II. TRIPARTITE ARBITRATION: OLD STRENGTHS AND NEW WEAKNESSES

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One way of approaching the subject of tripartite arbitration is to examine the history of the way this subject has been treated at previous meetings of the Academy. I was the editor of the volume of *Proceedings* of the 21st Annual Meeting which took place in 1968. At that meeting the subject of tripartite arbitration boards was examined more thoroughly than at any Academy meeting before or since. Not only did Hal Davey present a thorough and thoughtful paper on the subject, but four panel sessions, each of them tripartite, discussed tripartitism in arbitration and reported on their conclusions. My recollection of editing the reports of those panel workshops was that, in general, the partisans expressed far greater support for and confidence in tripartite boards than did the arbitrators who participated. I thought then, and continue to believe now, that this fact alone should give our members pause. Apparently our general confidence in our competence and expertise is not uniformly shared, or shared to the same degree, by those who retain us. If those parties are willing to accept the delays and higher costs that are usually associated with genuine tripartitism in return for the greater confidence it gives them in both the process and the outcome, then there is obviously no reason to argue they should not do so. More importantly, perhaps we should be less quick to keep harping on the weaknesses of the process.

That was my thought a dozen years ago. Since then I have found my arbitration practice increasingly in industries that rely on tripartite boards. As a result I find myself in complete sympathy with Workshop D of 1968, which was composed entirely of practitioners from and arbitrators with experience in the airline industry. This group, alone among the four workshops, expressed itself as overwhelmingly in favor of the tripartite boards almost universally used in the airline industry. It is, of course, true that this evolution resulted from the Railway Labor Act's system board precedents. But does the statutory background in

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any real way explain these parties' preference? Surely such sophisticated practitioners could waive executive sessions and the like if they did not think them useful, even if they felt the Act constrained them to include the facade of a tripartite procedure in their contracts. The answer seems clearly to be that they, and some of us, find the tripartite procedure useful.

One of my early pilot experiences illustrates why. In a particular case, I genuinely awaited the posthearing executive session, not to understand the dispute itself, but rather the intensity of emotion that seemed to underlie it. Early in the executive session, I therefore asked the ALPA pilot board member, "Tell me, why do the pilots seem to feel so strongly about this work practice?" Before he could respond, a company member, also a pilot, jumped in: "Because the damn practice just isn't as safe as the alternatives!" Not only did I realize this was a situation where two pilots could and should outvote three others, I also began to appreciate the real values of tripartite boards, at least where they are manned, or womanned, by partisans of integrity.

Similarly, my friends from the flight attendants' side of the industry have often helped me to understand not simply the facts, but also the underlying stakes involved in some of their grievances—issues that had I been working alone I might have misunderstood or weighed inadequately. Most arbitrators, even if they have a few kind words to say about the tripartite board members, nevertheless conclude that the practice is wrong if it changes their bottom line—who wins or loses the award. In his paper, Arnold Zack expresses frustration about a case where parties, having received a hint in executive session as to which way he was leaning, proceeded to settle the grievance on a basis much different than he would have awarded. Again, why?

Every day in North America parties settle grievances on terms much different than I would have, but I have never wrapped myself in a mantle of omniscience and concluded they were wrong. Returning to the airline industry, I have gone to more than several executive sessions with my mind tentatively made up, only to find that the discussion led me to a wholly different award. And it goes both ways. Occasionally an employee I have thought hopeless is deemed by both company and union representatives to be potentially salvageable and worthy of another chance. At other times I have been very concerned by the apparent inequity of what happened to the grievant under the contract, only to discover that both parties conceded that that was

what they bargained for, even if they did not foresee all the consequences. I cannot conclude that my resultant award, which might have been different without the further understanding I gained at the executive session, was somehow corrupted because the parties, even without knowing it, persuaded me to change the bottom line.

In summary, my experience with tripartitism among skilled and quasi-neutral board members is that it ranges from neutral to positive in terms of its value to the process—neutral in many cases because my board members genuinely cannot agree or because this industry, like any, has its share of five-and-dime grievances where the tripartite procedure contributed nothing to my understanding or the wisdom of my conclusion, but positive, often, for the reasons I have expressed.

Let me turn for a moment to tripartite boards in interest arbitration, particularly those in the public sector. At the 1974 Annual Meeting I gave a paper pointing out that if you combine final-offer arbitration with somewhat flexible procedures, the process becomes known as med-arb, where no award need ordinarily be rendered and even those that are necessary are often consent awards. I would simply repeat today that tripartitism is almost essential to this process. Moreover, med-arb has seemed a valuable enough tool that several states have deliberately sought by legislation to adopt med-arb procedures that we in Michigan happened on by accident.

Nor have I lost my confidence in such procedures. An interest arbitrator is a legislator, not a judge. We have not taken to legislating by philosopher-kings, either in Plato's time or now, and I don't think we should in labor-management relations. We who are occasionally asked to legislate in the public sector will almost invariably do so more wisely if we find our decisions informed and molded by the ideas and pressures of others' opinions, or even by their prejudices. This is the essence of the legislative process.

Having said that, let me add that I am not as enthused about some developments in the *practice,* as opposed to the *theory,* of public-sector arbitration as I was some seven or eight years ago. In practice, I have found that the wise legislative process of which I spoke increasingly breaks down, for several reasons.

First, as we have opted for public-sector interest arbitration in more and more states and as its use is therefore more common, the relationships between the parties and between the members

of tripartite panels are often immature. Those who think or behave childishly cannot by definition do a wise job of accommodating, compromising, and creative problem-solving the process requires. Moreover, I cannot absolve my arbitrator colleagues from blame in this area. Since I gave my 1974 paper, I spent four years as chief administrator of the Michigan arbitration statute. Upon occasion, the senior experienced arbitrators were simply unwilling to shoulder what Arvid Anderson has called the "heavy lifting" of interest arbitration. This leaves it to their younger and less experienced colleagues to fill the void. Thus, we have too often seen immature parties led by less experienced neutrals—hardly the best recipe for industrial creativity or a happily rising cake.

Another problem with public-sector interest arbitration that has appeared increasingly in recent years is that arbitration has been required to substitute for collective bargaining in relationships where, because of eroded tax bases, taxpayer rebellions, or both, the wages and fringe benefits of public employees have fallen well behind inflation and even to substandard levels. If you will go back to the 1973 Annual Meeting, you will find that Herman Sternstein cautioned us that interest arbitration cannot work, at least in the local transit industry, if wages and benefits are substandard. Without taking time to repeat his reasons for this conclusion, I would simply note that the caution expressed there is equally true of the public sector. Where arbitration panels are asked to work with genuine inability to pay, whatever its cause, the resulting awards have sometimes become a political football. The neutrals have too often been attacked by the politicians and even by judges because *we* have not been able painlessly to overcome *their* or *society's* deficiencies. It is not healthy for arbitration to become mixed with the political process. I decry such happenings, though I doubt that even the strongest and most experienced arbitration panels can do much to avoid it.

In final conclusion, while I believe that tripartite interest arbitration in the public sector is here to stay, I fear we are not doing all we can to make it work as well as it might. Where the parties and their relationships are not mature, where they put partisan representatives on panels who possess neither experience nor credibility with their constituents, and where they are led by a relatively inexperienced neutral, the potential for mischief is present. If the parties then use the award that ensues as a scape-

goat for their own political failures, the mischief becomes a reality. No matter where the fault lies—and I would spread it rather broadly, even including some of us—the result does no credit to arbitration, either as a profession or as an institution.

Comment—

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I received and read Arnold Zack's paper around Easter time, and as I went through his catalogue of actual and potential misconduct by partisan arbitrators in tripartite grievance arbitrations, my mind kept returning to my favorite Easter story. It is a very old one, dealing with the American priest whose origins were in that part of Ireland where a pronounced distaste for the British is a way of life. Every time this priest delivered a sermon, no matter what the subject, he found some occasion to blast England. Finally the Bishop called him in, lectured him on the fact that Catholicism is a religion and not a political institution, and ordered that henceforth his sermons be confined strictly to theological matters and not involve any castigation of England or the British people. For a full year the priest complied with the injunction, though his heart was not in it at all. Finally, after a year of suppressing the only subject he had any interest in, he could stand it no longer. It was Easter, and he rose in the pulpit and said: "My friends, the gospels tell us that at the Last Supper the Lord Jesus rose, and he said to his disciples, 'Before the cock crows in the morn, one of you will deny me thrice.' And there was one amongst the disciples whose name was Judas, and he rose and said, "I sy gov'ner; you aynt lookin' at me ar yu?' "

To all of the high crimes and misdemeanors that Arnold has listed, I plead not guilty.

A very large proportion of the grievance arbitrations, and almost all of the interest arbitrations, handled by my office involve cases in which we act as counsel and partisan arbitrators representing, in tripartite arbitrations, the Amalgamated Transit Union, which is the dominant union in America in the local and over-the-road passenger industry. From its inception in 1892, the Amalgamated has been wedded to the process of

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