

CHAPTER 1

THE PRESIDENTIAL ADDRESS: THE ADVERSARY SYSTEM IN ARBITRATION

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I.

Once upon a time a group of monks lived in a monastery in a remote part of the world. They were sworn to perpetual silence, contemplation, and prayer. When a new abbot was appointed, however, he decided to initiate a program of allowing one monk to speak each year on a certain saint's day. On the occasion of the first speech, the monk chosen for the honor was short and to the point. He rose at the table, looked around at his colleagues, and said: "My God, this food stinks!" Silence fell on the monastery again. Slowly the months passed, one by one, until a year later the time came for another speech. The monk chosen to give this second speech proved that he was a good listener. When the time came he rose and said: "I don't think the food is so bad." Again the quietness of the contemplative life returned, to await the cycle of the seasons which inevitably brought back the time for the next speech. At this point the abbot himself chose to give the talk. Looking sadly at the group of monks around the table he said: "If this constant bickering does not cease, I shall be forced to discontinue the practice of the annual lecture."

The story illustrates an important point of difference between the National Academy of Arbitrators and contemplatives. I will not say the only point of difference, for I have observed other habits and practices of my colleagues which are decidedly unmonkish in character, perhaps even Rabelaisian. But it certainly is true that this Academy, far from seeking to avoid controversy and debate, is dedicated to encouraging at every turn a searching and robust dialogue regarding the arbitration process of which we are all practitioners. Although we earnestly hope

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that our discussions will not degenerate into "constant bickering," as the abbot feared, we are ready to run that risk. A primary objective of the Academy, as stated in its constitution, is to promote the study and understanding of the arbitration of labor-management disputes. To that end our annual meetings feature nationally known speakers who address fundamental questions about the process, often disagreeing with each other, always pressing their themes energetically and vigorously. Our meetings are not known for any extended periods of silence.

This Academy, of course, represents different things to different people. As an organization it embodies the elite of the profession, men and women in the United States and Canada whose high acceptability to the parties has gained them reputations as professional arbitrators. To be selected by one's peers for membership is simultaneously an honor and the assumption of an obligation, a recognition and a challenge, a fulfillment and a promise. The Academy is also a steadfast promoter of the arbitration process, seeking to foster the highest standards of integrity, competence, honor, and character among those who are engaged in the profession. And, of course, the social and collegial aspects of the organization cannot be overlooked. The warm and lifelong friendships which develop are one of the prize fruits of membership.

But there is still another conception of the Academy, resistant to the contingencies of time and numbered annual meeting, which I am invoking today. In this conception, the Academy is a timeless forum for the exchange of ideas and opinions, suspended indefinitely in space and in time, each annual meeting and encounter preserved in some eternal animation of the mind's eye. In this Academy the inestimable Abe Stockman is still delighting my ear with his charming wisdom, and the eyes of Father Leo Brown are twinkling as he prepares to deliver one of his pithy remarks. Though sometimes found only in the memory and the imagination, this Academy is most readily encountered on the pages of the past Proceedings (and yes, on those to come). Much like rewinding a videotape, one can go back to another time and another place, to relive once again a spirited exchange, or to ponder the words of the giants of the profession.

When Plato chose a garden outside of Athens in which to meet and talk with his friends, the school which developed came to be called an Academy since that was the name of an earlier owner of that plot of ground. The land owned by Academus was origi-

nally a sacred precinct, one which is surely not less hallowed because of its association through the ages with the riveting dialogues which took place there. The philosophical questions which were raised and debated remain a permanent legacy for those who come after. In that sense, Plato and those with whom he walked in that garden are still alive.

While arbitrators discourse on a more pedestrian level, I think in some ways similar things can be said about the activities of this National Academy of Arbitrators. We are, of course, as far from being philosophers as we are from being monks. But while our dominating subject matter and our range of inquiry are considerably narrower than those of Plato's Academy, we share a trait in common. This Academy too has raised and pursued the basic questions of our profession, inviting into the exchange all of those who are informed and concerned about the process, examining and re-examining topics which lie at the root of our enterprise.

In our discussions, answers to problems are propounded but they are never offered as unequivocally final. Of Plato's group, it was said "The ancient academy doubted of everything, and went so far as to make it a doubt, whether or not they ought to doubt." The intellectual needs of arbitrators are perhaps too pragmatic to admit that degree of skepticism, for those who serve as decision makers are constantly seeking a solid footing on which to support their professional judgments. Still, many of the underlying principles and premises of arbitration remain a subject of hot controversy.

The Academy has always been a staging ground for debates of major importance to the growth and development of the process. In the thirty-eight year history of this organization issues of nuclear significance have been addressed: to mention but a few, the competing roles of mediation and adjudication; the interface between external law and the contract; the appropriate standards of proof in an informal forum. On subjects of this nature we are free at any time to return to a past debate and to join it just as if it were still in progress, though the event itself may have taken place five or ten or twenty years ago. Today I want to return to one such subject, lured back by the lambent memory of a scintillating exchange between one of our members and two distinguished lawyers who serve as representatives of the parties.

I am rewinding the tape.

II.

At the 35th Annual Meeting in Washington, D.C., the redoubtable Benjamin Aaron was invited to present a paper on a perennially fascinating subject, the role of the arbitrator in ensuring a fair hearing.¹ In his usual direct and magisterial style, Ben introduced his topic by identifying those to whom fairness might be due in the arbitration context. He identified the following as the proper objects of the arbitrator's efforts to assure a fair hearing: the grievant, the parties and their representatives, and the arbitration process itself. Ben then proceeded to analyze under each heading some of the questions that confront an arbitrator in conducting a hearing.

A substantial portion of the paper was devoted to the interests of the grievant. The speaker canvassed some of the familiar conundrums over which arbitrators agonize in endeavoring to assure fair treatment of employees:

- the seniority case in which the successful bidder is not present at the hearing as the union argues that a senior employee, the grievant, should have received the promotion because she has substantially equal skill and ability;
- the discharge case in which the grievant is not present at the hearing;
- the discharge case in which the grievant is present and the company calls him as its first witness;
- the discharge case in which the grievant indicates that he does not plan to testify.

For each of these and similar problems Aaron offered his own distinctive response, confessing later that the views of any particular arbitrator are "inevitably idiosyncratic,"² though presumably the ultimate goal of fairness to the grievant remains a common objective of all. As I sat and listened to the maestro perform that Thursday morning, I was by turn titillated and challenged, mentally measuring my own opinions on these matters against those advanced by the speaker. In a seniority case,

¹Aaron, *The Role of the Arbitrator in Ensuring a Fair Hearing*, Arbitration 1982: Conduct of The Hearing, Proceedings of the 35th Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1983), 30.

²*Id.* at 62.

unlike Ben, I had never called as my own witness the successful junior bidder since in the *rusticum iudicium* of arbitration I believe the company will normally represent her interests adequately. On the other hand, I certainly do make it a point to advise a nontestifying grievant in a discharge case of the possibility of adverse inferences being drawn from his silence. Whatever the variances in our individualized approaches to the subject, however, I harbored no doubts about the validity of the speaker's premises.

On his worst days Ben Aaron is only brilliant. That morning he performed up to par. But there was more to come on the program. The tempo began to accelerate as the two attorneys rose to comment. Andrea Christensen, representing management, spoke first in reviewing the legal standards announced by the courts in vacating arbitration awards for procedural defects.³ While the Christensen paper is admirable and certainly deserving of equal attention,⁴ it is the second response of that day to which I will devote the rest of this paper.

Speaking as a representative of labor, Judith Vladeck went back to first principles to challenge some of the basic assumptions on which Aaron had relied.⁵ In football lingo, she hit him from the blind side, a description which will not be taken as pejorative by those who know the rules of the game. She questioned whether the grievant really should be considered as having an interest separate from the union. She called for the arbitrator to be an umpire between the parties, that is, the union and company, and not "a surrogate representative of the grievant employee."⁶ She deplored the tendency of arbitrators to see themselves as independent searchers for the truth, instead of moderators operating within an adversary system. She reminded us that the parties are entitled to get what they expect procedurally, and the arbitrator's role is to serve that objective.

There is a well-known television commercial in which a famous singer projects and holds a note until the vibrations of sound cause a glass to shatter into pieces. The Vladeck presentation sent up its own vibrations across the meeting room that day,

³*Comment, supra* note 1, at 49.

⁴For some later proposals of this speaker to diminish the adversarial nature of the process, see Christensen, *What Employers Can Do About DFR Suits*, *The Changing Law of Fair Representation*, ed. Jean T. McKelvey (Ithaca, N.Y.: ILR Press, 1985), 117.

⁵*Comment, supra* note 1, at 55.

⁶*Id.* at 58.

inciting responses in members and guests on a wide range of fundamental issues in the arbitration process, such as the proper role of the arbitrator in running a hearing, the classification of arbitration as a purely adversarial exercise, and the rights of the individual grievant in a system of collective representation by a union. I am happy to report that as far as I know no members of the audience actually shattered into pieces, though I did detect a few bruised egos. The vigorous discussion which followed her speech signaled that some tender spots had been touched.

The raising of these issues was not done casually. The speaker noted that the arbitration process has reached a level of maturity which calls for fresh analysis of some of the conventional assertions of its practitioners. To assist in that project, Ms. Vladeck carefully formulated three basic questions suggested by the Aaron paper which she believed ought to be the focus of a new examination. It is to these three questions that I will now turn, hoping to make some modest contribution to what undoubtedly will be a continuing debate over these matters in the future.

The three questions are vintage:

1. Is the view that the arbitrator is concerned with balancing the interest of *three* parties—the employer, the union, and the grievant—correct? Or is it an arbitrator-created fiction?
2. Is the purpose of an arbitration hearing “to come as close to the ‘truth’ about the matter in dispute as it is possible for fallible humans to achieve in the circumstances”?
3. Is the view of fairness in the arbitration context as requiring the equivalent of “due process” correct, or is fairness in the arbitration context something else?⁷

To each of her basic questions, Ms. Vladeck gave an emphatic negative answer. From my comments here today, you will be able to tell that I liked her questions better than I did her answers.

III.

There is a plausibility to the proposition that the interests of the grievant—at least so far as they are considered to be separate and distinct from those of the union—are not properly cognizable by the arbitrator. After all, the arbitrator is retained solely by the named parties to the collective bargaining agreement, that is,

⁷*Id.* at 56. The phrasing of the questions is slightly altered from the original. Quotation marks in the second question are used by Ms. Vladeck to refer to a statement made by Aaron.

the union and the company. It is they who negotiated and signed the contract under which the arbitrator receives his authority to proceed. The election by the parties to use arbitration as an instrument for the resolution of their disputes is merely an extension of the collective bargaining process. That is why the arbitrator, in a telling phrase, is said to be the creature of the parties. Hence, any attempt on his or her part to pierce the "institutional, representative veil"⁸ is a usurpation of authority, not to say a betrayal of the trust which has been extended by the real parties to the dispute. Finally, so the argument runs, such a misguided concern for the putative rights of the grievant threatens to undermine the exclusive representative status which the law grants to the union. And without the union an employee has no rights at all in the plant.

Perhaps this mention of the law, however, ought to give pause to an uncritical endorsement of the notion that the interests of the grievant are always subordinate to those of the union in arbitration.⁹ Indeed, we know from a steady stream of cases in the courts that such a claim is of dubious validity. Even the dullest arbitrator is aware that legally the union operates under a duty of fair representation to the grievant. Under those circumstances, whatever the logic of the argument to the contrary, does it make any sense for an arbitrator to remain indifferent to the possible neglect or suppression of individual interests which the courts may find to be grounds for invalidating an award? Understand I am not at this point inquiring as to when or how the arbitrator might perform this prophylactic function of holding the proceedings to the standards of the law; but only asking whether in principle such an objective is so offensive as to be roundly condemned.

Yet the answer may fairly be given that the obligations which the parties owe to the grievant under the law ought to be left to the courts and the agencies, since the arbitrator is ill-suited to perform such a service and in any case has never been asked. To the degree that this response drives home the point that the job of the arbitrator is not primarily one of monitoring the legal

⁸Wirtz, *Due Process of Arbitration*, The Arbitrator and the Parties, Proceedings of the 11th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1958), 35.

⁹For an analysis of the individual's right under the collective bargaining agreement, making the point among others that the union does not "own" the grievance, see Summers, *Measuring The Union's Duty to the Individual: An Analytic Framework*, The Changing Law of Fair Representation, *supra* note 4, at 145.

obligations of the parties, it surely deserves attention. But it ought not be forgotten that the same conduct which later may trigger an action in the courts may also pose immediate questions for the arbitrator which must be answered in the context of the forum in which he is functioning. After all, the hearing is not intended to be a prelude for judicial action; to the contrary, it is expected to be the means for finally resolving the dispute. If an arbitrator is chosen to decide the complaint of a particular grievant, he cannot help but observe the level and the direction of representation which is being provided by the union because it impinges on the performance of his own function. Can it be maintained that the arbitrator ought deliberately to ignore such matters as being irrelevant to his duties?

Admittedly, the grievant is not a party to the proceedings in any formal, legal sense. He could not have brought the matter to arbitration, and he will not be able to challenge the award directly in the courts. But these statements are merely descriptions of the employee's legal rights in the utilization of the forum. The specifications of the merits of his contract claims, once the parties have decided to move to the terminal step of their procedure, is something else again. That will be achieved in arbitration. Similarly, it is in that process, and not at the law, that the determination must be made of whether a grievant has any independent interests in connection with those claims and, if so, how they ought to be treated procedurally. It is necessary to emphasize that the legal rights of a grievant in getting to arbitration are not the final measure of his contract rights in arbitration. While the process is positioned in a legal system, with the approaches to it and the retreats from it closely guarded by judicial process, arbitration constitutes an independent and distinct forum. Arbitration may be considered a substitute for the courts, but it is not a derivative.

When one turns to inspect the arbitral environment created by the parties themselves, there are unmistakable signs proclaiming that the interests under review encompass those of the grievant as well as those of the parties. In the first place, the arbitrator is asked by the submission to decide whether this individual employee was properly discharged, or denied a promotion, or deprived of his vacation pay. A flesh-and-blood person who filed the complaint—the employee who is grieving—is sitting in the hearing room. Indeed, except for the most extraordinary circumstances, the parties would not dream of proceeding without

him. To be sure, the grievance of that individual would never have reached the present stage unless the union somewhere along the line had approved it for arbitration. But the fact is the union, for whatever reasons and with whatever reservations, did approve it. The Rubicon has been crossed.

Throughout the hearing day the focus of the evidence is on the individual whose complaint has been certified for determination. The specification of his rights or lack of them, their vindication or rejection, are conspicuously the purpose of this proceeding. Legally and technically it may be said that it is the union's grievance, but the union is not losing a job, nor being denied a promotion, nor being deprived of vacation pay. There are other types of cases, of course, in which the designation of a grievant is purely formal, when the issue to be arbitrated urgently concerns the group as a whole, such as the meaning of contract provisions regulating vacation scheduling, or a work jurisdiction dispute. We may put those cases aside for now, since they seldom raise the issue under consideration. But where the nature of the dispute centers narrowly on the fate of the individual, it is virtually impossible for the arbitrator to doubt that his distinct and separate interests are being tried at the hearing.

The point urged here is not simply a psychological one: that the arbitrator will probably respond sympathetically to the plight of another human being whose job interests have been put in his hands. The reason for the arbitrator's concern does not rest on sentiment, but derives from the character of the function he is performing. Conceding that the arbitrator is a creature of the parties, what kind of a creature is he? The conventional understanding, a product of many spirited battles of the past, is that the arbitrator in a rights dispute is not a mediator or a problem-solver but basically an adjudicator. His function, then, is to adjudicate. And the essence of adjudication, as Lon Fuller once magnificently explained to this Academy,¹⁰ is the assurance offered to an affected party of an opportunity to participate in the proceedings by presenting proofs and arguments for a decision in his favor. That is what distinguishes adjudication from other forms of dispute resolution. Surely it must be conceded that the affected party in a discharge case is

¹⁰Fuller, *Collective Bargaining and the Arbitrator*, *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), 8, 24-28.

the grievant as well as the union. While the union may be presenting the case only because of the group interest at stake, it is the grieving employee in whom that group interest is now unavoidably embodied. Unless the adjudicatory process is to be a sham, therefore, the interests of that individual must be seriously taken into account by the arbitrator not merely as a matter of grace but as a matter of right.

Confusion sometimes surrounds this point because of a misunderstanding of the idea that arbitration is an extension of the collective bargaining process. It would be wrong to think that this truism means the arbitrator is expected to preside over a continuation of the wheeling and dealing that characterized the bargaining sessions which led to the contract. The extended form which collective bargaining takes when it reaches the stage of arbitration is no longer negotiations but rather the adjudication of a dispute over the proper meaning of standards already adopted by the parties. Prior to coming to arbitration the parties were free to compromise the grievance, or ignore it, or trade it off for another. Even after having submitted to arbitration, they may still mutually decide to withdraw it and resume their negotiations. But while the dispute remains in arbitration the parties are subject to the demands of a process in which the claim asserted by the grievant will no longer be resolved by their will and pleasure but instead by the unyielding norms of a contract to which they are bound. When we say that arbitration is an extension of the collective bargaining process we simply mean that it is designed to pin down and validate what the bargaining has actually produced. But the method by which that validation is achieved is now radically different from the methods used in negotiations. The outsider who is invited to make the decision will render it not in the abstract but in response to the particular situation of the individual complainant, in other words, in contemplation of the interests of the grievant.

A fear is expressed that if the arbitrator becomes preoccupied with the interests of the grievant he will place the exclusive representation status of the union in jeopardy. There is no denying that without the union there would be no employee rights to begin with. Group rights are indispensable to the realization of individual rights. But fears that the arbitrator will aggrandize union power by running a hearing in which grievant's interests are consciously and sensitively protected are misdirected. When a union comes into arbitration representing a

grievant it is implicitly asserting that the group interest for which it stands is served by the implementation of that employee's rights under the contract. The arbitrator is entitled not only to make that assumption but further to pursue those measures necessary to protect the grievant's interests in the conviction that the union itself must desire such a result. The supposed dichotomy between an arbitrator running a due process hearing with respect to a grievant's rights under a contract and a union's enjoyment of its exclusive representative status is in principle a contradiction. Only if it is assumed that the union has an interest in conflict with that of the employee it purports to represent, or for some other reason wishes to qualify the consideration which the grievant will receive, does a problem surface. And in an adjudicatory system those are the situations in which the arguments for disregard of the employee interests sound extremely weak, to say the least.

IV.

While the first question before us deals with the issue of whose interests are properly entitled to recognition, the second is phrased in terms of the purpose behind the hearing itself. A determination of the purpose behind the hearing obviously will dictate the role which the arbitrator should play in conducting it. And the role of the arbitrator as hearing officer is crucial in controlling the manner in which the adversary parties perform. You will recall that the second question is formulated as follows:

Is the purpose of an arbitration hearing "to come as close to the 'truth' about the matter in dispute as it is possible for fallible humans to achieve in the circumstances"?

For the uninitiated such a question may seem rhetorical. If the matter in dispute at a hearing is essentially factual, with various witnesses offering conflicting versions of a past event, what other purpose could there be than to determine who is telling the truth? Or if a decision turns on the interpretation of contract words in the light of a history of negotiations in their adoption, isn't the object of the hearing to establish which side has a truer view of what the evidence reveals regarding the intentions of the parties (or the next best thing, a rational attribution of intention based on statements and events)?

Why is the question raised at all? Perhaps, sensing a certain sarcasm behind the inquiry, one might attempt to explain it by reference to a modern philosophical skepticism about the concept of objective truth, which in sophisticated circles is thought to be a delusion and a snare.¹¹ However, that would take us into deeper waters than are necessary. The more relevant explanation for our purposes is much simpler and relates directly to the anxiety which seizes the trained advocate when he contemplates the possibility that the arbitration process may turn out to be something different from the adversary system which has developed in the courts. Particularly for the lawyer who engages in arbitration, such a departure would threaten to limit his control and dominance of the process. And to be an advocate is to know in your bones that there are some parts of the whole truth that are bound to be detrimental to your client.

The theory of an adversary system is that each side to a dispute is best equipped to develop and present its own case in the most effective way.¹² Ideally, the advocates will appear before an impartial tribunal which does not taint its objectivity by becoming enmeshed in the partisan interests of either side. The system, though not necessarily a prerequisite, is highly congruent with a system of adjudication to resolve disputes, since the latter requires decision on a record in which those affected are able to influence the resulting decision by their participation in offering evidence and making arguments. What is not so often recognized in debates about the desirability of the adversary system is the ultimate justification which must be offered for it: that it is a better and more efficient method than any other available for ascertaining the truth and providing for the just resolution of disputes. If those claims are not verified, insistence upon a rigid adherence to the system is questionable. Obviously the system cannot be justified by reference merely to the selfish interests of one or another of the parties to the dispute, nor can it be persuasively supported by arguing that it serves the convenience of those engaged in representing those parties professionally. In

¹¹Even though such a skepticism is an outgrowth of philosophical and religious battles far removed from the field of arbitration, the sentiment is sometimes evoked to shield the modern professional from pangs of conscience about the legitimacy of some of the requirements of one's daily job. If it is impossible to discover the truth about human actions, how can there be any responsibility for unpleasant consequences?

¹²A penetrating analysis of the system is found in Luban, *The Adversary System Excuse*, *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* (New Jersey: Rowman and Allanheld, 1983), 83.

other words, the adversary system is defensible as a good means to a desirable social end, but it is not an end in itself.

In our judicial system, where the adversary format has become entrenched through custom and past practice, a concern is often voiced that the pursuit of truth sometimes becomes a casualty of the zeal of advocates representing those who are in an adversary relationship. A good number of the attempts at reform of court procedures have been directed toward eliminating some of the trial-by-gladiator aspects of litigation. Yet the adversary emphasis remains a characteristic element of our court system, with lawyers on the one hand insisting that their obligation is exclusively to the interests of their clients and not to the elaboration of the truth of a disputed matter, while at the same time demanding that the judge not get involved in the development of evidence at the hearing.

The proper role of the decision maker or the impartial tribunal in an adversary system is a matter of recurring debate. In its extreme form the adversary system casts the judge as a moderator or umpire for the parties, with the latter the sole and final determiners of the evidence to be taken into account in deciding the dispute. In other words if the parties, or either of them, whether by deliberation or incompetence, fail to supply all the facts that could contribute to a fully informed decision of the matter, that does not entitle the judge to intervene or seek to adduce additional facts. In the last analysis, therefore, the objective of the hearing is not really truth in the sense of that word which is relevant to fact-finding and decision making. Instead, the purpose of the hearing is to give the adversaries an opportunity to shape and describe the issue from the viewpoint of their special interests, after which a choice must be made between the two versions which they have offered. Truth may inadvertently be a product of this system but it is not a conscious goal. The question before us is whether this is the model that arbitration should embrace.

Arbitration, which has borrowed so much from the legal system, has also tended to structure itself in an adversary format. Commonly the parties present their own case in a manner which roughly follows that of a civil trial: the order of presentation of evidence, examination and cross-examination of witnesses, closing arguments or briefs. Each side has an advocate to present its case and oftentimes the advocate is a lawyer. Since the adversary format has become so conventional in arbitration, it is sometimes

forgotten that there are other means for informing a decision maker about the dimensions of a case. Occasionally an arbitrator will run into a situation where the parties simply want to sit down at a table and jointly describe for him the details of a dispute, urging him to tell them what else he needs to know. More frequently, the parties while nominally employing the adversarial structure will mute its partisan tone by stipulations which cover much of the background of the case, leaving only a few critical points of difference between them.

As with most of its borrowings, arbitration has not adopted the adversary system because it was of legal origin but because it was efficient and convenient. For illustration, when the process found it necessary to determine what evidence ought to be admitted at hearing, arbitration gladly took what it could learn from the rules of evidence in the court system but it promptly adjusted them to its own special uses, even totally disregarding them where appropriate. Any feeling of obligation to duplicate the courts would be somewhat ludicrous, since one of the purposes of a resort to arbitration is the avoidance of courts. In the same way the adversary system as incorporated into the process is not a clone of what is found in the court system. To the extent that it serves the purpose of full and effective exposition of the information necessary for an informed and fair decision, the adversary format is a distinct asset to arbitration and should be encouraged. But one must be wary of the excesses of an adversary system which have no place in arbitration and, for that matter, may be directly antithetical to the goals of a collective bargaining relationship.

The reasons that arbitration should not be thought of as a purely adversarial procedure are basic. The parties have a continuing relationship which is always more important than victory in any single dispute. Moreover, *their long-range interests* (hard as it may be for them to acknowledge in the heat of a battle) are almost invariably served by seeing that the other side is treated honestly and fairly in the resolution of its complaints. Finally, the arbitrator cannot perform the job for which he is hired if the true dimensions of the dispute are distorted or obscured; this leaves the parties uncertain of how their contract applies in the actual circumstances which precipitated the grievance.

Accordingly, an arbitrator ought not to think of himself strictly as an umpire when he is conducting a hearing. Since the purpose of the hearing is to develop all the information which is

necessary and relevant to an informed decision, the arbitrator should not hesitate to inquire about whatever he thinks he needs to decide the case properly. He should, as occasion permits, inform the parties including grievant of the consequences of positions they may assume, as for example, that a failure to testify will lead to a negative inference being drawn. If he deems it essential (which seldom happens) he should feel free to call his own witnesses. But he should do these things cautiously, exercising the greatest prudence, and with mandarin courtesy. He should maintain a healthy respect for the professional competence and integrity of the parties and their representatives.

This last point merits repetition. My emphasis on the duty of the arbitrator to try and ascertain the truth about the matter in dispute is not a prescription for taking over the hearing, or becoming an independent seeker of the truth operating outside the framework of the process. The arbitrator remains bound to decide the case on the evidence developed at the hearing, and in most instances the parties will give him everything that is necessary to do the job of decision-making in a complete and satisfactory way. All of the wise admonitions against a hearing officer trying to take over a party's case ought to be strictly obeyed. Of course, the arbitrator does not know the case as well as the parties, and if not careful he may inflict harm on the parties by posing inept or irrelevant or embarrassing questions. Throughout my remarks there is a presumption, which some of you may find intolerably optimistic or even naive, that the arbitrator is a mature and experienced person with a sensitivity to collective bargaining relationships.

Yet when one reaches the bottom line the conclusion still stands that the first obligation of an arbitrator is to obtain a full understanding of the dispute consistent with the ground rules of an adjudicative system. This means that he must always be ready to assume the responsibility for seeing that all the evidence necessary to that end is developed at the hearing. Since the adversary format is only a means to an end, it should not be allowed to dominate the proceedings. Whatever may be said on behalf of a rigid adherence to such a system in our courts (a subject which remains controversial), its adoption in arbitration would be ruinous.

The model most often assumed in defending the use of the adversary system is the criminal trial, where legitimate concerns for vital political and civil rights are balanced against society's

interest in ascertaining the truth or falsity of an individual's guilt. Arbitration is quite dissimilar to a criminal proceeding, and political values are normally not at stake. If analogies are to be drawn, arbitration would more appropriately be compared to a civil trial. But even in civil litigation itself the main argument for keeping the judge in the limited role of umpire is the fear that his interventions may influence the jury and deny the parties the impartial judgment of their peers to which the law entitles them. In an arbitration, however, there is no jury. That fact-finding role is performed by the arbitrator himself, the very person who will be seeking to assure that all the facts are developed. While the interventions of the arbitrator must be delicate enough to avoid the appearance of partiality to either side, that is a different problem from the interference with adversarial presentations, and one concerning which the risks to be run are sometimes justified when balanced against the object which is sought.

Finally, the assumption behind the insistence on an unmitigated adversary system is that each side will be equal in the abilities of its advocate, a situation theoretically (but only theoretically) possible by the training and licensing of people as lawyers to represent others in court. In arbitration, however, there is no consensus that lawyers will always be utilized, and certainly none that the merits of one's case ought to depend upon the relative abilities of one's representative. In fact, disparities of representational abilities are tolerated in many relationships.

V.

An inquiry which began with an examination of the interests of the grievant and the proper role of the arbitrator in running a hearing expands in the third question to something much broader: the very nature of the relationship between the arbitrator and the parties. In effect, this final question asks if there is any responsibility at all on the part of the arbitrator to assure the integrity of the hearing. The third question is formulated thus:

Is the view of fairness in the arbitration context as requiring the equivalent of "due process" correct, or is fairness in the arbitration context something else?

For those who insist upon the prerogatives of the adversary system, the answer is that fairness consists simply in following what the parties have specified are the rules to be followed. In this view even if a grievant is “thrown to the wolves” in the course of the hearing, that represents due process if it is what the parties want.¹³

Due process is another of those terms borrowed from the law, one which even has a constitutional flavor. A commodious and flexible term, it is used in arbitration as in law to project the ideal of guaranteeing those procedures which are due in a given situation to assure fairness. In one sense of the term, due process may be thought of as the procedures which are established and familiar and customary in handling a dispute. Another definition of the term was advanced by Willard Wirtz in his seminal essay on this topic in 1958. Wirtz said:

I think of “due process” as being the exercise of any authority with a “due” regard to the balancing of the two kinds of interests, individual and group interests, that are involved in every situation arising in a complex society.¹⁴

You will recall it was precisely the attempt by Ben Aaron to strike a fair balance between the various interests which are found in arbitration that excited the response under examination.

One way to establish the process which is due in a given situation is to decide in advance of the adjudication what all the procedural rules should be. In that connection it is worthwhile to point out that whatever the distaste of a particular arbitrator for a designated procedural arrangement, it is within the rights of the parties to choose what they want. And once they decide, the arbitrator is bound either to follow their rules or refuse to accept the appointment. There is general agreement that the process belongs to the parties, and they are free to make of it what they will. Indeed, last year from this same pulpit Mark Kahn urged the parties to give more thought to the structure of their hearings and to take greater control of the process.¹⁵ Most of us would not hesitate to echo such advice.

¹³This point of view is described and cited in Wirtz, *Due Process of Arbitration*, *supra* note 8, at 4.

¹⁴*Id.* at 2.

¹⁵Kahn, *The Presidential Address: Labor Arbitration—A Plea to the Parties*, Arbitration 1984: Absenteeism, Recent Law, Panels, and Published Decisions, Proceedings of the 37th Annual Meeting, National Academy of Arbitrators, ed. Walter J. Gershenfeld (Washington: BNA Books, 1985), 1.

But with respect to the questions we are reviewing today, I am afraid that the argument that the arbitrator should not bring his own concept of due process to the conduct of the hearing since the parties are free to shape their own will not suffice. That argument is unacceptable on two grounds. The first is that the parties in fact have not elected to lay down any ground rules which would provide the answers to these three questions. And the second is that in the nature of things the parties are not likely to embark on such a venture, for reasons that will be apparent on reflection.

It is a striking fact that the arbitration process has evolved and grown with remarkably meager guidance from the parties concerning the standards of procedural fairness to be followed at the hearing. These rules have been developed almost exclusively by the arbitrators themselves.¹⁶ While in theory the parties have the authority to lay down such directions, collective bargaining agreements seldom address these matters. In long-term relationships with umpires or permanent arbitrators, there may be a slightly greater advertence to the subject. Yet by and large each arbitrator remains free to apply his own standards of fairness.

In part this failure to act may be attributed to an inability of parties with conflicting interests to agree as to what the standards should be. Perhaps, too, there is a neglect to consider in advance the importance which such matters may have on the disposition of a case. A more likely explanation, I maintain, is that most parties expect the arbitrator to bring the necessary expertise and competence to the job of running a fair hearing and they are willing to defer to his lead in these matters. In selecting an arbitrator, therefore, they are choosing someone to articulate the standards of fairness at hearing which they expect to follow in their relationship.

Whatever may be said in the abstract about the willingness of the parties to leave procedural rulings to the discretion of the arbitrator, the prospect that the parties might themselves answer the three specific questions before us in a negative way is in my estimation very remote. Consider what that would entail. Will the parties publicly announce as a condition of appointment that an arbitrator must promise not to take into account the interests of the grievant in a discharge or promotion case? That would be

¹⁶This phenomenon is noted in Wirtz, *Due Process of Arbitration*, *supra* note 8, at 22, 34-36.

a doctrine hard to explain to a bargaining unit employee, one which I believe any reputable union would find distasteful even to enunciate. Or contemplate for a moment an agreement of the parties instructing the arbitrator that the purpose of the hearing on a disputed factual issue is not to determine the truth of the matter, but merely to decide which of the presentations offered by each side seems to be most convincing. There is a disturbing insinuation in such an instruction, which calls for some further explanation. Is the implication that the presentations of the parties are calculated to obscure part of the picture? Would the parties really adopt the position that in a choice between a truth-seeking adjudicative mechanism and a pure adversary system, they prefer the latter? Finally, what answer would be given by the parties if they consciously faced the question whether the traditional concept of due process should be rejected as a standard to be followed in their arbitration hearings?

If contrary to my belief the parties would baldly assert that they do not want the arbitrator balancing the interests of the grievant against their own, and they want a decision restricted to the information that they decide ought to be taken into account, and in short they expect the arbitrator to do exactly as they tell him without regard to the impact upon the affected employee or the fairness of the process—does all this sound vaguely familiar?—we would then have something remarkably close to what is commonly called a rigged award. We know as a practical matter that the parties are not likely to enter into anything resembling such an arrangement. This *reductio ad absurdum*, however, may tell us something about the matter we are discussing, namely, that in principle the process is not a mechanical or tightly controlled one in which the parties seek to program the arbitrator to a preconceived result, but rather one in which each side is willing to risk its position on the confidence that a neutral outsider whose only commitment is to fairness will decide in its favor. This conviction of the rectitude of one's own position on the merits also carries with it a willingness to submit to any fair procedure that will produce a correct result. The parties make the grant of authority to the arbitrator not out of a belief in his great intelligence or insight or wisdom—all of these are in notoriously short supply for most of us—but out of the expectation that the chosen person is committed to treating each side fairly with the objective of achieving a just resolution of the dispute.

The same subject may be looked at from the viewpoint of the arbitrator. Since the parties have failed to promulgate specific rules of procedural fairness, there is a void which someone must fill. When the arbitrator is brought to the edge of that void he must ask himself how it is to be bridged. The operative question immediately becomes what assumptions should be made about the expectations of the parties. Do they want an arbitrator blind to the interests of the grievant? Do they shrink at the prospect that all the facts in the case may be revealed? Do they desire something different than due process? In answering those questions it will not do for the arbitrator to listen to the advocate in the heat of battle who sees the process from the perspective of someone who has an urgent desire to win a particular case. The expectations that are of importance are those which the parties entertain for the process in the long run, after the costs of winning have been carefully tabulated, and indeed after the meaning of winning and losing has been exactly defined.

An inept arbitrator may do great harm in attempting to do good. I understand that and I do not deny the danger. The advocates do well to remind us of it. At the same time I recall a revealing confession of Judge Harry Edwards a few years ago. He said "If I were employed in a job from which I could be fired, and if I did get fired and had a right to challenge my discharge in a forum of my choice, I would rather be in arbitration than in court."¹⁷ The parties, who surely deserve congratulations for creating a decision-making process that inspires such a vote of confidence, ought to ponder carefully the premises upon which that glowing endorsement rests.

¹⁷Edwards, *Advantages of Arbitration Over Litigation: Reflections of a Judge*, Arbitration, 1982: Conduct of the Hearing, *supra* note 1, at 18.
