CHAPTER 1

THE PRESIDENTIAL ADDRESS: A "MAINTENANCE OF STANDARDS" CLAUSE FOR ARBITRATORS

ELI ROCK*

I suppose it is quite common, in preparing a presidential address for the Academy, to look back over the products of one's predecessors. That, incidentally, is becoming increasingly difficult to do; by the latest count there should be 26 presidential addresses already enshrined in the permanent marble of our annual volumes. My predecessors, I am sad to discover, have said everything that could possibly be said to an annual meeting of the Academy and a few have said it twice in other talks.

I have also discovered that the length of my predecessors' talks varies substantially. Gerry Barrett, in his excellent address last year at Atlanta where he made a strong plea for shorter opinions, evidently accepted the educational maxim that the best way to teach is to set an example on the spot, and his talk consumed a total of only five pages in that particular volume.[1] For the same reason, I assume, Jim Hill in his equally excellent 1970 address entitled "The Academy and the Expanding Role of Neutrals" required 20 pages in the volume.[2]

One also tends, in preparing a presidential address, to research some of the other talks and comments that made up our past annual programs. Here, too, one often finds very high quality, and occasionally a nugget of some special interest. For example, in Charles Killingsworth's talk at the 1972 meeting, he made a comment at the outset that startled me somewhat when I heard it and

* President (1973-1974), National Academy of Arbitrators, Philadelphia, Pa.

[1] Barrett, "The Common Law of the Shop," in *Arbitration of Interest Disputes*, Proceedings of the 26th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1973), 95-99.

[2] Hill, "The Academy and the Expanding Role of Neutrals," in *Arbitration and the Expanding Role of Neutrals*, Proceedings of the 23rd Annual Meeting, National Academy of Arbitrators, eds. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1970), 187-207.

startled me again when I read it this time. He was describing, in somewhat poetic language, his own early experience as a starting arbitrator during World War II:

> "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 real thing was a call from a union or company man telling you they had a case they wanted you to arbitrate." [3]

May I say that, having graduated by the time Charles is describing, to an administrative post within the War Labor Board structure, I was one of those "only somebodies" who would "call" him. My recollection over 30 years is that while he may not have demonstrated a "radiant morning" kind of excitement, he sounded distinctly happy at the prospect of being given one of these lesser WLB assignments. Nevertheless, and despite the unkind cut, I shall continue to claim fame as the initial discoverer and recruiter of Charles Killingsworth for this business.

Another aspect that my reading of past Academy volumes has revealed is the seeming conflict, and uncertainty, which runs through them, on the dimensions and nature of the arbitrator's role—and particularly regarding the changes in the role with the passage of time. Arbitrators have always differed, it would seem at least in degree, on a number of basic questions which affect their function. We are grateful, for example, to Hal Davey and Phil Linn and Paul Prasow for highlighting for us again, at last year's meetings, the continuing debate over what, in overly simple terms, can be described as the strict versus the flexible interpretation of the contract. Hal stuck his neck out, as only Hal can do, for "the contract, the contract, the contract-is-the-thing" theme; and discussant Phil Linn, citing both Shakespeare's *The Merchant of Venice* and Cardozo and Archibald Cox, argued that there was

---

[3] Killingsworth, "Twenty-Five Years of Labor Arbitration—and the Future," in *Labor Arbitration at the Quarter-Century Mark*, Proceedings of the 25th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1972), 11-27, at 11.

much more to contract interpretation than that.[4] Discussant Paul Prasow also relied on Cardozo but made his most telling argument in citing a prior article by Davey in which Davey himself had espoused the Linn-Prasow position.[5] The latter, if I may be permitted a requote of my own, is reminiscent of Cardinal Richelieu's famous admonition—to which arbitrators and parties might still pay heed: "Give me six lines written by the most honest man, I will find something there to hang him."

This particular debate is signficant here, however, because it illustrates an aspect that I shall attempt to update. Quite clearly the Davey approach of last year reflects a narrow and shrinking role for the arbitration profession—of which others have also spoken—and this question, in the light of some more recent developments, represents a matter which, in my opinion, requires major renewed attention at this time.

The Academy is engaged currently in two highly significant internal discussions—one dealing with a proposed revision of our Code of Ethics and the other dealing with the nature of our membership as it is related to our standards of admission—both of which can, in my opinion, have far-reaching effects on the future character and makeup of the profession. I propose to attack the problem from a somewhat different perspective.

The future is always difficult to know, and you will recall the famous Dorothy Parker story apropos of not knowing what the future has in store. Dorothy Parker had a faithful cleaning lady who did her work while Dorothy Parker was out. Once Dorothy Parker was given two baby alligators. She returned home and put them in the bathtub for temporary safekeeping. Dorothy Parker went out again. While out, the cleaning lady came. When Dorothy Parker returned, she found this note on the hall table: "Dear Madame: I am leaving. I cannot work in a house with alligators. I would have told you this before, but I never thought the subject would come up." Since I face some of the same problem, I will start by going backward.

[4] Davey, "Situation Ethics and the Arbitrator's Role," in *Arbitration of Interest Disputes, supra* note 1, at 162-176. Linn, *id.*, at 176-184. Others at prior meetings, such as Sylvester Garrett, have of course also taken the Linn position, citing the well-known writings of Harry Shulman in further support. See Garrett, "The Role of Lawyers in Arbitration," in *Arbitration and Public Policy,* Proceedings of the 14th Annual Meeting, National Academy of Arbitrators, ed. Spencer D. Pollard (Washington: BNA Books, 1961), 102-124.

[5] Prasow, in *Arbitration of Interest Disputes, supra* note 1, at 187.

I believe we may begin with Gerry Barrett's address last year, and go backward from that. Referring to the "common law of the shop," or what others call "industrial jurisprudence," Gerry suggested that much of that common law has now been settled, that many of our opinions are thus either unnecessary or overly lengthy and fine spun, and that we and the parties will be engulfed by an avalanche of meaningless paper if we do not pause and take stock on the matter.[6] He goes on to say:

> "Although we may differ in our manner of description, I submit that the functions of an opinion are twofold. The opinion either tells the parties something useful about their contract, or it tells them something useful about their arbitrator—or it does both. If, in the nature of a case, the opinion cannot perform either one of these functions, then it is likely to be surplus, which nevertheless becomes indexed and digested by the parties and ends up assuming an ambiguous role in the common law of the particular shop. I do not overlook the internal discipline of organizing one's thoughts upon paper as an additional function of an opinion, but this exercise is best left to the discretion and experience of the individual arbitrator. If it is accurate to say that an opinion should tell the parties something useful either about their contract or about their arbitrator, then it follows that detailed opinions are now expected unnecessarily in substantial numbers of cases." [7]

Gerry recognizes that there will always be a need for decisions of the conventional type, and I can hardly do justice here to what is clearly an excellent paper. I am primarily using Gerry, if he will permit me, to make a point.

Charles Killingsworth had also outlined, in his 1972 paper, the major contributions of our profession to an established body of industrial jurisprudence (by published articles as well as by case law). While not making his point with the same emphasis as Gerry, the impression I drew from his paper was that he, too, felt that the greater amount of the basic groundwork was behind us, and he appeared, with typical Killingsworth reserve (interrupted only when his sentimental and poetic side usurps authority), to express a bit of surpise that opinions today are of about the same length as they used to be 20 and 25 years ago.

Moving back one step further, we have Ralph Seward's paper at the 1970 meeting—chiefly to be enshrined, of course, for his

---

[6] *Supra* note 1.
[7] *Id.* at 98.

memorable opus in French-English iambic pentameter, or perhaps better called free verse. On a lesser note, Ralph addressed the problem which I discuss today. He states specifically: "We are no longer explorers. We are technicians." Like Killingsworth, he also had looked back. He outlined in detail 14 basic principles of the labor-management relationship, which the arbitrator, together with the parties, had played a major role in fashioning. But his emphasis, too, is on past achievement. He, too, calls for a simpler procedure for many of the cases that are still going the old route. I am indebted to Lew Gill for also reminding me that it was Ralph, in this particular talk, who made the major plea for "expedited arbitration"—those were his words—which is now being so widely experimented with.[8]

I would refer further, however, to remarks by Ralph both before and after his 1970 talk. At the 1964 meeting, in the context of a discussion where there had been emphasis on the need to reduce the delays and cost of arbitration, Ralph made this statement:

> "We have heard a great deal about delay in arbitration, and about techniques of speeding up and cheapening arbitration. Not once, in two days of sophisticated discussion, have we heard the word 'quality.' Yet speaking to our guests from labor and management—the quality of an arbitrator's work is necessarily one of your prime concerns. You can take (and have taken) delay, though you complain about it. You can take (and, unfortunately, sometimes have taken) unjustified expense and have rightly complained about it. But the one thing you should not ever have to take from arbitrators is poor quality work—snap judgments, slipshod thinking, careless writing, offhand decisions that raise more problems than they settle. For a time, at least—and possibly for a long time—our decisions will be the binding law in your plants. One thing you should therefore be in a position to insist upon is

---

[8] Seward, "Grievance Arbitration—The Old Frontier," in *Arbitration and the Expanding Role of Neutrals, supra* note 2, at 153-163. (For those who have not previously been made aware of it, the names Seward and Gill also carry special significance for that same early War Labor Board period to which Charles Killingsworth referred in his 1972 talk. The WLB not only gave basic impetus to modern grievance arbitration as we know it, but also supplied many of those who later became prominent in this field. In addition to such Board members as Dr. George W. Taylor, and part-time hearing officers such as Charles Killingsworth, there was a small full-time WLB staff. Ralph Seward was our overall supervisor, and Lewis Gill was his immediate subordinate. Reporting directly to Gill were these names, among others Saul Wallen, Benjamin Aaron, Sylvester Garrett, Theodore W. Kheel, Jesse Freidin, Ronald W. Haughton, Robben W. Fleming, Frederick H. Bullen, Philip G. Marshall, I. Robert Feinberg, and Harold W. Davey.)

high quality in those decisions; and high quality comes at a price —in time, at the very least." [9]

Finally, and to update Ralph, I would mention that at our Saturday Board of Governors' meeting last year in Atlanta, Ralph appeared. With the eloquence that only a Seward can muster, and which I could not possibly reproduce, Ralph noted a number of recent developments, of which the movement in the direction of expedited arbitration was but one, and he questioned whether the Academy might not have a responsibility to consider the potential effect of these developments on the qualitative character of the profession and its membership in the future. Considering also the likely continued growth of both the caseload and the profession, he suggested that consideration of the matter might have important implications for the parties and the appointing agencies as well.

I trust that Gerry and Ralph and the others I have cited will forgive some liberties I may have taken in describing their positions. Nothing is black or white in this world. I have highlighted only some aspects of my colleagues' positions because that is necessary to make a point I consider to be important. In truth, there are only differences in shadings, not in essentials, between a Barrett and a Seward, or even between a Seward circa 1964, Seward circa 1970, or Seward circa 1973.

May I add to these evidences that we may be a declining profession, qualitatively if not quantitatively, these further signs: As was also pointed out by Seward and Killingsworth, top people on the labor or management sides very seldom attend our arbitration hearings anymore, although they did in the earlier years. Further, our high reputation and our earlier accomplishments were no doubt due in large measure to the presence in our ranks of such giants as George Taylor; there is some question whether we will be able to replace these illustrious names, or whether the times will offer the opportunity. The examples of possible decline could be multiplied. They could add up, at least by my standards, to a bleak picture. A role akin to that of an unemployment compensation referee, for example, is not my cup of tea, nor that, I would think, of most of our members—although it is doubtless a worthy and valuable occupation. Do I draw the picture too

[9] Seward, "Reexamining Traditional Concepts," in *Labor Arbitration—Perspectives and Problems,* Proceedings of the 17th Annual Meeting, National Academy of Arbitrators, ed. Mark L. Kahn (Washington: BNA Books, 1964), 240-251, at 242.

bleakly and overstate the case? Perhaps—but I think the trend is clearly there, unless it is somehow reversed.

I have been saddened, not only by the number of deaths among our past members, shown in the back of our membership directory, but simply by the number of notifications I have received from colleagues who will be unable to attend this particular meeting owing to illnesses of their own or of a spouse. I believe that we must recognize that our membership makeup will be greatly altered in the next 10 or 15 years, given our present age distribution. Do we not have a fundamental obligation to the profession to *attempt* at least to shape its nature, qualitatively, for those future members from the ranks of expedited arbitration or the public sector or elsewhere who will not have had the background and experience of some of our present high proportion of seasoned veterans?

I should point out that some of our "middle group" members, who do not date from the WLB, have shown some support for the position I will here be espousing. The question of a full versus a short or no-opinion decision is, I think, quite symbolic of the issue. Thus, Phil Linn, in his comments at last year's meeting, also spoke to the function and need of a conventional opinion in these terms:

> ". . . As to the notion that awards be rendered without opinions, I am prepared to state, quite emphatically, that I am opposed to any such suggestion. I deeply believe the arbitration process has in large measure succeeded in serving the needs of labor and management because of the rationale developed in well-reasoned opinions in support of the arbitrator's award. Delete the opinion, and the unsupported decision will soon bring our function into doubt in the minds of the parties. Believing, as I do, that the rationale is as important as the award, it is my personal intention to write opinions which I believe are essential to explain the case satisfactorily and permit it to stand the test of close scrutiny. I believe we shall continue to have the confidence of the parties and we shall provide the best possible system of grievance resolution if each case is able to stand on its own feet. It cannot do this if it is left to stand in its bare feet, with only its award hanging out." [10]

On a similar note, Rolf Valtin, in a letter to Bill Simkin commenting on one aspect of the proposed new Code of Ethics, said this:

> "It seems to me that there are essentially two kinds of Opinion-writing. The first is where one writes directly to the problem—i.e.,

[10] In *Arbitration of Interest Disputes, supra* note 1, at 182.

without first laying out the facts and the parties' contentions. One assumes that the parties have the confidence that the arbitrator has understood the facts and contentions; and one further assumes that it is those persons alone who were at the hearing who need to understand what the arbitrator is holding. Where this suffices, I'm all for it. It's a lot quicker and easier; and it keeps one from having to master the facts and contentions in the detailed fashion necessary for writing about them intelligently and meaningfully—which I think is often the real pain-in-the-neck part of the job. Without question, this 'directly to the problem' kind of Opinion-writing spares the parties cost and delay and simply keeps away the danger of 'writing for publication.'

"The other kind of Opinion-writing requires showing what the case is about before disposing of it. The process of putting the Opinion together is far more tedious and time-consuming, but the resulting Opinion makes it possible for those who were not at the hearing to understand the case and its holding. My experience is that most parties most of the time want an Opinion which gives the facts and contentions as well as the holding and its rationale. Furthermore, it seems to me that there is no gainsaying the fact that an Opinion in its true meaning is not really written unless it includes these elements. . . ." [11]

I cite these examples because I believe we are approaching at this time some very basic questions about our future both as a profession and as an Academy. Indeed, I believe there is very little doubt that the basic role of the arbitrator, as some of us have understood it, has at least begun to change; and while I do not agree with Ralph that we have already become technicians, clearly that future possibility must be realistically confronted and examined. The debate over short versus long opinions is one aspect of the question.

Perhaps I can help make my point with a brief composite picture of what I regard as the kind of arbitrator who has, at least in the past, helped bring this profession to its high estate. Quite possibly there may be relatively few who will have all the qualities I list, but a substantial number, I submit, has most of them. To the seasoned members of the Academy this will be elementary, but to others it may not be.

To start with, the arbitrator I describe is acutely conscious of the fact that his selection for a case, in the first place, represents an act of faith by the parties in him or her. From a list of many

[11] Letter from Rolf Valtin to William Simkin, dated Feb. 2, 1974.

alternative names, he or she has been *picked* for the case. There is, therefore, from the outset a deep sense of obligation and, if you will, gratitude to both parties which will cause that arbitrator to muster the maximum fairness and objectivity of which he is capable in deciding that particular case. No judge in the courts, whether elected or appointed, can have the same sense of *personal* commitment to the *specific* parties before him. It is impossible to explain to one who has never been in the arbitrator's position the powerful effect of this factor on an arbitrator's performance, but the parties have in this aspect of the process a form of protection that can be matched in no other way.

In addition to this factor of built-in integrity, the arbitrator also knows that his ultimate survival in his role will depend on the long-run reputation for fairness and competency he achieves. Unlike the judge, he is a decider who must be "reelected" constantly—by the very persons whose case or cases he is deciding. Here, too, is a powerful influence on the arbitrator and a powerful factor ensuring high-level performance.

Syl Garrett, in his presidential address in 1964, made this point well when he said:

> "When our published decisions are compared with the generality of the courts' published opinions, the arbitrators' work does not suffer. This relative excellence doubtless results from the fact that the arbitrator usually is something of a specialist, selected by the parties with care, and always on trial with them." [12]

Recognizing that the product, the only product by which he can be judged, is his decision in particular cases, the arbitrator will make a maximum effort to assure that this product is a highly workmanlike job and that, in particular, the *result* is right. The language of many labor contracts is, by nature, often unclear, and the facts even more so. Out of the impossible morass with which he is frequently confronted, the arbitrator may agonize at great length in finding the "right" answer—right not only in result but right in the framework in which the result is placed, and right in the decision language with which it is described. He or she will not always succeed, but often there will be a seemingly endless quest. A good many "impossible cases" do have a "right" answer, and the key to the whole puzzle may suddenly

[12] Garrett, "Some Potential Uses of the Opinion," in *Labor Arbitration—Perspectives and Problems, supra* note 9, 114-124, at 119.

dawn, in startling clarity, after long hours of tentative and wasteful attempts in a variety of other directions.

Of course there will be many cases that are "easy" to decide, but the kind of endless effort which the late Scotty Crawford, for example, would expend toward finding the "key" to the case—even in cases which might to others have seemed superficially "simple" and involving only the application of already established basic principles—is almost beyond description, notwithstanding that in large part Scotty's end result was often written in deceptively simple and relatively brief language. Scotty's wisdom and his knowledge of the "shop," of the problems behind the issues—gained from long years of experience—had stamped him during the last 10 years of his life as "Mr. Arbitrator's Arbitrator" to those of us who were fortunate enough to know him, and he gave to the arbitrator's role a basic dimension from which we all profited.

The arbitrator I describe will also, sometimes knowingly and sometimes unknowingly, examine into his own "internal stare decisis." Is his proposed decision in a particular case consistent with his approach in a somewhat similar case last month or last year, which the parties before him have never heard about and will never see? If there is a divergence, is it one in basic philosophy, or can it be justified by the subtle difference between individual cases to which we are all pledged or trained to give primary weight? Perhaps this *is* really a form of over-agonizing, but if nothing else it demonstrates the unusual sense of integrity and dedication that the selection process, in this particular form of human endeavor, has extracted from its practitioners.

Yes, there is often also boredom, and the highly polished decision may represent an effort to counter that. I suspect this may have been true of other craftsmen during the ages. Without the opportunity for pride and excellence of workmanship, however, man's long progress in a variety of areas over the years may have been inhibited.

I could go on at length to describe, or attempt to explain, what lies behind, let us say, an Abe Stockman kind of opinion. Much of it, I'm certain, resides in elements of the human psyche which I could not begin to understand or explain.

My point is, simply, that the profession could not have achieved its unique success—in a form envied by other democracies all over the world—without some of the qualities of the profession that I have described. It would unquestionably be easier for all of us, and much less painful for many, if the decision-reaching process I have described could be basically simplified. But the result, I submit, may be a quite changed profession—both in function and in terms of the persons who will be attracted to the profession. It is at least possible that some of the extremely high-caliber individuals who make up our membership —and whose very presence in the Academy makes it so completely captivating an organization for all of us—will in the future find better outlets for their talents elsewhere. I do not believe that we want this, and I question whether all of the parties or the appointing agencies want it.

The downhill trend of the profession need not, however, be regarded as inevitable. Let me pause to say now that I am in agreement with Gerry Barrett's basic point. Too many decisions *are* overwritten for the particular case or issue, and many, if not most, of us need to be reminded of this constantly. It is impossible to quarrel with Gerry's thesis—although I believe it is primarily applicable to large company umpireships—that the proliferating body of the common law of the shop has, in a great many instances, reached the point where it has no practical meaning or justification to those who must live under it and apply it. Gerry is as concerned as I am for the future of the profession, and the point he raises also goes to its continued viability. Some of the shortcuts are probably here to stay.

My belief, however, is that having recognized, as we have now been doing for a number of years, the need for some oiling and adjustment of a machinery that, in some ways, has shown signs of arteriosclerosis, the time has now come to express some very real concern about where we could be heading in terms of basics. The problem, as I hope I have indicated, goes beyond the mere question of shorter opinions or expedited arbitrations.

While some of the forces at work in these changes may be beyond our control, I am not of the belief that we are required to stand by helplessly. Basically as I see it, the problem today takes two forms. First, while the overall volume of cases will probably continue to increase (my information is that some of the expe-

dited procedures have even helped that trend along), on a percentage basis, it is likely that there will be fewer cases that require a "full" role by the arbitrator and more of the type where the arbitrator will have the more limited role I have talked about. Second, in terms of the membership in the profession, it seems clear—not only because of the passing of the George Taylors from the scene but because a greater percentage of the cases will now require the lesser role—that there will be more arbitrators before long with the limited background of having performed the narrower role.

Notwithstanding the latter, all of my colleagues whom I have quoted would agree that there will still be a need, for a long time to come, for the kind of full role I have described. Moreover, there is a whole flood of new types of cases and problems that may be confronting us. These can involve or flow from such things as the basic technological revolution that appears to be taking place in the newspaper publishing industry; or the fantastic growth of unionism in the public sector and its particularly unique problems in the schools, including, almost as a separate set of issues, the universities; or the new developments among professional athletes; or simply the new makeup of the work force and the nature of the contract changes in the plain old industrial sector. These new problems, too, will require the type of expertise that the "old" arbitrator has, including a high need for continued creative approaches.

Others will be affected by this, besides the National Academy of Arbitrators. But the Academy itself dares not let events pass it by. Among other things, it could take steps such as these:

1. In so far as it is within our power to do so, we must continue to set the example, for the profession, of a high-quality product. Even an expedited case, or a relatively simple case which may require a conventional decision involving only the application of established common law of the shop, cannot be analyzed or decided haphazardly. If this may in some cases require more time than the parties are willing to pay or we are willing to charge, so be it. This is nothing new; and we owe it to ourselves at least to do the job right.

2. Second, we are required, in my opinion, to speak out as an Academy regarding the intimate relationship between quality

standards and the very survival of the institution of arbitration, whose great value to our industrial relations society up to now is unquestioned.

3. Third, in so far as the Academy itself is concerned, we will be required to bend our every "internal effort" to keep our standards high. The need for a new Code of Ethics is one basic part of that. We will also have some significant problems in the area of membership admission standards, which are already being explored by a special committee on that subject. Part and parcel of our "internal problem" may be the question of whether we can continue much longer to cope with the various important challenges that face us, as an organization, purely on the basis of the volunteer effort of so many of our dedicated members. The need is steadily growing, in my opinion, to consider the possibility of a paid professional staff—but that is for another discussion.

Nothing in what I have said is essentially inconsistent with the idea of oiling and adjusting the basic arbitration machinery; I would hope that continued *new* efforts would be made in that direction, but always with the recognition that *we* cannot allow the basic standards, of what we have all regarded as a very high calling, to be lowered.

If you will permit me, Plato said it very well, a long, long time ago:

> "This gift which you have . . . is not an art, but an inspiration: There is a divinity moving you, like that in the stone which Euripides calls a magnet, but which is commonly known as the stone of Heraclea. For that stone not only attracts iron rings, but also imparts to them a smaller power of attracting other rings: and sometimes you may see a number of pieces of iron and rings suspended from one another so as to form a long chain: and all of them derive their power of suspension from the original stone. Now this is like the muse, who first gives to men inspiration herself; and from these inspired persons a chain of other persons is suspended, who take the inspiration from them."