CHAPTER 2

CHALLENGE AND CHANGE

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I am pleased to be with you today, and I bring greetings and congratulations from Secretary Brock. When I think of some of the remarkable papers that have been presented at your annual meetings, I am particularly honored to speak to you. I am an unabashed admirer of Paul Weiler, who made such an important statement to you two years ago, and I value the friendship of Tom Kochan, who spoke to you last year. I am proud to be in such company.

The 40th anniversary of the founding of the National Academy of Arbitrators prompts me to reflect on the dramatic history of arbitration. During these four decades arbitration has been confronted by some fundamental transformations in our industrial relations system. I salute the Academy and its members for their demonstrated integrity, judgment, and courage. These have been your valuable contributions to this nation.

Some of you have also understood the debt arbitration owes to the institution of collective bargaining and the important interdependence between the two. If we accept arbitration as a simple procedure voluntarily chosen by parties who want a dispute determined by an impartial judge of their own selection, it is easy to see why the discipline has become an adjunct of the collective bargaining process. In fact, labor arbitration historically has been most successful where collective bargaining has been successful. Now, however, arbitration stands at a crossroads. New demands are being placed on you and the future success of your

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discipline may well depend on your ability to support collective bargaining agreements which strengthen and encourage labor-management cooperation.

Arbitration came into its own element 40 years ago. It evolved as changes in the industrial relations system created a need for third party interests to lessen conflict. By the mid-1940s the nation had emerged from the most intensive wave of strikes in U.S. history. Memories of the Flint sit-down strike and the Memorial Day massacre, when unprovoked Chicago police shot and beat picnicking steelworkers and their families, were still fresh in the minds of most Americans. And strike idleness as a percentage of total working time was 1.43 percent—the highest ever recorded. To check and balance labor relations, Congress enacted the Taft-Hartley Act, over President Truman's veto, providing fertile ground for the development of arbitration in resolving industrial disputes. It was this evolution of labor relations, with increasing reliance on third party neutrals, that led practitioners to call arbitrators "peacemakers." But, before too many of you take pride in that accolade, let's keep in mind that an MX missile is now called a "peacekeeper."

Today I want to discuss some of the problems we face in the economy—with particular reference to labor relations—and the challenges and opportunities these present to arbitration. I also want to tell you some success stories which illustrate how flexibility and cooperation can make a dramatic difference to management and labor. All of this, as we shall see, affects the volume and character of arbitration cases.

I will not dwell on the traditional complaints about arbitration. You are all familiar with allegations of time delays, accelerating costs, and excessive legalism and formalism. I will not repeat the admonition of critical supporters who urge that such defects must be cured.

I believe that there are other, perhaps even more serious issues, which thoughtful members of the Academy might consider. I worry about the basic win-lose character of arbitration, its concentration on rules written into a contract, instead of a future-oriented dynamism. And I worry about arbitration's seeming inability to deal with conflict in human as well as legal terms and considerations. These difficulties seem to me to lead to a process which merely settles disputes without enhancing the quality of a relationship or the long-term abilities of the parties to deal creatively with conflict. Clearly, arbitration is being challenged from many directions. The time has come to move forward.

Today's Climate

The U.S. economy, and labor relations in particular, are experiencing a difficult, perhaps a watershed, period. The world has changed much in the last 40 years.

First, there is the matter of rapidly advancing new technology. We know that we desperately need state-of-the-art technology, and we must have the requisite research and development, capital investment and, most of all, capable management and trained, motivated workers to make the technology work.

Second, there is relentless global competition challenging our economy. We face enormous cost, productivity, and quality problems in successfully competing with international trade.

Third, we face many adjustments caused by widespread industry deregulation and shifting consumer and work force demands. In the past few years alone, industries ranging from transportation to communication have experienced deregulation, resulting in massive restructuring in the workplace.

Fourth, we must cope with major upheavals in the labor market—the emergence of information and service jobs as the dominant employment areas, while manufacturing production seems to have become decoupled from manufacturing employment.

Finally, there is the precarious state of private sector unionism, whose position in the work force has declined to the point where collective bargaining itself is threatened.

To meet these challenges, collective bargaining will need to be *future* oriented rather than simply a way to settle past differences. It must be integrative and focus on particular problems and joint problem solving. It must be capable of creating solutions benefiting *both* parties, instead of perpetuating the traditional win-lose scenario. Collective bargaining must also be distributive and encourage creativity and discourage polarization. Ultimately, approaches to collective bargaining should result in a more holistic and effective approach to our common future.

Meeting the Challenges

Three things are absolutely clear:

1. Whips won't work.
2. Wars between unions and companies won't help.
3. Paying coolie wages won't do the trick.

In other words, getting tough is no answer. Union-management battles will only make things worse, nor can we compete with low wages in Korea, Taiwan, and the Peoples Republic of China. Instead, we must continue to develop our strengths, such as our Judeo-Christian values, our knowledge of human resources and psychology, and our vibrant consumer market. We must be a technologically superior society, based on tenets of decency, skill, and competency.

Our industrial relations system has shown remarkable ingenuity and innovation in finding ways to respond flexibly and humanely to change. The cornerstones of these imaginative responses are found in mutuality, respect, and security. Employment security has become a basis on which to build. The signs of a dramatically different concept of labor-management relations are all around us. New forms of collective bargaining are evolving. There is *integrative bargaining*, which looks at solving particular problems through the creation of joint problem-solving processes. Even more exciting is *strategic bargaining*, which attempts to develop a holistic perspective, allowing the parties to create a common future. These new directions are forward thrusting and entirely unlike the collective bargaining of the past, in which each party came to the table with a laundry list of the nonfeasance or malfeasance of the other party.

A growing number of unions and companies are beginning to seek ways to improve upon arbitration procedures, which are frequently slow, expensive, adversarial, and focused on rules rather than results. One reason is that arbitration is usually not problem oriented. Northwestern University law professor Stephen Goldberg has said that "when the grievance reaches arbitration, it is generally presented exclusively in terms of contract interpretation, with little or no reference to the problem which led to the grievance." He also believes that this approach can severely limit the usefulness of the arbitrator's decision to the parties.

In the new labor relations climate cooperation is essential. It is the ticket to survival in some cases and to quality production in others. Grievance mediation is a logical element in the broader effort toward labor-management cooperation.

Mediation has the advantage of providing the parties expert assistance and advice without removing the responsibility for resolution from labor and management. It is also vastly less expensive. It is first-party decision making, and it tends to focus

on solutions for the future rather than problems of the past. It allows union representatives to play more versatile and positive roles. The result is a less legalistic and adversarial process.

A Northwestern University study of grievance mediation used by the United Mine Workers and the Bituminous Coal Operators' Association indicated that the average time between the request for mediation and the final resolution of the grievance in mediation was 15 days, approximately three months faster than the time normally required to resolve a grievance in arbitration.

The important thing for now is that new ways to meet challenges are developing, and they may be the only ways to successfully weather these cultural changes for most employers and unions. Of course, even in the most enlightened case it is unlikely that all conflict is eliminated. Clearly it is not. The relationship between future-oriented unions and companies will always contain elements of conflict; for instance, in distributing jointly created wealth, as well as cooperation and commitment to achieve joint goals. The difference in the successful cases is that the relationship is driven by interdependence and mutuality instead of rules and conflict.

In this context, I believe that the collective bargaining contract, more than any other document, offers an excellent starting point for labor and management to engage in positive, productive, and unique opportunities that are mutually beneficial. Cooperative labor-management agreements have been negotiated at New United Motor Manufacturing, Inc. (NUMMI), at National Steel, at Dayton Power and Light, and at Southern Bell, to name just a few. The collective bargaining contracts at these companies contain a wide variety of participative measures between management and labor. Let me now discuss some of these imaginative responses and how they affect arbitration. I believe they offer some valuable lessons.

NUMMI and the UAW

The NUMMI plant in California (the joint venture involving General Motors, Toyota, and the United Auto Workers (UAW)) is a wonderful example of how worker motivation and participation have unlocked the secrets of productivity and quality. It is truly an excellent symbol of the wide-ranging benefits which can come from labor-management cooperation. The plant had been operated by General Motors until 1982, when confrontational

labor relations and poor productivity caused it to be shut down. It had one of the worst disciplinary records in the GM system and thousands of grievances backlogged. When Toyota and GM reopened the plant in 1984 as a joint venture, it was run by Japanese management with an American work force. For everyone it was a new system. Yet by 1986, the plant had been transformed into a remarkable success story. I believe that a large part of this success is due to two things: willingness to try new procedures and a commitment to developing human resources.

The UAW had agreed that the new venture would not be bound by the rigid work rules and job classifications of the old GM contract. Working under a radically new "Letter of Intent," which stresses the labor-management partnership, the NUMMI contract (concluded in 1985) places strong emphasis on joint problem solving by nonadversarial means and on a team concept and involvement at all levels of the workplace. It also guarantees no layoffs. Job classifications have been compressed. Today productivity has improved; absenteeism has gone from 25 percent to 2 percent. During the past two years, 20 formal grievances were filed, all but one of them settled informally. There have been no job classification grievances, no management rights grievances, no layoff grievances.

As one would guess, where there are few job classifications, no layoffs, and no management rights assertions, there are likely to be no complicated arbitrations.

National Steel and the United Steelworkers

The case of National Steel and the United Steelworkers of America represents another innovative approach to competitive pressures. Again, the solution lay in a dynamic cooperative bargaining agreement that encouraged more productive labor-management relations.

For several years National Steel had been facing serious problems with imports and had lost its ability to compete. Profits were down, many steelworkers had been laid off, and relations with the union were terrible. The company realized it couldn't survive in the marketplace if it stuck with the old ways and it began to make dramatic changes. Last year it negotiated a new contract with the union which has been described by the *Wall Street Journal* as "the most innovative contract to emerge from the industry's bargaining this year." The company, a joint venture of

National Intergroup, Inc., and Nippon Kokan K.K. of Japan, agreed to profit-sharing, a no-layoff policy, and far-reaching labor-management cooperative efforts in exchange for modest wage and benefits cuts and flexibility to address work rule changes, combine jobs, and reduce the size of the work force through attrition. The contract itself symbolizes the new cooperative partnership between management and union and is clearly meant to extend from hourly workers to the executive suite. Joint labor-management committees have been established to regularly review and discuss concerns and resolve issues important to productivity and worker satisfaction.

The new cooperative partnership at National Steel is flourishing. Production has increased and the company has a better product. There are fewer grievances, greater worker satisfaction, and even a safer workplace. Of course, fewer grievances mean a corresponding decrease in arbitration.

Dayton Power & Light and the Utility Workers Union

The experience of the Utility Workers Union and the Dayton Power & Light Company (DP&L) may be the best evidence yet that unions and management can develop new styles of labor-management relations. Here, too, an unusual contract was instrumental in helping the company successfully compete in a changing market, while educating management to function in a cooperative style.

Dayton Power & Light, a regulated investor-owned public utility employing 2,800 workers in southwest Ohio, had had a traumatic decade of ups and downs. The lingering aftermath of a bitter strike in 1977, a stagnant economy, declining business, and impending deregulation had produced an upheaval in the company. In 1982 the company discharged 700 employees. Labor relations could not have been worse when DP&L approached its union in 1984 to discuss a plan for competitive survival. The challenge they faced was to convert a monopoly-style corporation into a competitive one, and they used the labor contract as the planning document for organizational change.

In 14 months of intensive negotiations, the parties converted a typical 160-page "rule book" labor contract into a unique 14-page "Compact" stressing the dynamic, cooperative relationship between union and company. The Compact explicitly

states that its goal is to "learn together to manage beneficially the inevitable issues of change." It also recognizes the need for continual employee involvement in adapting to change.

This is to be accomplished through an employee-management partnership—a relationship of mutual respect, open communication, shared success, mutual aid, and innovative problem solving.

The Dayton Compact also eliminated almost all work rules and substituted an "Employee Bill of Rights," securing full participation in work planning. Other key factors of the system include 100 percent employment guarantees for the life of the agreement, gain-sharing bonus plans, unlimited training opportunities, and an "issue resolution" procedure that uses union stewards as facilitators and includes a mediation procedure.

The results of the DP&L compact have been just as dramatic as those at NUMMI. Absenteeism is down 30 percent. Grievances have fallen from 178 in 1983 to 15 in 1986; instances of employee discipline have gone from 144 to 33 in the same time period. Operating income per employee has increased 35 percent. The company's power plant availabilities have risen from 72 percent to 92 percent, tops in the United States.

Southern Bell and the Communications Workers

The agreement of Southern Bell and the CWA in Atlanta, signed in August 1986, is another example of an innovative approach to labor-management relations.

For years the company had struggled with problems arising from divestiture, intense competition, and keeping up with a high-tech industry. It had a history of antagonistic labor relations with several bitter strikes. Finally, however, management and union recognized the need to cooperate in order to survive. A new relationship was forged based on joint problem solving through quality-of-work-life programs, grievance mediation, and joint committees designed to keep communication flowing both ways.

The contract also includes a profit-sharing program to provide financial incentives to employees and stimulate productivity. The agreement provides Team Incentive Awards based on "key service measurements" and "net income commitment objectives used for . . . management." That the company uses the

same incentives for employees and management is a clear indication of its effort to promote a team concept throughout the organization.

Joint committees are an important element in the contract. The Communications Workers helped preserve health benefits for Southern Bell employees by forming a labor-management committee to study cooperative cost-containment measures such as preadmission screening and the use of second medical opinions. Other joint committees have been formed to assess technological changes and to provide training and outplacement for workers displaced by modernization.

For Southern Bell, mediation is cheaper as well as quicker. Southern Bell began using grievance mediation on a trial basis in 1984. It was so successful that the procedure was incorporated into the 1986 contract. The average per-party expense for arbitrations was approximately $5,000, while average mediation costs per party were $850. Another plus, according to the union, is that mediation produces a signed agreement, as opposed to full arbitration, which can take 90 days or more to receive an answer. The union was also pleased with the first-party nature of the process. Southern Bell's experience proved that mediation is not only speedier than arbitration but is also a valuable training tool for positive styles of communication in the workplace—teaching participants techniques they can use to resolve their own grievances at earlier stages.

Some Conclusions and Recommendations

The increasing use of collaborative, problem-solving approaches to collective bargaining affects the entire industrial relations system. The examples I have touched on are, in my view, the wave of the future. But habits, cultures, and assumptions die very slowly. There will always be plenty of traditional, adversarial, old-fashioned arbitrations to keep the present members of the Academy busy for the rest of their lives. It is the future that should concern us.

Clearly, in the cases I have discussed, arbitration has fallen off almost to the point of vanishing. When job classifications drop from a hundred to four, one is not likely to find misclassification grievances. Where management and union resolve *all* issues together, there is not likely to be a "management rights" griev-

ance. Indeed, many of the old rule-driven disputes are banished. In those cases labor-management cooperation and arbitration are an oxymoron.

As I see the problem, there is too much emphasis on the written word—on the rule—too easy disposition of the problem by a merits result, which does not sufficiently consider the personalities, the human needs, and the assumptions of the parties. The dispute is settled but often at long-term costs to the relationship.

Power concepts, as enunciated by Ray Shonholtz of the Community Boards in San Francisco, a conflict-resolution operation, emphasize the need of the disputants to retain power over the dispute and the relationship. Shonholtz says that on a scale of third-party intervention, disputants retain the most power over the dispute and their joint destiny in conciliation, less in mediation, and none in arbitration.

And it is the great John Dunlop who has argued for negotiation, conciliation, and mediation, and, in essence, that any decision worked out together by the parties is more likely to be enforced than one that is handed to them and is adverse to one party. It is he who sees more creativity in problem-solving negotiations than could ever result from a more formal proceeding in which power is ceded to a third party.

Yours is a helping profession. You do help the parties and the system when you arbitrate. That will continue to be true, but it may not be enough.

It seems to me that you must begin to hone third-party skills other than those of formal arbitration. The Academy, in the tradition of George Taylor, one of your founders, has begun to develop mediation, conciliation, and negotiation skills among arbitrators, so that your members, particularly the younger ones, can facilitate the journey of labor and management from hostile enemies to partners in change. You must do a great deal more and very soon. You can make a major contribution to the economy and the society.

The future success of your discipline may well lie within the framework of what has been called the "med-arb" approach. George Taylor succinctly summarized this mission in the late 1970s when he stated that it was perfectly adequate and proper to mix mediation and arbitration to fit the problems at hand. Professor Kochan has updated this concept, saying, "One can

easily envision and predict an expansion in the demand for equally flexible third parties with multiple skills in problem solving, negotiations, mediation, strategic planning, and arbitration."

Consider a recent case in Pennsylvania and Maryland, where Bill Usery, a former Secretary of Labor and Director of the Federal Mediation and Conciliation Service (FMCS), successfully mediated a tremendously difficult dispute between UAW, its locals, and Mack Truck. This dispute had everything—intra-union dissension, threatened moves to the South, third-round concessions, and more. Usery, with great magic, almost brought the whole thing together. One piece remained and that went to arbitration.

I call this case to your attention to make the point that the media reported great unanimity and accord between union and company, union and union, politicians and parties, but they sounded a sour note, saying "the parties squared off" to arbitrate one matter. Peace is wonderful, but parties don't usually "square off" to do anything but fight.

Who is the peacemaker? The one who brings the parties together or the one who decides the winner—and loser—of the square-off?

Arbitration professionals must not fear to tread into experimental waters. Facing global economies, technological revolution, demographic phenomena, and a host of environmental forces, labor and management—the respective clientele of your profession—are turning to cooperative modes of collective bargaining. This is not novel. United States history is replete with labor and management responses to crises by joint problem solving. Rudimentary concepts of arbitration often played significant roles in promoting industrial cooperation. I fully expect that 10 years from now, on the occasion of your 50-year milestone, some speaker will comment on the active roles played by arbitrators in the process of labor-management cooperation, not to violate canons of impartiality, but to serve as constructive forces in our transitionary system of industrial relations.

One more word needs to be said. In the beginning, I noted that you had made a contribution to collective bargaining. You are in fact a creation of collective bargaining. Some of you, as I have said, fully understand your debt to collective bargaining. Some of you, unfortunately, do not.

Your future is tied to collective bargaining. I urge you to ensure that future. In short, I urge you to stand up for collective bargaining.

It is not a hard case to defend. Collective bargaining means equity, fairness, industrial democracy. It is self-regulation of the workplace and is the classic expression of freedom. It does not exist in totalitarian societies. It exists in every free society.

Of course, the best way to defend, protect, and promote collective bargaining is to do everything possible to make it work. Often that means helping the parties to establish its utility and, if possible, its indispensability. At best, a third-party participant can contribute creative and constructive assistance to the principals to improve their skills and the practice of collective bargaining. At worst, the third party can be part of the problem rather than part of the solution. That, of course, is absolutely unacceptable.

Speak up for collective bargaining and turn your very considerable talents to its preservation and enrichment. In doing so you will be true to your discipline, your origins, and, most important of all, your future.