

## CHAPTER I

### THE PRESIDENTIAL ADDRESS: REFLECTIONS OF A SECOND GENERATION ARBITRATOR

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I hope you will forgive me for having arranged a somewhat bifurcated method of introduction today. My reasons for having Syl Garrett and Mickey McDermott both participate was not because they are past Presidents of the Academy although that is a fact, or that they are great and respected arbitrators, although that is true. The reason I asked them to participate with me on this occasion is twofold: They are two of my closest and dearest friends and in different ways were mentors of mine.

In 1965 Syl enticed me away from government service and introduced me to the arbitration profession. In those days the term “intern” was not used as often to describe those sitting at the feet of an experienced arbitrator and learning what it was all about. We were referred to more often as “apprentices” or, in Academy circles, as part of Syl Garrett’s “stable.” When I arrived at the Board, Mickey McDermott was already in the stable. Our professional relationship ripened over the years into a close personal friendship that has continued to this day.

As for Syl Garrett, I have found out we have something else in common. We both, at some time in our misbegotten youth, sold books or magazines door to door. Sometime in the 1930s, I believe, Syl and Lew Gill sold magazines in West Virginia. My attempt at door-to-door selling was on the eastern shore area of Maryland and for a while in Baltimore. I attempted to sell a book called *Bible Readings for the Home Circle*. I don’t know how successful Syl and Lew were. I know I was a dismal failure. For example, at one home where I was successful in obtaining entry

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in order to make my pitch—which was not all that often—it turned out that the lady of the house was a member of the Latter-day Saints. We had a long and interesting discussion. I failed to sell the *Bible Readings for the Home Circle* but left having purchased a *Book of Mormon*. That's when I learned I was not cut out to be a salesperson.

One of the problems facing every president of the Academy, over the last 20 years at least, is finding a new subject to discuss. In reviewing the volumes of Academy Proceedings, I found that they pretty much cover the waterfront of arbitration. We have visited and revisited essentially all possible subject matters of arbitration. Presidents have discussed humor in arbitration, the fun of arbitration, the representatives of the parties, and even the problems one might incur in being accompanied by one's spouse to an arbitration hearing. Having become truly frustrated in attempting to find a new and different subject, I talked to my colleagues at the Board of Arbitration and, as one, they all stated, "Don't give an address!" As I indicated in the President's Column of the most recent issue of *The Chronicle*, I gave this advice a great deal of thought. While not an idea supported by practice over the past 35 years, my research through the Proceedings revealed no evidence that over the first nine years of the Academy's life any presidential address was given. Nonetheless, I have bad news for you. I have decided to follow the well-developed past practice and not revert to the apparent practices of yesteryear.

One evening about a year ago when I was out of town, I reflected, over a few drinks before dinner, about the mysteries of arbitration. I asked myself the question, "Who are these individuals who are not only willing but clamor at the doors to enter the profession of arbitration—a profession where we must realize that we are employed by two parties, both of whom have totally divergent views in a given case, and where each time you decide a case you must hold against one of the two parties who selected you. On top of this we have the chutzpah to expect the loser to comply without complaint with the adverse decision. But then the Supreme Court in the *Trilogy* decisions provided a substantial basis for this view, unreasonable as it may seem for the layman.

Contrary to Syl's suggestion in his introduction, there was, in my view, little in my background that would have led one to believe that I could have become successful at this unique profes-

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sion. I was raised in the countryside of Delaware, a state described by John Gunther in *Inside U.S.A.* as having three counties, two at high tide. Labor organizations and, indeed, industry as we know it were virtually unheard of. Until World War II, farming was the main activity, and the local "chicken factory" and various canning operations were the closest one came to industry. The community was so conservative that for years I was under the impression that Roosevelt's given name was "that God damn." When his administration inaugurated daylight saving time, my community's view was that this was an unadulterated and heretical interference with God's time. Nonetheless, through sheer fortune and despite this parochial background, I have now spent 25 years as an arbitrator in labor-management disputes, solely because Syl Garrett searched me out in 1965 in Milwaukee and suggested to the parties, U.S. Steel and the United Steelworkers of America, that I might be of value to them as an assistant to the Chairman.

I also reflected that evening on how we arbitrators tend to describe ourselves as neutrals. I am told that some years ago Jim Hill made the comment, "The only way an arbitrator can be truly neutral is to hear the case and never decide it." This may sound facetious on the surface, but is it? We arbitrators are human beings, and all of us bring into arbitration a lot of baggage based on our personal lives and experiences. I have been asked by outsiders, "How can one be neutral?" And I am inclined to agree with that if they expect total neutrality. In the area of automobile mechanics, when a car is not in gear, it is in neutral. While in that state the motor is said to be idling. Certainly we cannot function as arbitrators being neutral in that sense of the word. Our approach must be impartial and neutral particularly when we walk into a hearing. We can hear a case impartially. We may even be able to sit down and study the case or write the background of the case in an impartial fashion. But, believe me, there comes a time in the decision-making process when the arbitrator in a given case is no longer neutral or impartial. Once an arbitrator makes a decision and is writing the decisional portion of the opinion, the arbitrator to a substantial degree must espouse a cause, and that cause ultimately results in the opinion. If you don't believe me, you should sit in on some of our executive sessions at the Board of Arbitration when one party or the other is raising an issue about a tentative draft and listen to the arbitrator defend the result. This is not, at this point, neutrality

or impartiality. Seldom are we persuaded to change our minds. Ofttimes we have better arguments for defense of the opinion than the successful party submitted to the arbitrator at the hearing.

Nonetheless, I defend the view that we are impartial in the sense that we have no preconceived notion about how the case should be resolved as long as it is supported by the provisions of the labor agreement. This is all I believe the parties can ask of arbitrators. Whatever our psychological makeup that results in our being "good" arbitrators, it is that facility which makes it possible for us to succeed and be professional as arbitrators. Some individuals do not have respect for the facts of a case to assure a proper factual basis upon which to arrive at a proper decision, and even with a factual basis, they can read the agreement but are unable to arrive at a definitive and reasoned opinion to resolve the grievance. It is those individuals who have failed or should fail at our profession. I worry about those arbitrators whose opinions I have read, who write interminably and engage in rhetorical wandering, causing the reader to be somewhat, if not totally surprised when arriving at the "accordingly" sentence. Any well-written decision should lead the reader to the ultimate conclusion. In self-protection I should note that this principle applies to decision writing, not necessarily to presidential addresses.

Having engaged in these reflections, I decided, logically, to entitle my address, "Reflections of a Second Generation Arbitrator."

This does not mean that I view myself as the son of Solomon, who, by the way, was more a mediator with life or death power than an arbitrator. My first generation commences with the period immediately after World War II when, having been educated through their experiences with the War Labor Board as a substitute for dispute resolution through strike or lockout, more and more parties in the private labor-management sector concluded that the idea of third-party intervention in dispute resolution was perhaps not as much of an anathema as some had once thought. In any event, labor-management rights arbitration on a voluntary basis burgeoned over the ensuing two decades fostered in no small part by the arbitrators selected by the parties to resolve their disputes. These arbitrators became the founding fathers of the Academy, organized in 1947. I don't believe that those of us who came along later, in my case two

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decades later, can ever fully appreciate the challenges faced by these pioneers in the profession except in a purely vicarious fashion. I want to discuss a bit the contributions of these individuals to the decision-making process we arbitrators face daily and to the labor-management community as a whole.

Initially I was of the opinion that this was an original thought until I read an address given by Ralph Seward at the 1970 Annual Meeting of the Academy entitled, "Grievance Arbitration—The Old Frontier." Ralph referred to certain basic principles in arbitration that were worked out early on. He stated:

You still won't find a lot of them written out in contracts. They are in the minds of the arbitration practitioners—part of the unspoken, unwritten assumptions with which we now approach the arbitration procedure and from which both sides get some degree of certainty.<sup>1</sup>

He then listed 14 concepts that have been developed by arbitrators without express contractual language to support their use in a decision.

Frustrated but undaunted by this discovery, I decided to discuss a few more concepts, such as where in the contract do you see specific reference to years of service, disciplinary history, or the idea that discipline be progressive or be free from disparate conduct, as valid factors in evaluating just cause for discipline? Yet when I arrived on the scene as an arbitrator, it was well established that these were perfectly valid factors to take into consideration in resolving a disciplinary case. It is one thing to deny a grievance involving insubordination by an employee with short service and some disciplinary history. It is quite another matter when considering an employee engaged in the same conduct who has been discipline-free over a period of 20 or more years of service. Isn't it relevant in evaluating just cause to take into consideration an employee's 20 to 30 years of service which is virtually discipline-free and perhaps even sustain the grievance on the same given facts with respect to the event triggering the discipline?

You might say that this is old-hat stuff, "Of course we take these matters into consideration." But I ask you, where did you learn this? Is it technically contractual? And yet it would appear

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<sup>1</sup>Seward, *Grievance Arbitration—The Old Frontier*, in *Arbitration and the Expanding Role of Neutrals*, Proceedings of the 23rd Annual Meeting, National Academy of Arbitrators, eds. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1970), 158.

to me that most parties with any sophistication whatsoever have accepted these concepts over the years to the point that now they are viewed as relevant factors in analyzing any discharge case.

There is another area where the first generation of arbitrators established concepts that we of the second and third generations inherited and perhaps have had an opportunity to expand upon. This is a subject near and dear to my heart—contracting out or in terms of new-speak, “outsourcing.”

As I briefly review the development of arbitral precedent on this point, I would like you to keep in mind the interaction between the development of the case law and the approaches taken by the parties in subsequent negotiations, using the precedents developed by the arbitrators. Early on, in the 1940s and even today, many labor agreements contained no express language relating to contracting out. That certainly was the case with the Steel agreements. They were totally silent on the subject. About the late 1940s or very early 1950s, contracting out became a source of dispute between the Steelworkers and the various steel companies, particularly United States Steel Corporation. I will describe in detail only one case, but a leading one, which involved the company's contracting out slag removal and window washing, both of which for the most part had been performed by the bargaining unit employees prior thereto. The Steelworkers protested this action and argued that it was contrary to provisions of the agreement preserving the jobs described and classified by the parties and preserving the agreed-upon seniority units. The company relied essentially on its right under the management-rights clause and the fact that there was no language in the agreement that barred contracting out. Syl Garrett, as Chairman of the Board of Arbitration and a first generation arbitrator, refused to accept any of these theories as controlling but rather reached a decision based upon the inferences to be drawn from the recognition clause of the contract which set forth the scope of the bargaining unit. He reasoned as follows:

The inclusion of given individuals in the bargaining unit is determined, not on the basis of *who they are*, but on the basis of the *kind of jobs* which they happen to fill. In view of the fact that the Union has status as exclusive representative of all incumbents of a given group of jobs, it would appear that recognition of the Union plainly obliges the Company to refrain from arbitrarily or unreasonably reducing the scope of the bargaining unit.

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What is arbitrary or unreasonable in this regard is a practical question which cannot be determined in a vacuum. The group of jobs which constitute a bargaining unit is not static and cannot be. Certain expansions, contractions, and modifications of the total number of jobs within the defined bargaining unit are normal, expectable and essential to proper conduct of the enterprise. Recognition of the Union for purposes of bargaining does not imply of itself any deviation from this generally recognized principle. The question in this case, then, is simply whether the Company's action—either as to window washing or slag shoveling—can be justified on the basis of all relevant evidence as a normal and reasonable management action in arranging for the conduct of work at the plant.<sup>2</sup>

This decision was issued in 1951. In the ensuing 12 years contracting-out cases came before the Board of Arbitration and were resolved on a case-by-case basis with the guideline being whether the action of the company was a normal and reasonable management action in arranging for the conduct of the work at the plant. Various factors were analyzed and balanced in making this determination, such as the past practice in the performance of the work involved, the availability of the necessary qualified employees to perform the work, the availability of qualified supervision, the availability of the required equipment, and the nature of the work. Also relevant was whether the work was production, service, or day-to-day maintenance work as opposed to major new construction, major installation, or replacement of equipment and production facilities.

Did any of the parties go to court to challenge these decisions, which were not based on any specific provision of the agreement? The answer is, no they did not. To the contrary, in 1963 the parties decided that they wished to include in the contract specific provisions relating to contracting out. In so doing, they took a very pragmatic approach and, as to production, service, and day-to-day maintenance and repair work, provided essentially that past practice would prevail. The parties made a particular, specific provision for construction and major rehabilitation of facilities where the company had the right to contract out unless the union was able to show that the action was contrary to some pre-1963 right or obligation not to do so.

The interesting thing is what the parties did with respect to work outside the plant and with respect to maintenance and repair that did not fit nicely into the other categories—that is,

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<sup>2</sup>*National Tube Co.*, 2 Steel Arb. 777, 779 (Garrett, 1951).

day-to-day maintenance and repair work or new and major installations. The parties simply said that such work could not be contracted out for performance within the plant unless the company could demonstrate that it was more reasonable to do so than to have the work performed by bargaining unit employees. In short, with respect to that type of work, the parties simply adopted the contractual standard that had been used by arbitrators in the past in determining generally whether contracting out was proper under the agreement but placed the burden on the company to demonstrate the reasonableness of its conduct.

As I noted, the parties in 1963 did not make specific provision in the agreement for work contracted out for performance outside the plant. Instead, they included a preamble to the contracting-out section recognizing that each party "had existing rights and obligations with respect to various types of contracting out." Prior to 1963 the Board had decided cases involving contracting-out work to be performed outside the plant and had based its decisions on the same "normal and reasonable management action" standard that had been used for work to be performed within the plant by the contractor. Therefore, it was concluded that the parties did not intend to treat the contracting out of work for performance outside the plant any differently than they did prior to 1963, and the Board proceeded to decide cases on the facts based on the test of whether the action was a "normal and reasonable management action" for the contracting out of the work outside the plant.

This represented the state of the matter between 1963 and the Steel negotiations in 1987. Although coordinated bargaining among various major steel companies and the Steelworkers had broken down in the interim, the union, in 1986 and 1987 negotiations with all the companies, insisted on tightening up the contracting-out language even further. At U.S. Steel there ensued a six-month work stoppage lasting from August 1986 to February 1987, with the issue of contracting out being a significant matter in dispute. Nonetheless, the union succeeded in attaining a rather far-reaching change in the contracting-out language commencing in 1987.

I will not attempt to discuss in detail the new and expanded contracting-out language agreed upon at that time. I will note only that unlike prior agreements this agreement contained express limitations on the right of the company to contract out

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not only within the plant but also outside the plant. With respect to such work, as well as certain work to be performed within the plant, the parties agreed that the question would turn on whether it was more reasonable for the company to contract out the work than to use its own employees. The parties spelled out 11 factors to be considered in evaluating the reasonableness question (at U.S. Steel there was even a 12th factor). These factors included the impact of the company's action on the bargaining unit, the availability of qualified employees, the availability of adequate, qualified supervision, the availability of required equipment—all factors that had been considered in the past by the Board in evaluating the reasonableness of the company's action. It is apparent to me that in developing the specific language of the contract, the parties examined past arbitration decisions and used many of the factors that the arbitrators had considered after 1951 in deciding issues involving the reasonableness of the company's conduct.

So what does this tell us about what has evolved over the years? First, it seems to me that if it had not been for those first generation arbitrators who first faced the issue of contracting out, who were of the school that believed arbitration is an extension of the collective bargaining process and were willing to draw conclusions from the essence of the agreement rather than from its literal language or the absence thereof, the history of collective bargaining between these parties might have been entirely different. Had these arbitrators been pure contract readers and had they concluded, in the absence of specific language dealing with contracting out, that the company had an unfettered right to contract out (and some did and still do precisely that) less reason would have existed for the companies to agree to the development of the contractual language, at least not without extreme economic pressure from the union. The interesting thing was that as the parties negotiated their own contract language on the subject, they used arbitral reasoning from the precedents established, changing it to the extent that they could agree to do so but accepting many of the considerations developed by the arbitrators.

Another aspect of this development, however, is that, as the parties themselves over the last quarter of a century developed contract language, moving from the point where the agreement was totally silent to the point where now the agreement contains highly detailed language relative to contracting out, they have by

such action perhaps limited the discretion of the arbitrator substantially. Today it can be said that more arbitrators are being forced into the "contract reading" school of thought rather than into the "extension of the collective bargaining process" school of thought. I do not mean that there is no room left for arbitral discretion. After all, when the parties list 11 or 12 reasonableness factors, they give no guidance as to which relevant factors should be more or less determinant of the end result. It seems to me, however, that the parties in the steel industry at least are beginning to negotiate language intended to reduce the discretion of the arbitrator in many areas, particularly in contracting out.

In summary, for those of us who are in the second and third generation of arbitrators, it seems that the authority of the arbitrators affirmed by the Supreme Court in the *Trilogy*, while under attack on the perimeter, is still viable. The *Trilogy* cases were decided in 1960 and in effect approved the approaches established by our first generation arbitrators. It is still proper under Supreme Court law for arbitrators to consider the practices of the industry and the shop, to consider factors such as an employee's length of service, an employee's work history, an employee's discipline compared with other employees under like circumstances so long as no express language of the agreement bars the use of such arbitral authority. The Court's statement in *Enterprise Wheel* that an award is legitimate as "long as it draws its essence from the collective bargaining agreement"<sup>3</sup> is still good law for the 1990s, I hope.

I wish to take this opportunity to express before the guests as well as the members my appreciation to all the committees that have served under me and particularly the Program Committee chaired by Tony Sinicropi, who is sitting up here with me for particularly that reason, and to the Arrangements Committee chaired by Ken Perea, who will be at the head table tomorrow. Finally, I wish to express to all of you my admiration for and appreciation of the services of Dallas Jones as Executive Secretary-Treasurer of the Academy. This is his last meeting as Executive Secretary, having served for seven long years leading us presidents through each of our one-year terms by the nose so that we do not wander into error by taking action contrary to the Academy's Constitution and By-Laws or its past practices. I personally thank him for the guidance he has provided me during the last year.

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<sup>3</sup>*Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 46 LRRM 2423, 2425 (1960).