CHAPTER 2

REFLECTIONS ON LABOR ARBITRATION

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In 1965 The University of Illinois Press published a book which I had written called *The Labor Arbitration Process*. The book was a distillation of what I thought I had learned while laboring in both the academic and arbitration vineyards during the twenty-year period immediately after World War II. By now another twenty years have passed and, as fate would have it, during that period I have hardly arbitrated at all because I found myself involved in academic administration with no time for outside interests. All of which is to say that my qualifications for talking to you about labor arbitration today are, to say the least, questionable. The most optimistic way to characterize my appearance is to say that my removal from the day-to-day scene for the last twenty years has made it possible for me to view the terrain more objectively. More realistically, I could be viewed as the distant relative of the famous Emperor who paraded without his clothes!

In any event, having made the commitment to appear, I began to search around for what I might say. Two observations which I had made in the 1965 book came to my mind, and it is on them that I base most of my remarks.

The first is found in the Acknowledgments section which precedes the actual text of the book. In it I said: "In a dynamic society, we must not expect that labor arbitration will remain the same. The industrial world is changing, and the continued success of labor arbitration almost certainly depends on its ability to respond to new needs."

The second item which I want to recall comes in the opening lines of Chapter 1 and it reads:

> "From the vantage point of 1964 [which was when I wrote most of the book] the American experience with labor arbitration seems to

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be clearly divisible into three periods. The first extends from 1865, when the iron puddlers of Pittsburgh arbitrated wages in the first recorded arbitration proceeding, to the outset of World War II in 1941; the second from 1941 to the *Lincoln Mills* decision in 1957; and the third from *Lincoln Mills* to the present (1965)."

Looking back on those observations today, the first, that our society was dynamic and that labor arbitration would inevitably change as the society changed seems to have been clearly right. The second observation, that labor arbitration was in a third period which started with the *Lincoln Mills* decision in 1957 and was still continuing in 1965, is debatable mostly in the sense of whether we are now in a different and fourth period not known before.

Since arbitration is simply a mechanism for settling disputes, it has to take place in the milieu provided by the larger society. Therefore, let me start with a reminder of how much our society has changed since 1965.

The Changed Society

Though signs of change were on the horizon in 1965, manufacturing still employed a high percentage of our people and the great mass production industries—such as steel, automobiles, rubber, chemicals, aluminum—were bastions of strength for the labor movement. Foreign competition had grown in importance, particularly in industries like textiles and shoes, but had left steel and automobiles relatively unscathed.

By now that scene has been greatly altered. Manufacturing is no longer the dominant source of employment. Instead we are looking at the service and high technology industries. Foreign competition in steel and automobiles is so serious that both manufacturers and unions have sought protection through legislation. Production cost differentials and/or higher productivity through more advanced facilities have enabled foreign goods to push aside many American-made products. And as our manufacturers modernize their plants, they turn more and more to automated machinery which in turn replaces employees. Thus even in the current year, the auto industry, through enjoying very good sales, has thousands of workers previously laid off who will never return to work in the auto industry. The same can be said for steel.

Apart from foreign competition, we have also seen great domestic changes. The shift to the "Sun Belt" is a well-known phenomenon which has had an enormous impact upon New England and the Middle West. Moreover, a population which continues to grow older throws an ever-increasing burden on that segment of the work force which is of working age. Meanwhile, we have built into our political and social expectations a series of entitlement programs which are difficult to support.

As we struggle with the full employment problem, we find ourselves either unable or unwilling to resolve the problem of the flood of illegal immigrants which continues to cross our southern borders. And at the same time, our internal social revolution has at last opened the door to women so that the number of women who now work is vastly different than it was in 1965.

To complicate the problem still further, we are now aware of the water and air pollution problems which we have been creating for so many years. We worry about health impairment from pollution, but we don't know how restrictive we can be without losing so many jobs that the community will prefer to take its chances with pollution.

And then there is the energy problem. Though we always knew that our oil and gas resources were exhaustible, we continued to expend them at an alarming rate. Finally, we discovered how dependent we had become on the oil resources of the Middle East, an area of the world with a long history of instability. The impact that this chain of events has had upon inflation, production costs, our style of living, and defense spending has been immense.

As to the physical facts of change, I need not go on. We read about them daily. We worry about their long-run significance. We see industry engaged in a steady stream of mergers, and we see bankruptcy legislation used to invalidate labor contracts or to cope with asbestos suits. We see the great industrial unions reduced in size and strength with little prospect that the service industries can absorb laid-off employees at anything like their previous wages. We see a shift in the power base of the trade union movement as public employee unions come to represent an ever larger percentage of the organized work force. We may also be seeing something of a change in the approach of the labor movement, with more emphasis on legislation as against collec-

tive bargaining. Witness the number of states that have passed or are considering legislation requiring employers to go through a legislatively prescribed procedure, often including a form of arbitration; before dismissing employees.

It is unnecessary before this audience to detail the immense changes that have taken place in the labor-management scene since 1965. Included in that recitation would be examples of companies and unions that are trying a more cooperative approach, the many instances in which employees have bought out a failing company and tried to keep it going profitably, and a shift before administrative agencies and courts away from traditional labor law as set forth in the National Labor Relations Act and its state counterparts toward more comprehensive federal legislation covering such subjects as discrimination, occupational health and safety, and pension plan controls.

Let me add a few words about attitudinal changes as distinguished from purely overt physical changes.

Attitudinal Changes

In general, Americans have always been optimistic about the future, and with good reason. We were blessed with an immense and diversified country, rich in natural resources, politically unified so that domestic barriers so common in many other areas of the world did not stultify either social or economic exchange, and confident that whatever happened to the rest of the world we were protected by two great oceans.

Things have changed now. Oceans cannot isolate us. Some of our resources are depleted so that we must turn elsewhere in the world. The atomic genie is out of the bottle, and we may be only ten minutes away from total destruction as the superpowers continue to play "chicken" with one another. We have lost our first war, in Viet Nam, largely because we finally realized how wrong we were to be there in the first place. We have suffered a profound disillusionment with our government and witnessed the unprecedented resignation of both a Vice President and a President, both facing the alternative of impeachment. We have lived through unthinkable assassinations of public figures. We worry about the disintegration of the family in the face of a very high divorce rate and changing social mores. We know how many of our welfare recipients are single-parent households. We are deeply divided over how to deal with teenage pregnan-

cies despite the fact that the prospects for children brought into the world in such a circumstance are dismal.

One of our major present concerns is the widespread addiction to drugs and alcohol. You see the problem in cases which you hear. Society sees its impact on the family, the work place, in the world of sports and entertainment, and in educational institutions.

Thus one senses in the American people a feeling of both despair and frustration. In the past we have always thought that however great our problems, we could cope with them and we could find constructive solutions. Now we are faced with problems which have no apparent answer. How do we deal with a weapons race which is out of control? What do we do about the shocking unemployment among some segments of our population? How do we deal with the flood of illegal immigrants who flee from their own lands in desperation? How do we deal with pollution which increasingly threatens our lives without at the same time crippling the economy? Are we at a point in time where we can no longer look toward a higher standard of living and must accept a decline in our past hopes? And if there is no immediate solution to these problems, how do we inspire our people to once again reach for the stars?

The Future of Labor Arbitration

By now I may have taken much longer than you might have thought necessary to document the fact that the world of 1984 is a very different place from the world of 1965 when I last surveyed the arbitration field. Now it is time to see how arbitration looks in 1984. And it is time to be a little more cheerful! Let me start with what seem to me to be very favorable developments in the world of arbitration.

Because there is today great dissatisfaction with the way the American legal system is working, arbitration is receiving more attention as an alternative. The courts are alleged to be too costly, too time-consuming, too complex, too inaccessible to the poor, and too adversarial to deal properly with disputes which involve sensitive human problems. Chief Justice Burger has hammered away at this theme for years, the American Bar Association has a special committee looking at the problem, and there are widespread attempts to experiment with viable alternatives.

Among the alternatives spoken of with enthusiasm is arbitration. Accordingly, one is seeing arbitration spread into many new fields. It has found favor in environmental disputes, in the field of domestic relations, in product-warranty cases, in courts for small-claims cases (incidentally, some of the "small claims" today are considered to be suits under $20,000), and in nonunion plants. Public employers have now accepted grievance arbitration, though with some limitations; unions are using an internal disputes machinery to decide such questions as the appropriate fee payment in agency shop cases; schools now utilize the process both under their union contracts and in some kinds of student disputes; major league sports are heavily into arbitration under their player contracts; and an increasing number of states have passed or are considering legislation which provides arbitration of dismissal cases where no labor contract exists.

From all of this it is fair to conclude that arbitration is now well accepted, that it is viewed favorably in an increasing number of fields, that adaptations of it are being made to fit new circumstances, and that there is every reason to suppose that it will continue to prosper.

To this should be added the observation that both the courts and the National Labor Relations Board seem to continue to support the doctrine of the Trilogy, with only occasional departures when a new situation arises. Deferral to the arbitrator on the part of both the courts and administrative tribunals continues.

Despite these generally favorable signs, there are some clouds on the horizon. While talking with a nationally prominent labor leader not long ago, the subject turned to the current dissatisfaction with the court system. As our discussion ended, he said to me, "Well, if we solve the problem of the courts we can then turn to what to do about arbitration. It is getting just as bad in many ways." We continued the conversation just long enough for me to find out that he had many of the same complaints about arbitration that the public does about courts. It was, he thought, too expensive, too time-consuming, too legalistic, and too isolated from the real world of work.

My friend from labor may or may not be right, but he was deadly serious. And by now I have heard the same thing from enough others to know that the concerns are genuine. Is it possible that there is something about every dispute resolution

process which causes it, over time, to lose the very attributes which originally made it popular?

In this connection, you might be interested in a recent report from the Rand Corporation's Institute for Civil Justice. A study was made of Pittsburgh's model arbitration program for civil cases. Under the system, plaintiffs make their own estimates of damages, and those seeking $20,000 or less must submit their cases to arbitration. The panels that decide the cases consist of three arbitrators, each of whom is an active member of the bar. The panelists serve voluntarily, and are paid $100 a day for hearing four or five cases that take 30 to 45 minutes each. There is no shortage of volunteer panel members, and about half the lawyers in Pittsburgh are on the panel list.

Although the Institute's researchers who conducted the study found a "rough and ready" quality about the proceedings, a survey of the litigants showed a very high degree of satisfaction with it. Interestingly, one of the arbitrators said of the procedure: "If you're looking to do justice, you must sometimes bend the rules a little for these people. Public perceptions of justice are much more important than adherence to legal niceties."

As a result of this approach, the Rand report observes, "there is a tendency by the arbitrators to come down on the side of what they perceive to be fairness."

If there is a familiar ring about that language it may be because those of us who took our basic training with the War Labor Board had drummed into us the message that it was more important in labor settlements to reach a conclusion that the parties could live with, and which appealed to them as fair, than it was to do abstract justice. The model placed before us was the marriage, where we were told the parties must nevertheless continue to live together. Unfortunately, the model seems to have dissolved, but the message remains clear. It is important in any kind of an adjudicative proceeding that the parties emerge believing that they have had a fair hearing, that the merits of the case did not get lost in a procedural forest, and that the conclusion bears a meaningful relationship to the problem they thought they had in the first place.

There are, of course, some other problems for arbitrators. Much of the work that many of us did in the earlier years was in manufacturing industries. The volume in that segment of the economy is likely to diminish as employment goes down. It may

be replaced by the many other areas which now utilize arbitration for the settlement of disputes. But in some of those areas the common format for labor arbitration is hard to apply. In the environmental field, for instance, two serious difficulties present themselves. One is the fact that most environmental disputes are multi-party affairs in which it is difficult, perhaps impossible, to get all the parties together in a single proceeding. The other is that there is no ready source of payment for the arbitrator. Companies which are involved in environmental disputes may readily pay their share of the cost, or may, in some cases, even be willing to pay the entire cost. The latter is usually unacceptable to the other parties because it is perceived as a conflict of interest. On the other hand, many citizen organizations which are very active in environmental matters do not themselves have funds to finance a share of the cost of the proceeding. Charitable foundations have shown an interest in providing funds, but this cannot go on indefinitely. Steps are being taken to see whether it would be possible to create a "neutral pool" of money to which resort could be had, but there are problems which may not be surmountable. Thus the ready, well-accepted format of the labor arbitration is not always easy to apply in new fields.

Another area which in some ways appears to be a natural for the arbitration process has proven largely unworkable. I refer to cases involving discrimination on the basis of race, ethnic origin, sex, and age. Government processes before administrative agencies, or court proceedings, are often long delayed or overlapping. Yet the litigant may possess what is perceived to be either a constitutional or statutory right which cannot be waived in favor of arbitration.

The arbitration process is somewhat less than satisfactory in the area of public employment cases, where wages and fringes are being arbitrated for certain categories of employees, like firemen and policemen. For years the claim was made that arbitrations of this kind were unsatisfactory because arbitrators made overly generous awards. Enough studies have now been done to pretty well document that this is not the real difficulty. Decisions on the part of arbitrators in such cases do not appear to have been out of line with private settlements. What does happen, though, is that the arbitrator is faced with an insoluble problem. The public agency is often without the resources to increase the wages or benefits unless there is increased tax revenue, and the public is frequently unwilling to pay higher taxes.

The claim of the union in such cases may be valid and to deny it is inequitable. But if an award is made which is beyond the means of the agency, it must either reduce employment or take the money from other agencies which are not involved in the proceeding. The latter seems procedurally unfair and the former is not a very rational device for planning expenditures.

In short, labor arbitration has not yet reached a state of nirvana. Its position is, on the whole, favorable, but problems remain.

Let me summarize and state some brief conclusions.

Conclusions

I started out with two questions arising out of my 1965 book. One was whether I was right in concluding then that labor arbitration would have to change to meet new conditions in the future.

If anything, the changes in the ensuing twenty years have been greater than I would have anticipated, and I think the process has pretty well accommodated. Well enough, in fact, that it has furnished a model which could be applied in other fields.

On the question, whether the period which started with *Lincoln Mills* continues or whether we are in a new era, I am inclined toward the view that we are in a new era. This may be debatable, but the changes are so great that I suspect future students of the period will say that sometime in the late 1970s we entered on a new period in which the problems of arbitration had changed enough to classify the period as new and different.

As to the state of arbitration, I think the signs are generally favorable but with some clouds appearing on the horizon. The most serious, in my view, is whether in another decade or two the present criticisms as to cost, timeliness, technicalities, and isolation from the world of work will have escalated.

Finally, I would like to tell a Frances Perkins story. Those of you who did not have the pleasure of knowing her will nevertheless remember that she was the Secretary of Labor all during the Franklin Roosevelt presidency. As a preface to the story, I should say that the older one gets the more it becomes apparent that human institutions are imperfect. And because this is so, we are prone to tinker with them with a view to improvement. So as you tinker with labor arbitration perhaps you will remember the Perkins story.

In her earlier days in New York, Secretary Perkins had worked with both Theodore Roosevelt and Al Smith on social legislation, particularly for the protection of women and children against the hazards of sweatshop employment which then existed. She was ultimately successful, and New York was a pioneer state in enacting protective legislation of this kind.

Some years later Secretary Perkins' daughter, then being a grown woman, met the daughter of a colleague of her mother in that earlier adventure. As the two women chatted, the other woman said to the Perkins daughter, "And what is your mother campaigning for now?" To which the Perkins daughter accurately, but somewhat wryly, observed, "She's working on juvenile delinquency."

In the tinkering you will do in an effort to improve the labor arbitration mechanism, may you be spared from working subsequently on the equivalent of juvenile delinquency!