CHAPTER 1

THE PRESIDENTIAL ADDRESS: THREATS TO ARBITRATION

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I.

Although I am about to talk of what I perceive to be threats to arbitration, a rather somber pursuit in such glorious surroundings, I should say at the outset that there also are joys for the arbitrator in the arbitration process. Incidents occur at hearings which point up that we deal with a people process. What arbitrator has not wanted to shout with laughter and pleasure because of a surprise event at a hearing!

I remember one such event and the pleasure it gave me. A grievant was asked by union counsel a sort of a throwaway question, "And you want your job back, of course?" The response came fast and clear: "Hell, no, I don't want the job or any back pay—I just want the satisfaction." And I recall my appreciation of the sensitivity of the employer's labor relations vice president who gently invited the stunned union counsel and the grievant into the hallway—to work out the elements of "satisfaction."

One more story and we get to work. I had an interest arbitration dispute involving a police unit and a state employer in which the union was offering in evidence many, many fact-finding reports and arbitration awards as comparability evidence. In the third, or whatever, day of hearing, union counsel continued with the offers, as follows: "And, as Union Exhibit 362, I offer the fact-finding report of Arbitrator A, in a case between the PBA Unit of X Township and the X Township Police Department." As I took the offered document, I noticed that it was illegible; it had been copied so many times as to be impossible to read.

I expressed mild interest in being able to read the exhibits which were received in evidence. Counsel looked them over and

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agreed that I was right and that the other 361 exhibits also seemed to be illegible. Counsel then resolved the dilemma. Without tongue in cheek, with total seriousness, he said, "Well, Madam Arbitrator, take them for what they're worth." And I did. It is worth noting that the case was settled and I did not need to meet the problem of determining the worth of illegible documents. But I do cherish the experience.

II.

In 1975, at our Annual Meeting held in Puerto Rico, Ben Rathbun, Associate Editor of the Bureau of National Affairs, in a talk titled "Will Success Ruin the Arbitrators,"[1] said that we appeared to be engaged in a form of worship of past presidents. He added, "I hope some future president will open his [*sic*] address by asserting that he had not reviewed a syllable of the past presidential papers, and that if any of his brilliant remarks happens to coincide with the papers of the past—and many of those were, and are, splendid—so be it." Ben said he thought we were pushing it a bit far—that we were perusing prior presidential papers more exhaustively than Edmund Wilson researched the Dead Sea Scrolls.

You understand that the reason I came across and reread the Rathbun paper was because I was right in the middle of perusing past presidential and other papers, but not as an exercise in hero or heroine worship. My examination came out of an attempt to find out if the subjects I wanted to cover had been talked about *too* much in the recent past. The trouble is, of course, that when subjects are "over-talked" and "over-revisited," they probably continue to reflect problems that have not been solved. We read past presidents' addresses out of an effort to determine what now should be brought to the attention of our members and guests. The choices are many.

In reading some of the papers presented at our meetings, it is interesting to note that since 1959—in the past 22 years—every meeting has included one or more references in the program talks (presidential addresses or others) to the threats facing labor arbitration as we have known it in the past. From 1959 on (maybe before, too—I did not go any further back), presi-

[1]Rathbun, *Will Success Ruin the Arbitrators,* in Arbitration—1975, Proceedings of the 28th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1975), 155–169, at 156.

dents or member or nonmember speakers have referred with concern to such matters as (1) the growing formalization of arbitration and what appeared to some to be a growing effort to convert arbitration into a litigation-type process; (2) what Ben Rathbun called "the dangers of undue judicial intervention in labor-management arbitration";[2] (3) the burden of outside law —EEO, NLRA, OSHA, etc.—imposed on the arbitration process with different criteria and with law enforcement or administrative obligations, rather than private dispute resolution; (4) the reduction of the labor contract's influence as the *sole* criterion in resolving a labor dispute initially arising under that contract, such reduction at least partly due to public-sector arbitration; (5) the growing incidence of grievant representation by personal counsel (with or without union counsel or representation), and personal counsel's lack of knowledge or interest in the continuing relationship between employer and union; (6) the new advocates, without knowledge of or responsibility for continuing relationships, presenting cases as one-shot litigation rather than as arbitration; (7) so-called arbitration in situations where it is *not* final and binding, where the process includes appeals procedures—a growing concern; (8) the increasing incidence of charges against unions alleging failure to represent grievants adequately or properly, and the effect on the arbitration process and on the ability of a union to function responsibly; (9) in the face of the continuing growth of arbitration, the continuing shortage of qualified, knowledgeable, professional arbitrators; (10) the quality of the training of persons who seek in arbitration their major professional careers, either as advocates or as neutrals; (11) written opinions of arbitrators in the arbitration process and, as Sam Kagel once described it, going beyond the "necessities of the case" in writing the opinion;[3] (12) the conduct of the hearing—unnecessary litigation-type conduct of advocates and/or arbitrators; and (13) the increasing cost of arbitration and the delays in arbitration.

These are only some of the areas in which experts have noted present or potential threats to the process. Obviously, I cannot today talk about all of those threats, but I ask you to join me in examining a few of them. For discussions of all of these subjects,

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[2]*Id.*, at 168.

[3]Kagel, *Recent Supreme Court Decisions and the Arbitration Process,* in Arbitration and Public Policy, Proceedings of the 14th Annual Meeting, National Academy of Arbitrators, ed. Spencer D. Pollard (Washington: BNA Books, 1961), 1–29.

and more, I refer you to the previous issues of the *Proceedings.* They are worth rereading.

III.

What I most want to talk about today is what arbitration was and is now; what it has held out and now holds out to the parties, and how they view the process; how would-be arbitrators are "trained" or given some understanding of the process in order to minimize an employer's or union's risk in selecting them; how the new advocates or representatives are trained or developed; what the Academy's responsibility is for offering training to potential arbitrators or advocates; and what the results may be if we allow a continuation of the effort to remove from arbitration its important characteristic as a process for the establishment of an internal, final and binding system of dispute resolution, growing out of consent.

Arbitration under a labor contract is established by the parties as the last step of the grievance procedure, to serve their joint needs. It may be changed by them from time to time, as changes in their needs appear to dictate. Some changes appear to result from the confidence or lack of confidence which employers and unions have in the process. For example, the level within an employer or union hierarchy at which contract interpretation disputes are to be decided may differ from plant to plant or even, within a plant, from department to department. The parties know what they want to achieve: In one employer/union relationship they might well decide that it is safer to have all contract interpretation disputes decided at the highest union and employer level, and they will so provide; in another, equally thoughtfully, they might have sufficient faith in the judgment and ability of lower levels of management and union to allow persons at those levels to make dispute resolution judgments, and their contracts or practices will so provide. And if the dispute cannot be resolved in their grievance procedure by a full and proper use of that procedure, they have agreed that, recognizing and accepting their failure, they will, of their own choice, proceed to use a third party—a stranger—to decide their dispute. The confidence in that selection, too, must be total. The parties must be confident, from the reputation of the arbitrator or prior experience with her or him, that the one they select will justify their designation. They must be persuaded that the final

and binding concept—that important characteristic of arbitration—will not place them at such risk as to warrant change.

The need for arbitration has grown dramatically over the past 20 or 30 years. It no longer can be handled primarily by the "old timers" who participated in the growth of the process in the late thirties or forties, even if that were a desirable option. No longer are there in sufficient numbers the arbitrators who came out of the shining experiences of War Labor Board or similar activities, who grew into the arbitration process and developed it, giving it its deserved reputation for integrity, quality, and knowledge. It was they who persuaded employers and unions to place their faith in this system and in the individuals who were part of the system. Because of what they brought to the process, it has been seen as the best means of resolution of labor/management grievances and perhaps interest disputes.

The great growth in labor arbitration has reached proportions for which we—labor, management, and arbitrators—have made inadequate preparation. Arthur Stark, in his presidential address in 1978, talked of that growth, of the strength and flexibility of the process, and of how the parties have continued to fashion processes that meet their needs.[4] There has not been a year in which grievance arbitration has not shown large growth.

Examine, if you will, some of that growth. In the Federal Mediation and Conciliation Service (FMCS), for the years 1960 compared to 1980, the following case loads have been shown:

	1960	1980	Increase
No. of requests for an arbitration panel:	2,835	29,906	27,071
No. of panels sent out:	2,993	33,327	30,334
No. of appointments made:	2,039	13,911	11,872
No. of awards issued:	1,320	8,405	7,085

All kinds of interesting questions might be looked into as to the meaning of some of those figures, but this is neither the time nor the place to examine those questions. The numbers do raise a question, though, as to the quality of the grievance procedures which, theoretically, should have been fully used and exhausted before the request for arbitration was made.

[4]Stark, *The Presidential Address: Theme and Adaptations,* in Truth, Lie Detectors, and Other Problems in Labor Arbitration, Proceedings of the 31st Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1978), 1–29.

The American Arbitration Association (AAA) keeps its figures in a different fashion. In 1951, AAA had a countrywide total of 1,403 requests for arbitration panels and, with a 30 percent settlement estimate (as their general rule of thumb), it had less than 1,000 cases that actually went to arbitration in that year. In 1960, it had 3,231 requests, and an estimated 2,262 cases arbitrated. In 1980, AAA's figures had jumped to 17,061 requests and an estimated 11,944 cases arbitrated to decision.

These figures represent only two of the major designating agencies. Other cases go to arbitrators through the National Mediation Board, state and local designating agencies, public-sector designators, ad hoc direct designation by the parties, the great impartial chairmanships, and the parties naming their own arbitrators in their contracts. As only one example of the growth of public- (or quasi-public) sector arbitration, the United States Postal Service and the several unions that represent its employees entered into the Service's arbitration processes in 1980 a countrywide total of 9,824 "regular" arbitration cases and 4,115 "expedited" cases. Many hundreds of private arrangements are made, where the parties agree on arbitration procedures tailored to meet their needs and directly name the arbitrators.

Sometimes, the need for local arbitrators has been so great that new arbitrators have been named, having no background or knowledge of collective bargaining or labor/management relations, no real knowledge of the so-called "law of the shop," and no awareness of the contribution of arbitration to the continuing relationship of the parties. Some have been fortunate; they have worked with labor/management people, or with other arbitrators who knew and could convey the labor relations philosophies of Harry Shulman, Abe Stockman, Ralph Seward, Ben Aaron, Sylvester Garrett, Harry Platt, and so many others. Those fortunate new arbitrators were able to obtain an understanding of how the giants in the practice, neutrals and practitioners, had fashioned their labor arbitration practices with an understanding of those philosophies, and some of the new arbitrators had the great value and opportunity of continuing what the War Labor Board graduates had begun.

Others were not so favored, but were able, nevertheless, to absorb through their own abilities the sense of what arbitration should be, and they went on to recognized acceptance by the labor/management community. Some have come from union or

management backgrounds in which they understood the need to contribute to an ongoing labor-management relationship, and they, too, have achieved acceptance as arbitrators. Others have come from the law, but have recognized the very substantial difference between the arbitration of labor disputes and litigation, and they, too, have gained acceptance as arbitrators.

But there are some who never have had the benefit of working with parties who understood that they were not engaged in one-shot litigation, who have not been so fortunate as to have gained a clear understanding of how arbitration differs from the administration and enforcement of a law. Included in that group is a growing number of arbitrators who have gained acceptability because they are dealing with the new presenters of cases for management and unions. Their law backgrounds are much the same as those of the presenters. Together, they change the process.

We stand at a crossroad. As part of the growth in the numbers of cases and relationships, there has been a recognized need for new arbitrators. Employers and unions have needed new persons to present cases to arbitrators. Perhaps because arbitration employs some of the language of the courts—we talk of hearings, opinions, decisions, testimony, briefs, evidence—when the time came for management and unions to hire additional presenters of cases, they have tended to hire outside counsel having little understanding of the need to treat dispute resolution as part of the continuing relationship between the parties. Thus, we have the labor relations philosophy of employers and unions being developed away from the bargainers, away from the plant, and even away from the labor relations management and union officials, by persons who treat the presentation of the case to the arbitrator as a hard-fought litigation, with no holds barred. And there are then added to arbitration the delays of the legal process, and its costs. Arbitration becomes even further removed from what it set out to be, what it was, and what it still purports to be. It is removed from the consideration of effect at the workplace.

As parties, through their representatives or on their own, become increasingly formal and more litigious, as they place greater emphasis on winning and less on their obligation to the continuing relationships, there does develop on the part of some arbitrators a responsiveness to the changed demands. Some arbitrators believe that the parties, not the arbitrator,

must determine how they want their hearings to be run, even though the new presenters of their cases appear to be having an unfortunate effect on their labor/management relationships at the shop.

If arbitrators adopt the more formal, litigation-type presentations, there is a loss of the kind of dispute examination which, in the past, allowed arbitrators to come up with imaginative solutions. Is it likely that the arbitrator who developed and awarded the progressive, corrective discipline concept in a plain old discharge-for-cause case would be supported in today's climate? His award might have been tossed out because he exceeded his authority. Yet the concept he developed is now accepted as sound by industry, unions, and arbitrators, and in some situations also has translated into the public sector and is a contractual commitment. It was a great contribution to labor relations.

IV.

Another development causing some concern for the process is the higher incidence of statutory or other provisions for review or appeal of arbitrators' awards, so that the arbitrator's judgment, on the merits of the dispute or on procedural grounds, may be reviewed. The final and binding nature of the process has undergone real change in the past 15 or so years in some relationships. Does this constitute a threat to the process? Obviously, I think it does. It seems to me that it was of the essence of arbitration that this process, as we knew it, was the last step of dispute resolution, to be used only if parties failed to solve their own problems in their own, properly used grievance procedure. Inroads made on the final and binding nature of grievance arbitration tend to change the process. Where appeals procedures are statutory or required by regulation, there does appear to me to be an obligation on the parties, or on those who are represented, to use it with restraint—that neither overuse nor abuse is warranted. If the parties, by their action, make of arbitration simply a step in the process of dispute resolution to yet another level of resolution, on the merits, they will be doing to arbitration what some employers and unions have done to the grievance procedures. When they lost confidence in the lower levels of supervision or management, or in the shop-

steward or business-representative levels of unions, they sometimes made of those steps simply a rubber-stamp operation; in the alternative, some of them made it a practice to waive the lower steps. There is indication, in some areas, that certain attitudes—a lack of confidence because of insufficiently trained or inexperienced arbitrators, or an unwillingness of formal-minded presenters for employers or unions to put trust in a somewhat informal process—may be pushing people toward heavier use of appeals or review. These trends inevitably will greatly increase the cost of arbitration, and its delay. The transcripts of hearings, briefs, and other expensive aspects of the more formal process are almost automatic in many of the situations in which appeals are possible. It will be a pity if we cannot in some way prevent the further dilution of finality.

Judicial review of arbitration awards has been talked about in the Academy's meetings and in the labor/management community for many years. To that aspect of judicial involvement in decision-making on the merits, there is now added the appeals and review procedures, making a further inroad on finality. Some of the comments made in speeches to Academy audiences regarding judicial review appear to me to have equal applicability to the appeals procedures which are now appearing in greater variety and numbers.

In 1967, Bernard Meltzer talked with us about judicial review.[5] Nine years later, Rolf Valtin, in his 1976 Presidential Address, referred to the Meltzer paper and said:[6]

> "Meltzer, having shown that an outright separation of arbitration tribunals from public tribunals was not achievable, went on with an exploration 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*

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[5]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.

[6]Valtin, *The Presidential Address: Judicial Review Revisited—The Search for Accommodation Must Continue,* in Arbitration—1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1976), 1–11, at 3.

sparingly invoked by losing parties and if exercised in limited and discreet fashion by the judiciary, constitutes the necessary and appropriate coordination." (Emphasis supplied.)

Valtin concluded that there had been little heeding of the warning signals, and he saw a more troublesome problem for the future. He described the challenge to bilateralism and referred to third-party challenges to arbitration. Rolf's concern was that the Meltzer proposal for "workable coordination" had not been developed or realized. He was asking for a measure of predictability as to the firmness of results "coming out of the arbitral sphere," and he asked if "effective collective bargaining is still to be considered a cherished national goal."[7]

Since Valtin's talk in 1976, appeal and review procedures appear to be encroaching still further on the collective bargaining process. We have no knowledge of the extent of this encroachment or the effect it has had or will have on the strength and durability of the arbitration process. I think that this is a source of a real problem for the future and that it must be examined seriously. The confidence of parties in the continued national recognition of effective collective bargaining as "a cherished national goal" may suffer yet another sharp jolt if arbitration, in a substantial portion of the labor/management community, becomes yet another level of decision-making, subjected to scrutiny on the merits by a review level.

What Meltzer warned against in 1967 and Valtin considered a growing and serious concern in 1976 are, in 1981, magnified not only by judicial review but also by appeal and review procedures built into dispute-resolution systems.

It is fair, at this point, to ask what we—employers, unions, and arbitrators—want arbitration to be. We have an obligation to examine periodically where we are and what the trends appear to be. Do we really want what some of the new presenters of cases are supplying—a litigation-type process—or have we simply fallen into it because a new element has been added to the process without much scrutiny? Is it too late to change the growing incidence of presentations by persons having highly developed killer instincts and no knowledge of the effect of their actions on the day-to-day relationships at the plant? Have we committed ourselves to a path of appeals and review? If so, is that commitment limited to the public sector, or will it spread

[7] *Id.*, at 11.

to the private sector in significant volume? If the answers to these and other questions show process deterioration, should we not try to reverse that deterioration?

V.

Let me now go on to another aspect of the practice of arbitration—the combined subjects of continuing education for arbitrators and the development of arbitrators. The need for new arbitrators has been apparent for some time, and to some extent new arbitrators have come along and been accepted. Whether the market will supply a sufficient number of new arbitrators to meet the need for trained and able people is conjectural. Much depends upon the training we consider to be appropriate.

The need for continuing education for established arbitrators became apparent to Academy Presidents Arthur Stark and Richard Mittenthal, in successive years, and they were successful in establishing programs for the continuing education of our members. What they did led to the establishment of seminars on subjects related to arbitration. The seminars were run by the Academy, for members only. Many members contributed to the content and preparation of the discussion guides used in the seminars. In the past year, the Board of Governors has authorized interns of Academy members to attend seminars. This year, too, we have broadened the coverage from simply seminars to whatever activities are decided upon as coming within the concept of continuing education. We have not yet explored this as fully as might have been desirable, but a start has been made. Academy regions whose members wish to engage in some activity of benefit to them are being encouraged to engage in education activities for members and the interns of members, whether through establishing a course of study or through workshops, lectures, or similar activities. We hope that this will become a continuing activity, meeting the needs of as broad a group as is possible.

We have initiated two new efforts. For the first time, at this Annual Meeting, we have prevailed upon Ralph Seward, a distinguished Charter Member, to participate in a meeting with a group of new or fairly new members, to discuss with them the history of the Academy (which probably parallels the history of the major growth of arbitration), and to tell them of some of the discussions and subjects which engaged members in the past,

ever since the Academy was formed in 1947. Twenty-two new members attended (those admitted in 1978, 1979, 1980, and 1981). It is probable that something of the same kind will be done again, or the transcript of the tapes of the May 5, 1981, meeting will become a part of the material given to a new member. From what we have been told by some of the new members who attended, this was a source of understanding of the Academy and its roots, and probably has done much to add to the new members' understanding of the development of arbitration as well.

The second effort recognizes that arbitrators outside our membership also will have an interest in continuing education. We think, particularly, of new arbitrators or those who have gone through one of the training programs but who really have not had much experience and no real opportunity to talk with experienced arbitrators. Bob Coulson, President of the AAA, has given his blessing to the use of AAA facilities at an appointed time once a week, at which time a few of our members will be at the AAA to answer questions, to discuss some of the subjects of interest to arbitrators, and just to help the new arbitrators over the rough spots. This will depend upon the interest and initiative of the regional chairmen or chairwomen of the Academy and of the local AAA offices. So far, I have been told of two AAA regions in which this has been done—Boston, which previously had engaged in a similar type of activity though not necessarily for the same type of attendees, and Philadelphia. For regions which have expressed concern over the quality of training, experience, and new arbitrator exposure to an understanding of the arbitration process, this appears to me to offer an opportunity for our members to participate in the development of the skills and ethical values that we consider essential. It is readily available for those who want to use it.

What appears to continue to be a need is for new persons coming into the arbitration field to have an understanding of a common philosophy of arbitration—what it is, why it is, what it is hoped that arbitration will achieve. And this brings me to the questions I raised at the beginning of my talk—how would-be arbitrators are trained or given an understanding of the process, the Academy's responsibility for participating in training, and the substance of the available training.

For a person coming out of a background which did not include collective bargaining and labor contract administration,

the training need is critical. I suggest that whether the background is law, labor economics, law enforcement, law administration, or industrial and labor relations, there is a need for the kind of knowledge that comes from a study of the writings of Shulman,[8] or the early writings of Archibald Cox,[9] or *any* of the writings of Ben Aaron.[10]

What concerns many of us is that the new arbitrators and new advocates come from backgrounds that offer no real understanding of the collective bargaining process, of the philosophy of labor relations which produced labor arbitration as its dispute-resolution mechanism, or of the philosophy of grievance arbitration. Skilled technicians are available; they have been taught the techniques. But many have not learned the essence of arbitration as the unique process it is. Shulman said in 1949,[11] and Ben Aaron referred to the statement in 1959,[12] that arbitration was a "procedure that 'can be ever consciously directed—not merely to the redress of past wrongs—but to the maintenance and improvement of the parties' present and future collaboration.' 'It's authority,' he said, 'comes not from above but from their own specific consent. They can shape it and reshape it.' "

Archibald Cox also quoted Shulman in 1959, as follows:[13]

> "The parties to a collective agreement start in a going enterprise with a store of amorphous methods, attitudes, fears and problems. . . . [The contract] covers only a small part of their joint concern. It is based upon a mass of unstated assumptions and practices as to which the understanding of the parties may actually differ, and which it is wholly impractical to list in the agreement."

Cox added:

> "This background not only gives meaning to words of the instrument but is itself a source of contract rights.
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> "The generalities, the deliberate ambiguities, the gaps, the un-

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[8]Example: Harry Shulman, *Reason, Contract and Law in Labor Relations,* 68 Harv. L.Rev. 999, 1024 (1955).

[9]Example: Archibald Cox, *Reflections upon Labor Arbitration in the Light of the Lincoln Mills Case,* in Arbitration and the Law, Proceedings of the 12th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1959), 24–67.

[10]Example: Benjamin Aaron, *On First Looking Into the Lincoln Mills Decision,* in Arbitration and the Law, Proceedings of the 12th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1959), 1–14.

[11]Shulman, *The Role of Arbitration in the Collective Bargaining Process,* address delivered at the Institute of Industrial Relations, University of California. In Collective Bargaining and Arbitration, 19 (1949).

[12]Aaron, *supra* note 10, at 11, 12.

[13]Cox, *supra* note 9, at 37.

> foreseen contingencies and the need for a rule even though the agreement is silent, all require a creativeness in contract administration which is quite unlike the attitude of one construing a deed or a promissory note or a three-hundred page corporate trust indenture. *The process of interpretation cannot be the same because the conditions which determine the character of the instruments are different.*" (Emphasis supplied.)

The understanding we need for the new arbitrators we also need for the new advocates. The process will never be what once it was unless the parties recognize that their advocates—their presenters of a case to the arbitrators—must speak in the voice of the principal—of the employer or of the union—and must know and apply the arbitration philosophy of the party represented. What I believe is lacking is pointed up at the seminars and workshop meetings conducted for arbitrators by the Academy and for the parties by the American Arbitration Association and, sometimes, by the FMCS. Whatever the subject discussed, conduct of hearings, evidence, examination of witnesses, remedy, discipline and discharge, or even philosophy of labor relations or of arbitration, the earnest questions or comments of the persons attending deal primarily with *legal* questions: the admissibility of a document, the right to call a witness, the appropriate ruling on an objection. I have attended a large number of these workshops, seminars, and programs. I have waited in vain for a question from the floor or a comment that deals with the continuing relationship between the parties or with the philosophy of arbitration involved in the examples being discussed. It would be valuable if those seminars, lectures, workshops, and programs sought to show the impact of actions in the grievance procedure and in arbitration on the relationships between the parties, on shop-level problems. In my judgment, the education and training offered to advocates and arbitrators must give some understanding of how labor/management relationships are developed and nurtured, and the influence on those relationships of the quality of arbitrators' and advocates' conduct at the hearing.

I think it is for the employers and the unions, as well as for the arbitrators and those bodies offering training, to do something about revising the scope of the training for new advocates and arbitrators. It is not enough to offer training for procedure and case law; it is *required* that new advocates and new arbitrators get to know the essence of this unique process, the contribution

that arbitration makes to the continuing relationship between the parties and to their continuing accommodation.

VI.

For the past seven or eight years I have had calls from many would-be arbitrators, from various parts of the country, asking for help in analyzing their backgrounds and for suggestions about how they might enter the field. There have been as few as five and as many as fourteen persons each year. I invite them to talk with me, either when I am in their part of the country or in New York. Generally, they are with me for at least one day of observation and talk. I help analyze their backgrounds and training needs and try to describe what the process is and how it developed. If there is a real interest, I try to suggest what will be needed to contribute to their understanding of the responsibility of arbitration and of the arbitrator. Where these persons do not have experience in the collective bargaining process in their backgrounds, I generally recommend that they make up for that deficiency first, preferably at a school which does not fashion the teaching of collective bargaining only for unions or only for management. I have felt that those persons must know how language finds its way into a contract—what it means when, during negotiations, at four in the morning before contract expiration, the parties leave unclear language in their agreement, saying, "Well, *we* know what it means." The point is, of course, that they do not know what it means, exactly, but they do know what their relationships are, so that they may contemplate working out problems if they arise. It never is totally clear what are the unstated commitments of their contracts. I have tried to lead these persons who seek to get into arbitration into an understanding of that kind of problem—an understanding of the Shulman/Cox references I quoted a few minutes ago.

It is in connection with that effort that Peter Seitz and I have developed a new project. Peter and I have had a tremendous amount of help, in our early days, from a number of persons. Each of us had the benefit of working with people of great heart, who spent much time and effort helping each of us to develop an understanding of collective bargaining, mediation, grievance handling, contract administration, and arbitration. They contributed to our understanding of arbitration as the final

and binding dispute-resolution method of the parties' choice.

We wish to repay that great gift we received by sharing our knowledge and our intuitions with others—with the new hopefuls coming along. Peter and I will give to perhaps six persons at a time the opportunity to discuss arbitration with us, to read and talk about some of the treasured writings on the subject. The persons who will be admitted to our discussion series will have to have tried to prepare themselves for arbitration by obtaining some practical exposure to collective bargaining and the administration of the labor contract which we think is so important to an understanding of the philosophy of arbitration.

We will talk of that philosophy. We will not discuss or, to any extent, consider case law. Our interest will be in the conduct of the hearing, the analysis of the positions of the parties as submitted to the arbitrator, and what their presentations tell us about their grievance administration and their relationships at various levels within the employer and union organizations. We will talk of the opinions supporting the awards, how statements made in the hearing affect the future quality of the parties' relationships. Mostly, we will want to convey the essential, unique nature of the process that has made it so valuable an asset to the labor/management community.

The participants will not have to pay, of course, except as they may have to travel to reach us. We hope this will work, that we will be able to furnish to a few future arbitrators some of the same opportunities for learning that the apprentice arbitrators have had in the great steel and other umpireships, or that we ourselves have had from the arbitrators and others who shared with us.

VII.

I have tried to convey my sense of disquiet as to three aspects of labor arbitration: the technical and legalistic approaches to arbitration, the increase of appeal and review procedures, and the training and development of arbitrators and advocates. I think it is our responsibility, in the Academy, to bring to your attention some of the problems we have been seeing, and some of the solutions or actions we have been suggesting. The loss of arbitration as a dispute-resolution mechanism may not be the end, but if its character is changed by the technicians, or if its final and binding nature is threatened with appeals or other

judicial review, or if the new arbitrators or advocates are not given adequate background or experience, we may find arbitration so changed as no longer to be able to fulfill its unique function.

In the word of our Hawaiian friends, "Mahalo."