CHAPTER I

THE PRESIDENTIAL ADDRESS: THE ROLE OF THE ARBITRATOR'S WIFE

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I'm not accustomed to polite introductions, having been cut up by Jim Hill and others, and I don't know quite how to react. One possible correction: I heard some angry murmuring when Jean McKelvey suggested that I was the major league baseball arbitrator as of 12:30 today. That might have carried the implication that I had just been appointed. The opposite was intended—that I *had* been up until today and, as far as I know, I still am. But I'm watching the phone anxiously.

Jean said she was passing over the subject of women's lib this time. I regret to tell you that I am not passing it over. I know better than to tackle that subject head on, since there's no way for a male to escape unharmed in that kind of an encounter. But it has occurred to me that there is one aspect of the relationship of females to the arbitration process which has been very badly neglected and I'm quite sure has never even been mentioned in the entire history of the Academy meetings, and, so help me, I'm going to deal with it today—and that is the role of the arbitrator's wife in the process. All of what I have to say is without prejudice to the role of the arbitrator's husband, where applicable.

In the hallowed tradition of arbitrators approaching sensitive subjects, I will limit myself to posing questions rather than venturing answers. Hopefully, these questions will lead to constructive research and discussion and will result in a minimum of divorce proceedings against members of the Academy, present company included.

Proceeding in the logical fashion one should employ for such an important study, let us first consider the role of the wife before the hearing. Assuming that the arbitrator is going to drive to the hearing and that the wife can shake loose to go with him,

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should she do so? Is it helpful for the arbitrator to have a companion en route to the hearing? Or does he prefer to brood silently or perhaps sing loudly to himself off-key, or listen to the yammering of disc jockeys and the so-called music as he drives?

Assuming that the wife does go along, other questions arise regarding the conduct of the trip. Should the wife drive? Does that depend on whether the arbitrator has a hangover? If she drives, should he study the case file, or some other case file, or sleep, or criticize the wife's driving technique?

Well, I promised not to give answers, but it must be obvious that in this, as in most of the other areas to be covered, the time-honored cop-out applies; each case must be decided on the merits of the individual wife and the arbitrator, their relationship in general, and their respective frames of mind on the day in question.

Having arrived at the hearing, the next vital question is whether the wife should sit in on the hearing, in whole or in part. (I mean the hearing, not the wife.) If she does sit in, what if she cannot restrain herself from breaking in and asking questions? Should the arbitrator silence her—or try to? What should he do if she bursts out laughing at ridiculous testimony? Or at ridiculous rulings by her husband?

Other problems, many unforeseeable, may of course arise if the wife attends the hearing. To mention only one as illustrative, and this is the only reference to gamesmanship in the whole paper: Suppose the arbitrator decides, on the spur of the moment, to execute the "Calculated-Confusion Ploy." As you all know, this ploy involves stating his understanding of the contentions of both sides, and stating it in such a garbled and inaccurate way that the parties will be terrified into calling a recess and settling the case. The wife, not tipped off in advance, may register dismay at this show of ineptitude on the part of her husband, but even if she does not, it may lead to an ugly domestic scene afterwards, as the arbitrator tries to convince her that he was doing it on purpose—especially difficult if, as is likely, the ploy came off disastrously. At worst, it may become clear under the wife's searching criticism that the arbitrator was in fact just as confused as he pretended to be.

Assuming that she does not attend the hearing or leaves in

disgust shortly after it begins, should they meet for lunch? Should she encourage him to have a martini if he appears unduly depressed over the morning's proceedings? Should she tell him if she has made lavish purchases during the morning? Or has been given a parking ticket? Is this a good time to bring up domestic problems, to get his mind off the frustrations of the hearing?

En route back home, should the wife discuss the case with her husband? If she has sat in on the hearing, this will be inevitable, although her comments may have more to do with the personalities on display than with the duller aspects of the case. Is it prejudicial if she observes that certain of the witnesses were cute, or obnoxious, or incoherent? If she hasn't heard the testimony, should the husband sound her out for her views? Will they be prejudicial, and if so, against which side—the one she is espousing or the other? If the arbitrator disagrees with her reactions, should he say so and disrupt the harmony of the trip, or keep quiet and simply write it up the other way when he gets home? What if the wife happens to see the decision later and wants to know what was wrong with her theory of the case?

These last problems are, of course, closely parallel to the general problem of whether the arbitrator should try out his reasoning for size on the wife when preparing a decision, whether she has attended the hearing or not. Peter Seitz has immortalized in poetry—which I'm not going to read—the traumatic effect on the arbitrator when his wife and children will not listen to him as he tries to explain his thinking on a case.

Assuming, though, that the wife is willing to listen, what should be her attitude as the husband's theory unfolds, assuming that she has a choice and that the narrative is not so obscure or complicated that she can't control her reaction? Should she assume an expression of eager interest, or deep thought, or impatience for him to get to the point, if any? When he finally finishes his version of the issue and his reasoning, should she express an opinion? Does that depend on whether he asks for it? Assuming he does ask for her views, how can she tell if he really wants them or merely wants confirmation of his own opinion? If she has no opinion, should she say so or just make one up to be sociable? If the case is so dull that her attention has wandered and she can't remember what the question was, should she ask him to repeat? Presumably, that's the last thing she wants him to do. If she has a

strong view, should she let fly with it, suggesting that only a real idiot would have any trouble with that kind of case?

Once the opinion is on paper, with or without prior wifely assistance, if the arbitrator shows it to her, should she boggle over spelling, poor grammar, and unintelligible sentences, or should she limit herself to the grand sweep of his reasoning, if any?

That brings us to the really critical question: the state of the arbitrator's ego. Does it need repairing, either permanently or because of some momentary disaster in his career? If so, should she tell him that his lousy draft is splendid? Consider, however, what it will do to his sagging ego when he gets the reaction of the parties after issuing it. Is his ego, on the contrary, excessively healthy? If so, should she restrain herself from reacting favorably, as he reads the flowing prose, and make some humbling comment at the end like, "I've seen you do better"? Or, "I guess it's okay if you're sure you have the right result"?

Much could be said as to certain detailed housekeeping problems, especially if the arbitrator works at home. For example, should the wife bug the arbitrator to take out the trash, mow the lawn, hang up his clothes, go to the store, and so forth, when she finds him staring into space with a case file in front of him and a vacant look on his face? Should she assume, in short, that he is, in fact, not working? Or, again, should she urge him to "tidy up that mess on the dining room table," where he has spread out all the exhibits and notes and is arguably just on the verge of getting the first glimmering of understanding of the case?

This could go on and on, but enough has been said to indicate the vast possibilities for further research and the vast difficulties which I will get into if I don't change the subject.

That concludes the scholarly portion of my address. In the remaining time, which isn't too much, I will unashamedly take advantage of this last chance to get a few random thoughts off my chest.

Last year Jim Hill plaintively observed, out in California, that the Academy presidents have only this one brief moment in Camelot and then sink into obscurity, yearning for recognition and feeling the tightening grip of old age. No one will listen any more after today and so, as was recently suggested in Peking, it

behooves me to seize the hour and speak my piece before being hooked off the stage.

I shall comment briefly on four items, all of which deserve much fuller treatment and some of which have already had it. Maybe Gerry Barrett or Eli Rock or their successors will elaborate on some of the others. Much to my chagrin, Charles Killingsworth, Mickey McDermott, and Morry Myers did elaborate on some of them this morning, but their comments were much more coherent and thorough than mine, so I'll make mine anyway.

The first concerns the function and purpose of the Academy in general and the annual meeting in particular. You will doubtless hear more and better tomorrow night about the original purposes of the Academy from the original horses' mouths, so I will brush very lightly over that question.

Subject to correction by these higher authorities, I would suggest that the single most important function of the Academy, in my opinion, has been and is to provide the means for arbitrators to get together for mutual solace, fellowship, and exchange of ideas about our work. Ours is a lonesome profession; we only rarely work with other arbitrators, and even old friends often don't see each other at all except at these annual meetings.

That brings me to the function of the annual meeting. I was not in the Academy in the very early years, but I understand that the first annual meetings were almost entirely devoted to the primary objective of the arbitrators mingling with each other. The customers, as they are affectionately known (although for many of us they may be more accurately described as ex-customers), began attending later in ever-increasing numbers, and a lively debate has been going on within the Academy for some years as to whether the annual meetings are now being run for the entertainment and edification of the customers more than for the members.

I had planned to plagiarize some good stuff on this subject from a paper—an internal memo—that Dave Miller wrote a few years ago. He had a lot of nifties on that question, but with my filing system at home, I couldn't find it, Dave, so I can't quote you.

I need not tell you that mixed feelings are the order of the day

on this subject. We yearn to chat and carouse with our arbitrator colleagues, yet are reluctant to shut out the customers, who not only provide the fuel to keep the arbitration machinery going, but are also in the category of welcome old friends in many instances. The solution has been, as you would have expected, a series of compromises, with sessions for members only preceding the public sessions.

One intriguing question about the annual meeting is whether the program is really important. Does anyone really come to hear the speeches and the panel discussions? My answer will surprise you; I think the answer is yes, and I think the Academy meetings are somewhat unique in this respect. To be sure, some members and customers may be found in the bar while speeches are in progress (I saw a few leaving just before I got up), or hobnobbing noisily in the back of the room. But a remarkable number are usually sitting and listening. Of course, how *attentively* they're listening depends, as it should, on the degree of dullness in what they are listening to. But due to energetic and imaginative program chairmen like this year's Milt Friedman, I think the really dull presentations are fairly uncommon.

A possibly interesting subject for further research would be an analysis of the reasons why these annual meetings *are* so popular with the customers. We should not flatter ourselves into thinking we are good box office attractions. To the extent that the arbitrators are the attraction, a zoo is probably a closer analogy than the theater. This is, after all, the only time it's possible to observe so large a number of arbitrators feeding and playing together. Presumably some customers come out of curiosity to see if the other arbitrators around the country look and sound any better than their own. I will leave that subject now, since most of you presumably know why you're here, and if you're wondering why, I'd better not probe any deeper anyway.

A second area for comment concerns the thoroughly hashed and rehashed question of how to improve and expedite the grievance and arbitration procedure, and I have only two quick comments. One is to urge all of you, as Charles did this morning, to read or reread Ralph Seward's memorable luncheon address on this subject at Montreal. The other is to state my own conviction that if the parties really want to speed up the procedure and reduce the cost and generally make it fit their needs more effec-

tively, they can do it very easily, *if they will tell the arbitrators what they want.*

Parties seem to be strangely reticent and even bashful about suggesting to their own arbitrator how they want the proceedings handled, notably in regard to the kind of opinions they want and the time in which they want them. There seems to be an assumption in many quarters, though not all, that the kind of opinion the arbitrator writes—long or short, with or without detailed background findings and lengthy recitation of the parties' positions—is the personal business of the arbitrator, and that the parties have no right to ask him about it. But surely these things are the parties' business, too; after all, they are paying for it.

The writing style and the choice of reasoning can't very well be dictated, but if the parties want shorter opinions—and I am convinced that many of them do—they ought to say so, not by way of general complaints at seminars or Academy meetings, but directly to their own arbitrators. And if they really are anxious to get a decision in two weeks or 30 days or what have you, it seems to me not insulting or otherwise out of order to ask the arbitrator, before signing him on, whether he can agree to meet such a time limit. If he can't, they surely can find someone else who will. And that leads into my third area for comment—the problem of getting new arbitrators accepted by the parties.

Before leaving the last area I should, at the risk of stating the obvious, say that these comments have no relevance to the situation where *only one side* wants expedition and the other side, for its own reasons, *wants* the process to be lengthy and costly. That is an entirely different subject, depending largely on bargaining muscle or the lack thereof.

Going now to the matter of getting new arbitrators accepted: We have heard *ad nauseum*, over the years, about the reluctance of the advocates to try inexperienced arbitrators, out of fear that their wrathful constituents will blame them for losing a case by not insisting on an experienced arbitrator. This I think is the heart of the problem, as I understand it. Little is said about the possibilities of bragging to the constituents, if the decision is favorable, on how the clever advocate managed to sell the inexperienced arbitrator a bill of goods which a grizzled old-timer would not have bought. Possibly this is because the constituents

always think they ought to win anyway, regardless of who the arbitrator is.

Apart from that, I wonder if the parties have fully considered the advantages of expedition in choosing a new arbitrator. Why shouldn't they say to their wary and suspicious constituents, on whichever side of the table, something like this:

> "Look, we can wait eight weeks to get a hearing date with the well-known Elmer Zilch, and then probably wait a long time after that to get the decision out of him, which we may lose anyway since our case is not exactly airtight. On the other hand, we can try young Eager J. Beaver, who seems to be a bright and alert fellow. He'll give us a hearing next week and a decision in a couple of weeks. Besides that, he'll pay close attention to the somewhat involved argument we have to present, whereas old-hand Zilch probably will be bored or disgusted with it and start thinking about those 12 other decisions he has to get written."

If that kind of approach is tried on the constituents, I suspect a lot more new faces would appear on the scene, with results pleasing to some and distressing to others, just as they are with the old-timers.

Now to my final area for comment: I have a couple of observations on another thoroughly hashed subject—the arbitration of new contract terms. This is supposedly a sensitive area for arbitrators to get into. The parties generally discuss this with about the same degree of frankness and objectivity and candor as, say, venereal disease was discussed in the 18th century. I don't want to suggest that the analogy is precise; some of you may think it's pretty close.

You'll be very glad to hear I'm not going to add to the staggering mass of commentary on public emergency disputes. My comments are directed to the private interests of the parties in *non*-emergency disputes, where there is no compelling public interest against a strike, but where the parties themselves, in their own interests, may have strong reasons for seeking new ways to avoid the strike.

I suggest to you, with all due deference, that many strikes are not the result of well-thought-out decisions that the issues are of such moment that they are worth the price of a strike. I am persuaded—although I can't prove it—that the parties often stumble and blunder their way into strikes which neither side really

wants, because of weariness, or short tempers, or just plain miscalculation of what the other side will do, or what their own constituents will do by way of ratification. And I'm also convinced that very often the last-minute stumbling-blocks are, by themselves, of relatively small importance, either economically or otherwise. Each side may regard them as last straws which the other side is trying to dump on the back of the already overburdened camel.

Assuming that there are such situations, I wonder how much real consideration, if any, the parties have given to submitting some of these last-minute stumbling-blocks to private arbitration. True, the arbitrator may hand down a decision which is unpalatable, but so what? What's unusual about that? It goes on every day in the week on grievances which often are more important than any of these kind of last-minute items we're talking about.

The parties may shudder at the thought of turning the arbitrator loose without the customary limitation that he is only to interpret and apply the contract. But is he really likely to make such an outrageous decision that risking a costly strike is a more sensible course? These questions can't be answered in the abstract. I only suggest that the parties give them some careful thought, which I strongly suspect has not generally been done.

So much for the evangelism. My other comment is by way of a prediction, and this has been said before. The proliferating use of neutrals in public employment disputes, either as fact-finders or arbitrators, is in my judgment going to have an inevitable spillover effect on private contract disputes. The private disputants will observe what goes on, often through their own attorneys who participate directly in the public employment disputes, and I venture to predict that what they see will be reassuring in at least two respects.

First, they'll discover that the recommendations or awards are not as bad as they might have expected, but rather that they resemble very closely the settlements being reached in comparable situations around the area through direct collective bargaining. That, after all, is what most of us try to do in those situations.

Second, they will discover that this intervention by neutrals, contrary to the long-cherished articles of faith on the subject, does not in fact destroy direct collective bargaining for the future. For

a number of reasons, the parties often will not abandon bargaining in the future and rush back into the arms of neutrals the next time around, but instead will reach a settlement. That prediction is not based entirely on a crystal ball; it has already happened in many instances, and, as many of you know, the use of neutrals has often turned out to be non-habit-forming. I had one myself: I arbitrated a police wage dispute, and two years have gone by since then and each time they've settled without arbitration. That may tell me something.

For these and perhaps other reasons, the next few years will, in my judgment, see a growing realization that arbitration in one form or another is a useful technique, when used with discretion and common sense, in resolving disputes over contract terms without going through strikes which neither side really wants and in which both sides lose.

That ends my observations on the various points, but I cannot close here in Boston without saying something about my old buddy Saul Wallen. I have just a couple of comments to make about Saul, but first I'd like to ask Mary Wallen to stand up and represent him.

In Montreal there were some rather snide suggestions by another old buddy, Jim Hill, about my motives in wanting to have this meeting in Boston instead of Washington, which apparently holds a fatal fascination for Jim, or used to. As usual in Jim's most cutting thrusts, there was some element of truth in what he said. The one main reason for my preference, however, was one he did not mention, and it was blatantly sentimental. The first annual meeting I attended in the Academy was here in Boston in 1955; Saul Wallen was the Academy president; and I wanted, frankly, to have this 25th anniversary meeting in Boston as sort of a memorial to Saul.

In the proceedings of the Montreal meeting in 1970, Jim Hill said it all for all of us in his moving and eloquent tribute to Saul. I will not attempt to gild that lily, but simply will remind you of one of Saul's most remarkable talents, as Pat Fisher will remember with me, and that was his infectious ability to enjoy what he was doing, to get some fun out of this pressure-packed business. I think the most fitting tribute we can pay to Saul is to have a rip-roaring good time here in his beloved Boston, and I urge that you all address yourselves energetically to that high purpose.