I believe that labor arbitration faces new and exciting challenges. The Supreme Court stated, in essence, that substantive deference might be appropriate where there is "special competence" on the part of the arbitrators. The NAA should consider, therefore, utilizing its own wealth of skilled talent to train its unknowledgeable member-labor arbitrators in the subtleties of discrimination "in the shop." This could be done in conjunction with EEOC, U.S. Department of Labor, AAA, FMCS, and other interested agencies.

The NAA should help train a new cadre of labor arbitrators drawn from the ranks of persons with an EEO background, particularly those with the neutral temperament needed to serve as impartial dispute settlers. Such candidates would have their knowledge of antidiscrimination law bolstered by the common law of the shop.

This dual training approach should at least increase the competency of arbitrators in both labor relations and discrimination. It will not prevent multiple fora from being utilized. However, it is now clear that Congress intended "to accord parallel or overlapping remedies against discrimination." The emphasis, therefore, should be shifted away from the delays and repetitious efforts that are often imposed by a series of *de novo* proceedings. Thus, it seems to me, to the extent that arbitrators can competently award in the Title VII area, the chances are better that a federal court may properly accord great weight to their rulings.

A concerted effort by the affected agencies, labor, management, and the NAA may well produce this commonly desired result.

POST-GARDNER-DENVER DEVELOPMENTS IN THE ARBITRATION OF DISCRIMINATION CLAIMS

WINN NEWMAN *

The course of action that I am proposing is based upon the following four propositions, which I will attempt to establish:

1. The typical arbitrator, if firmly convinced that both employer and union desire nondiscrimination and if empowered by

* General Counsel, International Union of Electrical, Radio & Machine Workers, AFL-CIO, Washington, D.C.

them to exercise whatever powers are essential to effectuate a solution, is in a better position than any "other" outsider to devise a durable solution, satisfactory not only to employer and union but also to discriminatee.

2. Issues of discrimination because of sex and race are becoming inextricably entangled with so many other problems as to decimate the arbitration process if all grievances involving such issues cease to be arbitrated.

3. The relative speed of the arbitral solution affords tremendous advantages as compared with the delays imposed by the backlog of cases before the Equal Employment Opportunity Commission, other federal and state civil rights agencies, and the courts, especially in view of the inevitable additional problems generated by the uncertainty during the periods of delay.

4. With innovations such as selection of arbitrators from a special roster approved for decision of discrimination cases, preferably under arrangements with EEOC not only to establish such a roster but also to pay all fees and expenses of the arbitrators, and with the right of discriminatees to counsel of their own choice in situations where solely personal issues of discrimination are involved, arbitration will afford as favorable a forum for discriminatees as civil rights agencies or courts.

Since your evaluation of what I have to say in support of the above four propositions will be tentative until you know what proposal I intend to project upon the foundation of these propositions, I should outline it to you before entering upon my documentation of these propositions. My proposal is as follows:

1. Collective bargaining contracts should include: (a) the broadest possible nondiscrimination clause; (b) authority to the arbitrator to apply all applicable law, including Title VII, other federal, state, and local civil rights laws, and court and agency decisions and guidelines; (c) authority to the arbitrator in fashioning his award to afford any relief that a court could afford, including rewriting the contract after first giving the employer and the union an opportunity to correct any discriminatory provisions or add essential protection; (d) selection of the arbitrator from a special panel of arbitrators established preferably by EEOC or, in the event that the EEOC refuses to establish such a panel, under some system of approval by organizations such as NAACP and

NOW; (e) procedural safeguards for the discriminatee, such as the right to be represented by his or her own counsel should he or she so elect, where the issues involved do not require a change in the contract language or an interpretation of the contract in conflict with that asserted by the collective bargaining representative.

2. Adoption by the EEOC and other federal, state, and local civil rights agencies of a deferral policy similar to that of the NLRB as set forth in *Collyer Insulated Wire Co.*[1] and *Spielberg Manufacturing Co.*[2]

I. Impartial Arbitration Is the Most Desirable Forum for the Resolution of Claims of Discrimination

The preference that employers and unions have traditionally shown for impartial arbitration as the forum in which to resolve all grievances arising under collective bargaining agreements had extended generally, prior to the *Gardner-Denver* decision, to claims of discrimination, whether because of union membership, race, sex, national origin, religion, or age.[3] Nondiscrimination clauses, banning discrimination because of sex, race, creed, color, religious belief, or national origin, were typical in many industries for several decades before the enactment of Title VII.[4] The current BNA analysis of 400 sample contracts shows that discrimination on the basis of race, color, creed, sex, national origin, or age is banned in 74 percent of the sample contracts, up from 46 percent in the 1970 survey and only 28 percent in 1965.[5] Viola-

[1] 192 NLRB 837, 77 LRRM 1931 (1971).

[2] 112 NLRB 1080, 1082 (1955).

[3] *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 7 FEP Cases 81 (1974). Upon remand, the district court after a *de novo* trial reached the same result as the arbitrator, namely that Alexander had been discharged for just cause. 8 FEP Cases 1153 (D.C. Colo. 1974).

[4] *Luckenbach Steamship Co., Inc.*, 6 LA 99, 104 (Clark Kerr, arbitrator, 1946), in which the arbitrator agreed with the union that such a clause should be included in the initial contract between Luckenbach Steamship Co. and the International Longshoremen's & Warehousemen's Union, finding that such clauses were common in waterfront contracts, as well as in many industries and had been frequently granted by the National War Labor Board. For an account of the policy of the War Labor Board as to the inclusion of such provisions in contracts and making violations subject to the grievance and arbitration machinery, see U.S. Department of Labor, *National War Labor Board, Termination Report, Vol. 1* (Washington: U.S. Government Printing Office), pp. 151-155.

[5] BASIC PATTERNS IN UNION CONTRACTS (Washington: BNA Books, 1975), p. 127.

tions of nondiscrimination clauses are usually arbitrable, and awards finding violations—sometimes because of race discrimination,[6] and other times because of sex[7]—appear in arbitration reports.

There have been occasional exceptions to the preference of employers for arbitration of discrimination grievances. Both General Electric and Westinghouse, as part of an elaborate scheme to defeat the *Steelworkers* trilogy cases by excluding numerous issues from mandatory arbitration, excluded discrimination grievances. Although the IUE and all other unions with which it coordinates bargaining have made mandatory arbitration of discrimination grievances one of their bargaining demands, GE and Westinghouse have been adamant in refusing arbitration on such issues. The EEOC has found the Westinghouse contract in violation of Title VII on the theory that providing less favorable procedures for the settlement of discrimination grievances than the mandatory arbitration available for most other grievances itself constituted a form of discrimination on the basis of race and sex.[8] This decision may mean that various employer proposals to undermine the effect of *Gardner-Denver* by refusing to arbitrate are illegal.

We know of no instance where a union has expressed preference for any forum other than the arbitral forum for determining issues of race and sex discrimination. The harm to minorities and women that will be the inevitable long-range result of excluding discrimination grievances from arbitration was stated by Willam B. Gould as follows: [9]

"[A]n artificial and coercive kind of segregation would arise between discrimination and nondiscrimination complaints. Minority griev-

[6] *E.g., Lianco Container Corp.*, 73-1 ARB ¶8144 (Paul C. Dugan, arbitrator); *McCall Corp.*, 67-2 ARB ¶8498 (Robert G. McIntosh, arbitrator); *Tri-City Corp.*, 64-2 ARB ¶8603 (Paul Pigors, arbitrator); *Armco Steel Corp.* 61-2 ARB ¶8577; *Tennessee Products & Chemical Corp.*, 20 LA 180 (W.H.F. Miller, arbitrator, 1953).

[7] *E.g., Valley Kitchens, Inc.*, 72-2 ARB ¶8711 (Robert M. Draper, arbitrator); *South Pittsburgh Water Co.*, 71-1 ARB ¶8420 (David C. Altrock, arbitrator); *Research Projects Corp.*, 71-1 ARB ¶8187 (H. Herman Rauch, arbitrator); *Buco Products, Inc.*, 48 LA 17 (E.J. Forsythe, arbitrator, 1966); *Whittaker Controls and Guidance*, 42 LA 938 (Thomas T. Roberts, arbitrator, 1964); *Comstock Park Public Schools*, 57 LA 279, 282, 285 (Alan Walt, arbitrator, 1971); *Young Spring & Wire Corp.*, 30 LA 914 (Paul Prasow, arbitrator, 1958).

[8] *Sandra Bentley* v. *Westinghouse Electric Corp.*, EEOC Case No. YNY1-260, TNYO-0460. Decision issued by District Director Philip S. Lee on behalf of the Commission (11/27/72).

[9] Address of William B. Gould before Society of Professionals in Dispute Resolution, *Daily Labor Report* No. 204 (1973), p. E-1.

ants would no longer file their charges with shop stewards and union representatives, but would rather take them to public agencies. Union and employer representatives would therefore be able to very neatly wash their hands of all such problems and encourage resort to another forum. This would undermine a principle promoted by Title VII and other labor legislation, i.e., that the parties themselves are best able to resolve their own problems and should do so on a voluntary basis. Moreover, it would encourage unions and employers to believe that discrimination is not their own problem—and that, unlike other grievances, it would be ignored."

The reasons why most employers and unions have traditionally found arbitration the preferable forum are too obvious to need more than bare mention here. The arbitrator is jointly selected by the union and the employer. In no manner except arbitration can the union and the employer have any participation in the selection of the person who will decide their dispute. The arbitrator is versed in the practices of the industrial world. Unlike most judges who have little or no acquaintance with life in the plant, the arbitrator's specialty is that life. Besides, the arbitrator comes to the parties; he hears the dispute at or near the plant at a time and place mutually agreed upon. His services are relatively inexpensive and fast—certainly as compared with court proceedings. The long-drawn-out series of legal pleadings, discovery, trial and pretrial motions, and many extensions of time and adjournments now almost universal in court proceedings is avoided. The arbitrator's award is usually simple; it is understandable by employer, union, and employees; and it is final unless there is fraud or partiality or it is beyond the scope of arbitral authority.

But the history of arbitration of discrimination grievances has been grim for the discriminatee. The briefs of the petitioner and the EEOC to the Supreme Court in the *Gardner-Denver* case made a convincing presentation of the disasters for the discriminatee that had so often resulted from the arbitration of his grievances. Indeed, the result reached by the Supreme Court was probably due to its reaction to articles, cited to the Court, of Gould [10] and others [11] critical of the experience of race discrimi-

[10] William B. Gould, "Labor Arbitration of Grievances Involving Racial Discrimination," 118 *U. Pa. L. Rev.* 40 (1960); Gould, "Black Power in Unions: The Impact upon Collective Bargaining Relationships," 79 *Yale L. J.* 46 (1969); Gould, "Racial Equality in Jobs and Unions, Collective Bargaining and the Burger Court," 68 *Mich. L. Rev.* 237 (1969). In addition to the articles cited to the Court, see also Gould, "Non-governmental Remedies for Employment Discrimination," *American Bar Assn. Nat'l. Inst. Proceedings* (March 29, 1969); Gould, "Judicial Review

natees with arbitration. The equally unsatisfactory results to date in sex discrimination arbitration have been described by Jean T. McKelvey.[12] However, Professors Gould and McKelvey both still have faith that, with a bit of reform, the arbitral forum should be the primary forum for resolving race and sex discrimination grievances.

The failures of the past in the arbitration of race and sex grievances are no more serious than the failures that now have created a 100,000-case backlog at EEOC or for the delay of three or four years from the date of filing an EEOC charge before trial date is set in most federal courts. Further, the failures of arbitration should be more easily corrected than the problems posed by using EEOC and the courts if, as I believe is the case, the arbitral forum appears to be the best avenue for a genuine solution of these disputes.

A. The Arbitral Forum Encourages the Participation of Minorities and Females in the Handling and Resolving of all Grievances, Both Large and Small, on a Day-to-Day Basis

The goal of arbitration is that it constitutes an integral part of a process of simple self-government in the industrial world. If minorities and females are ever to have a secure place in the work-a-day world, they need to become participants not only in the work force as producers but also in the democratic processes of collective bargaining, grievance processing, and arbitration. Only as minorities and females attend union meetings, get elected as union officers and plant stewards, serve on negotiating and grievance committees, as well as file grievances, will the discrimination they suffer be solvable.

The notion that an isolated big case before the EEOC or the courts will solve the day-to-day problems of the workers in the plant is manifestly a delusion. Such cases are sometimes very use-

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of Employment Discrimination," in *Labor Arbitration at the Quarter Century Mark,* Proceedings of the 25th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1973); Gould, *supra* note 9.

[11] Meltzer, "Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination," 39 *U. Chi. L. Rev.* 30 (1972); Blumrosen, "Labor Arbitrator, EEOC, Conciliation and Discrimination in Employment," 25 *Arb. J.* 88 (1970).

[12] Jean T. McKelvey, "Sex and the Single Arbitrator," in *Arbitration and the Public Interest,* Proceedings of the 24th Annual Meeting, National Academy of Arbitrators, eds. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1971).

ful, and we encourage them. But no such suit can afford the same instant attention to problems as they arise in the plant as an effective grievance and arbitration procedure.

In most plants, any female employee who believes she has been denied her full rights can immediately summon to her place of work in the plant a union steward who discusses the issue with both the employer and her supervisor, often within minutes of the time the issue arose. Witnesses are present and their versions are available before anyone has time to forget. If the on-the-spot discussion does not produce a satisfactory solution, the paper work starts and the grievance is processed to higher levels of both management and the union, with the second step often occurring within a matter of a few days. If the processing of the grievance does not result in a satisfactory solution, arbitration brings in a neutral for the solution of the issue.

Whether the discrimination problem is individual to the grievant or whether it is basic and systematic, an arbitrator, with the easy, informal input of the workers and management, can understand the problem and the solution that will best achieve equal opportunity in the plant in question in a way that no judge in a remote courthouse, taking formal testimony a few hours here and there, can ever hope to match. Mr. Justice Douglas expressed this advantage when he stated, "The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed." [13] Similarly, the remoteness of the judge prevents his responding to corrections that may need to be made as a judgment takes effect. The arbitrator, meeting with the informal availability of all persons involved, can easily work out alterations needed to meet new problems as they arise.

But whether the discrimination is so deeply entrenched as to require major revisions in plant policies or whether it is sporadic and personal, the day-to-day manifestations of discrimination or suspected discrimination need to have a ready channel for solution, one in which the discriminatees are represented by a steward elected by the work group of which they are voting members, in which they can watch each step in the process of grievance ad-

[13] *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 46 LRRM 2416 (1960).

justment and arbitration, and in which they know and understand what is going on.

Gould, in his description of his *Seattle Construction Trades* case, tells how it became essential to organize a *continuing group of workers* in the plant to police the day-to-day operation of the plant and to recommend changes to make it more effective as a means of achieving equal employment opportunity.[14] The Supreme Court in the *Emporium* case [15] held that a minority group could not process grievances and deal directly with the employer on discrimination issues, but rather must proceed through the orderly processes of the established collective bargaining, grievance, and arbitration machinery. There the Court repeatedly mentioned the fact that the union had offered to take to arbitration every claim of discrimination.[16] The Court described the availability of the grievance-arbitration machinery to solve the problem at hand as follows: [17]

> "The collective bargaining agreement in this case prohibited without qualification all manner of invidious discrimination and made any claimed violation a grievable issue. The grievance procedure is directed precisely at determining whether discrimination has occurred. That orderly determination, if affirmative, could lead to an arbitral award enforceable in court."

Directing its attention to the claim of the minority employees that the grievance-arbitration procedure was inadequate to handle a "systematic" grievance,[18] the Court stated:

> "Nor is there any reason to believe that the processing of grievances is inherently limited to the correction of individual cases of discrimination. Quite apart from the essentially contractual question of whether the Union could grieve against a 'pattern or practice' it deems inconsistent with the nondiscrimination clause of the contract, one would hardly expect an employer to continue in effect an employment practice that routinely results in adverse arbitral decisions." [19]

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[14] Gould, "The Seattle Building Trades Order: The First Comprehensive Relief Against Employment Discrimination in the Construction Industry," 26 *Stan. L. Rev.* 773 (1974).

[15] *Emporium Capwell Co.* v. *Western Addition Community Organization,* 88 LRRM 2660, 9 FEP Cases 195 (U.S. Sup. Ct. 1975).

[16] *Id.* at 201.

[17] *Ibid.*

[18] *Id.* at 197.

[19] *Id.* at 202.

Nor are the grievances that can clearly be labelled discriminatory easily distinguished from other grievances of minorities or females. Grievances of females or minorities over wage rates, production standards, promotions, or seniority may appear on their face as nondiscriminatory, but the processing to a successful conclusion of such grievances of minority and female employees is an integral part of assuring them full equality in the plant. To attempt to isolate and relegate to a nonplant forum grievances that are labelled discriminatory creates a dichotomy, setting minorities and females apart from other workers and having a divisive effect.

The divisive effect of affirmative-action programs has already resulted in successful charges of reverse discrimination—that is, of white males alleging that the efforts to place minority applicants resulted in discrimination against the white males because of race.[20] If charges of one type of discrimination are excluded from arbitration, it would follow that all charges of reverse discrimination likewise would be excluded.

The ideal for both industrial democracy and equal opportunity is a community of workers who participate without regard to sex or race in running the affairs of the union and, as part of that function, furnish prompt processing of grievances to arbitration, if necessary, whenever a worker suffers an injustice—be it economic discrimination, sex discrimination, race discrimination, or personal discrimination at the hands of a supervisor.

B. Arbitrators, by Demonstrating True Statesmanship in Engineering Equal Opportunity, Can Strengthen the Institutions of Both Arbitration and Collective Bargaining

The caliber of the awards that arbitrators are making in discrimination cases, in my opinion, will be decisive in determining whether arbitration will prevail or the courts will take over. Arbitrators are daily making awards in discrimination cases; some

[20] *Hiatt* v. *City of Berkeley*, 10 FEP Cases 251 (Calif. Super. Ct., Alameda County, 2/13/75). Findings and recommended decision in discrimination complaint of Robert J. Neyhart, CSC FEAA 1/27/75, adopted by the Department of Labor 2/26/75, *Daily Labor Report* No. 54 (1975), pp. A-6, A-7; Iver Peterson, "Reverse Bias Found in City School Post," *N.Y. Times*, p. 1, cols. 1-3, and p. 57, cols. 5-8, describing the decision of the N.Y.S.D.H.R. overruling the appointment of a Puerto Rican women as principal of a public school and replacing her with a non-Puerto Rican male who was found entitled to the job on the basis of his qualifications and improperly denied the job because of his race—white.

36 of them, involving various issues of race, sex, or religion, have recently been published by the American Arbitration Association as a casebook entitled *Arbitration of Discrimination Grievances.*[21] These awards illustrate the wide variety of discrimination grievances that arbitrators are deciding today. I do not know the basis on which the cases were selected, but a few of them qualify to recommend arbitration in this field.

In this category is the award of Arbitrator Edwin R. Teple holding invalid as in conflict with the EEOC Guidelines on Sex Discrimination the six-week limitation on the number of weeks that sickness and accident benefits could be paid for pregnancy-related disabilities, whereas 52 weeks of benefits were available for other disabilities.[22]

Similarly, in awarding back pay to a female employee who was not recalled from layoff to work in the x-ray department where the dangers to her unborn fetus were less than those to employees who had been allowed to continue working throughout pregnancy, Arbitrator Alice B. Grant correctly observed that the employer was applying an inconsistent standard between retention on the job and recall from layoff.

But the characteristics of most of the awards suggest that they were selected more to satisfy employers and unions of how "safe" they were at the hands of arbitrators than to illustrate the ability of arbitrators to make a meaningful contribution to the resolution of these issues. Missing from the collection are any of the awards that recognize that an employer discriminates because of sex when he does not afford a female who finds a job physically difficult the same assistance by way of cooperation of fellow workers and labor-saving devices that is afforded the "frail" male.[23] Instead, the awards harshly uphold the discharge of women with many years' seniority in cases where management continues to in-

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[21] Morris Stone and Earl R. Baderschneider, *Arbitration of Discrimination Grievances* (New York: American Arbitration Association, 1974).

[22] *Goodyear Tire & Rubber Co.* (Edwin R. Teple, arbitrator, 1973), reprinted in Stone and Baderschneider, *supra* note 21, at 84, enforced 6 FEP Cases 1069, 7 FPD ¶9073, *aff'd* 8 FEP Cases 128 (Ohio Ct. App. 1974).

[23] *E.g., W. M. Chase Co.,* 48 LA 231, 236 (Erwin Ellman, arbitrator, 1966); *Dewey Portland Cement Co., Div. of Martin Marietta Corp.,* 64-3 ARB ¶9075 (John F. Sembower, arbitrator). *Cf., Pond* v. *Braniff Airways, Inc.,* 500 F.2d 161, 166, 8 FEP Cases 659 (5th Cir. 1974).

clude physically difficult tasks in job duties, without any recognition by the arbitrator of principles applied by fair employment practice agencies and courts in such cases.[24]

The only award in the casebook dealing with alleged religious discrimination involving refusal to sell lottery tickets blithely asserts that there is no requirement of accommodation to religious beliefs and practices,[25] without any recognition that EEOC guidelines and court cases require a reasonable accommodation.[26] Also in the casebook we read the award of one arbitrator who, upon discovering systematic discrimination, withheld his final decision and invited the parties to try to find their own method of achieving a remedy for the future by negotiating a method of integrating jobs and sex-segregated lines of job progression, with the arbitrator retaining jurisdiction to provide the terms of the solution if the parties were not successful. However, he failed to give the grievant, who was found to have been the victim of discrimination, any personal relief; she got neither back pay nor the job.[27]

Probably the most basic remedy for the type of discrimination present in most plants is making available to blacks and females their "rightful place" [28] in the job structure by substituting plantwide seniority for the existing departmental or job seniority and requiring that all job vacancies be posted.[29] In most plants, departmental or job seniority keeps minorities and females in lower paid jobs and results in their being laid off while junior

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[24] *Eastern Products Corp.*, 169 AAA 11 (Joseph M. Stone, arbitrator, 1972), reprinted in Stone and Baderschneider, *supra* note 21, at 148. Another illustration, not reprinted in this "casebook," of similar harsh treatment of females without recognition of principles applicable is *Steelworkers Local 5233 and Pilgrim Extrusion Co.*, AAA Case No. 53 30 0209 (David C. Altrock, arbitrator, October 20, 1974), *Daily Labor Report* No. 239 (1974), p. A-4.

[25] *Acme Markets, Inc.*, 165 AAA 18 (Robert F. Koretz, arbitrator, 1972), reprinted in Stone and Baderschneider, *supra* note 21, at 303.

[26] *Riley* v. *Bendix Corp.*, 464 F.2d 1113, 1116-1117, 4 FEP Cases 951 (5th Cir. 1972), citing and quoting at length the applicable legislative history; *Reid* v. *Memphis Publishing Co.*, 468 F.2d 346, 5 FEP Cases 69 (6th Cir. 1972); *Shaffield* v. *Northrop Aircraft Services*, 7 FEP Cases 465 (M.D. Ala. 1973).

[27] *South Pittsburgh Water Co.*, 71-1 ARB ¶8420 (David C. Altrock, arbitrator), reprinted in Stone and Baderschneider, *supra* note 21, at 327.

[28] *Local 189, United Papermakers* v. *U.S.*, 416 F.2d 980, 994-995 (5th Cir. 1969), *cert. denied* 397 U.S. 919 (1970).

[29] *E.g., Patterson* v. *American Tobacco Co.*, 8 FEP Cases 778, 783, (E.D. Va. 1974); *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870, 6 FEP Cases 813, (6th Cir. 1973).

white males are retained.[30] No arbitration award dealing with either "rightful place" or job-posting and bidding appears in this casebook collection, nor do I know of any such award.

The principle that no subjective standards can be used, but rather that all standards applied must be objective [31] when decisions affecting minorities or females are made, is conspicuously missing from arbitration awards. Before arbitrators can hope to find acceptance for their resolution of discrimination cases, they must master the basic principles. They also need to have their consciousness of race and sex discrimination raised. If the arbitrators show genuine statesmanship in their awards so that the organizations representing minorities and women begin to feel that arbitrators can be trusted, then it should be possible for arbitration to become the established forum for resolving most issues of discrimination. To the extent that the awards conform to standards that civil rights agencies and courts find acceptable, the *Gardner-Denver* type of judicial review should in time cease to be of any greater concern than the present limited review given by courts to labor arbitration cases.

C. *Arbitrators Must Be Willing to Apply Title VII and Other Civil Rights Statutes, Regulations, and Court Decisions Both in Resolving the Dispute and in Fashioning a Remedy*

To be acceptable, an award resolving an issue of discrimination because of race or sex must conform to the principles of equality set forth in Title VII and the Equal Pay Act. The following is a well-established principle of arbitration law: [32]

> "Questions of law as well as of fact may be submitted to arbitration. The arbitration agreement, on which the authority of the arbitrators generally depends, may require that arbitrators find merely facts and leave the law for the courts, or may give them carte blanche as to both law and facts. The extent of the submission of legal questions is determined by the wording of the agreement." [Footnotes omitted.]

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[30] *E.g., Savannah Printing Specialties & Paper Products Local Union 604* v. *Union Camp Co.*, 350 F.Supp 632, 5 FEP Cases 670, 82 LRRM 2721 (D. Ga. 1972) .

[31] *U.S.* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 453, 4 FEP Cases 2 (5th Cir. 1971), *cert. denied* 406 U.S. 906, 4 FEP Cases 661 (1972); *Baxter* v. *Savannah Sugar Refining Corp.*, 350 F.Supp. 139, 5 FEP Cases 24, 28, 29-31 (D. Ga. 1972), *aff'd* in this regard 8 FEP Cases 85, 89 (5th Cir. 1974); *Pond* v. *Braniff Airways, Inc.*, 500 F.2d 161, 8 FEP Cases 659, 663 (5th Cir. 1974); *Young* v. *Edgcomb Steel Co.*, 8 FEP Cases 337, 339 (4th Cir. 1974); *Chambers* v. *Hendersonville City Board of Education*, 364 F.2d 189, 193, 1 FEP Cases 488 (4th Cir. 1966).

[32] 5 Am. Jur. 2d, Arbitration §58, p. 563.

As one often-quoted court has stated: [33]

> "It is well settled that the jurisdiction to make awards is derived from the agreement of submission to be interpreted in accordance with the general principles of contract law, *Wright Lumber Co.,* v. *Herron,* 10 Cir., 199 F.2d 446, and that, in the absence of express reservation, the parties are presumed to agree that everything, both as to law and fact, necessary to the ultimate decision is included in the authority of the arbitrator."

Labor arbitrators have a tradition of disclaiming any authority to apply the law except when the collective bargaining agreement expressly confers that authority. In the past decade, however, arbitrators have frequently cited Title VII and held that they must apply it, although the collective bargaining contract had no language referring to Title VII or any other law.[34] In applying the Fair Labor Standards Act to define working time, the prevailing view among arbitrators today was stated by Arbitrator Emanuel Stein as follows: [35]

> "So far as statutory meanings can be ascertained with confidence as to their accuracy, they should be resorted to in defining those terms of the collective bargaining agreement whose ultimate meaning and application are controlled by the statute. It seems to me improper and incorrect to define terms in an agreement in a manner plainly inconsistent with the overriding legal definition, saying to the parties that which is invalid as a matter of law is proper and correct under the collective agreement, thus necessitating recourse to administrative agencies and the courts to vindicate manifest legal right."

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[33] *Continental Materials Corp.* v. *Gaddis Mining Co.,* 306 F.2d 952, 954 (1962).

[34] *American Air Filter Co., Fiber Glass Group, FAMCO Div.* v. *UAW,* 57 LA 549 (William F. Dolson, arbitrator, 1971); *Chippewa Valley Bd. of Ed.,* 62 LA 409 (James R. McCormick, arbitrator); *Clio Education Assn.,* 61 LA 37 (James R. McCormick, arbitrator); *Delevan Division of American Precision Industries, Inc., Daily Labor Report* No. 10 (1971), p. A-6 (Arthur Stark, arbitrator, Nov. 17, 1970); *Creative Industries, Inc.,* 49 LA 140 (Walter J. Gershenfeld, arbitrator, 1967); *Hough Mfg. Corp.,* 51 LA 785 (Robert J. Mueller, arbitrator, Nov. 1, 1968); *Grass Distributing Co. and NCIA Local 1059,* 71-1 ARB ¶8015, 55 LA 756 (Walter H. Allman, arbitrator); *Middletown Bd. of Ed.,* 56 LA 830 (John A. Hogan, arbitrator, April 26, 1971); *Simoniz Co.,* 70-1 ARB ¶8024 (Robert G. Howlett, arbitrator); *Southgate Community School District,* 57 LA 476 (David C. Heilbrun, arbitrator, 1971); *Thornapple-Kellogg School District,* 60 LA 549 (M. David Keefe, arbitrator, 1973); *UAW* v. *Avco Lycoming Div. (Stratford Plant), Avco Corp.,* 3 FEP Cases 936 (C. D. Conn. 1971); *W. M. Chace Co.,* 48 LA 231 (1966). *Contra: Pitman-Moore Div.,* 49 LA 709 (Walter Seinsheimer, arbitrator, 1967); *Eaton Mfg. Co.,* 47 LA 1045, 1048-1051 (Samuel Kates, arbitrator, 1966); *Allegheny Airlines, Inc.,* 48 LA 734 (Peter Kelliher, arbitrator, 1967).

[35] *Pennsylvania Elec. Co.,* 66-3 ARB ¶8842 (Emanuel Stein, arbitrator).

When faced with a claim of sex discrimination, Arbitrator Burton B. Turkus stated that "failure to apply Title VII to an arbitral dispute 'would not only be a disservice to the parties but an abdication of [his] very function and responsibility as contract designated arbiter,' since [t]he collective bargaining relationship implies a system of industrial jurisprudence operating within a framework of rules of law." [36]

Similarly, Arbitrator John Day Larkin, in granting a grievance for equal pay, referred to the Equal Pay Act, adding, "In fact, it is our candid opinion that if this Board should deny this grievance, the Union would have very good grounds for going to court and having the award set aside." [37]

If arbitrators refuse to apply Title VII, the Equal Pay Act, and other federal, state, and local laws in resolving discrimination disputes, it will be impossible for anyone to contend seriously that arbitration is either a desirable or even an appropriate forum for the resolution of such disputes. We believe the importance of arbitration as the desirable and appropriate forum far outweighs any considerations that might be used in favor of arbitrators' not applying these statutes. But today, not only in the field of discrimination because of race or sex but also in many other fields, it is becoming impossible for arbitrators to refrain from applying the law. Illustrative is the recent *Avco* decision in which the courts set aside an award of Arbitrator Turkus, who had found just cause for a discharge, and substituted the court's decision that it was not just cause because the employer was so intertwined with the Federal Government as to make the freedom-of-speech guarantees applicable to the leafletting that occasioned the discharge.[38]

The field of safety, for instance, is going to require that arbitrators be cognizant of the Occupational Safety and Health Act. The United States Court of Appeals for the District of Columbia set aside two NLRB decisions dismissing complaints alleging that truck drivers had been discharged for refusal to drive trucks that they considered unsafe. In one case the truck was loaded far in

[36] *Avco Corp.*, 70-1 ARB ¶8400 (Burton B. Turkus, arbitrator), enforced *UAW* v. *Avco Lycoming Div., Avco Corp., supra* note 34.
[37] *Gary-Hobart Water Corp.*, 70-1 ARB ¶8162 (John Day Larkin, arbitrator).
[38] *Holodnak* v. *Avco Corp.*, 88 LRRM 2950 (2d Cir. 1975).

excess of the maximum weight permitted by Ohio law, and the driver's refusal was based on this fact. The NLRB had deferred to what both the Board and the court called "an arbitration award" finding just cause. Actually the award was that of a joint board sitting without a neutral, but this feature played no part in the decision. The court stated, "Left standing, the arbitral award below grants the Company a license to violate state law and as such is void as against public policy and repugnant to the purposes of the National Labor Relations Act." [39]

The field of pensions requires knowledge of at least certain aspects of the Employee Retirement Income Security Act, as, for instance, when pensions vest, the field of health benefits, and the new HMO options. And arbitrators have found it essential to apply the Military Service Act of 1967 that accords seniority and other rights to returning veterans. One such case recently presented a conflict between the rights of a black employee as the member of the "affected class" under a court decree entered in a Title VII case and a veteran's rights under the Military Service Act.[40] To attempt to isolate grievance arbitration from the ever-increasing body of statutory law applicable will render large numbers of awards obviously useless.

The necessity that arbitrators apply appropriate legal principles in no wise means that arbitrators should be lawyers. The only body of law with which arbitrators will have to deal is that applicable to labor relations. Nor is there any need for extensive preparation ahead of time in all the branches of labor law. All that is required is a willingness to research and study the particular laws applicable to the case at hand. Usually the parties will include the pertinent statutes, regulations, and decisions in their briefs, thus greatly reducing the need for any research by the arbitrator. Even lawyers specializing in labor law find it impossible to keep up with developments in all branches. They bone up as the need arises and usually make no secret of this method of operation. And the arbitrators who apply Title VII often recite in their opinions, as one arbitrator put it, "The undersigned has en-

[39] *Banyard* v. *NLRB*, 505 F.2d 342, 347, 87 LRRM 2001 (D.C.Cir. 1974). Only one of the cases has thus far been decided on remand. There the NLRB decided the case on the merits, sustained the complaint, and ordered reinstatement with back pay. *Roadway Express, Inc.*, 217 NLRB No. 49, 88 LRRM 1503 (April 6, 1975).

[40] *VEP Co.*, 61 LA 844 (William P. Murphy, arbitrator, 1973).

gaged in extensive research of cases and opinions under the federal law." [41]

People in all walks of life are finding it increasingly necessary to understand substantial segments of the law. In a recent article in the *American Bar Association Journal* entitled "Need for Undergraduate Law Study," it is argued that "[t]he return of the law to the colleges is demanded today by the nation's social, political and academic metabolism." [42]

Collective bargaining contracts quite frequently contain language to the effect that their provisions shall only be enforced to the extent that they are not inconsistent with law. On occasion arbitrators have read language as empowering them to apply Title VII and the guidelines issued thereunder. For instance, in several recent cases the limitations on sickness and accident benefits for pregnancy disabilities to six weeks as compared with 52 weeks for other disabilities were held void because the contract provided that any provision "contrary to law . . . shall not be deemed valid." The EEOC guidelines on related disabilities were held to be the law as for other disabilities, and the six-week limitation being contrary thereto was void and benefits for more than six weeks were awarded by the arbitrator.[43]

Hence, we do not believe that any traditional reluctance of arbitrators to apply law should detract from the desirability of arbitration as the forum for resolving discrimination disputes. Those employers and unions that desire such resolution, however, should take no chances that any arbitrator serving under their arbitration provisions might not apply the law. All collective bargaining agreements should contain a clear, express provision for the application by the arbitrator of Title VII and all other federal, state, and local statutes, regulations, guidelines, and decisions of courts and administrative agencies thereunder, according the same weight and deference as a court would.

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[41] *Hough Mfg. Co.*, 51 LA 785, 791 (Robert J. Mueller, arbitrator, 1968).

[42] Philip Lader, "The Need for Undergraduate Law Study," 59 *Am. Bar Assn. J.* 266 (March 1973).

[43] *Walled Lake Consolidated Schools*, 64 LA 289 (James R. McCormick, arbitrator, 1974). To the same effect, see *Potlatch Corp.*, 63 LA 1057 (George B. Heliker, arbitrator, 1974); *Goodyear Tire & Rubber Co.* (Edwin R. Teple, arbitrator, 1973), reprinted in Stone and Baderschneider, *supra* note 21 at 84, enforced 6 FEP Cases 1069, 7 FEP ¶9073, *aff'd* 8 FEP Cases 128 (Ohio Ct. App. 1974); *Kaiser-Permanente Medical Care Program*, 64 LA 245, 248 (David J. Dykstra, arbitrator, 1975); *contra, Merrill Area Joint School Dist.*, 63 LA 1106 (Marvin L. Schurke, arbitrator, 1974); *Wausau Dist. Public Schools*, 64 LA 187 (Philip G. Marshall, arbitrator, 1975).

II. In the Present Framework of Adjustments to the Changed Position of Minorities and Females in the Plant, to Remove All Grievances Containing Discrimination Problems Would Decimate the Arbitration Process

In large numbers of grievances involving what used to be nondiscriminatory issues, discrimination issues lurk today. How often is a black, a Spanish-surnamed individual, or a female disciplined, denied promotion, laid off, or given lower pay than white males in situations where the grievant believes that discrimination was a factor? Certainly the number of grievances going to arbitration today in which such an accusation is made is great, and a substantial acceleration of such claims appears to be in the offing. As knowledgeable a person as Robert Coulson, president, American Arbitration Association, states, "It has become commonplace now for race and sex to be raised as an issue in almost every discharge or promotion case involving a woman or a person of a minority race." [44] By what speedy means will these irritations be removed from the plant should they all cease to be arbitrable? The alternative is the EEOC or the courts, neither of which is suited to handling the small day-to-day issues of discrimination.

Employees who believe they are the victims of discrimination but want to have their grievances arbitrated will omit references to the discrimination when processing the grievance. At General Electric and Westinghouse, issues of just cause for discharge, unreasonable failure to promote, or violation of seniority are alleged without any mention of discrimination—to assure arbitrability. Stifling the airing of discrimination grievances is not a healthy phenomenon. Indeed, it is a practice exactly contrary to national policy.

Nor are the EEOC and the courts equipped to handle the large problems of discrimination because of their unfamiliarity with industrial practices, their long delays, and their lack of staff for follow-up. Suppose the EEOC, the OFCC, or a court revises a seniority plan. Suppose plantwide seniority is substituted for the previously existing departmental or job seniority, as courts are requiring in cases where the allocation of employees by race or sex

[44] Stone and Baderschneider, *supra* note 21, at 4.

reflects historical patterns of job segregation by race [45] or sex.[46] Will a senior minority individual or a female be required to start in the lowest job on a job-progression ladder? Should the answer to this question depend on the employee's ability to perform jobs higher on the job-progression ladder without having had a period of residency in the lower job or jobs? Can jobs on the progression ladder that are not essential to the acquisition of ability for higher jobs be leap-frogged? [47] If a job at the bottom of the ladder or somewhere along the ascending scale requires heavy lifting, can women unable to meet the physical requirements of the job move into higher jobs without serving a residency in the physically demanding job? Will all the problems that arise out of the revision of seniority be unarbitrable? Is the EEOC or the court going to provide a forum for resolving these issues? Arbitrators have the industrial know-how to provide the answers.

Carving out of the arbitrable class of grievances all aspects of discrimination and tying the arbitrator's hands so he cannot notice and remedy flagrant violations of Title VII or the Equal Pay Act that may stare out at him during an arbitration hearing reduces greatly the caliber and worth of the arbitration process.

III. The Backlog of Cases Before the EEOC and Other Federal, State, and Local Civil Rights Organizations and the Courts Imposes Delays That Perpetuate Discrimination and Create Additional Problems

The 100,000-case backlog at the EEOC, combined with its limited staff, results in cases lying uninvestigated for two or three years or longer. The dockets of the federal courts are similarly overcrowded, with resulting delays of years in getting to trial. Nor is a decision by a trial court ever the last step. There is always the right of appeal to a higher court, occasioning further delays.

By no possible standards can the existing administrative and judicial machinery be deemed an adequate alternative to the arbitration process and forum.

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[45] *E.G., Patterson* v. *American Tobacco Co., supra* note 29; *U.S.* v. *U.S. Steel Corp.*, 371 F.Supp. 105, 7 FEP Cases 322, 329-330 (N.D. Ala. 1973). *Cf., Savannah Printing Specialties & Paper Products Local Union 604* v. *Union Camp Corp., supra* note 30.

[46] *E.g., Patterson* v. *American Tobacco Co., supra* note 29.

[47] See discussion of this issue in *U.S.* v. *U.S. Steel Corp., supra* note 45, at 329.

IV. The Defect in Present Arbitration Procedure of Inadequate Participation of Grievants in the Selection of Arbitrators or the Presentation of the Case Can Be Remedied

The criticisms of arbitration as a forum for resolving issues of race and sex discrimination are directed primarily at the manner in which the arbitrator is selected and the lack of procedural safeguards for the discriminatee. As it is now practiced. the arbitrator is selected by the union and the employer, and this is viewed as "stacking the cards" against the discriminatee, as both are considered in conflict with the discriminatee.

The large number of grievances alleging discrimination because of race or sex that have been prosecuted to a successful conclusion by unions on behalf of discriminatees belies the notion that there is necessarily a conflict of interest between unions and the victims of race or sex discrimination. To the contrary, when the true interest of the union is considered, it is manifest that all discrimination by employers on the basis of race or sex serves to undermine a basic tenet of union organization—that strength of workers comes only as the grievance of each is accepted as the grievance of all. The payment of lower wages to females and minorities serves to undercut the wages of white males. The absence of job-posting for minorities and females usually means that there is no job-posting for anyone. The acceleration in the number of discrimination grievances being prosecuted to arbitration by unions, and the success of their efforts, attests to the increased appreciation by unions that the unity of workers must include minorities and females.

However, the number of unions that recognize and are willing to assume a fair degree of responsibility for eradicating discrimination is few. To have arbitrators selected only by a hostile employer and a union that acquiesces in race and sex discrimination constitutes a disqualifying factor in securing deferral to arbitration. Bernard Meltzer has expressed this disqualifying aspect of the method of choosing arbitrators as follows: "There is some basis for the fear that economic self-interest and the desire to be loved, which are linked with future acceptability, may distort adjudication even where there is complete harmony between the individual's interests and those of his representatives." [48]

[48] Meltzer, "Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination," 39 *U. Chi. L. Rev.* 30, at 44 (1971).

It is not essential to the arbitration system as practiced today that the employer and the union pick the arbitrator without participation of the grievant. There have been suggestions that distrust arising from the method of selecting the arbitrator might be avoided if the selection were made in a manner or from a source to alleviate the grievant's concern. Not referring to discrimination cases but speaking of arbitration generally, Bernard Dunau stated, "We will have to say, in order for this to be a fair procedure, that the individual employee may participate in the selection of the arbitrator. It must be his choice as well as the union's and the employer's." [49]

Tripartite selection of an arbitrator can be achieved by different formulas. The individual or his counsel could participate with union and employer in the familiar process of striking names from a list secured from an approved source. Gould suggests: [50]

> "The arbitrator should be selected from a source that specifically promotes use of arbitration for problems involving minority group and women employees. For instance, the Center for Dispute Settlement of the American Arbitration Association has played a leading role in this respect and the parties might wish to consult it in putting together a roster of arbitrators. I have long maintained that it might be a good idea for the Equal Employment Opportunity Commission, through its Regional Offices, to make a similar service available to unions and employers."

The resolution of discrimination grievances by arbitration could be encouraged by having arbitrators picked from a panel approved and paid for by the EEOC. There is historical precedent: Under the Railway Labor Act all fees and expenses of arbitrators for all grievances are paid by the Federal Government.[51] Some states, notably Connecticut,[52] similarly provide arbitrators entirely at public expense.

The instances in which the minority or female employees will elect to displace union representation in the handling of a grievance before an arbitrator and substitute their own counsel are

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[49] Dunau, "Comment," in *Arbitration—1974,* Proceedings of the 27th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1975), at 39.

[50] Address before Society of Professionals in Dispute Resolution, *Daily Labor Report* No. 204 (1973), p. E-3.

[51] 45 U.S.C. 153 (g).

[52] Conn. Gen. Stat. Ann. §§ 31-97 *et seq.*

probably few. But a standard criticism of the use of arbitration in solving discrimination disputes is the absence of provisions for independent representation of the grievant.[53]

Dunau suggests that the handling by the employee of his own representation in arbitration be limited to the "individual interests of the employee." [54] So long as the individual discriminatee does not attack the provisions of the collective bargaining agreement or assert an interpretation of the agreement in conflict with the interpretation adopted by the union, there would seem to be no sound reason for denying any discriminatee independent representation before the arbitrator if the discriminatee so desires. However, such representation should be at the discriminatee's own expense and should in no way limit the role of the union in the arbitration.

V. Collective Bargaining Contracts Should Expressly Empower the Arbitrator to Exercise All the Powers That a Court Would Have in Resolving the Dispute and Fashioning a Remedy

Those employers and unions that are convinced of the desirability of arbitrating discrimination grievances should include in their contractual provisions governing arbitration express language requiring the arbitrator not only to apply relevant law—Title VII, the Equal Pay Act, and other legislation—but also to accord the same deference as do courts to all regulations, guidelines, and decisions interpreting and applying such statutes in deciding the dispute and in fashioning the remedy. The arbitrator should be expressly empowered to include in his award a direction to the parties to renegotiate their collective bargaining agreement both to eliminate illegal provisions and to add such provisions as are appropriate to remedy any past discrimination. As part of the foregoing provision, the arbitrator should be empowered to retain jurisdiction so that if the parties do not reach agreement within a specified number of days, the arbitrator himself would have the power to direct the necessary changes in the

[53] *E.g.*, William B. Gould, "Labor Arbitration of Grievances Involving Racial Discrimination," 24 *Arb. J.* (N.S.) 197 (1969); Gould's address before the Society of Professionals in Dispute Resolution, *supra* note 9; Alfred W. Blumrosen, "Labor Arbitration and Discrimination: The Situation After *Griggs* and *Rios*," 28 *Arb. J.* 145 (1973).

[54] Dunau, *supra* note 49, at 40.

collective bargaining agreement, with the stipulation that changes directed by the arbitrator be given the same effect as if they had been agreed upon by the employer and the union for the remaining term of the collective bargaining agreement.

A collective bargaining agreement so drafted and, subject to the union's full control of the terms of the agreement and its meaning, guaranteeing the grievant the right to independent representation, should the grievant so elect, would seem to afford as firm a basis for administrative and judicial deference to any award issued thereunder as it is possible to achieve through terms of the agreement. If the union then engaged in a rigorous and adequate representation of the grievant in the arbitration proceeding, making a full record, and the arbitrator exercised the powers conferred upon him, the ensuing award would meet all the criteria suggested by the Supreme Court in *Gardner-Denver* as relevant to the weight that courts would accord awards. The factors that the Court listed were "the existence of provisions in the collective bargaining agreement which conform substantially with Title VII, the degree of procedural fairness in the arbitral forum," and "adequacy of the record with respect to the issue of discrimination." [55]

We suggest the following as language desirable to include in collective bargaining agreements:

> "A. The Employer and the Union shall not discriminate against any employee or applicant for employment, nor perpetuate the effects of past discrimination, if any, against any employee in any term or condition of employment, including but not limited to, payment of wages, hours of work, assignment of jobs, seniority, promotions and upgrades, training, layoffs, recall, discipline, and discharge because of race, color, religion, creed, age, sex, marital status, or national origin.
>
> "B. In making an award, the arbitrator shall apply Title VII of the Civil Rights Act of 1964, as amended, and all other Federal, state or local anti-discrimination laws, and accord the same deference as do courts to all rules and regulations promulgated thereunder and judicial interpretations applicable thereto. The arbitrator shall fashion an award so that it grants any and all relief appropriate to effectuate the provisions of this section, including any remedy which could be granted by a federal district court acting under Title VII.
>
> "If the award requires rewriting any provisions of this Agreement, the arbitrator shall direct the parties to open negotiations to make

[55] 94 S. Ct. at 1025, fn. 21.

such changes, prescribe the number of days within which the parties are afforded the opportunity to make changes, but the arbitrator shall retain jurisdiction over the case until such time as the arbitrator is assured that the contract provisions conform to the requirements of the law. If the parties are unable to agree upon contract provisions which the arbitrator determines to be in accord with the law, the arbitrator shall enter an award specifying the changes in this Agreement which are necessary to achieve compliance with Title VII. Such changes shall then be binding upon the parties and become terms and conditions of this Agreement for the duration of this Agreement.

"C. In any arbitration of a grievance filed by an employee alleging a violation of Subsection A of this Section, the employee who filed the grievance may, so long as he/she does not take a position in conflict with the union position as to the validity or meaning of the collective bargaining agreement, appear as a party, present evidence, and be represented by counsel of his/her own choosing, the counsel fees and expenses of counsel to be paid for by such employee, and without limiting the right of the Union also to participate in said arbitration in the same manner as if the employee had not exercised the rights conferred on him/her by this subsection. The employee may cause a transcript of the hearing to be made if he/she pays therefor. Any time a transcript is made the employee may secure a copy thereof by paying therefor."

VI. The EEOC Should Be Persuaded to Adopt a Policy of Deferring to the Arbitral Process Where the Charging Party Could Process a Grievance to Arbitration Under a Collective Bargaining Agreement Such as Above Described

The EEOC should encourage the arbitration of discrimination grievances, both because arbitration can achieve the voluntary participation of all concerned parties in resolving the dispute before the most desirable forum, and because the resulting reduction in EEOC's backlog would free the commission's staff to handle the grievances of applicants for employment and of employees whose employers or unions are unwilling to embark on this effort to remedy and eliminate discrimination. This would involve the adoption by EEOC of a procedure similar to that which the NLRB follows under its *Collyer* doctrine.[56] A policy of deferral by the EEOC would encourage unions and employers to structure their arbitration procedures in order to be able to take advantage of a deferral to arbitration. All minorities and females would benefit from a fairer system of arbitration as well as by having

[56] *Collyer Insulated Wire, supra* note 1.

available as an integral part of their workplace the facilities for the prompt processing of all discrimination grievances to arbitration.

The courts have approved the NLRB's deferral policies,[57] and there is every reason to assume the courts will approve a similar deferral policy if adopted by the EEOC. Indeed, the Supreme Court's decision in *Gardner-Denver*, by suggesting the factors that will entitle an award to acceptance by the courts, affords the logical basis for deferral—for why should the EEOC spend its time and money if an acceptable award seems likely?

Conclusion

Robert Coulson, president of the American Arbitration Association, in his preface to the casebook, *Arbitration of Discrimination Grievances*, posed the alternatives as follows: "Labor arbitration can either be converted to a problem-solving tribunal by this explosive and potentially expensive conflict area, or it may wither away because individual complainants lack faith in its effectiveness." [58]

Converting labor arbitration into an effective and acceptable problem-solving tribunal in the revolution of race and sex now rising in American industry may be an impossible task. But the dangers of failing are ominous for the world of free labor. The challenge requires that arbitrators seek the approval of only those employers and unions who are willing to place the costs of achieving genuine equal opportunity for all ahead of immediate, selfish political and economic goals.

ARBITRATION OF EMPLOYMENT DISCRIMINATION CASES: AN EMPIRICAL STUDY

HARRY T. EDWARDS *

Probably the least surprising and best publicized employment discrimination case decided in 1974 was the Supreme Court ruling in *Alexander* v. *Gardner-Denver Co.*[1] The opinion finally re-

[57] *Enterprise Publishing Co.* v. *NLRB*, 493 F.2d 1024, 82 LRRM 1337 (1st Cir. 1973); *Nabisco v. NLRB*, 479 F.2d 770, 83 LRRM 2612 (2d Cir. 1973).

[58] Stone and Baderschneider, *supra* note 21, at 5.

* Member, National Academy of Arbitrators; Professor of Law, University of Michigan Law School, Ann Arbor, Mich.

[1] 415 U.S. 36, 7 FEP Cases 81 (1974).