CHAPTER II

ARBITRATION IS A VERB

W. WILLARD WIRTZ *

Madame President, Father McIntosh, Ladies and Gentlemen:

Father McIntosh, as one with my own future behind me, I can only express total admiration for the confidence with which you contemplate a reckoning that lies ahead of you. You must feel your credit rating is pretty high in the bank you draw on. If I recall your Invocation accurately, you asked divine assistance in assuring that the food be good, the waiters polite, the conversation pleasant, and the speeches short. Even recognizing your Sponsor in His tripartite capacity, which some here have some question about, it remains that never have so few been asked for so much by so many.

Father, I'd appreciate your importuning your Client for forgiveness, too, if I were to say to Him that if I had the Bible to write over again, after listening to this noon's Presidential Address, I would make one little change in it . . . right at the beginning, in the first book, in that Garden of Eden bit. On reflection, it wasn't an apple that Eve gave Adam; it was a big, round, red raspberry!

Every man here has spent this afternoon thinking back to that idyllic period in arbitration before we made God's second mistake. There were snakes around then, but we males weren't taking any serpentine testimony. We stuck to interpreting agreements, and the thought of nibbling at the forbidden fruits of that tree of knowledge of good and evil never crossed our minds. Our clients here tonight would testify that we didn't know right from wrong. We were doing all right; we were naked but unashamed.

It's plain after this noon, though, that someplace along the

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line, Madame President, you let that viper whisper sweet nothings in your ear. We don't know why; but lady, that's your problem. You said something this noon about two bites at the apple. One is enough. Don't try to eat your apple and have us eat it, too. We're not going to bite on this good-and-evil business. We make a decent living not bothering about the facts or about who's right . . . just splitting the difference. If you want to be equal, find something better to be equal to than men. Tell your EEOC-BFOQ troops that if they want to raise their skirts and lower their necklines, even if the twain meet, that's all right with us. But none of this fig-leaf stuff. We're getting along just fine.

One other thing, though, Jean. The truth is that we know you're dead right. Our problem is trying to figure out how to admit it without sounding condescending. All this banter is just the last hurrah of a bunch of stags at bay. We love you, and whatever it is we're still entitled to do, now and forevermore, Amen. Or even Ah-women.

I am an enemy of after-dinner speeches and never give them except for pay or under the influence of strong spirits. It has been a lifetime rule not to open my mouth when sober except at somebody else's expense. Now I find myself paying $30 just to listen to what's going to drop from me. So I have taken, with the rest of you, the trinity of liquid measures necessary to lessen the pain.

There remains, though, the sobering recollection of Cy Ching's comment that no man has more than one speech in him; and, as you have already been reminded, I have made mine here twice before. There is the compensating corollary to Ching's Law, though, that no audience ever remembers anything a speaker says anyway.

This corollary was confirmed Wednesday afternoon, when I came into the executive session of the Academy to find the brethren wrestling again with the problem of the "agreed," or "fixed," arbitration award. It is appropriate to explain to the ladies that this is the situation in which representatives of the parties come to the arbitrator to tell him that they have in fact worked out their problem, that they have agreed on

what the award ought to be, but that one of them lacks what it takes to admit it so they want to go ahead with a sham proceeding. The arbitrator goes through a Kabuki dance with his conscience, trying to figure out how to maintain his self-esteem without diminishing his fee. He finds some way of doing this and then comes to the annual meeting of the National Academy of Arbitrators where he engages in a mass confession before Father Brown. Then Leo gets up, as he did Wednesday afternoon, and provides mass absolution with some comment to the effect that arbitration is "nothing but a matter of smell" anyway.

What was particularly bothersome about that 45-minute mass catharsis Wednesday, though, was that Bob Fleming and Ben Aaron and I conducted a complete, exhaustive questionnaire among the whole Academy in 1958. We got all the answers to the rigged-award question, and then I went to the St. Louis meeting and delivered a learned text on the subject. Abe Stockman rose in confirmatory comment in the panel session, and we all agreed upon exactly what the answer was. Yet there wasn't one single reference to that Wednesday afternoon!

What's worse, I can't for the life of me remember what it was we agreed upon in St. Louis. As Ralph Seward might have said last year in Montreal, "Plus ça change, plus sic transit gloria!"

On another occasion, addressing this august body in Chicago, I made the mistake of prefacing a message of undiluted wisdom with some mixed metaphors. Only the metaphors survived.

So there will be no jokes this year. This is also out of deference to the Administration, the media, and the younger degeneration. Each of these forces is obviously hell-bent on exterminating the other two. I wish all three of them total success. But you wonder why they all have to be so sour about it. This country needs a Will Davis to remind us again that whom the gods would preserve they first make laugh, or at least smile just a little bit.

Jokes, though, are only plays on the truth, and the amateur who has to wait until after dinner hasn't a chance these days with the whoppers that come out of Washington during work-

ing hours. Some of you may have missed this story in the morning edition of the *Los Angeles Times.* I quote—a little loosely: Dateline Washington: "The combined rise last month in prices, unemployment, and the number of civilian advisors in Cambodia represented a smaller increase, conveniently adjusted, than during any comparable period in the nineteenth century, thus constituting a great ideological victory." With an instinct for the jocular, they live in a constant state of euphemism; but how they can lay one lemon after another and come up cackling like a rose is an enema to me.

But it's time, and past, to get down to business. And time for brevity even at the risk of seeming offense to contemplative reason.

Jean McKelvey, in her Presidential Address this noon, returned to the issue of the extent to which "third party" participation in disputes settlement extends properly beyond the function of "neutral" interpretation of what the contracting parties have agreed upon, to include a recognition and effectuation of broader "public policy." Her discussion was primarily of this issue as it arises in connection with the arbitration of grievances under collective bargaining agreements, particularly those involving the question of whether the myth of men's having been created equal is to be extended to women.

Sharing fully Jean's view about the particular point, I'd like to say a little about some broader aspects of it. For the extension of the third-party function—not in the collective bargaining area alone, and perhaps least of all in the settlement of grievances—seems to me a matter of increasingly critical importance in a period of escalating confrontation in the society as a whole. And I venture, perhaps presume, to suggest that the relative reticence of the arbitration profession's advocacy of this extension is in part the product of our having entered it under inhibiting circumstances.

We came in, many of us in the 1940s, as part of the single most significant development of arbitration in American history. Organized labor and large corporate management had decided, almost suddenly and as the product of the Washington Conference of 1946, to establish a terminal point for disputes which

developed under the agreements which companies and unions had entered into. It was important for a variety of reasons that the "private" nature of the arbitration procedure they adopted, and its total commitment to acceptance of the will of the contracting parties, be emphasized and respected. We, as arbitrators, accepted those terms. Even a determination as to whether an employee had been discharged for "just cause" was cast in terms of being only a matter of divining the parties' cryptically expressed consensus. If the issue of a possible conflict between something in the agreement and some public law came up, which it rarely did, it was part of the conventional technique to devise some approach or circumlocution which respected the law without offending clients closer at hand. The emergent institution of free, private collective bargaining needed, at that point, an arbitration function sternly disciplined to the dictates of a self-abnegating "neutralism." We performed that function.

There were accompanying attitudes about some related matters. Arbitration of new contract disputes, obviously requiring something more than "neutral interpretation," was considered a kind of aberration; and there was unanimous agreement that "compulsory arbitration" was a plague to which we couldn't risk exposing ourselves under any conceivable circumstances. (The fact that arbitration of contract grievances had been required by law in the Railway Labor Act was not mentioned in serious company.) And the companion gospel developed in the neighboring province of "mediation" was that what was good for General Motors *and* the UAW was good for the country. Which is not to fault the mediators of that period. Collective bargaining was considered a *private* process. The country, furthermore, was concerned about disputes being settled and totally unconcerned about settlement terms.

I urge it a little that relevant and significant circumstances have changed; that it is possible, indeed accurate, to believe that the third-party function served collective bargaining and the public interest well by being kept essentially and narrowly "neutral" during that formative period; but that concepts which became virtually part of the definition of "arbitration" and "mediation" at that stage have an inhibiting effect on the extension of this third-party function to meet the demands of

contemporary and prospective circumstance. It is unfortunate that words don't grow the way ideas do—and significant that in the hard sciences, unlike such soft disciplines as politics and public affairs, new vocabularies are developed to better accommodate the growth of reason.

This is not the hour for historical analysis, even as much as there has already been here. Yet it seems clear beyond the need for supporting detail that one thing which is happening in the society is a breaking down of the once sharp distinction between public and private interests. It is part of this that there is general recognition that the obligation of all "private" institutions includes taking account of the "public interest." The issue, so sharply debated 30 or 40 years ago, of whether a corporate board of directors was even *entitled* to take the public interest into account is now totally anachronistic. George Meany would not consider Samuel Gompers's answer—"More. More. More."—to the question of what organized labor's purpose is. Private representatives are on literally hundreds of public committees and commissions. And new forms of broader "public" participation in the working of the "private" sector are the subject of widespread interest and varied proposals.

Perhaps there are good reasons for not extending this changing logic of pluralism to the role of third parties in labor-management relations. I don't know them. Having grown up, or old, professionally, on the idea that "the right to strike and to lock out are the essential motive forces of collective bargaining," I know that this no longer seems to me the absolute we made it into. A perquisite of retiring from the field is the privilege of not feeling the compulsion to cower like one of Pavlov's dogs whenever anybody mentions "compulsory arbitration." Now I can dislike it, but feel that the fair reaction is along the lines of the housewife's answer when she is asked, "How's your husband?" and replies, "Compared with what?"

Perhaps it will appear a matter of having run up openly at my masthead the skull and crossbones of corporate piracy; but recognizing the Academy's rule against bringing here any case a member has under advisement at the moment, let me put a hypothetical:

Suppose there were an industry which had gotten into such deplorable shape that part of its service was being taken over in desperation by the government, most of the industry was in deep financial trouble, and the largest unit in it had gotten to the point where it was losing over $300 million a year and was therefore put into bankruptcy.

What the trustees in bankruptcy would find would be that the interests of that corporation's shareholders—its creditors, those with judgments against it, the local taxing districts dependent on that property to support schools and the like—were all subject to what is in effect third-party disposition. But not the interests of the employees.

Suppose the trustees found that over 65 percent of that corporation's operating costs were for labor, that wage levels were about to be raised some 35 percent in the next three years, that the whole system of work rules was a travesty on good sense, and that the business could probably be run equally well with 10 to 20,000 fewer employees on the rolls. But they would also find that with respect to the employment relationship, unlike that with creditors, shareholders, claimants, and taxing authorities, there is no provision at all for effective recourse to reason; that the bankruptcy laws specifically leave this to collective bargaining.

And suppose it were the situation that in this particular industry there hadn't been any real collective bargaining for at least 20 years; that there was still talk about the right to strike and to lock out, but that whenever there was a serious resort to these measures, a court or the Congress intervened to deny the alleged right; and that things were so bad that it had been necessary three times recently for the Congress to decide—what it had not had to with respect to any other industry—how particular disputes should be settled.

Sorry to have violated the rule so grossly. The point should have been made more directly. It is that one big reason for the condition the railroad industry is in today—although by no means the only one—is the stubborn insistence that its labor disputes be settled without resort to some kind of effective third-party determination. I think it is also a fact that the Penn

Central could be made a viable and effective operation again—without asking the Congress to supply $100-million lines of credit, indeed without *any* further cost to the public—by changing the bankruptcy laws to provide for third-party determination of questions involving (even aside from wages) disputes about labor terms and conditions.

We are paying a high price for trying to preserve as an absolute the principle of leaving labor disputes to the exercise of the disputants' economic strength regardless of the effect of their unreconciled disagreement.

It is not only the problem of disagreements. No fair-minded assessment of the present crisis of inflation in the country blames it all on rising wages, leaving out the other forces which contribute to rising costs. Neither does any reasonable assessment leave out the fact that the imbalance of bargaining power in the construction industry has resulted in agreements that include unconscionable and epidemic wage settlements.

Nor is it only in the labor field that the need for a broader concept of arbitration is increasingly imperative. I suspect there is an operative principle that as a society and its economy become more complex and more highly organized, and more sophisticated and powerful, and that as the pace of change is accelerated, confrontation increases and expands and becomes more dangerous. It is a corollary that under these circumstances the necessity for the arbitrament of reason—as against any other form of dispute settlement—increases.

With the splitting of the atom and the reducing of the miles and hours that used to separate nations to inches and seconds, the arbitrament of war—anywhere in the world—changed from fallacy to insanity. There *has* to be a way to put the disputes between governments to some kind of arbitrament of reason.

The past 10 years have seen the development of at least two new areas of organized confrontation: between people whose distinction is the color of their skins, and between those who are younger and those who are older. And now there is the emergence of organized consumer groups, where before we were organized almost exclusively in our capacity as producers.

The new conflicts these developments are producing are unquestionably painful, but by no means all regrettable. They are probably an inevitable part of coming out of a trance of hypocrisy and bigotry in which we committed outrageous misdemeanors of one kind or another.

In an address by Mr. Justice Holmes to the Bar Association of New York in 1913, he spoke about the timing of the role of law. Paraphrasing from memory, he said about this: That as long as conflicting notions and opposite convictions still keep a battlefront against each other, and the idea destined to prevail has not gained the field, the time for law has not yet come. Perhaps that's true of the law, although Holmes would probably say it a little differently today. But if this is true of the law, it is not true of the whole broader need for the arbitrament of reason.

In each of these areas of confrontation and in others, it seems increasingly plain that new forums, perhaps even more than new laws, are called for—new procedures which permit bringing to bear on a dispute, sometimes with terminal authority, the views and influence of someone other than the disputants. Or perhaps just "public interest" arbitration.

There will be the objection that the "public interest" is too vague and indefinable to permit or warrant its use as a guide to the exercise of the authority of either a mediator or an arbitrator. A little about this, and then I am done.

There is no point in pressing the question of whether identifying the "public interest" is actually any harder than finding the "neutral" answer to a good many issues which parties to a contract never thought about when they wrote it. Few arbitrators would say, as Mr. Justice Roberts almost did, that grievance arbitration is only a matter of laying the facts beside the contract and measuring them as with a ruler. It could be wondered, too, how many of the cases Jean referred to this noon were cases in which the arbitrator managed in his *award* to serve the "public interest" more fully than might be suggested by his deference in his *opinion* to the gospel of "neutralism" and the gods of the parties. You can question the whole dichotomy between "neutralism" and the "public interest."

Better, though, to question the assumption that the public interest is the mystique it is sometime considered.

I can't define the "public interest" any more clearly than I could one night, probably in 1945, when President-elect Gill and I were sitting as public members on a War Labor Board case that had to be settled before morning. We took a recess about 11 o'clock so that the labor members could get on the phone and find out what the labor interest was and the industry members could call their clients and find out about the industry interest. Public Member Gill and I went over to the window in that board room at the back of the fifth floor in the Labor Building and looked up at the stars, and he said—"lewconically"—"Too bad we don't have a phone to up there."

A year or so ago now, when we were deciding where to dig a well for a piece of heaven we've found in West Virginia, I discovered that I am possessed of the powers of the water witch. The forked willow branch bent sharply down in my hands at just the spot it had for the professional well digger, and we hit water at 37 feet. My fellow dowser was surprised at this sharing of his powers. He was an untutored type—who wouldn't even understand the difference between "compulsory arbitration" and "mediation to finality"—so I didn't tell him I had been in a similar line of occult divination ever since the War Labor Board days.

Which is all nonsense. The "public interest"? No, I can't define it. But in every case I can think of there has been a common sense of the right answer which most of the people close to it shared in substantial part.

Most of the mystery about the public interest comes from thinking of it as a noun. As a noun it's a big, fat, prostitute phrase continually compromised by rakes, not for their passions but for their pleasures. It was Buckminster Fuller's comment, in one of his earlier articles, that "God is a verb, not a noun." The stature of Fuller's thought has been diminished a little by his entitling his most recent book, *I Seem To Be a Verb*. But the point survives the sacrilege. The public interest is a verb. not a noun.

Part of it is doing those things rational people know by quite general consent need to be done, but which for some constraining reason—a tired habit or a rusty precedent or a retreating majority—can't be done easily.

The public interest has to be served in substantial part by an "adhocracy." When things are changing at the rate they are now, it demands that there be forums freed of the tyranny of precedents, in which every hard and fast rule is suspect and the seed-grain of experience is separated out from the chaff of custom and habit.

But if the service of the public interest is in administering change, it doesn't permit misconceiving change as being good in itself or as having any sense of conscience of its own—which change isn't and hasn't. That service is sternly disciplined according to one central principle: that only the individual counts.

It takes its procedures from that principle. Some of us were talking at breakfast this morning about a case, utterly insignificant in itself, at the U.S. Rubber plant at Passaic 20 years or so ago. Two men were discharged for fighting in the plant. We all knew the rule: Both had to go. It didn't matter that Joe, the big fellow, had thrown cold water on pint-sized Steve in the shower room, then taunted him about being a runt, and thrown in some reflections on his ancestry—until Steve finally tried to climb up Joe's frame. Lacking stone or sling, Steve's efforts were futile. But he mixed it up long enough to bring the inexorable rule into effect. Then, at the arbitration hearing, Steve got up and said just one thing: "Mr. Arbitrator, what would you have did?" I hope Steve is still there.

But a good deal more than procedures comes from the uncommon law of arbitration that only the individual matters. Nothing else. Not the individual as a remote and uncertain beneficiary of something called progress or the gross national product. Not the individual as a sparrow to be fed by gorging the horses. No. The individual as the owner of rights and interests—job rights, personal rights, human rights—at least as much entitled to protection as a piece of real estate or machinery. The individual as somebody the system is designed for instead of the other way around.

There is a strongly emergent sense today of the need to renew the idea of the supremacy of the individual. A book as third rate as *The Greening of America* becomes a best seller because it makes, even absurdly, a point that catches this sense. We're listening to "the kids," even in their sometimes outrageousness, because they're saying the truth about our having put the system ahead of the individual. They talk about "feeling" instead of "understanding." We only half get it—because we don't understand. But we know they are right that the "public interest" has to be served with the realization that "the public" is a myth. The reality is people.

Well, we seem to be a long way from where these remarks started, and yet at the same time tiresomely close. Listening to what you've just heard, I think of Holmes's apostrophe to the woodpecker: "Thou sayest such undisputed things in such a solemn way."

It is simply that I think of arbitration as an instrument with a potential for meeting infinitely greater needs than those we have spent most of our professional lives putting it to. What we do in using it to decide grievances under collective bargaining agreements—and regardless of what we conclude about restricting it there to the "neutral" interpretation of agreements—is not enough reason for defining it in those terms or confining it to those uses.

Feeling deeply, almost desperately, that the society is becoming mortally dependent on the arbitrament of reason—that the future may depend, even whether there will be a future, on the development of a jurisprudence built around people instead of the system of things—I speak for arbitration, too, as a verb.