CHAPTER 3

DISTINGUISHED SPEAKER: ARBITRATION IN AN EVOLVING LEGAL ENVIRONMENT: A MEDIATOR'S PERSPECTIVE

I. INTRODUCTION

JACQUELIN F. DRUCKER*

It is my honor and privilege to introduce the Annual Meeting's Distinguished Speaker, W. J. Usery, Jr., known to most of you either personally or through the headlines as "Bill" Usery, the nationally and internationally recognized master of labor-management mediation. He is the peacemaker who has settled hundreds of seemingly impenetrable disputes that arose in critical industries and at pivotal moments in our nation's history.

For four decades, Bill Usery has served the labor relations community and the country. He has held five presidential appointments. He was Assistant Secretary of Labor under President Nixon, and he served in the Nixon and Ford administrations as Special Assistant to the President for Labor-Management Negotiations, stepping in to assist with many pressing national issues, one of which was the energy crisis. While serving as director of the Federal Mediation and Conciliation Service in the mid 1970s, Bill led by example. As the country's fearless, hands-on mediator-in-chief, he took the agency in exciting new directions, developing such concepts as aggressive mediation and relationship by objectives (RBO). Bill then capped his career in government service with an appointment as Secretary of Labor to President Gerald R. Ford.

Bill's service to our field and the country, however, began long before these high-profile assignments. He grew up in Hardwick,

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Georgia (population 5,000), where he worked in his grandfather's blacksmith shop. Educated at Georgia Military College, he joined the U.S. Navy and served as an underwater submarine welder in the Pacific Fleet in World War II. Bill returned from the war, entered Mercer University, and took a job as a machinist at the local plant. One day a co-worker who was involved in the effort to organize a union handed Bill a leaflet, which Bill folded and carefully slipped into his pocket. This brief moment drew notice. A supervisor pulled Bill aside and told him that he really ought not to get mixed up with this "union business" and that, if he joined, it would cost him his job.

Knowing what the world now knows about Bill Usery, one readily can surmise what happened next. In the first of many acts of valor in labor relations, Bill joined the union. He went on to become president of the local—Machinists (IAM) Local 8—and then a Grand Lodge Representative. In that capacity, he was called into service at Cape Canaveral, where he negotiated 131 new or renewed labor contracts. While working at the Cape, Bill was appointed to the President's Missile Sites Committee, which was formed to help ensure the United States' victory in the intercontinental missile and space races. The space program skyrocketed, and so did Bill's career. He was plucked from the aerospace industry and called to Washington, where he commenced the illustrious series of governmental appointments noted earlier.

After his service as Secretary of Labor, Bill continued to bring his extraordinary skills to bear in the resolution of labor-management disputes and in the promotion of labor-management cooperation both here and abroad. Through Bill Usery Associates, of which he is president, Bill continues to employ his energy, insights, intuition, and overriding sense of integrity in resolving critical disputes. He is pursuing that important work literally to this very day and this very afternoon.

In 1997, Bill founded the W. J. Usery, Jr. Center for the Workplace at Georgia State University. The center is located here in Atlanta, just down the street, but it is global in focus. The Usery Center's mission, as stated by Bill, is to "apply the lessons of research and experience *today* to build the innovative and rewarding workplace of *tomorrow*."

Through all of these years and accomplishments, Bill Usery has been a good friend to and a champion of the National Academy of Arbitrators (NAA). Most recently, he has been an important and enthusiastic proponent of the NAA-initiated Alliance for Educa-

tion in Dispute Resolution. The Usery Center was one of the Alliance's first members, and it remains one of its most active. Last year, Bill was instrumental in securing for the Alliance its first $1 million grant for a program with the U.S. Department of Labor, a project for which the Usery Center generously has provided a home.

Bill has further graced the NAA with his willingness to join us today to convey a few observations and insights based on his remarkable career. Ladies and gentlemen, I am delighted to present our Distinguished Speaker, the Honorable W. J. Usery.

II. ADDRESS

W. J. USERY, JR.*

It is truly an honor for me to be invited to address the 54th Annual Meeting of the NAA. I compliment you and your officers for this fine program. And it's always good to be back in Atlanta. Tonight I'm heading down to my hometown of Milledgeville, Georgia, to give the commencement address tomorrow at my alma mater, Georgia Military College. Believe it or not, I graduated from that august institution even before the Academy was founded. I've never been a member of the NAA, but I feel a strong affinity for this organization, as my own involvement in labor relations in some ways parallels the development of the Academy.

The NAA was founded in 1947, just a few years before I became personally involved in the labor movement at the national level. The founders of the Academy were in large part the product of the World War II experience, many of them serving on the National Defense Mediation Board, which was later to be known as the War Labor Board. The war was a formative experience for me too, but in a different way. I saw firsthand the destruction wrought by our enemies and determined at that time to dedicate myself, on behalf of those who didn't come back, to the resolution of conflict and the protection of workers' rights.

I also had the good fortune to know personally some of the great founders of this organization. The Academy's first three presi-

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dents—Ralph Seward, Bill Simkin, and David Cole—were all good friends. I have also had the honor, over the years, to know and to work with George Taylor, Saul Wallen, Father Leo Brown, Jean McKelvey, Willard Wirtz, and many others who were NAA pioneers. I admired them greatly. With John Dunlop, another NAA founder, for more than 40 years I have enjoyed a friendship and working relationship and been a beneficiary of his teachings and wise counsel. No one has contributed more to conflict resolution through mediation and arbitration than John Dunlop.

I didn't know it in 1947, but upon reading the Academy's history, I came to notice another parallel with my own life. It seems that in the early years of the NAA there was something of a split between two competing philosophies on the proper conduct and practice of those engaged in "arbitration." The so-called Taylor-Braden debate pitted George Taylor against J. Noble Braden. Taylor argued that arbitrators should follow a freewheeling, problem-solving model fundamentally based on mediation in the labor relations context. Braden, on the other hand, looked at arbitrators as private judges, rendering decisions and doing justice in the context of a "law of the workplace" defined by the four corners of the contract.

Braden won that debate, and the Academy followed the "private judge" model of arbitration. While George Taylor lost, he gained at least one dedicated disciple—Bill Usery. I didn't always realize it, but as my own career developed, I was modeling myself after George Taylor. I became a mediator, and I believed in doing what was necessary to bring about a mutually acceptable solution. One result of this, as I have occasionally been told, is that because of the limited number of arbitration decisions I have rendered, I am technically not qualified for Academy membership. I can respect that. The Academy has been true to its principles. The model of arbitration that it has fostered and protected must be preserved.

But I think it is also important to consider the consequences that flow from adherence to that model, in the evolving legal environment referred to in the subtitle of this meeting. I've given a great deal of thought to the subject matter and want to give you my candid perspective, based on more than 50 years of toiling in this field. To do that, let me return once again to the founders of the NAA. These were people of extraordinary respect and integrity, who had been called on to serve during a national crisis. They gained great credibility from their service on the War Labor Board. The concept of arbitration was well established at that time,

although it was not commonly incorporated into most collective bargaining agreements until after World War II. Both during the war and in its immediate aftermath, the objective of national labor policy was to prevent strikes. Arbitration made sense to both parties as a tradeoff for a no-strike pledge. Despite the tremendous turmoil surrounding it, the passage of the Taft-Hartley Act in 1947 helped collective bargaining achieve even greater institutional legitimacy. The Act also created the Federal Mediation and Conciliation Service, lending even greater prestige to the profession of dispute resolution per se. Demand for arbitration was high, and there was great concern that the professionalism of its practitioners might somehow become diluted. The Academy was founded that very same year. Many of the Academy's founders, such as Dr. Taylor and the others I mentioned, played key roles in creating a far more responsible and effective collective bargaining environment in this country. While continuing to arbitrate, they also served on many emergency boards, commissions, and presidential panels. These bodies often were composed only of Academy members, because the NAA was held in such high esteem. Certainly, when I was in government myself, I called on Academy members whenever I needed particularly high levels of expertise.

I cannot emphasize enough the great contributions that the founders of the Academy made to the institution of collective bargaining, the legitimacy and acceptance of unionism, the stability of society, and the prosperity of our nation. That said, it is crucial to remember that the arbitration profession developed in an environment composed of several favorable elements. There was a crisis situation (World War II and its immediate aftermath), in which finality of outcome was a paramount dispute resolution objective. There was an exceptional group of highly respected arbitrators available. Most importantly, it occurred in the context of a broadly accepted, collective bargaining–based model of industrial democracy.

Put all of these elements together and you had the preconditions for a system of arbitration that worked quite well. Indeed, there was soon to dawn arbitration's so-called golden age. Union membership as a percentage of the work force hit a peak around 1954, and by that same year the proportion of collective bargaining agreements incorporating arbitration was around 89 percent, up from 12 percent before World War II. The Supreme Court, in the

Steelworkers Trilogy,[1] gave seemingly strong legal and institutional support to the concept of arbitration. The sky seemed the limit.

It was nice while it lasted. Unfortunately, some of the key elements underpinning the success of arbitration changed fairly quickly. First, the percentage of the work force covered by collective bargaining agreements declined steadily after 1954. Second, broadly based "rights" guarantees were legislated, at both the federal and state levels, which further undermined the legitimacy of the collective bargaining model. Finally, the courts voiced an increasing willingness to undercut arbitration's finality by allowing appeal to the courts. The first golden age of arbitration suddenly seemed to be facing a premature end.

While this was happening, what were the Academy's organizational concerns? Looking at its history, I can identify a number of issues that plagued the Academy from its founding: membership standards and size, professionalism and arbitrator competence, and integrity and ethics. These are interrelated, of course; an arbitrator who "splits" decisions to curry favor sparks concerns over ethics, professionalism, and membership standards. These are the kinds of issues with which any professional association might be concerned. But the most critical issue to emerge for the Academy is the relationship of arbitration to the external law. From its beginning, the NAA adhered to the policy that it would take no public positions on political or legislative matters. Yet it was here that the greatest threat to arbitration was developing, apart from the general decline in unionism.

Ironically, in their roles as citizens, I suspect that most NAA members strongly supported the kinds of legislative and court action (such as Title VII of the Civil Rights Act of 1964,[2] the Occupational Safety and Health Act,[3] the Employee Retirement Income Security Act,[4] etc.) that began in the 1960s to institutionalize the employment rights of individuals outside of the context of collective bargaining. How could they not do so? How could

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[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).

[2] 42 U.S.C. §2000e et seq.

[3] 29 U.S.C. §651 et seq.

[4] 29 U.S.C. §1001 et seq.

enlightened labor relations professionals oppose such progressive policymaking? Certainly it would have been perceived as unseemly, at the very least, and perhaps a bit hypocritical for Academy members to oppose something like Title VII on the ground that it might, in the future, cut in on their own and their fellow Academy members' "action."

Indeed, the Academy's failure to respond to the substantive legal changes was at least consistent with its refusal to serve as a kind of hiring hall for arbitrators. On the other hand, it appears to me that the debates occurring within the Academy's various committees over time on such issues as membership size, qualifications, advertising by arbitrators, and training of new arbitrators suggest a substantial concern over how such matters might affect the members' livelihoods. It's hard for me to sort all of this out, so I will leave the final judgment on these issues to Academy "insiders." However, I do know that, in large part because of concerns similar to what I've just described, David Feller, at the Academy's 1976 annual meeting, declared the end of arbitration's golden age.[5] This is familiar territory to most of you, and I don't pretend to be breaking new ground. But I want to communicate it from the perspective of someone whose career has always been, and remains, based on the institution of collective bargaining.

When arbitration was in its golden age, collective bargaining had a far more secure institutional position than it does today. And when I say collective bargaining, it's important to emphasize the word *collective*, because that word distinguished the institutional environment in which arbitration flourished. The employment-related legislation and judicial activity that has characterized the past 40 years has had a distinctly individualist orientation, despite the fact that it has generally been promoted as a means of achieving justice for oppressed groups. Although claims can be brought on behalf of groups (or classes), these groups are almost never part of an ongoing institutional structure of collective activity, like a union. They typically disappear after the litigation is concluded.

Couple this legal environment with the decline of unionism, everywhere except in the public sector, and what is the result? Although in the past "justice" for many workers was guaranteed by

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[5]Feller, *The Coming End of Arbitration's Golden Age*, in Arbitration—1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1976).

the constraints of the collective bargaining relationship, which were defined by the contract, today the entire collective bargaining concept is increasingly alien to most employees. Equally alien to them is the notion that there is some broad collective interest to be served by circumscribing their right to pursue a claim to the furthest limit of the law. As that law has expanded, there is less perceived legitimacy to any kind of parallel dispute resolution structure that mimics the operation of the existing courts, but may be subject to appeal to those very same courts, and thus doesn't ensure the finality of its own result.

The Academy's response has been to try to maintain professional integrity, in terms of both the quality of its members and the due process standards it proposes for arbitration procedures. Such measures seem to embrace the notion that if arbitration can be perceived as having the same safeguards of disinterested expertise and procedural due process as the courts, then it can provide an efficient alternative form of dispute resolution.

Maybe the courts will buy this—maybe. There is some hope in this regard to be found in some recent decisions, such as the *Gilmer*[6] and *Circuit City*[7] cases. I am not a lawyer, and I will not pretend I can predict the direction of the Supreme Court. But I must return to the beginning of the Academy, to the Taylor-Braden debate. The Braden faction won the debate and established arbitration as a legalistic dispute resolution procedure, with arbitrators in the quasi-judicial role. That made sense at the time, because there was a quasi-separate legal world in which to fit that process—the "virtual" legal world of the collective bargaining agreement. At the time, there was enough separation of these two legal worlds—the real and the virtual—that they could coexist without much conflict. Society's acceptance of the validity of the collective relationship made that possible.

Today that is not the case. Today, you can find very few individuals or institutions actively supporting collective bargaining as the basis of dispute resolution. Even many labor unions, which you would expect to be the primary voice of support for collective bargaining, seem more interested in political action in other areas. And, with the seemingly endless continuing expansion of individual rights under federal and state law, there appears to be less

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[6]*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 55 FEP Cases 1116 (1991).
[7]*Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 85 FEP Cases 266 (2001).

need for any other legalistic model of dispute resolution beyond the existing court system.

No matter how much you dress up arbitration in the finery of the court system, it will still be perceived as a second-class form of justice in the current legal environment. So, what is to be done?

Might we see help from the courts themselves? It's doubtful. Look at history. Has there ever been a situation in which a monopolist voluntarily gave up exclusive rights to a product? Even though the courts are supposed to be public agencies, their self-interest still revolves around power and influence, and they are loath to give that up to people whom they are in a position to condemn as amateurs and dilettantes.

At the other end of the spectrum is the possibility of capitulation to, and incorporation into, the court system itself. The Academy could work toward the institutionalization of arbitration as a kind of mandatory first step, a lesser court specializing and having expertise in labor issues. For this suggestion, of course, I can hear the objections coming already from the arbitrators themselves.

At the moment, arbitration exists in a kind of no-man's land, in legal limbo, another victim of the seemingly inexorable penetration of the legalistic mentality into every nook and crevice of our society. But not every problem is reachable by such an approach.

Remember that, when we talk about arbitration, we are really talking about the broader topic of alternative dispute resolution, or ADR. In most such discussions, it seems to me that there is too much talk about the *A* and not enough about the *DR*. By that I mean it is kind of fun and challenging to try to come up with alternative processes. There are endless possibilities, and who knows? Maybe one of them might work sometimes.

On the other hand, the dispute resolution part of ADR often seems like an afterthought. It's the endpoint of a successful process. The parties go away and don't come back until they need the process again. There are probably too many practitioners in the dispute resolution industry for whom this is actually the ideal, because it keeps lots of professional dispute resolvers employed.

I find it difficult to think like that. My own career has been in what would most likely be called mediation. To me, the resolution of disputes has a broader meaning, having to do with the ongoing nature of the underlying relationship. It is not the endpoint of ADR, but rather the starting point. Genuine ADR is what you get when the parties' relationship has evolved to the point that they have very limited need for outside intervention.

To me, the best model for perfectly developed ADR is not the courts—it is collective bargaining. The courts are part of what we are trying to find an alternative to.

Please understand, I have no illusions about a robust return of unionism or collective bargaining to the American scene. Economic, structural, and demographic changes have made that most unlikely. In its absence, however, we must look to the next best thing. The use of mediation should be expanded and applied to more diverse situations.

Mediation obviously differs from arbitration in a number of ways, which I will not belabor. However, I do want to deal with two of the objections commonly raised to the use of mediation. First, mediation is said to be too drawn out and expensive. I'm not even sure that this is a valid argument to start with, but I am convinced that mediation is actually cheaper in the long run, because it is much more likely than arbitration to have a salutary effect on the underlying relationship.

A second objection to mediation is that it has no mandatory or predefined endpoint for resolving the dispute. Thus, we can't be sure of the finality of the process. To this, the response is threefold. First, at this point, the finality of every other alternative, including arbitration, is also in serious doubt. Second, a good mediator can find and use to his or her advantage the "unofficial" endpoints that always exist, and that can be used to bring pressure on the parties to settle their differences. Third, it is important to remember that finality, although important, is only one of several values that a dispute resolution process must seek to advance.

Have I painted too bleak a picture of the future of arbitration in this changing environment? Perhaps so, but this is certainly not because of any failure on my part to deeply appreciate the value of the arbitration process. Arbitration, in whatever form it takes, will continue to play an important role in the world of labor relations, but it faces an extraordinary challenge. Its very success and professionalism have given it an identity crisis: What really *is* arbitration, and where does it fit?

As many of us do with too many of the difficult issues in our society, arbitrators seem to be leaving it to the courts to decide. Speaking as an outsider, I don't think I'd leave the decisionmaking, on an issue so fundamental to my identity, to a group with so much to gain from my demise. But that's just my opinion.

Dispute resolution in America needs the active involvement of the kind of talented people gathered here today. I don't expect you

all to agree with my interpretation of things, but I hope I've stimulated your thinking somewhat.

The founders of this organization, who I also consider my own professional role models, have placed on your shoulders the responsibility for making some very difficult decisions with regard to its future. May you have the wisdom to carry out that obligation in a manner worthy of the great legacy you embody.