CHAPTER III

THE PRESIDENTIAL ADDRESS

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The most arduous duty that must be undertaken by the President of the National Academy of Arbitrators is the writing of what has come to be known as the "Presidential Address." The speaker cannot look to the future—for his demise as President is only one day away. Rather than an inauguration, it is a "swan song."

This arrangement, however, may show the true wisdom of the Founding Fathers of our Academy. The President is thus relieved of the necessity of making any promises, painting a picture of the "Great Society," or charting a course of action in the uncertain future.

As to what a Presidential Address should contain, one can now look to a published line of precedent. This begins with *Critical Issues in Labor Arbitration, Proceedings of the Tenth Annual Meeting of the National Academy of Arbitrators,* published by BNA, recording our 1957 meeting. Despite the excellence of these papers, there is no way of knowing how generally they are read. Evidence does exist, however, that shows conclusively that they are carefully read and analyzed by successive presidents in preparing their respective addresses. And so it should be—if you want to learn to write a good arbitration award, read the awards of the great men in our profession. Of the first five Presidential Addresses appearing in the published *Proceedings,* beginning with the year 1957, four out of five of these speeches quote either or both Mr. Justice Cardoza or Mr. Justice Holmes. This would seem to establish a settled past practice amounting to almost a requirement that the address should contain apt quotations from Cardoza, Holmes, or as a bare minimum, some reference to the

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writings of Judge Jerome Frank. The addresses were deeply philosophical in tone.

In the year 1963, however, an abrupt change took place. In that year our President was a pioneer from the Golden West. He did not follow this past practice and as all of us remember his original and entertaining paper, it is well that he did not. Ben Aaron belongs to a rare group of writers. His is "not to quote—but to be quoted."

Syl Garrett in his very scholarly address in 1964 also ignored what had been the settled past practice. Syl, I am sure, did this on sound technical grounds. As an experienced umpire of long standing in the steel industry, he took cognizance of the fact that the basis for the local working conditions or past practice had changed. While formerly the Presidential Address had been given at an evening banquet where a serious, philosophical dissertation is appropriate, under the new practice the Presidential Address is given at the noon luncheon. In the stark light of day it is difficult for the speaker to soar off into the distant philosophical nebula, at least if he wants to stay in touch with his audience.

So we have the beginnings of a new trend. It should also be noted that in many of the early papers and programs there was a universal haunting theme that created a mood somewhat reminiscent of the novels of Dostoevski and the plays of Gogol. There was an intense, almost eschatological soul searching. Was it the long, dark winter nights of our January meetings? Was it an insipient melancholia? The programs of this early period evidence in even their titles some indication of latent masochism. Like many of the early medieval monks in their quest for perfection, there was a self-flagellation—and if we became too weak and dropped the whip, there were company and union representatives in attendance who were all too eager to assist. In a clinical Freudian sense, we seemed almost to take pleasure in "the whip." We invited representatives of management and labor and beseeched them "not to spare us" for our failings, but to lay on with no mercy shown. The heads of the appointing agencies were applauded when they laid us bare with what in my opinion are largely unwarranted charges of generally excessive fee practices.

We are now 18 years old—the legal age for some purposes. With

our approaching maturity we should set aside what might have been somewhat appropriate and inevitable in our adolescent period. Let us now have the confidence of our years. Let us consider what is good and right with arbitrators, the process of arbitration, and the functioning of our Academy.

Arbitration is a noble calling. To paraphrase the biblical quotation "Many are called, but few are chosen," or at least not often enough with such frequency and regularity as to make it a full-time, life-time career. All of us deem it an honor to be chosen. It is an expression of confidence in our integrity and competence. It is this express faith that the parties have that motivates us to give our best.

Considering the number of men who perform arbitration work and the thousands of cases that are heard annually, to the best of my knowledge and belief there is not a single substantiated case of out-right bribery or corruption involving a career arbitrator. Regretfully this same statement cannot be made with reference to the federal courts of the United States or other revered courts of our land. Credit must be given here to the representatives of management and labor who appear before us. They know that the entire process of arbitration, which they value, would completely break down if this touchstone—the arbitrator's integrity—was in doubt.

While integrity may be the first essential, standing alone it is not enough. The story is told of a respected and popular clergyman in one of our mid-western states whose services were sought for the first time as an arbitrator. He conducted the hearing in an admirable fashion. Months went by, however, after the hearing and no award was forthcoming. The parties were gravely concerned because back pay was at stake under several of the issues. They then commenced a series of individual and joint letters. This went on for a space of over a year. Finally a letter of reply came. In this letter the clergyman said in effect, "I have struggled long and hard in attempting to arrive at decisions in the matters before me. I find, however, that I am unable to reach any conclusions that would not sorely distress one or possibly both of the parties. Because of my great personal fondness for the representatives of both of the parties, I regretfully cannot bring myself

to a decision in any of these issues and I, therefore, withdraw from the case."

Arbitration does, we see, require a quality of toughness. Just as a surgeon must set aside all emotional attachments when he performs an operation (this may not be the most apt illustration of the point because I am frankly fearful of the parties' thoughts as to the type of operation most of them think we perform on them), so must the arbitrator in reaching a decision. It should go without saying that it also requires some courage to make hard decisions. Somebody wins—somebody loses. Human nature being what it is, there are very few good losers. Advocates by training and temperament are not so conditioned.

The decision-making process itself is difficult. In our personal lives many of us have had and still do have a difficult time making decisions—whether important or trivial. Now we are engaged in a career of everyday decision-making—decisions, decisions, decisions.

In most arbitration cases many alternatives are posed. In our secret thinking processes they keep spinning around—you can juggle and keep all the balls up in the air, but finally all must come down except for that one right solution. Then you seize it, you develop it, and you ride with it all the way. Your professional reputation hangs on its validity and acceptability. The most difficult role is the writing. In your decision you must firmly, but tenderly, convince the losing party that despite your understanding, your empathy, your sympathy for his position, the solution you have selected is the one right interpretation. This is the only way, the rules of the game require it.

This is the real function of the opinion. In it one does not sermonize. No individual is put on the spot. Statements are not made that would disturb the long-range relationship of the parties; and the arbitrator must stay within the set bounds of his authority under the terms of the contract. The opinion again is principally for the loser—you hope he reads it. The final conclusion set forth in a one-paragraph award is enough reading for the winner. It is most likely, however, that both parties read the award, the end of the story, first.

The cases submitted to arbitrators are becoming more difficult —or at least they seem so to most of us who as a group have moved up to the average age of about 56. The easy ones are settled— only the hard and close cases now come before us.

There is one recent and notable exception that I can recall. The aggrieved was charged with the offense of drinking on company premises and absence due to habitual intoxication. When the grievant testified as a witness, he made an excellent impression. He appeared to be a decent and dignified citizen. When the lunch hour approached and the case had not been completed, the parties requested a recess with the hearing to reconvene at 1:30 p.m. At 2:00 p.m. the grievant staggered back into the hearing room. The union committee had let him "grab a sandwich alone so that he could attend to urgent personal business." Company counsel immediately recalled the grievant for "just a few more questions." That case should be entitled, "Lunch can be an important meal," or—"Don't let your witness eat alone."

An arbitrator must weigh the evidence, the demeanor of the witnesses, and the arguments of the parties. He must, however, avoid coming to a conclusion too soon. We all have the recurring experience of listening to the case of the party who proceeds first, whether company or union, depending on the nature of the issue. We wonder after hearing it what the opposing party can possibly have to say—what sheer obstinance. Why wasn't the grievance settled?

Some years ago I had a discharge case—in a small plant in Iowa. The company proceeded first and made out a strong case. The foreman testified that a lady machine operator under his supervision was not performing a fair day's work, by any standard. The grievant was then put on the stand. During her direct examination she indicated her belief that the foreman was hostile to her. The company counsel in his cross-examination pressed her for details that led her to such a conclusion. She then asserted that this foreman had once tried to kiss her. The company then called a hurried recess. The foreman was put back on the stand. He testified that he not only had tried, but he actually had kissed the grievant. He went on to explain that by doing so, he was simply trying to be a good foreman. He had about 20 female employees

in his department. One of them put up mistletoe during Christmas season, and he dutifully kissed every girl in the department. Thus, from this parable should be drawn a lesson that we should reserve judgment until all the evidence is in.

It has been said that a man wants to be a woman's first love—while a woman wants to be her man's last love. Arbitrators being mostly men (perhaps it is more precise to say that most are men, while a few are ladies)—it is good to look back and reminisce about some of our first cases. For the benefit of our many new and youthful members, and seeing many young and attractive ladies in this audience, there must first be a prologue and a setting of the time and the background for this tale that will be told. It was in the period of the last great war—when the young men had gone off, women took their jobs, and the "old bucks" who were left were free to roam the war plants—their dominion unchallenged. This case involved a foreman, a somewhat elderly fellow, at least I then thought of him as being so because this was one of my first cases after I came home from the Army. He was a night-shift, bargaining-unit foreman. Unlike the mistletoe case, he was well satisfied with the performance of at least one of his young female operators. The company, however, took an unromantic view of this "Tom Jones," nocturnal cavorting. Management's attention was called to this situation by the evident malfunctioning of its piece-rate system. Incentive earnings were being paid for more work than there was material in the shop available to be worked on. It was discovered that the foreman was simply paying for more pieces than the girl had produced.

This story is not told simply as a contrast with the mistletoe case to show that all foremen are not dissatisfied with the work performance of their female employees. What is really intended is to illustrate that arbitrators, in addition to having a thorough understanding of the rules of evidence, must also have a broad knowledge of piece-rate practices of whatsoever kind and description.

Labor arbitration is not now, if it ever was, a role to be filled by the merely well-intentioned amateur. It is fundamental that the arbitrator must believe in and seek to safeguard the objective, the raison d'etre, of his two clients. Management, under a free

enterprise system, has the right to run the plant and make a profit; his equally important other client, the union, must be protected in its status as collective bargaining agent—responsible for policing the contract to secure the fruits of its bargain.

This dual client arrangement is somewhat unique. But that it does have its value may be explained by a story that is told of justice in the badlands of the early West. After the circuit-riding judge had set up his trial bench in the local bar and was ready to start the proceedings, he called the plantiff and the defendant up before him. Addressing himself to the defendant he said, "I want you to know that this here plaintiff, Rufus Brown, offered me $20 to decide this case for him. Now if you will also offer me $20, we can have a fair and impartial trial."

We do have a responsibility to both our clients. Leaving out the monetary aspects of western justice, many of the lawyers who appear before us think our handling of objections to evidence is in that tradition. They are partially correct. We are not "black-robed, white-wigged judges." Ours is a form of quick, hopefully "shop justice," with cases tried in the familiar surroundings of the plant. Clarence Darrow's observation was valid when he said that the robes, the wigs, the standing in the dock under the English system were all calculated to frighten the accused into dumb submission.

What is right in arbitration, in the milieu of industrial jurisprudence, is that we encourage the grievant, the shop steward, and the supervisors to speak freely and fully. True, this is often without consideration of the niceties of courtroom-accepted rules. Procedurally, at least, most of the law of evidence is exclusionary in nature. As arbitrators we don't want a party or a grievant after an award to say "I might have won the case, but I was not allowed to speak."

"Let him get it off his chest." This is an emotional catharsis in the original sense of the Greek tragedies of Aeschylus and Euripides. It has a therapeutic value.

The Academy is growing up. We are fulfilling our responsibilities to the community in new ways. In the field of training of new arbitrators, Dr. Pearce Davis and his committee have performed excellent work. They are co-operating with the Federal

Mediation and Conciliation Service and the American Arbitration Association in this important program. They are seeking to attract and assist new men. That it is urgent that this program be implemented is shown by documentary evidence appearing on the last two pages of the latest printed membership directory. The black bordered "in memoriam" contains the names of 37 deceased members. The bells have tolled since our last meeting for 3 more members. As the traveling missionary would say on his annual visit to the parish, "As I look around the congregation I am aware that there are faces missing that were here last year. Who will be here next year? Who will not?" To counter the fear that we are becoming a "Last Man Club," let me say that Larry Seibel and his membership committee have more than balanced the books with excellent new men. "Lo! We are not indispensable."

In the year 1964 it was found necessary to reactivate "The Committee on Liaison with Appointing Agencies." It is recommended that this be a permanent committee. We were fortunate that Ben Scheiber agreed to accept the chairmanship of this important committee. Let it be said that he is an active chairman.

Our Academy can function on a year-round basis only through its committees. I should like to commend Edgar Allan Jones, Jr., Chairman of the Law and Legislation Committee, and J. Fred Holly, Chairman of the Research and Education Committee, for their excellent papers.

We are moving into a new area, through the establishment this year of a grievance procedure. It would be difficult to estimate the hours and the days the Grievance Machinery Committee, and particularly Abe Stockman, has devoted to this truly monumental task. We all owe them a debt of gratitude. Because we live in a world of controversy, our members feel at home in the discussions within the Ethics Committee. When the record is written, this committee will have the largest and most vituperative group of dissenters. All of the great dissenters of the United States Supreme Court—Holmes, Brandeis, and Cardoza—are like Casper Milquetoast by comparison. To keep this committee working as it has been, as shown by the published opinions, is eloquent tribute to the chairmanship ability of Pat Fisher.

In January of each year the business community calls forth its leaders and its economists to do some scanning of the horizon and looking ahead. Our Academy has a starcast committee of star gazers and sooth sayers. This committee is appropriately called the "Special Committee on Development and Long Range Goals." As of the last progress report by Chairman Ralph Seward, however, its members were still examining the entrails—searching for the ambiguities which are a condition prerequisite for all oracles and prophecies.

In closing, on behalf of the membership of the Academy and our assembled guests, I would like to express sincere appreciation to the members of the program committee under Lew Gill and to all the members of the arrangements committee, but particularly Chairman Rolf Valtin and his co-chairman, Carl Schedler.