III.

ABRAHAM H. RASKIN*

Humility is not an occupational disease that customarily afflicts journalists. Indeed, even by the skewed standards of our narcissistic society, no other profession ranks anywhere close to the one in which I have spent my life in capacity to congratulate itself on its pre-eminence as a stainless champion of truth and justice, insufficiently appreciated by the dolts and ingrates who make up the rest of the population. And certainly that institu tional disposition to bathe in hubris is not alien to those, like myself, who have been privileged to dwell in the zenith of media omniscience, Mt. Olympus on Times Square.

Nevertheless, I feel constrained to preface my comments here today with a confession that my competence to provide expert guidance on the topic under exploration at this session is not only infinitely inferior to that of my two esteemed fellow-panelists but also well below that possessed by the newest tyros among the members of this arbitral Sanhedrin. It has been a long time since I supped wisdom at the feet of such trailblazers as George Taylor, Will Davis, Dave Cole, Nate Feinsinger, Saul Wallen, Aaron Horvitz, and Peter Seitz. I recognize that a thing or two may have changed while my back was turned.

Needless to say, my paucity of current knowledge on how far the judiciary has gone toward lowering the boom on the *Trilogy* and cutting arbitrators down to the size of mere mortals will not inhibit me in the slightest from passing definitive judgment on that question. I am confident that the lines of communication with celestial sources of illumination and inspiration which I built up in my years as an editorial writer pontificating on issues, great and small, will enable me to leap nimbly over the limitations of my familiarity with *Misco, AT&T Technologies, Garibaldi, W.R. Grace, Allis-Chalmers, Jones Dairy Farm,* et al.

In deference, however, to the patently superior qualifications Judge Reinhardt and Bernie Meltzer bring to an evaluation of recent ups and downs in relationships between arbitrators and the courts, I shall be mercifully brief in my assessments on that subject. My own time, I like to believe, can be expended more

*Labor Editor (retired), *The New York Times,* New York, New York.

usefully—if not necessarily more accurately—by getting out my crystal ball and sharing with you my somewhat doleful thoughts on what lies ahead for these bedmates.

Perhaps the best way for me to start is by capsulizing my overall estimate of the interaction, past, present, and future, in a single sentence. For those of you who, in the spirit of the *Trilogy,* believe that the right place for the courts in reviewing the arbitration process is no place and who fear that judges show signs of recoiling from that obliterationist role, my message is blunt: You ain't seen nothin' yet.

Up to this point, in my estimation, judicial encroachment on the sovereignty of arbitrators has been minimal, notwithstanding occasional bad lapses in the lower courts. We have at the moment in New York a dilly of an example of such magisterial ham-handedness. It involves a case (*Barr v. United Parcel Service and Teamsters Local 804*) brought in the federal district court in Brooklyn by a discharged package sorter at the United Parcel Service (UPS) depot in Maspeth, Queens.

A cardinal work rule at UPS is that workers going off shift must present any packages they may be carrying for examination by security guards at the exit gate. Under the company's agreements with Teamster locals all over the country, breaches of that rule are viewed as offenses more serious than murder. Barr, who had worked for UPS for 14 years with a good performance record, was fired in 1983 on charges of refusal to heed a guard's request for inspection of a flat package Barr was holding as he left the depot at the end of his shift at 3:30 a.m.

The local, through its shop steward and business agent, promptly filed a grievance supporting Barr in his demand for reinstatement. When UPS stood firm through the first two steps of the grievance procedure, Local 804 immediately called for arbitration and, in the interest of a speedy determination, arranged for deferral of a scheduled suspension case so that Barr's plea could be heard within three or four days. His challenge of the dismissal was presented before Arthur Stark, a past president of the National Academy, whose grounding in labor-management relations and the common law of the shop dates back to his boyhood as son of Louis Stark, the true dean of labor reporters in the United States.

At the arbitration hearing, Barr had the assistance of union counsel and two friends and fellow-workers who backed his assertion that he had not violated the rule. After listening to both

sides, Stark came down with a carefully written decision upholding Barr's ouster. I know I shall do Arthur's award an injustice by summarizing it too baldly, but in essence he concluded that the weight of the evidence and the relative credibility of the witnesses, coupled with the importance to UPS of strict adherence to the package inspection mandate, made a verdict for the company obligatory, despite his reluctance to enforce so severe a penalty on a good worker.

Barr thereupon retained an attorney on his own and initiated a suit for reinstatement with back pay, alleging failure by the union to fulfill its duty of fair representation. The core of his complaint was that Local 804 had undermined the credibility of the two shopmates who testified for Barr before Stark by failing to bring these same two witnesses to the conferences with management in the initial steps of the grievance machinery. According to the local, the reason for not bringing either in right away was twofold: Both had spotty work records, as against Barr's unblemished reputation in the shop, and both had privately told the union that they were already outside the door when the episode occurred and really weren't sure what did happen. However, when the dismissal went to arbitration, the local's officials felt that the two friends were the only chance Barr still had to get his job back and ought to be called.

At the first court session on Barr's attempt to upset the arbitration award, the district judge, Charles Sifton, declared that his disposition was to go along with a UPS motion for summary dismissal, but that he would allow 30 days for discovery to give the plaintiff an opportunity to bolster his claim. The only additional evidence submitted in that period consisted of affidavits from buddies at the Maspeth depot, attesting to Barr's sterling character but acknowledging that they had no first-hand knowledge of the specific incident. Other affidavits were filed by former UPS employees, who also insisted that they had been wrongfully fired and had no doubt Barr was the victim of similar injustice.

Despite this dearth of buttress for the complaint, the judge after six months handed down a one-sentence opinion denying the motion to dismiss on the ground that material issues of fact required exploration. UPS then urged a bifurcation of the trial so that a determination could be made on whether the union had fallen short on its duty of fair representation, before any judgment was attempted on the adequacy of the grievance and

arbitration procedure. The judge refused to separate the action and directed instead that the whole case go to a jury for an expeditious decision on Barr's right to be restored to his job and to be made whole for lost earnings.

In the trial, which began just six weeks ago, the judge gave repeated indications from the bench of his conviction that human values had received too little consideration in the grievance and arbitration process. Your incoming president, Arvid Anderson, called by the defense as an expert witness, was not allowed to testify on Arthur Stark's luminous credentials as an arbitrator, though the judge did let Arvid tell the jury how fundamental the concept of finality was to the integrity of the process.

The jurors appeared much more impressed, however, with the fact that Barr had had extensive dental surgery a day or two before the incident and was supposedly still suffering the aftereffects. In his own testimony he asserted that the disputed package contained dental forms and that he had not objected to its inspection by the guard. The jury, after listening to a week of conflicting evidence, exhibited scant concern for even the most cursory address to the exacting standards the U.S. Supreme Court has indicated the courts must apply before finding a union derelict in its legal obligation for fair representation.

Let me note, parenthetically, that Local 804, under the leadership of its president, Ron Carey, has acquired a national reputation for internal democracy, probity, and vigorous defense of rank-and-file interests that is in marked contrast to that of its parent union. In Barr's case the business agent had pleaded, in private discussions with the UPS district manager outside the formal proceedings, for application of a lesser penalty if the company could not see its way clear to reinstating Barr.

The jury took only an hour and a half after getting the case to render a general verdict for Barr. That entitled him not only to get his old job back, but also to get nearly $86,000 in lost earnings, plus $6,000 in interest and an unspecified additional amount in attorney's fees.

That was not the end of the shockers the court had in store for UPS and the union. In line with the Supreme Court's decision in *Bowen v. United States Postal Service and American Postal Workers,* Judge Sifton decided to apportion responsibility for the money payments on the basis of his assessment of relative fault. By that yardstick, he really socked it to the union. The UPS share of the

back pay indebtedness was confined to a little less than $2,500 and its proportionate cut of the interest. Local 804 was directed to pay the remaining $83,500, plus interest, as well as all of Barr's legal fees, presumably out of a belief by the judge that it was the local's failure to call the two supporting witnesses for Barr at the first steps of the grievance procedure that impugned their credibility when they testified before Stark.

The wind-up came just last week and no decision has yet been made by either UPS or Local 804 on whether to appeal. I know that, contrary to my initial commitment to be brief on the current state of relations with the judiciary, I have been inordinately long-winded on a case that is scarcely a landmark. Blame that, in part, on my schooling at *The New York Times*, where we are accustomed to chopping down whole forests for the newsprint required to acquaint *Times* readers with developments other papers compress into a few paragraphs.

I do have a larger purpose in this seeming imbalance. The Barr case, to my mind, does more than underscore the validity of the apprehension you as arbitrators feel for the damage that can be done through any retreat from the principles underlying the *Trilogy*. This case impresses me, for all its aspects of overkill, as very much a harbinger of precisely the trends in law and public policy that make me feel that the years ahead will see a distinct and continuing decline in the regard accorded labor arbitration as an industrial and social stabilizer.

Before I move further down that lugubrious furrow, let me repeat my belief that the slippage to date has been inconsequential. Remembering how exaggerated many, if not most, of us considered the Brobdingnagian qualities ascribed to arbitrators by Justice Douglas in the *Trilogy*, I find nothing short of amazing the rocklike firmness with which the essential elements of that arbitral Magna Carta have prevailed for nearly three decades.

Even when the U.S. Supreme Court limits the authority of arbitrators, as it did last year in its unanimous decision in the *AT&T Technologies* case reaffirming that the question of arbitrability is "undeniably an issue for judicial determination," the high court is at pains to stress its faithfulness to the thesis that arbitrators possess "greater institutional competence" than judges to interpret collective bargaining agreements and that they, not judges, have the exclusive right to weigh the merits of the claims underlying a grievance.

To my mind, an equally forceful indication of the judiciary's unbroken fealty to the primacy of arbitration as a resolver of disputes over contract requirements was the abrupt about-face executed by the Seventh Circuit two years ago in *Jones Dairy Farm v. Food and Commercial Workers Local P-1236,* a case arising out of the company's contracting-out of janitorial work.

The collective bargaining agreement stipulated that on subcontracting both parties retained their pre-existing legal rights and that nothing in the agreement should be construed as "adding to or subtracting from those rights." An arbitrator, relying on his interpretation of a 1982 National Labor Relations Board decision in another case—a decision which the NLRB repudiated on reconsideration two years later—found for the union in its contention that the collective agreement forbade contracting out the work.

In its first look at the case, the Seventh Circuit ruled in a 2–1 split that the arbitrator's award was invalid because it did not draw its essence from the bargaining agreement. After a rehearing, the same three judges were unanimous two months later in holding that the company had forfeited its right to sue by agreeing unreservedly to submit the issue to arbitration, instead of refusing to arbitrate or, at the very least, challenging the arbitrator's jurisdiction and making it clear that it intended to go to court if the arbiter found for the union. Five months later the Supreme Court denied a petition for certiorari.

The Academy's current big worry, the 2–1 decision by the Fifth Circuit denying enforcement of an arbitrator's reinstatement order in *Misco v. United Paperworkers,* gets us into the vexing matter of drug and alcohol abuse in the workplace and the many areas of collision such abuse opens up between arbitration and public policy. I have nothing worthwhile to add to Bernie Meltzer's foundation-shaking comments on this particular case, except to note that a significant factor in the majority's decision to throw out the award may well have been the oddball character of the arbitrator's opinion, which the court characterized as "whimsical" and which seems to have carried the oft-proclaimed privilege of arbitrators to be "idiosyncratic" to the border line of idiocy.

Without getting deeper into the *Misco* case, I find it an ideal springboard for analyzing the more diverse pressures that impel me to skepticism about any prolonged extension of the sheltered workshop the community and the courts have allowed labor

arbitrators to occupy since 1960. I don't have to tell you that the trade union movement and collective bargaining are both in serious trouble these days. With only one worker in every six now enrolled in unions and with the strike an increasingly dubious instrument for paralyzing industry or helping labor achieve its goals, an important part of the cornerstone has been cut out from under the *Trilogy's* basic premise that the national interest is best served by a labor policy assigning priority over the courts to a system of private law, in which the right to strike over contract-related grievances is traded off in exchange for final and binding decision of all such issues by an arbitrator mutually selected by the parties and theoretically steeped in "the common law of the shop."

The ratio of workers in unions has been going downhill steadily since the *Trilogy*, though by no means because of it, and the balance of power in industrial relations has shifted sharply toward management in many sectors. The resulting decline in public concern over union power and the disruptive effect of labor unrest has been accompanied by other developments that have materially altered the focus of national labor policy, if in fact it can be argued that there is such a thing as national labor policy.

Notable among these developments has been a reorientation in the approach the country has been taking—sometimes through calculated legislative or judicial action and sometimes through indirection—toward the regulation of employer-employee relations. As Dave Feller pointed out in his brilliant exposition on the impact of external law at the American Arbitration Association's 1975 Wingspread Conference on the Future of Labor Arbitration, the evolution of the regulatory system in the United States was markedly different from that followed by most of Western Europe's industrialized democracies in developing rules governing relations in the workplace. Overseas the basic reliance was on public law covering such elements as discharge or termination of employment, wages, hours, vacations, pensions, health benefits, and virtually all other aspects of the employment nexus. Here, in the half-century since the Wagner Act put a statutory floor under the right of workers to organize and to bargain collectively through unions of their own choice, most of the responsibility for fixing the terms and conditions of employment has been left to private determination by the parties.

A hallmark of the maturing of this amorphous structure of self-regulation in the post-World War II period was the ceding to arbitrators in most unionized industries of final and binding authority to resolve deadlocks arising out of the union contract. One key dividend has been a substantial reduction in wildcat strikes, formerly a major source of lost work time in many plants.

However, the freedom given labor and management to define all aspects of employee relations was never absolute. In the early New Deal era the Fair Labor Standards Act was passed to delimit maximum hours and minimum wages. Over the years a broad array of other laws at both the federal and state levels established job and income rights independent of collective bargaining. These are all too familiar to you to require rehearsal here, nor need I go into the dents made in the finality of the arbitration process by the frequency with which individual employees, disappointed at the fruits of the grievance procedure, seek a second bite at the apple through recourse to the courts for enforcement of their legal rights under these external laws.

The shrinkage of organized labor in recent years has introduced two new dimensions into this problem. One is an increased emphasis by legislators on the sponsorship and enactment of laws aimed at expanding the employment rights and safeguards of individual workers, particularly the five-sixths of the work force outside union ranks. A priority objective in several states is legislation to replace the ancient doctrine of employment-at-will with a statutory requirement that just cause be shown in connection with the dismissal of any long-term employee. On Capitol Hill, strong bipartisan support is being mustered for bills that would oblige all employers to give their workers a minimum package of family health and hospital insurance as well as guaranteed parental leave, child care, and other family services. Also on the legislative docket are measures to protect employee privacy, to shield whistleblowers, and to create additional defenses and entitlements for individual workers without concern for unionization or the specifics of bargaining agreements.

Unions themselves are the prime movers in the second area of change. In tacit recognition of the diminished clout of their strike weapon and of the failure of organizing tactics carried over from the turbulent 1930s to appeal to a new breed of workers, impatient of all forms of institutional restraint, unions

are turning increasingly to the political process as a more beneficial outlet for much of the energy labor traditionally concentrated on collective bargaining and strikes.

State legislatures and courts have been the vehicle for most of the advances organized labor has made—up to now almost totally in the public sector—in its campaign for pay equity to erase wage discrimination against women workers. Labor's congressional agenda puts such top-heavy emphasis on protectionism that it is easy to overlook the many measures the AFL-CIO is sponsoring aimed at a much more assertive role for Uncle Sam in the workplace. These range from job training to prohibitions on double-breasting. They also call for mandatory curbs on plant closings and on stock manipulation or preferential treatment for executives in corporate takeovers or leveraged buyouts. To the extent that any or all of these proposals become law, they will inevitably broaden the already troublesome area of overlap and potential conflict between the provisions of bargaining compacts and public law, thus creating new complications for arbitrators and increasing the vulnerability of their awards to judicial challenge.

Other adaptations in union policy and practice that alter the framework of collective bargaining and that will affect the arbitration process in as yet incalculable ways stem from the rapidly growing stake that unions and their members have in corporate ownership through the multibillion dollar holdings of employee pension funds in common stocks and bonds and through the spread—partly under the stimulus of favorable tax treatment and partly as a quid pro quo for union concessions at the bargaining table—of employee stock ownership plans. Ironically, these proprietary positions that unions and their rank and file have come to hold in many giant enterprises operate as a force both for peace and war on the industrial front.

In the so-called corporate campaigns undertaken by unions against recalcitrant employers, of which the tug-of-war between J.P. Stevens & Co. and the Amalgamated Clothing and Textile Workers Union was the most dramatic example, labor endeavors to use its money club to put the whammy on insurance companies, banks, and other business interests and make them allies, however reluctant, in bringing down a union target.

The opposite side of that coin—the cooperative side—finds expression in the movement spurred by the problems which savage trade competition, deregulation, and meteoric tech-

nological change have generated for management and labor alike in many industries, to work together in creating programs designed to give workers a greater voice in problem solving, decision making, and gain sharing at all levels from shop floor and office to board room.

This movement goes under diverse names—quality of work-life, employee involvement, joint labor-management production teams, quality circles—but one unifying thread runs through all such ventures with meaning and a capacity to survive. It is an acceptance on both sides of the need for changing the whole climate and culture of the enterprise in a manner which makes real to the workers a sense that they are recognized as adults with brains and worthwhile ideas to offer on all the decisions that affect their jobs, not as barely animate appendages to the assembly line or typist pool awaiting replacement by less bothersome, more efficient robots.

I am a great believer in the soundness of this teamwork approach as a constructive answer to the global challenges confronting American industry, though I would be less than honest if I did not admit to many doubts about the movement's capacity to survive the sniping of old-line "hate the boss" elements in labor and the undercutting effect of management's refusal in instance after instance to carry out pledges of "equality of sacrifice" in effectuating cooperative programs or in sharing even the most elementary aspects of power with workers.

This is not the place to go into the pluses and minuses of the quality of work life movement, important as such a discussion would be. My point in bringing the topic up in this forum on the future of arbitration is that, for the moment at least, QWL has a significant foothold in General Motors, Ford, AT&T, and scores of other unionized companies of all descriptions and sizes. The fiction exists almost everywhere that these programs and the changed relationships they produce exist outside and independent of the collective bargaining agreement, in no way enhancing or diminishing the obligations it puts on the parties—or, by extension, on the arbitrators they choose to interpret the contract and to resolve disputes arising out of it.

But how realistic or sustainable is this differentiation between relations under QWL and under the bargaining agreement if the "must" element in any genuine QWL program is, as I think it has to be, a joint acceptance of the necessity for transforming the basic climate and culture of the enterprise?

Let me be more concrete. Flexibility has become the watchword of management almost everywhere in its quest for improved competitive status. A major element in the adjustments being made as part of the junking of adversarial attitudes under QWL plans has been a willingness by union locals or by autonomous work teams within locals to agree to arrangements under which employees can work in several classifications, not just one, as prescribed in the standard bargaining agreement. Similarly, locals have permitted the relaxation or abandonment of time-encrusted work rules, once considered so precious that a half-million members of the United Steelworkers struck for 116 days, and would have struck all over again at the end of an 80-day national emergency injunction obtained by President Eisenhower in 1959, if the steel companies had not surrendered on their demand for a unilateral right to modify these rules.

How do arbitrators pick their way through the briar patch of irreconcilable work rules and job practices that now exist without formal contract recognition at the departmental, office, or plant level in many unionized companies? And what does the arbitrator with a companywide charter do if workers at one unit walk out in an unauthorized strike to protest giveaway policies approved by their union brothers and sisters in another unit as a means of insuring that management would keep their operation going and shut down the one with a less tractable work force?

In the couple of minutes left to me, I want to touch on what I suspect is likely to prove over the years the most prolific spawner of appeals from arbitrators' awards to the courts. My reference is to the slowly expanding field of interest arbitration, as distinct from grievance arbitration. The making of a labor contract through final and binding arbitration—sometimes on the basis of voluntary submission by the parties and sometimes in response to legislative compulsion—is already far from a rarity in the public sector, the one area outside of health care in which unions have recorded significant growth in recent years. Private sector unions still shy away from interest arbitration, but the boomerang effect of many current strikes may bring a reasonably swift change of heart, provided the unions can find takers on the management side.

I am indebted to Arvid Anderson for the information that at least 20 states now have laws providing for interest arbitration to settle disputes with their public employees over the terms of new collective bargaining agreements. Most limit the arbitration

requirement, however, to workers classified as essential, notably police and firefighters. What makes me sure that public sector arbitrators will find their awards of contract terms under increasingly frequent contest in the courts is that the state arbitration statutes tend to lay down exacting criteria to govern the arbitration procedure. In Michigan, for instance, eight specific standards are set for arbiters of police and firefighter disputes, and some of these are so comprehensive that each amounts to 10 or 12 specifications all by itself.

If neither the public employer nor the union challenges an award, individual taxpayers or groups with particular axes to grind almost always can find some handhold for a suit. That is especially true when civil service workers in most states and localities continue to rack up wage increases at an impressive clip while the once robust unions in the private sector come away with little or nothing to brag about in their visits to the negotiating table.

None of this is meant to suggest any weakening in the personal belief I began expressing fully 30 years ago in the efficacy of arbitration as a device for substituting reason for force in the resolution of labor disputes. I continue to wish you all the greatest success, notwithstanding the unshakeability of my conviction that your reign as philosopher kings and queens to whom the Solomons of the judiciary must defer is in imminent danger of toppling.