CHAPTER 2

ARBITRATION IN COURT: JUDGING THE JUDGES

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When I accepted Bill Murphy's courageous invitation for me to be with you today, I realized I was going to have to do some mental gear shifting to get back into the mood and mode of labor arbitration. I assure you I shall not presume to undertake vocalizing with pertinent lyrics as did my colleague Judge Alvin Rubin at our Thirty-First Annual Meeting. His performance was inimitable. Instead, I recalled a file that I had kept while I was engaging in labor arbitration which might be worth some interest and attention. When I went on the court I had given my arbitration files in toto to the University of Texas Law School Library. I might add that that year my tax accountant convinced me that I could not take a deduction for doing so because of their lack of intrinsic worth.

So I phoned the law librarian and he suggested he would phone me back later. They did find the papers. It took them three days. When he phoned me back I went out to the Law School Library. I was told that a librarian would accompany me to the papers, but since I had taught there for so many years I replied that that would not be necessary. They thereupon gave me highly detailed instructions how to reach the papers which were in the far corner of the subbasement of the library. And after making a turn here and a turn there and another and another, I did find them.

I do not want you to think that this was in a cold and dank catacomb type location. This is a cavernous room which was well lighted—after I turned on the various light switches as I went along toward the distant corner.

Well, I found my eighteen file boxes of papers, all intact and still in the boxes as I had placed them. When I noted their location I realized that the librarian concurred in the view of my tax accountant as to their intrinsic worth. Those of you who are

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older and are lawyers will understand. They were located in library shelves immediately adjacent to a complete set of Cyc. Cyc was superseded in full many many years ago by Corpus Juris, which in turn was superseded a considerable number of years ago by Corpus Juris Secundum.

At any rate I tackled the boxes. I did not know just where I had put the special file I was looking for. After I had disposed of several without success, I heard footsteps approaching from the distant corner of the room. Some moments later as the footsteps came alongside the stacks where I was working there was a sharp intake of breath and a short genteel scream. The library employee then apologized and said that she was the only one who came down there regularly and that she had never seen anybody else down there before. She then went on into another room to get some file which had been stored away. Thus, I was spurred on by the realization that the material if I could find it would be unique, or at least that no one had ever seen it in those files. And I did find the miscellany file that I was looking for.

It is indeed a miscellany—things that I had run across over the years in transcripts, the wording of grievances, and I even discovered some things that were not directly related to arbitration. Let me give credit for one third to one half of the items I have taken from my file to one of the nation's best court reporters, Jerry Von Sternberg, of Houston. They come from his book, *I Solemnly Swear.* But these were items which had piqued my interest. Thus, there was the forklift driver who described his accident as follows: "The forklift jumped ahead in reverse and ran into employee James who was running away too close behind."

There was the company reply to a grievance that said: "This company will not tolerate an employee expressing his candid view about the sloppy operation of our plant."

An employee grievance: "My discharge was entirely due to my supervisor misunderstanding my motive when I explained to him several times what he was always doing wrong."

And then there are a few items from transcripts. This first case involved someone who is accused of signing an improper time card:

Q. Would you tell me your name?
A. Yes.
Q. When you sign your name how do you sign it?
A. With my right hand.

Q. What do you write with your right hand?
A. I write my name.
Q. But what is your full name?
A. John Wayne Parker.
Q. What is your usual signature?
A. Well, I usually sign my name J.V. Parker.
Q. You say your middle name is Wayne?
A. Yes sir.
Q. What do you use the V for?
A. Wayne.

This next case involved an employee who had been disciplined, and the spokesman for the company was bringing up an earlier instance where he had been disciplined for a verbal exchange with a supervisor.

Q. Isn't it true that the day after you returned from your vacation about 11:00 o'clock in the morning when your supervisor criticized you for turning out a sloppy work product you made an obscene gesture at him and called him an s.o.b.? Is that true or is that not true?

A. That is an out-and-out lie if there ever was one. That happened at about 3:00 o'clock in the afternoon not at 11:00 o'clock in the morning.

In another case:
Q. You say your leg was broken in three places?
A. Yes. St. Louis, Beaumont, and Houston.

Another:
Q. Were you paid by the hour?
A. No, on Saturdays.

And another:
Q. What did the doctor tell you about your condition?
A. He said I had worked up a bad case of lazy.

Yet another:
Q. Your supervisor says you're a classic goofoff.
A. I not only resent the allegation, I resent the alligator.

Then I also discovered that I had thrown in a few things that were not directed to labor arbitration but the same kind of material coming out of transcripts or made in insurance claims and the like. First, as to some insurance claims. The first is reminiscent of the tow motor explanation I gave you earlier: "I collided with a stationary trolley coming in the opposite direction." Another: "I was taking a friend home and following the lampposts which were in a straight line. Unfortunately, there

was a bend in the road bringing the right hand lamppost in line with the left, so, of course, I drove into the ditch." And, again: "Coming home, I drove into the wrong house and collided with a tree which I haven't got."

A few more transcript items that I found in this file. The first is a direct quote from an automobile accident transcript and it has left me puzzled for many many years ever since I read it in "Jerry Von's" book:

Q. How fast were you going at the time of the accident?

A. Oh, I was only going after some olives.

Then there is this one which I found went right to the point:

Q. You say that she shot her husband at close range? Were there any powder marks on him?

A. Sure, that's why she shot him.

Finally, I ran across this actual arbitration award. It involved a wildcat strike at a warehouse. On a Monday morning an employee was suspended for refusing to take a physical exam. Shortly thereafter the employees walked out. The case involved the discharge of the chief steward for allegedly instigating the walkout although he said he knew nothing about it. This is what the arbitrator wrote commenting upon the evidence:

> Taking the full thrust of the union's evidence in this proceeding in its entirety we have one of the most remarkable walkouts in the history of industrial relations in the United States. If the union evidence is to be fully credited we have the picture of all employees walking out in protest of the suspension, a few minutes earlier, of Mr. Morris. Yet, none of the employees had been told by anyone that he had been suspended. In the meantime employees testified the chief steward was moving rapidly over the entire warehouse telling the employees not to go out on strike, although he testified he knew of no walkout planned or organized or taking place.
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> But most incredibly, 15 employees testified as to their participation in the walkout. And each one testified he followed everybody else out. [There follows a citation to 15 different pages in the transcript.] The picture of all employees walking out last through those doors after all the others had walked out is mind-boggling to say the least. The utter spontaneity and the mental telepathy as well as the time and space warp involved, if this evidence is to be taken at value, belongs only in the annals of the occult. This arbitrator does not accept it.

At this point, I had better take the wisdom of Yogi Berra to heart. It was Yogi who said: "You had better know where you are going or you are liable to end up somewhere else!" So it would be well for me to move into what might be called the substantive

phase of what I would like to say today; I warn you that I do not have a single theme. The various things I do want to talk about are in general intertwined, however. Two specific matters are raised by a case familiar to some of you—*W.R. Grace & Co. v. Rubber Workers Local 759.*[1] It may be that some of you may feel that the most laughable aspect of my speech today will be my attempt to explain my opinion in that case. More than one of you now in this room has in very gentle fashion raised questions about one or two things which appear in that opinion. Rather than to go into those items in detail let me say simply this. Please remember that I was writing not for myself but for a three-judge court, and that is all I shall say about that.

In this case black male employees filed a complaint with the EEOC claiming racial discrimination in employment practices. The EEOC also determined the company had been discriminating on the basis of gender. As a result of the findings, the company and the EEOC signed a conciliation agreement under which the company agreed to cease and desist. This agreement in terms overrode seniority provisions of the collective bargaining agreement between the parties. The union knew that this agreement was being worked out but did not participate in any way in the negotiations.

The union instituted grievances to establish seniority rights under the contract. The company brought suit to enjoin the union from arbitrating grievances where the relief would conflict with the conciliation agreement which had been signed with the EEOC. The federal district court held for the company and enjoined the arbitrations requested by the union. *Southbridge Plastics Division v. Local 759.*[2] The union appealed to the Fifth Circuit. While the union appeal was pending the Supreme Court decided *Teamsters v. United States.*[3] You will recall in that case the Supreme Court followed the wording of Title VII of the Civil Rights Act of 1964 and found that bona fide seniority systems were specifically protected by Section 703(h) of that statute. When the appeal of the union in the *Grace* case came to the Fifth Circuit the district court was reversed, the court relying, at least in part, on the *Teamsters* case. We returned the case to the parties for the operation of the grievance procedure. A grievance was

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[1]652 F.2d 1248, 107 LRRM 3251 (5th Cir. 1981).
[2]403 F. Supp. 1183 (M.D. Miss. 1975).
[3]431 U.S. 324, 14 FEP 1514 (1977).

submitted to arbitration. The arbitrator, however, ignored any terms of the contract and simply held that it would be "inequitable and manifestly unfair to penalize the employer when the employer was obeying the conciliation agreement with the EEOC at a time that it thought it was a valid agreement."

The union continued to process grievances and these other grievances then came to arbitrator Gerry Barrett. He upheld the union's grievances. In making his award Gerry Barrett accepted the position that if the earlier arbitration had been based upon an interpretation of the contract, it would have been binding upon him. He found, instead, that the earlier award was not based upon the contract. Thus he felt he was free to interpret and apply the contract and make the award which he made.

The company brought this suit to set aside the Barrett award and enjoin pursuit of further grievances. The district court held in favor of the company and granted a summary judgment against the enforcement of Gerry Barrett's award. On appeal, in essence we agreed with the position which Barrett took in his award and granted summary judgment enforcing the Barrett award on the ground that the earlier award was not binding because it departed from an interpretation and application of the contract.

We also stressed that the district court and the earlier award in talking about fairness and equity to the company seemed to overlook entirely the matter of fairness and equity to the employees who had been illegally deprived of their seniority rights until the *Teamsters* decision revealed the agreement with the EEOC as invalid. As I said in the opinion, the events began with a violation of the Civil Rights Act by the employer, followed by an illegal conciliation agreement with the EEOC. On the other hand the employees had not violated the Act, they had not agreed to an illegal conciliation agreement, and they had simply pursued their legal rights in court and they had won. I further pointed out that if the company was to be excused from paying damages for its failure to follow the seniority agreement, its monetary advantage came directly out of the wages of the workers who were deprived of the back pay to which they were entitled under those seniority provisions. This would mean that the company, which had violated the law and later followed a course of conduct not authorized in the law, would be excused from financial responsibility, and the employees who had done

nothing wrong and were correct in the law would bear the financial loss.[4]

The Supreme Court granted certiorari to review the case (this is scary to the court of appeals judge because it means at least four justices voted to review the decision). But the Supreme Court unanimously affirmed.[5] In affirming, however, Justice Blackmun writing for the Court gently stated that the Court in reaching the same conclusion to enforce the Barrett award, took a "less circuitous route" than I had taken in my opinion. The Supreme Court focused entirely upon the validity of the Barrett award. In other words, it did not in any way face the issue of whether the earlier award was valid or not. It simply evaluated the Barrett award on the basis of whether it drew its essence from the collective contract and was not in violation of public policy, and upheld it.

The *W.R. Grace* case raises two issues upon which I would like to comment briefly today. Both of them are issues which have been discussed over and over again in the National Academy without resolution. The first issue is raised by the difference between my opinion for the circuit court and the Supreme Court's opinion in the case. The circuit court evaluated the earlier arbitration and found it invalid because it did not draw its essence from the collective agreement. Indeed, it made no reference whatever to the collective agreement but talked solely in terms of fairness and equity. This was Gerry Barrett's conclusion and it was our conclusion as well. If the earlier award had been based upon interpretation and application of the contract, would it have been binding so that the later Barrett award could not change the interpretation? This is the issue of stare decisis in labor arbitration, and arbitrators have split on this issue over and over again. Some arbitrators have gone so far as to say, "the arbitrator may consider prior awards between the parties . . . but he is not bound to follow them. As long as the arbitrator keeps within his jurisdiction, he can decide the issues submitted to him, notwithstanding any prior awards between the parties unless the parties have agreed otherwise."[6] A number of arbitrators have recognized that the second

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[4]*W.R. Grace & Co., supra* note 1.
[5]*W.R. Grace & Co.*, 461 U.S. ___, 113 LRRM 2641 (1983).
[6]*Federal Bearings Co.*, 22 LA 721, 725 (Justin, 1954).

arbitrator should follow the earlier award unless it is "plainly erroneous."[7]

Arbitrator Barrett and the circuit court were aided in this case in finding that he was not bound by the earlier award because of a specific finality provision in this particular contract. But in general can it be said that the union and the company now have and are stuck with an authoritative interpretation of that provision of the contract involved in the grievance? It is my view that the award of an arbitrator at the conclusion of the grievance procedure, if the award is based upon the "essence of the contract" and interprets and applies a provision of that contract, is and should be binding on the parties for the duration of that contract. I do not now see, nor did I ever see when I was an arbitrator, the justification for saying that the parties can keep reopening the same issue through the grievance procedure to new arbitrators to keep the contract provision unsettled throughout the life of the agreement.

I am aware that it can be argued that since there is no hierarchy of appellate review of an arbitration award, there is greater justification for allowing an erroneous decision to be corrected by a later submission. But the argument on the other hand is that the parties themselves have promised to submit to an arbitrator the interpretation and application of a particular provision of the contract. That process having been completed, the parties are bound by their own submission. The contract now has the authoritative interpretation for which they agreed to ask. You will note that this does require that the award to be binding must be an interpretation and application of the contract and based upon the essence of the contract. Bargaining created their contract. If the parties do not like the award, bargaining can change it. But the very purpose of the agreement to arbitrate is to establish an interpretation and application of the contract that is to bind the parties.

Thus, the Supreme Court took the easy way out in the *Grace* case, and I know that many of you here feel we should have done the same thing. But Arbitrator Barrett and my court did not think so. You will notice how I keep insisting upon a close association with the views of Gerry Barrett, one of the most distinguished of all labor arbitrators and members of this Association, who served us as the NAA President in 1972.

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[7]*See, e.g., Mallinckrodt Chemical Works,* 50 LA 933, 935 (Goldberg, 1936).

So much for the first subject I touch upon briefly today. There should be a principle of following prior decisions—stare decisis—under the same collective agreement.

Somewhat more indirectly, the *Grace* case raises another perennial issue. I have heard it said many times from the podium of the National Academy of Arbitrators at its annual meetings that the arbitrator is hired to interpret and apply the contract, not to determine what is the law. The answer to these contentions is that the law simply does not recognize such a distinction. It is elementary in contract law that an illegal provision is not valid, and it is just as elementary that a contract is to be interpreted to operate in accordance with the law. It is my view that no arbitrator has the right under the agreement between the parties to apply a purported contract provision that is illegal. I suppose the parties could provide in terms that the arbitrator is to apply the wording of the document and nothing else whether or not the document constitutes a legal contract. But, of course, no court could be expected to enforce such an award. But absent such a stringent provision, insofar as the document purports to be a contract, it must comply with the law.

Some of you who are not lawyers may feel that I am urging a monopolistic ploy for lawyers as arbitrators, that I am unduly restricting the rights of nonlawyers to engage in labor arbitration. Nothing could be further from the truth. Any competent labor arbitrator with or without training in the law is more competent to know the law in the labor field and to interpret a contract legally than most attorneys who are not dealing with labor law all the time. The law is not that esoteric in this area. It is not for the arbitrator to ignore the law in making his decisions based upon a labor contract.

From this point on, I begin to move away from my personal views or problems and I emphasize more the recognition of problems which should be our concern.

These problems can probably be gotten into by talking, again, about a particular case. Last January, a panel of my court decided the case of *HMC Management Corp. v. Carpenters District Council.*[8] This case involved the discharge by the employer of two employees who were admittedly in precisely the same situation as to disciplinary offense and prior record. But after the

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[8]*HMC Management Corp. v. Carpenters District Council*, 750 F.2d 1302, 118 LRRM 2425 (5th Cir. 1985).

discharges, the company immediately reinstated one of the employees but not the other. One of our nation's most distinguished labor arbitrators and a prominent member of this organization, held in an arbitration that the company had discriminated by reinstating one of the two employees and not the other. The employer brought suit to set aside the award. The federal district court concluded that the award did not draw its essence from the collective bargaining agreement and vacated it.

The panel of our court affirmed. The basis of the holding of our panel was that the arbitrator had not said in his opinion in so many words that the reinstatement was a discriminatory application of discipline in violation of the just cause standard. The panel engaged in a specific and detailed semantic review of the actual wording of the award to reach this conclusion. The court did soften the blow by simply remanding the case to the arbitrator for a restatement of his opinion and award to make it clear that it was based upon the contract. I emphasize that the panel did not say that discriminatory discipline cannot be awarded under a just cause standard. I have no doubt the panel will accept a slightly reworded opinion that emphasizes that the discharge was being set aside because the company had discriminated under the just cause standard in reinstating one of the two discharged employees.

Normally you would not expect that a case such as this which is simply remanded to the arbitrator to alter the language of his opinion slightly would be worthy of an en banc reconsideration by the entire court. The case constituted such a departure, however, from our earlier holdings in the Fifth Circuit that some of the judges called for an en banc vote. The vote failed. But because of a very unusual outcome of the en banc consideration, the vote is a matter of public record. I wrote a dissenting opinion to the refusal of the court to reconsider the case en banc. Six other judges joined my opinion, making a total of seven who dissented. Fourteen judges voted on whether the case should be reheard en banc. It takes a majority of judges voting in favor of en banc for a case to be heard en banc. You can add up the figures.

My dissenting opinion[9] stresses the fact that the arbitrator even used the word "discriminatory" in his opinion. I and the

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[9]*HMC Management Corp. v. Carpenters District Council*, 759 F.2d 489, 119 LRRM 2296 (5th Cir. 1985).

other dissenting judges take the view that the court was engaging in a careful semantic analysis of the arbitrator's opinion and that doing so is not the business of the courts in reviewing arbitration awards. It is not for us to concern ourselves with the merits, and it is obvious to those of us who dissented that the arbitrator was using the standard principle that the discriminatory administration of discipline is an established aspect of a just cause standard.

To bolster the view of the dissent, I made a study of all of the published opinions of the Fifth Circuit in which an arbitration award was called into question. There are three other such cases where awards were not enforced out of a total of 32 published opinions. All three of them involve substantially stronger justifications for setting aside the award than does the *HMC* case. One of these three is the *W.R. Grace* case I have already discussed where the panel of the circuit held that the earlier award was not binding since it made no attempt at all to relate its decision to the contract. The other two cases are *Meat Cutters Local 540 v. Great Western Food Co.*,[10] in which we set aside an arbitrator's award which required the company to reinstate as an employee a truck driver who overturned his over-the-road 18-wheel truck rig while drinking on duty and received a criminal citation in connection with the event. The rationale for our decision in that case was extreme public policy considerations and no discrimination was shown. The other case was *Warehousemen Local 767 v. Standard Brands, Inc.*,[11] an en banc decision in a case in which we refused to enforce an arbitrator's award which gave super seniority to the employees at the old plant of the company when they moved to a new plant where a bargaining contract and seniority rights had already been established with respect to the employees already at the new plant, and that new contract did not call for super seniority. And I remind you this is just three cases out of some 32 published decisions. Of course, there are a number of other unpublished cases in which we upheld arbitrators' awards.

Since it is to me completely obvious that the arbitrator can by the addition of four or five words alter his opinion to be satisfactory to the court, it could well be urged that en banc rehearing was not justified in this particular case on the ground that it would have no serious impact upon the usual principles restrict-

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[10]712 F.2d 122, 114 LRRM 2001 (5th Cir. 1983).
[11]579 F.2d 1282, 99 LRRM 2377 (5th Cir. 1978).

ing judicial review of labor arbitration awards. In my *HMC Management* opinion, however, I expressed concern about a claimed relatively minor impact of this decision in these words:

> Unfortunately, however, the impact of the holding of the Court cannot be so readily eased. This opinion constitutes a constant invitation to a party dissatisfied with a labor arbitration award to search the award word by word and to parse each sentence to see if a presumed defect in the award can be found. Even if a court finds no defect or can be persuaded that all that needs to be done is to return the case to the arbitrator for clarification, we have compounded in drastic measure the time involved in resolving these disputes and, even more important, the expense of resolving these disputes. Labor arbitration carries the distinct advantage of being a prompt and an inexpensive remedy. Adding frequent judicial review at the end of the process destroys its advantages. Decisions such as that of the panel in this case encourage and enable parties with the greater financial resources to wear down the opposing parties in the arbitrations through the extraordinary and unjustified delay and expense.[12]

I mention this case, and I am concerned particularly about it, because I fear it exemplifies a trend in labor arbitration which is of great concern to me. President Eva Robins discussed this trend particularly as it relates to the work of arbitrators themselves in her Presidential Address in Hawaii in 1981: "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. . . ."[13] May I add this also applies to the concept of discriminatory administration of discipline, since the word discrimination often does not appear in the discipline provision of the contract.

So much the pity if Eva is correct, and I am afraid that she is. As she pointed out, the increased adversary stance of labor arbitration and its increased formality have been two of the

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[12]*Supra* note 9, 759 F.2d at 492, 119 LRRM at 2299.

[13]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), at 8.

culprits. The courts have also aggravated the problem. But I do not blame the parties, the arbitrators, or the courts entirely. We are living, as I am sure all of you know, in a new litigious age. I read the other day of a thirty-year-old man who fell out of a tree and injured himself. Whom did he sue for his injury?—the Hostess Bakery Company. He urged that he had been an addict of Hostess cupcakes and other Hostess products over many years and that the ingredients in those products had dulled his reaction time, had weakened his muscles and nerves, and that is why he fell out of a tree. He called it the "toxic junk syndrome"! The same argument has been used, fortunately thus far unsuccessfully, by some criminal defendants who have claimed that they were unable to avoid their criminal activities because of eating such products. In the trade it has become known as the "Twinkies" defense.

I remember dealing with a case not long ago in which a prisoner in a habeas corpus proceeding asserted that his conviction and sentence for a second robbery should be set aside because he committed the robbery while on parole and the authorities should not have paroled him because they should have known that he would commit another offense as soon as he got out!

This general attitude that we litigate every issue in court and under every possible theory is injuring the important social function that labor arbitration fulfills.

What are the remedies or solutions? Here I become less definite than on the first two matters I discussed. First, cases like *HMC Management* should be taken as a warning to arbitrators that perhaps they must fall into the habit, as tedious as it may be, to include some routine boiler plate language in their awards. At least say something like: "This action violated Article 8, Section 2, of the collective bargaining agreement." It wouldn't hurt to go on to say: "My award is based solely upon the collective bargaining agreement," or such wording as: "My award is based upon the essence of the collective bargaining agreement." Now most of you won't do that; I would have resented doing that when I was an arbitrator. But if it is the kind of case where you think there is any chance that a judge not well acquainted with labor law might think you have departed from the contract, it would be wise to make clear your loyalty and adherence to the agreement.

Second, while records of the proceedings of this organization are replete with statements that labor arbitration tends to become more and more technical, expensive, and time consuming, it still is far less of any of these things than is a trial in court. Keep the labor arbitration alternative alive.

Third, related to what I have just said is emphasis upon the recent burgeoning of fair representation litigation in court as well as in the NLRB. Going into that litigation and those cases in detail is another speech for some other time. Let me just suggest this much as a word of advice. In reviewing our habeas corpus cases where prisoners claim that their trial was improper and should be set aside and that they should be set free, we find most of these claims without significant substance. We have developed the principle, however, of, as we say, "leaving tracks," when we consider and deny these various claims. The purpose of this is to have it on record that the particular claims have been considered.

I urge that in the settlement of grievances the parties "leave tracks." In cases of some real dispute, memoranda should be written and signed by the parties explaining why the particular grievance was dropped or settled a certain way. Build a truthful record of why the action taken was taken. Perhaps a later court suit can be avoided or aborted by way of a summary judgment.

Four, do not overlook an educational function. I recall making a speech not long before I came on the court to a group that was a typical community cross-section of lawyers, downtown-type businessmen, clergy, and employees of smaller unorganized businesses. I spoke on "Labor Arbitration—The Unknown Jurisprudence." I am sure many of you have made the same speech. Unless someone is involved in collective bargaining they have little or no knowledge at all of the tremendous number of disputes that are resolved in a jurisprudential way by the grievance procedure and labor arbitration. They have read of some baseball and football stars who have received salary awards which are astronomical (but, of course, reasonable and comparable) from members of this Academy. They have heard about the occasional "interests" dispute. They have typically heard almost nothing of the great mass of labor arbitration which involves rights disputes and which are therefore jurisprudential.

We may in the past have tended to avoid educating the public on the role of labor arbitration on the ground that what they didn't know wouldn't hurt them. But with this great burgeoning

of litigation and with the somewhat stagnant status of collective bargaining, we may be finding out that what they don't know may hurt us.

This last statement leads me to my final point. I am a strong believer in labor arbitration. It is not a great or utopian process. But it is by far preferable to any of its alternatives. What is my concern? Not too long ago I talked to a highly skilled and experienced labor economist. I asked him about the future of collective bargaining. He agreed with the widespread current view. His conclusion was that the plateau or stagnation will continue and that as a result of growing economic activity, employees who are covered by collective bargaining agreements, represented by unions, and subject to bargained grievance procedures ending in arbitration, will steadily decrease, percentage wise, when compared to the overall work force.

Whether this will result in an unfortunate stagnation of wages is not my concern today. My concern is in the loss of the grievance procedure and labor arbitration with the loss of collective bargaining and union representation. Yes, the aggrieved employees can go to court, but most of the time they will not do so because they cannot afford it. They also will have enough common sense to recognize that a lawsuit against an employer in court which is based upon what we routinely call a grievance will in most instances have the effect of ending the employer-employee relationship with that employer regardless of the merits of the dispute.

I was most pleased to see you discussed—at the Hawaii meeting—the arbitration of employment-related issues for the unorganized worker. At that meeting Lawrence Littrell described a grievance arbitration and procedure which the Northrup Company had set up in its unorganized business. Yet, he properly expressed concern in that the Northrup experience might not fit well in other unorganized businesses.

Let me just say in concluding that I have always felt that the grievance procedure ending in binding arbitration is as important an aspect of collective bargaining as any of its various facets. As the top labor arbitrators assembled in convention, I would urge you to turn your attention to the development of educational devices, of procedures, and of standards, to enable labor arbitration to become accepted and to serve in those businesses which do not have collective bargaining but which must have a conscientious concern that their employees be treated fairly.

Ultimately some independent source of review must be found to look at employee complaints if they are serious enough. It may be that the development should move in the direction of the ombudsman or independent complaint officer rather than in the direction of formal arbitration. But as arbitrators, I believe you have the obligation, and not just for self-preservation purposes, to play a significant role in developing due process of law for employees and their employers in what we must now recognize as the frequent relationship where there is no union representation.

I have now said my say to a number of old and good friends. I thank you for having had this opportunity.