CHAPTER 1

PRESIDENTIAL ADDRESS: WHERE HAVE WE BEEN? WHERE ARE WE GOING? DO WE KNOW?

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It is with the strongest sense of remembrance that I appear today as president of the Academy. My first arbitration was assigned to me in 1943 by direction of the War Labor Board and the New York regional directors Theodore Kheel and Walter Gillhorn. I have continued arbitrating since. Shortly after World War II, I taught on college faculties as lecturer and instructor, but decided to forego the munificent salary of $4,000 per year and the attached prestige of being an academic, to arbitrate full time. I have been so fully occupied since then.

In 1955, my mentors and advisors, namely Abram Stockman, Robert Feinberg, Emanuel Stein, David Cole, Jim Hill, along with others, admonished me that it was time that I joined the Academy and paid my tithe. My application took the form of Aaron Horvitz, the greatest arbitrator in the world, accosting me to ask how to spell my name. I quickly received my certificate of membership and have been a member since, attending almost all of the meetings and holding many offices.

The inability to meet the many friends who are no longer with us is balanced by the many I can still meet in our meetings, continuing our friendships, exchanging ideas, agreeing and disagreeing, telling each other that we have not grown older, replenishing our hoppers of war stories, and being reminded that I am not alone riding the circuit dispensing justice in the variegated, turbulent, volatile, and ever-changing world of industrial relations. It is particularly rewarding for me to greet my daughter, Professor Dena Davis, and to greet those members I helped become arbitra-

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tors—mentoring, advising, and nurturing their continued active practice in our field.

What has happened to arbitration since we began our adventure in 1947 with the creation of the Academy? How has the Academy responded to the changes in the field of labor-management arbitration and its entry into other forms of the employment relationship? Is it time to reexamine the Academy, initially created and nurtured by "those engaged in the arbitration of labor-management disputes . . . to promote the study . . . of the arbitration of labor-management . . . disputes," to revise knowingly, if at all, its aims and structure to encompass other areas and forms of disputes such as "at-will" and "employment" cases?

Arbitration did not begin with the War Labor Board in World War II. It has been noted in history and literature since the beginning of recorded history. George Eliot describes in her novel, *The Mill on the Floss,* in the early part of the 19th century, the arbitration of the issue of the water level in the mill pond. The hearing was held at the side of the pond, culminating in a decision at the end of the hearing. The litigation of *Jarndyce v. Jarndyce* by Charles Dickens in his book, *Bleak House,* contrasts the dispute over the disposition of an estate, only to end after a number of decades with the exhaustion of money for legal fees.

My copy of *Blackstone's Commentaries,* the first American edition dated 1832 and 1849, from the 18th London Edition, under the heading of "Private Wrongs," defines arbitration as the submission by injured parties of claimed personal wrongs, to the judgment of arbitrators "to decide the controversy." "The decision . . . is called an AWARD . . . and thereby the question is as fully determined by a court of justice." In further relevant partial quotation: "it will be a breach of the arbitration bond to refuse compliance" with the award. The *Commentaries* do not provide for any form of process prior to and during the arbitration hearing as a prerequisite for confirmation by the courts. Arbitration is definitively described as distinguishable and separate from court proceedings.

The Pope arbitrated claims of division of the "new world" between Spain and Portugal.

Ellis Island, home of the Statue of Liberty, was divided by an arbitrator—one part assigned to New Jersey and the other part to New York.

President Theodore Roosevelt arbitrated boundary disputes between states and countries.

The 1910 general strike of thousands of garment workers, known as waistmakers, was resolved by then-Judge Louis Brandeis with his Protocols of Peace. The Protocols set up a biparty structure of employers and the union for the resolution of disputes without specifying procedure and any form of process. The Protocols fostered nonadversary proceedings informally presenting problems for resolution by the parties themselves, and, failing resolution, submission to the impartial chair of problems rather than disputes or issues. The absence of professional advocates, including lawyers, was the rule that has since continued in this basic nonadversary approach to resolution. Serving as impartial chair in this industry and as permanent arbitrator and chair in a number of other industries, I can vouch for the continued nonadversarial submission, exploration, and resolution of problems with the guidance of the chair or arbitrator.

Arbitration of labor-management issues received its major impetus with the War Labor Board's obtaining a commitment from employers and unions to arbitrate. The Board then had to create a cadre of arbitrators, which it did; drawing from its own employees, lawyers, academicians, clergymen, and community leaders—primarily people who qualified by not being tainted by previous association with employers or unions.

Industries having a continuing relationship with unions had their chairs as arbitrators—for example, printing in New York, ladies' and mens' garment manufacturing throughout the country, and hosiery and other textile operations in the Philadelphia area with George Taylor as the long-established chair. These industries with established industrial relations and continuing commitments to the recognition of the unions continued their practice, their habit, if you will, of exploring problems jointly with their chair for solutions adjusting to the challenges of the war and the following years.

Resolution and adjustment were the primary concern of these parties searching for means of mutual accommodation and continued function with only incidental, if any, attention paid to established rules of process, other than the offer of evidence, confrontation, and persuasion. Collective bargaining agreements in such industries were living instruments assuring mutual employer and union existence—led and nurtured by chairs in their continuing office.

Management and union people played major, active roles unencumbered by the limitations of procedural proscriptions classified

as "due process" as developed in trial courts. The free and easy, and I mean easy, offer of facts, ideas, and exchange of explanations in which the arbitrator was an aggressively active participant culminated in practicable agreements as expressions of mutually recognized rights, responsibilities, and benefits. Awards were issued when needed and requested, often without an opinion that could make later modifications difficult. This form of dispute resolution, if it be dispute, was labeled the "Taylor Model," after Professor George Taylor.

This could not be the case in industries without institutionalized mutual recognition by management and labor. The parties had no experience in arbitration. They could not select arbitrators; they did not know of any.

The American Arbitration Association (AAA) became the agency for providing the needed assistance. The Association was created in the mid-1920s by the merger of arbitration organizations chartered by legislation to provide the means of resolving disputes—arbitration—which then were civil matters in commercial and personal matters, and avoiding the courts with their proscriptions and prescriptions, in exchange for speed, economy, and justice.

The AAA developed a roster of people nationwide, and from this roster, supplied lists of names to parties looking for arbitrators. The AAA extended its administrative services from commercial disputes to labor disputes by appointing arbitrators when unions and employers could not select one from the supplied lists, arranging for dates of hearings, providing meeting facilities, and even serving as a conduit of communication between the parties and the arbitrator to protect the arbitrator from the taint of an approach by one of the parties without the knowledge of the other. Parties were not committed to use any arbitrator who served in previous cases.

The Federal Mediation and Conciliation Service later joined the Association to supply arbitrators, often the same as those on the AAA roster. Other administrative services were not provided.

Management and labor using these sources for arbitrators and administrative support did not have the history of constant relationship to nurture the Taylor Model. The parties met only when they had disputes, and then with the facilities supplied to them. This form of arbitration was named the "Braden Model" after J. Nobel Braden, the then-president of the AAA. Issues submitted to arbitration consisted almost exclusively of grievances claiming violation of written contracts, with rigid reference to the language

in their contracts. Professional advocates who were evaluated by cases won and lost were retained. The parties' relationships before and continuing after the arbitrations were a secondary consideration to winning and losing. Management jealously guarded what it considered to be its prerogatives or managerial rights, the theory of residual rights, which it had not expressly yielded in negotiations; labor fought for every advantage and benefit it thought it had obtained in negotiations, explicitly and implicitly expressed in the agreement.

Arbitration proceedings became adversarial, at least more so than prevailed in the Taylor Model of continuing collective bargaining. Professional advocates were retained by the parties, who, more often than not, were lawyers who viewed the arbitration as yet another form of litigation they brought with them from the trial and courtroom. The withholding of damaging evidence, making the proceeding a contest—often unequal—rather than the volunteering of all information to educate the arbitrator for problem solving and the issuance of dispositive and practicable decisions, became the norm of arbitration proceedings.

This review and comparison is given as my understanding of the development of the different concepts of arbitration. They were not created for imposition as templates upon the parties' proceedings. They were outgrowths of contrasting experiences.

The AAA quickly recognized that the arbitration it fostered had begun to imitate the litigation it was supposed to avoid. Its Voluntary Labor Arbitration Rules make it quite clear that rules of evidence developed in court jurisdictions need not apply: "The arbitrator may vary the normal procedure . . . [Rule No. 26]." "The parties may offer such evidence as is relevant and material to the dispute, and shall produce such additional evidence as the arbitrator may deem necessary . . . [Rule No. 28]." Testimony of witnesses by affidavit may be received, and hearsay may be heard as well. Importantly, the arbitrator may be an active player in the hearing by requesting, in addition to receiving, evidence. However, the Rules have not held off the development of "legal trappings" advocates bring with them from law school and practice.

As long ago as 1958, the AAA offered the following observations in its publication, *Arbitration Journal*: "One of those problems is the growing superstructure of legal trappings which has been increasingly evident in arbitration cases." Quoting Professor and Arbitrator Emanuel Stein:

> A frustrating kind of legalism has crept into labor relations because the arbitrator has cause to function like a judge and the parties have come to treat arbitration like litigation, with all the canons of construction familiar in the law of contracts.

The AAA agreed with Stein's placing responsibility for this development upon the parties and arbitrators alike. Further:

> The trend has, in fact, gone so far that unless it is reversed, there is serious danger that arbitration will lose the very characteristics of speed, economy and informality that cause companies and unions to prefer this method of grievance settlement above all others.

The National Labor Relations Board had not requested so-called due process in its Spielberg doctrine, which provides for deference to arbitration awards, providing that the hearing be "fair and regular"—the free submission of evidence and argument with the right to confrontation.

The Academy's Code, in Part 5.A.1, provides that "An arbitrator must provide a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence and argument." Yet, the same Code provides that an arbitration should conform to the various types of hearing procedures desired by the parties.

I prefer to believe that the drafters of the Code purposely selected "fair and adequate" to "fair and regular" and to "due process." Surely, plain meaning—sufficiency—can be ascribed to language written by arbitrators. Yet, I cannot reject the impression that the Code—with the provision for conformance with hearing procedures desired by the parties—achieved superlative pragmatism and continued acceptability by recognizing the trend and fears expressed by the AAA and arbitrators Stein, Mittenthal, and others. As Mittenthal concluded in his paper at our 44th Annual Meeting in 1991, "[i]nflexibility, formality, narrowness, and legality have become the vogue in arbitration." Due process is not assurance of fairness, adequacy, and sufficiency. Legalistic exploitation of so-called due process withholds, as well as opens, evidence to the arbitrator.

Yet, in 1995, the Academy itself embraced the legalistic concept of due process in the Protocol it adopted with the American Bar Association. The Due Process Protocol, a group effort in which the Academy collaborated, offers arbitration of claims alleging violation of legislated rights and protections.

The Academy then issued its Guidelines on Arbitration of Statutory Claims Under Employer-Promulgated Systems to its

members accepting such assignments. The Guidelines provide that

> the arbitrator should seek a comfortable balance between the traditional informality and efficiency of arbitration and court-like diligence in respecting and safeguarding the substantive statutory rights of parties.

The Guidelines then admonishes that arbitrators not discard the rules used within the structure of due process. Finally, the Guidelines acknowledge the legalistic approach by arbitrators in such cases by observing that they can be considered as serving as substitutes for a court, and therefore without protection of the immunity provided to arbitrators of labor-management disputes.

It would be naïve to expect that parties with the same advocates acting under the Protocol and Guidelines for employment and so-called "at-will" cases will shed the legalistic strictures when serving in labor-management arbitrations. Inevitably, the recognition of the due process prescription will become more firmly embedded in labor cases. By this time, the Academy cannot avoid sharing the responsibility for this development. Did the Academy understand this when, with minimum discussion, it adopted the Protocol and the Guidelines?

The Protocol, entitled "A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment Relationships," includes in its body repeated reference to the term "due process, shorthand for the legalisms and lawyerisms encountered in court room trials." The Protocol also refers to "exemplary due process." And further, due process as a procedure for training "existing . . . arbitrators." Unavoidably, the "existing . . . arbitrators" who functioned in the last 50 years and contributed to productive industrial relations by providing fair, regular, and adequate hearings assuring sufficiency will require training to cope with due process—the process viewed with alarm by the AAA and arbitrators; fairness, regularity, and adequacy may no longer be the icons of arbitration.

Furthermore, the legalism of due process is recognized by the Academy's acknowledgment in the Guidelines: "Members should recognize that in adjudicating a statutory claim, they are in some respects acting as substitutes for a court rather than serving as the final step of a grievance procedure under a collective bargaining agreement." Can the protection of immunity from legal challenge and appeal be presumed when serving as an arm of the court adjudicating claims of violation of law?

These concerns, tacitly acknowledged but less often openly expressed, make it timely for the Academy to reexamine itself to redefine its place and purpose in the field of dispute resolution:

- Shall it remain within the arbitration of labor-management disputes?
- Should it have extended its reach to employment and at-will cases, which are not labor-management arbitrations?
- Is there a place for the Academy should it extend its concern and jurisdiction where opportunities for additional dispute resolution assignments may arise, or, may it return to its initial identity of concern for arbitration in labor-management disputes, no matter whatever other disputes its members may find themselves practicing?
- Should the Academy take on the role of seeking other opportunities for its members, with or without revising its Code to reflect the extensions?
- Should arbitrators be the captives of the parties who decide on the format of proceedings at the cost of jettisoning the basic identifying principles—speed, economy, and justice?