

December 08, 2009

Mandatory employment arbitration has been a controversial subject for the last few years. Senator Russell Feingold of Wisconsin has introduced the Arbitration Fairness Act (AFA) which addresses many of the criticisms of mandatory employment arbitration as well as other types of mandatory arbitration.

Senator Feingold asked the National Academy of Arbitrators for its position on the content of the Arbitration Fairness Act. Attached is the National Academy of Arbitrators' position on the content of the AFA as approved unanimously by the NAA Board of Governors.

The NAA Executive Committee has chosen Theodore St. Antoine, formerly Dean of the University of Michigan Law School, Ann Arbor, to serve as the NAA contact person (734-764-9348). You may call me at 334-749-2612.

William H. Holley, Jr.
President
National Academy of Arbitrators

National Academy of Arbitrators

Office of the President

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October 13, 2009

The Honorable Russ Feingold
506 Hart Senate Office Building
Washington, DC 20510-4904

Re: Your letter of June 4, 2009 and S. 931

Dear Senator Feingold:

Thank you for the invitation to share our thoughts about S. 931.

First, The National Academy of Arbitrators (NAA) would like to sharply distinguish itself from the organizations addressed in the "Findings" of the bill. Some of those businesses have names that could be easily confused with our organization.

The NAA is non-profit and our members are neutral. Founded in 1947 we are a group of 634 of U.S. and Canadian arbitrators of labor-management and employment disputes. Neutrality is an initial and continuing condition of membership. A member cannot represent labor or management or be associated with anyone who does. (See Appendix 1) We do not generate income for our members or administer arbitration systems for our clients or members. In general our aim is to set and maintain appropriate professional standards. (See Appendix 2) Our members include some of the best known practitioners and academics in the field. (See Appendix 3) Our academic membership presently includes, and in the past included, university presidents and faculty members, law school deans and professors. It includes as well former cabinet members, judges, former labor law agency officials and dedicated attorney and non-attorney practitioners in a variety of industries.

As for the content of S. 931, I must qualify my remarks by stating our policy about legislative matters. It states:

The Academy will not take an official position as to whether there should be statutory regulation, state or federal, regarding voluntary labor arbitration but still may indicate its judgment on the desirable content of statutes.

Before addressing specific statutory language of the bill, please understand that non-collective bargaining agreement employment arbitration, including mandatory systems, have been a matter of interest and concern for the Academy dating back to 1997. Our current policy, revised in May of 2009, states in part:

It is the position of the National Academy of Arbitrators that voluntary arbitration is always preferable, and that it is desirable for employees to be allowed to opt freely, post-dispute, for either the courts and administrative tribunals or arbitration.

We, however, understand the present legal landscape allows for such arbitration. In this regard our policy goes on to state this recognition and, most importantly, sets forth guidelines for our members so that appropriate due process is observed if they choose to participate. The policy (quoted above) continues:

We recognize, however, that the United States Supreme Court has extended the Federal Arbitration Act to most contracts of employment. As a result, employers may require their employees to arbitrate some or all future disputes, including statutory claims.

The abiding concern of the Academy is that all arbitration, including employment arbitration, be conducted in a manner that respects the rules of fundamental fairness essential to the integrity and credibility of the arbitration process. When serving in cases in which, as a condition of employment, an employee has signed an agreement that imposes arbitration as a substitute for direct access to either a judicial or administrative forum for the pursuit of statutory rights and judicially recognized claims for relief, arbitrators should be especially careful to ensure the fairness of any employment arbitration procedures in light of the Academy's Guidelines for Employment Arbitration. (See Appendix 4 for the specific guidelines and complete policy)

We also filed an amicus brief in Pyett consistent with our policy favoring voluntary arbitration of statutory rights. (See Appendix 5) Additionally to be noted is the fact the NAA was one of the founding organizations that developed the voluntary "Due Process Protocol for the Mediation and Arbitration of Statutory Disputes arising out of the Employment Relationship". (See Appendix 6)

Beyond our long stated policy expressing a preference for voluntary arbitration of statutory rights, we take no legislative position as to whether mandatory arbitration should be unenforceable.

We do, however, wish to state that if some form of this type of employment arbitration continues to remain legal we strongly believe that such proceedings should be conducted in accordance with certain minimum standards of fairness. A committee headed by Theodore St. Antoine, former Dean and Professor at the University of Michigan Law School, drafted specific statutory language, which reflects these safeguards.

Our draft legislative language to assure this fairness is attached as Appendix 7.

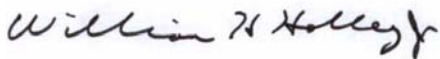
Additionally, we stress that if S. 931 were enacted in its present form, the NAA supports the general exemption for collective bargaining in Section 402 (b) (2) from the unenforceability provisions of Section 402 (a). Collective bargaining arbitration as an alternative to litigation has played an important role in our nation's jurisprudence and public policy for over 80 years. Indeed next year is the fiftieth anniversary of the Supreme Court's "Steelworkers Trilogy" which recognized

collective bargaining arbitration as a useful and valid alternative dispute resolution system. (*Steelworkers v. Warrior & Gulf Navigation Co.* (1960) 363 U.S. 574; *Steelworkers v. American Mfg. Co.* (1960) 363 U.S. 564; *Steelworkers v. Enterprise Wheel & Car Corp.* (1960) 363 U.S. 593.)

Since that time and before, countless disputes have been peacefully resolved without employer or employee initiated work stoppages and without reliance on the courts. The public has benefited greatly. It is not an exaggeration to say that the collective bargaining model of arbitration has been the standard for all third party arbitration systems in other areas of the law.

The Academy is always assessing developments relevant to the field, including this topic, and would welcome the opportunity to share those thoughts with you and your committee in any appropriate forum.

Sincerely,

A handwritten signature in black ink that reads "William H. Holley, Jr." The signature is written in a cursive, slightly slanted style.

William H. Holley, Jr.
President

cc: Gil Vernon, NAA President-Elect

Appendix 1:

Article VI Section 6 of the By-Laws of the National Academy of Arbitrators:
Section 6. (Added by Amendment April 21, 1976).

Pursuant to the membership policy adopted on April 21, 1976 and amended on May 24, 2008, the Academy deems it inconsistent with continued membership in the Academy:

a) for any member who has been admitted to membership since April 21, 1976, to undertake thereafter to serve partisan interests as advocate or consultant for Labor or Management in labor-management relations or to become associated with or to become a member of a firm which performs such advocate or consultant work;

b) for any member who has been admitted to membership since May 24, 2008, to undertake thereafter to serve partisan interests as advocate or consultant for an employee or employer in any workplace dispute proceeding or to become associated with or to become a member of a firm which performs such advocate or consultant work; (Added by Amendment May 24, 2008.)

c) for any member to appear, from and after April 21, 1976, in any partisan role before another Academy member serving as a neutral in a labor-relations arbitration or fact-finding proceeding.

d) for any member to appear, from and after May 24, 2008, in any partisan role before another Academy member serving as a neutral in any other workplace dispute proceedings. (Added by Amendment May 24, 2008.)

Any charges or complaints alleging a violation of any of these policy statements shall be referred to the Committee on Professional Responsibility and Grievances under Article IV, Section 2. (As amended May 20, 1991).

Appendix 2:

Constitution (As last amended May 24, 2008)

Article I

Section 1. The name of this organization is the National Academy of Arbitrators, a non-profit corporation. (As amended January 27, 1965).

Section 2. The principal office and headquarters of the Academy shall be located in such place as shall be designated by the Board of Governors.

Article II

Section 1. The purposes for which the Academy is formed are: To establish and foster the highest standards of integrity, competence, honor, and character among those engaged in the arbitration of labor-management disputes on a professional basis, including those who as a part of their professional practice hold hearings and issue written decisions in other types of workplace disputes; to secure the acceptance of and adherence to the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes prepared by the National Academy of Arbitrators, the American Arbitration Association and the Federal Mediation and Conciliation Service, or of any amendment or changes which may be hereafter made thereto; to promote the study and understanding of the arbitration of labor-management disputes and other workplace disputes; to encourage friendly association among the members of the profession; to cooperate with other organizations, institutions and learned societies interested in labor-management and employment relations, and to do any and all things which shall be appropriate in the furtherance of these purposes. (As amended April 29, 1975, June 1, 1993, and May 24, 2008).

Section 2. The Academy shall not recommend, designate or appoint arbitrators.

APPENDIX 3:

Note: The opinions expressed in this letter and the suggested legislative language is that as unanimously approved by the NAA Board of Governors on October 2, 2009 and does not necessarily reflect the views of any individual member.

A. Especially Distinguished Members (Living and Deceased)

Harry Edwards, Judge DC Circuit Court of Appeals
Robin Fleming, President University of Michigan
William Gould, Chair-National Labor Relations Board
Joe Grodin, Chief Judge California Supreme Court
Joshua Javits, Chair-National Mediation Board
James Scarce, Director Federal Mediation and Conciliation Service
George Shultz, U.S. Secretary of State
John Truesdale, Chair-National Labor Relations Board
J.F.W. Weatherill, Chair Ontario Labour Relations Board
Willard Wirtz, U.S. Secretary of Labor
Helen Witt, Chair-National Mediation Board

Ben Aaron, War Labor Board
Archibald Cox, U. S. Solicitor General
Paul Douglas, U. S. Senator
Jacob Finkelman, Chair Ontario Labour Relation Board
Alan Gold, Chief Judge Provincial Court of Quebec
Wayne Horowitz, Director Federal Mediation and Conciliation Service
Clark Kerr, President University of California
Bora Laskin, Chief Justice Supreme Court of Canada
Whitley McCoy, Director Federal Mediation and Conciliation Service
Wayne Morse, U. S. Senator
Jerre Williams, Judge Fifth Circuit Court of Appeals

B. NAA Committee on Issues in Employment-Related Dispute Resolution

Norman Brand
Raymond L. Britton
Howard C. Edelman
Sharon Henderson Ellis
Matthew W. Finkin
John Kagel
John E. Sands
Theodore J. St. Antoine, Chair

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Allen Ponak, Vice-President
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Susan R. Meredith
Robert B. Moberly
Elizabeth Neumeier
Rosemary A. Townley
M. David Vaughn
Hoyt N. Wheeler
Michel G. Picher (Ex Officio)

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James	J.	Odom
H.	Ellsworth	Steele
Cary	James	Williams
Craig	L.	Williams
Roger	C.	Williams

Alaska

Robert	W.	Landau
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Arizona

Mario	F.	Bognanno
Jonathan		Dworkin
Richard	D.	Fincher

Arizona, Continued

Albert	L.	Gese
Paul	E.	Klein
George	Edward	Larney
James	C.	McBrearty

Arkansas

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Joe	D.	Woodward

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Claude	Dawson	Ames
Thomas		Angelo
Charles	A.	Askin
Armon		Barsamian
Mei	L.	Bickner
Howard	S.	Block
Bonnie	G.	Bogue
Norman		Brand
C.	Chester	Brisco
Mark		Burstein
Thomas		Christopher
Barbara		Chvany
Alexander		Cohn
R.	Douglas	Collins
Jerilou	H.	Cossack
Morris		Davis
William	H.	Dorsey
William		Eaton
Edmund	D.	Edelman
R.	Wayne	Estes
Edna	E. J.	Francis
Joseph	F.	Gentile
Matthew		Goldberg
William	B.	Gould
Joseph	E.	Grabuskie
Joseph		Grodin
Catherine		Harris
David	G.	Heilbrun
Joe	H.	Henderson

California, Continued

Ronald		Hoh
Fredric	R.	Horowitz
Edgar	A.	Jones
Myron	L.	Joseph
John		Kagel
Walter	N.	Kaufman
Andria	S.	Knapp
Anita	Christine	Knowlton
John	B.	LaRocco
George	E.	Marshall
Gerald	R.	McKay
Charles	J.	Morris
Kenneth	A.	Perea
John	D.	Perone
William	W.	Petrie
C.	Allen	Pool
Michael		Prihar
Wilma	R.K.	Rader
Geraldine	M.	Randall
Michael	D.	Rappaport
Lionel		Richman
William	E.	Riker
William	S.	Rule
George	P.	Shultz
Kenneth	N.	Silbert
Franklin		Silver
Paul	D.	Staudohar
Robert	D.	Steinberg
Philip		Tamoush
Katherine	J.	Thomson
Barry		Winograd
Louis	M.	Zigman

Colorado

Bennett	S.	Aisenberg
Carl		Bosland
John	P.	DiFalco
Kathy	L.	Eisenmenger
Joseph		Lazar
John	Phillip	Linn
John	F.	Sass

Colorado, Continued

Thomas	L.	Watkins
Daniel	M.	Winograd

Connecticut

Peter		Adomeit
Peter	R.	Blum
J.	Larry	Foy
Susan	E.	Halperin
Susan	R.	Meredith

Delaware

Kathrine	B.	Hogan
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District of Columbia

Richard	I.	Bloch
Charles	B.	Craver
Herbert		Fishgold
C.	Allen	Foster
Paul		Greenberg
James	M.	Harkless
Joshua		Javits
James	C.	Oldham
Seymour		Strongin
Willard		Wirtz
Michael		Wolf

Florida

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Hugo	L.	Black
Charles	H.	Frost
Harry		Gudenberg
Lawrence	I.	Hammer
William	P.	Hobgood
Robert	B.	Hoffman
George	S.	Ives
Thomas	P.	Lewis
Mark	I.	Lurie

Florida, Continued

James	L.	Reynolds
W.	L.	Richard
James	F.	Scearce
Stanley	H.	Sergent
James	J.	Sherman
Harold	D.	Smith
Martin	A.	Soll
James	L.	Stern
Robert	E.	Stevens

Georgia

Linda	S.	Byars
Lloyd	L.	Byars
Rodney	E.	Dennis
Kathryn		Durham
Charlotte		Gold
Edward	E.	Hales

Hawaii

Joyce	M.	Najita
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Illinois

Ellen	J.	Alexander
Edwin	H.	Benn
Herbert	M.	Berman
Steven	M.	Bierig
Steven		Briggs
Vicki	Peterson	Cohen
James	R.	Cox
Peter		Feuille
Matthew	W.	Finkin
John	C.	Fletcher
Stephen	B.	Goldberg
Elliott	H.	Goldstein
Edward		Harrick
Marvin	F.	Hill
Michael	Jay	Jedel
Lisa	Salkovitz	Kohn

Illinois, Continued

Sinclair		Kossoff
Martin	H.	Malin
Arthur	A.	Malinowski
Robert	W.	McAllister
Raymond	E.	McAlpin
Peter	R.	Meyers
Harvey	A.	Nathan
Robert		Perkovich
Barry	E.	Simon
Lamont	E.	Stallworth
Jeanne	M.	Vonhof
Jeffrey	B.	Winton
Aaron	S.	Wolff
Byron		Yaffe

Indiana

Edward	P.	Archer
Terry	A.	Bethel
Robert		Brookins
David		Dilts
Barbara	W.	Doering
James	B.	Dworkin
Patrick	J.	Fisher
Stephen	L.	Hayford
Ann	S.	Kenis
James	P.	Martin
Donald	G.	Russell

Iowa

Clifford	E.	Smith
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Kansas

John	R.	Thornell
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Kentucky

David	L.	Beckman
Mollie	H.	Bowers
Phyllis	E.	Florman
Alvin	L.	Goldman
Edwin	R.	Render
David	W.	Stanton

Louisiana

Ed	W.	Bankston
Barry	J.	Baroni
Paul		Barron
John	F.	Caraway
Bernard		Marcus
Benjamin	M.	Shieber

Maine

James	B.	Atleson
Ann	R.	Gosline
Michael	C.	Ryan

Maryland

Suzanne	R.	Butler
Charles		Feigenbaum
Ira	F.	Jaffe
Homer	C.	La Rue
Andree	Y.	McKissick
Andrew	M.	Strongin
John	C.	Truesdale
M.	David	Vaughn

Massachusetts

Roger	I.	Abrams
Gary	David	Altman
David	R.	Bloodsworth
Tim		Bornstein
Richard	G.	Boulanger
Susan	R.	Brown

Massachusetts, Continued

Timothy	J.	Buckalew
Diane	Z.	Cochran
John	B.	Cochran
John	T.	Conlon
James	S.	Cooper
Peter	B.	Doeringer
Joan	G.	Dolan
Paul	J.	Dorr
Philip	J.	Dunn
Sharon	Henderson	Ellis
Linda	Robins	Franklin
Bruce		Fraser
Sarah	Kerr	Garraty
Roberta	L.	Golick
Marc	D.	Greenbaum
Marcia	L.	Greenbaum
Mark	M.	Grossman
Herbert	L.	Haber
Lawrence	T.	Holden
Mark	L.	Irvings
Lawrence	E.	Katz
James	M.	Litton
Robert	B.	McKersie
Elizabeth		Neumeier
Robert	M.	O'Brien
Nancy	E.	Peace
Theodore		Role
Michael	W.	Stutz
Sherrie	Rose	Talmadge
David	P.	Twomey
Donald	J.	White
Garry	J.	Wooters
Arnold	M.	Zack

Michigan

Elliot	I.	Beitner
Richard	N.	Block
Deborah	M.	Brodsky
Barry	C.	Brown
Mario		Chiesa
Howard	A.	Cole

Michigan, Continued

Stanley	T.	Dobry
Robben	W.	Fleming
Joseph	P.	Girolamo
Mark	J.	Glazer
Paul	E.	Glendon
Barry		Goldman
David	W.	Grissom
Peter	D.	Jason
Dallas	L.	Jones
Mark	L.	Kahn
Ruth	E.	Kahn
Benjamin	A.	Kerner
Ildiko		Knott
Michael	P.	Long
Robert	A.	McCormick
Patrick		McDonald
Richard		Mittenthal
Anne	T.	Patton
Shlomo		Sperka
Theodore	J.	St. Antoine
Jack		Stieber
Donald	F.	Sugerman
David	S.	Tanzman
Benjamin		Wolkinson

Minnesota

Stephen	F.	Befort
John	W.	Boyer
Laura	J.	Cooper
John	J.	Flagler
Jay	C.	Fogelberg
Janice	K.	Frankman
Thomas	P.	Gallagher
Jeffrey	W.	Jacobs
James	A.	Lundberg
Richard	John	Miller
Nancy	D.	Powers
Christine	D.	Ver Ploeg

Mississippi

Samuel	J.	Nicholas
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Missouri

Robert	Gary	Bailey
Mark		Berger
Neil	N.	Bernstein
Gerald		Cohen
John	E.	Dunsford
Thomas	J.	Erbs
Gerard	A.	Fowler
Michael	D.	Gordon
Gladys	W.	Gruenberg
Marsha		Murphy
James	P.	O'Grady
James	M.	O'Reilly
Robert	V.	Penfield
Josef		Rohlik
Mark	W.	Suardi
James	E.	Westbrook
Rex		Wiant

Montana

William	L.	Corbett
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Nevada

Gerald	E.	Wallin
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New Hampshire

Parker	A.	Denaco
John Van	N.	Dorr
Richard	Grant	Higgins
Allan	S.	McCausland

New Jersey

Stanley	L.	Aiges
James	P.	Begin
Michael	A.	Berzansky
Melissa	H.	Biren
Daniel	F.	Brent
Charles	J.	Coleman
Ralph	H.	Colflesh
John	B.	Dorsey
Mattye	M.	Gandel
Edmund	G.	Gerber
Robert	M.	Glasson
Joseph	A.	Harris
Thomas		Hartigan
Jacqueline	A.	Imhoff
Joyce	M.	Klein
Joseph		Licata
Robert	E.	Light
Randi	E.	Lowitt
James		Mastriani
Michael	J.	Pecklers
Earl	R.	Pfeffer
J. J.		Pierson
Stephen	J.	Rosen
John	E.	Sands
David	N.	Stein
John	M.	Stochaj
Jeffrey	B.	Tener
William	M.	Weinberg
Joel	M.	Weisblatt
Ernest		Weiss

New Mexico

Arthur	Eliot	Berkeley
Patrick		Halter
Donald	J.	Petersen
T.	Zane	Reeves
Rhonda	R.	Rivera

New York

Jonas		Aarons
Richard		Adelman
Douglas	James	Bantle
Ralph	S.	Berger
Dennis	J.	Campagna
Thomas	F.	Carey
Sheila	S.	Cole
Elizabeth	B.	Croft
Barbara		Deinhardt
Tia	Schneider	Denenberg
Fred	L.	Denson
Joel	M.	Douglas
Robert	L.	Douglas
Jacquelin	F.	Drucker
Howard	C.	Edelman
Dana	Edward	Eischen
Martin		Ellenberg
Howard	G.	Foster
Richard	M.	Gaba
Gayle		Gavin
Joseph	A.	Gentile
Eleanor	E.	Glanstein
Marlene	A.	Gold
Milton	M.	Goldberg
Steven	J.	Goldsmith
Margery	F.	Gootnick
David	L.	Gregory
James	A.	Gross
Robert		Herzog
Joan		Ilivicky
Arthur	T.	Jacobs
Rose	F.	Jacobs
Randall	M.	Kelly
Eric	W.	Lawson
Marilyn	M.	Levine
Michael	S.	Lewandowski
Ira		Lobel
Susan	T.	Mackenzie
Roger	E.	Maher
James	R.	Markowitz
James	R.	McDonnell

New York, Continued

Jay		Nadelbach
George		Nicolau
Robert	E.	Peterson
Stuart	M.	Pohl
Peter	A.	Prosper
Robert	J.	Rabin
Lois	A.	Rappaport
Arthur	A.	Riegel
Thomas	N.	Rinaldo
Philip		Ross
Richard	J.	Roth
George	S.	Roukis
Martin	F.	Scheinman
Eric	J.	Schmertz
Jeffrey	M.	Selchick
Elliott	D.	Shriftman
Robert	T.	Simmelkjaer
Josef	P.	Sirefman
Janet	Maleson	Spencer
Jack	D.	Tillem
Rosemary	A.	Townley
Alan		Viani
Bonnie	Siber	Weinstock
Carol		Wittenberg
Barbara		Zausner
Paul	S.	Zonderman

North Carolina

Hezekiah		Brown
Donald	P.	Crane
Elizabeth	C.	Wesman
Robert	G.	Williams

Ohio

Patricia	Thomas	Bittel
Hyman		Cohen
Nicholas		Duda
Marvin	J.	Feldman
Jerry	A.	Fullmer
Paul	F.	Gerhart

Ohio, Continued

Ed		Goggin
Mitchell	B.	Goldberg
Harry		Graham
William	C.	Heekin
Theodore	K.	High
Louis	V.	Imundo
Charles	F.	Ipavec
Margaret	Nancy	Johnson
Frank	A.	Keenan
Jonathan	I.	Klein
Linda	DiLeone	Klein
Charles	W.	Kohler
Daniel	N.	Kosanovich
Colman	R.	Lalka
Bruce	B.	McIntosh
Dennis	E.	Minni
John	J.	Murphy
Nels	E.	Nelson
Michael		Paolucci
Douglas	E.	Ray
Alan	Miles	Ruben
Susan	Grody	Ruben
Calvin	William	Sharpe
John	C.	Shearer
Thomas	R.	Skulina
Anna	DuVal	Smith
Donald	Valentine	Staudter
Robert	Gary	Stein
Gregory	J.	Van Pelt
Virginia		Wallace-Curry
Floyd	D.	Weatherspoon
John	S.	Weisheit

Oklahoma

Frank		Elkouri
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Oregon

Gary	L.	Axon
Howell	L.	Lankford
Thomas	F.	Levak

Oregon, Continued

Eric	B.	Lindauer
Luella	E.	Nelson
Leslie		Sorensen-Jolink
Jane	R.	Wilkinson
Timothy	D. W.	Williams

Pennsylvania

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Margaret	R.	Brogan
Timothy	J.	Brown
Scott	E.	Buchheit
Lawrence		Coburn
Martha	R.	Cooper
Robert	A.	Creo
Shyam		Das
Irwin	J.	Dean
Walter		DeTreux
Thomas	J.	DiLauro
Richard	W.	Dissen
James	Clair	Duff
Patrick	J.	Duff
Matthew	M.	Franckiewicz
Gladys		Gershenfeld
Walter	J.	Gershenfeld
Robert	C.	Gifford
Jay	D.	Goldstein
Robert	A.	Gorman
Thomas	L.	Hewitt
James	H.	Jordan
Richard	R.	Kasher
Kinard		Lang
J.	Joseph	Loewenberg
William		Lowe
Herbert	L.	Marx
Thomas	G.	McConnell
Edward	E.	McDaniel
Clare	B.	McDermott
Michael	D.	McDowell
Donald	S.	McPherson
Christopher	E.	Miles
Kathleen		Miller

Pennsylvania, Continued

William	J.	Miller
John	J.	Morgan
Elliot		Newman
Edward	J.	O'Connell
Joan		Parker
Philip	W.	Parkinson
Edward	A.	Pereles
David	A.	Petersen
Gerard	G.	Restaino
Mariann	E.	Schick
Stanley	J.	Schwartz
Louis	E.	Seltzer
John	Paul	Simpkins
John	Mark	Skonier
Alan	A.	Symonette
Ronald	F.	Talarico
David		Weinstein
Marc		Winters
Helen	M.	Witt
Steven	M.	Wolf
Perry	A.	Zirkel
Michael	E.	Zobrak

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Thomas	M.	Hines
Craig	E.	Overton
Charles	Ted	Schmidt

South Carolina

William	M.	Edgett
Robert	W.	Foster
Nancy		Kauffman
Dennis	R.	Nolan
James	E.	Rimmel
B. R.		Skelton
Hoyt	N.	Wheeler

Tennessee

Patrick Edward	J.	Hardin Sedlmeier
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Texas

A.	Dale	Allen
Ruben	R.	Armendariz
John	B.	Barnard
LeRoy	R.	Bartman
Norman		Bennett
Raymond	L.	Britton
Thomas	A.	Cipolla
Milden	J.	Fox
Donald	P.	Goodman
Barnett	M.	Goodstein
Don	B.	Hays
I. B.		Helburn
Daniel	Frederick	Jennings
Diane	Dunham	Massey
William		McKee
Michael	B.	McReynolds
Harold	E.	Moore
Francis	Xavier	Quinn
Mark	R.	Sherman
Elvis	C.	Stephens
Maretta	C.	Toedt
Don	E.	Williams

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Eckehard		Muessig
Jerome	H.	Ross
Joseph	M.	Sharnoff
Rolf		Valtin

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Joseph	W.	Duffy
David		Gaba
Janet	L.	Gaunt
Allan	J.	Harrison
Vern	E.	Hauck
Philip	K.	Kienast
Alan	R.	Krebs
Kenneth	M.	McCaffree
Sylvia		Skratek

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Wisconsin

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Sharon		Gallagher
Marshall	L.	Gratz
Amedeo		Greco
Jay	E.	Grenig
Sharon	K.	Imes
James	E.	Jones
Edward	B.	Krinsky
Bertram	T.	Kupsinel
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Stanley	H.	Michelstetter
Daniel	J.	Nielsen
Mary Jo		Schiavoni
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Gil		Vernon
Thomas	L.	Yaeger

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Andrew	C.L.	Sims

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James		Dorsey
Joan	M.	Gordon
Stan		Lanyon
Dalton	L.	Larson
David	C.	McPhillips
Christopher		Sullivan
Mark		Thompson
C.	Brian	Williams

Newfoundland

James	C.	Oakley
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Nova Scotia

S.	Bruce	Outhouse
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Ontario

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Christopher	James	Albertyn
Jules		Bloch
Felicity		Briggs
Howard	D.	Brown
Richard	M.	Brown
Kevin	Michael	Burkett
Donald	D.	Carter
Louisa	M.	Davie
Jane	H.	Devlin
Nimal		Dissanayake
Robert	Joshua	Herman

Ontario, Continued

William		Kaplan
Mark	Brian	Keller
Ross	L.	Kennedy
Paula		Knopf
Randy		Levinson
Gordon		Luborsky
William	A.	Marcotte
Richard	H.	McLaren
Marilyn		Nairn
Margo	R.	Newman
Michel	G.	Picher
Pamela	Cooper	Picher
Stephen		Raymond
Maureen	K.	Saltman
Ian		Springate
David		Starkman
Susan	L.	Stewart
Kenneth	Paul	Swan
Martin		Teplitsky
Richard	L.	Verity
J. F. W.		Weatherill
Bruce		Welling
David	R.	Williamson

Quebec

Serge		Brault
Jean-Guy		Clement
Francois	G.	Fortier
Harvey		Frumkin
Marc		Gravel
Carol		Jobin
Andre		Rousseau

E. Past Presidents of the NAA

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William E. Simkin	1950
David L. Cole.....	1951
David A. Wolff	1952
Edgar L. Warren.....	1953
Saul Wallen.....	1954

Aaron Horvitz	1955
John Day Larkin.....	1956
Paul N. Guthrie	1957
Harry H. Platt	1958
G. Allan Dash, Jr.....	1959
Leo C. Brown, S.J.....	1960
Gabriel N. Alexander	1961
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Russell A. Smith	1965
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James C. Hill.....	1969
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Arthur Stark	1977
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Edgar A. Jones, Jr.	1981
Byron R. Abernethy	1982
Mark L. Kahn.....	1983
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William J. Fallon.....	1985
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Arvid Anderson.....	1987
Thomas T. Roberts.....	1988
Alfred C. Dybeck	1989
Howard S. Block.....	1990
Anthony V. Sinicropi	1991
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Dallas L. Jones	1993
Arnold M. Zack.....	1994
J.F.W. Weatherill	1995
George Nicolau	1996
Milton Rubin.....	1997
James M. Harkless	1998
Theodore J. St. Antoine	1999

John Kagel	2000
James J. Sherman	2001
Richard I. Bloch	2002
Walter J. Gershenfeld.....	2003
George R. Fleischli	2004
Margery F. Gootnick.....	2005
Dennis R. Nolan.....	2006
Barbara Zausner	2007
Michel G. Picher	2008

Appendix 4:

**NATIONAL ACADEMY OF ARBITRATORS
POLICY STATEMENT ON EMPLOYMENT ARBITRATION
May 20, 2009**

It is the position of the National Academy of Arbitrators that voluntary arbitration is always preferable, and that it is desirable for employees to be allowed to opt freely, post-dispute, for either the courts and administrative tribunals or arbitration. We recognize, however, that the United States Supreme Court has extended the Federal Arbitration Act to most contracts of employment. As a result, employers may require their employees to arbitrate some or all future disputes, including statutory claims.

The abiding concern of the Academy is that all arbitration, including employment arbitration, be conducted in a manner that respects the rules of fundamental fairness essential to the integrity and credibility of the arbitration process. When serving in cases in which, as a condition of employment, an employee has signed an agreement that imposes arbitration as a substitute for direct access to either a judicial or administrative forum for the pursuit of statutory rights and judicially recognized claims for relief, arbitrators should be especially careful to ensure the fairness of any employment arbitration procedures in light of the Academy's Guidelines for Employment Arbitration.

GUIDELINES FOR EMPLOYMENT ARBITRATION

INTRODUCTION

NAA members are now being called upon to arbitrate employment claims in the non-collective bargaining sector. Cases arising under an employer promulgated arbitration plan require particular vigilance on the part of arbitrators to ensure procedural fairness and to protect the integrity and reputation of workplace arbitration. These Guidelines, together with the Due Process Protocol endorsed by the Academy, the American Bar Association, the American Arbitration Association and other interested agencies, are intended to assist arbitrators in deciding whether to accept a case and to provide guidance as to how such a case might be fairly

conducted and concluded. They supplement the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes. Members should also be alert to other applicable codes of ethics (e.g. code of Ethics for Arbitrators in Commercial Disputes) federal and state statutes or regulations, or any other ethical code or rules adopted by the parties.

Employment arbitrations can result from post-dispute arrangements made by the agreement of the parties. Often, however, they arise as a condition of employment or "pre-dispute agreement" with terms that are established by the employer. Either may involve statutory claims, common law claims or contractual claims. Academy members who undertake such cases should do so with full assurances that their powers and the procedures to be followed are consistent with minimum standards of due process and fairness. In matters involving statutory claims, the arbitrator's jurisdiction and remedial authority should permit a hearing, rulings and decision fully consistent with the provisions of the statute itself, no less than would be the case before a court.

Members should recognize that in adjudicating statutory, common law or contractual claims they are acting as substitutes for a court. If the arbitration plan under which a member is appointed lacks fundamental due process, the arbitrator should insist upon an agreed correction as a condition of service and, failing agreement, should decline the appointment or withdraw from any further participation. The power to withdraw from a case in the face of policies, rules or procedures that are manifestly unfair or contrary to fundamental due process can carry considerable moral suasion. However, in assessing the fairness of a given system, the arbitrator should be mindful that the parties to a post-dispute agreement have much more latitude to vary from the procedural and substantive requirements of statutory systems than do parties to a pre-dispute agreement.

I. SHOULD YOU TAKE THE CASE?

Do you have past or present connections, interests or relationships that should be disclosed?

Academy members are used to situations where disclosures are often

unnecessary because the parties know them well and the labor-management universe is relatively small. In contrast, in the employment field the parties may not be familiar with one another or conversant with the arbitration process. Caution suggests detailed disclosure regarding any past or present involvement with or relationship with the parties, counsel or potential witnesses, and any similar considerations. It is important to proceed carefully and to err on the side of disclosure so there can be no question of impropriety or of your impartiality. State statutes, regulations, or rules of court on disclosure may be applicable, particularly where federal law is not controlling, and these should be fully complied with.

Do the parties have adequate rights of representation?

At times, the parties in these cases, especially claimants, may not have experienced, professional representation. Arbitrators should exercise special care when accepting appointments or hearing cases where one party is not represented. Some members elect not to accept a case when the claimant is unrepresented.

Were you selected in a fair manner?

When notified of selection, if you are not familiar with the parties' procedure, you should inquire as to how you were chosen. Did both parties have a meaningful selection opportunity? A negative answer to this question should cause you to decline the case, absent clear evidence that the selection process was fundamentally fair.

Are you satisfied that you can serve in light of the documents creating and defining the scope of the arbitrator's jurisdiction, including, where applicable, the following?

- a. Arbitration agreement
- b. Employment contract
- c. Designating agency rules
- d. Court order
- e. Employer ADR plan or other policies

f. Any restrictions on class or group actions to the extent these might hinder particular grievants in pursuing their claims, especially where the monetary amount of each individual claim is relatively small, or hinder the vindication of the public purpose served by the particular claim.

Before agreeing to serve you should receive all of the documents defining your authority and scope of jurisdiction. If there are restrictions, particularly with respect to your remedial authority and your ability to control the proceeding, such as unfair limitations on discovery or on the production of documents or witnesses, you should make sure that you have the authority to make such directions as may be necessary to ensure procedural fairness. If the restrictions have previously been found unconscionable by a court, but the employer offers to waive those restrictions in this particular case, you should consider whether accepting the case is appropriate.

5. Where a claim involves statutory or common law rights, are you authorized to provide adequate discovery and remedies fully consistent with any applicable statute or the common law?

In an employment relationship where arbitration is a condition of employment it is essential to ensure that your remedial authority is equal to that of a judge or jury under any statute or the common law applicable to the matter before you. Different considerations may apply if the arbitration agreement is truly negotiated at arm's length or is a post-dispute agreement made between sophisticated parties. Similarly, if there are no provisions for discovery, you should make a determination about your authority. Unlike the collective bargaining setting, there is no administrative agency available to require discovery in the absence of agreement. If you believe that your remedial authority is unfairly restricted, you should consider carefully whether it is appropriate to serve.

6. Are there unfair restrictions on the date, time and location of the hearing?

Academy members should ensure that all aspects of the scheduling of the hearing are fair. The location should not be so distant that it causes cost problems for a party of limited means or be inconvenient to reach for a person with physical disabilities. The arbitrator should also consider the reasonableness of a party's request for a

“neutral” site. The dates of hearings should not be so soon as to prevent adequate preparation or so delayed as to prevent a timely remedy.

7. Are you satisfied that the arbitrator compensation arrangement is consistent with fairness and impartiality?

Compensation arrangements can take a number of forms, including employer pays in full or in substantial part, the parties share equally, or loser pays. You must decide whether the basic arbitrator compensation arrangement is consistent with fairness and applicable law. If there is a mandatory arbitration agreement executed as a condition of employment, and the claim is based on a statute or the common law, an arbitrator should consider whether fairness demands that the employee’s share of the arbitrator’s fees and expenses be no greater than the filing fees for such a claim in the appropriate court.

II. PRE-HEARING CONSIDERATIONS

Employment cases require active management to ensure due process, fairness, and efficiency. At the outset of the case, the arbitrator should make clear the rules governing the proceeding and the full range of pre-hearing and remedial authority the arbitrator intends to exercise. Depending on the agreement and relevant statutory and case law, that authority may include sanctions, compensatory and punitive damages, interest, attorneys’ fees, and equitable relief.

If the agreement to arbitrate or the parties’ agreed-upon rules do not set forth the evidentiary standards to be followed at the hearing, the arbitrator should make clear the standards he or she intends to apply.

Pre-hearing discovery is essential for adequate case preparation. In addressing discovery issues, the arbitrator must balance the parties’ need for sufficient information to ensure full and fair exploration of the issues and the expedited nature of arbitration. Fairness, efficiency, and due process should guide the arbitrator in managing discovery. Where the agreement is silent, the arbitrator should establish discovery rules in conjunction with the parties

In establishing discovery rules the parties may choose state or federal rules because of familiarity with them. Arbitrators should have some familiarity with both sets of rules and tell the parties whether they will be applied literally.

The arbitrator and the parties must establish time limits for pre-hearing activities, which the arbitrator is authorized to enforce. The arbitrator should determine whether dispositive motions shall be permitted, with or without further leave of the arbitrator.

When both parties are represented by counsel, arbitrators should encourage voluntary resolution of discovery issues. When claimants appear *pro se*, arbitrators should ensure that they understand the issues being discussed and the discovery obligations they must meet. Arbitrators should be careful, however, to avoid acting as advocates for *pro se* claimants, and should scrupulously maintain both the reality and the appearance of impartiality.

III. THE HEARING

Certain issues that often arise at the hearing in a labor arbitration will have already been discussed and ruled upon by the arbitrator in the pre-hearing process.

At the hearing, the arbitrator should seek a comfortable balance between the traditional informality and efficiency of arbitration and court-like diligence in respecting and safeguarding the substantive statutory, common law, and contractual rights of the parties.

While parties of equivalent capacity often object to what they consider excessive arbitrator intervention in their case presentations, arbitrators must exercise special care to ensure fundamental fairness when there is a *pro se* claimant. A frank statement to this effect at the beginning of a hearing may be helpful. Although an arbitrator should not take over the *pro se* claimant's case as would an advocate, the arbitrator may appropriately point out the basic procedures to be followed and the elements that must be proven to establish the claim. The arbitrator may also raise questions to clarify confusing testimony or argument.

If not following the formal rules of evidence, arbitrators should be mindful of issues of privilege and confidentiality, and instances where the application of an informal evidentiary approach might prejudice an underlying substantive right under a statute, the common law, or a contract.

Arbitrators should familiarize themselves with any legally established burdens of going forward and any legally established burdens of proof, including any shifting burdens of proof, that are applicable to the claim.

During the hearing the arbitrator should remain alert to any ongoing disclosure obligations not anticipated and dealt with at the pre-hearing consultation.

If the parties do not agree on having a transcript, the arbitrator may have to rule on what, if any, record of the proceedings will be required other than the arbitrator's own opinion and award. In statutory cases, an appropriate record is necessary for a court to accord the arbitrator's award full weight. But unless a case is unusually complicated or the evidence is highly controverted, a professional transcript could be unduly expensive and time-consuming. An audio recording or similar device controlled by the arbitrator may suffice.

IV. OPINION AND AWARD

The arbitrator should provide a written opinion and award.

The opinion should record the parties, the type of dispute, the issues to be decided, and the relief requested.

The opinion should recite the facts and the reasoning for any conclusions contained in the opinion and award. The arbitrator should identify and deal with all statutory, common law, or contractual issues raised, being mindful of the standards of judicial review which may apply. It is appropriate for the arbitrator to cite and rely on material supplied at the hearing, as well as on information in the public domain, including the jurisprudence of agencies and courts. In resolving public law claims the arbitrator is obligated to apply applicable statutory and case law.

Remedies should be consistent with the statutory, common law, or contractual

rights being applied and with remedies a party would have received had the case been tried in court. These remedies may well exceed the traditional labor arbitration remedies of reinstatement and back pay and may include injunctive relief, compensatory and punitive damages, interest, and assignment of attorney's fees and costs.

The award should be signed by the arbitrator or by a majority of a panel of arbitrators. It should specifically cite the disposition of each claim and the damages and relief provided, if any.

No. 07-581

IN THE
Supreme Court of the United States

14 PENN PLAZA LLC and
TEMCO SERVICE INDUSTRIES, INC.,
Petitioners,

v.

STEVEN PYETT, THOMAS O'CONNELL,
and MICHAEL PHILLIPS,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF
THE NATIONAL ACADEMY OF ARBITRATORS
IN SUPPORT OF RESPONDENTS

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June 2008

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INTEREST AND CONCERN OF THE *AMICUS*¹

The National Academy of Arbitrators was founded in 1947 “to foster the highest standards of integrity, competence, honor and character among those engaged in the arbitration of industrial disputes on a professional basis,” to adopt and secure adherence to canons of professional ethics, and to promote the study and understanding of the arbitration of industrial disputes. GLADYS GRUENBERG, JOYCE NAJITA & DENNIS NOLAN, *THE NATIONAL ACADEMY OF ARBITRATORS: FIFTY YEARS IN THE WORLD OF WORK* 26 (1997). As the historians of the Academy observe, the Academy has been “a primary force in shaping American labor arbitration.” *Id.*

The Academy’s stringent rules assure that only the most active, ethical, and well-respected practitioners are elected to membership along with scholars specially selected for significant contributions to the understanding of labor law and labor relations. Members are prohibited from serving as advocates or consultants in labor relations, from being associated with firms that perform those functions, and from serving as expert witnesses on behalf of labor or management. Currently, the Academy has approximately 650 U.S. and Canadian members.

¹ Rule 37.6 statement: Counsel of record is the sole author of this brief. No person or entity other than the **National Academy of Arbitrators** has made any monetary contribution to the preparation or submission of this brief. Letters reflecting the consent of the parties to the filing of this brief have been filed with the Clerk.

The traditional function of labor arbitration was to resolve disputes between management and labor primarily involving questions of interpretation and application of the terms of collective bargaining agreements—grievance arbitration. Arbitration of disputes as to the application and interpretation of statutes protecting individual employees against specified forms of employment discrimination has not been a traditional function of labor arbitration. Recognizing that such a form of arbitration was becoming a part of the American landscape, the Academy was a prime mover in what was to become the 1995 multi-partite *Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*. The Academy also amended its constitution and by-laws to encompass study and educational activity with respect to employment arbitration. Although it has continued to limit its membership primarily to those accomplished in traditional labor arbitration, its membership does include some who also serve as employment arbitrators.

In keeping with its educational mission, the Academy has appeared before this Court as *amicus curiae* in cases concerning the law of arbitration under collective agreements, *i.e.*, labor arbitration, *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986), and *Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57 (2000), in cases concerning the emerging law of the arbitration of individual statutory claims, *i.e.*, employment arbitration, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), and, in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), where the two might conflate. In that case,

the Court chose “not [to] reach the question” presented here. *Id.* at 82.

The Academy believes it is specially situated to advise the Court in this case. The Academy’s expertise provides the Court a deep understanding of how individual statutory claims relate to the system of industrial self-government of which labor arbitration is so integral a part.

It may appear odd that an association of professional labor arbitrators is advancing a position that would restrict the role of labor arbitration. The seeming oddity evaporates once the Court understands that the Academy’s position is grounded in its fundamental educational mission: to bring to bear its experience and considered judgment to the question of what best comports with the nation’s system of industrial self-government and of how individual civil rights in employment are best protected.

STATEMENT OF THE CASE

Amicus NAA defers to the Respondents' Statement of the Case² but it wishes to draw the Court's attention to three aspects of the instant collective bargaining agreement that play a critical role. First are the Grievance-Arbitration provisions of Arts. V and VI. As a matter of industrial practice, these are in all important respects routine. Art. V sets out the various steps through which a grievance proceeds in an effort at resolution between the union and management short of arbitration, including a contractual statute of limitations. Art. VI governs the submission to arbitration of disputes "between the parties" to the collective agreement. Consistent with the practice and philosophy of collective bargaining, under Art. VI the union and only the union controls whether or not a grievance will proceed to arbitration. THE COMMON LAW OF THE WORKPLACE § 1.29 (Theodore J. St. Antoine ed., 2d ed. 2005); ELKOURI & ELKOURI, HOW ARBITRATION

² The Petitioners have asserted that, under the instant grievance procedure, "the Union permits the employee to pursue the discrimination claims in the arbitration forum with his or her attorney." Petition for Certiorari at 5. The record does not substantiate the use of the present indicative "permits." The collective agreement makes no provision for the individual to proceed to arbitration independent of the union. In this case, the union "consented" on an *ad hoc* basis to the plaintiffs' "use" of the Office of Contract Arbitration (OCA) created under the collective bargaining agreement to hear their age discrimination claim so long as the plaintiffs bore the cost. Pet. App. 42a. That *ad hoc* decision made labor arbitration "available" to these employees. Brief for the Petitioners at 16. But the union was not obligated to allow it. Indeed, the Petitioners recognize as much in their treatment of the avenues of redress available to the employee whose civil rights claims the union declines to pursue. *Id.* at 41–43.

WORKS 243 (Alan Ruben ed., 6th ed. 2003). In labor parlance, “The grievance belongs to the union.” Clyde Summers, *Individualism, Collectivism and Autonomy in American Labor Law*, 5 EMPLOYEE RTS. & EMPLOYMENT POL’Y J. 453, 487 (2001). A collective agreement could grant employees the right to proceed to arbitration independent of the union, *id.*; but such provisions are extremely rare in the private sector, if they exist at all, and this collective agreement makes no such provision.³

Second is the non-discrimination article set out in the Brief for the Petitioners at 5–6. Collective agreements often prohibit discrimination on one or more invidious grounds, but this collective agreement’s non-discrimination provision is, in *amicus* NAA’s experience, unique. Not only does it enumerate the federal and state labor protective laws it specifically sweeps in, it provides that: “All such claims shall be subject to the grievance and arbitration procedure (Articles V and VI) as the *sole and exclusive* remedy for violations.” *Id.* at 6 (emphasis added). The Petitioners argue that “this language” was “specifically crafted” as clearly and unmistakably to preclude de novo judicial access for those statutory claims. *Id.* No reason appears to question this assertion, but the record is silent regarding the provision’s bargaining history.

Third is the agreement’s treatment of subcontracting. The last major survey of the contents of collective agreements by subject matter, unfortunately now of some vintage, found that about 58% of collective agreements in non-manufacturing dealt with subcontracting: for the most part by

³ *Supra* note 2.

reserving it for future bargaining, by prohibiting it if layoffs would result, by allowing it only where bargaining unit employees with necessary skills or equipment were not available, or by requiring adherence to past subcontracting practices. BUREAU OF NATIONAL AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 80 (14th ed. 1995). Art. 54 of this collective agreement contains an absolute prohibition: “There shall be no subcontracting of bargaining unit work during the term of this Agreement.” Joint App. Before the Court of Appeals at A215. This provision bears on the analysis in Section I of the Argument, *infra*.

SUMMARY OF ARGUMENT

In *Wright v. Universal Maritime Service Corp.*, *supra*, this Court expressly reserved on whether subsuming civil rights claims into a collective bargaining agreement's grievance-arbitration procedure would preclude access to the courts de novo. *Id.* at 82. That question is presented here.

Amicus NAA submits two propositions to be dispositive. First, the doubt this Court expressed over thirty years ago that statutory civil rights would be protected adequately by mapping them on to the grievance procedures of collective bargaining agreements continues to be well founded. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 (1974). That skepticism is unaffected by the Court's allowance, subsequent to *Gardner-Denver*, of employment arbitration to substitute for civil litigation. Subsuming civil rights for preclusive disposition by a collective agreement's grievance procedure places the vindication of those rights in the hands of the union, subject only to its duty of fair representation. But a union's adherence to a duty of fair representation in deciding not to pursue an employee's civil rights claim is no substitute for an adjudication on the merits of the claim: the vindication of a minority's statutory civil rights should not depend on the dispensation of any majority however well intentioned it might be.

Second, *Gardner-Denver's* allowance of two separate tracks for the vindication of workplace rights has not proven burdensome. If a collective agreement contains an applicable non-discrimination clause, its administration by the union up to and including non-preclusive arbitration provides a cost-

effective system for resolving the vast majority of civil rights claims without sacrificing those few whose claims are arbitrated by their unions negligently or not arbitrated at all.

ARGUMENT

INTRODUCTORY

At first blush, the current state of the law would seem to be anomalous: an unrepresented employee is deemed capable freely to consent to a contract of employment, albeit a contract of adhesion, pursuant to which her statutory civil rights are to be decided definitively by an employment arbitrator instead of a court (where state law would allow such agreement to be enforced⁴), but a union is not free to agree to have the same rights definitively resolved in labor arbitration as the product not of a unilateral managerial fiat but of an arms-length bargain. Consequently, the Court in *Wright v. Universal Maritime Service Corp.*, *supra*, perceived there to be two bodies of law in “tension” with one another—one generated under the Federal Arbitration Act (FAA), the other generated under the National Labor Relations Act. *Id.* at 76. The Petitioners say as much. Brief for the Petitioners at 30–31.

The anomaly is only seeming. The apparent “tension” disappears once it is understood that what is presented are two entirely different systems. The Court is *not* being asked in this case to sanction the submission of civil rights claims exclusively to arbitration under a collective bargaining agreement. The Court is being asked to sanction the submission of those claims exclusively to a collective agreement’s grievance procedure that may *not* result in arbitration. Accordingly, it would assist the Court

⁴ See Steven Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability and Agreements to Arbitrate*, 2006 J. DISPUTE RES. 469 (reviewing state decisional law).

briefly to lay out the underpinnings of the two different systems the Petitioners are asking the Court to conflate.

Labor arbitration is the product of the system of collective bargaining, erected on the statutory foundation of the Wagner Act of 1935, that grew to maturity in the post-War period. In the 1940s and 1950s, as in the 1930s, there were few statutory workplace rights: the common assumption was that workers were entitled only to those rights that unions were able to secure for them.

How to police the parties' self-adopted obligations presented a major legal and societal question. Unions had long tended to eschew the courts, which they distrusted, in preference to self-help; but the strike is a blunt and often awkward instrument and certainly not one to be resorted to frequently or over minor disputes. During the war, management and labor had grown accustomed to dispute resolution by arbitrators, at the behest of the War Labor Board. But even after the war, so experienced a labor umpire as Harry Shulman argued that the law's approach to labor arbitration—premised as “an integral part of the system of self-government”—should be hands off. Harry Shulman, *Reason, Contract and Law in Labor Relations*, 68 HARV. L. REV. 999, 1024 (1955). The Court accepted Shulman's premise, but instead shaped the law to conform to it.

In *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), the Court held a collective agreement's commitment to grievance arbitration to be specifically enforceable, not, however, by reference to the Federal Arbitration Act, but to § 301 of the Taft-Hartley Act. In the Court's view, § 301

commissioned a uniform federal common law of the collective agreement fashioned by the judiciary out of national labor policy and limited only by judicial “inventiveness.” *Id.* at 457. Three years later, in the *Steelworkers Trilogy*, the Court acknowledged labor arbitration as an integral element of the autonomous system of self-government created by the collective bargaining relationship. *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960), *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). The Court stressed that, unlike the commercial context, where arbitration is a substitute for litigation, in the collective bargaining context labor arbitration substitutes for the strike.

Not surprisingly, because a collective agreement bears scant similarity to a commercial contract or even a contract of employment, the legal nature of the collective agreement proved challenging. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 335 (1944) (distinguishing the collective bargaining agreement from a “contract of employment”). Scholars differed deeply over whether the collective agreement conferred any individual rights on the employees governed by it at all, or whether the collective agreement was a set of rules and practices that governed the workplace the only legally enforceable aspect of which being an obligation to arbitrate those disputes that the union chose to press. Compare Clyde Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U. L. REV. 362 (1972), with David Feller, *The General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663 (1973).

In fashioning the federal common law of the collective agreement, the Court accommodated the union's crucial role in the system of industrial collective self-government even as it countenanced the possibility of an accrual of individual contractual rights: the individual employee had first to attempt to exhaust the grievance-arbitration procedure, *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), and could thereafter sue the employer for an alleged breach of contractual rights *only* if she could prove that the union had breached its duty of fair representation either in declining to take her case to arbitration, *Vaca v. Sipes*, 386 U.S. 171 (1967), or in its presentation of the claim in arbitration, *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976). That the contractual claim was in fact meritorious is not dispositive of whether the union breached its duty of fair representation in declining to bring it before an arbitrator, *Vaca v. Sipes, supra*, at 192–93, such being the union's crucial role in the system.

By the early 70s, however, the legal landscape on which the system of collective bargaining plays out had changed. An expanding number of individual workplace rights were being legislated, especially in statutes prohibiting employment discrimination. How these laws related to the autonomous system of collective bargaining and grievance arbitration was addressed in *Alexander v. Gardner-Denver Co., supra*. The decision need not be rehearsed. It is enough to say that the Court saw two quite different legal regimes at work: the collective agreement policed by the union through the grievance procedure; and positive law policed via litigation in the courts. Where the collective agreement also committed the parties to observe principles of

non-discrimination as a contractual obligation, the union's resort to labor arbitration was not preclusive of the individual's resort to the courts: "Both rights have legally independent origins and are equally available to the aggrieved employee." *Gardner-Denver, supra*, at 52.

The *Gardner-Denver* Court addressed the argument that the union had waived the individual employee's access to Title VII and rejected it in part—but only in part—on the ground that statutory rights may not be submitted to private arbitration for final disposition, *id.* at 51–52, citing *Wilko v. Swan*, 346 U.S. 427 (1953). Inasmuch as *Wilko* was overruled in 1989, were it the sole basis of decision, the "tension" adverted to at the outset of this Introductory would be well placed. But there was a good deal more at work in *Gardner-Denver* than *Wilko*'s now discarded notion that law can be decided only by a court. Just as the Court had in the *Trilogy*, the *Gardner-Denver* Court dwelt on the system of self-government created by collective bargaining, *id.* at 52–53, not only on the labor arbitrator's role in that system, *id.*, but, even more importantly, on the union's role. The Court was skeptical that the autonomous system of industrial self-government could be expected to vindicate individual statutory rights, a skepticism grounded in

the union's exclusive control over the manner and extent to which an individual grievance is presented. . . . In arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit. . . . Moreover, harmony of interest between the union and the

individual employee cannot always be presumed, especially where a claim of racial discrimination is made. . . . And a breach of the union's duty of fair representation may prove difficult to establish.

Id. at 58 (citations omitted).

Over the course of the past decade and a half, employer resort to individual contracts of adhesion to sweep statutory civil rights into employer-promulgated arbitration systems has grown apace. Alexander Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMPLOYEE RTS. & EMP. POL'Y J. 405, 408–12 (2007). As a result, for many non-unionized employees the judicial track for the vindication of civil rights claims has been substituted for by an arbitral track; but that substitution works no change in the bases upon which *Gardner-Denver* rests. Now, as then, there are two very different regimes:

On the one hand is *employment arbitration*. This is conducted under an individual contract, for the most part addressed by the Federal Arbitration Act governing an individual “transaction involving commerce,” 9 U.S.C. § 2, the enforceability of which is determined by state law, *id.*, under which the individual has resort to an arbitrator commonly selected from a special panel of employment arbitrators most often trained in law, Jacquelin Drucker, *The Protocol in Practice: Reflections, Assessments, Issues for Discussion, and Suggested Actions*, 11 EMPLOYEE RTS. & EMP. POL'Y J. 345, 355 (2007), subject to procedures that, as a substitute for litigation, customarily include pre-trial discovery, *e.g.*, American Arbitration Association, National

Rules for Resolution of Employment Disputes, Rule 9 (July 1, 2006), in which proceeding the employee has a right to representation by counsel—the individual employee being the client to whom professional responsibility is owed—*id.*, Rule 19, in which the burdens of proof, often a key element in civil rights litigation, are those the respective parties would bear under the applicable civil rights statute, *id.*, Rule 28, and out of which the full range of statutory relief is expected to be afforded.

On the other is *labor arbitration*. This is the product of a collective agreement—a system of ongoing collective self-government, not an individual “transaction,” in which access to and the conduct of the arbitration is controlled by the union, not the individual, the enforceability of which is governed by a uniform federal common law of the collective agreement under § 301, not by the FAA or state law, in which claims are heard by persons commonly selected from a special panel of labor arbitrators designated as such, often persons not legally trained, Joseph Krislov, *Entry and Acceptability in the Arbitration Profession: A Long Way to Go*, in *LABOR ARBITRATION IN AMERICA: THE PROFESSION IN PRACTICE* ch. 4 (Mario Bognanno & Charles Coleman eds., 1992) (almost 40% of labor arbitrators are trained in industrial relations, not law), subject to procedures that, grounded in industrial relations, do not include pre-trial discovery, *THE COMMON LAW OF THE WORKPLACE*, *supra*, at § 1.13, in which a legal representative’s professional obligation (*if* there is legal representation) runs to the client union, not to the grievant employee, in which burdens of proof, as a matter of industrial relations, rarely play a role, *id.* § 1.92, at p. 54, and out of which the labor arbitrator

is expected to award only such relief as the collective agreement contemplates, *id.* § 10.1.

It is true that both employment arbitration and labor arbitration are called “arbitration.” But just as hounds and greyhounds, mongrels and spaniels are all called dogs, *Macbeth*, Act III, scene 1, they’re not the same animal.

Consequently, the skepticism the Court expressed in *Gardner-Denver* for the suitability of submitting statutory claims to preclusive resort to a collective agreement’s grievance procedure persists—and rightly. The question is not whether employment arbitrators may be deputed by contracts of employment to vindicate statutory civil rights in lieu of the courts. The question is whether the vindication of these rights can be mapped on to the system of collective self-government in which labor arbitration is embedded.

I. A COLLECTIVE AGREEMENT MAY NOT RELEGATE THE VINDICATION OF INDIVIDUAL STATUTORY CIVIL RIGHTS EXCLUSIVELY TO ITS GRIEVANCE PROCEDURE

The question before the Court is *not* whether to give judicially preclusive effect to an agreement that allows an employee to arbitrate his ADEA claim, for that is not what this collective agreement does.⁵ The question is whether to give preclusive effect to the submission of ADEA claims “solely and exclusively” to the collective agreement’s grievance procedure. The potential end point of that procedure is arbitration; but the union may decline to proceed to

⁵ See *supra* note 2.

arbitration, just as it did here. The union's discretion in making that decision is constrained by a duty of fair representation. But adherence to the duty of fair representation is simply no substitute for a hearing on the merits of the claim.

The standards of fair representation are "highly deferential" to the union. *Airline Pilots v. O'Neill*, 499 U.S. 65, 78 (1991). See generally ROBERT GORMAN & MATTHEW FINKIN, BASIC TEXT ON LABOR LAW ch. 30 (2d ed. 2004). Crudely, the union may not decline to pursue a grievance out of malice, hostility, discrimination, or bad faith; nor, less crudely, may it "arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion." *Vaca v. Sipes, supra*, at 191. Before *United Steelworkers of America v. Rawson*, 495 U.S. 362 (1990), the courts were at 6s and 7s on how restrictive the test of "perfunctoriness" was. But in *Rawson* the Court resolved that question categorically:

This duty of fair representation is of major importance, but a breach occurs "only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discretionary, or in bad faith." [citing *Vaca v. Sipes, supra*] The courts have in general assumed that mere negligence, even in the enforcement of a collective-bargaining agreement, would not state a claim for breach of the duty of fair representation, *and we endorse that view today.*

Id. at 372–73 (italics added).

Thus, the union's refusal to take an employee's grievance to arbitration is wrongful "only if it can be fairly characterized as so far outside a 'wide range of

reasonableness’ that it is wholly irrational or ‘arbitrary.’” *Airline Pilots v. O’Neill*, *supra*, at 78. A union has “room to make discretionary decisions and choices, even if those judgments are ultimately wrong.” *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 45–46 (1998). For that reason, even success on the merits of the violation, in a hybrid § 301 suit against the employer, does not alone sustain a breach of the duty of fair representation. *Vaca v. Sipes*, *supra*, at 192–93. As a leading treatise puts it:

If the union has investigated the case and considered the merits, its refusal to proceed even on the ground that, however “arguable,” it was unlikely to prevail before an arbitrator—or even that the outcome was less than encouraging—puts an end to the claim.

GORMAN & FINKIN, BASIC TEXT ON LABOR LAW, *supra*, at 1006 (citing authority). So long as honestly arrived at, a union is free to make a mistaken, flawed, or negligent judgment of whether to proceed to arbitration, of what issues to present if it does proceed or what arguments to make. *E.g.*, *Pease v. Production Workers Union*, 386 F.3d 819 (7th Cir. 2004). As Judge Easterbrook put it, with only a touch of hyperbole, federal labor law expects disputes about the application of collective bargaining agreements to be “resolved by the affected parties over the bargaining table, or by arbitrators knowledgeable about the business, rather than in court. That’s why a hybrid contract/DFR suit does not get to first base unless the worker shows that the union has abandoned him to the wolves.” *Id.* at 823.

The Petitioners argue that in “today’s integrated workforce and diverse unions” the potential of unions

intentionally refusing to arbitrate “meritorious discrimination” claims should be discounted. Brief for the Petitioners at 44. That is quite correct, but beside the point. A union’s erroneous judgment, doubt, or uncertainty that a violation of a civil right could be proved, arrived at honestly but mistakenly, no matter how well-intentioned, is no substitute for an adjudication of whether an employee’s civil rights were actually violated. However well versed the union is in the bargaining history of the collective agreement, however enmeshed in the application of the collective agreement over time giving rise to an accretion of shared meaning and expectation, to the “common law of the shop,” that shapes the union’s decisions on what contractual grievances to pursue, the union’s judgment on whether a statute has been violated is, to say the least, in no way similarly informed.

Although some union locals may follow a grievance screening process that can be trial-like in rigor, LEONARD SAYLES & GEORGE STRAUSS, *THE LOCAL UNION* 44–45 (2d ed. 1967) (still the authoritative study), such internal procedures are not legally mandated; and pressure from the rank-and-file, one way or another, is part-and-parcel of the grievance screening process, often including voting by the union membership on whether to pursue a grievance to arbitration. *Id.* at 104–05; *e.g.*, *Lee v. Cytec Indus. Inc.*, 460 F.3d 673, 677 (5th Cir. 2006) (pursuant to the union’s rules, the failure of the grievant to self-process his grievance to an authorizing vote of the union membership bars his claim). In other words, the duty of fair representation simply cannot be “divorced from the bargaining process,” Matthew Finkin, *The Limits of*

Majority Rule in Collective Bargaining, 64 MINN. L. REV. 183, 237 (1980), which is why the Court refused to draw a distinction between contract bargaining and grievance processing in the standards of fair representation. *Airline Pilots Ass'n v. O'Neill*, *supra*. Simply put: a union would not breach its duty of fair representation if it declines to take the grievance to arbitration because it believes that aggressively advocating a merely arguable or colorable discrimination claim would jeopardize its strategic relationship to the company, *cf. infra* note 7, or because more pressing contractual claims have a higher priority on the allocation of the limited resources the local has available for arbitration.

These are just the kind of judgments the collective's majority and local officers must make. Indeed, the embeddedness of grievance processing in the collective bargaining process, which played so influential a role in *Gardner-Denver*, is placed in stark relief in this case. The grievants' age claim presented two alternative ADEA theories: that the subcontract that caused their reassignment was let by their employer to effect that very end, *i.e.*, because of their age—a disparate treatment theory; or, that irrespective of motive, the decision to subcontract had an age-discriminatory effect and so required proof of reasonable business justification—a disparate impact claim. Note that both theories hinge on the decision to subcontract. But under Art. 54 of the collective agreement, subcontracting of bargaining unit work is absolutely prohibited: management's decision to subcontract could not be made without the union's agreement or acquiescence. Thus, the union's assertion of the employee's ADEA claim in arbitration would, of necessity, challenge its

own decision, either directly or consequentially, to allow the subcontract.

The union could have made the decision to permit the subcontract in utmost good faith, honestly, without hostile discrimination or intent to violate the ADEA, but unaware of the disparate impact on these employees. It could accordingly decline to pursue the age claim on an honest but arguably mistaken belief that its decision did not abet the company's alleged discriminatory act. Were *Gardner-Denver* to be abandoned, a union's honest if mistaken and possibly negligent belief in the propriety of management's decision would mean that affected employees would be denied any forum for the vindication of their civil rights.

From a larger perspective, it is understandable that a company would want civil rights claims to be subsumed into the grievance-arbitration procedure of the collective agreement: not only is the prospect of civil litigation ending in a jury trial foreclosed, but the company would bear no liability for wrongful discriminatory conduct if the union does not breach the duty of fair representation in declining to take the claim to arbitration; and, inasmuch as the standard of fair representation is in practice so highly deferential to the union, Goldberg, *The Duty of Fair Representation: What the Courts Do in Fact*, 34 BUFFALO L. REV. 89 (1985), in practical terms the company's potential exposure would be much reduced and, in some instances, entirely eliminated. Even if the union does fall afoul of the duty in not arbitrating the claim, thereby allowing the lawsuit against the employer to proceed, the union would bear a significant share of any resulting liability. *Bowen v. U.S. Postal Service*, 451 U.S. 212 (1983).

Consequently, the employer would clearly benefit by shifting these risks on to the union; but, concomitantly, a union would be most unlikely to assume the risks of becoming the sole guarantor of the employees' statutory civil rights unless some *quid pro quo* made it worth the union's while. The Petitioner asserts as much here: “[T]he Union gained sizeable wage and benefits enhancements, as well as other favorable provisions, in exchange for its agreement to arbitrate its members’ statutory employment claims.” Brief for the Petitioners at 6; *id.* at 14 (“It is appropriate for a union to bargain collectively over the method of resolving such claims in exchange for valuable concessions, as occurred here.”).

That would have to be the basis of the bargain, and it should be of no effect: an individual's civil rights should be no more disposable by a majority's will—by subsuming them exclusively into the grievance process the majority controls—than they are dispensable by a majority's will, by deciding on a case-by-case basis whose civil rights to vindicate.⁶ This is not because the majority might be hostile to the claim or even indifferent to it, but because, even

⁶ The Petitioners advert to the fact that rights granted by the Labor Act to further the process of collective bargaining may be relinquished by collective agreement. Brief for the Petitioners at 23–24. However, that says nothing about those individual civil rights that are insulated from majoritarian control; and, it should be noted, even some statutory rights that inhere in the system of collective representation are insulated from majoritarian dispensation. Matthew Finkin, *The Limits of Majority Rule in Collective Bargaining*, *supra*, at 190–91 (observing that not only “external law” but certain aspects of the Labor Act “are insulated from disposition by a majority,” and discussing *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974)).

if the grievance is investigated with painstaking care and in utmost good faith, other concerns relevant to the union's role in collective bargaining may persuade it against pressing the grievance to arbitration.

II. *GARDNER-DENVER* PLACES NO BURDEN ON EMPLOYERS

Rather early on, critics of *Gardner-Denver* thought it gave unionized employees “two bites on the apple” of civil rights protection. This was addressed in the still leading study by Michele Hoyman and Lamont Stallworth, *The Arbitration of Discrimination Grievances in the Aftermath of Gardner-Denver*, 39 ARB. J. 45, 57 (Sept. 1984), more on which below. The “two bites” criticism has recurred in the wake of *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); that is, because non-unionized employers may adopt employment arbitration for the definitive disposition of their employees' civil rights claims while unionized employers may not sweep those claims into labor arbitration for definitive disposition, the maintenance of two distinct tracks for the protection of civil rights in the latter employments is perceived to be burdensome to unionized employers, if only in comparison.

It is true that non-unionized employers have sought employment arbitration because they see it as more advantageous to them than civil litigation: the process is swift, informal, inexpensive, and of low visibility. As the Petitioners quite rightly argue, these advantages are also accommodated in the unionized workplace where contractual discrimination claims can be conjoined with other contractual claims and both might be resolved satisfactorily in a single proceeding. Brief for the Petitioners at 26–30. But

none of these advantages requires that preclusive effect be given to the decisions of labor arbitrators when treating statutory civil rights. Let us look more closely at how the system actually works.

Under *Gardner-Denver* and *Vaca v. Sipes*, a union is free to select those grievances it will take up through the grievance procedure. If it chooses not to pursue a discrimination claim to arbitration the grievant is free to pursue her claim in court. But if it does choose to take it up, the process can be swift (subject, as here, to a contractual statute of limitations), informal (a series of steps is commonly provided, as here, in which the facts and circumstances can be aired), costless to the grievant, of low public visibility, and, for contractual purposes, final; but only those intractable cases about which the union is strongly motivated will actually go to arbitration.⁷

If the union prevails in arbitration on the contractual discrimination claim the matter would be at an end, assuming an effective remedy is afforded the grievant. If the union does not prevail, the

⁷ The substitution of employment arbitration for the courts is premised on the assumption that employees are all too often unable to secure legal representation where “the stakes are too small and outcomes too uncertain.” Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. DISP. RES. 559, 563 (2001). But it is in just that category of case—where the outcomes are most uncertain—that the duty of fair representation is most deferential to union refusals to proceed to arbitration. Section I, *supra*. Thus, the relegation of these employees to the exclusive resort to the union would be antithetical to the fundamental policy assumption of employment arbitration, which is to make it possible for just those kinds of claims actually to be heard.

individual grievant may avail herself of legal relief de novo, though the arbitration decision can be given weight as evidence in the later civil proceeding. *Gardner-Denver Co.*, *supra*, at 60 n.21. For that employee the system functions as, in effect, one of advisory arbitration. Akin to some other pre-trial alternative dispute resolution devices, such as “mini trials,” the employee (and her lawyer) secures a sense of how a neutral adjudicator would assess the strength of her claim and is in a better position to judge whether further legal recourse de novo would be worth the candle.

The leading study on how the dual track system actually works surveyed practitioners for case disposition in the immediate period after *Gardner-Denver*, 1974–1981; there has been no more recent research. In this study’s sample, 1,761 grievances involving employment discrimination had been arbitrated under collective agreements. Of these, 307 (17%) were relitigated; 21 of these (6.8%) resulted in judgments that differed from the arbitral disposition. Michele Hoyman & Lamont Stallworth, *The Arbitration of Discrimination Grievances in the Aftermath of Gardner-Denver*, *supra*. In other words, in the vast majority of cases (83%) the employee either prevailed in arbitration or, having lost, decided against relitigating the claim. Though diligent research has revealed no more recent data, *amicus* NAA has no reason to believe the relitigation rate has significantly increased; in fact, the very want of research interest suggests the absence of a pressing problem. It is most plausible that, the more experience lawyers have had since 1984, the more employees are likely to be counseled of the unlikelihood that they will be successful contrary to

the labor arbitrator's disposition and the less likely will the employee be to incur the costs of further judicial resort. Indeed, the Court's allowance of the arbitration award into evidence in such a case serves as just such a sobering caution. *Gardner-Denver, supra*, at 60 n.21.

Consequently, de novo litigation would be availed of under *Gardner-Denver* only by those relatively few unionized employees who believe so strongly that their civil rights had been violated that they are willing to incur the costs of securing legal counsel to pursue that resort despite an arbitral determination to the contrary. The 7% who relitigate and succeed in court contrary to the labor arbitration, while scarcely enough to encourage de novo litigation, is not an insignificant figure from the perspective of vindicating civil rights. But, more important, under *Gardner-Denver* judicial resort remains available to those unionized employees whose claims are not pursued by their unions to arbitration without breach of the duty of fair representation.

Amicus NAA submits that this state of affairs is scarcely unduly burdensome to employers:⁸ in the

⁸ Petitioners argue that unless preclusive effect is given unionized employers will "cut unions out of the process" by exercising their "well established" right to impose employment arbitration unilaterally. Brief for the Petitioners at 32, citing the only decision on point thus far, arising under the Railway Labor Act, not the National Labor Relations Act, *see Air Line Pilots' Ass'n Int'l v. Northwest Airlines, Inc.*, 199 F.3d 477 (D.C. Cir. 1999). Two observations should suffice. First, a solitary decision on a novel proposition does make the law "well established." In fact, the National Labor Relations Board has yet to pass on the question the analysis of which is actually rather complicated. GORMAN & FINKIN, BASIC TEXT ON LABOR LAW, *supra*, at § 21.9. Second, and closely related, the fact that

case of employees whose claims are not resolved to their satisfaction in arbitration, the “second bite,” if such it be—*see* Conclusion, *infra*—is infrequently taken; but when it is employees prevail to a small but not insignificant extent. In the case of employees whose claims have not been taken to arbitration, there will have been no “first bite” to begin with.

As the Petitioners candidly recognize, were *Gardner-Denver* to be abandoned, the only recourse for employees whose claims were not arbitrated is either: (1) to persuade the Equal Employment Opportunity Commission (EEOC) to litigate on their behalf, Brief for the Petitioners at 43; or (2) to bring § 301 hybrid claims that condition the vindication of the civil right on the employee’s success in a claim of breach of the duty of fair representation, *id.* at 42–43. The EEOC would not be expected routinely to litigate on behalf of every discriminatee who fails to persuade her union to take her case. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 290 n.7 (2002). Nor, in view of the high degree of deference given unions, Section I, *supra*, would we expect a significant number of employees to prevail in § 301 suits, no matter how meritorious the statutory claim turns out to be, for want of breach of the duty of fair representation.

In practical effect, employees whose civil rights claims are not arbitrated have scant recourse. In that sense, the Petitioners are clearly correct: as to those whose civil rights are not arbitrated, the law,

there has been only one litigated instance of this occurring indicates that unionized employers have encountered no great burden as a result of *Gardner-Denver*’s continuing vitality; they have seen no need to take that action in the decade and a half since *Gilmer*.

as they would have it, would be less burdensome to employers. But it is equally clear that the law would be commensurately less protective of civil rights.

CONCLUSION

Today, as in 1974, we have two separate systems, differently derived and differently administered, that create and vindicate rights in the unionized workplace—external law and collective self-government. To borrow from *amicus* NAA’s brief to this Court in *Wright v. Universal Maritime Service Corp.*, *supra*, unionized workers do not have “two bites” at the workplace rights apple, they have two different apples. That is scarcely anomalous; indeed, this Court has recently reemphasized *Gardner-Denver*’s observation that employment discrimination legislation has “long evinced a general intent to accord parallel or overlapping remedies.” *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951, 1961 (2008) (quoting *Gardner-Denver*, *supra*, at 47). These separate systems have worked well in tandem for more than thirty years. In *amicus* NAA’s judgment, it would disrupt the system of industrial self-government—and do damage to the vindication of civil rights—to conflate them.

Respectfully submitted,

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Appendix 6:

A Due Process Protocol for Mediation and Arbitration of Statutory Disputes arising out of the Employment Relationship

The following protocol is offered by the undersigned individuals, members of the Task Force on Alternative Dispute Resolution in Employment, as a means of providing due process in the resolution by mediation and binding arbitration of employment disputes involving statutory rights. The signatories were designated by their respective organizations, but the protocol reflects their personal views and should not be construed as representing the policy of the designating organizations.

Genesis - This Task Force was created by individuals from diverse organizations involved in labor and employment law to examine questions of due process arising out of the use of mediation and arbitration for resolving employment disputes. In this protocol we confine ourselves to statutory disputes.

The members of the Task Force felt that mediation and arbitration of statutory disputes conducted under proper due process safeguards should be encouraged in order to provide expeditious, accessible, inexpensive and fair private enforcement of statutory employment disputes for the 100,000,000 members of the workforce who might not otherwise have ready, effective access to administrative or judicial relief. They also hope that such a system will serve to reduce the delays which now arise out of the huge backlog of cases pending before administrative agencies and courts and that it will help forestall an even greater number of such cases.

A. Pre or Post Dispute Arbitration - The Task Force recognizes the dilemma inherent in the timing of an agreement to mediate and/or arbitrate statutory disputes. It did not achieve consensus on this difficult issue. The views in this spectrum are set forth randomly, as follows:

Employers should be able to create mediation and/or arbitration systems to resolve statutory claims, but any agreement to mediate and/or arbitrate disputes should be informed, voluntary, and not a condition of initial or continued employment.

Employers should have the right to insist on an agreement to mediate and/or arbitrate statutory disputes as a condition of initial or continued employment. Postponing such an agreement until a dispute actually arises, when there will likely exist a stronger re-disposition to litigate, will result in very few agreements to mediate and/or arbitrate, thus negating the likelihood of effectively utilizing alternative dispute resolution and overcoming the problems of administrative and judicial delays which now plague the system.

Employees should not be permitted to waive their right to judicial relief of statutory claims arising out of the employment relationship for any reason.

Employers should be able to create mediation and/or arbitration systems to resolve statutory claims, but the decision to mediate and/or arbitrate individual cases should not be made until after the dispute arises.

The Task Force takes no position on the timing of agreements to mediate and/or arbitrate statutory employment disputes, though it agrees that such agreements be knowingly made. The focus of this protocol is on standards of exemplary due process.

B. Right of Representation

1. Choice of Representative

Employees considering the use of or, in fact, utilizing mediation and/or arbitration procedures should have the right to be represented by a spokesperson of their own choosing. The mediation and arbitration procedure should so specify and should include reference to institutions which might offer assistance, such as bar associations, legal service associations, civil rights organizations, trade unions, etc.

2. Fees for Representation

The amount and method of payment for representation should be determined between the claimant and the representative. We recommend, however, a number of existing systems which provide employer reimbursement of at least a portion of the employee's attorney fees, especially for lower paid employees. The arbitrator should have the authority to provide for fee reimbursement, in whole or in part, as part of the remedy in accordance with applicable law or in the interests of justice.

3. Access to Information

One of the advantages of arbitration is that there is usually less time and money spent in pre-trial discovery. Adequate but limited pre-trial discovery is to be encouraged and employees should have access to all information reasonably relevant to mediation and/or arbitration of their claims. The employees' representative should also have reasonable pre-hearing and hearing access to all such information and documentation.

Necessary pre-hearing depositions consistent with the expedited nature of arbitration should be available. We also recommend that prior to selection of an arbitrator, each side should be provided with the names, addresses and phone numbers of the representatives of the parties in that arbitrator's six most recent cases to aid them in selection.

C. Mediator and Arbitrator Qualification

1. Roster Membership

Mediators and arbitrators selected for such cases should have skill in the conduct of hearings, knowledge of the statutory issues at stake in the dispute, and familiarity with the workplace and employment environment. The roster of available mediators and arbitrators

should be established on a non-discriminatory basis, diverse by gender, ethnicity, background, experience, etc. to satisfy the parties that their interest and objectives will be respected and fully considered.

Our recommendation is for selection of impartial arbitrators and mediators. We recognize the right of employers and employees to jointly select as mediator and/or arbitrator one in whom both parties have requisite trust, even though not possessing the qualifications here recommended, as most promising to bring finality and to withstand judicial scrutiny. The existing cadre of labor and employment mediators and arbitrators, some lawyers, some not, although skilled in conducting hearings and familiar with the employment milieu is unlikely, without special training, to consistently possess knowledge of the statutory environment in which these disputes arise and of the characteristics of the non-union workplace.

There is a manifest need for mediators and arbitrators with expertise in statutory requirements in the employment field who may, without special training, lack experience in the employment area and in the conduct of arbitration hearings and mediation sessions. Reexamination of rostering eligibility by designating agencies, such as the American Arbitration Association, may permit the expedited inclusion in the pool of this most valuable source of expertise.

The roster of arbitrators and mediators should contain representatives with all such skills in order to meet the diverse needs of this caseload.

Regardless of their prior experience, mediators and arbitrators on the roster must be independent of bias toward either party. They should reject cases if they believe the procedure lacks requisite due process.

2. Training

The creation of a roster containing the foregoing qualifications dictates the development of a training program to educate existing and potential labor and employment mediators and arbitrators as to the statutes, including substantive, procedural and remedial issues to be confronted and to train experts in the statutes as to employer procedures governing the employment relationship as well as due process and fairness in the conduct and control of arbitration hearings and mediation sessions.

Training in the statutory issues should be provided by the government agencies, bar associations, academic institutions, etc., administered perhaps by the designating agency, such as the AAA, at various locations throughout the country. Such training should be updated periodically and be required of all mediators and arbitrators. Training in the conduct of mediation and arbitration could be provided by a mentoring program with experienced panelists.

Successful completion of such training would be reflected in the resume or panel cards of the arbitrators supplied to the parties for their selection process.

3. Panel Selection

Upon request of the parties, the designating agency should utilize a list procedure such as that of the AAA or select a panel composed of an odd number of mediators and arbitrators from its roster or pool. The panel cards for such individuals should be submitted to the parties for their perusal prior to alternate striking of the names on the list, resulting in the designation of the remaining mediator and/or arbitrator.

The selection process could empower the designating agency to appoint a mediator and/or arbitrator if the striking procedure is unacceptable or unsuccessful. As noted above, subject to the consent of the parties, the designating agency should provide the names of the parties and their representatives in recent cases decided by the listed arbitrators.

4. Conflicts of Interest

The mediator and arbitrator for a case has a duty to disclose any relationship which might reasonably constitute or be perceived as a conflict of interest. The designated mediator and/or arbitrator should be required to sign an oath provided by the designating agency, if any, affirming the absence of such present or preexisting ties.

5. Authority of the Arbitrator

The arbitrator should be bound by applicable agreements, statutes, regulations and rules of procedure of the designating agency, including the authority to determine the time and place of the hearing, permit reasonable discovery, issue subpoenas, decide arbitrability issues, preserve order and privacy in the hearings, rule on evidentiary matters, determine the close of the hearing and procedures for post-hearing submissions, and issue an award resolving the submitted dispute.

The arbitrator should be empowered to award whatever relief would be available in court under the law. The arbitrator should issue an opinion and award setting forth a summary of the issues, including the type(s) of dispute(s), the damages and/or other relief requested and awarded, a statement of any other issues resolved, and a statement regarding the disposition of any statutory claim(s).

6. Compensation of the Mediator and Arbitrator

Impartiality is best assured by the parties sharing the fees and expenses of the mediator and arbitrator. In cases where the economic condition of a party does not permit equal sharing, the parties should make mutually acceptable arrangements to achieve that goal if at all possible. In the absence of such agreement, the arbitrator should determine allocation of fees. The designating agency, by negotiating the parties share of costs and collecting such fees, might be able to reduce the bias potential of disparate contributions by forwarding payment to the mediator and/or arbitrator without disclosing the parties share therein.

D. Scope of Review - The arbitrator's award should be final and binding and the scope of review should be limited.

Dated: May 9, 1995

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Appendix 7:

(Note: The use of (X), (X1), (X2) or (XX) is simply to reflect a letter or number to be determined based on the final structure of the overall legislation.)

SEC. 3. ARBITRATION OF EMPLOYMENT, CONSUMER, FRANCHISE, AND CIVIL RIGHTS DISPUTES

(a) In General.—Title 9 of the United States Code is amended by adding at the end the following:

“CHAPTER 4—ARBITRATION OF EMPLOYMENT, CONSUMER, FRANCHISE, AND CIVIL RIGHTS DISPUTES

“Sec.

“401. Definitions.

“402. Validity and enforceability.

“§ 401. Definitions

“In this chapter—

“(X) As used in this Chapter the term “employment arbitration agreement” —

“(X1) means a written provision in a transaction or contract involving commerce to which an employee is a party, which would settle by arbitration a controversy arising under that transaction or controversy under that contract; and

“(X2) does not include such a provision that is part of a collective bargaining agreement or an employment contract that is individually and freely negotiated.

“§ 402. Validity and enforceability

“(X) An employment arbitration agreement that submits to arbitration a claim by an employee arising under any law, including any regulation or rule of decision, shall be enforceable only if it is adequate to vindicate the purposes of law under which the claim arises.

“(XX) “Adequacy” for the purpose of section (X) includes but is not limited to the following requirements:

(1) the employee has the right to be represented by a representative of his or her choosing;

(2) the time limit within which the claim must be brought is that applicable to the law under which the claim arises;

(3) the parties have access to such pre-hearing discovery as is appropriate for the disposition of the claim, with questions of discovery subject to decision by the arbitrator;

(4) the bringing of group or class claims as is reasonable for the vindication of the law is allowed, with questions concerning the management of such claims subject to decision by the arbitrator;

(5)(i) absent a post-dispute agreement of the parties, arbitrators are to be selected from the membership of neutral organizations or from panels that are prepared by agencies of recognized neutrality and that include experienced arbitrators who do not represent employers or employees;

(ii) if the panels include persons who represent employers or employees, the nature and extent of such representation will be disclosed to the parties prior to selection;

(iii) in the event the parties are unable to agree on the selection of an arbitrator, the agency preparing the panel will designate as the arbitrator a person who does not represent employees or employers; and

(iv) the arbitrator shall disclose to the parties any conflict of interest of which he or she is aware or becomes aware during the proceedings;

(6) the hearing is held at such a location and time as will reasonably accommodate the employee’s ability to be present and participate;

(7) the fee and expenses of the arbitrator are borne by the employer, the employee being liable for his or her own expenses and such filing fee as the instrument may require not to exceed that applicable to the initiation of civil litigation in a federal district court;

(8) the arbitrator has authority to award all relief, legal and equitable, that would be available in civil litigation under the applicable law; and

(9) the arbitrator shall provide a written opinion and award, with the opinion setting out the facts, resolving any material factual dispute, and drawing such legal conclusions as the disposition of the claim requires, applying the same standards as would a civil court under the law in question.