

CHAPTER 1

THE PRESIDENTIAL ADDRESS: THE ACADEMY AT FORTY

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As Jack Dunsford's introduction indicated, I am a man who is highly regarded in two professions. In the Academy, I am highly regarded as a law professor, and at my law school I am highly regarded as a labor arbitrator. I am also the third president in the history of the Academy from the University of North Carolina at Chapel Hill, my distinguished predecessors being Paul Guthrie in 1957 and Gerald Barrett in 1972.

Almost all of my predecessors have devoted their presidential addresses to an in-depth analysis of a particular topic. I am departing from that past practice because it seemed more appropriate, on the occasion of our fortieth anniversary, to survey a few highlights in the life of the Academy and the profession to which it is dedicated. What I am going to serve you will be lighter than the dessert you just had.

Contrary to later mythology, labor arbitration and the Academy did not spring full grown, as Minerva from the brow of Zeus, from the National War Labor Board. Historians of the process tell us that labor arbitration was well established by 1941, by which time almost three fourths of all collective bargaining agreements had arbitration clauses. The number of arbitrators had grown during the 1930s, and indeed in 1937 the American Arbitration Association established its Voluntary Industrial Arbitration Tribunal, a roster which has continued ever since.

It is true, however, that the activities of the War Labor Board during World War II, through its national and regional offices, expanded enormously the use of labor arbitration. The number of collective agreements adopting arbitration clauses, the number of cases settled by arbitration, the number of experienced arbitrators—all increased dramatically. Be it noted that

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the cases were both interest and grievance disputes, that the process included a generous element of mediation, and that the arbitrators were largely staff members of the Board. Thus, for many years after the War, the majority of labor arbitrators in the United States were graduates of the War Labor Board.

Under the urgency of the postwar wave of labor disputes and strikes, President Harry Truman convened a Labor-Management Conference on Industrial Relations in Washington, D.C., in November 1945. The blue ribbon conferees could agree on only one thing—the desirability and necessity of final and binding arbitration as the terminal step for grievance disputes. In 1946 the U.S. Conciliation Service, which a year later became the Federal Mediation and Conciliation Service (FMCS), compiled a roster of about 200 qualified private arbitrators, whose names were available on request. That roster has ever since nourished the growth of budding arbitration careers.

Once labor arbitration became, after the War, a private and voluntary process, the stage was set for the creation of the Academy. The idea was apparently conceived in April 1947 at a meeting of arbitrators in Washington, D.C., convened by the Conciliation Service. Not many persons today are familiar with the name Alfred A. Colby, then an employee of the Conciliation Service. Yet Allan Dash, Bill Simkin, and Ralph Seward, in their oral history interviews, all identify Al Colby as the individual who carried out all the correspondence and logistical planning that was necessary to convene that first organizational meeting in September 1947. He helped to prepare the first draft of our Constitution and later served as our secretary. His enduring contribution to the founding of the Academy is still gratefully acknowledged.

The date was September 13, 1947. The place was the old Stevens Hotel in Chicago. The participants were 43 members of a small but expanding occupation. The purpose was to put that activity on a solid professional basis. The event was the founding of the National Academy of Arbitrators. At that meeting officers were elected—Ralph Seward was the first president—committees were organized, and the first annual meeting planned for January 15 and 16, 1948, at the Drake Hotel in Chicago. By then additional members had come into the fold, running the total to 105, who were later designated as Charter Members—the Academy's Founding Fathers.

While in retrospect the success of their enterprise may seem to have been inevitable, to them it was the beginning of a journey on uncharted waters—an act of hope and faith. Our celebration this week of the Fortieth Anniversary of that occasion is living witness to the fulfillment of their goal. Less than a score of the Founders survive; seven are at this meeting, and we acknowledge them today with respect and gratitude and affection. (The following were recognized: Byron Abernethy, Allan Dash, Alex Elson, Peter Kelliher, Charles Killingsworth, Ralph Seward, and William Simkin).

In keeping with the goal of making an occupation into a profession, the first two committees were Membership and Professional Ethics. It was decided that the Academy would be for active, practicing arbitrators and that membership would be conferred only on application. Accordingly, the Membership Committee early on established guidelines to measure the substantial and current experience of an applicant. That approach has been followed ever since. The Ethics Committee went to work immediately, with the result that in 1951 the Academy, together with the AAA and FMCS, promulgated the first Code of Ethics and Procedural Standards.

From the beginning, representatives of the parties were invited to the Academy's annual meetings on the assumption, now time-tested and verified, that all participants in the process would benefit from an interaction of views. Originally the meetings lasted three days, one day for a members-only business session and two days for a planned program. Can you believe that in 1951 the registration fee was only \$5.00? The first record of a presidential address was that given by John Day Larkin in 1957. That started the tradition which has inflicted me on you today.

Although not completely new, labor arbitration in 1947 was still in an emergent and formative period, operating on a relatively undeveloped landscape. The debate over the comparative merits of the George Taylor mediation approach and the Noble Braden adjudication model had not yet been finally resolved. Longer and more detailed contracts, a shift to grievance rather than interest arbitration, and increased resort to ad hoc arbitration finally settled that one. But even in grievance disputes, arbitrators were treading new frontiers. For example, in those early years it was a matter of dispute who had the burden and

went first in a discharge case. At the 1970 Annual Meeting Ralph Seward ticked off more than a dozen concepts, all taken for granted today, which in 1947 were yet to be established.

Those new issues attracted high-level attention. Can you imagine having Walter Reuther pop in on one of your hearings? In those days there were no volumes of decisions to which an arbitrator could resort for guidance; publication of selected awards was just beginning. Indeed, we are told that many of the leading arbitrators of that day knew each other only by name and reputation. That first generation of arbitrators experienced what today we can only imagine—the excitement of uncertainty, the novelty and thrill of writing on a clean slate.

Another event in 1947 had a major, although an unintended, impact upon the young profession. That was the passage of the Taft-Hartley Act. That law stated its preference for the voluntary settlement of labor disputes, but it did not expressly deal with arbitration. The courts were generally free in those days to enforce or reject promises to arbitrate and arbitration awards. Taft-Hartley was a management-oriented statute, and Section 301 was designed to make it possible for employers to sue unions in federal court. Ironically, in *Textile Workers v. Lincoln Mills*, in 1947, the Supreme Court turned Section 301 to the advantage of unions in holding that arbitration agreements were judicially enforceable against management.

Building upon that decision, the Court, in the famous 1960 *Steelworkers Trilogy* and in a series of subsequent cases, emphasized the breadth of arbitration agreements, the final and binding effect of arbitration awards, and the insulation of the merits of disputes from court review, both in the enforcement of agreements to arbitrate and in arbitration awards. In 1955 Harry Shulman, dean of the Yale Law School and one of the giants in the young profession, in a famous speech at Harvard had urged that the law leave arbitration alone. Instead, in another ironic twist, the Supreme Court and the law intervened for the very purpose of achieving Shulman's goal, to keep the law out.

The *Trilogy* elevated arbitration to a new status. Arbitration of grievance disputes became recognized as an integral part of the industrial self-government created by a collective bargaining relationship and, therefore, an important aspect of national labor policy. Whereas public policies are normally enforced by public agencies, here was a public policy enforced by private

adjudicators with minimal scrutiny by public authority. Thus was ushered in what Professor Feller has called labor arbitration's Golden Age.

This unintended result of Taft-Hartley obscured the successful achievement of a clearly intended result—the containment of an expanding labor movement through the cumulative effect of numerous legal restrictions. By the time of the *Trilogy* in 1960, private sector union membership had leveled off and begun a slow decline. From the mid-fifties on, unionism in the private sector would gradually become a smaller percentage of a larger work force. Arbitration continued to increase, however, because of the steady expansion in the scope of labor agreements.

Other events contemporaneous with the *Trilogy* were the enactment of state laws and the Kennedy Executive Order, which authorized public-sector collective bargaining and opened up a vast new area for labor arbitration, thus contributing to the Golden Age.

The triumphal entry into the promised land was briefly marred by a volley fired by an apostate member, Judge Paul Hays, whose 1966 vitriolic indictment in his Yale lectures was that labor arbitrators generally were at best, incompetent and at worst, venal. There were many equally emphatic rebuttals, some by members of this Academy, and the controversy finally proved to be no more than a storm in a teacup.

The burgeoning growth of arbitration generated a surge of activism in the Academy which continues to this day. In 1972 we lengthened our annual meeting to four days: two for members only, followed by a two-day program to which our guests are invited. A mini-issue of the 1970s was the lavish parties given by the parties. We decided to restrict them as being unseemly and seductive.

Today our membership numbers about 675, a congenial mix of full- and part-timers, with a good sampling of lawyers and academics. For many years, membership in the Academy has been the nearest equivalent to certification or licensing in other professions. Our membership policy was extensively reviewed and reaffirmed in the mid-1970s by the Reexamination Committee, chaired by Rolf Valtin, and again several years later by a committee chaired by Peter Seitz. Our quantitative guidelines are based on acceptability, which in effect means we let the

parties determine for us who is eligible for membership. Rightly or wrongly, we have assumed that acceptability incorporates the qualities of competence and integrity which characterize a profession. Reliance on the parties' acceptability has put it beyond the Academy's power to increase the number of women and minorities in the profession. In 1977 the Academy rejected any affirmative-action relaxation of our quantitative criteria, and I still bear a small scar from that discussion. In only one respect have we departed from acceptability—we do not admit a person with even the slightest representational conflict, no matter how acceptable that person may be to the parties.

We decided in the 1970s to review the Code of Ethics. A tripartite committee of the Academy, the FMCS, and the AAA labored long and hard through many drafts. There was extensive discussion at our annual meeting, and in 1977 the current Code of Professional Responsibility was adopted. Our committee in this area was invigorated, and the years since have seen a renewed interest in professional integrity and good practice—the heart and soul of our work. Surely the Academy's continued emphasis on professionalism is largely responsible for the fact that, after 40 years, there has not yet been the first scandal involving a labor arbitrator. Recurrent disquieting reports led me, when I assumed this office, to appoint a Special Committee on Professionalism, whose report was presented this week and is now public property. Emphasis on professional responsibility must and will continue to be a vital part of our activity.

In the latter 1970s, Presidents Arthur Stark and Richard Mittenthal sponsored a program of continuing education for our membership. The Committee on Research and Education, sparked by Arnold Zack and Rich Bloch, prepared an excellent series of discussion guides and held numerous seminars. These endeavors prompted the Future Directions Committee, ably led by Jack Dunsford, to recommend what is now our highly successful Educational Conference, held each November: a two-day members-only meeting where we hone and improve our professional skills. Jack's Committee report also led to the adoption of our orientation program for new members which acquaints them with the history, structure, and activities of the Academy and, we hope, motivates them to become active participants in our work. In 1977 Ted Jones successfully launched our in-house publication, *The Chronicle*, which is now a major part of our informational and educational program.

During Mark Kahn's presidency, on the basis of much groundwork by Milton Rubin, we created the Legal Representation Fund to defray the legal costs incurred by our members who are subpoenaed or sued. The General Counsel of the American Arbitration Association renders valuable service in such instances and, as a result, the principle of arbitral immunity has been widely accepted by the courts. The Legal Representation Fund also financed the filing by the Academy last year, for the first time in its history, an amicus brief with the U.S. Supreme Court in the *AT&T Technologies* case. The Court accepted our position unanimously. This year we filed our second amicus brief in the *Misco* case, now pending. Both cases are follow-ups to the *Trilogy*, and our briefs were prepared by member David Feller, who was the successful advocate in the *Trilogy*.

In the early 1980s the Academy History Committee conducted oral history interviews with six of our senior members to preserve their recollection of what it was like in the early years of the process. Just this week the Committee taped two round-table interviews on the Academy's founding and early years. The Committee is also collecting memorabilia of the Academy's past, looking toward a future history of the Academy.

Several years ago, thanks to the prodigious efforts of Alex Elson, we launched the Research and Education Foundation to finance programs furthering the use of arbitration.

Two committees sufficed to get us started in 1947. Our expanded activities are today reflected in seven standing committees and 19 special committees, many of which are permanent. In any year, there are a number of special purpose, ad hoc committees which inquire, report, and become *functus officio*. Over the years we have engaged in a self-examination that borders on masochism.

Although we are called the National Academy, we are really international. We have members in Canada, over 30 of them. Their participation has immeasurably enriched the Academy. Many have served as committee chairs and officers, and the late H.D. "Buzz" Woods served as our president in 1976. We have held Annual Meetings in Montreal, Toronto, and Quebec City, and next year we will meet in Vancouver. I urge you to read Ralph Seward's bilingual tribute to our Canadian connection in the Proceedings of the 23rd Annual Meeting and Ted Weatherill's salute to the United States at the 29th Annual Meeting.

It was during Buzz Woods' presidency, incidentally, that the Academy bit the bullet on a membership dues increase to raise the money to finance our expanding activities. In retrospect, it is difficult to realize what a furor that created. Impassioned rhetoric flowed and there were even some resignations. Poor Buzz spent most of his year as President mediating an issue that today seems about as important as the long forgotten War of Jenkins' Ear. But can you believe that before then all Academy work was totally self-financed and committee members were not reimbursed even for out-of-pocket expenses?

Regional activities have been an important aspect of our operation from the beginning. Spurred by the efforts of Ed Teple and Dallas Young, in 1984 we amended our Constitution to encourage and regularize the vital role of the regions, and Jim Sherman became the first incumbent of the new Office of Coordinator of Regional Activities.

One problem we never did solve was what role we should play in the training of new arbitrators. Formal training over the years has consisted of ad hoc efforts by law or industrial relations schools, bar associations, and the like. Our members have willingly participated as faculty in these efforts, and have also served as mentors to interns on a one-to-one basis. From the beginning, the parties have wailed the plaintive cry that there is a shortage of arbitrators. If it was ever so, it is certainly not true today. Like many problems, the training of new arbitrators has been largely solved by time. The problem that has not been solved, and which is still acute, is the training of new advocates.

It is doubtless true that the annual meeting has been the main event in our activities. Our published Proceedings are a rich collection of papers covering every aspect of labor arbitration, usually several times. Some topics have been perennial favorites.

We became embroiled in what for a time promised to be an endless debate over what an arbitrator should do when there was a conflict between the contract and external public law. Like surrogate numbers put on oft-told prison jokes, we bandied the Meltzer maxim (you're a contract arbitrator so you enforce the contract), the Howlett exhortation (your award must be enforceable so you follow the law), the Mittenthal method (you permit but you don't require an unlawful act), and the Sovern synthesis (sometimes you do one, sometimes you do the other, it all depends on the circumstances). There was never any agree-

ment; the parties increasingly came to authorize us to consider the law, and somehow this once-boiling issue has been taken off the front burner.

But if some issues have been largely put behind us, there remain others which, like the poor, we will apparently have with us always. Early on there emerged the controversy over reserved management rights, implied obligations, past practice, and all those related questions. No subject in arbitration has been discussed at our meetings more often or at more length. Yet after forty years, no opinion yet offered by court, by arbitrator, by management or labor advocate, has settled the issue. I suggest that the subject has no final definitive answer, that we are now burdened by overanalysis, and that the best a conscientious arbitrator can do is to be aware of and understand the various points of view and then do what seems right in the particular case.

Of equally ancient vintage is the complaint that arbitration is becoming too lengthy, too costly, and too technical and legalistic. This mournful dirge was chanted at least as far back as the early 1950s, has been vocalized constantly ever since, and was forcefully reiterated in recent years by Presidents Mickey McDermott and Eva Robins. I share their concern, and indeed I have a stock speech I have given to various groups, not on "Creeping Legalism" in arbitration, but on "Gallopig Legalism." Still, the gloomy prophecies that it would kill arbitration have not yet been fulfilled, and, although as arbitrators we may deplore legalism and exhort against it, in the final analysis the process belongs to the parties and not to us. I think there is much truth to the ancient saw that the law sharpens the mind by narrowing it. Law schools pride themselves on teaching students to "think like a lawyer," but I tell my students, "If that's the *only* way you can think, you're a menace to society." Having said that, I will add that, when a case is presented to me by two good lawyers who know the difference between an arbitration hearing and a jury trial and who possess that sense of relevance so important to any adjudicative process, it's a pure professional pleasure to be able to sit back and listen.

One response to legalism has been what is called expedited arbitration. This is really ironic, since originally *all* arbitration was considered to be an expedited process. Another response has been med/arb and even pure mediation of grievances. To

tout these as new techniques would surely make George Taylor and Harry Shulman smile. But the process has proved itself to be flexible and adaptable to the desires and needs of the parties. For a sampling of the ingenious variations which have been devised, read Arthur Stark's Presidential Address at our 31st Annual Meeting.

At that first annual meeting in Chicago on January 16, 1948, Edwin E. Witte, the distinguished economist from the University of Wisconsin, gave a dinner address entitled "The Future of Labor Arbitration—A Challenge." In that paper he visualized the possibilities open to the Academy in advancing arbitration and challenged the Academy to realize that potential role. Clearly, we have not been wandering in the wilderness for 40 years, and today modesty must yield to honesty—the Academy has met the challenge.

In 1954, as a neophyte law professor at Ole Miss, I did graduate study at the Yale Law School. I knew nothing about labor arbitration and had never heard of the National Academy of Arbitrators. I do not now recall the happy chance that led me to enroll in Harry Shulman's seminar in labor arbitration, the last time he taught it before his death the following spring. The seminar was based entirely on his own cases, and I have been hooked on arbitration ever since. Back to Oxford to wait a year for my first case. Consider the vastness of the gulf that separated the permanent umpireship for Ford and the UAW from an ad hoc arbitrator in Mississippi. And yet, ten years later (in 1966), at another academic home base, I was admitted to the Academy.

Like almost all our members today, the heady days of the War Labor Board were not mine to experience; I was not in at the creation, and I never knew most of the people behind the big names of the early years. But, like hundreds of our members, through this Academy it has been possible for me to tap into the history and the tradition and the values of the profession which they launched and to be inspired in my own career. Such inspiration is what creates the cheerful willingness of so many of our number to dedicate the time and effort that make this Academy what it is that we should love it as we do. When life goes sour, I can blame it on Murphy's Law. When fortune smiles, I can credit the luck of the Irish. Surely it was the luck of the Irish that brought me into arbitration and into this Academy.

One of the purposes of the Academy, specified in our Constitution, is "to encourage friendly association among the members of the profession." Socializing with each other is one of the

joys of our annual meetings, but it is not so confined. Several years ago, here in New Orleans, in the Quarter, I literally bumped into Mickey McDermott. Both of us had recently had coronary bypass operations, so we hailed to the nearest bar, where—would you believe—we ran into Tom McDermott, who had just recovered from a heart problem. Over an hour and several drinks, we had a happy time talking about our hearts. How farsighted of our founders to make it possible to enjoy a drink with a friend and at the same time fulfill a constitutional duty.

So—here is the Academy, in Scott's phrase, "fat, fair, and forty." Our maturity is manifested by having this year, under the leadership of Tony Sinicropi, archived 42 boxes of materials at Cornell, and by the fact that we are now computerized by companies who sell information about us for their profit. For me the utility of such publications was revealed some years ago when I read my own bio in one of them. On succeeding lines one could learn that "Murphy is one of the best arbitrators in the country" and that "Murphy is a real turkey."

The past has been good to us; what of the future? The predictions from labor economists and analysts are uniformly gloomy. The theme is by now a familiar one. Unionism and collective bargaining, in the private sector at least, are on the decline, and the trend is irreversible. We are told that inevitably, as the child of collective bargaining, arbitration will also gradually phase out, and in the meantime arbitrators will decide issues of lesser importance than in the past. A speaker at last year's meeting predicted that increasingly the role of arbitrators "will be akin to rearranging the chairs on the deck of the Titanic." The same speaker, however, noted the "demonstrated inability" of economists and industrial relations experts to predict the future, although perhaps it would be just a little unfair to compare their art with palmistry, phrenology, astrology, and lie detecting. Recall that the reports of Mark Twain's death were greatly exaggerated.

It is just possible that economic forces as yet undetected or not yet in existence may bring about a renaissance in unionism. If not, then we must face the reality that life does not begin at 40. If our profession is destined to enter a slow decline, then we must accept the prospect with equanimity as being beyond our power to prevent (as, indeed, most of the forces which most affect our lives are beyond our power to control) and adjust our careers accordingly.

In the meantime, the Academy will continue to fulfill its useful role, and we will still have our duty to perform in our own individual careers. As a closing comment, I draw on the words of the late Bernie Dunau, a union lawyer of such character and integrity that he served frequently as an arbitrator. Just about 20 years ago Bernie noted that, like a judge, an arbitrator requires “knowledge, training, skill, intelligence, and character, and of these character is preeminent—the patience to hear the tedious controversy through without flagging attention and without irritability; the manners to probe positions incisively and to suffer stupidity without manifesting disrespect or impoliteness; the humility to withhold reaching a final determination until the parties have completed their presentation even though the point seems evident almost immediately; the drive to understand even apparent wrongheadedness to be sure that the controversy is truly comprehended; and the passion for a just result within the legal or contractual limitations that circumscribe the judge’s authority to decide. . . . Among union and employer representatives who select arbitrators, the encomium bestowed on the good arbitrator is that ‘he calls them as he sees them,’ and any system of adjudication would be hard pressed to profess or practice a higher ideal.”¹

That it will ever be so is my fervent wish on this 40th anniversary.

¹Dunau, *Review of Hays’ Book*, 35 *The Am. Scholar* 774 (1966).