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*University of Pennsylvania*

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### Comments

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STATEMENT  
TO  
COMMISSION ON THE FUTURE OF UNION - MANAGEMENT RELATIONS

April 6, 1994

My name is Clyde Summers, and I am Professor of Law at the University of Pennsylvania.

One of the important weaknesses in our labor law is that although we increasingly recognize legal rights of individual employees, those legal rights are empty promises because the remedies are not effective.

Cost is a major factor. Most individual employees cannot afford to sue in court. In wrongful discharge cases, the cost to a plaintiff of bringing a case to trial is \$10,000 to \$15,000 and the cost of trial is another \$10,000 to \$20,000. Lawyers may take cases on a contingency fee, but lawyers who handle these cases say that unless there is relatively sure prospect of winning \$25,000, they cannot afford to take the case.

The high cost of litigation is not only a bar to most individual employees except middle and upper management, it is a heavy burden on employers who ultimately bear almost all of the costs. The direct cost to an employer to bring a case to trial is \$25,000 to \$30,000, and the cost of trial adds another \$30,000 to \$50,000. Perhaps more important, the social waste in the transaction costs is enormous. A California study showed that for every \$50,000 recovered by a discharged employee, the cost to an employer is nearly \$200,000 - four times as much in legal fees for cases won and lost and the judgment. This is less a process for remedying wrongs suffered by employees than a device for redistribution which enriches lawyers at the expense of both the employer and employee.

The litigation costs in other individual employment cases are roughly similar. Under Title VII, a winning plaintiff is entitled to attorney's fees, which helps a plaintiff with a sure case. But a lawyer is at risk in taking a case which might be lost, and many plaintiffs claiming discrimination are unable to find a lawyer to take their case. The social costs here are also burdensome. It is not unusual for the attorney's costs awarded to the winning plaintiff to be more than the damages. When one counts the employer's legal fees in cases won and lost, the amount received by employees who have suffered discrimination is only one-third or one-fourth of the cost borne by the employer.

In wage-hour cases, litigation is largely an empty remedy, for the amounts recovered are too small, even with liquidated damages. Pervasive violations and the prevalence of repeat violators shows the inadequacy of the remedy. Again, where suit is brought, the attorney's fees are commonly multiples of the back pay awarded. The transaction costs swallow the transaction.

NLRB procedures have an advantage for the individual employee, for the General Counsel prosecutes the case. The individual, however, may feel the need for a lawyer, particularly in appeals to the Board and the courts. Completely buried, is the public cost of the General Counsel's preparing and presenting the case. The employer or union respondent must, of course, have a lawyer. The legal costs here are substantially less than in court litigation, but still substantial.

A second factor making litigation inadequate is delay. In both federal and state courts it often takes three to five years for a case to come to trial. Title VII cases are, by law, expedited in the federal courts, but from the filing of a charge to the trial takes a year and a

half, and in 10% of the cases the delay is more than three years. The NLRB procedures informally dispose of more than 95% of the cases before they go to a hearing before an Administrative Law Judge with a median time of less than five months. But if the case is contested before the Board, it takes nearly two years to obtain a decision.

It is quite clear that remedies through the courts and administrative agencies drain the substance from legal rights, common law and statutory, which purport to protect individual employees. Those remedies give meager protection to employees, heavily burden employers, and waste social resources. There must be a better way.

Is arbitration a better way? Comparison of court or administration procedures with grievance arbitration under collective agreements is striking. The legal costs for both unions and employers, in those cases where lawyers are used, are only one-fourth what it is for litigation, and the arbitrator's fees add about fifteen percent. The average time between requesting arbitration and an award is less than eight months, with some contracts providing for expedited arbitration. In the anthracite coal industry, for example, all discharge cases are decided within two weeks from the time of discharge.

We need to ask: Why is arbitration so much less expensive and faster? First, there are no pre-trial procedures --- drafting of complaints, motions to dismiss, depositions, interrogatories, memoranda of law and motions for summary judgment and trial briefs. All of these take an enormous amount of lawyer's time, all billed by the hour. In arbitration, there is normally nothing beyond a demand for arbitration and a copy of the grievance. The case goes direct to hearing.

Second, the procedure is informal. Many of the facts are simply stated without the necessity of witnesses. There is little or no haggling over admissibility of evidence, authenticity of documents, expert testimony, or use of hearsay. And there are no juries to be impanelled, shielded from irrelevant or prejudicial testimony and instructed, and no verdicts to move to set aside. Transcripts can often be dispensed with.

Third, the arbitrator is generally knowledgeable about the issue. Not all of the background and details need to be spelled out and placed in the record. The arbitrator has an understanding of collective agreements, how they come into being, how they are to be interpreted and the role of the common law of the shop. Briefs are seldom needed, and reference to authorities play a minor role.

Fourth, there is no docket to cause delay. Individual arbitrators may have a backlog, but other arbitrators who are available can be chosen. The parties need not stand in line waiting for other cases to be disposed of.

We come now to the obvious question. Can we transpose grievance arbitration which has worked so well in deciding collective contract disputes to deciding disputes as to the individual employee's legal rights.

I would point out three factors which require some modification of grievance arbitration. First, when a grievance comes the arbitration it has been through a process of investigation by the union and discussion in the grievance procedure which further develops the facts and focuses the issue. If there is no union and no grievance procedure it may be useful to provide some limited discovery and development of the issue in advance of hearing.

Much of this might be done at the outset of the hearing, extending the hearing to later dates as necessary to allow full exploration of the facts and the issue.

Second, the issues to be decided in grievance arbitration are contract issues, not legal issues. Experienced grievance arbitrators may be well versed in the law of the shop but have, at most, limited knowledge of common law or statutory rights. Arbitration of these issues requires arbitrators who are knowledgeable in the field of individual employee rights. The arbitration panels of the AAA and the FMCS, as they now stand, are not suitable for this purpose. Special panels will need to be created.

Third, and most important, in grievance arbitration the arbitrator is chosen by mutual agreement of the union and the employer, parties who are relatively equal in their experience with arbitrators and their knowledge or ability to find out the propensity or philosophy of particular arbitrators. The efforts of each to pick an arbitrator believed to be favorable is counterbalanced by the parallel efforts of the other. Also, the arbitrator concerned about continued acceptability by both parties will try to be neutral.

The same process will not work when an individual employee, unaided by a union, is involved. The employer will know which arbitrators tend to favor the employer's viewpoint and which tend to favor the employee's viewpoint. It will have not only the benefit of experience as a repeat player, but access to those who systematically collect and provide such information. The lonely employee will have no experience and not know the sources of information. Moreover, the arbitrator may consciously or subconsciously recognize that the employer can affect his future as an arbitrator but the employee most probably cannot.

This brings me to what I consider the most crucial and difficult question: How do we structure a process for selecting arbitrators which will give the individual employee an equal chance? Unless we solve that problem we cannot conscientiously urge employees to accept arbitration.

The process of the AAA and the FMCS of submitting lists of seven or nine names, allowing each party to strike names seems to me fatally flawed when used for individual rights disputes. All on the panel may be competent and disinterested, but some, if not most, will inevitably have leanings in one direction or another. The employer with experience and access to information will know who to strike. The individual can only guess or throw darts. The only way to avoid this problem is to have the arbitrators chosen from a panel in rotation or by lot. Each party then has an equal chance. This then raises the question of how the panel is to be selected.

The panel needs to be selected in a manner which, so far as possible, is composed of arbitrators who are relatively neutral. But who is to do the choosing? One solution, would be to have panels selected by the FMCS and by the various state boards of mediation. This would carry some risks. As administrations changed the membership on the panels might change to reflect "neutrality" from that administration's perspective. Also, employers would be more likely to complain about unfavorable decisions than individual employees, and their complaints would carry more weight, pressuring the agency to drop names from the list as not sufficiently "neutral" from the employer's viewpoint.

Entrusting the selection of the panels to the AAA would seem even more risky. The AAA is in the business of selling its services and employers are important repeat customers,



not only in labor arbitration but also in commercial arbitration. The AAA would be vulnerable to employer pressure to drop from the panel those who, from the employer's point of view, were biased.

Panels might be created by other private organizations or institutions such as the Section on Labor Relations of the American Bar Association, and labor law sections of state and local bar associations. But in these sections employer lawyers far outnumber union lawyers, and lawyers who represent individual employees have little or no voice. Such organizations are likely to produce panels which reflect the interests of their members.

Of all of the methods of selecting arbitrators the least risky alternative in my judgment would be to have them assigned in rotation or by lot, from panels developed, by the FMCS and state boards of mediation.

It goes without saying that arbitration of legal rights should be completely voluntary. Employers may provide in their handbooks, or other statements, for arbitration of employee disputes, and the employees may choose, once a dispute has arisen, to go to arbitration rather than to court. But an employee can not be required to give up her right to a jury trial under Title VII, or to have his rights under the NLRA adjudicated by an arbitrator. To require an employee to agree to arbitration of legal rights as a condition of being hired or of continued employment cannot be considered voluntarily except by those who live in marble palaces detached from the real world. For most employees, this is compulsory arbitration parading under sheep's clothing to pull the wool over judges eyes. The Gilmer case may do little damage if confined to the canyons of Wall Street, but this Commission ought to recommend

legislation to at least keep it so confined. Arbitration of individual employee disputes should be limited to agreements to arbitrate a dispute after it has arisen.

Once reliable and balanced arbitration panels are created, the problem is to encourage the parties to use them. In view of the great advantages to arbitration for both parties, this would seem not to be difficult. But it may not be easy to cure lawyers of their litigation syndrome. One discouraging straw in the wind. Montana enacted a statute giving general protection against unjust discharge. Either party may demand arbitration; if the other refuses and then loses when the case goes to trial, the one who refused arbitration must pay the other's attorney's fees. A field study of lawyers in Montana shows that arbitration was seldom requested. Whether this was due to unfamiliarity with, or distrust of, arbitration, a desire for more billable hours, or some other reason is unclear. It may be only a short term phenomenon reflecting the lawyers slowness to change.

It should be pointed out that there is already in existence arbitration systems applicable to individual employee disputes. A number of federal district courts and some state courts have established arbitration procedures for cases involving smaller amounts - in some federal courts up to \$100,000 and in some state courts up to less than \$25,000. In the federal courts, the clerk of the court maintains three lists, a plaintiff's list, a defendant's list and a neutral list. The arbitrators are essentially pro bono, paid \$100 per case. Three arbitrators are from each list, sit on a panel, hear the case and make an award. If neither party objects, it becomes an order of the court, but either party can demand a trial de novo. However, if the party rejecting the award loses at trial, there is a mild sanction, sometimes only the cost of

the arbitration. Although the award is not final and binding, less than 3% of the cases originally on the arbitration list end up in court.

This form of arbitration has been used increasingly and some federal courts make submission to arbitration compulsory, with the award not binding. This procedure saves time and money, but it goes only part way. The arbitration comes only after the parties have substantially prepared for trial, which may be more than half the cost. The experience here suggests that arbitration might be more acceptable, particularly to lawyers, if it were not stated to be final and binding but left the possibility of going to trial when the award was not acceptable. Whether the parties in employment rights cases would accept the awards and not ask for a trial de novo is uncertain. Only experience would tell.

There is one measure available to unions which could significantly increase the viability of arbitration of disputes over individual employee's legal rights. Unions do not need to have a majority in a workplace to represent employees in enforcing their legal rights. Union actions to protect those legal rights is protected concerted activities. In a plant where the union did not have a majority, it could inform employees of their legal rights, help them pursue those rights, give them advice in choosing an arbitrator and provide a competent advocate in the arbitration. Where the union performed this function, there would be no need for special panels. The union would not only help choose an arbitrator, but the arbitrator would be equally concerned about continuing acceptability by both the employer and the union. This would, in my judgment, be the most acceptable process for promoting and administering arbitration of legal rights of individual employees. What is needed is for

unions to recognize that they can play a significant role in protecting employees' legal rights, and they need not win an election to do so.