CHAPTER 1

THE PRESIDENTIAL ADDRESS: LABOR ARBITRATION TODAY

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It has been a half century almost to the day since I heard Phillip Murray say at a rally commemorating the Memorial Day Massacre at Republic Steel's South Chicago Works, "Ten men will picket this plant forever." As I listened to Murray and Bishop Shiel commemorate the tragic death of ten strikers who had been shot in the back and in the side a year earlier by the Chicago police in what is now known as the Memorial Day Massacre of 1937, I formed a determination to help find a better way to solve labor disputes other than by strike violence. I wanted to be involved and to contribute to a process whereby reason could be as powerful as muscle, where in the words of Walter Reuther, "The power of persuasion would be as powerful as the persuasion of power."

It has been my good fortune that I have been able to pursue that teenage dream. For I have been able to participate as mediator and arbitrator in collective bargaining in the private and public sectors for the past 40 years.

I am grateful to the University of Wisconsin and to Professors Edwin Witte and Nathan Feinsinger, members of this Academy, and to the state of Wisconsin for providing me with the training and the opportunity to work as mediator and arbitrator. I am also grateful to the city of New York for giving me the opportunity for the past 20 years to participate in the drafting and administration of a comprehensive collective bargaining statute for public employees that has successfully substituted final and binding interest arbitration for the right to strike.

The 1937 tragedy at Republic Steel South Works, the battle of River Rouge, and other incidents of strike violence in the late 1930s led to the creation of the La Follette Committee and ultimately to the enactment of the Wagner Act, which established as a matter of national policy the right to bargain collectively in the private sector. We are all aware of the subsequent

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major amendments to the Wagner Act in the Labor Management Relations Act of 1947 (LMRA) and the Landrum-Griffin Act of 1959, including Section 301 of LMRA, which led to the U.S. Supreme Court's *Trilogy* decisions of 1960.

Ultimately the success of private sector collective bargaining brought about the demand for public sector bargaining laws in Canada and the United States. In 1959 Wisconsin was the first state to pass a declaration of rights allowing public employees to organize and to negotiate. The opposition to public sector bargaining was strong in those days. The fear was that collective bargaining meant the right to strike, and since you couldn't strike against the government, there was no right to bargain collectively.

To some extent that debate exists today. But the enactment of public sector bargaining laws in the majority of U.S. states and in the Canadian provinces, as well as laws establishing collective bargaining rights for federal employees in the United States and Canada, has demonstrated that it is possible to establish a system of collective bargaining in the public sector for the most part without the right to strike.

One of the lessons we have learned from the collective bargaining process is that it brings about change. Changes occur not only in the immediate working conditions of persons covered by the labor contract, but often long range structural changes are brought about by collective bargaining and strikes for recognition. Just as the Little Steel strikes and the auto sitdown strikes fostered the enactment of a national collective bargaining law, so did the postal strike of 1970 in the U.S. lead to the enactment of the Postal Arbitration Act. A 1965 strike by welfare workers in New York City led to the creation of the Office of Collective Bargaining. In New York City strikes by sanitation workers in 1968 and by transit workers in 1980 led to the establishment of interest arbitration as the means to resolve public sector impasses without the right to strike. Similar strikes around the country brought about interest arbitration statutes for essential public employees, mostly police and firefighters, in more than 20 states.

Most significant to this organization was the introduction of grievance arbitration in lieu of strikes as the means to resolve public sector disputes arising during the term of the contract. The successful transfer of the grievance arbitration process from the private sector to the public sector was a major accom-

plishment to which many members of this Academy contributed. The successful adaptation of grievance arbitration to the public sector and the ultimate acceptance of interest arbitration in some 20 public sector jurisdictions was not without resistance, principally on the ground that the adjudication of contract disputes by third party neutrals was an unconstitutional delegation of legislative authority.

This is not the place to recite all those arguments. That the skills used by arbitrators were transferable from the private to the public sector was never doubted by arbitrators or the practitioners. The history of arbitration has shown a great ability of arbitration and arbitrators to accommodate to the differing needs and desires of the parties for the use of neutrals in dispute settlement.

In his presidential address 10 years ago, Arthur Stark gave a detailed recitation of the changes and adaptions of arbitration, including expedited procedures, tripartite procedures, appellate systems, fact finding, and interest arbitration. Today there are additional variants, including final offer, issue by issue or total package, and the increasing popularity of grievance mediation.

Stark observed, "What does not exist, will be invented." I believe that to be true because it is part of the genius of collective bargaining that it stimulates and adapts to change. As Bill Murphy reminded us last year, there was in the early years of the Academy a serious debate between the George Taylor view of the role of the arbitrator as mediator and the Noble Braden view of the arbitrator as judge. Today we know it is not an either/or proposition; both techniques work, and it is up to the parties and the arbitrator to decide what procedure they desire. Today, although there is a decline in labor union membership, arbitration continues to enjoy a golden age of acceptability as the preferred means of alternative dispute resolution. In addition to the many variations of arbitration to resolve labor disputes, arbitration is growing in additional areas, including construction, commercial, maritime, securities, and the insurance industry. As they say, imitation is the sincerest form of flattery.

For me personally and those of my generation, it has been an exciting and creative experience for the past 40 years to be a player in the extension of economic democracy to the workplace in both the private and public sectors. The promise of the Declaration of Independence of the pursuit of liberty, as well as

the concept of the consent of the governed, has been given an added dimension in the workplace in our time by collective bargaining.

As arbitrators we have had and continue to have a significant role to play in the enforcement and administration of collective bargaining agreements. Sometimes when we serve as interest arbitrators or fact finders we have a major voice in the terms of the contract. It is my perception of those roles in grievance and interest arbitration about which I now comment.

Arbitration and arbitrators have been placed on a pedestal by the parties and by the U.S. Supreme Court, starting with the *Trilogy* cases in 1960. They have been kept there by the Supreme Court's 1987 *Misco*[1] decision, which held that "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority," the courts may not overturn an award. The Academy can take some of the credit for the *Misco* decision because Dave Feller, who was the winning advocate in the *Trilogy* cases, along with President Bill Murphy, filed a brief amicus on behalf of the Academy. A detailed analysis of *Misco* will be presented this afternoon by Professor Jan Vetter, one of the co-authors of the Academy's brief amicus.

However, what the courts and the parties have given, they can also take away. Unfortunately, there are still examples where arbitrators have, "ignored the plain language of the contract" and where the award has failed to draw its "essence" from the contract and instead "simply reflected the arbitrator's own notions of industrial justice." Arbitrators and the parties cannot expect their awards to be immune from challenge when they ignore the plain language of the contract.

For example, the U.S. Supreme Court in a sequel to *Misco* remanded the *S.D. Warren Company v. Paper Workers*[2] case back to the First Circuit Court of Appeals. In *Warren* the lower court had overturned the award on the grounds that the arbitrator had exceeded her contractual authority and that the award violated public policy. The First Circuit conceded on remand that the award could not be overturned on the public policy ground; but it maintained its holding that the award could be set aside because the arbitrator had exceeded her contractual authority.

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[1] *Paperworkers v. Misco*, 56 USLW 4011, 126 LRRM 3113 (1987).
[2] *S.D. Warren Co. v. Paper Workers Local 1069*, 56 USLW 3414, 126 LRRM 3360 (1987).

The arbitrator had found "beyond a reasonable doubt" that three grievants had violated company Rule 7 against the "possession, use or sale on Mill property of . . . marijuana." Rule 7 provided that violations are "considered" cause for discharge, but the arbitrator reinstated the employee with a suspension. The arbitrator ruled that there was an ambiguity between Rule 7 and the management rights clause empowering the company to discipline or discharge employees for just cause and therefore, the "contract did not unequivocably state that the conduct in violation of Rule 7 was a proper cause for discharge." The First Circuit concluded that by substituting a suspension for the discharge, the arbitrator altered the contract and substituted her own "brand of industrial justice."

Whether the case will again be considered by the Supreme Court is unknown at this time, although certiorari has been requested. There is language in *Misco* which could uphold the arbitrator's interpretation of the contract. *Misco* held:

> The arbitrator may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract. So, too, where it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect.

Thus, an argument could be made that, since the contract did not unequivocably provide for discharge, the arbitrator was properly interpreting the contract when she ruled that there was an ambiguity as to the penalty and, therefore, under the just-cause standard she was allowed to reduce the discharge to a suspension.

The U.S. Supreme Court in *W.R. Grace*,[3] a 1983 case, and in *Misco* has made clear that awards may be set aside on the public policy ground if the award violates some "explicit," "well defined and dominant" public policy, which is exemplified by "laws and legal precedents." Nevertheless, the challenges to the finality of arbitration awards persists.

I have drawn attention to this continuing dispute because the Supreme Court has not (despite its extensive discussion of the public policy question in *Misco*) decided whether a court may

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[3]*W.R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757, 113 LRRM 2641 (1983).

refuse to enforce an award rendered under a collective bargaining agreement on the public policy ground *only* when the award violates positive law or requires unlawful conduct by the employer. Although this was the issue upon which certiorari was granted in the *Misco* case, it was not decided on that basis. Rather the Court focused on the circuit court's assertion of its powers to overrule the arbitrator's fact finding.

Thus the public policy questions raised by *Misco* and other cases await another day. The debate on the impact of external law on arbitration so familiar to the Academy will continue. Basically, can an award which conflicts with applicable law be enforced? For example, would the Supreme Court uphold an Eighth Circuit ruling in *Iowa Electric Light and Power v. IBEW Local 204*,[4] which overturned an arbitrator's award reinstating a nuclear power station employee who had been discharged for deliberately violating federally mandated safety regulations on the job? Does a collective bargaining agreement preempt state law? For example, would the Supreme Court sustain a Ninth Circuit holding in *Stead Motors v. Machinists*,[5] which overturned an arbitrator's award reinstating a garage mechanic who had been fired for reckless negligence when he failed to tighten lug bolts on a vehicle, on the ground that the reinstatment would violate the California Motor Vehicle Code? I do not know what ultimate answers will be provided by the Supreme Court or the various state courts to these and other public policy questions.

What is clear, however, is that when arbitrators depart, or appear to depart, from the language of the agreement as to their authority (particularly in the fashioning of remedies), they invite legal challenges to their awards. In the language of the Supreme Court, when we attempt to dispense "our own brand of industrial justice" for whatever reason, we are headed for trouble. We must remember that the parties did not hire us in grievance cases to write the contract but to interpret it. We need to remember that hard cases can make not only bad awards, but ultimately bad law. This is not to suggest that there is no place for innovative remedy, or in some limited circumstances of retaining jurisdiction to fashion a remedy; but it is a suggestion that we should be

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[4]*Iowa Elec. Light & Power Co. v. IBEW Local 204*, 834 F.2d 1424, 127 LRRM 2049 (8th Cir. 1987).

[5]*Stead Motors v. Machinists Lodge 1173*, 843 F.2d 357, 127 LRRM 3213 (9th Cir. 1988).

careful that our awards do draw their "essence" from the contract and that we find some basis for our awards in the contract.

I turn now to cases where we are invited "to write the contract" or a portion of it. I refer to interest arbitration or, as I like to refer to it, the heavy lifting. The very existence of interest arbitration is a high compliment to the integrity, honesty, and good judgment of arbitrators. Interest arbitration, depending on the statute and the arbitrator, can be an extension of the collective bargaining process and not a substitute for it. The New York City statute expressly authorizes the arbitrator to attempt to mediate the dispute, a technique which has led to the settlement and narrowing of issues. The process offers the opportunity for the parties to make concessions which would be difficult for them to make in direct negotiations.

Since interest arbitration is primarily a legislative process, experience in New York City and elsewhere has shown that a narrative presentation by witnesses following the initial presentation of written statements of position is a successful and expeditious method of resolving complicated interest disputes. Cross examination can be safely eliminated or at least severely restricted, with the issues being covered by rebuttal, if needed.

However, the opportunity to write contract terms is not quite the blank slate it may seem, because most interest arbitration statutes or private agreements for interest arbitration provide standards covering the scope of the arbitration and the criteria to be applied. Furthermore, some states, such as New York, require interest arbitrators to specify the basis for their holdings, that is, whether they are based on ability to pay, the cost of living, comparability, or wage patterns. Awards have been set aside in New York State on the ground that arbitrators have failed to specify the basis for their holdings.

To put it simply, it is not good enough to write an essay stating that you have considered the statutory factors and have arrived at X percent. You must explain how you got there. The task is not simple and requires the cooperation of the parties to provide the relevant data to make sound and defensible awards. These later comments about supplying a rationale in interest cases do not apply to final-offer salary arbitration in baseball, or to interest arbitration in Pennsylvania, where no rationale is expected or desired.

All of this means that as arbitrators we have been given great responsibilities, and it is incumbent on us in discharging our

duties to be careful not to overlook or ignore the material facts or the contract or the applicable law. We must be careful craftsmen so that we can continue to serve the parties and the collective bargaining process. While we have earned the respect of the parties in order to be selected for a case, we should not forget that we must "earn our wings every day." A good reputation may get one selected, but it is up to us to do our jobs carefully, correctly, and ethically.

Becoming a member of the National Academy and subscribing to the Code of Professional Responsibility do not make us immune from faults or criticism. We are made of the same clay as other mortals and are as capable of error and bad judgment as the parties. Therefore, we should strive to apply the qualities of which our Code speaks, honesty, integrity, impartiality, and general competence in labor relations, along with good judgment, in such a manner as to continue to deserve the respect of the parties. If we do, the future of grievance and interest arbitration will continue to be bright, and we will have the satisfaction of knowing that we are serving the public interest.

In closing, I want to say that I am proud to be a member of the National Academy and am honored to have been your President. I want to express my profound thanks to my fellow officers and committee members for their continuing support of the Academy's program for the past year. I wish particularly to thank Program Chairman Jim Stern, Arrangement Chairman Mark Thompson, and Secretary Dallas Jones for their superb work. I am satisfied that the Academy is in the good hands of Tom Roberts as it approaches the 1990s. Last but not least, I want to thank my dear wife, Avis, for her great help and devotion for the last 44 years.