LABOR PERSPECTIVE

WALTER C. BRAUER III*

The subject matter of this presentation and, therefore, the challenge of William Rentfro's paper are indeed daunting. From the perspective of a union advocate and sometime negotiator of collective bargaining agreements, it is not clear that there are changing values, or that there is, as the principal paper explores, any new breed of employee. To be sure, the values which people bring to their place of work, and, indeed, those values which are developed at work as a result of the interaction between societal forces and what people experience at work, are continually oscillating. If there really are significantly different belief systems in the workplace, Rentfro's paper is quite correct in suggesting only empirical research could demonstrate that. Job security, economic stability, and fair treatment certainly have not been displaced in terms of worker needs. Management surely does not believe that there are changing belief systems at work since companies continue to approach the process of collective bargaining, contract administration, and arbitration in exactly the same fashion as they have over the last several decades. If different belief systems were truly at work, then the behavior of management in its approach to the work force would change to accommodate those beliefs. There has been no such change.

To the extent that there are changing values in the workplace and therefore a new breed of workers, arbitrators should not be literalists in applying old doctrines and positions. Rather, we will need arbitrators who are contextualists and who will carefully weigh these emerging aspirations in deciding a case.

The principal paper spends significant time discussing and extolling the virtues of a couple of high profile and apparently successful employee participation plans in the automobile industry. The parties making those experiments work are certainly to be congratulated. Does that fact make the observations about the lack of different value systems inconsistent with these experiments? I think not. Workers have always been willing to participate in improving the workplace. The problem has been that too many managers and too many corporate board members have not viewed the work force differently from any other component of production

*Brauer, Buescher, Valentine, Goldhammer & Kelman, Denver, Colorado.

and have, therefore, not been willing to listen to their work force. Employers continually resist, and resist mightily, any effort to expand the subjects of bargaining. If employers are now willing to admit, as the labor movement has urged for many decades, that the work force really can make a contribution to the success of the enterprise, why is it that they are unwilling to bargain about those issues? Why do they not want to give collective bargaining a greater role as a private problem-solving mechanism?

One idea to be explored is the abolition of the distinction between mandatory and permissive subjects of bargaining. Perhaps, as Justice Harlan suggested, we should allow bargaining about any subject matter which is legal.[1]

Another and related impediment to creative problem solving through collective bargaining is the policy of the law, as enunciated by the Supreme Court. In *First National Maintenance*[2] the Supreme Court held that, even though collective bargaining is a substitute for economic warfare, the right to engage in collective bargaining does not make labor a partner in running the enterprise. On the other hand, the current rage about employee participation plans suggests that, while perhaps not a full partner, labor truly is entitled to a greater partnership than it has been afforded in the past. The law's hostility, or at least skepticism, as to the efficacy of collective bargaining as a problem-solving institution must be changed. The most pernicious part of the analysis in *First National Maintenance* is its observation that an issue must be bargained about only if it is one which the Supreme Court a priori believes is subject to resolution through the collective bargaining process.

I suggest that collective bargaining is not simply about conflict resolution. Collective bargaining must deal with conflict management. Often there are no quick resolutions, or solutions which can be easily reduced to paper in a three-year contract. If collective bargaining is viewed as an ongoing problem-solving process involving the management of conflict, then workers can make a greater contribution to the enterprise. Unless and until the leaders of American industry come to terms with this fact, many of the significant tensions about employee participation cannot be resolved.

Rentfro's paper suggests that social legislation adopted by Congress affects values and attitudes at work. He concludes with the request that arbitrators prepare themselves to handle these issues.

---

[1] *NLRB v. Borg-Warner Corp., Wooster Div.*, 356 U.S. 342, 42 LRRM 2034, 2037–42 (1958).
[2] *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 107 LRRM 2705 (1981).

There are many examples of social legislation, commencing with the 1964 Civil Rights Act,[3] which have affected the behavior and attitudes of industrial actors. This same legislation has required changes in contract provisions and how managers treat workers. However, arbitration has been affected very little by this massive amount of legislation. The exception is that sexual harassment is sometimes the basis for discipline, and that concepts from some of this social legislation are sometimes the basis of a defense for discipline. The most apparent example of this reasoning is the concept of substance abuse as a disease and not as a moral defect, although whether this grew out of legislation is problematic.

The Americans with Disabilities Act (ADA)[4] may very well be different from every other piece of social legislation, by requiring significant change in workplace behavior, and may come to arbitration in some fascinating and difficult contexts. The ADA is likely to be the exception because every other piece of social legislation dealing with discrimination has taught that distinctions between workers are largely irrational and that the law is violated by decisions based on those differences; that is, the lesson of the law is to treat everyone the same. Now the ADA has turned that precept on its head, requiring that workers be treated not the same but based on their unique variations. The ADA may be perceived as not treating people equally.

Even so the point of most significance for arbitration is that the law, as enunciated by the U.S. Supreme Court, has not supported and encouraged voluntary and private dispute resolution in the labor area. Only if the Supreme Court totally reverses its course can the desirable goal of voluntary, private dispute resolution be played out.

In three nonlabor cases, the Supreme Court has applied a claim preclusion doctrine in such exotic areas of law as antitrust,[5] securities,[6] and the Racketeer Influenced and Corrupt Organizations (RICO) act.[7] The Court has denied access to the federal courts to enforce federal statutory claims, holding that a disputant must litigate the federal statutory claim before an arbitrator. In the area of labor relations, however, the Court has taken a diametrically opposite point of view, refusing to apply either the doctrine of claim preclusion or the doctrine of deferral.

---

[3]42 U.S.C. §2000e *et seq.*
[4]42 U.S.C. §12101 *et seq.*
[5]*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985).
[6]*Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477 (1989).
[7]*Shearson/American Express v. McMahon*, 482 U.S. 220 (1987).

The Supreme Court has refused to defer to arbitration in cases involving race discrimination[8] and civil rights claims raised under section 1983.[9] It also has refused to apply the doctrine of claim preclusion involving claims arising under the Fair Labor Standards Act[10] and the Federal Employers Liability Act.[11] At the same time, however, it told Robert Gilmer[12] that a document signed when he applied for registration as a stockbroker with various stock exchanges meant that he had to arbitrate his claim of age discrimination and could not use a federal forum to enforce a federal statutory right. Why is it that when an individual who has no bargaining power signs an agreement to arbitrate a federal statutory claim, it will be enforced, whereas when a labor organization does the same thing, it will not be enforced? Is it simply that, since the individual signed the agreement, it will be enforced, whereas in the collective bargaining situation the collective bargaining representative signed the agreement? Certainly that cannot be the situation because the individual who signs such an agreement has an adhesive employment relationship and does not voluntarily agree to anything when signing an application for registration as a stockbroker in the securities industry. On the other hand, a labor organization, which ostensibly has equal bargaining power with the employer, can be said to have voluntarily entered into such an agreement. The Supreme Court seemingly recognized that there is such a thing as an adhesion contract in *Gilmer* when it noted that courts must be vigilant to determine whether the "agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'"[13] Fraud or coercion in the common-law sense is not the same thing as an adhesive employment relationship. Failure to recognize the latter is sufficient to frustrate the public policy goal of voluntary dispute resolution.

Let us examine the various reasons given by the Supreme Court for declining to invoke either deferral or claim preclusion in the labor arbitration area. Let us assume, as I believe to be almost universally true, that every collective bargaining agreement has a provision like this one:

---

[8]*Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 7 FEP Cases 81 (1974).
[9]*McDonald v. City of West Branch, Mich.*, 466 U.S. 284, 115 LRRM 3646 (1984).
[10]*Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 24 WH Cases 1284 (1981).
[11]*Atchison, Topeka & Santa Fe R.R. v. Buell*, 480 U.S. 557, 124 LRRM 2953 (1987).
[12]*Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 55 FEP Cases 1116 (1991).
[13]*Id.*, 55 FEP Cases at 1122 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, *supra* note 5, at 627).

> Neither the employer nor the union shall act or refrain from acting with respect to any employee on account of race, religion, sex, national origin, age, or handicap status.

The following assertions have been advanced by the Supreme Court to allow two bites of the apple:

1. There is a distinctly separate nature for contractual and statutory rights.

If the postulated contractual provision is in the agreement, then it is clear that by merger or convergence the parties have incorporated statutory rights into the collective bargaining agreement. The rights are not different. The concept of just cause is, moreover, an elastic, living doctrine. If it is claimed that the reason a discharge lacked just cause was that it was based on gender stereotypes, for example, then beyond peradventure, the case would be evaluated for sex discrimination.

2. An employee cannot prospectively waive statutory rights.

This is a curious argument since so fundamental a right as the right to strike[14] can be waived.[15] Even so, the issue is not really a waiver, assuming the aforementioned contractual provision, but a matter of the forum in which the right is enforced.

3. Collectively bargained rights are part of a "majoritarian process," whereas civil rights statutes create individual rights.

The process by which the right is created is of no moment. The issue is whether the right created inures to the individual as well as to the entire collective bargaining unit. There is no right more uniquely individual and personal than the right of every worker at the place of employment to be free from discipline except upon proof of just cause. In addition, the inclusion of the aforementioned prohibition on discrimination makes clear that individual rights are covered.

4. The arbitrator's task is to effectuate the intent of the parties.

This statement, while true, is a non sequitur because, if the collective bargaining agreement proscribes discrimination, then it is the intent of the parties that each individual enjoy the benefits of the federal statute.

---

[14]National Labor Relations Act §13; 29 U.S.C. §163.
[15]*NLRB v. Mastro Plastics Corp.*, 350 U.S. 270, 37 LRRM 2587 (1956).

5. An arbitrator's special competence is in the law of the shop, whereas public law requires statutory construction as well as the treating and interpretation of constitutional issues.

In considering this claim, one cannot help but wonder why it did not apply to poor Mr. Gilmer. If I could offer one statement directly to the Supreme Court justices, it would be that the parties are careful, very careful, to select arbitrators they believe have the competence to deal with issues that inhere in a civil rights case. Many lawyer-arbitrators handle these cases. Issues now before arbitrators are as complex as those which troubled the Court.[16] The process by which an employer and a labor organization select an arbitrator, in terms of competence to resolve complex issues, is as valid as the process by which a federal judge is nominated and confirmed.

6. There is no discovery in labor arbitration.

This notion is absolutely incorrect. All steps of the grievance procedure exist for the very purpose of allowing the parties to set forth their own facts and contentions, to hear the facts and contentions of the other side, and to evaluate them. Further, the right to obtain necessary information to evaluate a case for arbitration, or to prepare a case for presentation in arbitration, is augmented by sections 8(a)(5) and 8(b)(3).[17]

7. The rules of evidence do not apply in labor arbitration.

While the Court leveled this as a criticism, I view it as a refreshing change. The rules of evidence are essentially exclusionary rules. The process of arbitration, having not only an adjudicatory function but a cathartic effect,[18] is almost universally interpreted by arbitrators to allow in and to consider far more than could ever be placed before a federal judge or a federal jury.

8. Arbitrators are not obliged to give a written opinion.

This is true, but there is virtually no circumstance where an arbitrator does not render a written opinion because the parties use

---

[16]In *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416, 2419 (1960), the Court noted: "The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed."

[17]*NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 38 LRRM 2042 (1956).

[18]*Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960).

those opinions to structure their future behavior, and arbitrators recognize this use.

Arbitration is not a perfect institution. But it is voluntary; it is private ordering; it is about as good as any other institution. Its most significant aspect is that it has survived and been supported by employers and unions. The fact that arbitrators must continually satisfy the parties requires them to be at least as diligent and sensitive as a judge with life tenure. To give arbitration full sway, however, there will have to be adjustments. The Supreme Court will continue to be suspicious if arbitrators of federal statutory claims are not legally trained. Nonlawyer advocates, a hallowed practice, will also not pass muster. Arbitrators must be willing to exercise the broader remedial power of these statutes rather than only the equitable remedies normally given in arbitration.

The Court need not be concerned that a "majoritarian process" will sweep over the individual. The union is responsible in damages for breach of the duty of fair representation.[19] It may be historically noted that the genesis of the duty of fair representation was race discrimination.[20] An employer may not claim finality, even of an arbitration award, as a defense if the labor organization breached the duty of fair representation.[21] It may even be appropriate to con-sider some sort of election by the grievant so that, if there are misgivings about arbitration, the employee can opt out and pursue a remedy in federal court. Perhaps deferral standards similar to those of the National Labor Relations Board are a way to experiment.

On further reflection the Supreme Court must reverse the *Gardner-Denver* line of cases. An encouraging note is found both in the general tenor of the *Gilmer* opinion and in the Court's recognition that it no longer harbors the mistrust of the arbitral process that underpins *Gardner-Denver*.[22] Of course, the fact remains that Robert Gilmer's adhesion contract is no basis for resolving the question of where he must litigate.

---

[19]*E.g., Vaca v. Sipes*, 386 U.S. 171, 64 LRRM 2369 (1967); *Miranda Fuel Co.*, 140 NLRB 181, 51 LRRM 1584 (1962), *enforcement denied*, 326 F.2d 172, 54 LRRM 2715 (2d Cir. 1963).

[20]*Tunstall v. Locomotive Firemen*, 323 U.S. 210, 15 LRRM 715 (1944); *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 15 LRRM 708 (1944).

[21]*Hines v. Anchor Motor Freight*, 424 U.S. 554, 91 LRRM 2481 (1976).

[22]*Gilmer v. Interstate/Johnson Lane Corp., supra* note 12; 55 FEP Cases at 1123 n.5.