CHAPTER 8

DANGER SIGNS IN LABOR ARBITRATION

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Even after three years, it's a strange feeling to be here at a National Academy meeting as a mediator instead of as an arbitrator. [I say that, despite some insinuations in years past that I had a tendency to mix the two functions.] Moreover, it's especially strange to be here as the head of an agency that includes a function of appointing arbitrators. In calendar year 1963 fees for services of arbitrators, appointed under Federal Mediation and Conciliation Service auspices, totaled three-quarters of a million dollars—give or take a few thousands.

Thus, the comments made here are schismatic. As an ex-arbitrator, I retain loyalty to and admiration for the potentials of a relatively new profession. As a mediator, I observe and wrestle with the good and bad effects of arbitration as these results influence bargaining for new contracts. As an administrator, I have responsibilities to labor and management who utilize your services as well as to you who serve.

What I will try to say here can be summarized as follows:

1. Grievance arbitration continues to grow—quantitatively.
2. Despite the favorable growth pattern of grievance arbitration, there are a number of significant danger signs that should cause us real concern. They are:
   a. An increasing tendency by the parties to limit the scope of arbitration.
   b. Continuing complaints about cost.
   c. Increasing complaints about delay.
   d. A tendency towards more formality.
   e. An increasing tendency for arbitrators to look at their

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work as a business rather than as a profession or a service.

3. Arbitration of new contract disputes is not increasing.

The fact of continuing growth of grievance arbitration can be demonstrated. Requests for panels to the Federal Mediation and Conciliation Service in calendar year 1963 were more than double those made as recently as 1957 (4605 vs. 1941). Actual appointments also more than doubled (2985 vs. 1423). These increases have been gradual but persistent. In no month since I have been in Washington has the volume been less than the comparable month of the preceding year. Awards actually made have not increased as rapidly. The 1963 total of awards was 1961 in contrast to 1267 in 1957, an increase of 55 percent. A higher proportion of cases are now settled after a panel is requested and obtained but before an appointment is made. This is the "lost business" that you do not even know about. A higher proportion of cases are also now settled sometime between appointment of the arbitrator and issuance of an award. This is the "lost business" that you do know about and that gives rise to postponements and cancellations.

The volume of American Arbitration Association labor cases has also increased substantially. There is no reason to believe that selection of *ad hoc* arbitrators by the parties without benefit of any appointive agency has declined. More and more companies and unions are turning to some form of so-called permanent arbitrator selection.

In the admitted absence of any really adequate over-all statistical measure, it is a reasonably safe guess that the total volume of grievances actually arbitrated in this country has been increasing in recent years at a rate somewhere in the neighborhood of five percent per year.

Nothing succeeds like success. How can anyone challenge or question a process that appears to be growing even faster than most economic growth indices? I am not a "prophet of doom," but I do want to raise some questions that seem to me to be important.

The Teamster settlement, announced less than three weeks ago, eliminates grievance arbitration except for discharge cases.

The General Electric and Westinghouse settlements of only a few months ago curtail arbitration very substantially. Arbitration enthusiasts would be inclined to "write off" these specific developments on the valid basis that that particular union and those two companies were never very strong proponents or users of arbitration, to put it mildly, and that the total national volume of all arbitrations will not be changed materially.

I do not view the situation that way. The scope of the arbitration clause, or whether there should be any arbitration, is an increasingly important and difficult issue in literally hundreds of cases in which Federal Mediation and Conciliation Service mediators have been involved in the last two or three years. I have no desire here to either debate or discuss the merits of important NLRB or court decisions of recent years. However, I would suggest, even if all of these actions are completely correct and right, that what started out to be a strong "pat on the back" to arbitrators could be changed by others to an equally strong "kick in the posterior." It would be a sad day for grievance arbitration, and an even sadder day for collective bargaining, if it should become commonplace for either a company or a union to eliminate or substantially curtail arbitration whenever it "had the muscle" to accomplish that result.

When an attack is made on arbitration, either by a company or by a union, the most discouraging development is that the defending party does not always uphold the institution with full vigor. Why is this so? In my judgment, arbitrators can and should "search their souls" to try to find the answer. This requires a careful look at common complaints.

The cost complaint is still with us, but in slightly muted form. I have always been one of those who believed that the hearing days versus study days type of analysis and per diem fees are only indirect measures. The parties are interested in the gross amount of the fee and have limited interest in its components.

To secure some "cost-per-case" figures, we have tabulated fees, excluding travel expense, for a six-year period (1958 through 1963) where the arbitrator secured the case from a Federal Mediation and Conciliation Service panel. There are a total of 8566 assignments in the sample. The average fee per case was $391.00.

A small but statistically unknown number of assignments included more than one grievance. It is an "educated guess" that the country-wide average cost (arbitrator's fee only) of a typical *ad hoc* "run-of-mine" grievance was somewhere between $350 and $375, probably closer to the higher figure.

Contrary to my own prior impressions, I am pleased to report that there has been no substantial upward trend in cost during this six-year period. The separate figures for each year show that per diem fees have increased somewhat, but study days have declined. Some net increase is indicated, but it is not a high percentage figure. To put the matter quite bluntly, it appears that many arbitrators "got the message" when the heat was turned on the study-day problem.

There are some interesting regional variations. The average fees of Chicago, New York, and Cleveland arbitrators have been more than five percent above the country-wide average. [The New York average is explained, in part, by an apparent heavier incidence of multiple grievance assignments.] At the other end of the scale, average total-cost fees of southwestern states (east of the Rockies), southeastern states, Cincinnati, Philadelphia, and Pittsburgh arbitrators have been more than five percent below the nationwide average.

This study has indicated the need at our offices of certain refinements of statistical method before additional or detailed figures can be released. However, the six-year sample is large enough to make it reasonably reliable to the extent that I have indicated so far.

The question that this study does not answer is whether a "run-of-mine" grievance is really worth $375. You can buy a very excellent refrigerator with the proceeds of one case and have some change left over. Lest I be accused of comparing your priceless non-automated literary efforts with an inanimate automated object like a refrigerator, let me remind you that the factory men and women who made that refrigerator worked almost a month to equal your fee. The federal government is not popularly considered to be the most efficient employer, but one of our Federal Mediation and Conciliation Service mediators spends a week and a half on a tough new contract dispute for that same amount of money.

I am not suggesting that per diem fees be reduced on any widespread basis. I am saying that the parties who use your services are asking the kind of questions that I have suggested and that the answers are not very favorable. The simple fact is that many arbitration processes are not efficient, especially when other substantial costs are added to arbitrator's fees. The parties and the arbitrators will have to find satisfactory ways and means to decrease total costs to preserve the institution.

No satisfactory analysis of the delay problem has been made in our office. However, it is my judgment that delay in securing decisions is currently an even more virulent complaint than cost. Delays prior to arbitration and delays after arbitration that are the responsibility of the parties may be and are excessive. That does not relieve the arbitrator of responsibility for his own delays. We have an increasing incidence of four-, five-, six-, or eight-month intervals that tend to "kill" arbitration where they occur. The delay data disclosed yesterday by Bob Fleming and Art Ross's earlier study can only be characterized as completely unsatisfactory. When it takes as long as it does to secure a decision in too many discharge cases, there is something very wrong with the process.

The tendency towards more formality, "creeping legalism," or whatever we may want to call it, contributes to the cost and delay problems. Moreover, it tends to eliminate or minimize the cathartic value of a simple proceeding. In some arbitration proceedings today, even in a discharge case, the grievant somehow gets lost in a wilderness of showmanship and irrelevancies.

By advocating a return to simple, quick, and relatively cheap proceedings that did characterize most grievance arbitrations in days that many of us can remember, I don't think I'm simply being nostalgic. Grievance arbitration has made a tremendous contribution to industrial peace. Even at its present state, it is far superior to the alternatives—the strike and lockout. I am only concerned lest it cease to fulfill the purposes for which it was intended.

It is perhaps inevitable that any new type of work that starts out with a high level of idealism, almost with a missionary zeal, and develops gradually into a profession will lose some of those

characteristics and acquire "business as usual" attributes. However, I'm disturbed by what I believe to be a growing tendency of arbitrators to lose sight of their real place in the collective bargaining picture. I never did agree with Frances Kellor when she advocated that arbitrators serve without pay to preserve the public-service concept. I do believe, however, that we have moved entirely too far away from the precepts that caused her to take that position.

Time permits only a few words about arbitration of new contracts. There are many of us who believe that voluntary arbitration should be a satisfactory answer to some of our most difficult new contract disputes. The Taft-Hartley Act places on the mediator the responsibility to suggest arbitration as a last resort alternative to a strike. There is no inherent reason why some gradual growth of voluntary arbitration should not occur in this area just as grievance arbitration developed slowly and experimentally. The sad fact is that there is absolutely no evidence of any such trend. Many explanations can be made. But as arbitrators, we cannot evade the conclusion that our own performance on many past occasions, such as in the transit industry, has not established a sound basis for growth.

The Academy has a Liaison Committee designed to discuss common problems with the appointive agencies (primarily AAA and FMCS). That original purpose could be expanded to include discussion of arbitration problems that become evident in mediation [subject, of course, to the necessary restrictions of non-disclosure of information acquired confidentially by a mediator]. We, in the Federal Mediation and Conciliation Service, stand ready to work with that Liaison Committee if the Academy should so desire.

The preservation, enhancement, and continued progress of collective bargaining in the days, months, and years ahead are vital to our way of life. Arbitration has contributed much to the institution and continues to do so. Let us take whatever steps are necessary to guard against development of parasitic tendencies and to reaffirm the concept of service.