

Hot Topic "Future Worker Management"

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Mr. Chairman,

Testimony before the Dunlop Commission
Arnold M. Zack
Sept. 29, 1994

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I appreciate the invitation to testify before your Commission.

I am here to suggest an alternative to the employer controlled arbitration procedures spawned since the Gilmer decision. Although I became President of the National Academy of Arbitrators in May, I am speaking here as an individual, albeit with the approval of the Executive Committee of the Academy. The Academy has not taken any official position on the Report or on my proposal for arbitration of statutory enforcement issues. Thus the views expressed here and in my proposal are personal. I should emphasize that the Academy has retained it's historic 47 year commitment the union-management relationship while recognizing the right of its members to engage in dispute settlement work outside that union-management relationship. We recently reiterated our policy of considering only union management acceptability as the benchmark for Academy admission but have recognized our obligation to provide the training which members require for work in related employment fields.

I have read your May Report and noted your endorsement of the due process standards that have so long driven the labor management model of arbitration. Arbitration in the labor-management field has certainly been shaped by the parties to meet their needs. I recognize that the needs of the parties in the statutory dispute settlement field will be quite different in many respects, and it is for those parties to likewise shape an arbitration system to their mutual need and benefit. I offer the attached proposal to suggest that many of the due process attributes of our private labor-management system might have some appeal to the participants in this new and expanding field for resolving through arbitration, the spate of pending statutory enforcement issues described in your Report.

It should be emphasized that this proposal is not to duplicate the current union-management arbitration structure. Nor indeed is it a structure for union avoidance. It is equally apposite to the unionized and non-unionized sectors. It has no relation to the use of arbitration in so called union-avoidance schemes. It is a merely a structure for the narrow purpose of resolving the flood of unresolved statutory enforcement issues the Report identified as plaguing the dispute settlement field and as threatening to engulf both the enforcement agencies and the judiciary.

It should also be emphasized that this is not an effort to create an expanded work load for the present cadre of labor management arbitrators. First, it is painfully clear that the current cadre of labor management arbitrators may not be the arbitrators of choice for the new procedures. We are viewed by many as being too ignorant of the law and too wedded to the collective bargaining standard of "just cause" to be acceptable for statutory enforcement issues on the standards expected by the agencies and the courts. Second, many of us lack both the interest and commitment to venture into this new field of statutory responsibility, and are content to stick to our labor management knitting without risking the agency or court reversals that might come with ventures into this new maze. Third, we lack the qualifications that many of the new users may seek. Approximately half of the NAA members are not lawyers, and we lack sufficient female and minority arbitrators to meet the

expected qualifications for resolving the anticipated volume of sex and race and ethnic discrimination issues. But the needs of the new players (as was true of the needs of the original labor management parties) may lead them to develop a wholly different roster of acceptable arbitrators. Indeed, if adopted, this proposal may lead to an entirely new generation of neutrals quite different from what the public currently perceives as being the society's labor arbitrators. Thus it is the tradition of the adversaries in the labor management field having developed their own structure of private arbitration in the labor management field, that leads me to suggest that a similar system of privatized arbitration might likewise be shaped by the parties in this new employment law field.

In developing the attached proposal, I have received comments and suggestions from a number of groups concerned with the problem. In fact, after discussions with the Council of the Labor and Employment Law Section of the American Bar Association at its Convention in New Orleans in August, the Council established a special Task Force to further explore the development of a mutually acceptable procedure for resolving these and other workplace disputes. That task force including the representatives of the FMCS, SPIDR, ACLU, AAA and me from the NAA. We met last week in New York City in recognition of the need for developing such privatized machinery and to develop a plan for discussing procedures for most effectively resolving, with due process, the whole range of work place and related disputes. That is not a closed group, and we would welcome input from any other groups seeking to develop fair and effective dispute settlement machinery for these troublesome problems.

I have attached to this statement a revised draft of my proposal. I do not intend to read it, but I would like to highlight some of its elements. The proposal anticipates government encouragement of voluntary, enterprise based private arbitration structures with due process protections for the resolution of statutory employment rights. Such procedures may be self developed by employers (perhaps with the participation of employee groups), or be provided by existing dispute settlement organizations such as the American Arbitration Association. The selection of the neutral arbitrators would be by the parties to the individual dispute from a panel provided by a neutral designating agency. The arbitrators panel card would list the prior training of the arbitrator in the legal issues involved as well as the parties to recent cases decided by the arbitrator. It proposes to expand the roster from which the panels are drawn to increase the numbers of females and minorities to make it more demographically representative. Claimants would have the right to representatives of their choice, and the arbitrator would have the authority to provide remedies similar to those provided by the courts, including the award of attorney's fees. Arbitrators would be paid by the designating agency. The funds would be collected from the employer, the claimant, and perhaps outside sources such as the statutory agencies from the money saved from enforcement costs. The decision of the arbitrator would be final following the model used by the NLRB under its Spielberg doctrine.

Greater detail is set forth in the attached document. I offer this outline to suggest that a system providing due process to claimants in a private, voluntary, dispute settlement system is attainable. If adopted by the participants concerned, with the encouragement of the government, it may help to bring inexpensive, rapid and equitable dispute resolution to this troubled area of employment law.

Thank you for the opportunity to testify.

PROPOSAL for ARBITRATION of STATUTORY EMPLOYMENT CLAIMS

Arnold M. Zack

For every complex problem, there is a solution that is short, simple, and probably wrong.--H. L. Mencken

01. Summary

The Gilmer decision has encouraged employers to establish arbitration systems for administrative resolution of statutory obligations. Such systems have tended to preclude the employee's traditional access to the due process and fairness of judicial appeal. The employer's unilateral establishment of such systems raises issues of equity as well as issues as to the impartiality of the selected arbitrators. It also threatens the credibility and integrity of arbitrators and arbitration in the labor-management forum as created and monitored by unions and employers over the decades. This is a proposal to increase the prospect of due process and fairness in the arbitration of employment disputes using mutually selected arbitrators, to assure the preservation of the high standards and acceptability of arbitration in both unionized and non-unionized settings. If acceptable to government agencies, the courts, and the participants, it might extend to a deferral system for a wide range of statutory enforcement areas helping to relieve the courts of their heavy burden, while providing a more accessible and less expensive system of dispute resolution for covered employees.

2. Present system

At present some 95% of collective bargaining agreements provide for arbitration of disputes over the interpretation and application of collective bargaining agreements. Traditionally, the jurisdiction of the arbitrators is restricted to the terms of the agreement. Although arbitrators do venture into the interpretation and application of pertinent statutes, administrative agencies and the courts have been disinclined to cede to arbitrator's jurisdiction over statutory interpretation and enforcement. Arbitrator deferral under the NLRA functions in that context, and in Alexander v. Gardner Denver the Supreme Court expressed respect for the arbitrators factual determinations while asserting its exclusive authority over statutory application.

The expansion of legislation protecting employees, particularly in the areas of discrimination, has had an impact on the entire work force, and not merely the 15 percent who operate under collective bargaining agreements. The legislative encouragement of alternative dispute resolution to resolve disputes in lieu of litigation has led an estimated "100 big companies' employers" in the last three years¹ to develop their own administrative procedures. These are intended to pressure, if not to require, employees with claims of statutory violation to sign away the right to bring such cases before a judge and jury by agreeing to arbitrate their disputes. A Wall Street Journal Article on June 9, 1994 describing required arbitration of a sex harassment complaint in the securities industry pointed to the employer's control of the process, its unilateral appointment of security managers as arbitrators, its failure to follow fair procedures and the arbitrators disregard of prevailing standards of the law. It cited the references to arbitration as "industry fraud" and a "rigged game." The prospect of such employer promulgated schemes eroding the credibility of labor-

¹ Required Job-Bias Arbitration Stirs Critics, Wall Street Journal, June 22, 1994.

management arbitration is real as the complaints that the employer controlled arbitration systems "are mounting"²

There is need to protect the rights of the nation's 120 million workers by assuring a fair procedure with due process for the prompt resolution of claims of violation of statutory protections. There is need to bring together the affected constituencies to develop a fair means of resolving such disputes at a price workers can afford. Such fairness should entail among other elements, a right of employee representation, provision for jointly selected trained and qualified neutrals, and the encouragement of worker-management efforts to facilitate reduction of such conflict as a means of enhancing productivity and workplace cooperation.

It should be emphasized that this proposal for arbitration as an alternative to litigation is confined to complaints of statutory violation. Such approach must be distinguished from arbitration as a means of resolving questions of contract interpretation and application in the context of enforceable collective bargaining agreements. At present, arbitrators of collective bargaining disputes tend to confine themselves to the terms of the parties agreement. As noted above, the Supreme Court in Alexander v. Gardner-Denver, has declined to defer to collective bargaining arbitrators on matters of statutory application. In that case the arbitrator had not been authorized to resolve the statutory issue. If that decision is reversed, or if Section 1 of the US Arbitration Act is interpreted or amended to extend arbitrator authority into collective bargaining situations, then there would also be need to reexamine the present practice of union control over appeal to arbitration, and to extend that right to individual employees in statutory right cases, even where there may be a union.

What follows is a proposed approach to resolving problems of statutory enforcement through arbitration in the vast majority of non-unionized workplaces, although its adoption is also appropriate in unionized environments.

3. Administrative and Legislative Framework

At present there are three employment statutes which specifically encourage the use of ADR to resolve claims of statutory violation: Americans with Disabilities Act, Age Discrimination in Employment Act and the Family and Medical Leave Act. Title 7 of the 1991 Civil Rights Act also encourages such procedure. Additionally, arbitration of security industry disputes has been extended to job discrimination matters. Discrimination complaints are often appealed to arbitration under collective bargaining agreements. However, under Alexander v. Gardner-Denver, Section 1 of the U.S. Arbitration Act has been considered to bar a Gilmer-like deferral to arbitration of statutory complaints raised under collective bargaining agreements. It would presumably take an expanded decision by the Court or a legislative change to extend Gilmer-type arbitration authority to enforcement of other discrimination complaints based on race, sex, etc. as currently handled by the EEOC. This proposal anticipates that there will be expanded resort to arbitration in non-collective bargaining settings to resolve statutory claims, and focuses on that area.³

² *ibid.*

³ Presumably, if Gilmer is extended to apply to collective bargaining agreements, then the negotiated arbitration arrangements will apply, authorizing binding arbitral decisions of statutory claims. Employees under collective bargaining agreements should have the individual right to appeal their statutory enforcement cases to such binding arbitration. This might require modification of the general rule that the union controls the right of appeal to the arbitration step as well as of the traditional standard that the cost of arbitration be shared equally between union and management.

In order to assure an equitable procedure, agencies responsible for statutory enforcement might promulgate regulations requiring that employer-created arbitration procedures adhere to certain due process requirements. This might be accomplished by a general mandate calling for due process procedures or through listing specific due process requirements such as a. voluntary employee access to the plan, b. the right to select representatives of the employees own choosing, c. availability of some form of discovery to minimize multi-day hearings, d. designation of arbitrators either by a neutral agency or from a neutral pool, e. written arbitration opinions, f. arbitrator cost sharing standards, g. entitlement to damages, attorney fees, etc.

Additionally the regulations might encourage joint development of such procedures by employers with committees of employees.⁴ The regulations might provide more favorable conditions, such as exemption from liability for employee's attorney fees in case of appeal, varying burdens of proof or adjustment of appeal deadlines for employers including employee representation in the development of the procedures.

Employers would have discretion to develop their own arbitration procedures, without the requirement of prior approval of the agency involved. Adherence to general due process or specifically required standards would be a prerequisite to agency or court acceptance of the arbitrators awards. Claimants would have the right on appeal to challenge the propriety of the employers plan in the light of the agency regulations. Employers might also embrace plans developed by the designating agencies. The governmental agency or court would then have the option of determining whether the procedure and arbitration decision was in compliance with the regulations and if not, of vitiating the award and permitting a de novo proceeding before the agency or court. There might of course be areas where the agency might wish to establish legal precedents by processing cases to court review. Penalty provisions for successful challenge to the fairness of the employers plans might encourage employers to embrace the recommended due process standards or to encourage employee committee participation in the development and administration of such plans.

4. Employer Created Plans

This proposal endorses the current practice of employers unilaterally establishing dispute settlement procedures (although not embracing a commitment to arbitration as a precondition for hiring). Employer promulgation of a voluntary arbitration system would encourage on-going adaptability of such plans to meet changing standards and regulations without the administrative burden of having to register or certify the plan, or being barred from changing the plan without agency acquiescence. It would also substantially reduce the cost of the system, avoiding the bureaucracy inherent in administering, or challenging, such certifications and filings. But the proposal also encourages the inclusion of employee representatives in developing and jointly administering the system by relieving the employer of certain burdens, or time constraints. Plans which provide protections beyond those mandated by the regulations might also be entitled to favored treatment, as might employer acceptance of plans established by designating agencies.

Employers who developed plans which meet or exceed the requirement of the regulations would be more likely to have endorsement of arbitrators awards rendered thereunder. Those which do not meet the agency requirements of fairness and due process would risk appeals which might overturn their procedures, bring de novo litigation of the claim, with potentially costly jury awards.

⁴ with an exemption from Section 8a2 of the NLRA

5. Arbitrator Involvement

Of greatest concern to those worried about the spill over impact of self-serving employer systems on the credibility of truly impartial arbitration is access to qualified and unbiased arbitrators. That can not be achieved if the employer is entitled to designate its choice of who is to be the arbitrator. Nor can it be achieved by allocating all cases to the present cadre of labor-management arbitrators. Numerous problems must be addressed in assuring the neutrality, professional competence, and acceptability of the arbitrators in such plans.

a. Arbitrator Pool

Individual neutral designating agencies might opt to create their own rosters of neutrals for selection in such disputes. Alternatively, to assure the broadest pool of experienced professional arbitrators, it is proposed to combine the rosters of all participating designating agencies into a single pool. This would embrace all those who are currently engaged in the practice of employment and labor-management arbitration, and those who have had sufficient acceptability to be admitted to such rosters. Presumably many of the professional arbitrators are currently on more than one such roster. Such a pool would presumably number upward of 5000 names nationally, although admittedly largely those working as labor-management neutrals. Rapid expansion of that pool is essential. Recognition by the government agencies that the pool constitutes an acceptable body of experienced employment arbitrators would place at a disadvantage and risk of overturning their systems, those employers who designate arbitrators without such credentials.

Admission to the pool could be achieved on the same basis as presently required for acceptance to any designating agency roster. Once an individual is accepted to an agency roster the arbitrator would be automatically enrolled in the pool. Designating agencies would embrace the pool listings, and draw the panels from their own rosters or from that pool when so requested by a plan. The size of the individual panel would be determined by the employer plan. Alternatively, the employer's procedure might call for appointment of an arbitrator by the designating agency directly, foregoing resort to panel selection.

It is recommended that the pool not be restricted to lawyers. It is true that the burdens imposed on the arbitrators will require application of, and conformity to, statutes and regulations, and that endorsement of arbitral decisions will be dependent on compliance to legal standards. But some of the most renowned arbitrators, with the sharpest legal minds are not members of the bar. It would be unfortunate to lose access to experienced non-lawyer arbitrators with extensive employment law experience.

b. Arbitrator Qualification

The effectiveness of this proposed system is dependent on providing qualified and acceptable arbitrators. The credibility of such a private alternative to statutory entitlement requires that the arbitrators be knowledgeable of the governing regulations and statutes and court decisions. It can only provide an effective alternative to the courts, or meet the courts' goal of reducing the flood of potential litigation if the arbitrators have the requisite knowledge of statute and regulation to assure the proceedings meet the test of judicial equivalency. It also requires that the parties have faith in the neutrality of the arbitrator, and some knowledge of the arbitrator's prior awards.

Most labor-management arbitrators today do not have the requisite familiarity with pertinent statutes or court decisions to provide a credible alternative to litigation.

Experience in labor-management arbitration is largely confined to the interpretation of collective bargaining agreements and application of the so-called "law of the shop", as distinguished from the law of the land. Many such arbitrators have been involved in applying agency regulations and statutes in their arbitrations, particularly those handling cases involving Federal agencies, but their knowledge has been largely provided by the parties in the adversarial arbitral system. Those with recognized expertise in the particular field of law might be exempt from such training.

Arbitration under the proposed system may not assure equally competent presentations by both sides. Such inadequacies make it all the more important that statutory enforcement arbitrators have the requisite independent statutory knowledge and not have to rely on the presenters to secure the information needed to decide cases involving legal issues. Such should be an integral part of their training.

To assure the confidence of the claimants, particular attention should be paid to augmenting the current numbers of women and minorities in the arbitration pool. Unfortunately, the labor-management arbitration group is not representative of the general population in this regard. There should be exploration of a special program by designating agencies to recruit and train such individuals to assure the availability of a broader selection of acceptable arbitrators. The current shortfall of such individuals might dictate waiver of the traditional avenues of entry onto the designating agency panels.

c. Arbitrator Training

To provide the specialized knowledge required of such neutrals, it is proposed that we establish a comprehensive training program to familiarize the arbitrators with the requirements of the regulations and statutes, so that the designating agencies will be able to establish rosters of individuals with skills pertinent to the particular issues being arbitrated.

Training could be provided by the government agency in cities around the country, or by the designating agencies themselves utilizing as trainers those who have experience in the substantive issues of the law, and the procedural process of arbitration. The designating and governmental agencies should jointly develop standards for such training, and permit arbitrators who have completed such training to list those courses on their resumes and panel cards to demonstrate to potential employers the extent of their expertise. Such training could embrace topics such as definitions of disability and reasonable accommodation under ADA, physical and emotional aspects of specific disabilities, rules of the EEOC, judicial rulings under various discrimination statutes, rules of evidence in arbitration, formulation of remedies, etc. For those recruited without prior arbitration experience from the ranks of women and minorities, there should also be training in the conduct of arbitration hearings, as well as a program of mentoring by established arbitrators before such individuals are added to the rosters of the designating agencies. Current requirements of listing a certain number of completed labor-management arbitrations should be reexamined for such individuals.

Arbitrators should be expected to pay for such training which would be directly correlated to their acceptability as arbitrators in the substantive areas of training.

d. Arbitrator Selection

The selection of the arbitrator will be determined by the procedure established by the employer in the light of the government agency regulations. Thus, if the regulation requires the claimants right to participate in the selection of an arbitrator from a panel developed by a designating agency, it would be assumed that the employer's plan would provide for that selection, perhaps utilizing a neutral agency of the employers choice to select the panel. If the plan calls for the designating agency to appoint the arbitrator from its roster, then that

would determine the choice. If the plan calls for alternate selection of names from a provided panel, then that would control the choice.

In some cases, particularly where there has been joint development of the procedures with an employee committee, the parties may jointly establish the panel without reliance on any designating agency nominations. They may even select a permanent umpire. In the event that this system is introduced into collective bargaining relationships, individual employees should have the right to participate in the arbitration selection, challenging the traditional view of the unions exclusive right to appeal to the arbitration step.

There should also be recognition that parties may lack awareness of the arbitrators' prior decisions that is common in the labor management environment. Listings of prior decisions might be set out on the arbitrator's panel card or be provided from agency rosters.

e. Arbitrator Compensation

The present system of compensation in the labor-management collective bargaining field mandates equal cost sharing between the parties. With minor variations that has been the universal standard. That mutuality has in turn enhanced the neutrality of the arbitrator as being jointly funded by both parties. It has also helped to free the arbitrator from hesitation in deciding cases against a party which might be paying the entire bill in that case or with a favorable ruling be the source of future work. The risk of non-payment and future recall in labor management arbitration lies equally at the feet of both parties.

Employer promulgated arbitration presumably anticipates employer compensation of the arbitrator, with minimal, if any, employee contribution. That in turn raises the issue of whether a determination in favor of the employer is more likely to bring promised compensation for that case, let alone create a favorable predisposition for future selection than would an adverse ruling.

There are many labor-management arbitrators who are currently performing arbitration services in employer promulgated systems on a variety of issues including discipline and discharge cases without concern over whether the issue of compensation influences their judgment. But there are others who decline such work in the belief that the perception of greater employer influence through compensation and the potential for reemployment reduces their effectiveness as neutrals.

Compensation thus becomes an important issue in developing a scheme for statutory enforcement arbitration. Ideally, the neutral would be jointly compensated by the participants. In most situations the employee lacks the resources for equal funding, and since the procedure is geared to avoid the high cost of court litigation, it would be unrealistic to require more than a token payment from the employee⁵. Some employee contribution is desirable to filter the volume of complaints, and may be attainable through the arbitrators to award attorney fees and costs to a prevailing employee.

Compensation paid into escrow in advance of the proceeding or provided directly by a designating agency without the arbitrator knowing the relative contribution to the funds might solve this problem. Partial subsidy by the statutory agency might help to match the employer's share while reducing the agency's litigation backlog and costs. Subsidy from some independent source might also be obtained. Development of a rational, credible compensation system should be addressed by the statutory or designating agencies, with the goal of protecting against an arbitrator bias in favor of the major funder.

⁵The impact of individual right of appeal to arbitration in the presence of a collective bargaining agreement issue must be addressed. If the employee is given the personal right of appeal to arbitration, the rationale of union paying half when it "co-owns" the grievance would not necessarily apply.

f. Arbitrator Responsibility

Arbitrator authority in the context of statutory enforcement would be driven procedurally by standards of due process, and substantively by the regulation or statute being invoked.

Procedural requirements could be established by the statutory agencies authorizing the arbitration process, or by the arbitrators in the same manner as the due process procedures and shop law in the collective bargaining context. It might be desirable to develop a model code of due process procedures for such arbitrations at the request of the designating agencies, and perhaps the labor-management bar. If so approached, the National Academy of Arbitrators, as sponsors of the arbitrators Code of Professional Responsibility, might be receptive to participating in developing a model code of civil procedure for such arbitrations.

In substantive matters the arbitrators would be responsible for adhering to the requirements of the pertinent government agency regulations and controlling statutes and court decisions. Appellate review would presumably focus on examination of the fairness of the arbitration system, with standards of deferral similar to those applied by the court in the Gilmer decision.

Attention should also be paid to the interrelationship between state and federal law and the authority of the arbitrator to resolve such conflict of laws issues. In the collective bargaining arena, there must also be attention paid to conflicting statutory and contractual rights, and the rights of the arbitrator in the two areas.

6. Implementation

This proposal offers some suggestions to instill greater equity and fairness in employer promulgated systems of arbitration in litigation avoidance systems of statutory enforcement. At the same time it seeks to protect the reputation and credibility of the institution of arbitration and in particular its manifestation in the field of collective bargaining dispute settlement. It is also intended to meet some of the concerns for cheaper, more accessible, and more rapid resolution of disputes over issues of discrimination as raised by the May 1994 Fact-finding Report of the Dunlop Commission. It may, also provide a means of stimulating the development of new employee committees in enterprises deemed so important to the stimulation of work place productivity. It requires much discussion, organizational commitment and refinement. But it may, if pursued, resolve a number of pressing problems of our industrial relations society.