Chapter 1

PRESIDENTIAL ADDRESS: ARBITRATION UNDER FIRE

Sara Adler[1]

At the risk of sounding like an Academy Awards winner, I want to begin with my appreciation of my husband, Jim Adler. There is a small group of us in the Academy who are married to lawyers who practice in the field of labor relations and, frankly, none of us could become successful arbitrators if our spouses had not been viewed as smart, knowledgeable, and respected by both sides.

Centuries ago, Heraclitus is reputed to have said, "There is nothing permanent except change." More recently, philosopher Arthur Schopenhauer said, "Change alone is eternal, perpetual, immortal." I want to talk today about the challenges we face in the changes occurring daily.

Change can improve matters, such as the joy that we and our youngest son and his partner share in the surrogate-assisted birth of his two children. It can make our lives more difficult as medical problems, and loss of loved ones and respected colleagues mount—not uncommon in an organization such as ours with many wiser, but also whiter, heads. There have also been multiple changes in our profession.

In the last decade, technological change has altered the practice of arbitration in very practical ways, such as the ease of scheduling and of serving documents by e-mail. Another change that I've been mentioning across the United States as I've visited various regions is that news reports captured digitally now usually name the parties and the arbitrator, and they will be perpetually available—for better or for worse—to anyone who wants to Google a name. I'm pleased to report that if you Google my name, you'll find that I'm a very famous Yiddish actress from the 1920s.

[1]National Academy of Arbitrators, Los Angeles, CA.

In the last half decade or so, we've seen other changes that negatively affect our profession far more than was the situation occasioning Dave Feller's erudite lamentation in his 1976 speech titled "The End of the Golden Age of Arbitration."

In Dave's view, prior to the passage of new broad workplace legislation, such as Title VII and the Age Discrimination in Employment Act, unions and employers had full governing power over their workplaces, impinged on only by the long-standing and stable statutes of the National Labor Relations Act and Fair Labor Standards Act setting minimum terms and conditions. He saw this new legislation as significantly altering the perceived paradise, but was quick to point out that did not mean any diminished amount of work for arbitrators. Dave was right—the years with the highest admission of new members to the National Academy of Arbitrators (NAA) were 1987 and 1988.

Beginning in 2011, the General Counsel of the National Labor Relations Board (NLRB) in the United States proposed substantial changes in deferral standards. In one recent case, an NLRB administrative law judge (ALJ) overturned an arbitrator's award upholding a termination under the parties' collective bargaining agreement. The issue was a mandatory drug test that the arbitrator found was provided for in the collective bargaining agreement, but the ALJ overturned the award because the employee had not been accorded his Weingarten Rights and the award, therefore, was repugnant to the Act.

In another case, the NLRB held that a reinstatement without back pay was not repugnant to the Act, as the General Counsel had argued, despite the award being different than the Board itself might have ordered. The Board declined to rule in that case whether or not other elements of the General Counsel's revision of deferral standards would be upheld.

There is currently a proposal in Congress to amend the Fair Labor Standards Act to allow private-sector employers to provide for compensatory time off in lieu of paid overtime as is already the case in the public sector.

Dave's speech made no mention of the then-developing unionized public sector that now forms the bulk of the work for many of our members. Since he spoke in 1976, we've seen markedly diminished unionization in the private sector.

Now, however, public sector unionization is being dramatically curtailed in some instances, such as Wisconsin's new laws regarding collective bargaining, and the passage of right-to-work laws in

Indiana and Michigan affecting both public and private sectors, and it may be quite changed by such legislation as the recently enacted Bill 85—the Saskatchewan Employment Act.

There may be many more possible curtailments of public sector arbitration on the horizon, fueled at least in part by municipalities' discontent with interest arbitration awards, especially for police and fire units—the groups with the most widespread right to interest arbitration because they are prohibited from striking—and regardless of the objective justification for the awards.

The alternative, neither the right to strike nor access to interest arbitration, as is the case in my home state of California, inevitably leads to other forms of self-help, such as widespread attacks of "blue flu" or a sudden devotion to working to rule. As an interesting footnote, a Scottish judge ruled a few weeks ago that human rights (as that phrase is understood in Europe) requires that interest arbitration be provided if employees are denied the right to strike.

Many of you know that my favorite allegation in a suit alleging discrimination by the arbitrator was that "the arbitrator was biased by the evidence in the record." Well, my favorite complaint from this last year of reading media coverage of arbitration was from an official in Canada who is reported to have exclaimed, "What can you expect? All Canadian arbitrators come from the union-side!"

There seems to be growing pressure to reform interest arbitration in Canada, especially in Ontario, with the complaint that interest arbitrators do not start with the governing body's ability to pay and accepting a tax increase in order to pay the awarded wages and benefits as a legitimate basis for making the award. Similarly in New York, where the long-standing Taylor Act will expire at the end of June, there is a possibility that it will be replaced with a modified version limiting interest awards by the arbitrator or replacing arbitrators altogether with a government restructuring board. Revised legislation is being actively considered elsewhere as well.

One part of the mission of the NAA is to provide education. We could be providing education to the public and legislators about how the interest arbitration system works and what we think would be beneficial if changes are to be made. So far this year, however, we've been so focused on our inability to credibly support collective bargaining that there have been no proposals to seek to provide input that might be valued regarding interest arbitration.

Everyone who gives it a moment's thought knows that the NAA supports collective bargaining—we wouldn't exist without it.

Complaints about grievance arbitration are also heavily weighted to police and fire along with healthcare and education. Somewhat surprisingly, the governor of Oklahoma (hardly an arbitration- friendly state) recently vetoed a legislative attempt to limit arbitration of police discharges with the explanation that she believed litigation would be more expensive.

The recession and the sequester have damped the parties' economic ability to engage in arbitration and who knows what will happen with the U.S. Postal Service, another historically fertile source of work for arbitrators.

Many of our members have begun to supplement their labor arbitration practices by serving as arbitrators in non-union employment and for the Financial Industry Regulatory Authority, as well as engaging in more non-union mediation work.

The newest version of the Arbitration Fairness Act was proposed in the House and Senate in May, and it would prohibit pre-dispute arbitration agreements for all employment disputes not covered by a collective bargaining agreement or regulated by the Securities Exchange Commission. We do not know if this will get any further than prior versions. Apart from making it possible for planes to fly on schedule, our Congress hasn't passed much meaningful legislation lately.

There is relentless negative publicity in the media about arbitration rarely answered or balanced by positive public comment. I believe that it is the duty of the parties to collective bargaining agreements to ensure that at least their own employees understand that labor arbitration is a fair process with a neutral, jointly-selected decision-maker. I fear, however, that too often employees only hear the complaints about the process.

A modern curbstone philosopher is quoted as saying, "You can avoid ulcers by adapting to the situation. If you fall in a puddle, check your pockets for fish." I suggest that the NAA will have to adapt to the changing fortunes of many of our members or it will cease to be the viable, vibrant organization we have today.

Change is hard for both individuals and for organizations. In the relatively recent past, some members of the NAA whom I most respect and of whom I am most fond have suggested that they would rather see the organization wither than significantly change. I'm decidedly of the view that, together, we have some-

thing more to offer beyond the definition and redefinition of just cause.

Without abandoning our core mission, we should begin to seriously consider how we can proactively reach out to the workplaces in both of our countries to develop and promote peaceful ways to manage the conflict that will follow in the absence of broad-based unions and arbitration and which will provide for a reasonable measure of due process and fairness for both employees and employers.

Perhaps we need national laws based on the work of Ted St. Antoine (well, I think of it as *his* model act) in creating the Uniform Termination of Employment Act. Perhaps it is time to look again at industrial tribunals or labor courts, as Walt Gershenfeld suggested. Perhaps it is time to require advisory arbitration before an employment-related suit can be filed in court. Perhaps we can reach out to the stakeholders, as Arnie Zack did in crafting the Due Process Protocol. What I do know is that we can be more than experts in arbitration.

In our NAA community of both arbitrators and advocates, there is a tremendous body of experience and thoughtfulness that could, and in my view, should, be able to craft an expanded body of workplace dispute resolution processes—probably most effectively with our sister organizations.

I leave you with this challenge and I hope you'll accept it.