Laing get [h]is wages for five year and a half. We hear you gott most of his wages—Tou hundred pound it is reported hear. But dam you, tack care of your self, for we are Mr. Laing's Friends and will be revenged of you. We [will] not murder you, but we [will] brake your Bones that you may never be able to mack another award. So tack care thou old fello, thou be not safe. We [are] resolved, when opertunity suits. Dam your old eyes for doing so. And may you never be able to make another award nor hold a pen till you repent of what you don to Mr. Leng. And we will do this, some of us, to you, and may the Pope's Curse lite upon you and may you never die a natural death but creep about the house like a Toad till you repent of what you don to Leing. This is from some that does not wis you well but wishes Mr. Leang well. The Pope's Curse is, may you be taken from the soal of your feet & the crown of your head . . . [wax blot]. We will do it. You may depend on [it].

PART II. HARRY SHULMAN: DECIDING WOMEN'S GRIEVANCES IN WARTIME

LAURA J. COOPER*

The purpose of labor arbitration is to resolve satisfactorily real workplace disputes that arise between union-represented workers and their employers. There is a question, however, whether the very nature of the labor arbitration process precludes it from adequately performing this function at a time, like today, when society is changing and when those changes are reflected in the workplace.[1]

There is every reason to expect that grievance arbitration would be unresponsive generally to social change and, specifically, unresponsive to rapid change in the gender composition of the work force. Grievance arbitration in North America, unlike workplace dispute resolution elsewhere in the world, is exclusively rights based and purports only to recognize rights previously established by collective agreement. That collective agreement is negotiated

*Member, National Academy of Arbitrators; Professor, University of Minnesota Law School, Minneapolis, Minnesota. This project was funded in part with a grant from the Fund for Labor Relations Studies.

[1]Fraser, *A New Diversity in the Workplace—The Challenge to Arbitration: I. The U.S. Experience*, in Arbitration 1991: The Changing Face of Arbitration in Theory and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1992), 143. Between 1960 and 1990, while male union membership fell from 35% to 20% of the work force, women's union membership doubled. Since 1960 women's share of total union membership increased from 18% to 37%. Albelda, *Engendering Unions*, Dollars & Sense (Sept./Oct. 1993), 10.

within a legal context, the National Labor Relations Act, that defines the scope of mandatory subjects for bargaining in part by looking to those topics that traditionally have been the subject of bargaining.[2] If historically the members of the work force and the participants in the collective bargaining process have been almost entirely male,[3] it is likely that the topics they select for bargaining will be more responsive to the needs of male, rather than female, workers. The union's legal right exclusively to represent employees in the collective bargaining and grievance arbitration process, and the democratic determination of union positions by majority rule, should make it more likely that, when men are in the majority, women's interests are less likely to be advanced. The union leader determining the grievances to be arbitrated[4] and the arbitrators deciding those grievances are overwhelmingly men,[5] whose assessments of workplace issues, like that of women, are influenced by their gendered life experience. To the extent that arbitrators' decisions rely on past practice rather than explicit contract language, that past practice is likely to have been molded in a workplace responsive to the needs of existing male workers rather than the hypothetical needs of nonpresent women workers.

One way to assess the capacity of labor arbitration to respond to the social changes occurring in today's work force is to reflect upon how it has in the past responded to the challenges of a rapidly changing work force. The most profound change in the unionized American work force occurred during World War II, when women moved from lower paid service, domestic, and agricultural jobs and from work as homemakers into unionized manufacturing jobs

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[2]*Ford Motor Co. v. NLRB*, 441 U.S. 488, 101 LRRM 2222 (1979).

[3]Melcher, Eichstedt, Ericksen, & Clawson, *Women's Participation in Local Union Leadership: The Massachusetts Experience*, 45 Indus. & Lab. Rel. Rev. 267 (1992).

[4]Berkeley, *Arbitrators and Advocates: The Consumers' Report*, in Arbitration 1988: Emerging Issues for the 1990s, Proceedings of the 41st Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1989), 290, 292 (in 1987 23.8% of union representatives requesting arbitration panels from the Federal Mediation and Conciliation Service were women). The underrepresentation of women at the upper levels of union leadership remains substantial today. For example, in 1990, 52% of Communication Workers of America members but only 6% of officers and executive board were women. Similarly, during that same year 83% of International Ladies' Garment Workers Union members but only 23% of officers and executive board were women. Milkman, *The New Gender Politics in Organized Labor*, Proceedings of the 45th Annual Meeting, Industrial Relations Research Ass'n, ed. Burton (IRRA 1993), 348, 351, Table 2.

[5]Coleman & Zirkel, *The Varied Portraits of the Labor Arbitrator*, in Labor Arbitration in America: The Profession and Practice, eds. Bognanno & Coleman (Praeger 1992), 25 (in 1987 9% of arbitrators were women). A review of the 1993–1994 Membership Directory of the National Academy of Arbitrators suggests that approximately 9% of Academy members are women.

in war industries. Between 1940 and 1944 women's employment in the economy as a whole grew by 50 percent.[6] The most dramatic change occurred in the automobile industry, which itself changed dramatically during the war. It ceased producing automobiles for civilian use in February 1942 and in the course of the war manufactured tanks, aircraft, military vehicles, and other ordnance.[7] Of all American enterprise the auto industry experienced the greatest and most rapid change in its work force. Between 1940 and 1944 women's employment in the auto industry increased by 600 percent.[8] In April 1942 only 1 of every 20 auto production workers was female. Only 18 months later 1 of every 4 auto workers was a woman.[9]

How well did the labor arbitration process respond to this change? Were women's grievances pursued by their unions? Did unions pursue issues arising from women's status or did they represent women only in the more routine cases that would have been brought on behalf of men? And, if women's grievances were raised, how did arbitrators respond in the face of contract language and past practices established without consideration of women's needs?

My examination of women's wartime grievances in the auto industry will focus upon decisions arising under the collective bargaining agreement between Ford Motor Company and the United Automobile Workers (UAW) because grievances under this contract raised the broadest range of women's issues during the war and because the umpire under this contract was Harry Shulman, one of the most influential people in the history of American labor arbitration.

In 1943, at the time of his appointment as umpire, Shulman was a professor at Yale Law School, where he was later appointed Dean. He had served as a mediator under the auspices of the War Labor Board for the first agreement between Ford and the UAW and was a charter member of the National Academy of Arbitrators at its founding in 1947. In 1955, a little more than a month before his death at the age of 51, Shulman delivered the Oliver Wendell Holmes Lecture at Harvard Law School, entitled "Reason, Con-

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[6]Milkman, Gender at Work: The Dynamics of Job Segregation by Sex During World War II (Univ. of Ill. Press 1987), 50.

[7]Gabin, Feminism in the Labor Movement, Women and the United Auto Workers, 1935–1975 (Cornell Univ. Press 1990), 54.

[8]Milkman, *supra* note 6, at 51.

[9]*Id.* at 52.

tract, and Law in Labor Relations."[10] That lecture, which was relied upon by the U.S. Supreme Court in the *Steelworkers Trilogy* for its vision of the labor arbitration process,[11] remains today one of the most frequently cited law review articles of all time.[12] Shulman's influence upon the arbitration profession, both as academic and arbitrator, has been profound. Although nearly 40 years have passed since his death, his writings continue to be cited in deciding an extraordinarily broad range of issues, including the role of the arbitrator, burdens of proof, evidentiary standards, the use of precedent, management rights, past practice, and fundamental concepts in discipline and discharge.[13]

Shulman published a book of his awards for the first three years of his tenure as Ford-UAW umpire. It included 221 decisions issued between 1943 and 1946, spanning World War II and the immediate postwar period. More than 10 percent of those decisions concerned women. Examining the range of issues presented to Shulman in the 1940s immediately challenges our ahistorical assumption that women raised issues of workplace equality for the first time in the 1960s. In this brief period Shulman addressed such questions as sexual harassment,[14] equal pay, and pregnancy discrimination. He examined gender discrimination in promotions, recall from layoff, and enforcement of dress codes. Although it is difficult to determine whether the UAW's submission of grievances on behalf of women was in proportion to their presence in the work force, the union did provide substantial grievance representation for women, and it was willing to pursue not only routine grievances it would have pursued for male employees but also cases challenging women's status in the workplace.

While enormous attention has been paid within the arbitration profession to the work of Harry Shulman generally, no one before has systematically examined this rich collection of decisions on

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[10]Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999 (1955), *reprinted in* Management Rights and the Arbitration Process, Proceedings of the 9th Annual Meeting, National Academy of Arbitrators, ed. McKelvey (BNA Books 1956), 169.

[11]*Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578–82, 46 LRRM 2416, 2418–19 (1960).

[12]Shapiro, *The Most-Cited Law Review Articles*, 73 Cal. L. Rev. 1540 (1985).

[13]There are 23 citations to the writings of Harry Shulman in Elkouri & Elkouri, How Arbitration Works, 4th ed. (BNA Books 1985). There are 77 citations to Shulman in the 46 previously published volumes of the *Proceedings* of the National Academy of Arbitrators.

[14]Although two of Shulman's published awards concerned discharge of male employees for "intimidation of women" including use of obscene language and attempts to drive women from the plant, in neither case was Ford able to prove the existence of any general campaign to intimidate women. Shulman, Opinions of the Umpire, Ford Motor Co. and UAW-CIO, Opinion A-41 (Dec. 14, 1943); Opinion A-42 (Dec. 23, 1943) (hereinafter Shulman Opinions).

women's issues. With the exception of a brief mention in Jean McKelvey's presidential address in 1971 of a Shulman decision about the effect of state legislative restrictions on work available to women,[15] the few citations in the labor relations literature regarding Shulman's experience with women's issues refer to a single, particularly whimsical award concerning enforcement of dress codes. The award is mentioned in the Elkouri treatise,[16] is described in a 1951 labor relations text,[17] and is the sole Shulman arbitration decision specifically mentioned in the overview essay accompanying the Shulman papers in the Yale University archives.[18]

While Shulman routinely gave his published arbitration awards dry, descriptive titles such as "Classification-Ledger Clerks," he called this one "The Case of the Lady in Red Slacks."[19] It concerned a woman who had been docked 30 minutes of pay and reprimanded because of her clothing. At first thought, the issue of women's attire seems a relatively trivial issue, particularly when compared to such questions as equal pay or nondiscriminatory treatment in promotions and recall. Yet, the issue of women's clothing in factories during World War II was of considerable significance to both the women workers and the factories that employed them.[20]

While management had a legitimate concern that employee clothing not interfere with workplace safety, some regulation of women's clothing was motivated not by safety concerns but by a desire to diminish feared intrusion of sexual tension in the workplace.[21] Olga Madar, who worked during the war at the Ford bomber plant at Willow Run, and later was the first woman to serve on the UAW executive board said that the company had initially based its refusal to hire women on fear of prostitution.[22] Manage-

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[15]McKelvey, *The Presidential Address: Sex and the Single Arbitrator*, in Arbitration and the Public Interest, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators, eds. Somers & Dennis (BNA Books 1971), 1, 5. The case McKelvey mentioned is discussed in the text accompanying note 42, *infra*.

[16]Elkouri & Elkouri, *supra* note 13, at 109.

[17]Smith, Human Relations: Labor and Management (Exposition Press 1951), 89.

[18]Stark, Harry Shulman Papers (Yale Univ. Sterling Memorial Library Manuscripts & Archives, Manuscript Group No. 239, 1983), 8 (unpublished manuscript).

[19]Shulman Opinions, A-117 (June 30, 1944).

[20]Mezerik, *The Factory Manager Learns the Facts of Life*, 187 Harper's Mag. 289 (1943).

[21]Rosen, *Women in the Plant, the Community, and the Union at Willow Run* (Univ. of Pittsburgh Dep't of History 1978), 43 (unpublished thesis).

[22]*Id.* at 48. Rumors persisted in wartime shipyards that some women had sought employment there to facilitate their work as prostitutes. Archibald, Wartime Shipyard: A Study in Social Disunity (Univ. of Cal. Press 1947), 19. In a wartime novel about the lives of workers at a Ford bomber plant, male employees assumed that attractive women workers were engaged in prostitution. Swarthout, Willow Run (Crowell 1943).

ment also worried that foremen would be exchanging special workplace privileges for sexual favors from women workers.[23] When a shortage of male workers forced Ford to hire women, it tried to dampen sexual tensions by segregating lunchrooms by gender[24] and regulating women's clothing. Thus, control of women's attire had a critical symbolic role, that is, if management could keep women from looking like women, the danger of sex would disappear from the workplace.

The clothing issue had an equally symbolic role for the women workers. Madar reported that the largest meeting she had ever seen was over the issue of whether women would be required to wear uniforms, leading to threats of a massive walkout.[25] Elsewhere women did strike, despite wartime no-strike obligations, when Ford attempted to require women clerical employees to wear slacks, as the manufacturing employees were required to do.[26] Women, who felt forced into the male role of doing factory work, struggled to retain their feminine identity within the plant. They chafed at the loss of individuality resulting from regimentation of their appearance.[27]

With management viewing women's workplace clothing as critical to control of sexuality in the workplace and women viewing it as central to their identity, it is not surprising that their differences on the issue were sufficiently important and irreconcilable to result in grievances taken all the way to the Ford-UAW umpire.[28] Shulman's published awards include two cases concerning women's challenges to management's attempted regulation of their clothing, one of them "The Case of the Lady in Red Slacks."[29]

In that case a Highland Park employee had been reprimanded and docked a half hour for wearing bright red slacks. Management claimed that the red slacks created safety and production hazards because of the "tendency of the bright color to distract the attention of employees, particularly that of the male sex." Shulman's award reaffirmed management's right to promulgate reasonable

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[23]Rosen, *supra* note 21, at 50.
[24]*Id.* at 48.
[25]*Id.* at 43.
[26]Mezerik, *supra* note 20, at 292.
[27]Rosen, *supra* note 21, at 43. *See also* Archibald, *supra* note 22, at 21–22.
[28]Compare the manner in which the social conflicts of the Vietnam era played out in workplace disputes concerning clothing and hair style. *See Changing Life Styles and Problems of Authority in the Plant*, in Labor Arbitration at the Quarter-Century Mark, Proceedings of the 25th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1973), 235 (including comments by Valtin, McDermott, and Cohen).
[29]Shulman, *supra* note 19.

rules to promote safety and production, and even to limit what he described as the seductiveness of women's attire, if it interfered with the attentiveness of male employees. Shulman was not so much a feminist as to suggest that men should be responsible for their own behavior. His decision, however, upheld the grievance. The new phenomenon of women in the factory did not alter the need to apply ordinary principles of workplace fairness. He objected to Ford's failure to provide clear notice to the employees of the rules, to its inconsistent application of the policy, and to the irrationality of permitting bright green slacks while condemning red ones. No doubt with a twinkle in his eye, Shulman wrote, "[I]t is common knowledge that wolves, unlike bulls, may be attracted by colors other than red. . . ."

Shulman dealt similarly with the other grievance concerning employee dress.[30] Two women at an Ohio Ford plant were suspended for three days for rolling their slacks above the ankle. Here again, Shulman was unconcerned about whether the rule was designed for safety or to "subdue the novelty of feminine charm in the workplace." Nor did he find it necessary to resolve a conflict in testimony between one of the grievants and a foreman over whether the grievant's slacks had been rolled only to the ankle or halfway up the leg. He had, however, two concerns, fundamental to fair discipline: notice and equal treatment. Ford had never made it clear whether ankle flaps had to be buttoned, whether it was permissible to leave them unbuttoned if they were sufficiently rolled down, and, if so, how much exposed leg was too much. With respect to equal treatment, the foreman had acknowledged that on the day of the discipline these two women were neither the only nor the worst offenders. Ordering that the grievants be compensated for lost pay, Shulman stated, "The rule, if it is to be enforced, should be more specifically stated and published to the employees; and its enforcement should be regular rather than sporadic or whimsical."

In each of these dress code cases, Shulman avoided assessing the legitimacy of the concerns of Ford and the women with respect to workplace dress codes. Any attempted resolution of the conflict between their perspectives would have exacerbated tension between the parties. Shulman was amused but not distracted by the unfamiliarity of territory inhabited by questions of ankles and ladies' red slacks. Instead, he merely resolved the precise

[30]Shulman Opinions, A-43 (Dec. 23, 1943).

issues before him through the use of general principles of fair discipline.

While the dress code cases can be viewed as instances in which the union afforded women representation no different than that it would have provided men by challenging Ford's disciplinary actions, in other grievances the UAW overtly asserted the right of women to be free from discrimination on the basis of sex. In some cases involving job classifications and wage rates, the claim of discrimination was based on circumstantial evidence and in each case the union prevailed.

In two classification cases the union claimed that without adequate explanation women doing the same work as men had been placed in different job classifications bearing lower wage rates. In one case women clerks dealing with stock in one building were classed as general clerks while male clerks dealing with aircraft tools in another building were classed as ledger clerks.[31] After visiting the work sites, Shulman concluded that the work performed by men and women was identical. When management could offer no explanation for the difference, Shulman ordered the women reclassified.

The other classification case concerned timekeepers at two plants.[32] Prior to Shulman's consideration of the case, no woman had ever been classed as a no. 1 timekeeper. The union contended that the difference between a no. 1 and a no. 2 timekeeper was based on responsibilities, and that women timekeepers classed as no. 2 were doing the same work as men classed as no. 1. The company contended that no. 1 and no. 2 were not separate classifications differentiated by the nature of the work, but rather grades within a single classification where advancement depended on management assessment of merit. Ford claimed that the women's work did not warrant a merit increase. Shulman rejected Ford's analysis because of the way the categories were presented in the contract and the fact that the company's interpretation was inconsistent with the contract's seniority structure. Once Shulman concluded that the distinction between categories was in fact a classification, he found that Ford had refused to award women the higher classification solely on the basis of gender. He ordered retroactive reclassification of all women doing the work of a no. 1 timekeeper.

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[31]Shulman Opinions, A-167 (Dec. 27, 1944).
[32]Shulman Opinions, A-178 (Apr. 8, 1945).

Another case in which the discriminatory treatment claim was circumstantial involved the assignment of new workers to one of two systems of subminimum wages.[33] Under a prewar wage agreement, new unskilled employees were hired at a rate 10 cents below the normal contract rate for the job. As war production increased, however, the company wanted an even lower rate for some new workers, contending that war production was more specialized and simplified than auto production and that many newly hired employees, particularly women, lacked prior factory experience. In a supplementary agreement the union acceded to a lower subminimum hourly wage of 85 cents, with a proviso permitting assignment to the prewar higher entry level wage if the employee could demonstrate ability to handle the job within three days. The evidence showed that male applicants with prior experience were presumed qualified for the higher entry wage without demonstrating their capacity to do the particular job. However, women were generally denied an opportunity to have their qualifications assessed. In fact, in some cases where foremen found women qualified for the higher wage, those decisions were overturned by upper management. Shulman sustained the union's challenge to this differential treatment of women although his analysis simply required Ford to abide by the literal language of the supplemental agreement. If the contract called for individual assessment of qualifications, the company could not substitute assumptions about employee qualifications resulting in different treatment of men and women. If the contract called for assessments by foremen, higher levels of management had no authority to overrule those decisions.

In those cases involving classifications and wage rates, where the union relied on circumstantial evidence to support discriminatory treatment, Shulman generally resolved the grievances without attempting to determine whether management had a discriminatory intent. Where the evidence showed similarly situated employees receiving different contractual benefits and where Ford offered no explanation for the difference, Shulman simply insisted on effectuation of the contract language.

In other cases where the union claimed sex discrimination, Ford management did not dispute that the distinction between men and women workers was based solely on gender but assumed that this different treatment was permissible. Although at the time

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[33]Shulman Opinions, A-64 (Jan. 28, 1944).

gender discrimination was widespread in the industry,[34] Shulman, without reference to any explicit contract language prohibiting this distinction, merely assumed that intentionally different treatment of women violated the agreement.

In a 1944 case at an aircraft plant in a department with exclusively women workers, the foreman recommended a woman's reclassification as a working leader with a higher wage,[35] but management refused to implement the reclassification. At the second stage of the grievance procedure, Ford's superintendent replied that he did not intend to make women leaders. At the third stage the labor relations officer stated that Ford did not believe that "female employees are capable in assuming the duties of working leaders." Although at the hearing Ford denied discrimination, Shulman concluded that the woman had been denied the position solely because of her gender. Without citation to any provision of the contract, Shulman stated that classifications based on sex were "improper" and ordered the woman reclassified with back pay.

Later that same year Shulman sought to derive the prohibition against sex discrimination more directly from the terms of the collective bargaining agreement. The case consolidated a number of grievances involving both men and women, where Ford had denied merit increases.[36] The contract provided a range of wage rates for certain classifications and specified procedures but not substantive standards for granting merit increases. Shulman's initial concern was jurisdictional. The contract, he noted, limited the umpire's jurisdiction to "alleged violations of the terms" of the contract and precluded him from substituting his judgment where the contract permitted company discretion. Shulman added, however, that all agreements, including this one, implicitly require good faith in their execution. Having defined the limits of the umpire's jurisdiction, he then considered the specific grievances before him.

In one case where the union challenged a foreman's assessment of the work of four male patternmakers, Shulman concluded he had no jurisdiction because the contract did not specify the circumstances under which a merit increase would be recommended. Another of the grievances involved a woman, K, classified as a general shipping checker with an hourly wage rate from $1.20

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[34]Gabin, *supra* note 7, at 51–55.
[35]Shulman Opinions, A-83 (Apr. 12, 1944).
[36]Shulman Opinions, A-150, 6 LA 952 (Oct. 4, 1944).

to $1.25. Although K was recommended for an increase to $1.25 by her foreman and committeeman, the department head disapproved the recommendation because K, as a woman, was prohibited by law from doing the heavy lifting occasionally required of workers in that classification. Thus, while the contract wage rate extended to $1.25, the employer's practice limited women to $1.20. Shulman said, "The established rates at Ford apply to all employees in the classification, whether they are male, female, white, colored, Republican, Democrat, Catholic or [atheist]. The contract does not permit a rate differential based on sex." While acknowledging that inability to perform a task within a classification might be a factor in determining an employee's eligibility for a merit increase, Shulman said that it could not be a conclusive factor where it made women, as a class, ineligible for a contractual wage rate. He explained, "When this contingent availability is made a conclusive factor in the case of females who are forbidden by law to do a particular task, it becomes in effect a sex bar. No female, however meritorious her actual performance or however insignificant the need for her services on the heavier tasks, would then be eligible for the increase."[37]

Thus, Shulman derived from contract language specifying a wage rate a command that Ford not differentiate on the basis of sex. And Shulman so held, despite his conclusion that he had no authority to review the company's exercise of discretion, and despite the fact that the employer's gender distinction was arguably a direct result of a gender distinction not merely authorized but compelled by law. Unlike the cases considered earlier where he narrowly applied general principles of contract interpretation to women's grievances, Shulman in this case found an implicit requirement of good faith and then interpreted this obligation expansively to prohibit gender discrimination.

While this decision precluding management from considering women's legal disability in assessing eligibility for merit pay was perhaps Shulman's boldest departure from explicit contract language, he was sometimes willing to read explicit contract language broadly to assure women workers benefits equal to those of men. Although the U.S. Supreme Court ruled, as late as 1976, that employers had no legal obligation to afford pregnant employees

[37]Shulman's analysis presages contemporary discussion of discrimination under the Americans with Disabilities Act and the notion of limiting an employer's assessment of qualifications to "essential functions of the employment position." 42 U.S.C. §12111(8) (Supp. IV 1992).

the same benefits given to those with other temporary disabilities,[38] Harry Shulman imposed this obligation in 1944 through contract interpretation.

Shulman considered the case where a woman claimed that she had been improperly discharged because of her pregnancy.[39] The grievance raised two issues: (1) Could Ford require a woman to leave work as soon as her pregnancy was known to the company? (2) Was the company required to reinstate women with uninterrupted seniority when they returned to work after a pregnancy? Shulman observed that the parties, prior to negotiating their agreement, had no experience with pregnant employees and therefore their contract was "altogether silent on the matter." He reviewed two wartime studies that demonstrated that many companies discharged pregnant women. Of those that required pregnant employees to take leaves of absence, some did not provide for retention of seniority. The studies collected employers' reasons for requiring pregnant employees to leave work, which included concerns that "the presence of an obviously pregnant employee is embarrassing to the male workers" and "generally indelicate." On the other hand, Shulman identified fear of accident and liability as the primary concern. He acknowledged that the safety objective would be seriously undermined if a company discharged women upon knowledge of pregnancy because this policy would create an incentive to withhold information about the pregnancy during the first trimester when the danger of miscarriage is greatest. Shulman concluded that contractual silence regarding when a pregnant woman might be required to leave work permitted the company to order women to leave as soon their pregnancy became known. He nevertheless suggested that the parties negotiate to achieve a joint policy resolving the issue more appropriately. Thus, Shulman confined himself to contract interpretation. If no provision of the contract arguably entitled a pregnant woman to continue work, Shulman, although he recognized the advisability of this policy, declined to create such a right.

However, Shulman was willing to decide the seniority retention issue through the process of textual interpretation. He noted language in the agreement prohibiting discharge except "for

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[38]*General Elec. Co. v. Gilbert*, 429 U.S. 125, 13 FEP Cases 1657 (1976). Congress subsequently amended the statute to ban discrimination based on pregnancy. Pregnancy Discrimination Act of 1978, 42 U.S.C. §2000e(k) (1988).

[39]Shulman Opinions, A-103 (May 29, 1944).

cause" and assuring employees, whose absence from work was "due solely to disability resulting from sickness or injury," an automatic sick leave of absence and return to work without loss of seniority. Ford maintained that it had a policy of allowing new mothers to return to work with full seniority but was not contractually obligated to do so because "pregnancy is not an illness." Shulman agreed that pregnancy was not generally considered an illness but was unwilling to give the contractual term this general meaning. Instead, he thought the term deserved a functional interpretation. Concluding that the purpose of contract provisions pertaining to temporary disability was "to preserve the job security of employees who are temporarily disabled from working by a weakened physical condition," he stated that the provision's concern was not the illness itself but the weakened physical condition and the rest from work thereby necessitated. "Pregnancy," he said, "involves precisely these consequences." Although acknowledging that the temporary disability contractual provisions had not been written with pregnancy in mind, he concluded that their purpose included cases of pregnancy and that the provisions could be applied to pregnancy "without creating any difficulties or anomalies." It would have been just as easy for Shulman to say that the contract had not been written to maintain seniority during maternity and that the contractual language required both "disability" *and* "illness," but he didn't. He chose to read the agreement's language broadly to afford women the benefits of contractual seniority.

This review of Shulman's wartime decisions demonstrates that the labor arbitration process was capable of listening to the concerns of new and different work force entrants and of satisfactorily resolving their grievances. But was Shulman's ability to resolve these grievances the result of his bringing to the process techniques we would think today inconsistent with the arbitrator's role? Certainly much of the writing about Harry Shulman has emphasized how broadly he construed the role of the arbitrator.[40] He did think an arbitrator could serve a mediatory function, freely socialize with the parties, and gather facts through

[40] *See, e.g.,* Aaron, *Reminiscences and Honors,* in Arbitration 1993: Arbitration and the Changing World of Work, Proceedings of the 46th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1994), 291, 301; Killingsworth & Wallen, *Constraint and Variety in Arbitration Systems,* in Labor Arbitration: Perspectives and Problems, Proceedings of the 17th Annual Meeting, National Academy of Arbitrators, ed. Kahn (BNA Books 1964), 56, 67–68.

ex parte communications. Nevertheless, both Shulman's own writings[41] and the analysis of his decision making considered here demonstrate his conviction that, in adjudicating contract grievances, the arbitrator is confined to interpretation of the contract. He achieved results in these cases without ever departing from ordinary principles of fair workplace discipline and ordinary methods of contract interpretation.

However, Shulman's willingness broadly to interpret contract language to respond to women's claims was no longer in evidence in the immediate postwar period. In November 1945 a grievance requested that Ford recall women after reconversion layoffs to alternative jobs if the job to which they were otherwise entitled was one barred to them by legal restrictions on the employment of women.[42] The issue arose at Ford's Highland Park plant, where the situation for women was particularly acute. At the peak of wartime production in 1944, 43 percent of the workers had been women. Ford planned to reconvert the plant to tractor production and anticipated a work force nearly as large as during wartime. However, Ford did not intend to recall laid off women workers to fill those jobs. In 1944 there were 5,800 women at Highland Park; in November 1945 there were only 300. Ford was hiring new male workers with no prior plant employment to do jobs women were capable of performing, while women with as much as 27 years of seniority remained on layoff.[43]

Under the collective bargaining agreement a laid-off employee was entitled to bump "the employee with the least seniority" in the labor pool. If the job of the least senior employee required tasks women were prohibited by state law from performing, such as heavy lifting, Ford denied women the opportunity to bid on any other job. As a result, large numbers of women remained on layoff with no prospect of ever being recalled. In this grievance, the union asserted that a senior woman employee should be entitled to bump a junior male employee on a job she could perform. Shulman used the grievance as an opportunity to reflect upon how attitudes toward women workers, including apparently his own, had changed at the end of the war:

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[41]*See, e.g.*, Shulman, *The Lawyer's Function in Respect to the Operation and Administration of the Collective Agreement*, Proceedings, Conference on the Training of Law Students (Labor Relations Round Table Council on Labor Law, Association of American Law Schools 1947), Vol. III, 661, 702 (Transcript).

[42]Shulman Opinions, A-211, 1 LA 462 (Nov. 30, 1945).

[43]Gabin, *supra* note 7, at 125–26.

> The introduction of female labor into plants theretofore employing exclusively or chiefly male labor has created difficult problems. During the war, when the manpower shortage was acute and strenuous efforts were made to utilize fully the reservoir of female labor, employers endeavored to move male employees from the lighter jobs, suitable for women, to the heavier jobs which women, for one reason or another could not do. Very considerable resistance to this program was encountered among many male employees,—a resistance that was overcome only by careful handling, long negotiations, the country's need, and the pressure of union leaders and official union opinion. The problem today, exemplified by this case, is entangled in fears of restricted employment opportunities, and real or attributed notions of employees and employers as to the place of women in industry or society, relative efficiency in the plants involved, and the effects of a "co-educational" system in the plant. . . . The issue presented involves not only the interests of the female employees but also the interests of the male employees who would be subject to displacement.

Shulman concluded that the contract language allowed a senior employee to bump the employee with the least seniority in the group and "no one else." Applying this provision to women who, because of a legal prohibition, were not permitted to do the job of the least senior employee, Shulman said, was not discrimination, but rather the result of "external factors peculiar to themselves at the particular time [that] disable them from exercising the privilege which they have in the same manner as all their fellow employees."[44]

Shulman's determination in this case is entirely contrary to the analysis of the merit increase case, where he said that when a legal disability precluded women from performing a job and thus obtaining a contractual right, women were discriminated against and the contract was violated.[45] Now, with the wartime labor emergency ended, he sided with the newly popular view that women's place in society was not in the factory, with Ford's discomfort with a "co-educational" work force, and with male employees, who admittedly had less seniority than the women[46] and would lose their jobs if the women were recalled.

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[44]In his award Shulman said that although the union had sought relief on the basis of contract language, it was actually seeking reformation of the agreement. He pointed to language in a local union prehearing brief suggesting the need for renegotiation of the issue, even though the union's position at the hearing was clearly based on contract interpretation and not a request that the arbitrator rewrite the agreement.

[45]See *supra* note 36, and accompanying text.

[46]Shulman's consideration of the desires of junior male workers for job retention is particularly inappropriate when the union charged with the responsibility for representing those employees had resolved the conflicting interests by deciding to grieve on behalf of the women with seniority.

What can we, as practicing labor arbitrators, learn from these wartime decisions about the ability of the process of labor arbitration to respond to the needs of a diverse work force in a time of rapid social change? Harry Shulman's experience during World War II shows that an arbitrator, using ordinary tools of interpretation, can hear and satisfactorily resolve the grievances of new entrants to the work force who raise issues fundamentally different from their predecessors. But, while Shulman's body of wartime decisions demonstrates his capacity for focusing on basic fairness in the maelstrom of social change, it reminds us that even the best among us can lose that focus when overwhelmed by the social biases of the times in which we live.