

early days still may be interviewed so that those details may be regained and preserved, for the Academy as an institution must begin to take better care of preserving the significant events in its earlier years.

III. ARBITRATION IN THE FUTURE

MORRIS L. MYERS *

I have been attending Academy meetings since about 1955 when the meeting was held in Cleveland. At that time I was terribly impressed with being in the presence of members of the Academy, and the problem I have today is that I am still uncomfortable in talking before many of them who are now here. In fact, speaking here reminds me of an experience I had when I was in high school and was attending a summer music camp in Interlochen, Mich. There was a nationwide Sunday night broadcast from Interlochen and I was the cymbal player for Dvorak's New World Symphony. The only thing I had to do throughout the symphony was to make a soft cymbal crash about one third of the way through the fourth movement. I sat throughout the first three movements and, when the fourth movement began, started counting hundreds of bars of rests. At the appropriate time I stood and then made my attempt at the soft cymbal crash solo. I went through the motions all right, but I was so scared that I didn't hit the cymbals together. I only hope that my speech today is not a repetition of that sad experience!

The subject of my talk is "Arbitration in the Future," and I have used the year 1980 as my target date to prognosticate what arbitration will be like then. I believe that there will still be concern over the cost of arbitration and predict that the cost will be substantially greater than it is today, at least on a per diem basis. I also believe that there will be a continuing concern over delay in arbitration and predict that the delay will have decreased somewhat from that which exists today, primarily due to the pressures on the arbitrators from the parties—pressures which will have been initiated from the work force itself. Even as of now, in certain quarters of the work force, we have seen an impetuosity regarding the time it takes to get a dispute resolved through arbitration, and it is my belief that this impetuosity will increase in both volume and intensity.

* Member, National Academy of Arbitrators, San Francisco, Calif.

Furthermore, there will be a continuing concern about getting more and newer arbitrators, and in my judgment the average age of arbitrators will be materially lower than it is today. In my view, training programs in and of themselves will not be responsible for there being younger or more arbitrators. Rather, it will be as a result of the disenchantment, primarily by the work force, with the arbitration process as it now exists. There is a degree of lack of credibility at present in the process by the work force, largely due to the chasm which exists between the moral and social values of the work force vis-à-vis the moral and social values of many arbitrators. In this regard, the problem of the age differential between the work force and the present stable of arbitrators rears its ugly head. We have a relatively young work force compared with the average age of members of this Academy, and this age differential will be with us for some time, because people in the 24 to 35 age range will increase throughout the 1970s about twice as fast as the rest of the population. Let it be clearly understood that when I refer to the average age of arbitrators (and the average age of the members of this Academy is now in the 56-57 range), I am concerned not so much with physical age as with the "age of the spirit." As an example, I am reminded of Cy Ching, a man that the Academy, through respect for his values and spirit, saw fit to enter into membership when he was 89 years of age. Cy, until the day he died at age 91, was more concerned about what would happen 10 years hence in our society, our country, and our world than what happened 30 years ago. It is this "thrust for the future" rather than the dug-in reverence for things past that separates the young from the old, and arbitrators, if the process is to remain credible, must be able to shift their gears to the present and future instead of remaining in "past gear."

I do not wish my comments to be taken as a remonstrance to arbitrators that they should have the same life style as a person in his or her late 20s, or that they should have the same moral and social values. However, it is my belief that too many arbitrators lack even the threshold of awareness of the values of the young, and such awareness is obviously necessary in order that there be an understanding of those values. Such awareness *and* understanding do not constitute acceptance for those values, but awareness and understanding are, in my view, prerequisites for arbitrators if arbitration is to remain as a credible process.

A personal experience of mine demonstrates the point that I am attempting to make. A few months ago I arbitrated an airline case involving the discharge of two employees, each of them having about two years' seniority, who had been caught drinking approximately half a can of beer on the job. The airline had a strict rule about drinking on the job, and it had rigidly enforced that rule. I sustained their discharges. Several weeks ago I addressed a group of third-year law students at a good law school, told them about the case, and then asked how many of them thought I had decided the case the wrong way. A slight majority in that law class disagreed with my decision. In fact, one student said, "Mr. Myers, judging from the way you decided that case, I don't think you're impartial." Perhaps it is a rationalization, but I was not terribly disturbed that a slight majority thought I was wrong, because many of them have not had experience in the industrial scene. However, they were bright young people, and, in a very concrete way, I was made aware of the difference in values between the majority of them on one hand and myself on the other. The point is, I am confident that if the same set of facts had been presented to *my* law school class, practically all of them would have said that my decision had been the right one.

So I think we have to look at ourselves as arbitrators very closely in terms of our credibility to the society we serve. I submit that there is pressure from "below" in terms of a difference of moral and social values that are held there as compared with the values of most arbitrators, and that gap is bound to manifest itself. I might add that that manifestation has already occurred in the steel industry, and it is my prediction that what has happened in the steel industry will proliferate to other industries.

Speaking of the steel industry "experiment," it is apparent that there is a push for faster and expedited arbitrations. This desire for speed, as distinguished from quality, will probably not be as marked by 1980 as it is today, but it will still exist. We, as arbitrators, must address ourselves to the demands of our constituency as they exist at any given point of time and respond as best we can to those demands. I submit that the arbitrator profession has not responded to those demands as well as it should. We had better start doing so.

Now, let's talk about the quantity of arbitration in the future. In the private sector, with one exception, it is my belief that the

volume of arbitrations will remain relatively constant—that is to say, there will be no appreciable increase. The one exception to which I refer is the railroad industry. By 1980, it is my belief that arbitration in the railroad industry will be the same as it is now in other industries. That is to say, I predict the demise of the National Railroad Adjustment Board. Parenthetically, may I say that many of us got our start as arbitrators under the auspices of the National Mediation Board and we owe some loyalty to them for that. I know that we do not make as much money doing NRAB work and that the procedures are somewhat less than satisfactory to us. However, aside from loyalty, I urge that arbitrators take their fair share of railroad industry work in their own best interests, because in time, arbitration in that industry will be the same as it is in all other industries, and the railroad industry has developed a penchant for doing a lot of arbitration.

As for the public sector, it is my belief that arbitration will proliferate by leaps and bounds in the coming years, not only in terms of grievance arbitration but also in terms of “contract-making” arbitration. I sense a danger to the credibility of the arbitration process as it relates to public sector arbitration because of a tendency in that sector to get inexperienced arbitrators. This tendency is due, in my opinion, to the fact that public agencies and unions representing public employees are so often more concerned with the cost of arbitration than they are with the quality of arbitration. We may criticize them for that judgment, but criticism does not alter the facts. As I see it, the only short-range solution to this problem is for experienced arbitrators, at least to a reasonable degree, to subordinate their economic interests to a concept of performing a public service from time to time.

Let us look at the future of arbitration in broad perspective. I believe that in this country arbitration is the last bastion of justice which is credible to the constituency which it serves. There has been an attack upon the judicial system in this country at the local, state, and federal levels, both from the left and from the right. So we are the last bastion. I believe that the present high regard for the arbitration process is due to the competency and integrity of the people who are involved in that process—arbitrators, unions, employers, and employees alike. However, it is my dire prediction that there will be a public scandal involving arbitration by 1980 and that that scandal will probably involve

arbitration in the public sector. This sad prediction is due to a number of factors. First of all, and as I have mentioned before, low fees are paid to arbitrators in the public sector. This does not attract the tried-and-true arbitrators, but instead attracts the “un-tried and new” ones. This problem is exacerbated in view of the tremendous increase in public sector arbitration, which increase is confidently predictable. Second, there is a great deal of money involved in public sector arbitrations, especially in interest- or contract-making arbitration. Third, politics is almost inevitably involved in public sector arbitration. So much money and so much politics, judging from history, have a tendency to corrupt. Combining all of these factors, the question, in my view, is not *whether* there will be a public scandal, but *when*, and *whom* it will involve.

I have some confidence that the arbitrator involved in the scandal, when it occurs, will probably not be a member of this Academy, but if he is, this Academy will have to take the responsibility for his membership. I have somewhat less confidence that the arbitrator will not be on the arbitration panel or roster of the Federal Mediation and Conciliation Service or the American Arbitration Association. Again, the FMCS and AAA must bear the responsibility if he is on their panels or rosters. I have no ready-made solution to this danger—only to say that the Academy, FMCS, and AAA must at least be cognizant of the potential for this kind of scandal and do their best in terms of screening their memberships and rosters in order to minimize the risk.

In closing, I am reminded of the speech by a person a number of years ago to a group of labor relations people who worked for Kaiser Industries. He was highly knowledgeable about labor relations but was highly uncertain in syntax. For example, he kept talking about Mr. Kaiser’s “subversified” industries. He closed his speech, as I now close mine, by saying, “I could go on and on, but time don’t prevail.”

Discussion—

CHAIRMAN SYLVESTER GARRETT: Perhaps we can still have time for a little debate.

MR. RALPH SEWARD: This is a rare opportunity, for there are many people here from labor and management, and if we are to talk usefully about the training of new arbitrators, it is with labor