CHAPTER 1

THE PRESIDENTIAL ADDRESS: JUDICIAL REVIEW REVISITED— THE SEARCH FOR ACCOMMODATION MUST CONTINUE

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The difficulty of the presidential address is at once its unique advantage: One is given no instructions as to subject. It is easier to be *told* what to write a paper on, but it is also a matter of considerable opportunity to be allowed to cut loose with whatever may be on one's mind.

What has lingered on my mind—and what has been brought to the fore by the decision of a Connecticut U.S. district court—can be stated as follows: (1) for many years, we managed somehow to skirt and live with fuzziness as to whether collective bargaining is a private or a public institution; (2) now that we are in an era of emphasis on and protection of individual rights, the fuzziness is being pierced more and more; (3) judicial review of arbitration decisions, as such, is both inescapable and appropriate for watchdog purposes; but (4) if it proceeds with concern for individual rights to the exclusion of concern for the preservation of effective dispute-settling mechanisms—which is among the *collective* rights—the strains and stresses on the institution of collective bargaining will become so great as to make survival of the institution unlikely. My concern, let me add at once, is not for the survival of arbitrators or the protection of ill-asserted mystiques of the arbitration process. My concern is that there may not be sufficient understanding of the fact that collective bargaining assumes and depends upon the relinquishment of some individual rights and privileges. I am concerned that public processes may ignore the realities and thereby threaten the vitality of the private collective system. We cannot proceed as if our society had no stakes in the preservation of that system.

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It is an astonishing coincidence that it was in this very city—nine years ago—that the Academy had a serious look at the relationship between the functioning of arbitrators and the duty of the judiciary. The coincidence, indeed, does not stop there: It was Bernie Meltzer, the man you heard from this morning, who gave the major lead-off paper.[1] I apologize to him if he feels sheepish about overexposure. But there is so much by way of wise observations and prognostications—and so much by way of springboard material for what I think now needs to be looked at—that I want to take you back to that meeting of nine years ago.

Meltzer cautioned against acceptance of either the trilogy's ringing endorsement of arbitration or the meat-ax denunciation of arbitration by Judge Hays. He saw the Supreme Court as expressing a "mythology of arbitral excellence" and Judge Hays as expressing a "mythology of arbitral corruption and incompetence."

Meltzer was prepared to grant that the pressures which may cause arbitrators to make bad decisions are equally operative with other adjudicative tribunals; that arbitrators possess greater expertise than judges when it comes to the interpretation and application of collective bargaining agreements; and that arbitrators generally possess competence and integrity. Nevertheless, so went his fundamental thesis, the notion that arbitration is a purely private institution—entitled to go without scrutiny and intrusion by the judiciary—would not wash. Of the several reasons he gave, there was one which to me is conclusive: that a public law underlies the bargaining system of which arbitration is a part. It would be a far easier world for all of us if we could go with Ben Fischer's remark, made at an earlier Academy meeting, that the trilogy "is essentially a recognition of the private nature of the bargaining relationship and the integral part that arbitration plays in the relationship."[2] It was a legitimate and useful remark in the context of Ben's paper and the paper to which he was replying. But we are entertaining false hopes if we seek to apply the remark as yielding the proposition that there is nonreviewability by the judiciary of arbitration decisions.

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[1] Bernard D. Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, 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), 1–20.

[2] Ben Fischer, *What and When and How to Arbitrate*, in PROCEEDINGS OF THE 18TH ANNUAL MEETING, National Academy of Arbitrators, ed. Dallas L. Jones (Washington: BNA Books, 1965), 139–52.

Meltzer, having shown that an outright separation of arbitration tribunals from public tribunals was not achievable, went on with an exploration of the real problem—namely, how to obtain workable coordination of the arbitral and judicial functions. It is difficult to summarize so meticulous a thinker as Meltzer, but I think that the following threefold proposition is correctly attributable to him: (1) the trilogy is well-nigh airtight, and soundly so, in making the arbitration forum the proper one for determining arbitrability questions; (2) the trilogy is not of such airtightness, again soundly so, when it comes to judicial review of arbitral determinations on the merits; (3) judicial review of arbitral decisions on the merits, if sparingly invoked by losing parties and if exercised in limited and discreet fashion by the judiciary, constitutes the necessary and appropriate coordination.

Commenting from the floor, Ben Aaron agreed with the need for keeping the door open for judicial review of arbitral decisions on the merits, but wondered about the chances of judicial restraint.[3]

Judge Tobriner spoke on the then-recent expansions, in the courts, of due-process protection of individual rights.[4] Granting that these were constitutional protections against *state* action and that arbitrators are not bound by due-process rulings by the courts, Judge Tobriner went on with the poignant observation that: "The worlds of public adjudication and private arbitration cannot live in isolation; no iron curtain separates them. The due-process rights evolved by the judicial tribunal are bound to intrude in some form, if by nothing more than argument and analogy, into the presentation of the case to the arbitral tribunal."

Then came Bob Fleming's presidential address. It provided an extensive review of the history and practices of the Labor Court in Sweden.[5] One point of the review showed that the opportunity for a new trial under the Swedish system, though not lacking, requires the fulfillment of stringent conditions. The two which he identified are (1) gross miscarriage of justice and (2) discovery of new evidence of a decisive character. Fleming did

[3] THE ARBITRATOR, THE NLRB, AND THE COURTS, *supra* note 1, at 26.

[4] Mathew O. Tobriner, Associate Justice, California Supreme Court, *An Appellate Judge's View of the Labor Arbitration Process: Due Process and the Arbitration Process*, in THE ARBITRATOR, THE NLRB, AND THE COURTS, supra note 1, at 37–46.

[5] Robben W. Fleming, *The Labor Court Idea*, in THE ARBITRATOR, THE NLRB, AND THE COURTS, *supra* note 1, at 229–249.

not advocate the adoption of European-type labor courts as a sound alternative to grievance arbitration in the United States. But there was a hint that it might come to that. Seeing our system as being in need of reexamination, Fleming suggested the establishment of an Arbitration Conference modeled after the Judicial Conference.

I close this review of our meeting of nine years ago by quoting a passage from the Meltzer paper. It embodies observations that I think are so utterly sound that they ought to be faced up to as the starting point of the problem. Meltzer said this:

> "It is, I believe, questionable to require courts to rubber-stamp the awards of private decision-makers when courts are convinced that there is no rational basis in the agreement for the award they are asked to enforce. In no other area of adjudication are courts asked to exercise their powers while they are denied any responsibility for scrutinizing the results they are to enforce. The courts, moreover, exercise such responsibility in areas at least as complex and specialized as labor arbitration. . . . In any case, the unique attempt to shrivel judicial responsibility in enforcing arbitration awards is likely to fail because it runs against the grain of judicial tradition. . . ."

There you have it—a remarkably incisive discussion of where we were likely to go in the area of judicial review. The sad part of it is that the discussion was not taken as a warning that the then-tranquil waters might become turbulent.

I find it less than surprising that there was little heeding to the warning signals. The climate at the time augured against alarm. Major collective bargaining relationships were in a state of maturity; the trilogy,[6] after all, *was* reassuring doctrine—and acceptable, I think, to most managements, despite the fact that it was the Steelworkers' arguments which had prevailed; the "Hays haze" had been effectively dispelled; [7] and the fallouts on collective bargaining from the intensified regard for individual concerns had not yet set in.

But we are in a different ball park now. There is a trend toward more frequent efforts to vacate arbitration decisions. Jerry Aksen—that staunch and tireless defender of the process of arbitration—is running around the country putting out enforcement

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[6] *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

[7] Saul Wallen, *Arbitrators and Judges—Dispelling the Hays' Haze*, in LABOR LAW DEVELOPMENTS, Proceedings of the Southwestern Legal Foundation's 12th Institute on Labor Law (Washington: BNA Books, 1966), at 159.

fires. And there is the new development that arbitrators are being sued—and, indeed, are being asked to give depositions on a variety of areas said to test their impartiality and competence. Further, it has become fashionable to sue unions as well as corporations. What I think is happening is that bilateralism is itself under attack. It is third-party challenges which are to be reckoned with nowadays—more so, in terms of the adverse impact on the proper functioning of the collective bargaining system, than disputes between the parties. And part of the picture of the third-party challenges is that resort to the courts for the purpose of overturning arbitration decisions is frequently coming from individuals.

Holodnak v. *Avco* [8] is among the cases brought by an individual. It is a multifaceted case in terms of the issues raised before the district court, and there is no way here to provide an adequate review of it. But let me try fairly to give the highlights. I should note, before doing so, that the district court's decision was affirmed by the Second Circuit in all respects save one (the award of punitive damages) and that the Supreme Court has denied certiorari.

Michael Holodnak was an employee at the Stratford, Conn., plant of the Avco-Lycoming Division of Avco Corporation. Local 1010 of the United Auto Workers was his bargaining agent. The arbitrator served in the role of permanent umpire.

The plant had a set of rules of prohibited conduct. They had long been in existence, were posted, and were incorporated in the agreement by reference. Rule 19 read as follows: "Making false, vicious or malicious statements concerning any employee or which affect the employee's relationship to his job, his supervisors, or the Company's products, property, reputation, or good will in the community."

Holodnak had written an article for a biweekly New Haven newsletter with a circulation of about 750. There was no evidence that any of the plant's employees were on the newsletter's mailing list. Holodnak had shown the article to a few employees at the plant.

The article was titled "Why the UAW Local at Avco Is Floundering," and it was denunciatory of the union, the company, and

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[8] *Holodnak* v. *Avco Corp.*, 381 F.Supp. 191, 87 LRRM 2337 (D.Conn. 1974), *aff'd in part*, 514 F.2d 285, 88 LRRM 2950 (2d Cir. 1975), *cert. den.*, _____ U.S. _____ (1975).

the arbitrator. There is no way to summarize the article or to provide excerpts from it without incurring the charge of lack of dispassionate reporting, for the nature of the article goes to the heart of the dispute. It must be read in its entirety to capture its flavor and to assess its import.

Holodnak was discharged for the writing and publication of the article. He had nine years of service. His protest remained unsettled in the grievance procedure and was thereupon taken to arbitration. Holodnak requested that his case be handled by the local's attorney. The local granted his request.

A transcript was made of the hearing. It apparently shows the arbitrator as joining in the questioning of Holodnak—sometimes vigorously, and with a showing of disapproval of certain portions of the article.

In a posthearing brief, the local's attorney apparently granted that much of what Holodnak had written was ill-advised and apparently argued for modification, rather than full reversal, of the discharge penalty.

The agreement had characteristic "just cause" language and a clause providing that "the decision of the Arbitrator shall be final and binding." The arbitrator upheld the discharge. He did not write a supporting opinion.

From what I can make of the case, I venture the comment that it was one of those which could reasonably have been decided either way. It depends on what one makes of the article. There had been a history of wildcat strikes at the plant, and the article can be taken as inflammatory and as openly defiant of the parties' effort to achieve stability. But one can also reasonably take the view that the article represents no more than the resentful statement of someone on the "outs" in the local's politics and that the company overreacted in resorting to discharge. I do *not* think that one could have made the nature of the *rule* the basis for decision in the case. The rule might offend many of us on grounds of vagueness and repressiveness. But to go that route would have been to go contrary to the principle that what the parties have agreed to is to be accepted.

If the assessment that the case could reasonably have been decided either way is a sound assessment, I think it follows that the arbitration decision should have been left standing on judicial review. If judicial restraint means anything, it must mean that much. To have left the decision standing would certainly not have

been a matter, to requote Meltzer of "rubber-stamping . . . when . . . there is no rational basis in the agreement for the award."

The court, however, overturned the decision, and the rationale which it employed is, to say the least, far-flung. I read it as an effort to circumvent the trilogy's doctrine. The least that must be said about it is that it represents an incautious excursion beyond reasonable boundary lines between public and private law. The result, in terms of potential inhibitions on the collective bargaining process, is ominous.

First, the award was vacated on the ground of the arbitrator's "evident partiality" under the U.S. Arbitration Act. Ben Aaron comments in the current issue of the Academy's *Chronicle* that the weight of opinion is that the Act does not apply to labor disputes. This aside, I want to make a few comments on some collective bargaining considerations that may have been overlooked in coming to the "evident partiality" finding.

As to hostilities which the arbitrator may have evinced toward the grievant at the hearing, the picture was complicated by the facts that the arbitrator had himself been disparaged in the article and that wildcat strikes at the plant, to which the article gave an approving nod, had on past occasions been dealt with in strong terms by the arbitrator. Perhaps, having been attacked, the arbitrator should have disqualified himself. But such disqualification poses difficulties for parties who arbitrate via a permanent umpire. Where is the line to be drawn, and to what extent are attacks invited if they are in effect rewarded by the appointment of another arbitrator? Similarly, when it comes to the clash on the use of wildcat strikes, it is not something that an arbitrator under collective bargaining agreements can easily run away from. Typically, the simple fact is that wildcat strikes are barred at pain of discipline and that the arbitrator is merely faithful to the agreement in upholding discipline.

It is not made express in the court's decision, but I believe it is fair to infer that the "evident partiality" finding was influenced by the absence of a supporting opinion. If true, the court would be overlooking the commitment that many companies and unions have made toward expedited procedures. Let me say a few things on the nature of that commitment. (In saying them, I do not mean to suggest that the absence of a supporting opinion in this instance was the wise course or could not legitimately have of-

fended reviewing judges. I simply plead for some understanding of the lot of the collective bargainers.)

The absence of an opinion may be a matter of the parties' design and may be a matter of something that came into being in response to long and severe pressures on them from their constituents. As everyone knows, opinion-writing involves a substantial cost and delay factor for the parties. This is to be coupled with appreciation for the fact that many a collective bargaining relaship has been under great stress from overloaded grievance-procedure and arbitration dockets. It is also to be coupled with appreciation for the fact that there have recurringly been substantial rumblings concerning the high cost of arbitration. The truly fundamental virtue of the institution of collective bargaining is that it represents government by consent of the governed. But this means that the parties cannot ignore the pressures which the governed bring for the correction of defects. It is no wonder—indeed, it is to be applauded—that the parties consider and adopt various expedited ways of arbitrating when they hear the battle cry, "Arbitration takes too damn long." Not as a dig but to demonstrate that the absence of opinions may serve, rather than deny, the interests of due process, let it be noted that the court's own decision in the present instance was four years in coming.

Though of course not without an eye toward reducing costs and delays, the parties may have further—and equally legitimate—reasons for adopting ground rules under which certain types of cases are to be decided with no accompanying opinion or with a mere sentence or two showing the basic conclusion. They may make the policy decision that as to certain areas of the agreement they have amply sufficient common law, as developed in the opinions covering past cases, to know where they stand when it comes to the processing of grievances. They thus decide that regurgitation—even if an occasional refinement should pop up—is a waste of time and money. I think the parties should be free to make such a decision.

Let me further observe that the GM-UAW agreement, covering some 400,000 workers, expressly authorizes forgoing a written opinion in any case in which the parties agree so to proceed. The reciprocal part of the arrangement is that the decision must be issued within 10 days of the date of the hearing. The UAW is not normally attacked as an organization insensitive to incursions into due-process protections. It must have seen the ad-

vantages to the bargaining unit as a whole as outweighing the value of providing every grievant in every case with a supporting opinion. I don't know about Arthur Stark and Rich Bloch, who currently serve as umpires under the agreement. But when I served under it and was informed of the fact that some cases were henceforth to be decided without an opinion, it never occurred to me to raise an objection—be it on due-process or any other grounds. And though there were times, once we had started to arbitrate under the policy, when I squirmed for lack of opportunity to explain myself, the answer clearly had to be that my feelings could not control over the agreement.

So much for the court's "evident partiality" finding.

Second, the court considered Holodnak's claim for reinstatement under Section 301 of the Labor Management Relations Act. Putting the trilogy aside, the court went to *Vaca* to decide the claim.[9] If this was the legally sound approach, I am still most troubled by the extent to which the court was willing to second-guess the strategy and tactics of the local's lawyer under the guise of examining "fair representation." Let those who view my statement as alarmist read the court's decision on this score.

The court's analysis of fair representation starts from *Vaca*'s "arbitrary, discriminatory or in bad faith" test. But it ends with something quite different. It ends with what I think amounts to a test of *competent* representation. And if this indeed becomes the law of the land—if those who normally implement the grievance-processing machinery (by which I mean to include the presentation of cases in arbitration) have to function under the gun of whether or not their performance will be approved as competent by the federal judiciary—I shudder at all the revamping which the collective bargaining structure will have to undergo. The price will be enormous.

Of course we want American workers to be competently represented, and *of course* we want their cases in arbitration to be handled competently. But I question that Congress intended the judiciary to scrutinize the representation by applying its views of advocacy expertise. One may assume that that rather affluent local known as the Major League Baseball Players Association has hired the trained and talented persons who easily conform to the judiciary's standard of advocacy expertise (and, indeed, who would delight in being so scrutinized). But it is too much to ex-

[9] *Vaca* v. *Sipes*, 386 U.S. 171, 64 LRRM 2369 (1967).

pect of former steelworkers or autoworkers or miners, who normally do the representing in arbitration. And if there are those who would say "that's not good enough," the answer must be that collective bargaining is not a public institution to the point where that assessment is properly makable by outsiders. It is an assessment to be made by insiders at union election time.

Let me inject one more personal experience. In my current job, I sit as a member of an appellate arbitration board. We have reversed some decisions, but we wouldn't dream of second-guessing, or otherwise looking to the nature and quality of, the *presentation* before the district arbitrator for a clue to whether we should affirm or reverse.

It is difficult to close this part of the paper without making mention of the Supreme Court's recent *Anchor Motor* decision.[10] This case is by no means the same as the *Holodnak* case, for it involves a series of discharges as to which there can be no question that they had been wrongful. The grievants had been discharged for fraud; the discharges were upheld in arbitration; and the alleged fraud was subsequently proved not to have been committed by the grievants. But, instead of treating the case as one involving the "discovery of new evidence of a decisive character"—as the Swedes have left room to deal with—the Court went with the *Vaca* route, quite as in *Holodnak,* and *thus* set the decision aside. It is this which makes *Anchor Motor* as troublesome as *Holodnak.* Both cases create what I think are unreasonable expectations as to representation effectiveness, and both thereby carry the danger that those who do the grievance-processing work—and who must have fortitude vis-à-vis their own people if grievance procedures are not to become hopelessly clogged—will be put on the defensive and rendered jittery.

Third, returning to *Holodnak,* the court addressed itself to Holodnak's claim that the discharge violated his free-speech rights under the First Amendment and therefore his rights under the agreement. The court acknowledged, on the one hand, that First Amendment rights are not protected from infringement by a private employer. At the same time, however, on the grounds that most of the plant's production represented output under defense contracts and most of the land and equipment was government-owned, the court held that there was sufficient governmen-

[10] *Hines et al.* v. *Anchor Motor Freight, Inc., et al.,* ——— U.S. ———, 96 S. Ct. 1048, 91 LRRM 2481 (1976).

tal involvement to render the discharge "state action." It then proceeded on the basis of balancing the employer's interest in job efficiency against the employee's interest in free speech and found the balance to tip in Holodnak's favor.

It is not where the court came out on the balancing question —if it properly applied—which bothers me. What bothers me is the leap from private employer, to governmental impregnation, to the application of constitutional tests for evaluating rights and obligations formed within a private system that has its own dispute-resolution machinery. I *understand* that the court is saying that the business here was "not so private." But does it follow that the privately formulated rules should be supplanted or modified? And how, on a practical level, is the doctrine to be implemented? How will it be applied to a multiplant company with a single national agreement? On a plant-by-plant basis? If so, the agreement, heretofore applied with uniformity, would presumably have to be given varying application. Or assume a single plant which normally operates on a strictly commercial basis and which for a year switches to defense work: Is the First Amendment protection instituted for the duration of the defense work and then terminated? Or assume a single plant, one department of which, though it has but 20 percent of the plant's employees, is wholly devoted to defense work: Are these employees carved out from the rest of the bargaining unit for First Amendment protection? These are not questions of immediate concern to those who weave the constitutional fabric, but they are questions of great concern to those who administer the agreement.

I thus return to the "workable coordination" proposal in effect made by Meltzer nine years ago. The thought I have tried to develop is that the proposal now cries out for adoption. Arbitration, to say it again, cannot hope to escape judicial review. But reasonable certainty as to the finality of arbitration decisions is also a matter of critical public importance. Therein lies the need for "workable coordination." To achieve it, the review function of the courts must be of limited and discreet character. Only then will we obtain the requisite measure of predictability as to the firmness of results coming out of the arbitral sphere. Which is to say that, if effective collective bargaining is still to be considered a cherished national goal, *Holodnak* is less than a model for "workable coordination" between the arbitral and judicial bodies.