in being white? What thought has been given to training black neutrals, or the role the white can take in training blacks?

MR. JACKSON: I am not at all surprised at Mr. Zack's perception in raising a question like that because, as you all know, Arnold has been chairman of the Labor-Management Division of the AAA.

It certainly is obvious that it will depend more upon the particular individual than upon his race in determining whether he will be acceptable. We have had difficulty in getting black persons as well as white persons as mediators and arbitrators. In mediation, so far, we have developed black and white teams. We are trying to resolve conflicts, and we know the parties have to have confidence in those who are about to resolve the conflict, so we have faced the issue head on, and that has become a criterion for serving on the panel. We simply anticipated that this will be a problem. In forming the Detroit tripartite panel, the administra-

tion members of the panel were free to choose whomever they wanted, and they chose a white person. The students obviously chose a black person. But the demand was, and the school agreed, that the third impartial chairman would be black. That was the party's political muscle working, so we found a third-party impartial who was black to serve as chairman.

Oftentimes the parties themselves will tell you whom they want, and to the extent that we can certify that these persons have a background of impartiality and are qualified to participate in the dispute and are acceptable to the parties, we will accommodate to their wishes.

Sometimes we have to mediate with the parties to develop a criterion of acceptability. You have to look at the situation realistically and find persons who are acceptable to the disputants. It is difficult but not impossible.

We are now operating programs to train people, and we are trying to find more arbitrators and mediators that come from the Puerto Rican, the Mexican, and the black communities. Where students are challenging an institution that is all white, they are especially unlikely to accept most white arbitrators or mediators, but they will accept a white mediator or arbitrator if he has an acceptable background.

We have just trained 30 for Washington, D.C., and about three quarters or 22 of them are black. We have made a special effort to get black lawyers and black professionals to serve on panels; we are recruiting among the black lawyers, labor lawyers, and bar associations. We recognize there is a tremendous imbalance in the nation in terms of black persons or people with Spanish surnames who serve as arbitrators. We recognize our responsibility to bring more of them into the fold as neutrals.

MR. DAVID ZISKIND: Your comments on the nature of the conflict and its resolution by arbitration were extremely fine; but I think if we stick to our arbitration techniques, we might puzzle someone by a perspective that seeks the realization that, at least at this historical juncture, we won't use our traditional arbitration techniques except in a very few instances. Perhaps we are at the

stage where industry was over 50 years ago, when we had presidential commissions and investigations that issued reports that were very perceptive of issues that existed but led to no remedial action. Now we have presidential commissions and investigations that are doing exactly the same thing. We know the conditions that exist, but those reports do not provoke any remedial action.

I think we have to stress more and more those things that bring about change in the social or economic climate, conducive to doing in human relations what we have done in labor relations. We are perhaps at that stage in arbitration that the Bradys and Millers were in labor relations, when we had to innovate. We know what good labor relations are. We are not at all certain what good race relations are, and if we keep our focus on mediation service rather than on arbitration service, I think we will progress much more rapidly.

Let me make two comments on the use of arbitration techniques, as such, in race relations. My first comment relates to the element of poverty that we find in race relations. Race relations problems are compounded by poverty. If we talk about making arbitration available, we are immediately confronted with questions. How is the grievant going to be able to hire a spokesman? How is he going to pay the AAA? It is true that there are some organizations such as the NAACP, tenant leagues, or others that might advance money, but, by and large, in most race disputes there are no organizations that grant costs. The individual, the black man who has not been able to get apprentice training and cannot get into the union, doesn't even have a union to talk for him, and if we want to make technical arbitration procedures available in race relations, we must find some way of subsidizing the process.

My second observation is this: I think we have a very real opportunity to use technical arbitration procedures in race relations in an area in which the Equal Employment Opportunity Commission and the parent one have been lacking. Most of these government commissions function on the basis of investigating a dispute and taking action only in those situations where the investigator finds what appears to be a good case.

I have noticed that, by and large, black Americans are completely unhappy in that situation because they do not have their day in court. They do not even trust the black investigator or the brown investigator. They want to be able to go in and say what they want to say and have their opportunity to be heard. This point, I think, should be made to the Commission—nothing, including lack of funds, should deprive them of that forum. I think there should be written into the law a provision for arbitration which will give all grievants an opportunity to come in and have a full-blown hearing on the merits of their cases; they should not have their cases shunted aside because the investigator isn't quite happy with the situation. In those two respects, perhaps formal arbitration may be useful.

MR. JACKSON: I find myself in agreement with practically everything you say. I only want to add that landlord-tenant cases have lent themselves to arbitration. Take a situation where a lawyer represents 13 tenants of a particular landlord who refuses to make repairs. He will not let them pay their rent, but puts their money in escrow until the repairs are made. Then the other lawyer fighting for the landlord says, "My client can't meet his monthly notes because the rent money is tied up in escrow, so he can't make the repairs." We have no difficulty at all in getting these parties to sit down and arbitrate, in the general sense of the word.

So I would say we don't think there will be much difficulty in consumer-merchant cases, especially where there is a substantial amount of money involved, because you have a one-and-one situation. You have a clearly defined group of tenants and a clearly defined group of landlords; you have a clearly defined group of consumers and you have a clearly defined merchant. We believe that there we will be able, and have in fact been able, to use arbitration more in the judicial sense.

In other cases, especially those that involve public policy matters, you are correct when you say that mediation and other forms may be more useful. We are fighting for a combination of all of these methodologies to resolve the conflict. For example, if we begin thinking in terms of conflict resolution and using any techniques that will resolve it, we won't be hung up by one technique excluding the other.

With regard to the cost of arbitration or mediation, both are costly. There are two ways to deal with the problem. The Ford Foundation and the Rockefeller Foundation have provided money to handle these costs on an experimental basis during the two years of our operation to prove the viability of the concept on a national basis. But as we become more general in application, the cost factors will be more of a problem. We are establishing and using unique approaches in the local centers that we hope will provide for local funding for various categories of disputes so that we will be able to take advantage of arbitration and mediation.

Finally, we are finding, as has been the case in commercial arbitrations and negligence-case arbitrations, that there are many types of situations where we can find arbitrators or mediators who will serve without fee. I recognize that those of you in the labor arbitration field possibly are not accustomed to serving too often without fee, but we are going to ask you, in cases involving public matters, not to insist upon your handsome fees, because we are talking about resolving conflict that may very well affect us all seriously—you can't arbitrate a dispute concerning a building that has been burnt down.

II. INDUSTRIAL JURISPRUDENCE AND THE CAMPUS

ARTHUR M. ROSS *

In requesting me to speak on this topic, the managers of the conference appear to be assuming that arbitration experience provides useful training for handling student unrest.

It is not difficult to understand why the proposition might appear plausible. A good case in point is the distinguished President Emeritus of the Academy, Dr. Robben W. Fleming, who now serves as the chief executive officer at The University of Michigan. Dr. Fleming was planning to be with us at the Broadmoor today, but has been deterred by a series of recent developments. These include a budget recommendation even more inadequate than usual, requiring an urgent summit meeting with Governor Milli-

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