CHAPTER II

TWENTY-FIVE YEARS OF LABOR ARBITRATION—AND THE FUTURE

I. ARBITRATION THEN AND NOW

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My assignment is to review 25 years of arbitration in 30 minutes. That's 72 seconds per year. The easy way out would be to say that it can't be done and just to tell a few stories about the good old days. I'm going to try to do a little more than that. I do want to tell a story or two to convey something of the flavor of arbitration 25 or 30 years ago. But I will devote most of my attention to what we saw as the most pressing issues of 25 years ago and what has happened to them.

When one of the great figures in our field was asked to take part in organizing the Academy, he refused on the ground that arbitration was an art, not a profession. There was a reasonable basis for that position in those days, but one main theme of my comments is that arbitration now has a much firmer claim to the title of "profession" than it did a quarter-century ago. However, our success has been accompanied by such a growth in demand for arbitration services that we may now be compelled to make some basic changes in the system that has seemed to work so well in the past.

The Ambience

In looking back at early beginnings, one must guard against the rosy glow that often settles over a long-past experience that had its moments or hours of anguish. But I truly believe that it would be hard to overstate the excitement and the stimulation of being an arbitrator in that time of radiant morning three decades ago.

First would come "The Call." It hardly counted, of course, if the caller was only somebody from the War Labor Board. The

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real thing was a call from a union or company man telling you they had a case they wanted you to arbitrate. A lot of us suddenly realized that being wanted was the next best thing to being loved. Then came the matter of a date for a hearing. It was always hard to resist the temptation to suggest tomorrow or the day after. Dignity required the pretense that you were all booked up for at least a week in advance. And then you had somehow to restrain your impatience while waiting for "The Hearing."

Almost every hearing produced some kind of incident that was worth telling and retelling back home to admiring family and friends. Several times I had to call a quick recess to prevent a fist-fight in the hearing room. Once a quick-tempered advocate stopped in midsentence, led out into the hall a member of his own group who had been commenting all too audibly on the proceedings, and then knocked him flat on his back. Once I had to call a recess because the hearing room was suddenly filled with tear gas—not intentionally, but because of a threatened riot outside. In a wartime shipyard, I held a week of hearings that opened at 1:30 a.m. and closed shortly after daybreak. And then there were the plant visits. I was constantly amazed by the conditions that people would endure to earn a living—unbelievable heat, unbelievable odors, unbelievable filth, unbelievable noise. The most memorable experience of my early arbitration career was standing inside a half-built steel ship with some 200 riveters working on it.

After the excitement and the glamour of the hearing came the morning-after feeling when you sat down to write the decision. You suddenly realized that the parties had not been very helpful at the hearing. Once, after listening to a somewhat confusing opening statement by a union representative, I asked, "Mr. Jones, would you mind telling me what clause of the contract you contend was violated?" He glared at me, and said, "Well, Doc, what the hell do you think we're paying *you* for?" The parties were usually pretty good at giving you the facts of the case, but sometimes weak on contract interpretation. And so, when you sat down and faced the necessity of rendering a decision, you began to realize that being an arbitrator involved not only excitement and glamour but hours of lonely mental anguish.

It's that anguish, I think, that partly accounts for the great pleasure that arbitrators have always found in each other's com-

pany—that, plus the shared feeling of working on the leading edge of a new frontier. Of course, we were dimly aware that there was a substantial history of arbitration *before* the 1940s,[1] and there were a few old pros around to remind us that we were really rediscovering the wheel. The response of the new generation of arbitrators seemed to be, "Okay, but this is the very first time *I* ever discovered the wheel!" And it is true, of course, that we were involved almost entirely with parties and industries that had had no prior experience with arbitration. The inexperienced were leading the greenhorns.

Some Early Issues and Problems

Decision-Writing

Let me go back to the decision-writing part of the job because in that crucial area our most pressing early problems and controversies developed. Despite the long history of arbitration in a number of industries, we found almost no published decisions available in the early 1940s; and even when we managed to find a collection of decisions, they were not very useful because they lacked an index. So we turned to some of the old pros for advice. We got a lot of it, but it was highly contradictory. Some took the quite logical position that the answer was to write no opinions at all; if you gave no reasons for your award, who could be certain you were wrong? Some other old pros told us that the best technique was to give one side the language and the other side the award. We heard about the long-time client who told one of these arbitrators in the bar one afternoon, "Well, Billy, I've finally learned how to read those decisions of yours. I just skip all the crap until I get down to that paragraph that starts with a 'however,' and I know there's where the answer really is." Then there were still others who told us that what we needed was creative ingenuity—if in doubt, try something brand new. Finally, there were some highly regarded arbitrators who told us that the opinion should really record the consensus of the parties on the issue; the real job of the arbitrator was to lead them to that consensus.

There were some of us who tried each of the recommended approaches. There were also some, understandably, who seemed to be confused. If you go back and read a sampling of the

[1] The history of arbitration before the 1940s is summarized by R. W. Fleming in *The Labor Arbitration Process* (Urbana: University of Illinois Press, 1965), Ch. 1.

decisions of 25 to 30 years ago, you will find abundant evidence of uncertainty and insecurity in the writing. It was not at all unusual for a decision to uphold a discharge but to "recommend" strongly that the grievant be reinstated. Often the arbitrator would deny the grievance before him but then describe two or three other grievances that he would sustain if the union would present them to him. Gratuitous advice to the parties about how they should conduct many aspects of their relationships, or even changes they ought to make in their contracts, appeared in many decisions. And it was not uncommon to find the pros and cons of a difficult question discussed at length, but inconclusively, and then referred back to the parties for further negotiations.

Expendability of Arbitrators

Observing this state of affairs, many company and union representatives concluded, quite understandably, that the personal views of the particular arbitrator were the most important determinant of the outcome in a given case. The key to winning your case was simply to find the right arbitrator. Many parties went further and automatically refused to go back to any arbitrator who had once decided a case—any case—against them. This attitude became apparent even in some of the new umpireships that were established during the 1940s. Some highly regarded arbitrators were summarily fired from these umpireships after rendering a single decision that one side found objectionable. And it was common knowledge that many parties judged an arbitrator who was otherwise unknown to them on the basis of a "box-score"—that is, how many of his published decisions were for the union and how many were for the company.

One of the first issues to which the newly organized Academy devoted considerable attention was what was called "the expendability of arbitrators." [2] One of our leading members pointed out that there really weren't a lot of qualified arbitrators around, and that if they were all considered to be disposable after a single use, like Kleenex, the supply would be quickly used up. Labor and management representatives replied that they really believed in

[2] "The Status and Expendability of the Labor Arbitrator," a panel discussion by David L. Cole, Jesse Freidin, and Eli L. Oliver at the Third Annual Meeting, National Academy of Arbitrators, published in *The Profession of Labor Arbitration* (Selected Papers from the First Seven Annual Meetings of the National Academy of Arbitrators, 1948-1954), ed. Jean T. McKelvey (Washington: BNA Books, 1954), 42-65.

trying to win, that one of the greatest virtues of the voluntary arbitration system was the free choice of arbitrators, and that they were convinced that the absence of a generally accepted body of principles in labor arbitration meant that picking the arbitrator was often more important than the merits of your case. (You will understand, I hope, that I'm giving you a rather free translation of this discussion; nobody was really as frank as this version of their remarks makes them appear.)

Shortages and Training Programs

There was some merit, of course, in both sides of that argument. In any case, for some years arbitrators continued to be fairly expendable, and from the earliest days of the Academy we were concerned about reported "shortages" of arbitrators. The late Edwin E. Witte, in his dinner address to the first annual meeting, warned that the further development of labor arbitration depended to a large degree upon the development of "a larger group of qualified and experienced arbitrators." [3] Then, two years later, a report of the Committee on Research and Education to the annual meeting stated: "Officials of designating agencies have indicated that there is a definite need for larger panels of acceptable arbitrators to permit easy replacement of those who become temporarily or permanently unacceptable." [4] If I may leap ahead of my story momentarily, I want to observe that there is no other one issue on which we have spent more time as an Academy, and accomplished less, than the matter of training new arbitrators. Expendability has gradually faded into the background, for reasons which I will discuss shortly, and the number of practicing arbitrators has greatly increased; but we still hear more and more about the shortage problem.

Mediation v. *Adjudication*

We were also intensely involved, in the earliest days, in the debate concerning whether mediation or adjudication was the proper tool for the labor arbitrator. George Taylor presented a powerful paper to the second annual meeting in which he laid out the case for the mediation approach.[5] At the risk of doing an injustice to Taylor's carefully reasoned argument, I will try to

[3] Edwin E. Witte, "The Future of Labor Arbitration—A Challenge," in *The Profession of Labor Arbitration* at 1-19.

[4] "Education and Training of Arbitrators," *id.* at 170-175.

[5] George W. Taylor, "Effectuating the Labor Contract through Arbitration," *id.* at 20-41.

summarize it in a few sentences. Collective bargaining agreements, he said, are always incomplete documents; the parties can never anticipate all of the problems that will arise in their continuing relationship, so they deliberately adopt a document with many gaps and ambiguities and generalities. They expect to solve problems as they arise by continuing the process of collective bargaining. When their collective bargaining fails to resolve such a problem, they call in the arbitrator. His role should be to assist the parties in completing their bargaining process, and his principal tool should be mediation.

Taylor's chief antagonist was not a member of the Academy, although he was a man who devoted his life to the promotion of arbitration. He was J. Noble Braden, for many years executive vice president of the American Arbitration Association. Again I must limit myself to a brief and inadequate summary of his position.[6] In essence, he argued that it was unethical for an arbitrator to attempt to mediate a dispute which the parties had asked him to arbitrate; the processes and techniques of mediation and adjudication are fundamentally different. The adjudicator has the duty to decide matters entirely on the basis of the formal record placed before him, including the contract which defines the rights and obligations of the respective parties. The mediator must seek confidential information from each side; he must put pressure on each side to modify its position; he must try to "sell" compromises—and all of these necessities are prejudicial to the role of adjudicator, argued Braden and others who shared his views.

For a time this controversy threatened to split the Academy, or at least to thwart our efforts to develop a Code of Ethics that would be broadly acceptable. In the light of hindsight, however, it seems clear that Taylor and Braden and their respective supporters to some extent were overstating their cases and to some extent were talking about quite different situations. Taylor did not believe that the arbitrator should ignore the contract when its meaning was clear, and he did not advocate simply splitting the difference in every case of disagreement. Most of all, he did not think that mediation could be successfully used in ad hoc cases. Braden, on the other hand, conceded that if the parties really wanted their arbitrator to mediate, that made it acceptable. And

[6] J. Noble Braden, "Problems in Labor Arbitration," 13 *Mo. L. Rev.* 143 (1948); also "The Function of the Arbitrator in Labor-Management Disputes," 4 *Arb. J.* 35 (1949).

Braden was almost entirely concerned with ad hoc cases. But, as often happens, they, and particularly their respective supporters, seemed to be more conscious of their differences than of their areas of agreement.

Other Problems

I have confined my discussion to only a few of the early issues and problems in an effort to meet the time limits here. Of course, there were many other important concerns and controversies in the early days. Let me conclude this section by simply mentioning a few. We spent many heated hours, year after year, discussing membership policy; the major issue was how inclusive the Academy should be. Some members argued that we should accept only those who had a very substantial commitment to arbitration, while others contended that we should be willing to include even those who handled only a few cases a year and also those whose principal interest in the field was scholarly. Another membership policy question was whether we should accept arbitrators who also served as advocates. We still have occasional recurrences of those durable issues. We spent several years, and many hours of word-by-word debate, on a Code of Ethics. The document that finally emerged was actually the product of collaboration between the Academy, the American Arbitration Association, and the Federal Mediation and Conciliation Service. From the first annual meeting on, we had management and labor speakers who roundly criticized arbitrators and the arbitration process. The papers that have survived have a surprisingly contemporary ring to them. The speakers have changed, but the complaints are about the same. We discussed the relationships between arbitration, the law, and the courts. Academy members, in both the annual and the regional meetings, also debated a large number of substantive issues. For example, once in Detroit we had a rousing discussion of the authority of the arbitrator to modify a disciplinary penalty when the contract was silent on the point. Many other examples could be cited, of course. Arbitrators are accustomed to having the last word, and when arbitrators disagree with each other, the discussion sometimes goes on for quite a long time.

Major Accomplishments

Ralph Seward, in a memorable address to the Academy in 1951, remarked that arbitration is a training school in humility

for the arbitrator.[7] Perhaps it is inappropriate for an arbitrator to point with pride to the major accomplishments of the past quarter-century in our field, but an arbitrator can be humble about himself without undervaluing the substantial achievements of the arbitration process. That process, after all, is not the exclusive property of the arbitrators; in a very real sense, the process involves a close and continuing collaboration with labor and management representatives, working together daily with arbitrators, and with occasional contributions from courts and legislatures. From the perspective of 25 years, it seems clear that the collaboration has been quite fruitful.

Industrial Jurisprudence

The greatest accomplishment, in my estimation, has been the development of a quite substantial and functional industrial jurisprudence. To some extent, we have drawn upon and adapted legal doctrines from the larger society; but to a much greater extent, we have evolved doctrines carefully tailored to the particular circumstances of American industrial relations. Our raw material has been millions of hours of testimony and argument from the contesting parties themselves. We have winnowed and sifted, accepted and rejected, and then reconsidered and modified. We have sat at the center of one of the greatest free markets for ideas that our nation, or any nation, has ever seen. From the competition of ideas has gradually developed a substantial body of principles that is generally accepted not only by arbitrators but by labor and management.

I do not mean to imply that we now have ready-made answers for all problems and disagreements that arise, or that the answers are, or should be, the same everywhere. We have all learned to respect the provisions of the applicable contract, to dig for the facts of the particular case, and to follow those facts where they lead us. Hardly ever do we find two cases with identical facts. But only rarely today do we find cases that are wholly different from any ever decided before. In most areas in which disagreements arise, we find—if we take the trouble to look—that informed and disciplined minds have labored there before us. Hardly any of us follow earlier decisions simply as binding precedents; but we often find the reasoning of the prior decision helpful, and sometimes it is compelling.

[7] Ralph T. Seward, "Arbitration in the World Today," in *The Profession of Labor Arbitration* at 66-75.

Nobody has tried to count the number of arbitration decisions rendered in the past 25 years, but they must run to several hundred thousand. Only a small fraction are ever published, although many companies and unions maintain large files of unpublished decisions. There are two major arbitration reporting services that go back many years, and several services of more recent origin.[8] In the steel industry, the union has sponsored a reporting service for many years, and twice it has published an exhaustive analysis of the reported decisions in the industry.[9] We have a growing shelf of books on arbitration in general or particular problems in arbitration, most of them by Academy members.[10] And we have some 16 volumes of proceedings of the annual meetings of the Academy.[11] Some of the papers in these Academy volumes represent contributions of fundamental importance to the development of industrial jurisprudence. It is unfair to mention only a few and to omit others of equal value, but simply to illustrate the point let me recall to your minds the papers that we have had on such subjects as various aspects of discipline,[12]

[8] The Bureau of National Affairs, Inc. has published *Labor Arbitration Reports* since 1946. Prentice-Hall has published *American Labor Arbitration Awards* since 1946. Commerce Clearing House, Inc. has published *Labor Arbitration Awards* since 1961. The American Arbitration Association has recently begun a reporting service on awards issued under its auspices.

[9] Volumes I-VI were known as *Basic Steel Information Bulletins;* volumes VII-X as *Steelworkers Arbitration Bulletins;* and volume XI to date as *Steelworkers Arbitration Awards.* Since 1952 the service has been edited by Pike and Fischer, Inc., Washington, D.C., and published by the United Steelworkers of America. The analysis was issued in 1960 (rev. ed. 1970) under the title *Steelworkers Handbook on Arbitration Decisions,* edited by Pike and Fischer, Inc.

[10] For example: Thomas Kennedy, *Effective Labor Arbitration: The Impartial Chairmanship of the Full-Fashioned Hosiery Industry* (Philadelphia: University of Pennsylvania Press, 1948); Maxwell Copelof, *Management-Union Arbitration* (New York: Harper & Bros., 1948); Frank Elkouri, *How Arbitration Works* (Washington: BNA Books, 1952; rev. ed. with Edna Asper Elkouri, 1960); Clarence M. Updegraff and Whitley P. McCoy, *Arbitration of Labor Disputes* (New York: Commerce Clearing House, 1946); Fleming, *The Labor Arbitration Process, supra* note 1. Many others could be cited, including several recent textbooks.

[11] Only selected papers are available from the first seven meetings; they are collected in a single volume, *The Profession of Labor Arbitration, supra* note 2. The volumes for the eighth and following meetings are published under various titles and under various editors by BNA Books.

[12] A. Howard Myers, "Concepts of Industrial Discipline," in *Management Rights and the Arbitration Process,* Proceedings of the 9th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1956), 59-76; Gabriel N. Alexander, "Discussion," *id.* at 76-83; Sanford H. Kadish, "The Criminal Law and Industrial Discipline as Sanctioning Systems," in *Labor Arbitration—Perspectives and Problems,* Proceedings of the 17th Annual Meeting, National Academy of Arbitrators, ed. Mark L. Kahn (Washington: BNA Books, 1964), 125-144; Arthur M. Ross, John F. E. Hippel, and Bertram Diamond, "Discussion," *id.* at 144-164. Arthur M. Ross, "The Arbitration of Discharge Cases: What Happens after Reinstatment," in *Critical Issues in Labor Arbitration,* Proceedings of the 10th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey

contracting out,[13] past practice,[14] work assignment,[15] and protection of the rights of the individual in the arbitration procedure.[16] These papers and many others of similar caliber have distilled the most persuasive thought on the subject, have informed not only the practicing arbitrators but also advocates, and have stimulated further thought. So, over the past quarter-century, we have amassed a substantial body of literature in our field. There is unevenness and there are still gaps, but the body of industrial jurisprudence continues to grow and even to change. Given the relatively brief time span involved, it is a remarkable collective achievement. This body of literature, articulating commonly accepted principles, now supports our claim to the status of a profession.

Expendability and Mediation Controversies

The growth of industrial jurisprudence has contributed to the solution, or at least the fading away, of some of the issues that troubled us in the early years. We no longer talk much about the

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(Washington: BNA Books, 1957), 21-56; Sidney A. Wolff, "Discussion," *id.* at 56-60. J. Fred Holly, "The Arbitration of Discharge Cases: A Case Study," *id.* at 1-17; Benjamin Aaron, "Discussion," *id.* at 17-20. Dallas L. Jones, "Ramifications of Back-Pay Awards in Discharge Cases," in *Arbitration and Social Change,* Proceedings of the 22nd Annual Meeting, National Academy of Arbitrators, ed. Gerald G. Somers (Washington: BNA Books, 1970), 163-175. Patrick J. Fischer, "Ramifications of Back Pay in Suspension and Discharge Cases," *id.* at 175-181.

[13] Donald A. Crawford, "The Arbitration of Disputes Over Subcontracting," in *Challenges to Arbitration,* Proceedings of the 13th Annual Meeting, National Academy of Abitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1960), 51-72; Mark L. Kahn, "Discussion," *id.* at 73-77.

[14] Benjamin Aaron, "The Uses of the Past in Arbitration," in *Arbitration Today,* Proceedings of the 8th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1955), 1-12; Pearce Davis and Lloyd H. Bailer, "Discussion," *id.* at 12-23. Richard Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements," in *Arbitration and Public Policy,* Proceedings of the 14th Annual Meeting, National Academy of Arbitrators, ed. Spencer D. Pollard (Washington: BNA Books, 1961), 30-58; Alex Elson and John A. Hogan, "Discussion," *id.* at 58-68. Saul Wallen, "The Silent Contract vs. Express Provisions: The Arbitration of Local Working Conditions," in *Collective Bargaining and the Arbitrator's Role,* Proceedings of the 15th Annual Meeting, National Academy of Arbitrators, ed. Mark L. Kahn (Washington: BNA Books, 1962), 117-37; Lloyd H. Bailer and Harry H. Platt, "Discussion," *id.* at 137-147.

[15] Wallen, *supra* note 14. John Perry Horlacher, "Employee Job Rights versus Employer Job Control: The Arbitrator's Choice," in *Collective Bargaining and the Arbitrator's Role* at 165-196; Benjamin C. Sigal and David L. Benetar, "Discussion," *id.* at 196-204.

[16] W. Willard Wirtz, "Due Process of Arbitration," in *The Arbitrator and the Parties,* Proceedings of the 11th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1958), 1-36; Abram H. Stockman, "Discussion," *id.* at 37-46. R. W. Fleming, "Due Process and Fair Procedure in Labor Arbitration," in *Arbitration and Public Policy* at 69-91; David Ziskind and Irvin Sobel, "Discussion," *id.* at 91-101.

expendability of arbitrators. It is still true, of course, that arbitrators get blacklisted or fired from permanent umpireships from time to time. But in many of the major umpireships, the same man has now served for 10, 15, or even 20 or more years. It is common even in nominally ad hoc situations for the same group of men to be called back again and again. In some large, multiplant situations, permanent panels of arbitrators serve for long periods. I suggest that these changes in the tenure of arbitrators mean that we have moved from expendability to interchangeability of arbitrators. Twenty-five years ago it was not unreasonable for many parties to believe that the outcome of their case depended on the luck of the draw in picking an arbitrator; today there is considerable evidence that many, perhaps most, parties believe that most experienced arbitrators would reach the same conclusion in most cases.[17]

The once-heated debate over mediation versus adjudication has also faded away.[18] In a few industries where the "impartial chairman" system was established, it survives. In some major umpireships, the arbitrator is free to discuss basic problems and issues or even specific cases off the record with designated representatives of the parties. But by and large, mediation never found a place in the tool kit of the postwar generation of arbitrators. I can see several reasons for this. One is that hardly any of us can match the remarkable combination of talents that a man like George Taylor has. Another reason is that the newly organized industries of the 1940s and 1950s had characteristics quite different from the industries in which the mediation approach flourished in the 1920s and 1930s; in particular, the representation of the parties in arbitration tends to be delegated to a lower level in the organizational hierarchy on both sides.

Subsequent developments in collective bargaining and in arbitration in some industries have undermined some of the assumptions on which Taylor predicated his approach. Taylor emphasized the brevity and generality of collective bargaining agreements. In one typical relationship, the initial agreement in 1937 was two typewritten pages; the current agreement runs to 186

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[17] See Fleming, "Predictability in Arbitration," Ch. 4 in *The Labor Arbitration Process, supra* note 1.

[18] This paragraph and the following one are based on Charles C. Killingsworth and Saul Wallen, "Constraint and Variety in Arbitration Systems," in *Labor Arbitration—Perspectives and Problems* at 56-81.

printed pages plus a separate pension agreement. In most relationships today, there is also a thick file of arbitration decisions interpreting many clauses of the agreement; and in the background there is the body of industrial jurisprudence that I just discussed. In the early years, we had a largely *unstructured* decision-making environment, in the sense that there were few guideposts available, and the consensus-seeking approach had much appeal. Today we have a much more *structured* decision-making environment. The answers are not always obvious, but it is a rare occurrence today, as I suggested above, for the arbitrator to find himself in completely uncharted territory.

Shortage (Continued)

The most important problem that has not only survived but worsened over the years is the shortage of arbitrators. I think the nature of the problem has changed over the years. A quarter-century ago, expendability sometimes meant that well-qualified, experienced men were seriously underemployed from time to time. To the best of my knowledge, that rarely happens today. And in terms of numbers, the supply of well-qualified arbitrators has increased substantially. The real source of difficulty today is the vast growth of demand for arbitrators. In 1949, the Federal Mediation and Conciliation Service made 620 appointments of arbitrators. In 1971, the FMCS made 5,759 appointments, nearly a ten-fold increase.[19] Figures for the American Arbitration Association, which are compiled on a somewhat different basis, show a six-fold increase in cases in roughly the same time span.[20] And, of course, requests to these two principal designating agencies represent only a part of the total demand for arbitration services. Furthermore, a whole new area of demand has opened up with the rapid spread of collective bargaining in the public sector. Some new arbitrators and fact-finders are being developed there; but a portion of the available time of private sector arbitrators is now being drawn into this new growth area, while there seems to be little transfer of public sector newcomers to the private sector.

[19] 2 FMCS *Ann. Rep.* 39 (F.Y. 1949-1950); 24 FMCS *Ann. Rep.* 54 (F.Y. 1970-1971).

[20] The AAA figures are based on the number of cases for which fees were paid, which would be a smaller number than appointments of arbitrators because some cases are settled after such appointment but before a hearing. The AAA cases total for 1947 was 1,093, and the total for 1971 was 6,658. (Information provided by Joseph Murphy, executive vice president, AAA).

I said a moment ago that the supply of experienced arbitrators had expanded considerably. There is a fairly widespread belief to the contrary. One often hears the statement that most of the better known arbitrators today got their start through the War Labor Board, and that when these veterans pass from the scene, there will be a critical shortage. I think that is a mistaken view and that it leads to a misunderstanding of the shortage problem.

Let me give you a few figures to illustrate the point. At the time of our first annual meeting in 1948, we had 105 members. As of today, by my count, only 47—or less than half—of those charter members are still active; the majority are dead or retired or have moved on to other fields.[21] The surviving charter members are only about 15 percent of the present total membership of the Academy. I would estimate that considerably more than half of our charter members of 1948 got their start in arbitration through the War Labor Board; but by 1969, only 29 percent of our members reported that this was the way they got started.[22] The Academy has accepted approximately 375 new members since 1948.[23] Despite this, the average age of the membership has risen from 49.7 in 1952 [24] to 57 in 1969. There has been a striking change in age composition. In 1952, 12 percent of our members were under 40; in 1969, less than 2 percent were under 40. In 1952, 17 percent were 60 or older; in 1969, 42 percent were in that age bracket. This large shift in age composition reflects the fact that many of our new members are in their 50s and 60s when they are admitted.

The Academy does not discriminate on the basis of age. As far as I know, no applicant for membership has ever been turned down because he was too young or too old. Apparently the labor

[21] Based upon examination of the list of 61 survivors of the original 105 charter members to whom special membership certificates were issued in 1967.

[22] Jean T. McKelvey and Derek L. Rogers, "Survey of the Arbitration Profession in 1969," in *Arbitration and the Public Interest,* Proceedings of the 24th Annual Meeting, National Academy of Arbitrators, eds. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1971), 275-303. Ensuing figures referring to 1969 are taken from this survey. The statements in the text should be qualified to the extent that 60.5 percent of the Academy members responded to the survey questionnaire.

[23] We started with 105 members in 1948, of whom fewer than 50 survive; some of those admitted since 1948 are now dead; and the total membership as of the 1972 meeting was 397.

[24] Irving Bernstein, "Survey of the Arbitration Profession in 1952," in *The Profession of Labor Arbitration* at 176-182. The response rate in this survey was 58.4 percent on the general questionnaire and 57.4 on the financial questionnaire.

and management representatives who choose arbitrators do consider age. In 1952, our members reported that the average age at which they got their *first* case was 38.5, and in 1969 the average was 37.4—essentially the same. Those who choose arbitrators seem to agree with the Old Testament when it says, "With the ancient is wisdom; and in length of days understanding." [25] (Incidentally, the Old Testament has a further pertinent observation: "The price of wisdom is above rubies." [26])

Academy members have responded to the growth in demand for arbitration services. In 1952, they averaged 36 cases per year; in 1969, the average was 51 cases per year, an increase of 40 percent per member. The proportion of our members devoting half or more of their time to arbitration has roughly doubled since 1952. Yet most of them find it difficult to keep up with the demand for their services. In 1969, two thirds of our members had a waiting list; typically, they had six to 10 cases that were scheduled but not heard, and the busiest 10 percent had 30 or more cases awaiting hearings. Mercifully, no questions were asked in 1969 about the number of cases heard but not yet decided.

What these figures add up to is delay. Most of us, arbitrators and advocates alike, would undoubtedly agree that delay is the most pressing problem in the arbitration field today. It is not uncommon for parties to have to wait six months or longer for a hearing date and another six months or longer for a decision. In some situations, the grievances that are being decided today are three or four years old or even older. Nobody needs to describe for this audience the consequences of that kind of delay.

Much earlier in this paper, I observed that the Academy had devoted a great amount of time to ways and means of training new arbitrators. I also pointed out that we had accomplished surprisingly little. To be sure, individual arbitrators have succeeded in training apprentices, and some of the apprentices have become highly successful arbitrators; but in 1969, only 14 percent of our members reported that they had entered the field by this route. Over the past 25 years, we have been almost constantly involved in some kind of training program other than apprenticeship (usually, of course, in collaboration with others). In general, the results have been quite disappointing.

[25] *Job* XII, 12.
[26] *Job* XXVIII, 18.

In the light of hindsight, I suggest that we may not have been sufficiently aware of the inherent difficulties in such an undertaking. In virtually all other professions, specialized training begins immediately after graduation from college and practice begins in the late 20s or early 30s. The beginning arbitrator is almost always middle-aged, and he must have established earlier in life some other means of support. Arbitration must almost be an afterthought for him. But the highest hurdle for new arbitrators has been placement after training. Labor and management representatives are generally agreed that new arbitrators should be given a chance. With only a few exceptions, they seem also to agree that somebody else ought to provide the chance. An effective placement operation is a vital part of a successful training program, and that has been the missing element in Academy training programs, by and large. Our constitution has prohibited the Academy from recommending arbitrators, and I see little or no likelihood of any change in that basic policy. The Academy will undoubtedly continue to cooperate wholeheartedly with others in training programs, and I hope that in the future more attention will be given to advance arrangements for placement of the successful trainees. In all honesty, however, I must say that I do not see any quick or easy way to speed up substantially the rate at which the present system has been producing new arbitrators. Another speaker this morning is assigned to give us prescriptions and predictions for the future, and I gladly pass this problem on to him.

But I will offer a concluding observation from hindsight. Any shortage is really a two-sided coin; if there is an inadequacy of supply, there is also an excess of demand. In recent years we may not have been aware of the extent to which the growth of demand for arbitration has contributed to our shortage problem. The overall statistics that we have certainly show that requests for arbitrators have increased much more rapidly than the number of workers covered by agreements. We could profitably direct much more attention to the demand side of the equation. One might logically expect that the development of a substantial body of industrial jurisprudence, which I discussed earlier, would enable the parties to do a much more effective job of screening grievances prior to arbitration; but, in all candor, the effectiveness of screening seems to have diminished, not increased. Furthermore, like most other arbitrators, I have often been sur-

prised by the wasteful use of the time of arbitrators by some parties. Many cases that could be adequately presented in an hour or two take a full day or more. And arbitrators' decisions—at least the published ones—are just as long today, on the average, as they were 20 and 25 years ago; presumably, the arbitrators believe that the parties continue to want detailed opinions in most cases.[27] Some companies and unions (steel is a notable example) are preparing to experiment with streamlining their grievance and arbitration procedures.[28] While there are obvious difficulties and dangers in such experiments, we all should welcome them and hope to learn from them.

Conclusion

I refuse to conclude on a pessimistic note. Nobody should underestimate the seriousness of the closely related shortage and delay problems. But, in a very real sense, these are the problems of success. Twenty-five years ago, there was no certainty that arbitration was a viable institution. Most of the grievance-arbitration clauses in contracts then were the result of War Labor Board orders, and the parties were free to discard them if they chose. I think it is safe to say that no one then foresaw the great increase in the number of arbitration clauses in contracts and the even greater increase in arbitration cases. The institution has surely met the test of time.

Arbitration could not have flourished as it has if it did not meet a basic and pervasive need of our industrial relations system. No other country has developed an arbitration system comparable to ours. And I suggest to you, with mixed feelings, that few institutions in our society today are as healthy and thriving as arbitration. This is a day when the media of mass communication are polluted by lies, half-truths, and stupidities; when every branch of government is tainted by scandal and dishonesty, with mayors, legislators and even ex-governors and judges going to prison for gross misdeeds; when great cities are less and less capable of providing basic security and justice for their citizens;

[27] Based on two comparisons: a random sample of 50 decisions from the first five volumes of *Labor Arbitration Reports* with a random sample of 50 from the most recent five volumes in that service; and a random sample of 15 from Vol. II of *Basic Steel Information Bulletins* with the same size sample from Vol. XVI of that service. In neither comparison was the difference in average length large enough to be statistically significant.

[28] The Basic Steel Companies-Steelworkers plan is summarized in BNA *Daily Labor Report*, No. 148 (8/2/71) at F-3.

when more and more of us understand the bitter truth of President Kennedy's remark that "life is unfair."

Yet we fortunate few who are arbitrators inhabit, in most of our working hours, a different kind of world. We hold a position that is filled not on the basis of personal or political connections or physical beauty or old school ties but on the basis of a cold bipartisan judgment of performance. We are enjoined to seek the truth, and in few forums is that search as untrammeled or as effective as in our hearings. We are constrained by a contract, but that contract is validated by the mutual consent of those living under it. Within that constraint, we are free to be fair and to do justice. I suggest to you that today the average working man under a contract has a much better chance to get justice done him in his workplace than in the law courts of his community. No arbitrator would claim infallibility, but few of his mistakes are the product of carelessness or callousness, and no professional arbitrator has ever been adjudged guilty of corruption. The arbitrator, however humble he may be as an individual, can be proud of the high purposes of his office and of the industrial jurisprudence that he and his colleagues and collaborators have created in the past quarter-century. In a time of rising discontent, disorder, and conflict, arbitration has contributed to the fairness and the stability of American industrial relations. But the arbitrators must also recognize that the true architects, builders, and proprietors of this unique institution of arbitration are the uncounted thousands of labor and management representatives who bestow upon the arbitrator the privilege of serving.

II. SOME DEVELOPMENTS IN THE HISTORY OF THE NATIONAL ACADEMY OF ARBITRATORS

CLARE B. MCDERMOTT *

I am reminded of the man mentioned by Jim Hill who stood up on a similar occasion and said, "I want to say something before I make my speech." What I want to say is that this will not be a definitive history of the National Academy of Arbitrators. I was concerned about the possibility that the title assigned to me might have been misleading.

I have chosen to interpret my directions from the Program Committee as a franchise to take a few minutes to outline what I

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