cess in resolving employee disputes and policies creating independent substantive employee rights. The Court struck a balance that preserved complete access to the courts in statutory cases.

The *Gilmer* Court has redressed that balance. Judicial access in some cases may be completely denied. But, in other cases similar to *Alexander, Barrentine,* and *McDonald,* it may be substantially diminished. Through this diversion of cases from the courts to arbitration, arbitrators will replace courts as the primary protectors of important statutory rights. This enhanced prestige of arbitration will bring with it an increased professional responsibility and a heightened judicial scrutiny of the arbitration process. It behooves the community of arbitrators to observe the Scout's motto: "Be prepared."

PART III. NLRB DEFERRAL TO ARBITRATION

ABNER J. MIKVA*

Let me start off by saying how pleased I am that you invited me to address your Annual Education Conference. As a former labor lawyer, I was one of your satisfied customers who thought that the arbitration process worked wondrously well to promote justice in the workplace and to promote collective bargaining, the touchstone of our national labor policy. I am also flattered to be allowed to poach on the private preserve of my colleague, Judge Harry Edwards. Every time I look around, he seems to be addressing a group of arbitrators about the general climate of labor arbitration in this country. Indeed, I intend to quote from some of his previous efforts in this regard.

But I have a more compelling reason to be grateful for this invitation, because it allows me to expiate a great frustration that I have harbored about a case arising out of my court. Those of you who have practiced appellate law know the frustration of not being able to persuade an appellate tribunal of the correctness and importance of your cause and running out of higher tribunals to appeal to. I have not usually felt that way about cases where I end up in the minority as a judge. Perhaps my 20 years

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of serving in legislative bodies conditioned me to accepting losses. But this one case, decided earlier this year, continues to gnaw at me. It involves arbitration, and is indeed at the cutting edge of the question of when it is appropriate for the Labor Board, or courts, to defer to arbitration. While I hope to shed some light on the question, or my views on the question, at the very least it might serve as a catharsis for me and allow me to go on to my next defeat.

Let me describe the case and its setting. Paul Hammontree was a very unhappy member of the Teamsters' Union. He had been jousting with his union officials for some period. His union had an understanding with his employer whereby the union would not process employee grievances based on certain seniority rights in return for the employer posting departure times for available trucking assignments. Hammontree, not a team player, nevertheless filed a grievance based on seniority and, worse yet, he won. At that point, the employer stopped posting times, and Hammontree also grieved on that dispute—unsuccessfully. The employer did what many employers do with such a problem child—Hammontree started getting some very undesirable work assignments.

Hammontree took his unhappiness to the National Labor Relations Board, and the general counsel for the Board issued a complaint, alleging that the employer had violated Hammontree's rights under sections 8(a)(1) and 8(a)(3) of the Act by its retaliatory conduct. The administrative law judge (ALJ) who heard the case ruled that Hammontree raised a question of his individual rights under the law, and that he need not exhaust any grievance remedies as to the work assignments before asking for Board relief.

I should point out that the grievance procedure established in the contract called for a very dubious "arbitraton" procedure. The Teamster Joint Arbitration Committee called for a "bipartite" panel consisting of an equal number of employer and union representatives. After a hearing, the Joint Committee met in private, and either granted or denied the claim without any explanation or record. There was no neutral involved. You can understand Hammontree's reluctance to put his fate in such sympathetic hands. The Labor Board reversed its ALJ and told Hammontree that he had to exhaust this "arbitration" procedure before it would hear his claims.

Let me set the stage at our court when Hammontree took his appeal. Initially it was heard by a panel of three judges. A district judge sitting by designation and I agreed that Hammontree was entitled to relief now. The third member of the panel dissented and, when the Labor Board requested an en banc rehearing by our entire court, the request was granted. On the en banc court the district judge did not sit, and after full reargument the court decided, 11 to 1, that I was wrong and vacated my decision. The en banc decision came down less than one month after I assumed the role as Chief Judge of the Circuit, and I must confess that I felt more like Don Quixote than a Chief Judge. That added to my frustration, I am sure.

Almost a year has passed since I first took up the concerns of Hammontree and the Labor Board, but I still feel the frustration. And so I take my case to this higher authority and put it in terms of a broader question: When is it not appropriate to refer and defer to an arbitration procedure?

Some six years ago Judge Edwards delivered a very thoughtful paper on labor arbitration. In it he rehearsed the basic reasoning of the Supreme Court in the *Steelworkers Trilogy* cases that favored arbitration as a means of resolving labor disputes. Among the reasons that Judge Edwards cited were the following: it was "therapeutic in that it allowed workers to have their day in court; it was voluntarily binding; it usually involved a judgment from someone who was well known and well respected by the parties; and it was an extension of collective bargaining—a private system of jurisprudence created by and for the benefit of the parties." Not one of those significant and necessary factors was relevant in the *Hammontree* case. More worrisome, if you don't care about my personal frustrations, not one of those factors is present in any of the cases that the Labor Board now finds suitable for reference and deference to arbitration.

I think the beginning of the Board's problem, which my court colleagues bought into, is failing to recognize the separate and necessary concerns of the individual employee. We so often think of the union democracy model that we forget that the entire universe of interests is not represented when you talk only of the employer and the union—any more than that the whole of the government model is represented when you talk only of the Congress and the President. Those two interests may be sufficient for the passage of a law, just as the union and the employer are sufficient for the signing of a collective bargaining agree-

ment. But if the law is to be interpreted solely by the Congress and the President without regard to the concerns of the individuals who have to obey the law, then the democratic model falls apart—just as it does when the collective bargaining agreement is treated as the concern of only the union and the employer.

What makes my *Hammontree* case the more egregious is that my concern was voiced many years ago, many times, by the policymakers of our country—the members of Congress when they wrote the various labor laws of our country. Let me start with the Wagner Act. Those of you who have read the early history of that piece of legislation know that it was passed against a backdrop of concern about any dispute-resolution mechanism that did not take into account the deep suspicions of many union leaders about courts, about arbitrators, about lawyers.

Senator Wagner himself backed away from his earlier proposal to allow the agency that was to be created to "defer its exercise of jurisdiction over any such unfair labor practice in any case where there is another means of prevention provided for by agreement, code, law, or otherwise, which has not been utilized." He backed away because so many union spokespeople were afraid of arbitration. One of the witnesses seemed to anticipate the *Hammontree* case when he complained that the individual employee was not protected by allowing the union and the employer to agree to arbitrate basic rights. Union "bureaucrats were always ready to submit to arbitration. It has been their slavish policy for years." Think how this witness would have felt about the Teamsters' particular brand of bipartite arbitration.

If there was any doubt that this concern for the individual employee existed in the labor policy of our country, it was certainly dispelled by the Landrum-Griffin law. Again, I hardly need to remind this audience that the very reason for Landrum-Griffin was a widespread concern that not every union was always representing its members with full vigor. The legislative history and the specific provisions of Landrum-Griffin are replete with examples of this concern that the third leg of the labor-management stool—the rights of the individual employee—should have statutory protection. Perhaps no provision shows that concern better than section 10(m), which establishes a priority for the Labor Board to hear employee discrimination cases quickly. Senator Mundt successfully persuaded his colleagues to add this provision to avoid the hard-

ships caused to employees by allowing the Board to defer these discrimination claims.

Nothing in the Taft-Hartley Act, which preceded Landrum-Griffin, diminished this concern. While section 203(d) of Taft-Hartley declared that any method of adjustment "agreed upon by the parties" was the desirable way of resolving bargaining agreement disputes, it did not affect individual rights arising out of the labor law itself. That seems to be the "hook" on which the Labor Board and some unions are hanging their deferral-to-arbitration hat: If the collective bargaining agreement incorporates various provisions of the labor law in the agreement, then an individual's rights are to be resolved under the agreement rather than the statute. That is as silly a way to interpret and undercut the statute as it sounds.

I started out by saying how much I admired your profession and what a satisfied user I was. Why, then, do I seem to be damning your profession when it comes to the resolution of individual disputes? My answer is that the voluntariness of the agreement to arbitrate is missing, among others. Arbitration works when both sides agree to submit the dispute. It is rarely a satisfactory solution to a dispute when one of the entities to be judged has never agreed to the procedure.

Notice that I used the word "judged." We sometimes forget that the arbitration process is a "judgment" process. Unlike counselling or even mediation, arbitration proposes to find the "just" answer to a dispute. Without respect for and commitment to the process that is doing the judging, "just results" are hard to come by. Law judges work very hard and use all kinds of props to obtain that respect and commitment: The high bench and the black robe, the rising and the "oyez" are all designed to command these attitudes. For those who would argue that the hardened Chicago criminal has little respect for or commitment to the judge who is trying a criminal case, I would remind you that the trial takes place according to specific law and under important constitutional safeguards. The "voluntariness" of the trial comes from the basic social contract we make to live in an organized society.

Contrast that with the milieu of a Teamsters' bipartite arbitration. Hammontree walks into the camp of the very people he is complaining about and is expected to have respect for and commitment to their secret and unrecorded deliberations about his complaint. Even a more traditional arbitration procedure

may not give individual employees much to feel confident about. They must rely on the union to present their case and, if the union is not sympathetic to their grievances, employees cannot take too much comfort in the fuzzy obligation of the union to fairly represent them. It is hardly the equivalent to having your own advocate and set of rights to rely on.

There are some kinds of disputes that the formality of a court or even an agency proceeding complicates and compounds. I have long believed that family disputes are in this category. The very finality which the formality portends makes it difficult for an irate spouse to accept a decision with pleasure. Disputes over finite things like jobs, wages, and assignment times do not suffer from this predicament. In those areas, if the resolution is to be satisfactory, it must be under a process that the real disputants accept.

I have to confess that I did not expect much relief from this tribunal. Even if I persuaded you of the righteousness of Hammontree's cause, there is no possible way that you could claim jurisdiction over his case. We are not even in the same country, but I do feel somewhat catharsized. And maybe I have persuaded you that those qualities of successful arbitration that Judge Edwards rattled off in the speech I quoted are more than rhetoric. They are the *sine qua non* of an arbitration process that can distribute justice in the workplace. To that goal I commend you.