

II. EMPLOYMENT ARBITRATION: THE VOICE OF (MOSTLY VICARIOUS) EXPERIENCE

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Introduction

At the 1999 Annual Meeting of the National Academy of Arbitrators (NAA), Dennis Nolan gave a provocative, influential address on the Academy's future.³⁸ He concluded that if the organization was to survive and remain a vibrant force for workplace justice, to the mutual benefit of employers and employees, it must expand beyond its traditional role in labor arbitration based on collective bargaining. According to Nolan, the Academy should also encompass employment arbitration in the nonunion context. Like many good advocates, he may have slightly overstated his case. Although subsequent changes in admission standards now allow the counting of 10 employment arbitrations toward the requirement of 60 written decisions in six years,³⁹ few if any persons recently admitted to membership needed to count their employment arbitration cases in order to qualify. When Nolan spoke, our total membership was 633; at present it is approximately 642.⁴⁰ So our demise would not have been imminent in any event. But the downward trend in unionization that Nolan noted continues. Union density in 2011 had declined to 11.8 percent of the total workforce, and a mere 6.9 percent in the private sector.⁴¹ By comparison, Professor Alexander Colvin reports that mandatory employment arbitration agreements now cover one-fourth to one-third of the nonunion workforce.⁴² There is thus strong evidence to support Nolan's thesis. And if Professor Colvin's figures are indicative, mandatory

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³⁸Dennis Nolan, *The National Academy of Labor and Employment Arbitrators*, in *ARBITRATION 1999: QUO VADIS? THE FUTURE OF ARBITRATION AND COLLECTIVE BARGAINING, PROCEEDINGS OF THE 52D ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS* 52, 76–79 (Jay E. Grenig & Steven Briggs, eds., 2000).

³⁹See National Academy of Arbitrators, NAA Membership Guidelines, available at www.naarb.org/member_guidelines.asp (last accessed Mar. 22, 2012).

⁴⁰Compare Nolan, *supra* note 38, at 57, with National Academy of Arbitrators, 2012 Membership Directory.

⁴¹Bureau of Labor Statistics, U.S. Dep't of Labor, Release No. USDL 12-0094 (Jan. 27, 2012).

⁴²See part I of this chapter, "The Impact of Case and Arbitrator Characteristics on Employment Arbitration Outcomes," at n. 15. Some have questioned these figures in light of reported cases. Thus, in 2011, the American Arbitration Association (AAA) handled 10,175 labor arbitrations as contrasted with only 1,689 employment arbitrations. E-mail from Frank Rossi, AAA chief financial officer, to author (Apr. 25, 2012) (on file

employment arbitration remains a pressing issue for the country as a whole and most deserving of our close attention.

A disclosure: In my 40 years or so of arbitrating, I have probably handled no more than half a dozen nonunion employment cases. I have arbitrated none for several years. So, I am more of an onlooker at the process, and my voice is mainly that of *vicarious* experience.

In my remarks, I will provide a brief summary of the current legal framework and set forth the standards I believe are needed to ensure a fair procedure for all parties, particularly the isolated individual nonunion employee.

U.S. Supreme Court Rulings on Employment Arbitration

Over the last couple of decades the U.S. Supreme Court has provided us with two modern “Trilogies” with lessons for employment arbitration. The trailblazer, of course, was the *Gilmer*⁴³ case in 1991. There the Court, seemingly departing from then-current law regarding collective bargaining agreements,⁴⁴ held that an individual employee could be required as a condition of employment to agree that all workplace disputes would be subject to arbitration rather than court suit. A 7-2 decision found this mandatory arbitration requirement enforceable under the Federal Arbitration Act (FAA)⁴⁵ even as it applied to a statutory civil rights claim. This was only a waiver of a judicial forum, said the majority, not a waiver of substantive rights.

Gilmer created a storm of controversy.⁴⁶ But 10 years later a 5-to-4 Court in effect reaffirmed *Gilmer* in *Circuit City Stores, Inc. v. Adams*.⁴⁷ Placing the emphasis on the text rather than the legislative history of the FAA and stressing the federal policy favoring

with the author). It appears, however, that many if not most employment arbitrations are arranged directly with the arbitrators and not through a designating agency.

⁴³*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

⁴⁴*Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (adverse arbitration ruling did not prevent black employee from filing Title VII suit for alleged racial discrimination in discharge). *But cf.* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009) (5-4 decision) (union contract that “clearly and unmistakably” requires employees to arbitrate statutory civil rights claims is enforceable under federal law).

⁴⁵Pub. L. No. 68-401 (1925).

⁴⁶*Compare* Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DEN. U. L. REV. 1017 (1996) with Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better than It Looks*, in ARBITRATION 2009: DUE PROCESS IN THE WORKPLACE, PROCEEDINGS OF THE 62ND ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 99 (Paul D. Staudohar, ed., 2010).

⁴⁷532 U.S. 105 (2001). The NAA filed an amicus brief in support of the employee.

arbitration, the majority held that the Act exempts only arbitration agreements of transportation workers from judicial enforcement. The following year, however, the Court in *EEOC v. Waffle House, Inc.*⁴⁸ qualified the restriction on judicial action by holding that an individual employee's agreement to arbitrate does not prevent the Equal Employment Opportunity Commission from seeking victim-specific relief in court, including reinstatement, back pay, and damages.

With those basic principles in place, the Supreme Court waited almost a decade before returning to add several refinements to arbitration doctrine. The first case in a new "Trilogy" was *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,⁴⁹ a commercial dispute between two businesses that had obvious implications for employment arbitration. In a 5-3 decision, the Court emphasized the consensual nature of arbitration and held that under the FAA there could be no class-action arbitration when the parties had stipulated there was "no agreement" on the issue. Also, without actually deciding whether "manifest disregard of the law" survives as a separate basis for vacatur, apart from the grounds listed in the FAA,⁵⁰ the majority rather curiously concluded that the doctrine would have been "satisfied" in *Stolt-Nielsen*.

The Court has long held that questions of "substantive arbitrability," that is, whether the parties have agreed to arbitrate a dispute, are ordinarily for the court, not the arbitrator.⁵¹ In *Renta-Center, West, Inc. v. Jackson*,⁵² the Court added a new wrinkle. An employee alleging racial discrimination challenged an arbitration agreement as "unconscionable." Under the agreement, the arbitrator was to resolve all disputes, including the validity of the arbitration clause. A 5-4 majority held that the employee was challenging the arbitration agreement as a whole, including limitations on discovery and one-sided coverage. Because the employee did not contest the severable *delegation* provision regarding the arbitrator's authority in particular, the "gateway" issue here was for the arbitrator and not a court. The dissenters protested that

⁴⁸534 U.S. 279 (2002) (6-3 decision).

⁴⁹130 S. Ct. 1758 (2010). *But cf.* *Sutter v. Oxford Health Plans*, 675 F.3d 215 (3d Cir. 2012) (arbitrator could infer authorization for class action in contract without express provision).

⁵⁰*Cf.* *Hall Street Assocs. v. Mattel, Inc.*, 552 U.S. 576, 585 (2008).

⁵¹*John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964).

⁵²130 S. Ct. 2772 (2010).

the Court had “add[ed] a new layer of severability—something akin to Russian nesting dolls. . . .”⁵³

The status of class actions in arbitration was again to the fore in *AT&T Mobility LLC v. Concepcion*.⁵⁴ This was another commercial case with significant implications for employment arbitration. The Court held (5–4) that the FAA preempts a state court ruling that class-action waivers are unconscionable in arbitration agreements of adhesion, since the rule would impede streamlined proceedings. This decision will make it much harder for individual consumers or employees to pursue claims of relatively small monetary value, like a typical retail purchase or a worker’s unpaid overtime. But the arbitration clause in *Concepcion* was so favorable to a *winning* grievant that the decision could easily be distinguished by a more sympathetic court in the future. In any event, an unfairly discharged employee will usually have a claim worth pursuing in arbitration on an individual basis.

A Pragmatic Assessment

There is something inherently offensive about the notion that, as the price for getting or keeping a job, an American worker must surrender the right to a court suit, and often a jury trial, to enforce statutory claims. Instead, under *Gilmer* and its progeny, the employee has to turn to an arbitration system imposed by the employer. That in essence is the argument against mandatory arbitration. Yet, as I have argued at length elsewhere,⁵⁵ there is another side to the story. Several reputable empirical studies, for example, show that employees in arbitration have about as high a winning percentage as those employees who manage to get into court, and sometimes a higher one.⁵⁶ One survey also disclosed that fewer than 20 percent of the arbitral decisions dealt with claims of employment discrimination; the vast majority concerned individual contracts or personnel manuals and policies.⁵⁷

⁵³*Id.* at 2786.

⁵⁴131 S. Ct. 1740 (2011). The NAA filed an amicus brief in support of the consumers.

⁵⁵Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better than It Looks*, in *ARBITRATION 2009: DUE PROCESS IN THE WORKPLACE, PROCEEDINGS OF THE 62ND ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS* 99, 105–12 (Paul D. Staudohar, ed., 2010).

⁵⁶See authorities cited *id.* at 108–11. A *winning* plaintiff in a court action, however, will obtain a higher recovery on the average.

⁵⁷Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58(4) *DISP. RESOL. J.* 44, 48–49 Table 1 (Nov. 2003–Jan. 2004).

That sharply undercuts the argument that arbitration is adversely affecting the enforcement of civil rights legislation.

Even more importantly, several studies indicate that the ordinary blue-collar or pink-collar employee with a small monetary claim will have a hard time finding a lawyer to take his or her case to court. A report now a decade old concluded that most employees below the \$60,000 income level (about \$80,000 today?) could not get into court, but arbitration remained a realistic recourse.⁵⁸ In a major empirical survey, Professor Colvin declared that “one of the key potential advantages of employment arbitration over litigation is that the relatively high costs of litigation inhibit access to the courts by lower to mid-income ranges [of] employees.”⁵⁹ Plaintiffs’ attorneys themselves estimate that only about 5 percent of the individuals with an employment claim are able to obtain private counsel.⁶⁰ Of course, many of those rejected cases are nonmeritorious. The crucial question is: How many substantively *meritorious* cases are being rejected only because the dollar amounts involved do not justify the time and effort and financial investment of a first-rate lawyer working on a contingent fee?

Right now, Lewis Maltby and his National Workrights Institute (NWI) (full disclosure: I am participating) are seeking to answer that very question. The NWI is trying to trace the efforts of the rejected clients of upscale firms to find representation elsewhere, perhaps a hungrier attorney lower in the profession’s pecking order. So far, preliminary figures, viewed conservatively, suggest that at least 60 percent of the employees who have legitimate *legal* claims cannot find a lawyer to represent them if court litigation is the only resort, because the potential money damages are not sufficient to warrant action. If arbitration had been available, then it could have been a different story. To me this harsh reality overrides the theoretical objections to mandatory arbitration. Even an arguably flawed system that produces some decent results is better than nothing. But that’s still no reason for not trying to make the system as good as it can be. To that I now turn.

⁵⁸Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, DISP. RESOL. J. 8, 10–11 (May–July 2003).

⁵⁹Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?* 11 EMP. RTS. & EMP. POL’Y J. 405, 419 (2007).

⁶⁰William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?* DISP. RESOL. J. 40, 45 (Oct.–Dec. 1995).

The NAA and Employment Arbitration

The Academy has dealt extensively with employment arbitration on three prior occasions. First was our participation in 1995 with the American Bar Association's (ABA's) Labor and Employment Law Section and other organizations in writing the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship.⁶¹ Then-President Arnold Zack was the principal draftsman. Next, in 1997, was a policy statement that the Academy "opposes mandatory employment arbitration," softened in 2009 to say that "voluntary arbitration is always preferable."⁶² Accompanying these statements were detailed Guidelines for Employment Arbitration for use by arbitrators handling such cases.⁶³

More recently, at the Fall Educational Conference in October 2009, the Academy's Board of Governors (BOG) followed a long-standing neutrality policy on legislation and declined to express any opinion on whether the Arbitration Fairness Act (AFA)⁶⁴ should or should not be adopted to prohibit pre-dispute agreements to arbitrate or other mandatory arbitration agreements in employment, consumer, or civil rights cases. But the Board did recommend that any legally permissible form of mandatory arbitration should be required to include a comprehensive list of due process protections for employees who are covered by it.⁶⁵ The Academy would expressly exclude from this regulation arbitration provisions contained in collective bargaining agreements and arbitrations agreements that are individually and freely negotiated, such as those with a national TV anchor or top business

⁶¹ Available at <http://naarb.org/protocol.asp> (last accessed Mar. 22, 2012).

⁶² Compare *Statement of NAA on Condition of Employment Agreements*, in *ARBITRATION 1997: THE NEXT FIFTY YEARS, PROCEEDINGS OF THE 50TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS* 312, 313 (Joyce M. Najita, ed., 1998) with *NAA Policy Statement on Employment Arbitration* (May 20, 2009), available at http://naarb.org/due_process.asp (last visited Mar. 22, 2012).

⁶³ *Id.*

⁶⁴ The current version is S. 987, H.R. 1873, 112th Cong. (1st Sess. 2011). The practical effect could be to eliminate nearly all employment arbitration, because most employers (in small claims) and most employees (in large claims) would not agree to arbitrate after a dispute has arisen.

⁶⁵ On October 13, 2009, Academy President William H. Holley, Jr., wrote then-Senator Russ Feingold, who had introduced the AFA, setting forth the Academy's position. A general press release followed on December 8, 2009. A copy of the press release, including the Feingold letter and its attachments, is on file with the Executive Secretary-Treasurer of the NAA.

executive. I chaired the committee reporting to the BOG but Matthew Finkin did the lion's share of the drafting of the proposal we submitted for consideration if—I emphasize *if*—Congress decided to act.

The Academy's due process recommendations for mandatory arbitration, should there be legislation, included the following: (1) a representative of the employee's choice; (2) the same time limits on filing claims as in the law; (3) appropriate discovery under the arbitrator's supervision; (4) class actions to be available when reasonable for vindicating the claim; (5) arbitrators to be selected from neutral organizations or from neutral agencies with panels containing non-advocate arbitrators—if there is no agreement on an arbitrator, the agency is to select a non-advocate arbitrator; (6) arbitrator disclosure of any conflict of interest; (7) a convenient location and time for the hearing; (8) the employer to pay the arbitrator except for a filing fee not exceeding the federal court filing fee; (9) all the remedies that would be available in civil litigation; and (10) a written arbitral award with findings of fact and conclusions of law.

The major pending Academy project in this area began in June 2011, when President Roberta Golick, together with Immediate Past President Gil Vernon and President-Elect Sara Adler, established the Special Committee to Draft a Code of Professional Responsibility for Employment Arbitrators. There were 12 members, including me as Chair.⁶⁶ In addition, the three Presidents were *ex officio* members.

My first step was to ask the Committee to list the subjects that should be covered in any new code. Several members raised what they regarded as the "threshold" question of whether the Academy should draft such a code at all. President Golick responded that the impetus for an Employment Code came through independent suggestions from various members of the new Committee. After conversations with Past President Vernon and President-Elect Adler, President Golick said it was concluded that "the debate on 'whether' to move forward with a code can most fairly be evalu-

⁶⁶Jack Clarke, Sharon Ellis, George Fleischli, Ed Krinsky, Susan Mackenzie, Martin Malin, Dennis Nolan, Ted St. Antoine, John Sands, Susan Stewart, Jeff Tener, and Barry Winograd.

ated at the Board and Membership levels once we're all armed with a draft of what the code might actually look like."

In July 2011, I appointed two drafting subcommittees, with Martin Malin and Dennis Nolan as the Chairs, to deal generally with the corresponding parts of the two halves of the existing Code of Professional Responsibility for Arbitrators of Labor-Management Disputes. Both subcommittees completed drafts in time for discussion by the full Committee in September 2011 at the Academy's Fall Educational Conference in Miami. Extensive written comments were submitted on the two drafts after the Miami meeting. A consensus emerged that the Employment Code, being enforceable by discipline, should focus on ethics and not "best practices." Both subcommittees then met a January 2012 deadline for a second round of drafts of their respective portions of the proposed Code. The full Committee considered still a third set of drafts in June 2012 at the NAA's Annual Meeting in Minneapolis.

As of this writing, a clear majority of the full Committee supported most proposed provisions. There were, however, some fundamental questions to be answered. Three or 4 of our 12 regular Committee members had expressed reservations of one kind or another about the existing process. There was some feeling that we already had enough applicable codes and another one was not needed. A few members would prefer to have had other organizations, like designating agencies American Arbitration Association (AAA) and JAMS, involved in the drafting process from the outset. Others suggested that at least before a recommended code was placed before the membership, interested groups should be asked for their comments or asked whether they would be willing to sign on, with or without changes in the proposed provisions.

An example of a disputed area was the nature of the panel from which an arbitrator is selected. Thus, one subcommittee draft provided that an arbitrator would have to decline an appointment from a panel unilaterally formed by one of the parties in a compulsory arbitration arrangement. But other Committee members questioned whether it would be unethical for an arbitrator to serve when the panels did not decide statutory or other public law claims and were established by the employer for the limited purpose of resolving disputes over the employer's own personnel policies. A majority of the full Committee, however, concluded

that the principle against unilateral panel formation was so fundamental that there should be no exceptions.

In February 2012 I reported to President Golick and the Executive Committee on the Committee's progress and asked the Academy leadership "to determine whether this project, on the basis of developments to date, is to continue, either on its present path or on some redirected approach." In March 2012 President Golick informed the Committee that the Executive Committee was "unanimous in its endorsement of the project and we encourage the committee to continue on its current path." It was also arranged that the Committee Chair and the subcommittee Chairs or their designees would appear at the Board of Governors' June 2012 meeting in Minneapolis to describe the Committee's progress in more detail and to respond to Board members' questions and comments.

Conclusion

Despite the objections or concerns of many employee advocates and even some employer advocates, employment arbitration, whether mandatory or otherwise, may well turn out to be a win-win arrangement for all parties. For employers it could mean avoiding the multimillion-dollar judgments that emotionally aroused juries have awarded, and the \$200,000 litigation costs that even a successful court defense can entail. For most low-income employees with relatively small monetary claims, it may be the only practical resort. For everyone involved, arbitration at its best is a cheaper, faster, less forbidding process than court litigation. Even labor unions, the ostensible outsiders in this context, may find new organizing opportunities in representing grievants in employment arbitrations.

Ensuring due process for everyone is critical. A special problem arises when there is a pro se claimant or lay representative. Arbitrators must walk a fine line here. They cannot become the grievant's advocate, but they can explain the procedure generally and they can ensure that the record is clearly and fully developed. Most of us have had to walk that fine line with the occasional inept counsel even in union-management arbitrations. At the same time, both employers and employees may need reasonable but not excessive discovery, and employers in particular may be entitled to the equivalent of summary judgment in certain instances.

Another essential aspect of due process is fairness in arbitrator selection. Currently it is not uncommon for the employer to draw up the panel from which the grieving employee must choose the arbitrator. That obviously presents the risk of a tilted playing field right from the start. But suppose the panel consists solely of members of the NAA. Or suppose the employee can ultimately exercise a veto power, in which case the AAA designates the arbitrator. Or suppose the mandatory arbitration system is limited to interpreting and enforcing the employer's personnel handbook, not public-law claims. These are some of the issues with which our Employment Code Committee has had to wrestle.

I do not know how all these questions will ultimately be resolved. But on the basis of my past experience, I have every confidence that a committee that represents a cross-section of this Academy will find solutions that will be fairer, more sensible, and better balanced than what any one of us could come up with on our own. The Academy has always been a leader in setting standards for labor arbitration. This has not been a self-serving process; the major beneficiaries have been several generations of employers, employees, labor unions, and society at large. We should now be a leader in the burgeoning field of employment arbitration as well.

III. PANEL DISCUSSION

The rapid growth of arbitration in nonunion employment settings has provoked endless debate about its advantages and disadvantages for employers, employees, and unions. Often absent from the debate is systematic, reliable information on the extent of employment arbitration and arbitration outcomes. Professor Alexander Colvin of Cornell University has undertaken pioneering work that explores how employment arbitration is working in practice and its impact on the major players. After Professor Colvin presented his latest findings,⁶⁷ a panel of leading arbitrators and advocates discussed the implications of his results for the continuing development of employment arbitration.

⁶⁷See Part I of this chapter, "The Impact of Case and Arbitrator Characteristics on Employment Arbitration Outcomes."