

CHAPTER VIII
THE PRESIDENTIAL ADDRESS:
THE ACADEMY AND THE
EXPANDING ROLE OF NEUTRALS

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If time permitted I would address myself to three topics of major interest and concern. The first would be an expression of appreciation to our Canadian hosts. The second, and major portion, would be a reply to Lew Gill's introduction. Finally, I would express some thoughts on the Academy and the expanding role of neutrals.

As many of you know, the Academy had planned to meet this year in Atlanta but, because of labor difficulties in the hotel industry there, we felt it best to have a change of venue. We had previously planned to meet in Montreal in 1972, and we are delighted that, through the assistance of Harry Woods, we were able to move the date forward by two years.

It has been an altogether appropriate choice and delightful experience. Montreal is a city of great beauty and charm and historical interest. It is also a clean city, something that many of us south of the border had never experienced before. Moreover, we meet here in an atmosphere of confidence that vital services will go on without interruptions caused by labor strife, except in such marginal areas as the postal service and the police.

We are specially pleased to welcome, and be welcomed by, Mayor Jean Drapeau. To meet him is to understand how he is continually elected and reelected mayor of this great city by the largest majorities of any mayor where free elections are held.

We are very proud of our Canadian membership. They bring to the Academy a level of distinction which far outweighs their relative numbers. To mention just a few, Jacob Finkelman, a speaker at yesterday's meeting, is an old friend and a veteran mem-

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ber of the arbitration fraternity. He served for many years as chairman of the Ontario Labour Relations Board, and he is presently chairman of the Public Service Staff Relations Board, an independent tripartite tribunal which administers the basic labor relations law for all employees in the public service of Canada. Harry Arthurs, who participated in this morning's program, is professor and associate dean of the Law School of York University in Toronto. He is a distinguished arbitrator and a member of the UAW Public Appeal Board. Alan Gold, who joined the Academy last year, is associate chief judge of the Provincial Court of Quebec. He is a distinguished arbitrator and teacher and he is the Arbitrator in Chief of the Collective Labour Agreements between the Government of Quebec and its public employees. Bora Laskin is shortly to be installed as a Justice of the Supreme Court of Canada, the first member of this Academy ever to be so honored.

Harry Woods, long active in the Academy and a member of its Board of Governors, is a professor of industrial relations and, until recently, dean of the Faculty of Arts and Science at McGill University. He has written extensively on both the American and Canadian experience in labor relations, and he has served in numerous consultative capacities to the governments of Canada, most recently as chairman of the Prime Minister's Task Force on Labour Relations. The Academy is especially grateful to "Buzz" Woods who, on very short notice and late in the season, took on the difficult and thankless task of chairman of the Arrangements Committee for these meetings. He has done a magnificent job.

Turning to my second topic, since Lew Gill has hogged the platform for such an inordinate length of time, I shall be charitable and resist the temptation to reply to his introduction. Suffice it to say that his remarks were replete with half-truths; at least he might have spared me that half which was true. Surely, in his unkindest cut of all, when he reported that I once allowed 33 runs in the first inning of an interfraternity softball game, he should have realized that I had no support in the infield; much worse, I had no support in the outfield. Besides, our team never got its licks at bat; the game was called on account of darkness. Lew has been plotting this revenge for the past eight years, ever since the occasion when it was my privilege to introduce him to the annual meeting in Pittsburgh. In this age of confrontation

it is good that we find ways to relax tensions. Now that Lew has had his say, we may find that he is much easier to get along with.

In considering an appropriate subject for this occasion I confess that I have looked over the published proceedings of our past annual meetings in order to gain inspiration and hopefully to borrow here and there from previous presidential addresses, without overt plagiarism. I find that my predecessor's remarks conform to no particular mold but there are three recurring themes—the backward look, the forward look, and the defense of arbitrators against their critics. Under the last heading one recalls how vigorously Harry Platt, Russ Smith, and Bert Luskin have rallied to our defense against all enemies and detractors—foreign, domestic, and judicial.¹ John Larkin initiated the backward look with his review of "The First Decade."² Charles Killingsworth embraced a variation of the backward look, known as the revisitation.³ Our first president, Ralph Seward, has viewed our world from all perspectives. Addressing the fourth annual meeting in 1951, Ralph characteristically elected to speak on a topic of precise spatial and temporal boundaries, "Arbitration in the World Today." In 1957 Ralph looked forward to "The Next Decade." And in 1964, he turned back to "Reexamining Traditional Concepts."⁴ One sees the process of maturation at work. Tomorrow Ralph will probably address you on the topic, "Back to the Womb."

I shall be mainly concerned with the forward look. I would

¹ Platt, "Current Criticisms of Labor Arbitration," in *Arbitration and the Law*, Proceedings of the 12th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1959), vii-xix; Smith, "The Presidential Address," in *Problems of Proof in Arbitration*, Proceedings of the 19th Annual Meeting, National Academy of Arbitrators, ed. Dallas L. Jones (Washington: BNA Books, 1967), 74-85; Luskin, "Arbitration and Its Critics," in *Developments in American and Foreign Arbitration*, Proceedings of the 21st Annual Meeting, National Academy of Arbitrators, ed. Charles M. Rehmus (Washington: BNA Books, 1968), 125-136.

² Larkin, "Introduction: The First Decade," in *Critical Issues in Labor Arbitration*, Proceedings of the 10th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1957), viii-xvi.

³ Killingsworth, "Management Rights Revisited," in *Arbitration and Social Change*, Proceedings of the 22nd Annual Meeting, National Academy of Arbitrators, ed. Gerald G. Somers (Washington: BNA Books, 1970), 1-19.

⁴ Seward, "Arbitration in the World Today," in *The Profession of Labor Arbitration*, Selected Papers from the First Seven Annual Meetings of the National Academy of Arbitrators, 1948-1954, ed. Jean T. McKelvey (Washington: BNA Books, 1954), 66-75; "The Next Decade," in *Critical Issues in Labor Arbitration*, 144-150; "Reexamining Traditional Concepts," in *Labor Arbitration—Perspectives and Problems*, Proceedings of the 17th Annual Meeting, National Academy of Arbitrators, ed. Mark L. Kahn (Washington: BNA Books, 1964), 240-251.

like to consider some problems and trends of the present and the very near future. I call it "The Expanding Role of Neutrals," but I fear that it were better described by the mundane title, "Supply and Demand of Arbitrators." I do so in a particular context. Many of you in this audience have complained of a shortage of arbitrators—or, I should say, a shortage of competent, acceptable arbitrators. This is a more polite expression; it also defines a much more difficult problem. You must have both; you can't have one without the other.

I am quite sure that there is a large reservoir of highly competent, unacceptable arbitrators in the land. And at least one voice has been heard to say that we harbor a large supply of acceptable, incompetent arbitrators. But it should be noted that this statement, while emanating from auspicious authority, was self-proclaimed as "A Dissenting View."⁵

In speaking of supply and demand I tread on dangerous ground. I was a student of economics in my day, and I even taught the subject in several academic institutions of fair repute. I still subscribe to the *American Economic Review* although I have hardly understood a word they have been saying for 20 years. (In fact, they seem to have abandoned the use of words.) There are some who will deny that there is any shortage of arbitrators. They say that all the requests for the appointment of arbitrators and the scheduling of hearings are being met. They see many competent and experienced arbitrators who are readily available for more cases than they are presently handling. They point out that in the market place supply and demand reach some kind of equilibrium at a price. Perhaps, but the price may be too high—in dollars, in quality, in the willingness to put up with delay. I think it is time to take a fresh and serious look at some of the trends and forces which are shaping the supply of and demand for neutrals in the resolution of labor-management disputes. I suggest that we may face, in the very near future, a critical shortage of arbitrators who, by traditional standards and customs, are acceptable to management and labor.

Supply of Arbitrators

Turning first to the supply side of the equation, I know of no statistics on the overall numbers of persons engaged in the arbitra-

⁵ Paul R. Hays, *Labor Arbitration, A Dissenting View* (New Haven: Yale University Press, 1966).

tion of labor disputes. The panels of the American Arbitration Association and the Federal Mediation and Conciliation Service include several thousand, but most of these are names on a list of people who serve very occasionally, or perhaps not at all. Still there are hundreds, perhaps one or two thousand, who do some arbitration of labor disputes. There are several hundred, although probably well under a thousand, who handle a substantial number of arbitration cases, meaning somewhere around 10 to 20 a year. There are probably not more than 50 or 60 who serve as arbitrators on a full-time or near full-time basis. This is an aging group; there is a real problem of replenishment through new recruits.

Joseph Murphy, vice president of the American Arbitration Association, has furnished me certain figures for the past three years which illustrate the point. The total number of individuals appointed as arbitrators in AAA labor cases was 398 in 1967, 416 in 1968, 443 in 1969. The total cases handled increased each year, from 2,356 in 1967 to 2,959 in 1969.

This compilation also shows the number of AAA-designated arbitrators by age groups and the number of cases handled by each group. Approximately 30 percent of the arbitrators appointed by the AAA in 1967 were 60 years of age or over. In 1968 the figure was 32 percent; in 1969 it was 37 percent. The arbitrators aged 50 to 59 constituted 42 percent of the total in 1967, 38 percent in 1968, and 34 percent in 1969. Arbitrators in their forties held to a relative constant proportion of the total, 20 to 22 percent. There were 27 arbitrators below 40 years of age who were appointed by the AAA in 1967, 30 in 1968, and 34 in 1969, approximately 7 percent of each year's total.

The arbitrators of "high middle age" in Mr. Murphy's compilation, those aged 60 and over, heard 28.8 percent of the cases in 1967 and 40.4 percent in 1969. Those aged 50 to 59 heard 49 percent of the cases in 1967, 38.3 percent in 1969. Those youngsters under 50 heard 22.2 percent of the cases in 1967, 20.7 percent in 1969. There were four arbitrators under 35 years of age in 1969 who handled a grand total of five cases, or 1.2 cases per man or woman as the case may be.

One other point to be made from these statistics—within each age level we find that a handful of arbitrators heard a very large

proportion of the cases. Of the total of 443 AAA-appointed arbitrators in 1969, 45 heard 1,306 cases, or 44 percent of all the cases. Of the 165 arbitrators aged 60 or over, 20 arbitrators heard 552 cases, or 46 percent of the total for this group. The figures point to a similar disregard of equitable distribution among the septua- and octogenarians. There were 26 of these, but 56 percent of their cases were heard by five of their tribe.

I do not have similar figures for the Federal Mediation and Conciliation Service or other designating agencies, or for the arbitrators who serve by direct selection of the parties, but there is every indication that similar trends obtain. The FMCS advises that the great bulk of the cases are handled by the "oldtimers" on the roster.

The principal qualification for membership in the National Academy of Arbitrators, aside from impeccable character, is "substantial and current experience as an impartial arbitrator of labor-management disputes." I asked Rolf Valtin, chairman of the Membership Committee, to review the age distribution of persons elected to membership in the recent past. Without going into detail, the point to be made is that a substantial number of applicants, and an even larger proportion of those who become members of the Academy, are drawn from the middle and upper age groups. Of 55 new members in the past four years, 16 were in their fifties and nine (16 percent) were aged 61 or over. The ages ranged from 31 to 74; the average was 48.⁶

Many of us have thought that the most fruitful source of new arbitrators would be the assistants to major umpires who enter the field by the traditional route of apprenticeship. This is true of some of our ablest young colleagues, but the numbers are very small. Only four of the 55 new members in the past four years came from this background.

The Academy, acting in cooperation with the AAA and the FMCS, has undertaken several training programs designed to bring new faces into this field. In this we have worked closely with leading representatives of management and labor in several

⁶ The age distribution of new members parallels rather closely that of the total Academy membership in 1952. A survey in that year, with 112 members reporting, shows 12 percent under 40 and 16 percent who were 60 or over. The average age was 49.7. "Survey of the Arbitration Profession in 1952," in *The Profession of Labor Arbitration*, 176-182.

large cities, enlisting their cooperation in the selection of candidates and the encouragement of acceptability. This has been done in Chicago, Cleveland, and Pittsburgh, and a program is just getting under way in St. Louis. For the most part the results of these programs have been very disappointing. And it has been the judgment of those who were most instrumental in these programs that these failures do not flow primarily from a lack of competence among those who have expressed great interest in entering the field of private labor arbitration. Rather, they reflect the continuing propensity of management and labor representatives to reject those names with whom they are not familiar and to select that same old, tired group you see sprinkled around this room. This, I submit, is a luxury you cannot long continue to enjoy.

The Demand

Let us then turn to the factor of demand. All indications seem to point to an increase in the number of arbitration cases from year to year. Both FMCS and AAA figures show a steady increase. In the three years which I have referred to in the discussion of the age distribution, the total AAA cases increased 26 percent, from 2,356 in 1967 to 2,959 in 1969. The same trend appears in the records of the FMCS. The volume of appointments of arbitrators increased 21.4 percent in the past three years. It has more than doubled in the past decade, from 1,756 in fiscal 1959 to 4,175 in fiscal 1968 (the year ended June 30, 1969). The number of awards issued increased, although not in steady progression, from 1,226 in 1959 to 2,309 in fiscal 1968.⁷ Several state agencies report similar trends. The statistical definitions of case units differ, but consistent usage within each agency points to a similar conclusion. Further, the lesson of the past is that grievance arbitrations tend to increase in any period of recession.

These are the trends in the arbitration of contract grievances in the private sector. There are many other types of service which neutrals are called upon to perform, chiefly mediation or fact-finding, or some combination of the two. There has been a great deal of discussion from time to time of enlarging the uses of voluntary arbitration of new contract terms. We have a session devoted to new contract arbitration on tomorrow's program,

⁷ Federal Mediation and Conciliation Service, *Twenty-First Annual Report*, Fiscal Year 1968 (Washington: U.S. Government Printing Office, 1968), 49.

including an interesting case study of the use of advisory arbitration by United Press International and the United Telegraph Workers.

Great interest has also been shown in the uses of neutrals in various consulting roles dealing with long-range problems through procedures hopefully designed as alternatives to crisis bargaining.⁸ Consideration has also been given of late to the application of labor mediation skills and the concepts of "industrial jurisprudence" to community and campus disputes.⁹ And I would note that the recruitment of college and university presidents threatens to become one of the major causes of attrition in the ranks of professional arbitrators.

In qualitative terms, these experiments and programs are of great interest and significance. For the most part, however, they have called upon the services of a small handful of extremely talented arbitrators and mediators. They have had little impact on the overall problem of the supply and demand for the services of neutrals, and they can hardly be viewed at this time as the wave (though perhaps a wavelet) of the future.

Public Employee Organization

What is new under the sun is the development of union organization and collective bargaining in public employment. This is clearly the most significant development in American labor relations in the decade of the 1960s.

More than 12 million persons are now employed by federal, state, or local governments, half again as many as there were 10 years ago, twice the number in 1950. It is estimated that by 1975 total government employment will be approaching 15 million, with much the greatest increases in state and local government.¹⁰ Public employees constitute the largest work force in the country.

⁸ Cf. Neil Chamberlain, David L. Cole, George W. Taylor, John T. Dunlop, and Robben W. Fleming, "Neutral Consultants in Collective Bargaining," in *Collective Bargaining and the Arbitrator's Role*, Proceedings of the 15th Annual Meeting, National Academy of Arbitrators, ed. Mark L. Kahn (Washington: BNA Books, 1962), 83-116; George H. Hildebrand, "The Use of Neutrals in Collective Bargaining," in *Arbitration and Public Policy*, Proceedings of the 14th Annual Meeting, National Academy of Arbitrators, ed. Spencer D. Pollard (Washington: BNA Books, 1961), 135-167.

⁹ Samuel C. Jackson and Arthur M. Ross, "The Application of Industrial Jurisprudence to Emerging Conflict Areas," in *Arbitration and Social Change*, 21-54.

¹⁰ George H. Hildebrand, "The Public Sector," in *Frontiers of Collective Bargaining*, eds. John T. Dunlop and Neil W. Chamberlain (New York: Harper & Row, 1967), 125.

The number of public employees organized in unions, or in professional associations which are unions in everything but name, has been increasing at a much more dramatic rate. A few years ago union organization was virtually nonexistent among government employees, outside of the postal service and a few special units such as the Government Printing Office, the TVA and municipally owned utilities, and local transit systems. Today the number is approaching two million. There is substantial organization of state and local government employees in almost all cities of significant size. The American Federation of State, County and Municipal Employees is the fastest growing union in America. Close rivals may be the National Education Association and the American Federation of Teachers.

During the past few years the Federal Government, about one third of the states, and many large municipalities have, by statute, ordinance, or executive order, declared the right of public employees to organize and, in varying degrees, to bargain collectively with their employers. Legislation is pending in several major states. With or without enabling statutes, public employee organization and collective bargaining is on the march; it will sweep across the land like an avalanche (if avalanches may be said to march or sweep).

We have witnessed a revolution in the whole concept of management-labor relations in public employment. In 1958 Charles Killingsworth, addressing an annual meeting of the Academy on the subject of "Grievance Adjudication in Public Employment," pointed out that the whole framework of institutional arrangements which are the prerequisite conditions of a system of collective bargaining in the private sector was completely lacking in most of government service. Looking to the future, Killingsworth stated:

"Even if the opposition of courts and legal officers could be overcome in other jurisdictions it seems unlikely that conventional arbitration would be widely adopted in the absence of other basic changes in the structure of industrial relations in government."¹¹

Eli Rock, commenting on Killingsworth's paper, supported these conclusions, stating: "Obviously, real arbitration is not in the

¹¹ Killingsworth, "Grievance Adjudication in Public Employment," in *The Arbitrator and the Parties*, Proceedings of the 11th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1958), 149-163, at 158.

cards on any extensive scale for the immediate future.”¹² Nine years later, at the 1967 meeting of the Academy, Eli recognized that

“The ‘basic changes in the structure of industrial relations in government’ are now here, and, predictably, the story regarding grievance arbitration in this field has also been fundamentally altered.”¹³

Even then, a scant three years ago, only 10 states had passed enabling legislation which recognized, in any significant degree, the right of public employees to organize and bargain collectively. Among those which had no such legislation were New York and New Jersey. Since then both states have enacted comprehensive legislation on the subject, and both have established special agencies for the administration of these laws. New York’s Public Employment Relations Board (PERB) and New Jersey’s Public Employment Relations Commission (PERC) are actively engaged in the resolution of public employee disputes, primarily through the appointment of ad hoc mediators and fact-finders in a volume which may soon exceed the designation of arbitrators in these states by the AAA and the FMCS combined.

It is here that we must really wrestle with the question of supply and demand. Our previous appraisals, based on experience in the private sector, are already obsolete. In the public sector we are in a wholly new ball game.

In virtually all jurisdictions in the United States, though not in Canada, public employees are legally forbidden to strike. Where the right of organization and collective bargaining (or negotiation, or consultation) is recognized, there is a concurrent acceptance of the necessity to provide alternatives to the strike weapon. The universal answer has been some form of third-party intervention—mediation, fact-finding, or arbitration. This means a tremendous increase in the demand for the services of neutrals in public employment disputes. This may soon approach, perhaps surpass, the entire volume of demand for similar services in the private sector.

In terms of the immediate priorities, the pressing need for the

¹² *Id.* at 166.

¹³ Rock, “Role of the Neutral in Grievance Arbitration in Public Employment,” in *The Arbitrator, the NLRB, and the Courts*, Proceedings of the 20th Annual Meeting, National Academy of Arbitrators, ed. Dallas L. Jones (Washington: BNA Books, 1967), 260-281, at 261.

services of neutrals in public employment disputes is mediation, not arbitration. Traditionally, mediation has been a function of the paid staffs of state and federal agencies. That function in the public sector is being performed in large measure by the appointment in the hundreds of ad hoc mediators and fact-finders on a per diem basis. Michigan and Wisconsin have assigned the administrative responsibility in relation to collective bargaining and dispute settlement in public employment to existing state mediation agencies. New York and New Jersey have established new agencies for this purpose. In all cases, however, these agencies will probably draw heavily on outside personnel to supplement their own staffs in mediation and fact-finding assignments. Not only is the volume too great to be handled by staff mediators, but it is highly seasonal. School teacher cases, in particular, are geared to budget submission dates. Assignments of mediators and fact-finders in these peak periods run into the hundreds. It is inevitable that appointing agencies at all levels will call upon experienced neutrals in private practice or employment, which for the most part means experienced grievance arbitrators. But much of the need is being filled by new faces, many with little or no prior experience. Many of the arbitrators are unable or unwilling to take on this type of activity. They are too busy, their schedules too inflexible to accept such appointments. It means working odd hours, on very short notice, for unpredictable periods of time in an unfamiliar role, often at considerable sacrifice in their accustomed standards of remuneration. The situation is analagous to the postwar period of the latter 1940s when, with the establishment of grievance and arbitration provisions in collective bargaining agreements generally, it became necessary to enlist the services of private arbitrators to handle the volume of grievance arbitrations. We are in the process of developing a new corps of private mediators and fact-finders in public employment.

Mediation, Fact-Finding, and Arbitration in the Public Sector

I would like to make a brief comment about each of these techniques—mediation, fact-finding, and arbitration—with particular reference to their uses in public employment disputes. I do so with considerable trepidation. I have had a fairly intensive baptism in the arbitration of grievance disputes involving pub-

lic school teachers, but limited personal experience in the resolution of new contract disputes of public employees. My exposure is sufficient, however, to offer a word of warning to those of us who are disposed to deliver lectures on this subject after serving as a neutral in one or two public employee disputes. I call it the Martini Principle. It is well known among scholars in the field that one martini is not enough, two martinis are too many, but three martinis are not nearly enough. So too with public employee disputes. One case is not really enough to qualify as an expert. Those who have had two cases seem quite prepared to articulate their expert knowledge at great length and with little or no provocation. I think one has to have at least three such assignments before humility sets in.

It may be argued that the arbitrators should stick to their knitting and stay out of this mediation activity. Some will assert that mediation is unteachable, that success as a mediator is rooted in the genes and chromosomes, that mediators are born, not made. The complaint is made that arbitrators take too long in scheduling hearings and getting their decisions out; the last thing they should do is to take on a new activity. Above all, it is argued, arbitration and mediation should be kept in separate compartments, and the best way to do this is to separate the personnel.

I would agree that experience as an arbitrator does not suffice to make a good mediator, and vice versa. Indeed, one of the first tasks of an arbitrator-turned-mediator is to discard his ingrained propensity to inject his own conclusions as to the rights and wrongs of conflicting claims into the arena of dispute. Nothing is more readily calculated to terminate his usefulness in the mediation role.

Mediation is the more demanding job. By comparison, the arbitrator has it made. He arrives on the scene cloaked with authority to direct the proceeding and to decide the issue on the basis of such evidence and argument as the parties choose to present. The mediator must create anew in each case the basis of confidence in his competence and impartiality. He must analyze the power structure on each side and gain access to the real centers of authority—which is often much more difficult in public employment disputes. In a hundred ways he explores and sifts the issues in terms of their relative importance to each side; he assists the parties in appraising the consequences of this or that

course of action, in finding alternatives, in advancing and backing off. He brings to bear a subtle sense of timing and all the qualities of inner chemistry and personality which his trade demands. But all is not mystery or magic. There are many do's and don'ts in mediation which can be learned, not only by arbitrators but also by experienced mediators who are newly entering the field of public employee disputes. I think this has been demonstrated in the training programs which the Academy has sponsored in the recent past.

I think it is perfectly possible to combine mediation and arbitration functions and skills in the same persons and to keep the roles separate as occasion demands. I have seen it work well in the New York State Board of Mediation, which regularly provides mediation and arbitration services by its own staff, and I believe the fears which this combination has generated in some quarters are wholly unwarranted. Certainly the alumni of the State Mediation Board are to be counted among the most prominent arbitrators in the New York area. Some of the most illustrious arbitrators in this Academy are also among the country's most outstanding mediators. There are many, of course, who would not feel comfortable in this combination of roles. In general, however, I firmly believe that the skills and insights of arbitrators and mediators are complementary rather than opposed and that experience in both is an asset to either.

This leads me to make one observation on the role of neutrals as fact-finders and as arbitrators of new contract terms. While mediation is viewed as a strange and separate skill, it is often assumed that fact-finding is a simple extension of the arbitrator's customary role—to hear the parties in a structured and dignified setting, to receive and to weigh the evidence, and to arrive at a conclusion which, in the fact-finding proceeding, becomes a recommendation rather than an award. There are, of course, real life situations in which this description is reasonably accurate. It sometimes happens that the dispute lends itself to purely factual analysis and the facts point to a clear and proper solution. It is also important in some situations that fact-finding be approached in this manner in order to deter the parties from making a mockery of mediation efforts by holding out for fact-finding purely as a bargaining strategy. Some mediators tell me they have wielded the threat of the unpredictable and possibly dire

consequences of fact-finding as a major weapon of pressure for a mediated settlement. But I suggest that in many, probably most, situations the conduct of a fact-finding proceeding in accordance with these premises is the surest method of failure in the given case and the rendering of the fact-finding process a useless device.

The theory of "judicial" fact-finding flows from three related assumptions, all of them dubious if not basically false. One is the assumption that if the pertinent facts are made known to the public through the offices of objective and impartial persons of standing in the community, public opinion will then be brought to bear and work its influence toward bringing the parties together. I remain extremely skeptical of this proposition. I believe experience demonstrates that the public does not assess the facts or even come to know what they are, that it is the recommendation of the fact-finder, not the facts he finds, which has any influence on public reactions, and the impact of public opinion is generally pretty feeble in any event. It should be recognized, however, that public opinion may be a considerably greater force in local disputes, especially those involving teachers and municipal employees, than it is in the national and regional disputes such as those that are subject to the emergency procedures of the Railway Labor Act or the Taft-Hartley law.

I am equally cynical concerning the basic assumption that there is a body of standards which can be set forth as the proper criteria for the determination of wages and other conditions of employment, and the corollary assumption that a careful sifting of the relevant facts in accordance with these standards will point the way to a proper recommendation (or decision) which should govern the parties and resolve the dispute. Lew Gill, in his gracious introduction, has credited me with setting forth a rational set of criteria for wage determination in the report of a railway emergency board under my chairmanship. Would t'were true, not just for the great public service which this might represent, but also because it would be nice to think that Lew Gill spoke truly, at least in the one and only instance in which he had anything nice to say about me. Alas, I must take issue. I would assert it as a defensible proposition that one could take any of the many listings of the criteria of wage determination, from Sumner Slichter on down, and justify almost any decision within

a wide range from low to high, depending on his manipulation and weighting of the various criteria which are available. The process of fact-finding in most new contract disputes is essentially an extension of the mediatory process, in which the fact-finder seeks to fashion a recommendation which is acceptable to the parties, or at least within the area of their expectations.

Finally I would suggest that, rather than setting fact-finding apart from arbitration of *new contract terms*, this analysis points to an essential similarity. For it can be equally fallacious to assume that the arbitration of grievances and the arbitration of new contract terms are one and the same process. The grievance umpire interprets and applies an agreement. In most cases he must call it black or white, yes or no, and he does so with no concern or predilection as to which side should win. In a new contract arbitration, especially a wage determination, the arbitrator operates in a different ball park. The notion that he weighs the facts against a set of objective criteria to reach a correct answer is in all but the rarest instances a fiction. He is engaged, I suggest, in essentially the same type of operation as the fact-finder, and he seeks a solution which is acceptable for the particular parties in the particular context and circumstances of their relationship. It seems to me that many of the objections to combining mediation and arbitration functions are grounded in a failure to make this essential distinction between the arbitration of disputes over grievances and new contract terms.

In voicing these heresies, I believe I express substantial support for the views expressed more eloquently and effectively by Bill Simkin in his address to the meeting of Academy members on Monday.

Grievance Arbitration in the Public Sector

Grievance arbitration in public employment is now in its infancy. There is every reason to believe it will soon become a giant. The notion that unilateral determination of grievances is incompatible with bilateral determination of the content of agreements under which the grievances arise is ingrained in American labor relations. Arbitration of grievances as the counterpart of the no-strike agreement will carry over to the no-strike law. Further, as unionization and collective bargaining increase in public employment, the scope of bargainable issues and arbitrable claims will also expand. The concept (some call it the

myth) of sovereignty of governmental agencies as a fundamental barrier to collective bargaining by public employees is fast disappearing. I doubt if it will long have any standing at all as a bar to the delegation of authority to an arbitrator to interpret and apply the agreements reached.

There is an inherent dynamic in the collective bargaining relationship which fosters this expansion. Unions have a way of becoming somewhat recalcitrant in areas which are fully accepted as proper subjects of bargaining when employers refuse to consider their demands in relation to the marginal or excluded areas. Questions of workloads and production standards may be reserved to the unilateral determination of management, but what happens when a grievance is filed over the disciplining of employees who fail to measure up? Where the concept of seniority gains recognition, employers may find it very difficult to preserve their unrestricted authority to determine qualifications and ability. The distinction has been made in both private and public employment between the reserved right of management to make decisions in such matters as manning, work assignments, and methods of operation, and the right of the union to bargain and to grieve over the *impact* of such unilateral decisions. It does not require much experience or even reflection to realize what an uncertain and insecure barrier is thereby erected between the two halves of this dichotomy.

I believe we shall find that the issues in public employee grievance arbitrations are more difficult than those in the private sector. The relationships are new. Contractual usages are less developed and defined. In the eyes of the parties, much more is at stake. The interrelations between different provisions and the implications of one for the other have not been fully anticipated or thought through. The discovery of mutual intent is often very difficult. On-the-site management—school principals and agency officials—find it very difficult to adjust to the whole idea that their discretion has been drastically limited. Questions of arbitrability are frequent and troublesome. The definition of boundaries between the subject matter of bargaining and the areas of reserved authority is of vast importance but is frequently imprecise. Professional and semiprofessional employees do not accept the traditional concepts of managerial prerogatives. Teacher organizations, for example, assert the right to bargain

over matters of educational policy and method. Even if boards of education resist these demands, the lines of demarcation between policy and working conditions are difficult to draw.

The question of obligations incurred in the implementation of contractual commitments may draw the arbitrator quite deeply into operational problems. To cite but one example, one of the most important concerns of public school teachers has been the limitation of teaching hours and the relief of teachers from onerous administrative assignments such as cafeteria and corridor patrol. The 1965 agreement of the Board of Education and the United Federation of Teachers in New York City provided a "basic maximum" of 25 teaching periods, five preparation periods, and five administrative periods per week for teachers in junior high schools. It also provided that "Teachers who are relieved by school aides of administrative assignments shall not be assigned to teaching duties in lieu of such administrative assignments."

Grievances were filed in several junior high schools alleging that the Board had violated the agreement by excessive assignments of teachers to fill in for absentees. Such an assignment, in itself, was not deemed a violation; it was traditional practice for a teacher, during a nonteaching period, to take over the class of an absent teacher when no substitute teacher was available. But the record in these cases indicated a substantial increase in the frequency of these assignments. The Board argued that the increase was attributable to an increase in teacher absences and "an unprecedented shortage of qualified personnel persons available or willing to serve on a per diem basis." The shortage of substitutes was doubtless influenced by the reluctance of some teachers to go into certain schools and neighborhoods and, ironically, by the increased demand and the greater attraction of full-time teaching under improved conditions brought about through collective bargaining.

The ultimate question which these grievances posed was whether the Board, in good faith, was doing all that could reasonably be expected to obtain substitute teachers. This was a major point of controversy. The Board relied in part on the necessity, recognized in custom and contract, of exceptional treatment in cases of "emergency," which it defined as "an unforeseen circumstance calling for immediate action." The arbitrator held that

"An emergency is not only an unforeseen condition but one which is beyond the reasonable powers of the Board to foresee and prevent." In the case at hand, the arbitrator held that the problems faced during the current school year were not within the Board's powers to predict and control; hence, there was no violation of the agreement. He added, however, that

"Given this experience, however, the Board stands forewarned. It is the responsibility of the Board to find ways to implement the contract provisions governing teacher programs and to minimize the incidence of additional coverage assignments. If this responsibility entails additional staffing, revised hiring and recruiting methods or new administrative devices, the Board is nevertheless obligated to carry out its contractual commitments. It must be recognized, however, that these are obligations which, in many instances, involve basic organization and planning and can only be carried out over a longer period than the immediate school term or year in which the problem becomes manifest."¹⁴

He then offered up a silent prayer that if the issue arose in a subsequent year, it would be referred to one of the other arbitrators on the panel.

The Role of the Academy

What, then, should be the role of the Academy in this area of burgeoning activity? The principal contributions, of course, will come from individual members rather than the Academy as an organization. Academy members have been deeply involved from the start. They are being called upon in great numbers to serve as mediators, fact-finders, and arbitrators in public employment disputes. Some of them are serving as leaders of local, state, and federal agencies actively engaged in the resolution of management-labor disputes—Morris Slavney in Wisconsin, Bob Howlett in Michigan, Bob Stutz in Connecticut, Arvid Anderson and Eva Robins in New York City, and many others. We take pride in the fact that our membership also includes Secretary of Labor George Shultz, his immediate predecessor, Willard Wirtz, Deputy Under Secretary George Hildebrand, Assistant Secretary Arnold Weber, and such distinguished Canadian officials as Jacob Finkelman and Alan Gold.

Of the greatest importance in this historic development is the work of special commissions and advisory groups which have pre-

¹⁴ Opinion of the writer, dated Sept. 2, 1966.

pared reports and recommendations on public policy and legislation in public employment labor relations in several major cities and states.¹⁵ Robert Stutz served as chairman of such a commission in Connecticut, Martin Wagner in Illinois. The Governor's Committee on Public Employee Relations in New York State included George Taylor, chairman, David Cole, John Dunlop, and Fred Harbison. Saul Wallen and Peter Seitz served as public members of the Mayor's Tripartite Panel in New York City, which laid the groundwork for the establishment of the Office of Collective Bargaining. In Michigan the Governor's Advisory Committee on Public Employee Relations was composed of Russell Smith, chairman, Gabriel Alexander, Edward Cushman, Ronald Haughton, and Charles Killingsworth. The Consultants' Committee which drafted the employee relations ordinance for Los Angeles County was composed of Benjamin Aaron, chairman, Lloyd Bailer, and Howard Block. You will recognize all of these names of members of this Academy.

The Academy, nationally and in the regions, will serve as a forum for discussion of policy and practice and the sharing of experience among the many members who are being called upon to serve as neutrals in dispute settlement. But it seems to me that we should do more than this. At the outset of my term of office I announced as a principal concern the question of the Academy's response to the expanding demands for the services of neutrals in dispute settlement, particularly in public employment. It seemed to me of urgent importance that we examine the means and take the steps required to make the Academy as an organization and our members as individuals of greater usefulness to the parties and the agencies of government involved in public employee disputes.

To this end we have created a Special Committee on Disputes Settlement in Public Employment under the chairmanship of Eli Rock. The report of this Special Committee for the past year will be included in the published proceedings of these meetings. I am grateful to the Committee, and to Eli Rock in particular, for the work they have done, and I am happy to endorse their proposals. I have been assured from the start by our president-elect, Jean McKelvey, that the Committee will be continued.

¹⁵ See Russell A. Smith, "State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis," 67 *Mich. L. Rev.* 891, 891-918 (1969).

The principal emphasis of the Committee has been on the training of Academy members, and many nonmembers as well, in the new roles of mediation and fact-finding in the public sector for which many of us are completely unprepared. Two years ago Eva Robins led a pioneering venture in this area in New York City, where, as a member and deputy chairman of the Office of Collective Bargaining, she conducted a series of six weekly seminars on the techniques of mediation. It was my thought when we first discussed this project that perhaps six or eight of the New York arbitrators would be interested in attending a few such sessions. This was far short of the mark. About 40 persons signed up for these seminars, which had to be run in two separate series. The central focus was on mediation techniques, but attention was inevitably drawn to the special problems encountered in public employment disputes. Experienced mediators in the private sector as well as total newcomers to mediation found this an extremely useful program.

During the past year, under the aegis of this Special Committee, sometimes with joint sponsorship of other agencies, intensive training sessions have been held in several of the regions. Over this past weekend, here in Montreal, the Academy has conducted a series of workshops in the techniques of mediation and fact-finding with special emphasis on public employment. This was an "extra-curricular" session, independent of the program of the annual meeting. I believe it was extremely successful and well received, and I would hope that similar programs will become a part of the official agenda of future meetings. I think that we have demonstrated a willingness to share whatever expertise we possess in the resolution of labor-management disputes with others who are entering the field. More important, I think we have shown a realization that our most important task at this stage is not to teach others but to learn.

This is a bare beginning. The Committee's report points to other areas of interest and potential service which we have just begun to consider. These include problems of public policy and procedures, the use of neutrals in representation questions and bargaining unit determinations, and the special problems of arbitration of grievances and new contracts in the public sector.

I do not suggest that arbitrators should abandon their way of life or livelihood, or that the Academy should change its basic

character. But as the sole professional organization of experienced neutrals outside of government service, I think the Academy has an obligation to give major attention to this expanding field. I would also urge our members individually to make themselves available for some of these assignments. Their services are needed and the experience is rewarding. At the same time we should view the appearance of so many new faces in this field as a healthy development. These people, now serving largely as appointed mediators and fact-finders, will be called upon soon as arbitrators of both interest and grievance disputes. They will become known to the parties and to union and management counsel operating in both the public and private sector. In the long run this may prove to be the most fruitful source of new recruits among the arbitrators to replenish our vanishing tribe.