

## CHAPTER 11

### REMINISCENCES: HONORARY LIFE MEMBERS

#### INTRODUCTION OF ROBBEN W. FLEMING

BY WILLIAM P. MURPHY

The reason I am hosting this session is that I am the outgoing chair of the Committee on Honorary Life Membership. When I became president of the Academy in 1986, I appointed Jack Dunsford as a one-person committee to study the possibility of breathing some life into the long dormant provision in our constitution for honorary life members. Jack submitted a report to the Board of Governors. Then another committee was formed, chaired by Arnold Zack, which reported to the Board its approval of the honorary life membership program. A third committee was organized to pick the people; it came full circle at that point, and I was appointed as chair of that committee. We had our first class of honorary life members in San Diego two years ago.

The guidelines which the Board approved for the selection of honorary life members at this time are twofold: (1) all past presidents of the Academy who no longer engage in active labor arbitration are automatically eligible for the status of honorary life member; and (2) people from outside the Academy who have made special contributions in their lives and careers to industrial relations and particularly to labor arbitration.

I would be very remiss if I did not tell you that Dick Mittenthal and Arnie Zack served with me on the committee that proposed these guidelines to the Board of Governors and recommended the first inductees into the honorary life membership category. I want to thank them publicly for their help. Arnie Zack deserves special recognition because it was his idea that we should use the honorary life program not only to honor these people but also to bring programs like this to you for your benefit. If you remember last year at Washington Arnie chaired a fascinating

session with John Dunlop, who just came in as an honorary life member. So this is the second of these programs, and I wanted to thank Dick and Arnie publicly and particularly Arnie, who deserves credit for this concept.

Now let me introduce to you honorary life member, Robben Fleming, who will be our first speaker. Later I'll introduce Willard Wirtz, our second honorary life member.

Back in the 1950s Rob Fleming was Director of the Institute of Labor and Industrial Relations at the University of Illinois. He then moved to the University of Wisconsin as Chancellor, and then went to the University of Michigan as President. Of particular interest to us is that Rob was president of the Academy in 1966 and was the author of one of the first studies of the labor arbitration process which still bears reading today after all those years.<sup>1</sup> I recommend it to you. Since he retired from higher education, Rob was the founding chairman of National Institute for Dispute Resolution, and was the senior advisor to the Corporation for Public Broadcasting.

#### ROBBEN W. FLEMING

Since all of us, when we come into the field of arbitration, are to a certain extent products of our individual backgrounds and philosophies, perhaps I should say a word about how I got into arbitration in the first place. I graduated from the University of Wisconsin Law School in June of 1941. My labor law professor was Nathan Feinsinger, who went on to become a distinguished member of this Academy and one of the country's best-known mediator-arbitrators. I took his labor law course and was quite fascinated by it, although I had come from a little agricultural town in Illinois of about 500, where there never was a union and certainly never a strike.

Nate was a provocative teacher. He could always do us in because he was so much better informed than any of us were. He would take either side and we'd always lose. It was really wonderful teaching because I would go away thinking I was really right but didn't know enough about it to cope with Nate's superior knowledge. He left me with a great interest in the subject, however.

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<sup>1</sup>Fleming, *The Labor Arbitration Process* (Urbana: Univ. of Ill. Press, 1965).

World War II was coming on, and I knew I was going to be in the Army within probably a year. I hoped to find something interesting to do for part of that time so that, when I came back from the Army, I wouldn't have to say I'd never had a job. I worked in Washington, D.C., for a few months. Law firms weren't very anxious to hire people who were about to be drafted into the Army, so I went with the Securities and Exchange Commission in Washington.

About that same time the National War Labor Board was being formed—January 1942—and I thought that would be something very exciting to do. Through Nate's influence and Lloyd Garrison, who was then Dean of the Wisconsin Law School, I got a job as a panel assistant. A panel assistant was essentially a gofer. At that point I had absolutely no experience whatsoever in this field. What a panel assistant did was to sit with these three-man panels who tried to work out settlements of cases and to help with errands.

As time went on, the Board was inundated with cases, so they had to take a bunch of the younger people, including Ben Aaron, Eli Rock, and myself, and give us assignments which nothing in our experience warranted. The first strike I'd ever seen in my life involved 20,000 employees at an aeronautical plant in Patterson, New Jersey. I discovered that it was an organizational strike between the Machinists and the UAW.

I survived that period for about six months and then I went into the Army in September 1942. But that six months was probably worth about three years at that time in my life because I did get a great deal of experience. More than that, I was exposed to people whose philosophy I took over in later years when I began to arbitrate. As I said, a lot of those people who were at the War Labor Board when I was there are members of the Academy, so I've known them forever.

I came out of the Army in the spring of 1946 and was trying to decide what I would do. I worked a few months for the Veterans Housing Program in Washington, but then in the summer of 1947 I was invited to come back to Wisconsin where they were starting an Industrial Relations Center—many universities were doing this at the time since labor-management relations was considered the most serious domestic problem of the time. It was a small operation; I could be had cheap at that point. So they hired me as an assistant professor and as director of the Center, and I went back to the University of Wisconsin. Nate was the

driving force behind that, along with Ed Witte, whom many of you knew. Nate then got me started arbitrating, and for the next 20 years I was moonlighting as an arbitrator while working full time for the university. My friends from the War Labor Board days got me on both the Federal Mediation and AAA lists.

To put things in perspective, two facts should be noted about the state of labor relations in 1942. One was that the National Labor Relations Act had been passed in 1935, but it was not declared constitutional until 1937, which meant that labor had not been able to fully utilize its provisions until very shortly before the NWLB came into existence. Many of the mass production industries were in an early state of organization or not organized at all. Thus, many of the companies and unions whose cases came to the NWLB were signing first contracts.

The second fact was that, though labor arbitration had a long history, it was the War Labor Board which persuaded or ordered many companies to include a grievance arbitration clause in agreements. This was not an altogether welcome idea at the outset, but by the end of the war it was well accepted, and the field of labor arbitration became firmly established.

Now let me say a word about the philosophy of the NWLB. Some of you probably never knew the public members of the Board. They were Will Davis, chairman, a patent lawyer from New York; George Taylor, associate chairman, from the Wharton School at Penn; Frank Graham, who was on leave from the presidency of the University of North Carolina; and Wayne Morse, who was then Dean of the Law School at Oregon and later became a U.S. Senator. This was a fascinating group of people, all very different; watching them work was an education in and of itself.

In the matters that came before the Board, their general philosophy was to come out with a settlement which the parties could accept. Their thinking was: It doesn't do much good to stop a dispute when the feeling is so bitter at the end of it that all you've got is a lot of tension, which wasn't likely to help with war production. They were wise enough to know that a settlement upon which the parties could agree, or at least one which they could accept, was an important ingredient in determining how productive a plant would be.

So the background from which I came to arbitration subsequently was one of trying even in the arbitration context to come out with a solution which the parties could live with. You can say

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that's a somewhat delicate process because your sense of what they can live with may be wrong, and it may not be a very good decision. But that was my background.

As I said, Nate got me started. After the war I did mostly ad hoc cases, mostly on panels from the FMCS or AAA. I want to tell you about a few of those cases because they illustrate some of the points I want to make.

1. In Chicago I was asked to hear the grievance of a worker who had had a heart attack on the job but now wanted to return to work. The company doctor ruled this out on the ground that he was not in condition to work. The union doctor, on the other hand, said that he could work. When they could not agree, they had a third doctor, who was not a heart specialist, examine the man. He said that his findings "were consistent with a heart attack." This wasn't very helpful since no one disputed the fact that he had had a heart attack.

The parties, by this time disgusted with doctors, asked me to hear the case. The only evidence was what I have recited. Since I felt totally unqualified to decide whether the man's physical condition was such that he could, or should, return to work, I suggested that we agree on sending the man to a heart specialist and then accepting his opinion as final. They would have none of this, they were tired of doctors.

I then reached in my pocket and got a coin that I poised on my thumbnail and blithely asked them which one of them wanted to call the toss. They looked at me in astonishment and said, "You can't do that, that would be purely capricious." I said, "No more capricious than asking a lawyer whether a man has had a heart attack, and anyway it will save you money not having me think about it!"

So we drew up a little agreement. I would ask the Chicago Heart Association to give me a list of some heart specialists. I would pick one, and we would send the job description of this man's work to the heart specialist and ask him to give an examination and then give us a yes-or-no opinion, no medical terminology to argue about; just yes or no, can this man go back to work? He did that, and after the examination he called me up and said: "Not only can this man not go back to work, he can't go back to work at anything. He has a very serious heart condition." So I wrote a one-line award which said that the heart specialist

says that the man is in no condition to go to work; therefore that's the answer. Well, you can say that's a crazy way to arbitrate a case, but I say it's not so crazy then or now, because why should anybody ask a lawyer whether a worker has had a heart attack? So I thought it was a good result, and that's what I did.

2. Once again in Chicago, I was asked to hear a major utility dispute involving the handling of high tension electrical wires. The practice had been that in such cases two men would be on the pole, whereas it was now proposed that there would be only one man. The workers feared that this would endanger the life of a man who made contact with a wire because he could not be reached by a man on the next pole in time.

The difficulty in that kind of a case, of course, is that one does not want to be wrong in concluding that one man per pole is enough. The consequences of such a decision are too life-endangering. On the other hand, if it is safe the company seemed justified in saving the cost of having an extra man on the job.

The evidence, presented largely by the company, was that they had made several trial dry-runs and had found that the man on the next pole could reach the endangered man within the time both sides could agree would be satisfactory. The union had no contrary evidence, but did not accept the company's demonstrations.

I knew that the company maintained a testing ground nearby, and since they could agree on the time required for a rescue, I suggested that all of us go to the testing ground and conduct several tests to see whether the man on the second pole could reach the stricken man in time. They agreed. We went to the test site and the tests took place. The matter was facilitated by the fact that the company hired foremen from the ranks, and many of them had been skilled linemen and former members of the union. They were the ones who, by consent of both sides, performed the experiment. I held the stopwatch. The rescuers had three minutes to effectuate the rescue. I wouldn't have thought myself that it could be done in that time. But the tests were successful, and I ruled for the company. The union was a little unhappy, suggesting later in its newspaper that there were certain deficiencies in my character. But they had agreed to the method of deciding the case in advance, so that's what I did.

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Again, that seemed a more sensible way to solve that problem than for me to make a judgment as to whether it was or was not safe based upon what they told me.

3. A bus driver for a major company found himself caught in the fog on a turnpike in the East. It was one of those pockets on the New Jersey Turnpike where occasionally a very heavy fog sets in very suddenly. This bus driver, who had been with the company for 20 years and had a superb record of safety under all circumstances, was caught in this pocket of fog and tried to make a decision about what to do. He debated pulling off to the side and stopping, but decided against that because of his fear of being hit. Instead he chose to creep along, keeping an eye on the middle line. Suddenly a steel beam, extending considerably beyond the flat-back truck ahead of him, crashed through the windshield, went right down the middle of the bus, hit and killed two people, and mildly injured several others. The driver was fired because the company had a rule that any rear-end collision was an automatic discharge.

In the course of the hearing, the company conceded that the driver had a long and perfect record, and that it was sad about firing him, but it insisted that this one ironclad rule could not be violated without the penalty of discharge. The union agreed that the rule was firm and that it concurred in it, but argued that there were extenuating circumstances in this case.

I could not see how the driver could reasonably be discharged for such an accident. Everybody admitted he was an excellent driver. The options he had in this circumstance were very limited, no one argued that he had chosen unwisely, and there was no way that the steel beam could have been seen in the intense fog. It was clear that the company did not regard taking the driver back as posing any future driving danger for them, it was only that the rule was important to them.

This was a three-man board, with a union representative, a company representative, and myself. We heard the evidence and everybody agreed that this was a flat rule within the company. In our executive session, I told the company representative that I couldn't agree that under these circumstances the rule should be so strictly enforced.

When I made it clear to the company member of the Board that I would vote with the Union member for reinstatement, he

asked for time to discuss the matter with his superiors. He came back with the answer that while he could not vote with us, the company would not object to taking the driver back if I simply ordered reinstatement but wrote no record whatsoever of the facts of the case. The company did not want a record of ever having taken back a driver after such a collision. The Union member agreed, and that was the end of the case.

4. One final example about how social change affects these cases. In the early 1950s I got a case involving the UAW and a major manufacturer involving janitors and janitresses. Under their contract women got 10 cents less in any job category. Women brought a grievance under the clause in the contract saying that you get equal pay for equal work. So they picked these two categories to bring this grievance under that provision.

There was lots of testimony during the trial that there was a difference in the type of work since the men did the heavier work, although they also explained that their source of janitors might be somebody who had had an arm cut off in an accident and could only sweep thereafter. And they had some very powerful Katrinkas as janitresses. In fact, it looked to me that they could probably pick up some of the men janitors.

The company had a job analysis system and, acting dumber than I really was, I asked the company: Please explain to me how the job evaluation system works. Well, they said: This is a system where you don't look at the individual. What you do is look at the job, and you have all those characteristics (e.g., is it hot, is the work heavy, is the area of employment unpleasant), and you give each one a rating and a certain number of points. Then you add up the points and allocate those point totals in the various labor grades. You don't have to distinguish between individuals; you just assign the rate.

I said: That's very interesting. Now would you explain to me why some of these women have the same number of points as the men but they all get 10 cents less. I must have missed something about this system, so would you explain it to me again. Well, they went all through it again. Finally, I said: Let me tell you how I understand it. I repeated exactly what they told me and I concluded: I thought this was a system that didn't look at individuals. They said: That's right. But, I asked, why is there is a distinction between men and women? Well, they said, because

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they're women. Everybody had a totally straight face about all of this. This was early 1950s, and you can see the problem we had. So I told them: You can't have a job evaluation system which disregards individuals and still have a differentiation between men and women.

The interesting part of this case was that I later used it in my labor seminar class at Illinois, composed of 90 percent men and 10 percent women. I told them the facts, making every effort to keep it objective without telling them how it came out. I asked: What do you think about that? How many think the company should win? And 90 percent of the hands went up. Even the women were very reluctant to vote against the company. I asked: How do you explain that answer under this scientific system which rates only the job and not the individual? And they looked blank and said: Because they're women.

I tell you this because it seems to me a commentary on our general thinking in the society about this issue. Here are intelligent people acting in good faith, who can explain a system apparently in scientific, objective terms, but when it comes to application, the social mores prevail.

I want to conclude my remarks by saying that I left the field of arbitration in 1967 when I became president of the University of Michigan; I no longer had time for arbitration. I'm not very well informed about new developments now, although I must say that this afternoon's discussion sounded like old times. I hear criticism these days that arbitration has lost too much of its flexibility, that it's too formal. In the early days it was pretty informal. There were no transcripts, few briefs.

That reminds me of another case: A fellow had been discharged in a little town in Illinois where they'd never had an arbitration before. There were no lawyers. When we got there, I asked the company to explain why they had discharged this man. The owner of this little business had a big briefcase, and he patted the briefcase and said: I could tell you a lot of bad things about this guy, but I'm not going to. I said: If you don't tell me, I'll never know why he was discharged, in which case I'll have to reinstate him. He kept saying: I could tell you a lot. So I called a recess and took the company member of the board out in the hall. I said: What am I supposed to do? Do you want me to stop right now and reinstate him because there's no evidence of any

kind. He said: Go ahead, I can't find out either. The hearing had lasted for about an hour. It was time for lunch, and the owner said: I always take a nap after lunch so I won't be back this afternoon. So we finished the case without him.

Is it true that some of the flexibility is gone? Is arbitration now subject to the charge that things have become too formal, too legalistic, too drawn out, too brief-ridden, too expensive? Or is that simply a myth? Certainly at the end of the time I was arbitrating, I rarely had a case where there wasn't a lawyer in the hearing. Far more often there were briefs. I would therefore be very interested in your reaction as to the validity of these criticisms.

Thank you for inviting me to come to talk to you. The Academy holds a very warm spot in my heart. I'd be happy to answer any questions.

Q. I think one of your great contributions was your study of due process. Would you say something about that?

A. Bill Wirtz was really the one who got that started. Bill had written an article on that, and then we (Bill, Ben Aaron, and I) had some money from the Fund for the Republic, as I remember. We set up three or four regional meetings around the country and invited about a dozen arbitrators to come (New York, Atlanta, Philadelphia, as I remember). We sent out in advance a questionnaire, indicating the things we would talk about and asking: How would you handle this type of situation? We had an all-day session and kept very thorough notes which we used to write it up. It was a very interesting experience and did contribute to a better understanding of the relation between arbitration and the law.

Q. I thought your experiment of asking your students to decide the cases that had been heard by an experienced arbitrator and finding that they pretty much came up with the same answers was very interesting. I know that a lot of employers are anxious about using inexperienced young people as arbitrators. I'd like to hear your thoughts about how quickly these young people can be brought into the profession, at least for some of the simpler discipline cases.

A. That chapter I wrote as a result of an experiment I did with my students in the labor seminar. I had a great accumulation of arbitration cases with transcripts and briefs, so at the start of the seminar I gave each student all the papers in a case except the decision. I always picked ones where the decision had not been

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published. I said to them: Here's the case; you decide it. I don't care which way you come out; you're going to get graded on how you write the analysis of it because there isn't necessarily any right answer to these things. The one thing, of course, they didn't have, which a sitting arbitrator would have, was the opportunity to observe the witnesses as they talked, and we all know that can be very important. They all had access to published arbitration reports so that they could seek out other analyses, and they all wrote a decision.

I was convinced as a result of this experience that, in a great percentage of cases except the very complex ones, a reasonable person with some training would be likely to come out the same way that I had. Of course, I caution that I hadn't necessarily come out right. That's why I wanted to grade them on their analyses rather than the outcome. The interesting thing to me was that they did come out much as I had. By that time I'd had a lot of experience; they didn't have any. You can say: Well, they were in your seminar and thus were influenced by your philosophy about cases. It's conceivable that entered into it. But many of these cases didn't involve any great philosophical content.

On another occasion I sent some students out two or three years after I'd made an award on cases where I always wondered about the impact of the award. For example, I had a case where a man had been discharged for allegedly slugging the foreman, but it was one of those one-for-one cases where there were no witnesses. The foreman said he did; he said he didn't. I thought they were both lying at the hearing. This was another case where the man had a clean record. I reinstated him and always wondered whether it was a bad thing or a good thing, and who was lying. So I had the student go to see what the status was. The grievant was still there; he had turned out to be a good employee and was no problem. But the student interviewed all the people who had been witnesses, and they didn't change their version one bit. And I believe to this day they were both lying.

Q. I was in Ann Arbor during the 1960s and had an opportunity to see you handle the various antiwar demonstrations. I was wondering whether and to what extent you found your arbitration experience to help you in what would now be classified, I suppose, as alternative dispute resolution.

A. I'm trying to do some writing about that now. I may end up over the next year or so saying something about that. There are some things you learn. That reminds me about that first strike I

went out on. There were about 50 men in the union group, and I said: Let's get three representatives from each side, and we'll go in and sit at the table and negotiate. They said: No, we're all going to do this together. We compromised and they all stayed there. So I said: If you're all going to be here, you must have only two or three people who are going to talk. That they agreed to and they stuck to it. But everytime we'd break, this big Irishman would stand up and he'd blast the union, he'd blast the company, he'd blast me. The first time this happened, I thought everything we'd done had been destroyed, but when they came back, it was as if nothing had happened. This occurred every time we'd take a break. I learned a great truth from that experience: the bark is far worse than the bite. That was very useful to me in the student days because they were regularly suggesting a deficiency in both my lineage and my character, and then adding: there's nothing personal about this. Yes, I did learn some things.

### INTRODUCTION OF WILLARD WIRTZ

WILLIAM D. MURPHY

Bill Wirtz many, many years ago was a law professor at Northwestern University Law School and had an active labor arbitrator career. While a professor he was the brain father of a consortium of law professors for the purpose of publishing teaching materials for labor courses in law schools. That group, called the Labor Law Group, is still in existence to this very day publishing labor law materials.

Along the way he became a law partner of Adlai Stevenson in Chicago, and then in the early 1960s he went to Washington, D.C., where he was Under Secretary of Labor. When Arthur Goldberg went to the Supreme Court, Bill Wirtz became Secretary of Labor until the end of the Johnson administration. Upon retiring from government service, he and an associate set themselves up in Washington as consultants. They sent out announcement cards, but this one was not the usual one. Bill has authorized me to tell you what they put on their announcement card when they went into business. They were "counsellors and consultants in such matters as are interesting and worthwhile."

He appears on the program only as Willard Wirtz, but he has a third name which also starts with a W. He used to appear on programs as W. Willard Wirtz. I mention that because Bill is one