CHAPTER 2

DISTINGUISHED SPEAKER: BUILDING BRIDGES

ARCHIBALD COX*

It is a great honor and a great pleasure to come before you at the 46th Annual Meeting of the Academy. Perhaps, if I had had greater discretion, I should have accepted the honor of the invitation and turned away from the honor and pleasure of actually joining you here. For about 30 years ago, while Arthur Goldberg and Bill Wirtz were shaping labor policy, my central interests and energies shifted and came to be focused on the U.S. Supreme Court and constitutional law. Since then I have had little to do with the worlds of arbitration and industrial relations.

Fifty-three years ago, my involvement was a great deal more intense, beginning with the kind of happenstance that Robben Fleming described a year ago.[1] Chance took me to the National Defense Mediation Board under the aegis of Charlie Wyzanski and along with Ralph Seward, George Kirstein, Avery Leiserson, and Lew Gill. There was wonderful teaching by example, interstitial conversation, and advice from public, labor, and industry members, who brought together as much expertise in the institutions of collective bargaining as there was in the country in 1941. Will Davis, the chairman; Cy Ching, an employer member; and Clint Golden from the Steelworkers come first to mind. The recollection that takes my breath away is of young and utterly inexperienced individuals being thrown into critical labor disputes to learn by doing whenever the cases or issues were too numerous for all to be handled by the Board.

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*Honorary Life Member, National Academy of Arbitrators; Carl M. Loeb University Professor Emeritus, Harvard University, Cambridge, Massachusetts.

[1]Fleming, *Reminiscences: Honorary Life Members*, in Arbitration 1992: Improving Arbitral and Advocacy Skills, Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books, 1993), 308.

Collective Bargaining Institutions

We came to see collective bargaining, including the infant grievance procedures and grievance arbitration, as a largely autonomous set of institutional arrangements bringing participatory democracy and the rule of law, self-made law, to industrial plants. We accepted the Taylor model, characterizing arbitration as an extension of collective bargaining substituted for strikes and picketing. The fear of a strike provided motive power, but surely it was the extension of collective bargaining through arbitration that should be emphasized. The convenient metaphors were of political government. "The trade agreement," wrote one circuit court of appeals, "thus becomes, as it were, the industrial constitution of the enterprise. . . ."[2] Contract administration through the grievance procedure would have some of the characteristics of the administration of a basic statute by a specialized administrative agency.

But only some. The metaphors of government were misleading in a key respect. The system, as a whole, was one of private ordering by mutual agreement—for which the surrounding body of conventional law might provide some framework, but which did not depend upon conventional law and which was very little of the conventional law's concern.

Collective bargaining seemed wholly new. It was radically new in the sharing of power. But it was also importantly the product of traditional American habits and philosophy. The industrial combinations creating large aggregations of plant and other capital on the employer side of the labor market had, as Justice Holmes observed, made combination in labor unions inevitable on the side of employees. Given labor unions, a largely autonomous system of private ordering was the system most consonant with the older and general American habit of self-reliance, self-help, and self-determination. The New Deal had introduced a new kind of active, affirmative government in a few areas, but most of the old tradition of private decisionmaking remained dominant for a few more decades.

This system of industrial relations could not have worked as well as it did without great willingness in the private sector to shoulder responsibility and without great creativity in building bridges between parties with some common goals and common problems

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[2] *NLRB v. Highland Park Mfg. Co.*, 110 F.2d 632, 638, 6 LRRM 786 (4th Cir. 1940).

but also with unavoidable differences. I describe as "bridges" or "bridgework" all the extraordinary variety of processes and procedures of collective bargaining, the institutional arrangements built up by employers and unions mostly within the space of two or three decades. Each descriptive category—arbitration, mediation, fact finding, adjustment boards—covers its own variety of mechanisms; and one must add other institutions, like the construction industry's National Joint Board for the Settlement of Jurisdictional Disputes and the public review boards set up by the United Automobile Workers and the Upholsterers Union. These private institutional arrangements, moreover, had to be worked into the framework of the National Labor Relations Act or the Railway Labor Act and much surrounding law. Supportive decisions like the *Collyer*[3] doctrine were slow in developing. Creativity, which requires flexibility, was essential both in the world of private ordering and in fitting that world into the surrounding legal structure in ways that would leave the private ordering essentially free. It was a time of extraordinary creativity.

Changes in the Arbitration Model

Much has now changed. Where once the Taylor model of labor management arbitration seemed standard, now the J. Noble Braden model prevails. Richard Mittenthal[4] and others have admirably described the forces impelling the shift. The parties, aided by greater and greater professional expertise, wrote more and more detailed contracts narrowing and "technicalizing" the field for contract administration. Arbitrators put increasing weight upon precedent and seemingly less weight upon the individualities of each relationship. Other forms of labor arbitration were gaining acceptance, which could not be viewed as an extension of collective bargaining—grievance arbitration unilaterally established by an employer whose employees do not bargain collectively, for example, and arbitration of statutory claims.

There were also deeper currents: changes in the structure of industry, changes in the nature of the workplace and the work force, and constant shrinkage in the proportion of the work force choosing to bargain collectively. Perhaps I speculate too broadly,

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[3] *Collyer Insulated Wire*, 192 NLRB 837, 77 LRRM 1931 (1971).

[4] Mittenthal, *Whither Arbitration?* in Arbitration 1991: The Changing Face of Arbitration in Theory and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books, 1992), 35.

but it seems to me that everywhere in the past 30 years there has been a major shift in thinking away from the old emphasis on self-help, private ordering, and the creation of private-sector bridging institutions. Instead, the current runs toward government, law, and the creation of more and more legal rights. In the area of employment law, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act, the Occupational Safety and Health Act, and sundry similar state laws leap to mind. The broader rush to enforce any and every kind of legal right and to carry every disagreement to court is part of the trend. In this milieu, it is hardly surprising that law and the ways of the litigating lawyer should overrun the Taylor model of labor arbitration. In the new arbitral context there is need for the informed, disinterested, and fair-minded "judge" but less scope for the skillful and creative "facilitator" or mediator, who played such an important role in the "glory days" of the past.

I generalize, as others have done, but I do not mean for a moment to suggest that the need for the creative facilitator, for the expert in building bridging institutions and procedures, is gone from industrial relations. Quite the contrary. In fact, I would suppose that the changing structure of industry and the changing character of the work force and the workplace would increase the opportunities for private ordering with the aid of informed and imaginative neutrals introduced through one form of bridging institution or another. At the Academy's 1991 Annual Meeting, John Dunlop presented a strong case for the use of neutrals as "effective mediators and creative problem solvers in the many other galaxies of industrial relations than the 'milky way' of grievance arbitration."[5] The developments at New United Motors Manufacturing[6] and the Saturn Corporation[7] described at the same meeting read as wonderful examples of the flexibility and creativity necessary to successful employment relations in a fast-changing world. The need for creativity in building institutional arrangements between those who have conflicting interests as well as common goals and responsibilities can hardly be less today than during the glory days of collective bargaining. At the very least,

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[5]Dunlop, *The Neutral in Industrial Relations Revisited*, in Arbitration 1991, *supra* note 4, at 26.

[6]Childs, *The NUMMI Experience: A Management Viewpoint*, in Arbitration 1991, *supra* note 4, at 174.

[7]Bennett, *The Saturn Experience: A Union Viewpoint*, in Arbitration 1991, *supra* note 4, at 179.

neither generalizing about the nature of arbitration nor the very real importance of arbitration as a substitute for litigation should be allowed to overshadow the instances of continuing important use of the so-called Taylor model or the values of its informality and flexibility.

I recall earlier days of labor arbitration and collective bargaining partly out of nostalgia but chiefly to emphasize three characteristics: (1) the system of private ordering, which necessarily implied acceptance of private responsibility; (2) the role of independent neutrals (call them arbitrators, mediators, or facilitators, as you will); and, most important, (3) the extraordinary creativity in building bridges between organizations with important common and important conflicting interests. I think there is great need to use them in creating new processes and procedures, new institutions, bridging the gulf and encouraging cooperation between government and organizations and individuals in the private sector, whose activities are directly affected by government. Chance led me to an example in the field of environmental protection that I hope you may find interesting because the analogies to and differences from tripartitism in the field of industrial relations played a part in our thinking.

Public-Private Coalitions

One of the basic problems in protecting public health against environmental hazards is ensuring that regulatory decisions have a sound scientific basis. There is an old saying that, in Washington, the facts are negotiable. Last winter a five-part series in *The New York Times* described America's environmental program as having gone "seriously awry," charging that the measures adopted evolved "largely in reaction to popular panics, not in response to sound scientific analysis of which environmental hazards present the greatest risks." The earlier scare over asbestos-containing materials in public and commercial buildings is an example. The Carnegie Commission's Task Force Report on Science and Technology in Regulatory and Judicial Decision-Making urges the agencies to improve "their means of integrating scientific and technological considerations into agency decision-making processes." Advisory committees appointed by administrators of the Environmental Protection Agency (EPA) have made similar recommendations.

The problem often begins with lack of reliable scientific knowledge. The uncertainty about the health effects of electric and

magnetic fields in which we all live and move is a current example. The broad problem takes on two or three further aspects:

1. How can the ablest scientists be attracted to fill the gaps in knowledge? The best scientists seldom rush to work long term on assigned problems for either government agencies or regulated industries.

2. How can public confidence be secured for the science upon which regulatory decisions are based? There is distrust of findings made by government due to fear of political influence. There is distrust of findings based on research supported only by industrial concerns due to the source of the funds. There is also a problem of communication. Scientists do not often speak in language fully understood by policymakers, much less by the general public.

3. In a time of huge government deficits and lagging corporate earnings, how can we maximize the available funds?

A new method of attacking these problems was launched some years ago by EPA and motor vehicle manufacturers. After enactment of the Clean Air Act in 1970, EPA and the manufacturers went through a decade of fear and turmoil, especially over the standards to be applied to emissions from the tailpipes of trucks and automobiles. Both the regulators and the regulated needed a "substitute"—not for the strike but for the fear and distrust. Douglas Costle, the EPA administrator, observing that "at least the facts should be friendly," joined Roger Smith of General Motors, Henry Schacht of Cummins, and other industry leaders in an effort to work out an arrangement for establishing a new institution which, if successful, would become the primary source of the science on which regulatory decisions affecting automotive emissions would be based.

Some points were clear. EPA and the manufacturers would provide the funds for research in equal shares. This would maximize funding as well as give assurance of impartiality. Both had interests in the direction of the research program and in the officers of any new organization. On the other hand, there was great need for independence to preserve impartiality, to attract the highest quality scientists, and to build public confidence in the scientific findings concerning the impact on public health. You may see in the situation, as I did, certain points of resemblance to the problems of industrial relations leading to the creation of tripartite bodies—private mediation and arbitral tribunals as well as governmental bodies, such as the War Labor Board and the Wage Stabilization Board. The key resemblance was the need for

a new bridging institution between parties often in conflict. The central difference was that here the bridging institution must embrace a government agency, on one side, and business enterprises in the private sector, on the other. And, needless to say, concerning the scientific process and findings, there should be no room for negotiation.

The upshot was the creation of the Health Effects Institute (HEI), a nonprofit organization under a neutral and independent Board of Directors drawn from the public sector with the power to choose their successors, subject to the veto of either government or nongovernment sponsors. William O. Baker, the retired CEO of Bell Laboratories; Donald Kennedy, formerly president of Stanford University; and I have served on the Board from the beginning. Currently, we are joined by Walter Rosenblith, formerly provost of the Massachusetts Institute of Technology (MIT). HEI consults its sponsors and other stakeholders in forming its research priorities and program, but none of the sponsors has any control over the selection of studies, their conduct, or the conclusions reached. On the other hand, HEI confines itself to science without drawing conclusions of regulatory policy. And, if HEI lost the confidence of either EPA or the motor vehicle manufacturers, it would be dissolved, just as a tripartite labor relations board cannot function in the absence of labor or management.

HEI's dedication to first-rate science is worked out through two scientific committees with the staff assistance of scientists. The committees are somewhat novel. The Health Research Committee defines, updates, executes, and oversees performance of the research agenda under grants to individual scientists and institutions. The Health Research Committee stays in touch with the extramural investigators, not only monitoring progress but sometimes shaping and reshaping the project as new information begins to develop, all in an effort to keep the focus on the information needed for wise policy decisions.

When the study is complete, the Health Review Committee takes over and provides a uniquely stringent peer review of the quality of the research, and its report takes the added step of putting the researcher's findings into their scientific and regulatory context, pointing out what has been added and what remains to be done. From time to time the Health Review Committee has also surveyed the state of knowledge in particular fields (e.g., the effects of methanol used as a motor vehicle fuel), and recently, mindful of the wide gap between the language of scientists and the

understanding of policymakers and the public, we have been trying to add a short statement, summarizing the report and commentary in language understandable to nonscientists.

The path of HEI has not been smooth, but on the whole, I believe, the HEI idea has proved its value. Many of the studies have dealt with the effects of diesel exhaust, carbon monoxide, oxides of nitrogen, ozone, and now the specific air toxics to which attention is directed by the Clean Air Act of 1990. I am not qualified to judge, but HEI's science seems to be highly regarded, and it has made important contributions to regulatory decisions. Recently, a National Research Council (NRC) committee reported, "HEI has proven itself as the sponsor of independent, credible research." For me, the hardest thing to get used to is the slow pace at which science progresses. A lawyer who orders up urgent legal research expects to have it in 48 hours, if not overnight. Our research committee is presently developing a 10-year strategic plan for the study of specific air toxics.

The larger, more important issue is whether HEI can serve as a model, tripartite bridging organization for much more and wider cooperation between the government, a regulated industry, and what I shall call the "independent sector" to provide a sound and credible scientific base for decisions of environmental policy. The NRC committee, with a number of constructive criticisms, described HEI as "a notable prototype for public-private ventures in health-related research although not a universally applicable model." I think that that is a fair assessment.

The motor vehicle model has been followed, successfully and encouragingly, in seeking to determine the health effects of asbestos-containing materials in public and commercial buildings, a matter of great public concern, leading to multimillion dollar expenditures in ripping asbestos-containing materials from school buildings. In 1988, Congress appropriated funds for HEI:

1. To determine actual airborne fire levels prevalent in buildings,
2. To characterize peak exposure limits and their significance, and
3. To evaluate the effectiveness of asbestos management and abatement strategies in a scientifically meaningful manner.

All of this was contingent upon agreement of businesses in the private sector to match public funds. Fortunately, real estate interests, insurance companies, and manufacturers did agree.

That was an interesting development because, whereas there are only a few motor vehicle manufacturers to deal with as one cohesive group, there are many, many diverse stakeholders in public and commercial buildings.

Establishing an expert and representative panel to determine what was known, what was not known, and what was uncertain about the risks of human exposure to asbestos in public and commercial buildings was difficult, partly because it was necessary to include scientists and technicians from several diverse fields, and partly because the questions were highly controversial and knowledge had evolved slowly so that a number of the most qualified scientists had previously expressed opinions and even served as consultants or expert witnesses for interested parties. Despite these difficulties, we put together a representative group of 17 highly qualified scientists under the chairmanship of Dr. Arthur Upton, all committed to a fresh and fair-minded study. Fifteen of the 17 joined in the Panel Report, noting the inadequacies of existing data but concluding that three generalizations were warranted:

First, asbestos-containing material within office buildings in good repair is unlikely to expose office workers and other general building occupants to airborne asbestos fiber concentrations above the levels in urban air outside the building. The risks are far less than those associated with indoor radon and environmental tobacco smoke.

Second, janitorial, custodial, maintenance, and renovation workers are in a different category because they may be subject to peak exposures resulting from disturbance or damage to the asbestos-containing material.

Third, asbestos-removal workers are at the greatest risk of potential exposure. Here good work practice and respiratory equipment are essential.

The Panel Report appeared greatly to narrow the asbestos controversy and to quiet some of the political pressures. Perhaps science was headed in that direction anyway without the participation of HEI, but I venture to think that once again the joining of government and private-sector organizations through a quasi-independent bridging organization proved an important method of bringing high-quality and publicly credible science to the aid of regulatory policy.

HEI has also carried the idea of an independent institute, equally funded by government and the private sector, into preparing for

the scientific study of the health effects of electric and magnetic fields associated with the transmission and possibly some uses of electricity. Here the sponsors have been EPA and the Large Public Power Council. Earlier this week, HEI released a report projecting a coherent and concrete plan for interdisciplinary research, offering the prospect of widely credible answers to the critical questions within the next decade. Only the future can tell whether the work will be done and who will do it.

Conclusion

Let me leave HEI there. I also leave it to you to speculate further, if you wish, about a much broader need for bridging organizations in a society that often seems to be breaking up into increasingly hostile segments. The collective bargaining systems of industrial relations were exciting during the creative years, partly because they were so creative, but also because their creativity was in bringing people and organizations with sharp differences together in pursuit of larger common goals realizable only by cooperation. As you can see, I delight in the memories.

I finish, then, where I began. It has been a joy to spend the past three days with members of the Academy. I am honored by your giving me the opportunity.