III. THE LEGITIMACY OF ARBITRATING CLAIMS OF DISCRIMINATION*

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I disagree with the position taken by Mr. Jenkins, that a federal agency (the National Labor Relations Board) should have sole responsibility for carrying out the national policy in labor relations as evidenced by the National Labor Relations Act (NLRA). I believe that national policy can only be appropriately effected when the citizens who are governed thereby acquiesce in the demands of the law and seek ways of complying without the intervention of federal enforcement agencies. There are many examples of how national policy can be undermined if general compliance without the intervention of law enforcement officials does not occur, such as the experiment with prohibition.

However, I wish to make it clear that there are several features with respect to the laws prohibiting discrimination in employment which sharply distinguish them from the National Labor Relations Act and which make it absolutely mandatory that we keep open access to private efforts at compliance with the law.

In the first place, there is an enormous difference between the number of potential violations of the Civil Rights Act of 1964 and violations under the NLRA. The Civil Rights Act of 1964 covers all employers in the country who employ 15 or more persons. It is probably fair to say that very few companies could claim that, post-1964, they had not engaged in any discrimination in terms of race, sex, national origin, or religion. A similar potential for violations does not exist with respect to the NLRA. While it is possible that any employer engaged in interstate commerce could violate the act by acting improperly with respect to spontaneous collective activity of unorganized workers, the overwhelming bulk of charges are lodged against employers in circumstances where there is a recognized union or where

*The speaker preceding Mr. Clark on the panel was Howard Jenkins, Jr., Member, National Labor Relations Board, who did not submit a paper for publication in the Proceedings. Mr. Clark's opening remarks are in response to Mr. Jenkins's position that any matters that are the subject of an unfair labor practice charge ought not to be deferred to arbitration by the National Labor Relations Board.

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there are active attempts by a union to organize employees in order to achieve representative status. Only about one-quarter of the workforce are union members, and there are no current signs that the percentage of union membership will increase dramatically in the foreseeable future. Unfair labor practice charges, therefore, will revolve around the organized workforce, or that small percentage who are involved in organizing drives.

Given the breadth of coverage of the Civil Rights Act and the fact that discrimination is widespread and has been firmly rooted in the mores of the society, if substantial compliance is ever to be achieved, a large part of it must come through employers who recognize their responsibility and actively seek to change their own practices. Arbitration of discrimination claims could be one privately initiated mechanism for doing so.

Additionally, the structure of Title VII of the 1964 Civil Rights Act is quite different from the NLRA. Under the National Labor Relations Act, the authority for sustaining an unfair labor practice charge and, indeed, prosecuting it is lodged exclusively with the NLRB. Title VII, on the other hand, relies quite heavily upon private parties litigating against other private parties and therefore, I believe, implicitly recognizes the possibility that these private parties may develop their own mechanisms for dispute resolution. Moreover, Title VII explicitly builds in a period of conciliation during which, as a factual matter, most charges are resolved. This also suggests that processes other than litigation (that is, arbitration) are compatible with the statutory scheme.

The issue of whether arbitration is a productive way of resolving employment discrimination claims has been debated since the inception of the statute in 1964. The proponents of arbitration suggested that it would be an effective way of reducing the burden of litigation in the federal courts. The prime reason offered in the early comments was that the equal employment opportunity agencies were swamped with massive numbers of charges of discrimination, and the Equal Employment Opportunity Commission (EEOC), in particular, had built up a backlog of cases which often languished in the agency for years without being investigated. This created a serious problem for employers because months could elapse before a matter was brought to them for resolution and, where back pay was at issue, potential damages had mounted in the interim—making it even more difficult to arrive at a settlement. Objectively, the time-lag also

made it more difficult for either side to recapture the facts accurately in situations where the parties had to rely on the memories of participants or witnesses.

Despite some strong support for the arbitration of discrimination claims, there were also some severe critics of this approach. The charge was made that arbitration was not geared to the handling of claims of a multiple number of persons who were similarly situated (class-action-type claims), since it had traditionally been limited to adjusting grievances brought by single individuals. It was also noted that conventional arbitration lacks some of the procedural safeguards of litigation, that is, the power to order discovery. Also, under a collective bargaining agreement, the union is one of the parties in an arbitration. However, it may be a party *to* the discrimination, thus compromising it as an adequate representative of the victim of the discrimination. It was also claimed that arbitration is a relatively private, invisible process and, thus, not the best one for the resolution of ambiguities in the statute where a more public forum is needed. Further, in the typical arbitration clause, the arbitrator has no power to reform the contract or to nullify certain provisions in it, which may be necessary in a discrimination case to give full and permanent relief to the grievant or grievants.

The debate around the usefulness of arbitration took a sharply different turn after the decision in the *Gardner-Denver* case.[1] When the Court held that a grievant had a right to a de novo suit in federal court even though he had previously resorted to grievance arbitration, the scholarly comments began to focus on how to invest arbitration with the procedural safeguards mentioned in the *Gardner-Denver* opinion which would give it, if not complete finality, at least some weight in the fact-finding process in a subsequent suit.

After the *Gardner-Denver* decision, there was very little discussion about whether there continued to be a need for arbitration as an alternative to the resolution of discrimination claims by state and federal agencies. This was probably due to the sweeping reforms that were undertaken at the EEOC beginning in 1977. The Commission instituted a rapid-charge and fact-finding process in which the scope of an investigation was sharply limited to the specific claims of discrimination made by

[1] *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 7 FEP Cases 81 (1974).

the charging party, and quick settlements in face-to-face conferences were arranged. (The Commission had previously broadened many investigations of a charge to cover all possible discriminatory practices in the entire company.) With this new approach in place, the 1977 backlog of approximately 130,000 charges had, by December 1979, been reduced by 45 percent, and by December 1980 by 66 percent. The processing time for individual charges was reduced from an average of two years to four months.

One might ask, with this greatly improved efficiency, whether there is any longer a need for utilizing arbitration to settle discrimination charges. I believe that there are a number of reasons which still argue for arbitration being developed as an alternative mechanism. In the first place, the very success and the improved image of the EEOC have perhaps contributed to the fact that many more charges are being lodged with the agency currently than in previous years. In particular, the number of age-discrimination complaints that the agency is now receiving is much higher than was the case when they were handled by the Department of Labor. This increase in the volume of charges is occurring at a time when a new Administration is cutting back general support funds by millions of dollars and has ordered a reduction of the staff by 241 persons by July 1, 1981. There are already projections that the time for processing charges will increase, and thus there is the potential for another backlog developing as in pre-1977 days.

Moreover, there have been severe criticisms of the rapid-charge processing system. The General Accounting Office (GAO) has indicated that, in spot investigations which it undertook, there appeared to be some negotiated settlements under the rapid-charge process system in which there may have been no merit to the charge at all. The dilemma that the GAO criticism presents for the EEOC is that if these "no-fault" mediated settlements cannot go forward without a full-scale investigation, it is inevitable that a backlog will develop again. One cannot completely dismiss the GAO criticism, however, for a random sampling of charging parties showed a high rate of dissatisfaction (48 percent) after they had thought about the settlements they had received through the rapid-charge process. This was true even though a look at the dollar figures would show that there was a higher return per charging party under the rapid-charge processing system than before its adoption. Ultimately,

however, it must be admitted that a less than full investigation with quick negotiated settlements may create a certain kind of cynicism about the total process among both the charging parties and the respondents. Neither is forced to take responsibility for the true merits of a claim, for respondents may simply feel that they are buying their way out of a nuisance situation and the charging party whose case has no merit is never made to take responsibility for that fact. Arbitration may be a viable solution to many of these problems, and it certainly is a less resource-consuming compromise.

There is the question of whether arbitration can fit within the current statutory scheme or whether amendments to the statute might be necessary if arbitration were to be undertaken on a large scale. Under Title VII, fact-finding may occur in a state agency's administrative process or in a suit in federal court as well as in the EEOC procedures. Since the *Gardner-Denver* case suggested that, where arbitration was conducted with certain safeguards, the federal court could give some weight to the arbitrator's findings of fact, it would seem reasonable to argue that the EEOC or, indeed, a state agency could give similar weight to an arbitrator's findings in their own proceedings. The only problem with that reading of the statute is that the only instance in which the statute explicitly authorizes the EEOC to take into account the findings of another agent is with respect to state and local antidiscrimination commissions. Thus, one might read the statute as not authorizing the EEOC to grant any weight to other fact-finding forums. A more important problem, however, is that arbitration loses a great deal of attractiveness as a remedy if it cannot be made final and binding on all of the participants. However, even if the federal commission took into account the findings of an arbitrator in its "reasonable cause" findings, it is clear that this would not completely preclude a grievant from subsequently resorting to litigation, under the *Gardner-Denver* decision.

The view that there is an absolute right to a trial de novo in the federal court under Title VII, despite prior arbitration, was recently reinforced in the case of *Barrentine* v. *Arkansas-Best Freight System.*[2] The Court was dealing with arbitration under the Fair Labor Standards Act (FLSA), but its dictum references to *Gardner-Denver* showed that even the dissenting judges who

[2]49 LW 4347 (April 6, 1981).

thought that the FLSA could be interpreted to accommodate final and binding arbitration of minimum wage claims did not believe that this was an appropriate interpretation of Title VII. The Court is thus unanimous in that view of *Gardner-Denver.* Therefore, while I think that arbitration ought to be incorporated explicitly within the scheme under Title VII, I believe it is probably best done through amendments to the present statute. An amended statute could respond specifically to some of the legitimate criticisms that have been made of arbitration as a dispute-resolution procedure in certain contexts. For example, I would exclude from arbitration class-action-type claims seeking a reformation of the collective agreement, or situations where there are unresolved areas of the law.

I think that the EEOC, under this amended statutory scheme, ought to train arbitrators in the law of Title VII so that they could apply it in the context of their arbitrations, and that the Commission should be given the funds to pay for the arbitrator and for representation of the employee-grievant. This form of arbitration should be initiated and controlled by the employee and not a union, and it should be available even where the employer has no union. With those limitations and strictures on the arbitration process, I would give the EEOC an oversight review of an arbitrator's decision, similar to that which the NLRB now has, to give minimal assurances that there has been basic compliance with Title VII.