CHAPTER 1

THE PRESIDENTIAL ADDRESS: LABOR ARBITRATION—A PLEA TO THE PARTIES

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I have just emerged, not completely unscathed, from three days of intensive involvement in the internal affairs of the National Academy of Arbitrators: our Executive Committee on Monday morning; our Board of Governors' sessions on Monday afternoon and all day Tuesday; and our Annual Business Meeting yesterday, where the ultimate policy debates take place.

I am glad to report that the Academy is a healthy and vigorous organization. We now have more than twenty active committees on which 180 members are serving, and we have seventeen regions serving our members' needs between Annual Meetings. Half of our active members are actually in this great banquet hall today.

We have also been welcoming twenty-five new members, who have been steeped in the ways of the Academy since Monday noon and in whose honor all members and their spouses enjoyed a dinner party last evening. (I would like to invite these new members to rise so that all of us can give them the recognition they richly deserve. Thank you. Your special status as *new* members is terminated.)

Now, I want to shift gears. I wish to address these remarks primarily to the users of our services: to the parties who agree to arbitrate labor disputes, who establish arbitration machinery, and who jointly hire arbitrators; and also to *their* organization, the American Arbitration Association, many of whose officers and top staff are with us today. We who arbitrate thank you for the opportunity of serving in a challenging, exciting, and constructive role. Our obligation, as individuals and through the Academy, is to do the best job we can. In addition, as professionals, we who arbitrate have an informed and constructive

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concern for the quality of arbitration and for detecting and opposing developments that would undermine the usefulness of this process to the parties. The Academy helps us to achieve these objectives.

The demand for labor arbitration has increased consistently since World War II in spite of dramatic changes in the labor relations environment. We are all aware of such factors as the decline in the share of the labor force that is unionized; the relative shift of unionism out of its traditional blue-collar base into public employment, health services, professional athletics, and other new sectors; innovative employee involvement programs in some unionized plants and offices; the aggressive anti-unionism of many unorganized employers; the traumatic impact of deregulation on collective bargaining in some industries; the major and sometimes devastating effects of nonunion and foreign competition on many industries; higher rates of unemployment than in past decades; increasing regulation of conditions of employment (e.g., discrimination, pay floors, job safety, pension rights, and even the employment rights of nonrepresented employees); radical technological changes, including those based on computers and robotics; changes in labor law under new interpretations by the National Labor Relations Board and the courts; and so forth. *Nonetheless, the use of labor arbitration steadily increases.*

This trend is verified by data from appointing agencies even though more and more arbitration is accomplished under direct arrangements between parties and arbitrators. We are also witnessing, in both the public and private sectors, a growth in rights arbitration for nonrepresented employees—an application of arbitration that raises some unique procedural issues. On the horizon, I believe, is an increased use of both government-imposed and voluntary arbitration as a means of ending interest disputes over changes in the terms of employment.

One excellent measure of the growth of arbitration is the size of this Academy, since we welcome into membership any person of good moral character who has achieved "general acceptability" as a labor dispute arbitrator. Since 1975, we have excluded from membership arbitrators who also function as advocates in labor relations. There are acceptable and capable arbitrators—my own estimate is several dozen—who fall in this category. I believe that very few arbitrators who qualify for membership are not in the Academy, apart from some who

delay the timing of their application, perhaps by a year or two after they are eligible, either because they are too busy to fuss with the necessary paperwork or too modest about their progress.

When the Academy accepted my membership application in 1955, we had only 216 members. The number rose quite steadily to 500 by 1980. Including the 25 you have just met, our membership today stands at 634: a net growth of 27 percent in only four years. But there has been another important change. I remember counting the number of Academy members in 1955 who were full-time arbitrators. The total came to 22 in that year, or about ten percent of 216 members. In contrast, 46 percent of the respondents to a 1982 survey of Academy members were arbitrating on a full-time basis. Moreover, of the 184 arbitrators admitted to Academy membership in and since October 1979, 81 (44 percent) were already full-time arbitrators when they entered the Academy.

Of course, it is the users of arbitration who establish the size of the Academy, ultimately, by the extent to which they want the services of arbitrators; and it is the users who also decide on who will become eligible to join the Academy by determining who the acceptable arbitrators are. It is a fantasy that membership in the Academy confers acceptability, and I have never heard of rises in demand for new members of the Academy that could be attributed merely to their acceptance into this organization. The simple fact is the reverse of the fantasy: acceptability gets one into the Academy, and that's why the acceptable arbitrators are in there. The Academy plays no role in the nomination or designation of arbitrators, and we seek to avoid any activities that could be interpreted as seeking business for our members. We invite representatives of the parties to the public sessions of our Annual Meetings because we know that the opportunity for joint participation in the programs and for the informal exchanges of information and viewpoints helps the process; but we also urge and invite nonmember arbitrators and would-be arbitrators to join us for the same reasons.

So now I want to talk briefly to the parties concerning their dominant role in shaping the arbitration process to their needs. I speak for myself, of course. I believe that most members of the Academy will agree with most of what I have to say, but I'm sure that some would challenge some of my points. My purpose is to evoke constructive discussion between unions and employers, to

whom the arbitration process belongs, and also between arbitrators and the parties. I do so with considerable diffidence, first, because the partisans in this room are among the most experienced and sophisticated users of arbitration and therefore are not really the audience to which my comments need to be addressed; and, second, because—as I have confirmed by reviewing the *Proceedings* of our previous Annual Meetings—everything I have to say has already been said, usually more than once, and very eloquently. André Gide once observed:

> "What another would have done as well as you, do not do it. What another would have said as well as you, do not say it; written as well, do not write it."[1]

Were I to comply with this admonition, I would thank you for your attention and sit down now. (Hold your applause.) Last year in Quebec, however, Judge Alan Gold pointed out that André Gide also said, somewhat inconsistently: "All this has been said before, but, since nobody listened, it must be said again."[2] It is on this basis that I will boldly proceed; but it is also on this basis that I promise to be brief and therefore fervently hope you will listen.

My thesis is a simple one: the parties control their arbitration process and they should exercise that control much more than they often do. I am talking about control over the performance of the arbitrator, control over picking the kind of arbitrator they want, control over the design of their arbitration machinery, and control over the conduct of the hearing.

Most of these matters are of mutual concern to both parties, and can be addressed by them on a cooperative basis. If one party, for ulterior and extraneous reasons, is engaging in conduct that undermines the effectiveness and acceptability of arbitration, the other party is going to have to deal with that as a bargaining table issue. If the parties don't take whatever steps are necessary to develop an arbitration process (and the underlying grievance procedure) that works well for them, no one else will.

Let's start with the usual grumblings about arbitrators: that they take too long and write too much. As Lew Gill said in his

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[1]André Gide, *Les Nourritures Terrestres* (1897). *Envoi.*

[2]Gold, *Small Claims Grievance Arbitration,* in Arbitration: Promise and Performance. Proceedings of the 36th Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1984), 19.

1972 Presidential Address, the parties can deal with such matters very easily "if they will tell the arbitrators what they want."[3] That's not hard. Make what you want a condition of appointment. Eastern Airlines and the Machinists Union tell me that any discharge case I hear must be decided in five working days. If I can't meet that deadline, I don't agree to schedule the case. I've always met that deadline. Some years ago, American Airlines and the Transport Workers Union specified that they wanted my decisions single-spaced on one sheet of paper if possible. They got what they wanted. If an arbitrator should fail to comply with your instructions, progressive discipline is not a prerequisite to the penalty of nonselection. On the other hand, if you—meaning *both* parties—have found an arbitrator you'd be glad to use again but whose performance and product have some attributes you'd like to modify, have a cup of coffee with this arbitrator and talk it over with her or him.

Is there a shortage of good arbitrators? This question somehow reminds me of Yankee Manager Yogi Berra's classic remark about an eating place he once enjoyed: "Nobody eats there any more. It's too crowded." Although there are plenty of would-be arbitrators, the profession is in fact a small one. The great bulk of labor arbitration is handled, in my own estimate, by about 800 persons in the United States and Canada, of whom about 540 are members of the Academy (we now have about 95 inactive members). Most of the remainder consist of those who are on their way to qualifying for admission to the Academy during the next five years. As a rough guess, about 250 of the 800 are full-time arbitrators. Many of those who do not arbitrate full-time want it that way, preferring to be professors or lawyers who also arbitrate.

It would be useful to have a complete census of labor arbitration for a calendar year, but none is available. What we do know, however, is that the impression of a shortage derives from the overwhelming preference of the parties for the old hands. For this reason, the experienced arbitrators get all they can handle (sometimes more), and the rest spills over to those with less experience. That spillover means more experience for the neophytes, and thus increases over time the number who gain acceptability.

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[3]Gill, *The Presidential Address*, in Labor Arbitration at the Quarter-Century Mark, Proceedings of the 25th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1973), 7.

There are hundreds, perhaps thousands, of would-be labor arbitrators who aren't going to make it. Among those who will be disappointed and frustrated are a majority of the 3,100 on the AAA labor panel and about one-third of the 1,500 on the FMCS panel. Some of these people shouldn't make it: they're just not qualified. Others, who could develop into good arbitrators, lack credibility among those who pick arbitrators. The parties are going to end up getting as many as they need, and the successful ones will be those who started from a credible base.

Unions and managements clearly want people who understand the labor relations context. This is why many of those who succeed are old hands in labor relations before they start to arbitrate: mediators, industrial relations directors, union leaders, or veterans of government agencies concerned with labor problems, who enter arbitration as a second career. One example was Richard O'Connell of St. Paul, Minnesota, a veteran of the National Labor Relations Board who first served as a labor arbitrator at age 60 and who would have entered the Academy yesterday but for his recent death at age 73. Most of these old hands, incidentally, are not attorneys. Many of the others who succeed are either professors in a relevant field (industrial relations, law, labor economics, and even a rare political scientist like Chuck Rehmus), or persons who acquire insight and experience through service as associate arbitrators in umpire systems or as interns for established arbitrators.

The parties who seek an arbitrator face the dilemma of a tradeoff between experience and availability. There are tactical devices for promoting access to the busiest arbitrators, such as scheduling hearing days long in advance unrelated to a particular dispute. The AAA should undertake to increase the credibility of its panelists by insisting on some measure of direct and successful involvement in labor arbitration—for example, through some kind of internship—as a precondition for listing. Meanwhile, when you see names you don't recognize on the panels of appointing agencies, I would urge you not to scratch them without some investigation. Ask the agency staff and other advocates about their experience and reputation. Although some of those listed may *not* be well qualified, remember that there are hundreds of people out there with both arbitration experience and early availability and whose names do appear on these panels. Identifying them is worth some trouble. Finally, those users of arbitration in a position to do so should help

provide training and experience to aspiring arbitrators, especially those who show signs of acceptability. Agree to let them observe your arbitration hearings; consider using them for some kinds of issues; and cooperate with proposals under which they might serve as hearing officers or as associate arbitrators under the supervision of old masters. The Academy and many Academy members are doing what they can in this direction. We are delighted, for example, that thirty interns participated yesterday in special intern programs arranged by our Committee on the Development of New Arbitrators.

What about your arbitration system? Myron Joseph talked about "The Design Process" at our 1979 Annual Meeting and observed:

> "When arbitration is considered in the context of the complex framework of union and management goals that clearly go beyond speed, efficiency, and justice, it is apparent that it is in the interest of the parties to fine-tune their system to try to achieve their own particular balance of objectives."[4]

Here, too, there must be tradeoffs among conflicting goals. The "system" concept embraces not only the obvious structural characteristics—sole arbitrators versus tripartite boards, ad hoc selection versus permanent appointments, and so on—but also many attributes relating to and affecting the total industrial relations system. For example: Where should hearings be located? Who should be permitted or encouraged to observe them? What level of the union and employer structure should handle the presentation of cases, or should that be turned over to outside counsel? Which subjects should be excluded from arbitration? What kinds of time limits should be imposed? Should there be transcripts prepared or briefs submitted? Should the same "system" be employed for different kinds of issues?

The status quo may be satisfactory, but I would urge parties to consider periodically whether some fine-tuning or even a major redesign may not be in order. Because many of the objectives relating to contract administration should be mutual ones, a joint study committee can be a productive device. And I leave this topic with one suggestion: consider whether arbitrators who

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[4]Joseph, *The Fine Art of Engineering an Arbitration System to Fit the Needs of the Parties*, in Arbitration of Subcontracting and Wage Incentive Disputes, Proceedings of the 32nd Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1980), 170.

have had much exposure to a wide range of arbitration systems may not be a helpful source of ideas. It is my impression that the parties rarely ask arbitrators for ideas about arbitration systems, and I would like to know why. Do they believe we don't have any?

The arbitration hearing is an integral and conspicuous part of the system. How and by whom it is conducted has a critical effect on whether the process is respected, not only by the parties as such, but by the employees whose grievances are decided and by the supervisors whose actions are under review. Accordingly, it is my view that control of the hearing structure should remain with the employer's labor relations staff and with the appropriate union officials including the local officers and grievance committee. If they need expert outside help, those helpers—who are usually labor relations attorneys—should be charged with understanding the context out of which grievances arise, with recognizing that more may be at stake than winning each adjudication by any means, and that the parties' total relationship should be healed, not wounded, by their arbitration experience. Ideally, the hearing room advocates should participate in at least the last step of the grievance procedure prior to arbitration and always avoid tactics that will poison the labor relations atmosphere.

This Academy, over the years, has heard many warnings about the deleterious effects of approaching grievance arbitration like one-shot courtroom litigation, adopting techniques, as Allan Dash said at our 1957 Annual Meeting, "glaringly out of place in the simple arbitration procedures which many unions and managements have initially adopted."[5] Of course, some kinds of issues are unavoidably more technical than others. Also, parties and arbitrators must be increasingly aware and sensitive to the interactions between external law and the substance of many grievances. Nevertheless, many employers and unions are managing to keep arbitration under control as part of their labor relations system. At the other extreme, however, as Eva Robins noted in her 1981 Presidential Address:

> "[W]e 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

[5]Dash, Jr., *Halting the Trend toward Technicalities in Arbitration—Discussion*, in Critical Issues in Labor Arbitration, Proceedings of the 10th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1957), 109.

> officials, by persons who treat the presentation of the case to the arbitrator as a hard-fought litigation, with no holds barred."[6]

I believe you understand the concern that Allan Dash, Eva Robins and I share, and I won't belabor the point. The parties are going to get the kind of arbitration they deserve because they control the process. I urge them to recognize the broad areas of mutuality that should exist and to act jointly to keep the process as simple, understandable, educational, constructive, and efficient as possible. And I will conclude with one short story.

About twenty years ago I heard a case in the town of Troy, Ohio. It was a Goodrich plant that made airplane wheels and brakes with a relatively skilled work force represented by the U.A.W. The Union's spokesman was the local president. An international representative was present but not active. The Company's advocate was the plant's labor relations manager. A corporate labor relations staff person was present but not active. The hearing was in a conference room adjacent to the plant floor. For each case to be heard, the parties had prepared written opening statements, a set of joint exhibits, and a joint stipulation of the issue and the facts. In some instances, they had also prepared a stipulation concerning the facts that were in dispute. Witnesses, where needed, were called in from the plant floor to testify concerning specific disputed facts. They were not sworn and were typically on the stand for about five minutes each. Half the cases did not require witnesses. There was, of course, no court reporter. Closing arguments were brief and to the point. In some cases, they, too, had been written up in advance. I was given copies of the opening statements, stipulations and closing arguments, as well as the exhibits, so that my notes primarily covered only the brief testimony of witnesses. I heard eight cases that day in seven and one-half hours: five contract interpretation issues and three disciplinary grievances. My total bill was for three and one-half days: less than half a day *per case.*

That was quite an experience. I was pleased, eighteen months later, to learn that I had again been selected by these parties in Troy, Ohio. This time, only five cases were on my docket for the day. The first case took about forty minutes. We enjoyed a short break, during which I asked those around the table how fre-

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[6]Robins, *The Presidential Address: Threats to Arbitration,* in Arbitration Issues for the 1980s, Proceedings of the 34th Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1982), 7.

quently grievances were arbitrated. They said nothing, apparently not understanding my question. "Well," I asked, "when did you last have an arbitrator here?" The local union president then spoke up, smiling: "No arbitrator has been here since your last visit, Professor Kahn. We didn't want to bring you down again until we had enough cases to fill up your day."

I close on that happy example of economy, efficiency, and fine-tuning a process that met the needs of those parties.

There is still a lot to come in this Annual Meeting, both work and play: enough to fill up your day, and tomorrow as well. I intend to enjoy these days with you, and I thank you for your attention.