CHAPTER 3

THE NEUTRAL IN INDUSTRIAL RELATIONS REVISITED

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The Proceedings of the 29th Annual Meeting of the National Academy of Arbitrators held in San Francisco in 1976 include my luncheon remarks entitled, "The Industrial Relations Universe."[1] The theme emphasized the roles of the neutral, outside of-grievance arbitration, in the mediator-arbitrator-advisor functions that hark back to the origins of modern arbitration in labor-management disputes in this country in anthracite coal mining, the clothing industry, and some branches of construction. The 1976 universe also included the galaxies of labor-market oriented government regulations and negotiated rulemaking, various types of labor-management committees concerned with sectoral, local, or economywide factfinding, exchanges of views, and problem solving. I also pointed to the new opportunities presented by the rapid growth in government regulations related to health and safety, pensions, affirmative action, equal pay, and so forth, and the vital task of relating and coordinating private bargaining and personnel policies with the regulations derived from public policies.

My observation in 1976 was: "In the arbitration fraternity, too often the repetitive attention to grievances has dulled the mind and hardened the seat, creating an unfulfilled longing for other neutral roles in the industrial relations universe." I had in mind then, as now, that many arbitrators have developed the skills, perceptions, and respect to be effective mediators and creative problem solvers in the many other galaxies of industrial relations than the "milky way" of grievance arbitration. My message

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[1]Dunlop, *The Industrial Relations Universe*, in Arbitration 1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1976), 12–19.

was not derived from an appraisal of the prospects for employment or income of the then 420 members of the Academy, but rather it sought to encourage the significant contributions they could make in other fields of industrial relations. My concern was unresolved problems and underused talents in industrial relations, rather than the still larger sphere of all dispute resolution.

In the intervening fifteen years since 1976, the focus of grievance arbitrators has narrowed further while the universe of industrial relations and the range of activity for neutrals has been expanding. Richard Mittenthal, 1978 Academy president, tells this Annual Meeting:

> [T]he pragmatic school of arbitration that held sway in the postwar years has declined . . . arbitration has become a quasijudicial substitute for litigation with increasing reliance on lawyers and the trappings of a court. . . . Today most arbitrators see themselves as something akin to an administrative law judge . . . the arbitration process is no longer as creative as it once was . . . Legalism is here to stay because arbitrators who take a more free-wheeling approach are not likely to be selected . . . the desire of the parties is for certainty and predictability.[2]

I would accept that description as reliable today for a good deal of ad hoc grievance arbitration and even for some umpire dispute resolution, although many umpires and repetitive ad hoc arbitrators and their parties behave in the classical mediator-arbitrator-advisor manner. The revival of mediation in some sectors as a means of settling grievances has attracted attention in coal mining and other industries.[3] But there is a great deal more to the universe of the neutral in industrial relations, and these remarks are pointed toward such other galaxies.

It is elemental to make a distinction between two quite different industrial relations activities into which a neutral may be drawn. First is the administration, maintenance, or routine working of a given industrial relations system, or some parts of it, as in the grievance process and arbitration generally or as they

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[2]Mittenthal, *Whither Arbitration*, in Arbitration 1991, The Changing Face of Arbitration in Theory and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators, ed. Gladys W. Gruenberg (Washington: BNA Books, 1992), Chapter 4 *infra*.

[3]*See*, Goldberg, *The Mediation of Grievances Under a Collective Bargaining Contract: An Alternative to Arbitration*, 77 NW. U. L. REV. 270, 271, 278 (1982). For an account of an earlier era, *see*, Cole, The Quest for Industrial Peace (New York: McGraw-Hill Book Company, 1963), 69–94; Simkin, Mediation and the Dynamics of Collective Bargaining (Washington: BNA Books, 1971), 289–312.

apply to an incentive system, fringe benefits, work jurisdiction, or some other element. Second is the creation of a new system or the alteration and transformation in major respects of an existing system. These processes necessarily involve the test runs, balancing, modifications, and stabilization of the new arrangements for a considerable period in a dynamic environment.

The first activity is the work of journeymen and mechanics, with the involvement of some apprentices. The second involves elements of the activity of artist, inventor, architect, engineer, and manager in varying proportions. These characterizations imply no judgment as to the relative worth of routine operations and creative design or any suggestion as to their appropriate relative rates of compensation. But it is to the galaxies with opportunity for design and innovation in industrial relations systems to which I believe qualified neutrals should pay more attention. So should the Academy. These are worlds in which administrative law judges are useless and even dangerous, and many labor, management, and government institutions are looking for assistance in creative problem solving rather than for old certainty and predictability in a rapidly changing universe.[4] I recognize, of course, that many current arbitrators would prefer to act as judges are presumed to behave, and they should not abandon their natural proclivities.

I have been invited into a number of long-term labor-management-government situations over the years to assist in restructuring or creating new processes to resolve disputes or to achieve different results. I thought it would be helpful to convey my point of view expressed in 1976 and reiterated today through five of these cases in brief—and necessarily inadequate—reports and then to draw a few general observations from these experiences. I have omitted cases that arose prior to 1976.

1. *Joint Labor-Management Committee for Municipal Police and Fire (Massachusetts).* At the request of the Cambridge city manager in 1977, I invited to lunch statewide firefighters and municipal association representatives. They were concerned with the problems arising under the compulsory arbitration statute for municipal fire and police collective bargaining agreement disputes. An agreement between the parties was achieved in a few

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[4]*See,* Salter and Dunlop, *Forums and Governance,* Industrial Governance and Corporate Performance, An Introductory Essay (Boston: Harvard Business School, January 31, 1989), 33–45.

sessions to remove these collective bargaining disputes from an all-public member arbitration board and to set up a joint labor-management committee with a small staff to mediate the disputes with fire, police, and municipal committee members and a neutral selected by the parties, with the same powers of arbitration reserved as a last resort. The agreement was quickly and almost without opposition enacted into law.[5]

The new objective was to avoid routine resort to arbitration and to enhance the role of the statewide organizations in helping to settle local disputes with local parties and their lawyers. It was also intended to develop a forum to address continuing underlying issues affecting the parties on a state-wide basis.

In 1991 the machinery and the processes continue despite some further limitation on the role of arbitration. Our authority to arbitrate was eliminated in 1980 and restored in a limited way in 1987. An arbitration award now binds the municipal executive but not any legislative body that appropriates funding. In the more than 350 cases handled since 1987, we have used this limited authority in only five cases. We use internal and external factfinders and arbitrators. From the beginning there has scarcely been a divided vote on a matter; all procedural and substantive actions are unanimous.[6]

This dispute settlement machinery has resolved about 75 contract disputes a year, largely by specialized mediation, with greater satisfaction and at lower costs to the parties, in the process denying business to scores of arbitrators.

2. *Migratory Agricultural Labor, Northwestern Ohio and Southern Michigan.* In the fall of 1984 a vice-president of Campbell Soup Company complained of a boycott by Catholic bishops and the Council of Churches on account of a dispute over the harvesting of tomatoes by Hispanic migratory labor from Texas and Florida on farms supplying products to the Company. He suggested that I be hired as a consultant to resolve the controversy. I declined, explaining that my preferred role was that of a neutral; I had never heard of the dispute but would look into it.

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[5]*See*, Dunlop, Dispute Resolution, Negotiation and Consensus Building (Boston: Auburn House Publishing Co., 1984), 242–47; Brock, Bargaining Beyond Impasse, Joint Resolution of Public Sector Labor Disputes (Boston: Auburn House Publishing Co., 1982), 25–49.

[6]*See*, Lester, Labor Arbitration in State and Local Government, An Examination of Experience in Eight States and New York City (Princeton University, Industrial Relations Section, 1984), 117–37; *see also, Analysis of Experience Under New Jersey's Flexible Arbitration System*, 44 ARB. J. 14–21 (1989).

Fortunately, in my current view, neither the National Labor Relations Act nor any state statute constricted the problem solving. Recently, it was necessary to work with the U.S. Labor Department to change the status of these workers from owner-operators to employees, as determined by the circuit court.

After an extended period of getting acquainted with the major participants, including many hours in the kitchens of farmers and their wives, it was possible to work out a procedure for voluntary elections on the farms with the aid of Harvard students, to use Spanish and English, to declare the Farm Labor Organizing Committee (FLOC) an appropriate representative on some farms, and to negotiate a first agreement for the 1986 season. I appointed a commission, with the approval of the parties, comprised of Monsignor Higgins (NAA member), Douglas Fraser, with knowledge of labor organizations, and Tom Anderson and Don Paarlberg, with farmer and management background, to assist in the process. The arrangements were also applied to Vlasic Foods, the pickle subsidiary. There is much more labor involvement in cucumber hand harvesting than in tomato harvesting which is by machine.

Subsequently, a mail-ballot procedure was designed during the winter season for Heinz, U.S.A., outside the role of the commission, but with my involvement as neutral. Recently another procedure has resulted in agreement with Dean Foods, the other major processor in the area. Thus, three-way collective bargaining agreements, involving FLOC, the farmers, and the major processors, govern the harvesting of cucumbers by migratory workers. There are about 5,000 migrants covered by these agreements.[7] The development of this industrial relations system is an example of pro bono mediation work an arbitrator can do.

3. *Textile/Clothing Technology Corporation (TC)*[2]. The president of the Amalgamated Clothing and Textile Workers Union (ACTWU) called in 1977 to advise that a contract dispute had been settled in the shirt industry, and a strike averted, by an agreement that included a provision that I should make a study of the outlook for imports. I had never handled any dispute in the industry. The study was made with an assistant professor in

[7]*See, e.g.*, Collective Bargaining Agreement Between Farm Labor Organizing Committee and Vlasic Foods, Inc. and Growers under Contract to Vlasic Foods, Inc. (For Ohio Delivery), January 1, 1990–December 31, 1993.

the Economics Department and showed a likely rapid expansion in imports by items in men's clothing. The opportunity for joint discussion and problem-solving activities was too important to abandon, and initially a joint training and data gathering organization was developed.

In 1979 a Links Club meeting of the CEOs of Dupont, Burlington, and Hartmarx with the president of the ACTWU led to the creation of $(TC)^2$ to develop and introduce new technology into men's clothing. An engineering colleague, Professor Fred Abernathy, was persuaded to join the efforts to make the U.S. industry more competitive. The U.S. Commerce Department, and subsequently the Congress, were persuaded to match the private industry funding.

Today $(TC)^2$ has 75 company members, both clothing unions, and a budget of $9 million a year. We have a model factory and instructional facility in Raleigh, N.C., continuing technological research at Draper Laboratory in Cambridge, and a major grant from the Sloan Foundation to help improve the productivity and competitiveness of the industry. The project leads particularly into the relations between retailers and manufacturers, inventory costs, and quick response.[8]

This activity grew out of a labor-management dispute, but these developments illustrate that economic and technological problems often underlie industrial relations issues, and the skills needed to make contribution to problem solving can often be more generally applied in labor-management-government interactions.

4. *Harvard-Harvard Union of Clerical and Technical Workers (HUCTW).* For almost 14 years Harvard University had opposed the organization of its technical and clerical employees. There are 3,500 employees in the unit; 83 percent are women. After an election in May 1988 that the union won by 44 votes with 41 votes contested, and after an adverse administrative law judge decision to a Harvard protest, President Bok decided to recognize the union. At the same time he asked me to negotiate an agreement representing the administration of the university. I had no advance notice from the university and had only met the union leader a few times in the immediately preceding months.

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[8]*See,* Dunlop, *supra* note 5, at 247–251; Richard Kazis, *Rags to Riches, One Industry's Strategy for Improving Productivity,* 98 TECH. REV. 43–53 (August-September 1989).

At the outset we agreed to postpone presentation of any proposals for three months while we arranged for a joint transition team, with seven or eight from each side, to meet regularly to explore the basic objectives of both sides, to exchange any and all data, to articulate what sort of a university and workplace we were seeking, and to arrange subsequent negotiation procedures. We invited Professor James J. Healy (NAA member), retired from the Harvard Business School, to sit with us as a neutral from the beginning.

We developed an agreement that is built upon joint discussion, participation, and problem solving. We now have 28 joint councils throughout units of the university that are intended "to be a forum for the discussion of all workplace matters which have a significant impact on staff." Similarly, we have 19 problem-solving joint teams to handle issues at a decentralized level.[9] The agreement provides for mediation-arbitration for questions that are not resolved by our joint problem-solving team on a university level. Thus far, arbitration has had no business and I expect little.

The switch from neutral to partisan negotiator did not prove traumatic. I had the experience once before dealing with unions in the U.S. Labor Department.

5. *Labor-Management Group.* A quite different type of labor-management forum is involved in those designed to facilitate discourse, responsible dialogue, consensus building, and, on occasion, common public positions on issues of important policy. Such forums can take place on a local or national level and on a sectoral, economywide, or even international basis.

For 18 years I have been the coordinator of a group comprised of eight CEOs of the Business Roundtable, the president of the AFL-CIO, and seven other members of the executive council that meets two or three times a year on a prepared agenda developed with a staff group from the parties.

The body began as an advisory committee when I was director of the Cost of Living Council and continued as an advisory committee to President Gerald Ford. When I left the government in 1976 the group decided to continue as a private body and asked me to remain as coordinator.

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[9]Agreement, Harvard University and Harvard Union of Clerical and Technical Workers, AFSCME, AFL-CIO, July 1, 1989–June 30, 1992.

In the past year we have devoted our time to seeking common ground on appropriate national health policy concerned with issues of access, cost containment, and quality. In the classic language of the trade, positions have been appreciably narrowed in recent months. This activity clearly is not arbitration, but it is vital to the industrial relations universe.

An analogous forum, created in 1981, consists of national organizations concerned with health care issues. I serve as coordinator of the Group of Six, comprised of the chief executives of the American Hospital Association, the American Medical Association, the Blue Cross and Blue Shield Association, the Health Insurance Association of America, and senior representatives of the AFL-CIO and the Business Roundtable.

General Observations

A few general observations derived from these cases, and the larger universe of which they are a part, conclude these remarks.

- All of these cases involve the creation of a new industrial relations system, new features, or a significant revision in an older arrangement. These assignments do not involve the administration of an existing system although they do require the development of administration in a new system.
- The persons who asked for my intervention, or even the parties eventually involved in these cases, did not have a very good idea of the eventual outcome or result. They responded to a relatively immediate dissatisfaction or a perceived problem. The results were achieved by working through a complex of questions with the parties over a period of years. The specification of the assignment of the neutral was not definite. It was much broader than any assignment to "interpret and apply" the agreement.
- These cases generate long-term involvement, often not apparent at the outset. The exterior environment is often changing, the internal politics and leadership of organizations change, and government policies are in a state of flux. The adaptation of relationships to these changes is vital. The intervention is systemic, not ad hoc for a single episode.

- These situations operate in what Robert H. Mnookin has happily called "the shadow of the law."[10] There is often a question of whether the law applies or to what extent and in what way does it constrict or complicate the parties in problem solving.
- The cases cited are drawn from both the private sector and the public sector, from profit-making and nonprofit institutions. There are differences across these boundaries, but they do not appear to be large or significant. Each situation is distinctive, but these categories of private/public or profit/nonprofit are not decisive in my experience.
- The common temptation to transfer institutions or procedures or concepts from one industrial relations system to another often produces dangerous consequences. Many systems reject these transplants. They often prove to be incompatible. Nowhere is this tendency more suspect than applying private sector concepts to the public sector. I have, for instance, written out of our Massachusetts fire and police statute any reference to "impasse" that authorizes management to make unilateral changes in conditions of employment or change association status. I have substituted disputes that "have remained unresolved for an unreasonable period of time resulting in the apparent exhaustion of the processes of collective bargaining."[11] This language carries none of the private sector baggage. In turn, the civil service regulations and prohibitions of strikes also involve noncommensurate status.
- A common element in this experience is the importance of working directly with the parties and their interaction at every stage. Invention and solutions are reciprocal processes. There is a great need for hard thought and imagination but little occasion for a learned opinion to impress colleagues, the labor-relations services, the lawyers, or the courts.

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[10]Mnookin and Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

[11]MASS. GEN. L. ch. 589, §3a (1987).