CHAPTER 4

THE PRESIDENTIAL ADDRESS: THE COMMON LAW OF THE SHOP

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May I share with you today some thoughts concerning the common law of the shop. A few short years ago our profession was characterized by high judicial authority as the author of the common law of the shop, where little or none had previously existed. What has made our work the common law of the shop has not been our awards deciding cases before us, but the opinions we have written to accompany our awards. It is in these opinions that we have marshalled our reasoning in interpreting the contracts of the parties, and it is the language of these opinions which constitutes the announced guidelines to be followed in like future cases, just as the common law of England became in large measure the body of judicial rules to be followed in this country more than two centuries ago.

I cannot ever remember anyone telling me that I had to write an opinion to accompany an award, in the sense of saying, "Thou shalt write an opinion." Occasional references were made in hearings to the opinion which would be forthcoming, and everyone plainly assumed that there would be one. Because of these known assumptions, we have all faithfully prepared opinions stating the facts with precision, deploying the contentions of the parties, and then analyzing and disposing of those contentions in the light of the contract; and we have gone through this process consistently without regard to the type of issue or the nature of the evidence before us. The result has been a stupendous outpouring of verbiage which has helped to create the guidelines for future action by the parties and, hence, has truly become the common law of the shop.

The parties have necessarily had to prepare and to adjust themselves to utilize all of this new common law in their shops.

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Publishing services have helped to fill the need by publishing our opinions and by indexing and digesting them for ease of location and utilization. There are also publishing services which exist for individual industries, and, in addition, the parties to each contract maintain their private systems for their own cases—very substantial systems for those parties with nationwide operations and high caseloads. The sum of it is that he who wishes to know the meaning of a paragraph, or of a sentence, or of a clause, or of a word, or even of a comma in a collective bargaining agreement has a reasonably good chance of getting an answer from the accumulated case law, whatever his question may be.

We can all take comfort from the unique opportunity afforded to us to share in the evolution of an orderly system for the resolution of labor disputes, particularly during a period when our society has not been characterized by devotion to orderly systems. We have been at this job now for barely more than 25 years, and in this brief period we have written much common law. But let us not be guilty of admiring ourselves. The common law of England eventually became so overstructured that a new system of equity courts had to be created to provide needed relief to parties. We ought to be alert—all of us, agencies, parties, attorneys, and arbitrators alike—against any comparable overstructuring of our common law of the shop. We need to remind ourselves that our opinions are destined for use not only by the sophisticated representatives of the parties, but also by their separate ranks and files.

A few weeks ago I chanced to read an arbitrator's opinion in which he cited *Corpus Juris Secundum*. I intend no personal criticism because it might have been any of us, but our common law of the shop becomes somewhat overstructured when such events can occur. It is a part of our heritage and of the common-law system in which we have been trained that we grope for precedents like security blankets to support our decisions, but we are thereby removing the arbitration process further away from those people on both sides for whom it is eventually intended. Similarly, we share the experience at a hearing of receiving past decisions under the same contract from both parties, and eventually concluding when the case is later studied that the evidence and the contract seem reasonably straightforward—until we begin to read the common law submitted at the hearing. The problem then all too frequently becomes not how to decide the case under

the evidence and the contract, which continue to be straightforward, but rather how to decide the case by somehow fitting it into the language of the cited common law and finding the elusive thread common to all the decisions, a thread which is sometimes never revealed.

These are challenging intellectual puzzles, but I fear again that we are perhaps removing the arbitration process too far from the realities for which it is intended. Indeed, it is no coincidence that, after little more than 25 years, we have rushed to the point where the parties in the steel industry will talk on this program tomorrow afternoon on the subject of "Updating Arbitration." If the arbitration of labor disputes should continue indefinitely in substantially its present format, how many volumes of written opinions will there be in 50 or 100 years? Who will be qualified to work with all of this common law, and how many educational degrees will be necessary to establish such qualifications? How will first-line supervisors and shop stewards comprehend this ever-expanding common law of the shop as it applies to their immediate problems?

Please do not misunderstand my purpose. I do not suggest that our opinions of the future be written in words of one syllable. At the risk of running upstream against some colleagues, what I do suggest is that we all work out ways to write fewer opinions before our common law begins to lose its useful purpose in sophisticated confusion. The glittering generalization is always risky, but it is probably safe to assert that in many active arbitration relationships, the basic principles under the contract have already been hammered out and are well known to both parties. While there are always some new issues under the sun, much of what remains in grievance arbitration in the private sector is the application of known principles to particular cases, and it is scarcely clear that we should continue to resolve them with an ever-increasing flow of lengthy written opinions. It is here that we may be building our common law of the shop to the point of near futility, taking the known principle which is not in dispute but seeking to draw increasingly fine distinctions in the application of the principle and frequently ending up with myriad distinctions which lack substantial difference.

I submit that we are nearing the saturation point with written opinions such as these, and that awards without opinions or

awards accompanied by simple per curiam opinions may now better serve the purpose in some cases. We know of the seemingly mundane request from an increasing number of parties to please see that our opinions are typed in single space and on both sides of the paper. If such a request merely seeks to stem the tide of paper, it is common to the evolution of many of our mature institutions. But this request may have more serious underlying consequences than appropriating funds to buy more file cabinets and to build more space in which to house them. It may also reflect the difficulty of coping with an increasingly complex common law which in some instances is approaching the unmanageable. It may well be time for us to reconsider our common assumption that every award must be accompanied by an opinion. There are those who object to the barren nature of an award standing alone, but they perhaps ignore the equally barren nature of some opinions.

Although we may differ in our manner of description, I submit that the functions of an opinion are twofold. The opinion either tells the parties something useful about their contract, or it tells them something useful about their arbitrator—or it does both. If, in the nature of a case, the opinion cannot perform either one of these functions, then it is likely to be surplus, which nevertheless becomes indexed and digested by the parties and ends up assuming an ambiguous role in the common law of the particular shop. I do not overlook the internal discipline of organizing one's thoughts upon paper as an additional function of an opinion, but this exercise is best left to the discretion and experience of the individual arbitrator. If it is accurate to say that an opinion should tell the parties something useful either about their contract or about their arbitrator, then it follows that detailed opinions are now expected unnecessarily in substantial numbers of cases.

In those cases in which the parties are served by a permanent umpire, a system which accounts for a sizable percentage of the total, the parties do not invariably need an opinion from their umpire in order to become acquainted with his reasoning, because they already possess such knowledge in many instances. In those cases in which the outcome turns upon the resolution of issues of fact, an opinion by either a permanent umpire or by an ad hoc arbitrator rarely adds anything to the accumulated common law of the parties. In those cases in which the outcome turns upon the application of undisputed contractual interpretations to

specific circumstances, there may be need for opinions in some number of cases short of repetitious or monstrous proportions. And there will always be a need for opinions in the case of the untested contractual provision or in the case of the untested arbitrator.

In our profession, a well-reasoned opinion is a thing of beauty, and, when it establishes necessary and clear guidelines for the parties, it performs its highest purpose. But it should be possible to reach some kind of understanding that formal written opinions are not automatically necessary in all cases, and that it is within the discretion of the parties to specify those cases in which they desire formal written opinions or per curiam opinions or even no opinions. Thus we can better confine our common law to the universally understandable and useful purposes which it can best serve. In the process, windfall dividends to the parties should emerge, including the obvious reduction in writing time which can favorably affect both speed and cost of decision.

May I close by urging that we continue to decide cases as the need exists, while saying less.