CHAPTER 4

# WHEN ARBITRATION IS NOT THE ANSWER: PROBLEM-SOLVING APPROACHES TO TODAY'S WORKPLACE

## I. INTRODUCTION

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Arbitrators subscribe to the dispute resolver's version of the Hippocratic oath: "Above all, do as little harm as possible." There may be critical workplace problems for which arbitration affords no constructive solution, however.

Let me set the scene for you. Dangerous, disruptive, or threatening incidents are common in today's workplace. Management may impose discipline, and the union may respond with a grievance. Does the traditional grievance and arbitration process sometimes worsen such a situation by burying it in an adversarial morass? Are less confrontational problem-solving approaches more likely to yield a sensible result?

These questions are worth answering because modern working conditions seem to breed dangerously stressed employees. Prominent among those conditions are:

- *Competitive pressures.* Relentless, global market forces and "lean production" styles require employees to function more efficiently and respond to novel demands. Mandatory overtime, fatiguing production goals, and erratic scheduling may disrupt circadian rhythms and family responsibilities. Privacy has been eroded by various forms of surveillance and monitoring. Abrasive co-workers, authoritarian management styles, and lack of autonomy create additional strains.
- *Downsizing.* Ubiquitous threats of mergers and takeovers, downsizing, mass layoffs, and mid-life "career crash" also create tensions that can elicit hostility. The long-term conse-

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quences may be overwhelming psychological trauma, leading to hostility and outbursts of violent or bizarre behavior.

- *Workforce demographics.* Growing ethnic, linguistic, cultural, and gender diversity fosters intergroup tensions. Some employers, for example, have promulgated "English-only" rules to prevent strife among linguistic groups. In the absence of strong integrating forces such as vibrant unionism, ethnic and cultural divisions become more salient.
- *Domestic dysfunction.* Family discord, domestic violence, alcohol and drug abuse, and other social ills intrude into the workplace. An abusive domestic environment has been a particular liability to female workers. In the main, private companies, state and government agencies, and trade unions have yet to recognize the extent of domestic overspill and the cost to health, productivity, and morale.

It is thus critically important that grievance procedures resolve problems in a timely, effective manner and flag incipient perils. Unfortunately, rather than solving problems pragmatically, as it was designed to do, the grievance procedure often becomes hyperadversarial and mired down in labor-management confrontation. What may be needed is a healing, rather than a hearing. Testifying before Congress in 1992 about a massacre perpetuated by a postal employee in Royal Oak, Michigan, psychologist Mark Braverman concluded:

> The disciplinary process, because of its adversarial nature, often interferes with adequate attention to the needs of the employee for medical, psychiatric or social service intervention. Aberrant or unacceptable behavior on the part of an employee, whatever the cause, sets in motion a grievance-arbitration procedure that takes on a life of its own. The causes for the behavior, be they personal or health problems unrelated to work, management practices, or other workplace conditions, are usually forgotten as the disciplinary tug-of-war between labor and management lurches into action. . . . The search for a solution to the problem, now called a "dispute," is thus governed by the rules and strictures of the disciplinary process, rather than by attention to the conditions that gave rise to the dispute.[1]

We are privileged to have Dr. Braverman here as part of a panel that will address the questions posed earlier from a variety of perspectives. He has been a consultant to industry, a witness in arbitration, and a pioneer in the field of crisis management. Also

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[1]Testimony to Subcommittee on Postal Personnel and Modernization, U.S. House of Representatives, Sept. 15, 1992.

on the panel is Jordan Barab, Assistant Director for Health and Safety of AFSCME, the public employee union, that is based in Washington, D.C. He has written cogently about workplace violence from the union viewpoint. And finally, we have one of our Canadian hosts, Kenneth P. Swan, an arbitrator who has been a leader in professional education.

Among the workshops planned for the afternoon is a followup to this plenary session, led by National Academy of Arbitrators Member Marcia L. Greenbaum. It offers an opportunity to apply to an actual case some of the principles we discuss here. The morning's speakers and others will take part, and our problem-solving skills can be put to the test.

## II. WHEN NEUTRALS CONFRONT CASES OF WORKPLACE VIOLENCE

MARK BRAVERMAN*

Neutrals are being increasingly called upon to rule on cases involving violence or threats of violence in the workplace. It is the rare practitioner in the field who has not heard cases involving disputes between employers and employees regarding violent or threatening behavior in the workplace. Ruling on cases of this sort, however, presents particular challenges to the arbitrator, and it is the wise practitioner who recognizes this. Neutrals, along with labor leaders, attorneys and legal experts, corporate managers, human resource managers, policy makers, and health care professionals are playing a part in determining how workplace violence is defined, conceptualized, and ultimately confronted. Three of the most crucial issues at stake here are:

1. *The limits of present concepts and laws regarding worker rights and employer responsibility.* Until recently, cases brought to arbitration typically involved disputes over contractual issues or over discipline for violations of proper workplace behavior or job performance. Rarely, however, were arbitrators required to render awards about issues involving life and death. However, this is precisely what many cases are about. Considerable uncertainty exists about the application of established

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