CHAPTER 4

POST-GARDNER-DENVER DEVELOPMENTS IN ARBITRATION LAW

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As a lawyer with more than a passing interest in labor arbitration law, I was initially taken somewhat by surprise by the Supreme Court's decision in *Alexander* v. *Gardner-Denver*.[1] It followed by only 16 months a very balanced ruling by the Fifth Circuit Court of Appeals wherein federal courts would defer to labor awards along the familiar and comfortable path accepted by the NLRB.[2] Only 14 years before, the Court had endowed labor arbitration with unique status and dignity. It required a trilogy of cases to establish the labor rule of arbitral law.[3] Only four years before, the same Court had reversed itself and permitted injunctions in situations where a collective agreement contains the usual *quid pro quo* twin clauses—the arbitration and no-strike provisions.[4] If this galaxy of judicial precedent was not sufficiently clear, Supreme Court buffs took heart in a decision rendered only weeks before *Gardner-Denver* permitting arbitration in a case where a safety-dispute question arose.[5] If alleged violations of the Federal Coal Mine Health and Safety Act were arbitrable, surely individual discrimination grievances deserved similar treatment.

However, it was not to be. The 14-year pendulum moving constantly in one direction has reached its point of swing return.

Have the scales of justice been tipped prematurely or has a proper balance been struck between labor law and employment

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1 415 U.S. 36, 7 FEP Cases 81 (1974).

2 *Rios* v. *Reynolds Metals Co.*, 467 F.2d 54 (5th Cir. 1972).

3 *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).

4 *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235, 74 LRRM 2257 (1970).

5 *Gateway Coal Co.* v. *United Mine Workers*, 94 S.Ct. 629, 85 LRRM 2049 (1974).

discrimination? "To Arbitrate or Not to Arbitrate," that is the question that now perplexes unions, employers, and labor arbitrators. Fortunately, my distinguished copanelists will address this dilemma from the viewpoint of these three constituencies. My brief remarks will be limited to the decision's impact on arbitration law with emphasis on the 14 months since *Gardner-Denver* was decided.

To recover from my initial reaction to Justice Powell's opinion, endorsed by a unanimous Court, I went to the library and reread several comments written immediately after the Supreme Court decided the *United Steelworkers* cases in 1960. A nagging question that ran through the notes and comments was whether the holdings would sound the "death knell" for the use of arbitration clauses in collective agreements. The Supreme Court had surely gone too far in permitting frivolous grievances to be arbitrated. If contracting out was arbitrable, then management's rights clauses were not worth the paper they were written on. Allowing arbitrators to fashion legal remedies that survived the termination of the collective agreement was the last straw. Despite these "landmark" rulings, labor arbitration not only has survived but has actually increased in usage. The early fears of some labor writers proved unfounded.

It is my conclusion today that *Gardner-Denver* likewise will not signal the demise of this most successful method of private dispute settlement. The arbitral feature of collective bargaining has deservedly earned its reputation as a substitute for industrial strife. My conclusions are based upon the words of Justice Powell, a significant number of legal comments, and recent court decisions, including some from the high Court.

To begin with, there are at least seven clear signs in the *Gardner-Denver* opinion that labor arbitrators have not lost favor with the nine final arbiters of all U.S. law. They are as follows:

1. The Court acknowledged its awareness of labor arbitration law. It cited and took the trouble to summarize its major prior decisions, indicating its reaffirmation of "the federal policy favoring arbitration of labor disputes." [6]

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[6] *Supra* note 1, at 46.

2. Title VII legislative history was cited to accentuate a lack of congressional intent to affect any "rights or obligations under the NLRA or the Railway Labor Act." [7]

3. Realizing that its decision might carve an exception into the doctrine of finality of arbitral awards, the Court reminded us of the "therapy that labor arbitrators can bring to 'a complicated and troubled area.' " [8] Thus, while on the one hand the Court departed from traditional labor arbitration dogma, on the other it encouraged discriminatees to utilize the "arbitrator's couch."

4. The Court left open, in my opinion, the question of whether employees could voluntarily consent to *submit* an existing Title VII discrimination case to final arbitration when they freely and knowingly relinquished this legal right. Only prospective waiver was involved in Mr. Alexander's case.[9]

5. The opinion states squarely that discriminatees have "a strong incentive" to arbitrate (Title VII) grievances because the arbitration "may often eliminate those misunderstandings or discriminatory practices that might otherwise precipitate resort to the judicial forum." [10]

6. The decision does not prevent or even discourage discriminatees from arbitrating pursuant to the collective agreement. Indeed, the Court balanced the two federal policies by holding that discriminatees be permitted "to pursue fully" both labor arbitration and Title VII cause of action.[11]

7. Finally, after carefully explaining why a "Spielberg-type" deferral rule was inappropriate, and after indicating that the "more demanding 5-point deferral standard" formulated by the Fifth Circuit in *Rios* v. *Reynolds Metals* was an unconvincing solution, the Court nevertheless ended its opinion with the following sentence: "The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate."[12] For further guidance to federal district judges, Justice Powell added an explanatory footnote that can be characterized only as balancing justice's pendulum so as not to overly swing away from the

[7] *Id.*, at 44, 45, 46.
[8] *Id.*, at 50, note 13.
[9] *Id.*, at 52.
[10] *Id.*, at 55.
[11] *Id.*, at 59.
[12] *Id.*, at 60.

federal policy favoring arbitration of labor disputes. At the same time, the Court clearly upheld the view that the federal policy against discriminatory employment practices is of the highest priority.

Thus, (1) if a labor arbitration gives full consideration to the employee's Title VII rights, (2) if the collective agreement contains antidiscrimination language substantially in conformance with Title VII, (3) if procedural fairness has been accorded the discriminatee in the arbitral forum, (4) if the record discloses that the discrimination issue was dealt with adequately, and (5) if the arbitrator has the requisite special competence to deal with the discrimination issue, then federal district courts may accord the award "great weight." [13] In other words, the Court, while unconvinced of the soundness of the five-point *Rios* deferral standards, has nonetheless transposed them into a five-point "great weight" rule of evidence.

I submit that there was no reason to articulate Footnote 21 so carefully unless the Court still truly believed in the salutary adjudication process so well known to all members of the NAA and this audience here today.

Subsequent events are beginning to bolster my conclusions. There are clear, albeit not absolute, signs that labor arbitrators should not retire or bask only in past glories. Ben Rathbun of BNA only yesterday presented an eminently thought-provoking paper, entitled "Will Success Ruin the Arbitrator?" The remarks were indeed timely. The title was, however, out of date. The arbitrators were spoiled, if at all, in 1960 by the "Shulman-Douglas" characterization of arbitrators as labor experts of the common law of the shop. If anything, *Gardner-Denver* will temper the mystique with reality and put labor arbitrators on their mettle to prove themselves in a "culture shock" society that also pervades the labor arbitrators' domain in the shop. One cannot survive long on past successes in the fast-moving world we live and work in today. Even lawyers are hard put to keep pace with the rapid surge of statutory and case law developments that Congress, state legislatures, and courts are fashioning. It is doubly difficult for labor lawyers since most laws impact upon the work force in one way or another. There is little doubt that Title VII legisla-

[13] *Id.*, at 60, note 21.

tion has already created a whole new body of shop-related changes. Collective-agreement provisions for seniority, layoffs, hiring, and firing are all called into question when management and labor personnel deal with affirmative-action requirements. The new pension legislation will also overlap with collectively bargained provisions for employee-benefit plans. Here again, yesterday's luncheon speaker, Richard F. Schubert, former Under Secretary of Labor, described how well-intentioned laws very often do not achieve their hoped-for goals.

There is ample room for courts, arbitrators, and other agencies to help define and shape the future of American workers' emerging grievances. People's problems in their daily working lives deserve prompt redress. Say what you will about the shortcomings of labor arbitration, but no other forum has provided workers with such prompt and understanding relief.

The legal notes and comments to date dealing with the impact of the *Gardner-Denver* decision appear to cover a broad spectrum of views. Five major themes have emerged from the dozen or so articles that I reviewed.

The first concern was whether voluntary labor arbitration will continue to remain a vital part of the grievance process. Robert Coulson, president of the AAA, has indicated on several occasions that arbitration not only will remain viable but may even extend into noncollectively bargained areas of employment. In a forceful commentary, he concluded that employers who utilize voluntary arbitration procedures for discrimination cases "will have less to fear from government agencies, from class actions in federal court and from lost production due to deep-seated antagonisms generated by abiding patterns of discrimination." [14] The AAA, he stated, is qualified to help parties create appropriate arbitration systems because of the many discrimination cases that have already been administered under its voluntary Labor Arbitration Rules.[15]

Others, however, have posited that the approach taken by the Supreme Court "virtually nullifies an employer's claims of discrimination in the arbitration process." [16] On balance, the major-

[14] Coulson, "Equal Employment Arbitration After *Gardner-Denver*," *N.Y.L.J.* 1, 4 (3/13/74).

[15] Coulson, "Handling Discrimination Grievances," *N.Y.L.J.* 1, 4 (10/9/74).

[16] Dent and Martin, "Multiple Remedies for Employment Discrimination: How Many Bites at the Apple," 16 *S. Tex. L.J.* 57, 70 (1974).

ity position rests with the conclusion that much is to be gained from employers' continuing to use the grievance-arbitration mechanism for hearing discrimination cases despite the *Gardner-Denver* holding.[17]

A second question running through the articles was whether the Supreme Court was correct in carving a judicial exception to the federal policy favoring arbitration of labor-related disputes. Here again, there was no unanimous agreement among the commentators despite the fact that there was not even a single dissent from the nine justices. One carefully analyzed report concludes that "the practical effects of the Court's holding surely could not have been intended." Thus, the Court's reasoning in reference to the incentive to arbitrate alleged discrimination grievances applies only if the employee wins the arbitration.

> "Only if the employer arbitrates a discrimination grievance and loses in arbitration, and the employee is satisfied with the award, will the employer be absolved from further processing of the employee's claim of discrimination in another forum. In the Court's desire to liberally construe the national policy favoring the elimination of discriminatory employment practices, it has created a situation whereby grievance-arbitration procedures may be used by employees to prove the existence of discrimination but not by employers to rebut such allegations." [18]

The consensus, however, is perhaps best summed up by one writer who stated that "[t]he *Alexander* v. *Gardner-Denver Co.* opinion represents a realization by the United States Supreme Court that private tribunals are unable to achieve the goal of eliminating racial discrimination in employment." [19]

In my own opinion, by so holding was the only way the Court could convincingly reaffirm the highest priority that Congress has given toward granting minorities protection against racial discrimination in employment. Although the ruling was appropriate, it is not seen by the consensus as diminishing the judiciary's trust and confidence in the labor arbitration process and its continued ability to maintain peaceful labor-management relations.

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[17] See, for example, in addition to the Coulson articles, *supra* notes 14 and 15, "Editorial" in AAA, *Study Time*, ed. Morris Stone (April 1974); Oppenheim, "*Gateway* and *Alexander*—Whither Arbitration," 48 *Tulane L. Rev.* 973 (1974); Siniscalco, "Effect of the *Gardner-Denver* Case on Title VII Disputes," 98 *Monthly L. Rev.* 46 (March 1975).

[18] Dent and Martin, *supra* note 16, at 70.

[19] Zarskis, "Arbitral Deferral Under Title VII, NLRA and FLSA After *Alexander* v. *Gardner-Denver Co.*," 22 *La. B.J.* 99, 106 (1974).

Another interesting question was whether employers would attempt to avoid the multiple-fora dilemma by expressly excluding from arbitration grievances arising under the nondiscrimination clause of the collective agreement. This is unlikely for two reasons. First, such an exclusion might itself arguably be "discriminatory" and prohibited under Title VII. And, secondly,

> "Though, on its face, such an exclusion might appear to be desirable, the ultimate effect would not be. Since a no-strike clause is considered to be the *quid pro quo* for an arbitration clause, a strike in violation of a no-strike clause may be enjoined if the strike involves a dispute which is subject to the grievance-arbitration procedure under the collective bargaining agreement. Accordingly, if discrimination grievances are not subject to arbitration, no injunction may be obtained to bring about a cessation of strikes arising out of such grievances. This, then, is the real incentive for employers to arbitrate grievances alleging discrimination." [20]

A fourth subject dealt with the impact on arbitral deferral under the NLRA now that the Court has rejected deferral of discrimination grievances under Title VII. While a few commentators guessed that the Court's ruling might possibly signal a review of the *Spielberg* doctrine on NLRB deferral to arbitration,[21] the overwhelming view was to the contrary. The most authoritative and persuasive observation was made by Peter G. Nash, the General Counsel of the NLRB, who stated that:

> "[I]t seems likely that the *Gardner-Denver* decision will have little, if any, impact upon the *Collyer* and *Spielberg* policies. Indeed, the question left open by the Court, that of the weight to be accorded arbitrators' decisions, suggests that the district courts in Title VII cases may well look for guidance in assessing arbitration awards to the substantial body of law which has and is being developed under the Board's deferral policy." [22]

Finally, a persistent theme concerned itself with possible ramifications for arbitrators. The most enjoyable reading on this question is to be found in the prize-winning essay of the Saul Wallen Contest at Cornell University.[23] The language employed by the student at the School of Industrial and Labor Relations may have caused the coffin of the late distinguished neutral Saul Wallen to

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[20] Dent and Martin, *supra* note 16, at 70.

[21] See, for example, Getman, "Can *Collyer* and *Gardner-Denver* Co-Exist? A Postscript," 49 *Ind. L.J.* 285 (1973-74).

[22] Nash, "Board Deferral to Arbitration and *Alexander* v. *Gardner-Denver:* Some Preliminary Observations," 26 *Lab. L.J.* 259, 269 (1974).

[23] Siber, "The *Gardner-Denver* Decision: Does It Put Arbitration in a Bind?" 25 *Lab. L.J.* 708 (1974).

stir slightly in its grave. The essay characterizes the Supreme Court decision as a "bombshell on the world of labor relations" that has severely shaken the arbitrator's "throne." According to this young scholar, the opinion now establishes the arbitrator's status as that of a "guest lecturer" in Title VII matters. This, continues the author, poses an "enormous" array of speculation with respect to the "effectiveness and desirability" of the arbitral process. But even this prizewinner admits that "the *Gardner-Denver* decision was merely a realistic appraisal of the arbitrator's role as contract interpreter/peacemaker." [24]

Despite the colorful articulation of *Gardner-Denver* as a put-the-arbitrator-in-his-place decision, the longtime students of labor arbitration do not view the case with dismay. For example, Morris Stone, AAA vice-president, author of several labor arbitration books, and editor of *Study Time*, stated the impact of the Court's opinion on labor arbitration in a more moderate and understanding tone:

> "[T]he U.S. Supreme Court continues to look with favor on labor arbitration. The confidence is not misplaced. Some years ago, a survey showed that 69 percent of collective bargaining agreements barred discrimination in a manner paralleling Title VII. It should not be inferred from this that an arbitrator ruling on a discrimination issue under a contract that was silent on this point would permit discriminatory employment practices. Such tools of contract interpretation as the presumption that parties intended to obey the law, and the effect of the 'contract as a whole,' have been serviceable in the past, and they continue to be invoked when necessary to reach a just result. By and large, arbitrators have been deciding discrimination cases with sensitivity and understanding, and in some instances even anticipating later decisions of courts on the meaning of the Act." [25]

Leonard Oppenheim, a law professor and NAA member, also took a more optimistic view. He wrote that "arbitrators will continue to decide cases involving alleged discrimination, and in some instances, EEOC actions will also be brought. However, this does not diminish the role of arbitration or the arbitrator, and whatever accommodations must be made will come in the future." [26]

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[24] *Id.*, at 713.
[25] AAA, *Study Time* (April 1974), at 4.
[26] Oppenheim, *supra* note 17, at 988.

But it is recent court decisions that have done much to convince me that labor arbitration has not yet been abandoned. To begin with, Mr. Alexander's federal court trial on the merits of his discrimination claim itself proved anticlimactic. According to Judge Matsch, the discriminatee was discharged for "a legitimate, nondiscriminatory reason." [27] He apparently did not possess the competence necessary to be a drill press operator, producing too many defective or unusable parts that had to be scrapped. So, by November 19, 1974, Alexander's contractual and statutory grievances were truly "finally" resolved. The *de novo* trial did not alter the result of the arbitrator, the EEOC, or the Colorado Civil Rights Commission. Precise critics will perhaps comment that the grievant did have four bites at the proverbial apple. Pundits may state that the company, having gone through five years from grievance filing on October 1, 1969, is now worn to the "core." More practical attorneys, however, may read this litany of litigation as proof positive of the need to find a better way to resolve discrimination charges quickly, fairly, and inexpensively.

United Parcel Service has twice been helpful in 1974 in reestablishing the eminence of arbitration as a viable process. In one case, *Satterwhite* v. *United Parcel Service*,[28] the company eliminated two 15-minute coffee breaks per day. This, grieved the union, added two and one-half hours per week for which the workers were entitled to receive one and one-half times the straight hourly rate for time worked in excess of the regular 40 hours per week. An arbitrator, however, granted pay only at straight time rather than overtime. A union member then brought suit to recover time-and-a-half pay for work in excess of 40 hours per week for himself and others similarly situated under the Fair Labor Standards Act. The company pleaded the award as a defense. On the authority of the Tenth Circuit's holding in *Alexander* v. *Gardner-Denver Co.*,[29] the federal district court ruled that the arbitrator's award was final and dispositive. When the Supreme Court reversed the Tenth Circuit, the employees argued that *Gardner-Denver* also stands for the proposition that arbitration of a contract right is no defense to judicial determination of

[27] *Alexander* v. *Gardner-Denver Co.*, Civil No. C-2476 (D. Colo., Nov. 19, 1974) (unpublished opinion), commented upon in Note by Thomas L. Roberts, 52 *Denver L.J.* 352, 368 (1975).

[28] 496 F.2d 448 (10th Cir. 1974).

[29] 466 F.2d 1209 (10th Cir. 1973).

a statutory right. Thus, the employees sought reversal of the district court ruling, claiming that they had the statutory right to a federal court suit just as Mr. Alexander was granted a *de novo* trial of his Title VII right. The Court, however, after analyzing the wages-and-hours provision of the Fair Labor Standards Act with the antidiscrimination provisions of Title VII, concluded that "wages and hours are at the heart of the collective bargaining process," and, since they "are more akin to collective rights than to individual rights," [30] they were more suitable to the arbitral process than Title VII rights. In conclusion, the Court held that wage-and-hour disputes that have been resolved by arbitration are final and employees may not relitigate the same issue under a FLSA suit. Thus, at least the Tenth Circuit does not view *Gardner-Denver* as standing for the proposition that all statutory issues are capable of relitigation. It is also important to note that the Supreme Court has denied certiorari to the *Satterwhite* case despite a request for review by the U.S. Department of Labor.[31]

The second UPS case involved a male employee who charged the company with sex discrimination because he was required to shave off his beard before being permitted to return to work as a body-and-fender mechanic.[32] His normal job duties included a substantial amount of welding work in conjunction with reconditioning motor vehicles. During his suspension, he filed a grievance under the collective agreement and a complaint with EEOC. The grievance was denied, but EEOC issued a right-to-sue letter. The arbitrator denied the grievance, reasoning that forbidding beards on welders was justifiable on the basis of safety factors. Citing *Alexander* v. *Gardner-Denver,* the federal district court ruled that the arbitrator's award was entitled to "great weight," [33] and judgment was entered in favor of UPS and against the employee.

This is the first decision I have found applying the Footnote 21 standard articulated by the *Gardner-Denver* opinion. It is, however, an indication that federal judges may fashion the appropriate standards as to the weight to be accorded to the arbitrator's

[30] *Supra* note 28, at 451.
[31] *Cert. den.* 42 L.Ed. 674 (12/16/74).
[32] *Dripps* v. *United Parcel Service of Pennsylvania, Inc.,* 381 F.Supp. 421, 10 FEP Cases 48 (W.D.Pa., 1974).
[33] *Id.,* at 422.

award. The Supreme Court was careful to point out that it was not promulgating definitive rules, although some guidance was offered in the now-famous Footnote 21.

If anything, the conclusion to be reached from *Gardner-Denver* is that the discrimination field is *sui generis* at this point in time. The decision does not intend to destroy the viable labor arbitration process. This view is further bolstered by the fact that when it comes to antidiscrimination law, proceedings from all agencies are reviewable, not just arbitration awards. Even federal government employees are entitled to trials *de novo* on bias claims, according to a very recent Third Circuit holding denying finality to the administrative proceedings before the U.S. Civil Service Commission.[34]

And, finally, it has just been clearly demonstrated that federal policy favoring *de novo* review of Title VII claims does not mean that all rules of the collective bargaining community have been completely abandoned. On the contrary, on February 18, 1975, Mr. Justice Marshall wrote an opinion for an almost unanimous Court in the *Emporium* case holding that despite the "highest priority" to be accorded nondiscriminatory employment practices, the NLRA does not protect concerted activity by minority-member employees when they seek to bypass the union to bargain directly with the employer.[35] Here again, the Supreme Court is *balancing* the two federal policies—not continuing the pendulum swing as some feared *Gardner-Denver* might portend. Thus, the Court specifically states: "The grievance procedure is directed precisely at determining whether discriminaion has occurred." [36] That orderly determination, if affirmative, could lead to "an arbitral award enforceable in court," the Court states, citing *Gardner- Denver* for authority.

What then is the impact of *Gardner-Denver* on the future of labor arbitration law and what, if anything, should the NAA do about it? Obviously, the subject is of great moment. The AAA, in conjunction with its 50th Anniversary celebration in 1976, has

[34] *Sperling* v. *United States,* Civ. No. 74-1533, *Daily Labor Report* No. 81 (1975), p. D-1. This decision apparently conflicts with a Tenth Circuit ruling to the contrary in *Salone* v. *United States,* 10 FEP Cases 1 (1975) and may well have to be resolved by the Supreme Court.

[35] *Emporium Capwell Co.* v. *Western Addition Community Org. et al.,* 43 L.W. 4214, 88 LRRM 2660 (2/18/75).

[36] *Id.,* at 4219.

scheduled a conference entitled "The Future of Labor Arbitration in America." The Johnson Foundation is sponsoring the event at its Wingspread meeting center in Racine, Wis. Management, labor, and various foundations are also contributing financial support. Seven prominent labor law professors, all members of the NAA, are preparing papers, which will be published in a forthcoming book. Several of the academicians will be addressing the question of the impact of antidiscrimination laws on arbitration, either directly or tangentially. Hopefully, they will provide some thoughtful wisdom on this timely subject.

Perhaps the most encouraging sign that labor arbitration has viability in resolving discrimination disputes is evident in a recent arbitration heard by William B. Gould, an NAA member who certainly has competence in both labor and Title VII law.[37] The case was submitted to him pursuant to both an EEOC Conciliation and Settlement Agreement and a collective bargaining agreement. The agreement provided, among other things, for "final and binding" arbitration. While declining to comment upon the validity of the agreement, Arbitrator Gould did comment upon the efficacy of this "first arbitration procedure negotiated" for the specific settlement of a Title VII issue under the deference guidelines proposed by the opinion in *Alexander* v. *Gardner-Denver*. He said:

> "I commend the parties for entering into this novel and important agreement. It seems to me desirable that employment discrimination cases be heard by arbitrators wherever possible because of the complicated and time-consuming nature of Title VII litigation in the Federal Courts and the huge backlog with which the Equal Employment Opportunity Commission is now confronted. Delay and protracted litigation permit open wounds to fester. But traditional arbitration procedures are no answer to this problem. It is axiomatic that the parties provide the arbitrator with the authority to act as a Federal District Court as was done in this case. Only under such circumstances can the parties hope to have the judiciary accord 'great weight' to the process. Also, it should be noted that the parties have wisely permitted third party intervention." [38]

He agreed with this approach and also hoped that others would follow suit by submitting Title VII cases to arbitrators who are granted the same authority accorded federal judges.

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[37] *Basic Vegetable Products, Inc.*, 64 LA 620 (1975).
[38] *Id.*, at 624.

I believe that labor arbitration faces new and exciting challenges. The Supreme Court stated, in essence, that substantive deference might be appropriate where there is "special competence" on the part of the arbitrators. The NAA should consider, therefore, utilizing its own wealth of skilled talent to train its unknowledgeable member-labor arbitrators in the subtleties of discrimination "in the shop." This could be done in conjunction with EEOC, U.S. Department of Labor, AAA, FMCS, and other interested agencies.

The NAA should help train a new cadre of labor arbitrators drawn from the ranks of persons with an EEO background, particularly those with the neutral temperament needed to serve as impartial dispute settlers. Such candidates would have their knowledge of antidiscrimination law bolstered by the common law of the shop.

This dual training approach should at least increase the competency of arbitrators in both labor relations and discrimination. It will not prevent multiple fora from being utilized. However, it is now clear that Congress intended "to accord parallel or overlapping remedies against discrimination." The emphasis, therefore, should be shifted away from the delays and repetitious efforts that are often imposed by a series of *de novo* proceedings. Thus, it seems to me, to the extent that arbitrators can competently award in the Title VII area, the chances are better that a federal court may properly accord great weight to their rulings.

A concerted effort by the affected agencies, labor, management, and the NAA may well produce this commonly desired result.

POST-GARDNER-DENVER DEVELOPMENTS IN THE ARBITRATION OF DISCRIMINATION CLAIMS

WINN NEWMAN *

The course of action that I am proposing is based upon the following four propositions, which I will attempt to establish:

1. The typical arbitrator, if firmly convinced that both employer and union desire nondiscrimination and if empowered by

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