CHAPTER 1

PRESIDENTIAL ADDRESS: PROTECTING NAA STANDARDS IN THE WORLD OF ADR

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I start this Presidential Address with two commitments. The first is in response to an admonition from Ben Rathbun to make Academy history by being the first President to *not* begin his speech with the statement that: "I have reviewed all the prior Presidential Addresses. . . ." Fulfilling that commitment has been easy. I have sat through every single Presidential Address since 1957, when I was an intern to Saul Wallen. I have heard all but the first 10 and am heartened to recall frequent references to these being trying times for the National Academy of Arbitrators (NAA) and for arbitration.

The second commitment, made recently to Dick Mittenthal, was that my oral Presidential Address will take no more than 20 minutes. This recitation will be within that promise. You can pick up the full text at the Registration Table where three California redwoods have made the ultimate sacrifice to contribute to your luncheon comfort.

I want to spend my time talking about the nagging problem with the world of alternative dispute resolution (ADR), as the outside world calls it, or alternative labor dispute resolution (ALDR) as the NAA has chosen to label it. We have faced and discussed that question extensively over the past few years, and I personally believe we made the correct decision in continuing our role as monitors of the labor-management relationship. But even as we adhere to that standard, we cannot ignore the reality of that enormous and overwhelming ADR universe and the impact it has on our little corner of it. Although we have not surrendered to its onslaught, neither can we avoid its continuing inroads into our arbitral universe.

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First, there appears to be a growing tendency to incorporate by reference into the collective bargaining agreements requirements to abide by statutes such as the Americans with Disabilities Act (ADA), Age Discrimination in Employment Act (ADEA), and the Family and Medical Leave Act (FMLA). Such language seeks to resolve employment-related disputes quickly, less expensively, and by a judge of the parties' own choosing, outside the machinery of the administrative agencies and the courts. The traditional side-stepping of external law by confining ourselves to the four-corners-of-the-contract rationale becomes harder and harder as the parties place before us requirements of interpretation and application of the ever-increasing range of employment-related statutes. At the same time the courts increase their scrutiny as to whether or not our decisions conform to public policy, and we begin to face the question of whether our traditional make-whole remedies do in fact bring finality to disputes in which the employee may exact a substantially greater remedy through resort to courts. Unions as well as employers face new problems in determining whether in the light of the external alternatives the labor-management arbitration forum provides full protection of employee legal rights, whether the duty of fair representation has been met, and whether the arbitration forum does provide a final and binding award on such issues.

Second, there is the issue of whether the restrictions on our statute-reading authority imposed by *Alexander v. Gardner-Denver Co.*[1] will be overshadowed by the Supreme Court's wholesale endorsement and enforcement of arbitration awards under the Federal Arbitration Act (FAA) in *Gilmer.*[2] In the former, the courts have retained jurisdiction over issues of law, while respecting the labor-management arbitrator's determinations of fact. But in the *Gilmer* case and its progeny, the courts have treated even employer-created, condition-of-employment and nonnegotiated arbitration procedures as justifying deferral under the FAA. Even under the Ninth Circuit's *Prudential Insurance Co.*[3] case, such preemployment commitments to arbitrate may be acceptable as long as they are knowingly entered into. The stance of the Judicial Conference encouraging use of ADR and the flood of new employment protection statutes, without a commensurate increase in the size or budget of the judiciary, call for a reality check. Can the courts

[1]415 U.S. 36, 7 FEP Cases 81 (1974).
[2]*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 55 FEP Cases 1116 (1991).
[3]*Prudential Insurance Co. of Am. v. Lai*, 42 F.3d 1299 (9th Cir. 1994).

continue a bifurcation where they decline to defer finality to arbitrators of negotiated arbitration systems, while accepting as final, judgments rendered under systems unilaterally imposed by one side—the employer? Is the national policy of encouraging and enforcing collective bargaining agreements under the National Labor Relations Act to be as strong as the national policy of enforcing arbitration agreements under the FAA?

A third focus of change is the always pressing problem of the self-interest of the arbitrators. For many of us who have grown up (and grown old) within the NAA, our role continues to be the same as it was at the founding in 1947. We arbitrate labor-management disputes. We have been employed to assure tranquility as functionaries in the ongoing relationship between unions and employers. We are there solely to interpret and apply the *parties'* agreement, and to do equity only within the authorization that their agreement has given us. For nearly 50 years our role in the structure has been limited to how we as individuals should function in the context of the parties' collective bargaining institution, and it has not extended to how that institution should change. We are, in fact, relatively powerless in any efforts to change the institution. We can decide and control the lives of others, but not the process of arbitration. That remains properly within the control of the parties who negotiate the agreements to arbitrate, who select us, and who ask us to resolve those issues that they have agreed to submit to us. We intone that it is the parties' process, that we are a creation of the parties, and that our range of roving is within the four corners of the labor-management agreement. That's a rather self-limiting role, particularly in an era of declining trade union membership that is shrinking from 34 percent of the work force in the 1950s to some 16 percent now. Clearly, our membership is frustrated by our shrinking institutional universe. As that continues, we hear the world proclaim the benefits of arbitration as a panacea for the overcrowded dockets of the courts and the swamping backlogs of the government employment discrimination agencies, and even proclaim arbitration as the hope for workplace equity through universal adoption of termination-at-will arbitration procedures. We also see a growth of employer-promulgated arbitration but distrust its motivation.

Many in our labor-management family view employer-promulgated dispute settlement as a hostile, if not antiunion, institution. Some of these systems may be motivated by union-avoidance, but some are also developed in a good-faith effort to resolve disputes

where employees have not opted for unionization, and some are to resolve issues such as discrimination that might otherwise be taken to endless and costly court litigation. Regardless of the motivation, resort to employer-promulgated arbitration is an increasingly common phenomenon. Arbitration is certainly in greater focus in new legislation than it has ever been. Most recent rights legislation encourages the use of ADR, specifically arbitration, to bring about early resolution to statutory enforcement issues.

The call for arbitration outside the confines of collective bargaining is heard particularly by our newer generation of members who have joined us in the past 20 years or so. For many of these members who have not come into the NAA through the early private-sector labor-management relationship, the NAA represents the best and most qualified professional neutrals, a group of respected, independent, thoughtful, and above-reproach neutrals whose primary responsibility is to provide a forthright and equitable resolution to disputes between employers and employees. That role, many in this group feel, can be honestly carried out for the benefit of employees regardless of whether or not they are unionized. They view the arbitrator's involvement as the only means by which workers, organized or not, can secure fair treatment. We find ourselves in a burgeoning world of ADR where the potential of arbitration for over 100 million workers dwarfs our collective bargaining world of 15 million.

Those divergent views of whether we should stick to the labor-management paradigm or, alternatively, endorse our members venturing into the world of ADR have been heard clearly and respectfully within the NAA for the past few years. We have debated the issue for several years under the auspices of the Committee to Consider the Academy's Role, If Any, With Regard to Alternative Labor Dispute Resolution Procedures—the Beck "If Any" committee. It is not necessary to take sides or to hold one view as better, more valid, more likely to prevail, or a better prescription for the future than the other. We have taken the decision to stay on course, allowing our members to continue doing as they wish in nonunion arbitration settings.

I am clearly in that camp. I personally think the decision to continue to confine our scope to the labor-management realm was correct, and it is indeed the only realistic choice we could have made given our genesis and evolution as the custodians of the labor-management relationship. I do not think, however, that we can deny the impact on the NAA of this burgeoning external ADR

market. It is a market that is exploiting "us" and by that, I mean exploiting not only the arbitrators, but the collective bargaining partners as well.

The fourth pressure ADR imposes on us is the increasing risk that the respected labor-management arbitration procedure will lose its credibility in the face of unilaterally imposed arbitration. Arbitration as we know it is being diluted, if not abused. When the rest of the world talks about arbitration, they are talking about our arbitration—union, management, neutral—and the legacy that has been handed down to us as practitioners of labor-management arbitration. Our arbitration results from a negotiated trade-off between parties of comparable power where one party surrenders the right to wildcat strike, in exchange for the other party's commitment to comply with final and binding arbitration awards. "Our" arbitration means standards of integrity and credibility that we maintain for the parties and society through the tenets of our Code of Professional Responsibility, our procedures for membership selection, and our programs of continuing education to increase the competence of our members.

This growing embrace of arbitration by that outside world should come as no surprise. Its popularity is in large measure due to the credibility and acceptability to society that has been established by *our* brand of labor-management arbitration. Not only have we been for half a century the only arbitration game in town, but all three participants in that system deserve credit for having maintained labor-management peace over the past half century. Even if the public may view us solely through the prism of baseball final offer arbitration, at least it has come to recognize arbitration as an acceptable and fair procedure for resolution of disputes. Our reputation for a clean, scandal-free process is what has led the legislatures and the judiciary to urge its usage. But our arbitration is being hijacked, and our good name is being exploited. The arbitration that's being touted is not *our* arbitration.

It is painful to read the articles in the *Wall Street Journal* and elsewhere[4] where the term arbitration is applied to internal procedures created not through the parity of labor-management negotiating power that we know, but imposed by the employer's unilat-

[4]*See* Schmitt, *More Lawyers First Seek Arbitration for Internal Disputes*, Wall St. J., Aug. 26, 1994, at 18; Jacobs, *Required Job Bias Arbitration Stirs Critics*, Wall St. J., June 22, 1994, at B2; Swoboda, *Employers Find a Tool to End Workers' Right to Sue: Arbitration*, Washington Post, Sept. 18, 1994, at H8.

eral edict. In those systems, such as are utilized in the securities industry, the employee is required to promise to arbitrate unforeseeable statutory violation claims as a condition of getting a job. With that surrender of the right of access to the courts may also come a deprivation of the right to counsel or representation, and certainly there is no grievance procedure to provide discovery or access to evidence. And with that, the case is heard by other employers serving as arbitrators unilaterally selected and paid for by the employer, trained by "putting the new boys with the old boys." Is it surprising that even the defendant in one such case "bragged that he could influence the industry process: He had served as an arbitrator himself. Arbitration is 'industry fraud' and a 'rigged game.'"[5]

Nor should it be surprising that that label some day may be transferred to our type of "clean" arbitration. That seems to be the ironic and unintended consequence of our remaining outside that arena.

So, if the NAA is sticking to the tradition of labor-management arbitration, why should we, the NAA, unions, and management mess with the ADR quagmire?

I believe it is crucial for the protection of the credibility of arbitration under collective bargaining agreements and for the credibility of the NAA, our members, and the parties to the labor-management relationship, that we take action. We must undertake to counter the perception that arbitration is "rigged," and to assure that claimants under such employer-promulgated schemes are accorded due process protections and provided fair treatment, as well as to strive for the goal that the process of arbitration, theirs as well as ours, is regarded as equitable with adequate due process protections.

We, on both sides and at the end of the table, have the experience, the perception, the know-how, and the credibility to clamor for due process standards of employment dispute resolution to assure the continuing acceptability of our own process. It is desperately needed, not only in our own self-interest, but to bring fairness to this troubled and enormous universe of ADR. Ironically, it is a universe that the unions have helped create by their endorsement of such universally protective legislation as the ADA, ADEA,

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[5]Jacobs, *Riding Crop and Slurs: How Wall Street Dealt With a Sex-Bias Case,* Wall St. J., June 9, 1994, at A6.

Civil Rights Act of 1991, and FMLA, protecting the more than 100 million workers of the work force whether unionized or not.

Again, I must stress that this is not solely an NAA responsibility or mission. By "we," I mean the tripartite community of labor-management arbitration. All three parties must protect against the erosion of the credibility of the labor-management institution of arbitration.

So, if we do have a stake, what role should we be playing?

The first step is to point the way to a more reasonable and equitable system. That is what is recommended in the report of the Dunlop Commission, to replicate some of the fairness and safeguards of due process that are negotiated into arbitration agreements in the collective bargaining arena. And that is what has occupied a Task Force that was established to pursue the project. Together with the union and management leadership of the Employment and Labor Law Section of the American Bar Association (ABA), the American Arbitration Association, Federal Mediation and Conciliation Service, Society of Professionals in Dispute Resolution, American Civil Liberties Union, and National Employment Lawyers Association (the plaintiff bar group), we have been occupied since last August formulating what we all believe to be a fair system for arbitration of employment issues. I am pleased to report that we have at last reached unanimity on what we consider to be a procedure with due process protection for that arena. The Protocol was signed by the 12 participants on May 9, 1995. It has been endorsed by the union and management representatives of the Employment and Labor Law Section of the ABA. It has been presented to Secretary Reich in his effort to expedite dispute settlement within the U.S. Department of Labor and independent statutory agencies.

I won't bore you with reading the entire protocol. It is attached to my paper. [The protocol appears in Appendix B.]

It includes:

- the development of a qualified roster consisting of neutral arbitrators (lawyer and nonlawyer) and experts in discrimination, including training requirements for both groups;
- the right of employee representation, ideally with employer subsidy;
- the right of discovery and to take depositions;
- joint selection of the arbitrator through neutral agencies;
- shared payment of the arbitrator's fees;

- the right of arbitrators to fashion the same awards and remedies as would the courts; and
- standards for scope of review by statutory agencies and the courts.

Only on the issue of whether the commitment to arbitrate should be made pre- or post-dispute did we fail to reach accord. But we reached agreement on the content of the procedure once it is initiated.

We believe the half century of arbitration practice and precedent has created an "ethos" of employment dispute resolution that can provide guidance to those in this new field of employment disputes. It does not commit the NAA or its members to undertake such work. We continue to be an organization of labor-management arbitrators. Our members continue to be free to arbitrate in noncollective bargaining arrangements. But we now have a standard that should guide them in assuring that the arbitrations they conduct provide due process.

While procedural matters may be the initial focus of such procedures, we are all aware not only of the burgeoning of arbitration of discrimination matters, but also concerned more broadly with the increasing prospects of statutory termination-at-will arbitration looming in the future. Even if they wanted to use us, our small group of 700 could hardly meet the demands of that 100 million potential invokers of arbitration. A new army of arbitrators will be needed.

We certainly have much to offer these new decisionmakers from our labor-management bank of experience. And they, new to that role, will ideally seek guidance to assure fairness, both procedurally and substantively.

So this leads me to the second subject of my talk. Last month, in cooperation with the two prospective NAA Presidents, J.F.W. Weatherill and George Nicolau, we launched a group to undertake the codification of our law of the shop under the leadership of Vice President Theodore St. Antoine. Certainly, there are numerous publishers surviving on the dissemination of arbitration awards, but the published awards, by virtue of the restriction of the Code, present only those cases that the parties agree to have published: The tendency, either because of the needs of the publishers seeking new or different "law" or the disinterest of the old hands in whether or not their awards are published, has been a perceptible veering away from conventional tenets of arbitration. As a consequence, the collected wisdom of our founding fathers and the

giants of this field, who in the early days published to provide guidance to the parties in this new field of industrial law, has been seriously diluted.

We believe a reexamination of the law and the issuance of a "restatement"-type document would serve several valuable purposes. First, it would provide continuity to our educational efforts in our 17 regions and at our fall educational meetings and provide a focus at our annual meetings for our membership on the issues inherent in the various facets of a prescribed topic (discipline and discharge, vacation and leaves, seniority, promotions, management rights, etc.).

Second, it would provide a guide to decisionmaking for the newer and next generation of labor-management arbitrators, in and out of the NAA, and for advocates of unions and management, standards to consider when arguing cases.

Third, it would provide a similar set of benchmarks for those handling employer-promulgated arbitration, as advocates or arbitrators. Even if such guidance is taken only in the field of procedural fairness or due process, it will help to protect us all and ensure fairer employee treatment. And if the ADR employment field expands into the termination-at-will arena, it may provide valued guidance in assuring due process and fairness in that troublesome area as well.

Finally, such a codification will provide a valued documentation of the NAA's role over the past 50 years as monitor of the parties' relationship. That statement of the law of the shop will provide an incredibly valuable tool for students and the study of labor arbitration in this era, even if one buys the argument that the practice of labor arbitration is declining. In recent years, as union membership has dwindled, and as reports have spread of less resort to arbitration and arbitrators, some have forecast that when the history of labor relations is written, there will be a footnote stating that in the second half of the 20th century, there was a thing called labor-management arbitration. I don't believe that prognosis is valid.

It is hoped that labor-management arbitration will continue to survive, even thrive, to the extent that parties incorporate into collective bargaining agreements requirements that the employers adhere to expanding statutory requirements and that claims of violation of those rights be resolved through the grievance and arbitration procedures, thereby avoiding resort to, and relitigation of, such issues in the courts.

The format may change. Unions may begin to represent more employees in currently nonunionized enterprises, and arbitration may even become a much more acceptable and credible institution in nonunionized settings. I am not much into crystal balls, but these two projects may help to make a difference.

In summary, the NAA has produced in the area of ALDR two innovations. In the Task Force Protocol, we hold out to those involved in the resolution of statutory employment issues the standards of due process that have made labor arbitration a hallmark of equity, integrity, and credibility. Let us hope that the statutory agencies and the courts will demand no less in employer-promulgated arbitration. In the second, we are trying to establish this code of the law of the shop as a standard to be considered, if not followed, in the expanding universe of employment arbitration. Both, we hope, will leave a legacy that should do the NAA, the arbitrators, unions, and management proud, not only reflecting the contributions we have all made in assuring tranquility in the collective bargaining arena, but also for the contribution we hope to make to fairness and equity for the 100 million workers who so far have missed their chance at unionization.