CHAPTER VI

GRIEVANCE ARBITRATION—THE OLD FRONTIER

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Before getting to my speech, I'd like to insert a slight parenthesis. We're here in Quebec, the City of Montreal, the largest French-speaking city next to Paris, I believe, and I think that our program should give some recognition to our French-speaking friends in Canada.

I'm not competent, obviously, to do that completely in French, as it should be done. But I do think that a description of arbitration south of the border might be helpful to them, even if it is bilingual (if indeed you consider it lingual at all).

Dans un tout petit hotel room,
Qu'est full de cigarette smoke,
Ou l'atmosphère becomes itself très blue,
Il y a Union men et foremen,
Et more et more et more men,
Et l'air conditioning ne marche plus.

Or, le compagnie attorney il dit, "Pas de jurisdiction!"
Et le Union Grievance Chairman il dit: "Phooey!"
Puis le Union witness dit qu'il a un "nagging back affliction"
Et le docteur de la compagnie dit: "Hooey!"

Puis le foreman dit, que "ce slob, il ne peut pas faire le job,
Mais ce junior employé a déjà learned it."
Puis le Union grievant say, "J'ai la séniorité!
Donnez-moi ce job, parce que j'ai earned it."

Dit le Manager, "Le low down, c'est qu'il y a ici un slowdown,
Et tout les Union travailleurs sont shirking."

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Dit le Union, "Nous sommes jeering à votre stopwatch engineering!
Nous demandons plus de monnaie pour our working."

Alors, l'Arbitre dit, "I'm tough,
Mais j'ai enfin had enough.
Il faut maintenant que j'aie un bon vacation.
J'irai donc à Montréal parce qu'on need not think at all,
A l'Académie Nationale d'Arbitration!"

Well, I have a speech to make, Jean McKelvey tells me. When Gerry Barrett gave me this assignment, he wasn't kind enough to tell me what sort of speech I should make, or what the subject should be. I asked Jean about it, and, with total disregard for your comfort and pleasure, she told me that maybe I should sing it.

So I asked Sy Strongin. He replied, to my surprise, in the language of fashion design. He said, "Make it sort of simple and straightforward, but be sure to put in a little uplift."

The part about being straightforward, I think I can handle; at least, I can try to tell you what I think I think. But the uplift is a bit more challenging. I suspect that in speeches, as in fashion design, achieving real uplift depends on having subjects that are pointed pretty well in the right direction in the first place. But I'll do my best.

We've been talking a great deal during the last few days about labor relations in the public sector—about fact-finding and mediation among policemen and firemen and garbage collectors, about the special problems of teachers and hospital employees, and about such special public sector problems as how we find out who the parties are and what to do when we do know.

This is all thought of as the "new frontier" in labor relations: the place where there's a lot to be learned, a lot to be experimented with—which calls for courage, imagination, inventiveness. It's where the action is.

I'm not going to talk about this. Instead, I'm going to talk about another long-standing frontier in labor relations: about, of all things, private grievance arbitration—what we were doing last week and the week before that and what most of us will be doing

next week and the week after that. (When I say "we," I'm referring not only to the arbitrators, but to all the participants in grievance arbitration—the practitioners before arbitrators; the representatives of the parties involved in the arbitration process; and the wives, who sacrifice so much of their time, whose lives are so much conditioned by, and who render so much support to the arbitration process.)

Making a speech can be useful to the speaker. I suppose it's the first time in a long time I've really thought about grievance arbitration as a whole, as an institution. I had to, to think up something to say. I haven't come up with any answers, but thinking has raised some questions in my mind that I want to present to you.

These are questions that need thought, not only from arbitrators but particularly from representatives of managements and unions—the parties who really make grievance arbitration work or let it fail.

Before coming to the questions, just a few comments. As I look back over the years, I think that those who have been involved in grievance arbitration have a lot to be proud of. We have established a working, effective, on the whole successful system of dispute settlement by third parties—a dispute-settling system that is, of course, only an adjunct to the grievance procedure, but one that is an important part of that procedure and conditions it just as it is conditioned by it.

Arbitration is accepted; it is established; it is blessed by the Supreme Court. The caseload, as we heard, is growing all the time. There is a shortage of people to handle it. We need new people in what has now become the profession of labor arbitration.

We are no longer explorers. We are technicians. And though we may not always show ourselves to be highly skilled technicians, we are at least old hands at our trade.

We are a part of the Establishment—so much a part of it that we are getting bored with ourselves. We are even getting accustomed to the criticisms that are directed at us—so accustomed, indeed, that we almost shrug them off.

We take a lot of time with our decisions (much more than the decisions call for), and people are impatient with us.

"Well," we are tempted to say to ourselves, "that's nothing new. People have been impatient with us for years and they'll probably go on being impatient, for delay and impatience with delay have come to be regarded as almost a part of the arbitration process."

We cost too much. We are too legalistic. Our whole process has become too far removed from the man at the machine.

"Well," we are tempted to say again, "these things have been said about us for a long time, and they're still being said. Okay, those are the defects of our institution. We'll try to do what we can about them, but in the meantime let's go back to the hearings next week and resume our comfortable routine."

We are pretty complacent, I think, and we are very routine. There was a time, when I first began arbitrating, when it was not unusual at a hearing to see the company vice president in charge of labor relations come in and sit in the background. That doesn't happen any more. Arbitration has dropped down to an effectively operating level, both in the union hierarchy and in the company hierarchy. We have specialized departments handling it; we have digests of our decisions; we have indexes; we are travelling well-established and familiar paths. Our program committees at the Academy have more and more difficulty in finding subjects connected with grievance arbitration that haven't been worked to death.

Why is there this complacency and routine?

Part of it, of course, is natural. I suppose all surgeons find the five-hundredth appendix they take out less exciting than the first, even though undoubtedly they do as good or better a job the five-hundredth time than they did the first. It's that kind of thing; you get used to it; you get bored with it; you wish you had a chance to go and teach, just as the teachers wish they had a chance to come and arbitrate.

This is natural, but I think there's more to it. I think one factor is that we have thought through already a lot of the basic

issues underlying contract arbitration, so that, even though the parties are terribly concerned about individual decisions, both sides feel pretty secure about the basic process.

This was not always true. Some of us remember the days when this whole thing was pretty new, when any suggestion of grievance arbitration raised burning questions: Should companies and unions turn over to third parties the interpretation of their agreements and the settlement of grievances?

Could arbitrators be trusted? Could you find men who would not play the box score, throw the decisions this way and that to keep themselves acceptable? Could you establish a system in which the arbitrators, with their own sentiments of equity and fairness and their own supposed wisdom, would not be rewriting the parties' contracts for them rather than following and applying these contracts?

If such a system could be established, how should it be set up? Ad hoc? Permanent? Tripartite boards? Single arbitrators? Advisory relationships between single arbitrators and the parties? Should we have formal or informal hearings? Should there be representation by law firms or by company and union staff people? Should there be transcripts? Should there be briefs? And if we go this far, shouldn't we create a labor court instead?

All these were new and novel questions that were thought about and experimented with, that were exciting to confront, and that called for exactly the kind of imagination and inventiveness that are now being called for in the public sector.

What is the basic function of grievance arbitration? We remember our debates as to whether or not it should be problem-centered or contract-centered and as to how and when we should range between those extremes. We remember the discussions about whether arbitrators should mediate (and about how, in some circumstances, an arbitrator cannot help but mediate!).

Some of these discussions dealt with real problems, some with only theoretical problems. Some concerned real dangers, some only imaginary dangers. But they constituted a real frontier of labor relations in those early days.

And more was going on than the creation of structure. Basic principles were being worked out. I have a list here of 10 or more statements. I suspect that to many of you, in many situations, these statements will sound like the ABCs of arbitrating, but there was a time when they were not accepted ABCs. Rather, they were fiercely challenged; they achieved acceptance only after repeated argument and debate and often after being rejected, reproposed, and fought over again and again.

You still won't find a lot of them written out in contracts. They are in the minds of the arbitration practitioners—part of the unspoken, unwritten assumptions with which we now approach the arbitration procedure and from which both sides get some degree of certainty.

1. *It is for management—not the union—to initiate, and for the union, if it disagrees, to challenge.* That's pretty old stuff, but there was a time when it was not.

2. *If an employee receives an order which he thinks violates his rights, he should obey it, nevertheless, and file a grievance.* What can seem more old-fashioned than that statement? There was a time when it wasn't.

An exception to it is often recognized: That is, 3. *If there is a question of personal safety involved, an employee may be entitled to disobey the order of supervision and file a grievance to test the safety issue.*

4. *A wage classification is designed to classify the job and not the man.* That wasn't easily gotten across, nor was it easy to work out the modifications of this principle that must be made in the case of the skilled trades, where one is dealing with a range of potential skills rather than with a set of duties that are repeated day by day.

5. *Job descriptions do not, by themselves, freeze the content of a job.* We had quite a fight over that. It went on for many years, involving decisions and reversals of decisions, before the significance of the job description became generally understood.

6. *In determining wage-rate grievances, there is a basic distinction between* **establishing** *a rate and* **applying an established rate to new work.** That took a little thought. It is a very fundamental

distinction, and though it is not expressed in most wage agreements, it is coloring thousands of wage decisions.

7. *In regard to wage incentives, there is a basic distinction between the standards and guides that form an incentive plan, and the application of those standards and guides in establishing particular rates.* This is another basic distinction, which is often thought unnecessary to express in contractual terms but which underlies hundreds of incentive cases.

8. *The ability to learn a job is not the same thing as the ability to do it.* 9. *The need to be broken in on a job is not the same thing as the need to learn it.*

10. *A few occurrences do not necessarily create a practice.* 11. *A few exceptions do not necessarily indicate the absence of a practice.*

12. *Where corrective discipline applies, the test of whether there is good cause to discharge is not what the employee did in the particular case at issue, but whether he has now proved himself incorrigible.* 13. *The burden of proof, in most grievances, is on the union, except in discipline cases.*

14. *The arbitration hearing is no place for the introduction of new contentions or new and major items of evidence* (unless you have established an arbitration system in which the hearing functions as a trial de novo of the issues). *The place to frame the contentions both of fact and of contract interpretation is in the grievance procedure, not before the arbitrator.*

This is only a random list. Not everybody would agree with all these statements, and none of them apply across the board in all grievance arbitration systems. But I suggest that, in most company-union relationships, concepts similar to these have been hammered out over the years and now form the underlying conceptual structure of the grievance arbitration system, giving security to the parties and making it possible for them to regard individual cases as more or less important occurrences in an essentially routine procedure.

During the period when this structure of understood assumptions and principles was being developed, almost all grievance procedures that I know of had an important characteristic. All

cases were treated in the same way. Whether it was a discharge case, a reprimand for loitering, a complicated incentive case, or a seniority case involving the transfer or layoff of hundreds or thousands of employees, the case went through each stage of the grievance procedure. And when they got to arbitration all cases were treated in the same way, were briefed in the same way, were subject to the same procedures, and were decided by the arbitrator with the same care.

This uniformity of treatment was necessary at first. One never knew which cases had the possible problems that could explode and affect an entire chain of plants, which ones might set precedents that would color the employees' working relationships for years thereafter. And the results of this early need are still with us. We are *still,* by and large, treating all cases in the same way. I suggest that that is one reason for the criticisms of us, for our backlogs and delays, and for the fact that so many simple cases somehow or other find themselves divorced from the needs and expectations of the man at the machine and of his foreman. The little cases are caught up in the same procedure that has been developed to handle the big ones.

I do not stand here as an alarmist. I am not saying that we are faced with a crisis in arbitration. We can rock along as we are doing and we probably will for quite a while. But I suggest that if there is no cause for alarm, there is, nevertheless, cause for concern.

We are not living in the same world we were living in when arbitration was developed. There is experimentation going on these days that is not experimentation in the methods of peaceful settlement. There is experimentation and imagination and thought concerning new ways of getting disputes settled, but these ways have little to do with reason and persuasion and much to do with the application of force

This is not a trend that is easily channeled and kept to itself, and our lovely routine arbitration procedure is not so isolated from the world that it will not have to meet the same challenges that other supposedly routine processes are meeting in the world today.

We are part of the Establishment. The grievance procedure, of all things, is one of the working parts of the Establishment, and this part of the Establishment is no more immune to challenge than any other part.

I am not talking about the challenge of the younger generation, though I suspect that the younger generation, in both union and management ranks, is often impatient with our procedures and our approaches.

I am talking about pressures in the world that can put strains on the grievance procedure it has not yet had to meet. Such pressures are already appearing in the area of minority representation and minority grievances. In this area, problems are arising for which our bilateral grievance procedure, our leisurely approach, and our earnest desire to think through and correctly apply all the nuances of contractual language are inadequate.

Again, we face a curious combination of inflation and deflation, and the frustrations and resentments to which this combination gives rise do not make the orderly processes of the grievance procedure easy to follow and easy to protect. And we are in the presence, these days, of growing polarization of thought, of spreading hatreds and divisive fears, and these attitudes also are contagious.

I think this is a situation which, though it need not be cause for immediate alarm, does mean that we've got to start asking some hard questions. On this old frontier there is need for the return of some of the imagination, some of the inventiveness, and some of the deep concern that were present in the early years of grievance arbitration.

The questions which need asking are not questions which arbitrators can usefully ask by themselves. They are questions which all three parties must ask. They are not questions to which I have the answers. They are only questions which I think are important. And they are by no means all the questions in this area that are important, but just some that have occurred to me.

I want to ask you, seriously, whether or not it is still necessary for all grievances to be treated in the same manner and through the same procedures. We have experimented with expedited

procedures in some cases. (An example is the special safety procedures that have been established in the steel industry.) There are special procedures on the waterfront for getting quick decisions, where speed is regarded as more important than the substance of the decision (the night-time arbitrator who is summoned out of bed to get down to the docks quickly and settle a case right there).

Is it necessary for all types of cases to go through all steps of the grievance procedure before a final answer is determined? Is it necessary to have, in all kinds of cases, the opinions not only of local management and local staff representatives, but of top management and top staff representatives, and eventually of the top arbitrator? Would it be possible, if all you're trying to decide is whether the man did or did not punch the foreman in the nose, to have a local decision on a local, factual issue?

Is it necessary to allow all cases to be potential precedents? Is it necessary to write opinions in all cases? Are there not areas in which, by agreement, short-form decisions could be possible? The lawyers will understand what I mean by a *per curiam* type of opinion—a quick, one-sentence or one-paragraph opinion that will terminate a grievance which simply requires termination and which does not involve real basic issues of contract interpretation.

Is there an area in which there could be local arbitration—local *expedited* arbitration, if necessary—with the possibility of appeal if the surprise case comes along that does involve, in the opinion of one side or the other, a basic issue? The appeal in such a case might not be a matter of right but might resemble what we lawyers refer to as *certiorari,* with the topflight arbitrator, or possibly the topflight parties, deciding whether a local award should be appealed.

All of this could mean, of course, a new kind of screening: *directional* or *procedural* screening, if you will, with the parties giving thought to the nature of each grievance and to what that grievance needs in the way of procedure.

Again, it might involve a procedure we began to experiment with at Bethlehem: third-party intervention in the screening of cases, a system under which a representative of the umpire's

office can sit with the parties and give them the benefit of his advice as they jointly go through the docket of appealed grievances and try to separate the wheat from the chaff.

But my purpose here today is not to make suggestions but to raise questions. They are questions to which I do not know the answers, but which I think need asking. I hope that they will be asked by both management and labor.

Bob Fleming has proposed that a continuing conference on grievance arbitration should be established, involving labor and management representatives as well as arbitrators, to study on a national basis the institution as it is working and to see how it can be improved. I think there is much merit in that suggestion. But what I am really suggesting is the need for this type of study and inquiry by each company and each union in terms of their own special problems and needs.

We in this room and those whom we represent—the practitioners before arbitrators and the arbitrators themselves—are the custodians of a very precious thing: a process by which disputes are being settled by reason and persuasion rather than force and violence. It is a process which we dare not neglect.

We must nurture it, protect it, and develop it, and make sure that it continues to do its job. By design or by accident, by intent or by happenstance, we find ourselves in charge of this procedure. It is a trust which we must not fail.