

CHAPTER 2

DISTINGUISHED SPEAKER: THIS GENERATION'S RECONCILIATION

WILLIAM B. GOULD IV*

It is a special pleasure to have the opportunity to speak to you here today. This occasion is proof positive for the proposition that you can, indeed, come home again for, as you may know, I became a member of this organization almost a quarter of a century ago in 1970, a period so long ago that it now seems lost in the distant haze of another era.

At that time I was in Detroit as a professor at Wayne State University Law School and a neighbor of Academy worthies such as Dick Mittenthal, the late Harry Platt, Ron Haughton, and Mark Kahn, with whom I taught a seminar available to law, economics, and industrial relations students at the university. Thus, the Academy holds old and fond memories for me and it is good to see so many old friends and to have the opportunity to make new ones as well.

Once in each generation or so, a broad theme emerges which characterizes that particular era. In the Eisenhower 1950s, the first period that influenced me, it was McCarthyism and the anti-Communist hysteria that went with it, the contentment and middle class prosperity attracted to "I like Ike."

In the 1960s it was intense conflict and upheaval vaguely reminiscent of the Great Depression, New Deal, and Wagner Act—first over civil rights and related domestic inequities, and then with regard to the Vietnam conflict and the various forms of civil disobedience arising out of that engagement. For the next decade it was Watergate, which accelerated a sense of cynicism already rampant by virtue of the Vietnam War.

*Chairman, National Labor Relations Board, Washington, D.C.; formerly Member, National Academy of Arbitrators, and Professor of Law, Stanford University, Stanford, California.

Disraeli said, "We, all of us, live too much in circles"—and yet, the 1980s brought another round of moral torpor and greed reminiscent of both the 1950s and 1920s. Now President Clinton's focus on a comprehensive national health insurance program—an idea first put forth by President Truman almost a half a century ago—suggests a renewed sense of morality, which brings to mind the domestic initiatives undertaken in both the Kennedy and Johnson Administrations and the New Deal and Fair Deal before them. The end of the Cold War in the 1990s not only allows for more attention to domestic issues but also reminds us of St. Matthew's aphorism that the peacemakers are blessed.

We have been in the business of peacemaking for some years—though I know that most of us would have difficulty recognizing ourselves in the laudatory and effusive passages of the *Steelworkers Trilogy*¹ written by Justice Douglas 34 years ago. Yet it seems obvious that the need to substitute peaceable procedures for conflict and to promote cooperation in human relationships in a period of change is a subject with which we have considerable familiarity.

The bulk of the arbitration that blankets unionized industry and much of the public sector in this country has emerged since the emergency conditions of World War II and the promotion of arbitration under the auspices of the War Labor Board. It is often said that the developments of the 1940s, of which the War Labor Board and arbitration procedures were a major part, outrank the importance of the 1930s and the rise of the new unions at that time. The institutional developments, of which you have been a major part, principally voluntary and private, are associated with events now half a century old.

The emergence of our voluntary system of private arbitration in the United States is one of the best illustrations of new methods to deal with a changing social circumstance, in this case, in the workplace. As the U.S. Supreme Court has noted on countless occasions, this system has served as a substitute for industrial strife for labor and management. If it has had difficulty completely adjusting to the new world of employment discrimination and individual employee rights, nonetheless it seems clear that the new field of alternative dispute resolution owes its existence to the success of arbitration in employment.

¹*Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

This May 1994 reminds us of other profound changes even more considerable than the arbitration process of which you have been a part—changes containing graphic parallels to your work. Last week we celebrated the 40th anniversary of *Brown v. Board of Education*,² the Supreme Court's decision where "separate but equal" in public education was declared unconstitutional under both the Fourteenth and the Fifth Amendments to the Constitution. Anthony Lewis of *The New York Times* in his important book *The Second American Revolution*,³ highlighted the significance of *Brown* and its role in substituting reconciliation in the place of conflict.

For *Brown*, whatever its limitations and the frustrations associated with desegregation of public education, produced a nonviolent revolution in our country which led to agitation for civil rights legislation in the late 1950s and the 1960s, beginning with the Civil Rights Act of 1957 and carrying forward to the important and consequential legislation enacted in 1964 (employment and public accommodations), 1965 (voting rights), and 1966 (private housing). As Lewis noted last week:

What happened was that protests, and brutal suppression of those protests by white officials, aroused the conscience of Americans who had not known or cared much about segregation. President Kennedy made the first speech ever from the White House calling racism a moral issue. President Johnson pressed for action.⁴

Inequities along racial and social lines are ever with us—and in some respects more deep and divisive than 30 years ago. The big cities are overwhelmed with the problem of drugs, crime, and the tawdriness associated with both. But the fact is that *Brown* presaged a nonviolent revolution, where blacks moved into positions of responsibility in both the private and public sector, and where black political representation increased enormously.

Two weeks ago I participated in events reminiscent of *Brown* and its progeny at a ceremony which in some respects was even more startling. I stood outside the Union Buildings in Pretoria, South Africa, and witnessed the inauguration of Nelson Mandela, as the first black president of the Republic of South Africa. The May 10 inauguration was in some respects the logical culmination of

²347 U.S. 483 (1954).

³Lewis, *The Second American Revolution: A First Hand Account of the Struggle for Civil Rights* (Random House 1964). (Originally published as *Portrait of a Decade: The Second American Revolution*).

⁴Lewis, *Brown v. Board*, *The New York Times*, May 16, 1994, A17, col. 1.

efforts that have taken place throughout the West during the past 300 years, beginning with England's bloodless revolution of 1688, the Declaration of Rights in France and its revolution, as well as our own Declaration of Independence, the Constitution, its Bill of Rights, and ultimately and most important, the post-Civil War Amendments.

In the United States, of course, even when the country attempted to correct the previous century's *Dred Scott* decision, which declared that blacks were property, the promise of the Constitution was not realized through actual deeds of government or private parties. The result of the Civil War was the abandonment of human rights through both the 1877 Compromise, which brought Rutherford Hayes to the White House, and Supreme Court decisions which narrowly limited the post-Civil War Amendments. The emergence of Jim Crow and the Supreme Court's proclamation of the constitutional acceptability of "separate but equal" in public transportation in the 1896 ruling of *Plessy v. Ferguson*, as well as congressional abdication of its role in the post-World War II era, made it necessary for the Supreme Court to speak out against apartheid in this country in the 1954 *Brown* ruling.

But in South Africa the situation was quite different. No written constitution or independent judiciary with the capability to render legislation invalid through judicial review existed. Until the 1980s blacks had no right to move freely throughout the Republic. And again, until that decade interracial marriage or sexual relations were prohibited by statute—and blacks were excluded from jobs by statute on the basis of race. Indeed, until this decade all rights of citizenship and political participation were nonexistent.

My first published writing was a review of Alan Paton's book, *Hope for South Africa*,⁵ in *The New Republic* in September 1959. But, at that point there appeared to be precious little hope indeed. The only prospect was that of recurrent violence between the political and economic leadership, which possessed modern weaponry and an efficient military fighting force, and the black masses who attempted to resist the laws of oppression. The prospect was Armageddon.

President Mandela's appointment of so many of his major opponents to key positions in his cabinet vividly demonstrates his commitment to the politics of reconciliation between the races

⁵Paton, *Hope for South Africa* (Praeger 1959).

and contending points of view in that country. In the broadest sense the new government's commitment to the politics of inclusiveness dramatizes its belief in innovative methods of conflict resolution. As President Mandela put it in his May 10 Inaugural Address:

We must . . . act together as a united people, for national reconciliation, for nation building, for the birth of a new world. . . . Never, never and never again shall it be that this beautiful land will again experience the oppression of one by another. . . .

Thus, the challenge in South Africa is to devise a new institutional mechanism to respond to the need both to tackle racial and social inequity and simultaneously to preserve the infrastructure that the country possesses.

I would like to explore with you today four areas in our own country where efforts to achieve a similar goal are ongoing, two of which affect my agency, the National Labor Relations Board, directly and one indirectly. All of them, in my view, involve attempts to cut through the barriers of wasteful litigation or confrontation responsible for unnecessary acrimony.

The *first* relates to our attempts to process litigation at the Board without excessive delay. One of the most vexatious areas under the National Labor Relations Act (NLRA) relates to the finding of what constitutes an appropriate unit for the purpose of collective bargaining and, more immediately, for a vote among employees to determine whether a union will represent them. All too frequently, disputes about what constitutes the unit for such purposes have provided the basis for substantial delays, conflict, and maneuvering under numerous criteria, some of which play no actual role in the Board's decision. This problem was a principal factor in the Board's decision a few years ago to devise a mechanical rule that would diminish, if not eliminate, the potential for such disputes in the acute health care industry.

Where the employer possesses more than one facility, frequently there have been disputes about whether the single facility is the appropriate unit or whether it shall consist of multiple facilities. Over the past almost 60 years of the Act, there has been extensive litigation involving factors such as geographical separation, autonomy of the location manager, extensive employee interchange, contact between facilities, functional integration—and in 1994 the litigation still continues!

If the Board devised a relatively mechanical rule that focused upon one or two factors and allowed for dispute only in the most

extraordinary of circumstances—an approach already used in acute health care cases—the potential for delay in representation proceedings and the consequent impact that would have upon employee loss of faith in the law might be diminished considerably.

The agency committed itself to rulemaking in the acute health industry prior to my arrival on March 14, and the results, if measured by the frequency of resort to litigation in the courts, are dramatic and positive. As many of you know, this venture has successfully concluded with affirmance of our authority by the Supreme Court.

A process begun by my predecessors, and one in which I am involved now, relates to the Supreme Court's 1988 ruling in *Communications Workers v. Beck*,⁶ where the Court held that the NLRA prohibits a union, over the objections of dues-paying nonmember employees, from expending funds collected from those employees (pursuant to a union-security clause) for purposes not germane to collective bargaining. A whole host of issues for the agency has emerged under *Beck*. Again, prior to my appointment, the rulemaking process was invoked.

It may be that a variety of other issues lend themselves to rulemaking. Some issues relating to the jurisdiction of the Board might be good examples. Moreover, the whole area of campaign tactics (e.g., captive audience speeches) may appropriately fall into this arena—just as the Board obliges employers to provide unions with the names and addresses of employees when an election is ordered.

The *second* area where litigation could be diminished again relates to the Labor Board itself. A number of years ago I wrote a book entitled *Japan's Reshaping of American Labor Law*,⁷ which suggested that the American NLRB has much to learn from its Japanese counterpart, established at the end of World War II by virtue of the MacArthur Occupation. As a general proposition, the Japanese Board is much more active in promoting settlements than its American counterpart.

Of course, two cautionary notes are in order in this regard. The first is that the American Board does promote a substantial number of settlements, generally in excess of 90 percent of the charges filed. However, the difficulty is that most of this settlement

⁶487 U.S. 735, 128 LRRM 2729 (1988).

⁷Gould, *Japan's Reshaping of American Labor Law* (MIT Press 1984).

activity occurs prior to the issuance of a complaint, that is, before the battle lines are drawn and hardened. The second is that the ability to transplant practices from another country is difficult because of the obvious cultural differences—particularly between Japan and the United States—which are part of the industrial relations systems and the law, contrasts that impose limits upon the ability to compare practices and law.

Nonetheless, it is possible to learn something from the experience of another country. It appears that our administrative law judges, who have direct involvement at the time a complaint is issued, vary substantially in terms of their degree of intervention to promote settlement and discourage litigation. I shall be meeting a group of senior administrative law judges early next week with a view toward promoting a greater potential for the dispute-resolution process—and, indeed, have sought the views of others, both inside and outside of the agency, on this matter.

It is ironic that the American system has devoted considerable energy to sophisticated dispute-resolution techniques in both the private and public sector on grievance and interest disputes, matters frequently discussed and analyzed at your Academy meetings—but comparatively little attention has been given to procedures that might operate in the area of public law so as to diminish the amount of litigation that would otherwise take place. One of my major initiatives, with a view toward diminishing administrative litigation before our agency, is to institute more effective mediatory initiatives by our administrative law judges to resolve unfair labor practices prior to hearing.

A *third* area is one with which Academy members are familiar and about which I spoke to you in Chicago a decade ago. This is the subject of wrongful or unfair dismissals and the extent to which new procedures, arbitration constituting the best example, could be put in place in lieu of the existing system of litigation in courts of general jurisdiction. Causes of action in the employment relationship over the past 10 to 20 years have increased considerably in number. The Civil Rights Act of 1991, which amended in significant respects the 1964 legislation, and the Americans with Disabilities Act of 1990 will cause an even greater increase in litigation.

The prospect of expensive and substantial litigation, which is vexatious to both sides, has led to a consideration of alternatives to these lawsuits. In the wrongful discharge area, the expense of litigation is undoubtedly harmful to most employees, and the

disproportionate number of managerial and white-collar employees who have used the wrongful discharge theories demonstrates the importance of income to litigation and the necessary involvement of an attorney whose financial stake is frequently predicated upon a contingency fee arrangement. The system is also harmful to employers because of the erratic and unpredictable nature of juries, which sometimes have been known to award multimillion dollar punitive and compensatory damage judgments predicated upon the depth of the defendants' pockets.

Another problem is the inherent vagueness of many of the concepts used in wrongful discharge litigation. For instance, it has been held that longevity of employment is an important prerequisite to maintaining an action under the covenant of good faith and fair dealing concept. But how long must the employee be employed? Since these are common law actions, the matter cannot be addressed with precision as under a statute. Moreover, the idea that an employee may not be dismissed for reasons inconsistent with the public policy of the state is not only inherently vague but also of benefit primarily to higher echelon employees who are able to blow the whistle on the misdeeds of the employer.

The problem of liability is considerable. As I have already indicated, many of these judgments are of the multimillion dollar variety. The availability of punitive as well as compensatory damages encourages, perhaps excessively, employees to roll the dice in the hope that their number may emerge in the lottery before a sympathetic jury.

A decade ago a special California State Bar Committee, which I co-chaired, recommended comprehensive legislation providing for arbitration and limited liability. Two years ago the National Conference of Commissioners on Uniform State Laws recommended a similar model. But no state, except Montana, has enacted legislation regulating this matter.

In the meantime, subsequent to the California report, an increasing number of employers have introduced so-called at-will clauses, under which employees agree to be subject to dismissal at will or without cause. The Supreme Court in the *Gilmer*⁸ decision has facilitated the binding nature of wrongful dismissal agreements which provide for arbitration—a process that may be controlled and/or financed by the employer unencumbered by the presence of any other party. Both developments are one-sided and

⁸*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 55 FEP Cases 1116 (1991).

unfair and thus argue even more persuasively for legislation along the lines proposed in California 10 years ago.

On the other hand, it is said that the California proposals would be a full employment act for arbitrators and thus swell the Academy's ranks to untold numbers! I leave for your consideration and discussion the implications of such prosperity. I cannot resist noting that it would provide you with a wonderful opportunity to increase the numbers of minorities and women in your ranks—an area where you could use lots of improvement!

But your numbers may be diminished by the last area that I want to discuss. This is the attempt to develop, in both nonunion and unionized circumstances, nonadversarial procedures through which cooperation between employees, employers, and unions is promoted. The emergence of employee committees and other cooperative mechanisms in the organized sector in some circumstances heralds a more infrequent invocation of grievance arbitration machinery. But the verdict is still out on whether the same results apply in nonunion firms where arbitration is used to ward off the dreadful prospect of punitive and compensatory damage awards. Numerous issues relating to the introduction of procedures facilitating cooperation will be coming before the Board shortly. So also will the cases relating to employee committees in the nonunion context.

Two of the most prominent relationships where the interdependence of labor and management and the need for cooperation have been recognized are at the Saturn Corporation, a wholly owned subsidiary of General Motors, and at NUMMI (New United Motors Manufacturers, Incorporated), the General Motors/Toyota Joint Venture in Fremont, California—both relationships with the United Automobile Workers. Both situations have attempted to eliminate archaic work rules and rigid job classifications, to compress job categories into a small number so as to promote work-force flexibility. Part and parcel of this is the development of a team system, where workers assume the challenge of designing their jobs and, in some instances, possess disciplinary functions as well. Indeed, at Saturn the line between the employees and their supervisors has been blurred if not obliterated by virtue of supervisory responsibility in the discipline area undertaken by union *and* employer representatives, who work together as “unit module advisors.”

The payoff for employees is twofold. First, both NUMMI and Saturn provide strong pledges against the potential for dismissal.

In NUMMI the employer is obligated to utilize alternative methods including “the reduction of salaries of its officers and management” before economic dismissals or layoffs are instituted. At Saturn the union is involved in virtually all aspects of decision making in the management prerogative arena—investment planning and the like.

Our statute does not mandate these procedures and relationships. But the fact that the parties have undertaken these efforts independently demonstrates maturity and means, in my judgment, that a greater measure of economic democracy is reaching the workplace, notwithstanding the limits of law. The new economic democracy is a mirror image of the political democracy produced by the *Brown* decision and President Mandela.

But just as the wrongful discharge arena giveth more business to your members, so also the parties' reliance upon their own mechanisms may taketh it away. Notwithstanding my good wishes to old Academy colleagues, primary reliance upon new mechanisms are the bedrock of autonomy, the virtue so frequently associated with your work.

All these developments I have discussed with you today—beginning with *Brown*, on through Nelson Mandela's inauguration, as well as the four labor issues—present opportunities to promote dialogue, understanding, and reconciliation between old adversaries.

Justice William Brennan—your distinguished speaker at this luncheon a few years ago—stressed the role of antagonistic viewpoints and self-interest in collective bargaining in a 1960 opinion issued a few months before *Steelworkers Trilogy*. To suggest modifications to that well accepted philosophy does not necessarily mean that the lion will lie down with the lamb or that old foes will love their enemies. But you peacemakers of this world are best positioned to promote and practice reconciliation through word and deed—to bring the political changes in the United States and South Africa into the workplace of this decade and the next. I wish you good luck on this and on your deliberations here in Minneapolis generally!