CHAPTER 2

DISTINGUISHED SPEAKER: ARBITRATION AND LABOR, A TRADE UNION PERSPECTIVE

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I am delighted to be here. I bring you greetings from President Lane Kirkland, the AFL-CIO Executive Council, and the millions of working women and men who make up the American trade union movement.

Let me begin by offering to you the Biblical beatitude: "Blessed are the peacemakers, for they shall inherit the Earth." This has a modern corollary: "Blessed are the arbitrators, who combine the best features of a peacemaker, a dispenser of justice, a psychotherapist, and a wise grandmother. They may not inherit the Earth, but at least they get to spend some quality time in San Francisco."

It is a revealing fact that with one of the earliest pieces of information about this meeting came a list of John Kagel's 22 favorite San Francisco restaurants, plus 21 more from "other sources." Since you are likely to be able to dine here only two or three nights, it is suggested that you divide up into groups of five and begin with each of you striking those that do not appeal, until you are down to the two or three you can handle. In that way you will probably be about as satisfied with those two or three as most of my colleagues are when any one of you winds up as the case arbitrator—after waiting too long for a table and receiving the too-high bill, you may wonder why you devised that system in the first place.

I come here to pay tribute to your work and the ideals you represent. As a trade unionist for many years, I have seen time and time again the great contribution that arbitrators make to the collective bargaining process and system. It is fascinating that labor-management arbitration has become as successful as it is in

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a relatively short time. Your profession, after all, is quite young. Some of its great pioneers started their work in the 1930s. There are people in this room who were present at the creation—or at least present during early infancy. Over the last three generations, the good influence of the early practitioners has spread far. Our model of arbitration has been adapted to resolve all sorts of conflicts. It has inspired the resolution of disputes ranging from multimillion-dollar environmental problems to arguments between neighbors about barking dogs. It spawned the entire alternative dispute resolution (ADR) industry. In a period when our society is polarized—when consensus even on the proper role of government has become frayed—the contribution of the arbitral system and other forms of ADR has been tremendously valuable.

I salute you for that, but I want to associate myself with the remarks of Arnold Zack yesterday and the conclusions you have reached with respect to employer-created, unilaterally imposed, ADR schemes. And I share your concern that the good name you and we have given to the arbitration process may be sullied by some of those schemes. I would urge you to hold tightly to the term arbitration and limit its use to labor-management arbitration, and even commercial arbitration, where the arrangements for the process and the process itself are closely guarded and guided by interested equals. Let them use ADR phrases for what they do, and we can be clear that they are only alternatives to be selected—and they do not necessarily bear the imprimatur of respected institutions such as this.

I am most pleased to tell you this morning that as a result of discussions we have had with the American Arbitration Association (AAA), and discussions that AAA has had with Arnold Zack and a number of you in seeking guidance and input, we are near a formal announcement of a new AAA service designed to further improve the system and serve the needs of unions and employers for speedy and inexpensive resolution of simple grievance cases. Through the discussions we have had, AAA is developing what they will call the Excelleration Program, under which a joint labor-management committee (on which I believe Arnold will serve) will identify the most active members of the Academy, and they will be asked if they wish to serve on a new national roster for this program. When a grievance is submitted, AAA will appoint an arbitrator from the roster. He or she will be able to fill an otherwise empty day, and the parties will be advised of the name of the arbitrator and of the times available. The program will call for a simplified hearing and for an

award—setting forth only decision and remedy—to be issued within 24 hours of the hearing, with the time from submission to decision within 15 days. Some details remain to be worked out, but I believe this program can be of important assistance to unions and employers who want to resolve simpler grievances quickly. I congratulate the AAA and those of you who have been involved in its development.

Arbitration as we know it, of course, has been and remains a central element of our collective bargaining system, and it is one of the crowning achievements of that system. In some industries, notably in health care and in public employment, the collective bargaining system is growing and adapting. But we need to recognize that it is in serious trouble as the number of workers who are part of our unions and therefore part of the system is, at best, steady in absolute terms but shrinking as a percentage of the work force.

The bright side is that the Bureau of Labor Statistics (BLS) has reported increases in the absolute number of union members in 1993 and 1994 after seven straight years of decline. The BLS figures put total U.S. union membership at 16.3 million in 1992, 16.5 million in 1993, and 16.7 million in 1994. That growth of 400,000 would represent an increase of only 2.5 percent, but as Secretary-Treasurer, I can tell you that even small growth quickens the pulse and gladdens my heart. The truth is, though, that trade union membership, and therefore the collective bargaining system, has been shrinking continuously for over 20 years as a percent of the total work force and as yet no real turnaround is in sight. We are currently a bit below 16 percent of the total work force, and a bit above 10 percent of the private-sector work force.

I can explain much of that as the result of the shrinking of our manufacturing sector as employers have shipped jobs offshore to foreign subsidiaries or out to domestic or foreign subcontractors; the result of other shrinkage in transportation, mining, construction, and maritime—essentially all once heavily organized industries—and the concentration of much of our newly created employment in fast food and in retail and service trade—traditionally lightly organized. And I can explain much more of that shrinkage as the result of the enormous opposition of employers to every suggestion that their workers should have a free choice of a voice to represent them. Nonetheless, if current trends continue, one could project penetration rates of 10 percent overall early in the next century. But, current trends will not continue—they never do—which is why economists keep to themselves so much.

I firmly believe that if union membership ever neared the end of its road, it would still be the most vital, most meaningful force in the work life of its last 100 members, assuring the recognition of their dignity and the decency of their working conditions. But, it would have ceased to be a significant social, political, and legislative force—guaranteeing, as it still does today, the representation of all workers' interests within the body politic.

If that decline were to continue, the consequences for a free and democratic society are obvious and enormous. And after that bitter harvest, the nation would have to again, as in the 1930s, create conditions propitious for the growth of a new system of worker representation designed to create a new equality between bosses and workers and to insure free and independent representation of worker interests. But think a bit upon the damage that would be inflicted on workers and on the nation in those intervening years—the shrinkage of purchasing power, the wildly disparate income distribution, and the enormous social unrest.

The good news is that that is not going to happen. The labor movement is finding the necessary new approaches and in the next years can bring about its growth and renewal. It will require some serious adjustments and the development of a movement able to "walk and chew gum" or "walk softly and carry a big stick"—choose your own metaphor—a movement more sophisticated and skilled. It will require a movement able to live up to its role as representative of all working men and women, able to communicate its willingness and readiness to work in partnership with decent employers and, more subtly, able to fight and inflict pain upon those who cling to the conflict model.

For growth to continue, and to move to a much higher level, we will obviously have to spend a larger percent of membership dues to insure that the unorganized are given the opportunity to form or join unions. That is a shameful and unfortunate fact of life—or rather fact of law. It is the inadequacies of current law and the failure of law to come to terms with the real impediment to the free choice of workers—the economic power that employers freely wield over their employees—that occasions the bitter contests we call representation elections.

In some service industries, given a large oversupply of easily exploited workers and employers who are insulated from the normal measures of decency, or given anonymity through subcontract arrangements by which they deny responsibility, workers have no choice but militancy, struggle, and the creation of, at least,

inconvenience to the general public, as the routes to organization and to justice. That is a style well-demonstrated by the Service Employees' Justice for Janitors campaigns in a number of major cities. In other industries, a more reasoned, more reasonable approach will attract members who do not feel they have to go to war with the boss. Among some groups of professionals and semiprofessional workers, that professionalism may be the tie that binds with or without collective bargaining developing later. The truth is that the workers of the 1990s are different from those of earlier generations. The world in which they live is different, and the unions that attract them are different, but that last fact has been too little recognized.

Broad, deep, and sweeping changes have taken place in our unions as they have adapted to the new society. They are becoming far more diverse in leadership at every level and more skillful and sophisticated in approach.

Our Organizing Institute, formed six years ago, has embarked on the largest organizer-recruiting effort in the history of our movement. It scours our unions and the nation's campuses and recruits hundreds of young people every year, training them and involving them in organizing campaigns. About 500 highly trained young organizers have graduated into the ranks of our affiliates.

Our Union Privilege programs have combined the purchasing power of 13 million prospective consumers to develop programs of benefits unequaled by any other consumer organization—from credit cards to mortgages, from life insurance to college tuition grants and loans at preferential rates, all designed to give membership an appeal beyond, or in place of, collective bargaining.

Our Organizing Responsibility Procedures provide a system through which mediation and arbitration can prevent the wasteful duplication of effort of two unions competing to represent the same group of workers.

Our Strategic Approaches Committee has enabled us to bring to bear the resources of the federation and of combined affiliates in support of collective bargaining goals. That approach has helped greatly in achieving contracts with Pittston, Ravenswood Aluminum, the *New York Daily News*, and in a number of other bargaining situations. Perhaps the clearest success of the approach has been in coordinating the efforts of our unions in the newspaper industry and in blunting the hitherto successful strategies of the law firm that represents so many newspapers. The successes, the strike victories, at the *New York Daily News*, the *Pittsburgh Press*, and the

San Francisco Chronicle bear ample testimony to the benefits of solidarity.

Clearly, finding the solution to making the strike weapon effective once again—or the development of substitute mechanisms to increase labor's bargaining power—is an important element of labor's renewal. Part of the answer is interunion solidarity, part greater resources to carry on strikes, and another part, in many strikes, will be building effective bargaining links with other unions in the same company in other countries. Just as single-unit bargaining had to be pushed up to higher corporate levels, so, in some cases, we must seek to push domestic bargaining up to international levels. Recent times have no better example than Bridgestone, which has not only recruited scabs but turned the workers of their plants in Brazil and Japan into strikebreakers as well. Clearly, we need to carry a bigger stick than we do today and use it wisely.

We have begun to experiment with broad-based community or industry organizing efforts and with "less than exclusive," or minority, representation.

The truth is the labor movement has proven remarkably resilient and adaptive. The labor law has not. The Congress, which is its keeper, has refused to change and adapt it and has locked us into a legal regime last substantially adjusted in 1947.

The tragedy of the Dunlop Commission lay not only in its seeking an acceptable denominator that might be common to a majority in the Congress, but in its failure to call for sweeping reform of the system for determining representation. The inequality of power in the election process, the ability of the employer to assert its economic power and to influence that process is so great—and used with such sophistication—that it destroys freedom of choice without leaving a single fingerprint.

We have spoken clearly on the desirability of partnership—of peaceful, productive relationships that improve jobs and job security. But we all delude ourselves if we come to believe in a new and perfect era that will be free of disputes about the ways employers and workers relate to one another.

And now, we face a further onslaught as the Republicans move to put into law the Teamwork for Employees and Management (TEAM) Act, a misbegotten effort to permit employers to establish, assist, maintain, or participate in any organization or entity of any kind in which employees participate to address matters of mutual interest, including terms and conditions of employment.

The TEAM Act would do to independent democratic unions what the people's democracies of Eastern Europe did to democracy. It would polish the rhetoric, glorify the labels, and mock the substance. The TEAM Act has been presented to the Congress, will be seriously considered, and likely passed—even though not a single employer organization appearing before the Dunlop Commission recommended any modification of the law and in spite of the statements by all members of the Dunlop Commission in opposition to its passage. Such is the spirit of the times and of the Congress. Small wonder, then, that the frustrations of my colleagues well up and spill out in intramural bickering. But all these things will pass and a rejuvenated trade union movement will continue to speak out and act on behalf of America's working men and women.

Finally, let me address the claim that employers make so often today that the collective bargaining system has "outlived its usefulness" and has been supplanted by a regime of individual rights created by statute. That argument is fallacious in at least two respects.

First, while there are many more employment laws today than 60 years ago—perhaps more than there would need to be if the collective bargaining system were healthier—the fact of the matter is that these public laws do not address most of the basic needs of working people. Those laws do not secure fair wages, decent benefits, respectful treatment, job security, or any of the gut concerns workers seek to address through unions.

Second, those who look to public laws as an alternative to unions ignore the fact that, without an independent representative, those laws exist only on paper. How many workers have the money it takes to sue to enforce their rights? How many nonunion workers feel free to sue the boss? And who will protect the worker if, God forbid, he or she wins a lawsuit against the employer?

These fundamental problems cannot be solved by attempting to transfer the system of grievance arbitration, which was created and which functions in the context of an ongoing collective bargaining relationship, to nonunion workplaces as a means of enforcing public law rights. To be sure, it may be possible to develop procedures for nonunion ADR that meet rudimentary tests of fairness (although the difficulties of doing so given the disparate knowledge and resources of the employer and the individual employee should not be underestimated).

But, no matter how fair the procedures for adjudicating individual cases, an alternative dispute resolution system that is not jointly

created and jointly controlled, and in which there is no ongoing employee representative, will, at very best, be a pale imitation of the real McCoy and does not deserve to be called arbitration.

Let me close by raising two "yellow flags" about the entire effort to define "fair" procedures for nonunion arbitration.

First, that effort can play into the hands of those whose real agenda is not to create an *alternative* dispute resolution system but rather to *supplant* the current (judicial) system for enforcing individual employment rights with an arbitral system. At the core of the debate over nonunion ADR is the question of whether to allow a new form of the "yellow dog" contract—one that would require employees to agree to forever surrender their right to sue their employer in court. Such contracts are attractive to management because of its well-founded belief that the consensual nature of the arbitral process makes that process unlikely to produce significant punitive damage or even compensatory damage awards, and thus management sees arbitration as a means of blunting the force of the modern trend toward enhanced penalties for violations of employment laws. The Dunlop Commission wisely recommended against allowing employers to force employees to submit disputes to arbitration, and your conclusions to the same effect are most helpful, but this debate is just beginning.

Second, the Academy needs to take care not to give ammunition to those who would argue that collective bargaining has outlived its usefulness. If anything the Academy or its membership does were understood to mean (or used to suggest) that arbitral systems can work equally well with or without employee representation—that public law combined with nonunion ADR is a substitute for collective bargaining—a grave disservice would be done to values we hold dear and to the cause of working people. This proud institution grew from the roots of our collective bargaining system. As part of that system, it matured and developed the techniques and practices, the principles, and policies of "labor-management arbitration." It has now spawned the wide variety of ADR applications from which so many may benefit. But it would be a pity if this Academy lends itself in any way either to the coerced denial to employees of their full rights or to the spreading of the view that public law combined with nonunion arbitration is any kind of a substitute for collective bargaining, grounded in a group voice that can deal with an employer in rough equality.

For the trade union movement, the bottom line of these times is that even with the law tilted against us, even with a Congress that has gone from "passive indifference" to "active hostility," even with all the roadblocks against us that have been put up by business, we can still organize and grow. It will be a good deal harder and slower than it should be, and it will call for our best steel and even greater ingenuity, but we can do it. We know these are difficult times. But in the end, what keeps us going is a profound idealism and the certain knowledge that because our cause is just, we will prevail.