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Minutes of the April 6, 1994 Meeting of the Commission on the Future of Worker-Management Relations

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Commission on the Future of Worker-Management Relations

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Comments

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COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS
MINUTES OF MEETING HELD ON WEDNESDAY, APRIL 6, 1994

The Commission on the Future of Worker-Management Relations met in Washington, DC on Wednesday, April 6, 1994 to consider issues in the area of alternative dispute resolution (ADR). Present were Chairman Dunlop and members Voos, Fraser, Marshall, Kochan, Turner, Freeman and Usery. Absent were Allaire and Kreps and Counsel Weiler. Designated Federal Official June Robinson attended the meeting. The Chair announced that the record of the factfinding portion of the Commission's work will close on April 29. The record will reopen at a later date for comments in the recommendations phase of its work.

The morning's panel presented the views of attorneys and others representing unions, management, and individual workers, as well as persons involved in ADR. Attorney Charles G. Bakaly, Jr. of O'Melvaney and Myers representing employers submitted a written statement. In oral remarks he described his personal odyssey from believing that strikes should be subject to injunction to his present-day support for binding arbitration ("I guess it's time to quit!"). Indeed, he is planning a second career as a mediator. Bakaly stated that arbitration is alive and well -- it is less expensive and much quicker than litigation; it relieves courts of part of their growing burden, and contrary to past practice, arbitrators these days can resolve all kinds of disputes (his agreements to arbitrate even include trade secret violations) and provide remedies of the kinds available in court: equitable relief, punitive damages, etc. He noted that a contract of employment under common law is not specifically enforceable, that a person unjustly dismissed cannot get his or her job back, but an arbitrator can give that remedy. Some problems with respect to the resort to arbitration were noted: it is not cheap, and discovery may be quite limited.

Chairman Dunlop interjected with a reference to a NY Times article from the preceding day which described findings of a GAO report on arbitration in the securities industry. (The article begins: "...at a time when more employees are compelled to submit complaints of job discrimination and sexual harassment to arbitration, the people who decide the cases are overwhelmingly white men in their 60's with little experience in labor law." Apr; 5, p. B6) Dunlop stated that Bakaly's assessment on specific questions such as when the agreement to arbitrate should occur, selection of arbitrators, and whether and how to mediate would be more useful to the Commission than a recital of the arguments for and against arbitration per se. Bakaly responded with a description of a situation involving an HMO with about 400 doctors of whom two-thirds have signed an agreement to arbitrate disputes (an incentive to sign was provided in the form of a good severance package). He views this result as excellent. (New hires will be to sign the agreement to arbitrate.)

He urged also that the agreement to arbitrate be separate from the employment contract, since a recent Supreme Court decision (Gilmer 1991, an ADEA case arising in the securities industry) leaves some

uncertainty as to the scope of the Federal Arbitration Act's exclusion of employment contracts of workers in interstate commerce: in essence, does the exclusion apply to all workers or just those in the transportation industry? [Much discussion throughout the hearing addressed the desirability of clarifying the law under Gilmer and prior leading case in the area, Alexander v. Gardner-Denver (1974, arbitration under a collective bargain agreement (CBA), apparently does not preclude subsequent judicial resolution of a civil rights claim.]

Paul H. Tobias, a plaintiff's lawyer in Cincinnati and founder of the National Employment Lawyers Association, also expanded on his written statement. He provides representation in unjust dismissals to individuals from CEOs through professors to floor sweepers. In his view the best form of ADR is when employers and employees resolve their own disputes. But he sees a clear need for the Commission to educate the public, and employers particularly, about mediation and arbitration -- "employers don't respond to reason and moral suasion. He always asks for alternative dispute resolution as part of his lawsuits, and employers reject the request.

Attorney Tobias argued, in summary, that informal methods of private dispute resolution should be tried first, that the Commission should support mediation of disputes early on (he "didn't come over on the Mayflower but he's an early settler"), and arbitration should be truly voluntary: employees should not be subject to the duress of being required to agree to arbitrate all disputes in advance, which he compared to a "yellow dog" contract. Tobias pointed out serious problems he sees in subjecting statutory rights to arbitration -- for example, under civil rights laws one is entitled to a jury trial, emotional damages, and front pay. While arbitrators can order reinstatement, in his experience (in nonunion settings) 95 percent of employees do not want their jobs back. (Dunlop observed that they don't go back that frequently in the union world, under NLRB orders, either.) Employers fear jury trials. They can win arbitrations because discovery is limited, and employees need access to personnel records to prove patterns of discrimination, etc. in order to win discrimination cases. Arbitrators in nonunion situations don't know the law.

Finally, Tobias advocated a national just cause statute; employers should be taught to be more humane; employee law centers should be created. In effect, we need "business agents" to handle discharges in the nonunion world. In response to the question of when an agreement to arbitrate should be made, he stated that it is only appropriate after an incident arises that is potentially subject to arbitration. He could devise a "dream" statute that would spell out all the conditions for a fair system, (an in fact is working on it). The Chair expressed interest in seeing the result.

Douglas S. McDowell, a Washington attorney, submitted a written statement on behalf of the Employment Policy Foundation (EPF). Responding to the prior witness, he said that he does respond to reason and moral suasion, despite the fact that he represents employers. The EPF's position has changed from insisting on (mandatory?) binding arbitration to agreeing to try voluntary arbitration. He urged that a national policy be adopted to encourage ADR but retain flexibility. Data cited in his paper noted the explosion in the EEOC caseload, with

some 90,000 complaints expected this year, in part due to the addition of disabilities act claims. The EEOC system is not working very well, although they had a pilot project, now lapsed, that provided for timely and outside mediation instead of by an internal investigator. The laws passed by Congress run ahead of the resources to enforce them (and, as the Chair noted at several points during the day, the money will never catch up.) Courts are turning to mediation in their own systems. [This point was made by several later witnesses as well, and the Chair asked to be educated. Professor Clyde Summers cited an article by Professor Leo Levin in the Fordham Law Review.]

Attorney McDowell cited the availability of in-house dispute resolution systems, including so-called "open door" policies, ombudsmen, peer review, and employee involvement (EI) plans of the kind the Commission had heard about in previous hearings. He noted the downside to using a plaintiff's attorney, including large legal fees. He said there is no "employer juggernaut" trying to impose arbitration on workers, it should be an option but not mandated on employers, and EI could be an alternative. He noted that the 1991 civil rights statute encourages ADR, and said that there are ways to remedy some of the potential weaknesses in having legal rights subject to arbitration, for instance, by ensuring diversity in panels, requiring written opinions, perhaps making it on optional route. He referred to a bill introduced by Senator Danforth that would require parties to undergo a 60-day mediation period before court action (unclear whether this is before filing suit, before a hearing or before trial). The Commission will take a look at this bill. Commissioner Freeman asked how this could be mandated if one or both parties are adamantly opposed. McDowell stated that even parties in this position can learn from the observations of an outsider, and this may be particularly useful when an attorney has a different view than his/her client about the potential success of a case.

Attorney Marsha S. Berzon Altshuler, Berzon Nussbaun Berzon and Rubin, who has represented workers and unions, spare on pitfalls of subjecting statutory rights to private arbitration. As distinct from grievance arbitration that has evolved under collective bargaining, where parties have input into both the rules (the CBA) and their enforcement (selection of neutral, etc), arbitration of statutes is not a total workplace governance system. The rules are public but the decisions are privatized. Berzon noted that arbitration under the collective bargaining system involves parties with (relatively) equal power to participate in its establishment; unions assist employees in going through the system; both sides are potential repeat customers of the arbitrators, so there is a natural tendency towards balanced decisions; decisions are often publicly reported so there is some carry-over to other cases that becomes the common law of the shop; and, finally, if the overall results are unsatisfactory, the actual rules can be changed.

Attorney Berzon would contrasted the above system with ADR that is elected before a dispute arises: inadequate discovery is provided; the varying laws that grant enforceable rights also have varying procedural standards to balance efficiency versus fairness, whereas making them subject to a private arbitration exerts a leveling effect whose primary goal seems to be efficiency. It tosses all disputes into one box.

Employers may argue that the alternate system saves costs, but they are counting on lower damage awards than are likely to result from a jury trial. Individual employees are not repeat users of the system, employers are the only repeat customers in nonunion systems, so there is an inherent impetus for the arbitrator to tilt awards in favor of management. Of course transaction costs are lower for both parties, but since they are of unequal bargaining power (how can an individual employee know enough to select a particular arbitrator?) a pre-incident waiver of statutory rights is, in Berzon's view, inherently involuntary.

Finally, Berzon asked what does it do to the legal system to push these decisions underground? The entire body of law in sexual harassment might never have developed if cases had been decided piecemeal and the results hidden. Parties might have been involved in litigating the same issues over and over, whereas under a public law system they learn what the rules are.

Mary P. Rowe, adjunct professor of management at MIT and its long-time Ombudsperson, described in some detail the workings of this in-house system. (Perhaps the term was changed from Ombudsman after she was addressed as "embalmsman.") The MIT system covers management employees, nonunion workers, students, and unionized employees with respect to problems not covered by the CBA. The office keeps no formal records, but does maintain statistics. Clients are referred to as "visitors," not complainants. The matters resolved are often delicate, including peer relationships, student to student harassment, and cases in which there is justified fear of reprisals.

Professor Rowe endorsed the position that a public law system is important to the enforcement of statutory rights, and that if binding arbitration is used it should have equal input from employers and employees in its design, and decisions should be publicized within the workplace. She urged greater attention to the consideration of the relatedness of internal and external dispute resolution systems. She argued that labor law should be amended to shield internal problem-solving of the kind she does from subpoena in subsequent litigation. She noted that under the Federal Administrative Disputes Resolution Act of 1990, neutrals are so protected.

Among the features of a good system (and this apparently describes the MIT one) are that it covers a wide spectrum of subjects, including crimes; it covers all personnel, individually or in groups (presumably with the aforementioned exclusion of unit employees with respect to CBA issues): resources and advice are provided to all parties; staff are diverse; the system is taught to all; reprisals are proscribed; and the operations of the system are monitored and evaluated. Rowe urged that the Department of Labor be given the role supporting the design of such systems in all workplaces. In response to Freeman's questions about the cost of the system, which has handled about 20,000 cases in about 20 years, Rowe said she will provide the data "in excessive detail."

Lewis Maltby, Director of the ACLU's national task force on civil liberties in the workplace, stated that he is in the middle ground regarding ADR. His organization receives about 50,000 complaints a year from employees who think employers have violated their rights.

Most people with employment disputes don't get them resolved, and therefore there is a need to expand the scope of workplace justice in the US. But ADR has the inherent potential for abuse because of deficiencies highlighted by prior witnesses, such as the lack of discovery, true neutrals and bilateral input. Maltby also joined other witnesses in arguing that it is unreasonable to require a waiver of rights in favor of what might turn out to be "kangaroo courts." A truly voluntary system that meets minimum standards of fairness -- notice, access to information, genuinely neutral decision-makers -- should be subject to the law of the marketplace: that is, employees should be allowed to select or reject it freely.

The composition of the judges' pool may stack the deck even if there is no actual conflict of interest, given the inherent imbalance of power and knowledge between the employer and an individual employee. Maltby's conclusion was that the basic law of the workplace is employment at will "despite all the ink that's been spilled writing about the exceptions." He'd even argue to take the selection of arbitrators out of the hands of the parties and to provide for post-employment election of a dispute procedure that is kept secret until a dispute arises.

Reference was made to a Weiler idea that selection of the neutral could be in the hands of the parties if the employees have an independent organization, with an institutional memory. In general, the commitment of lawmakers is needed to guarantee a fair system. In response to an inquiry from the Chair, Maltby clarified that about a quarter of the total of 200,000 yearly complaints received by the ACLU relate to employment questions. Asked for data on the complaints, Maltby observed that a federal grant to computerize their system would be welcomed, and that statistics are compiled manually from figures submitted by the 50 state offices. He agreed to write a letter to the Commission describing the organization's experience over a period of years.

The Chair returned to the theme of overburdened courts and administrative agencies, which have been given the responsibility for enforcing substantive rights created by Congress without the resources to do so. He cited figures showing a five-fold increase in employment law cases in US district courts in the 20 years between 1971 and 1991, and the DOL's large and increasing workload: What should the Commission do about this dilemma, since Congress is clearly not going to appropriate enough money? Ms. Rowe replied that this is a good reason to look to internal dispute resolution systems.

Commissioner Fraser remarked that if the employees who were complaining to the ACLU belonged to unions, there would be no need for the panel now before him. The panel was asked to comment on whether ADR should have the force of law. Maltby replied that employers have enough incentives to use it. He observed that Gilmer is a "judicial train wreck" and the law should set standards. Bakaly stated that courts aren't going to permit alternative systems to be binding if they're unfair. They'll be created by the common law. The holding under Gardner-Denver was that collectively-bargained processes can't resolve sex, age and other similar cases. Unions were defendants in early civil rights cases. Because of the changes since then there may

be a need to revisit that case. There is still a problem with a multiplicity of forums. Employers are willing to give due process in order to get one final binding decision. McDowell, too, argued that unfair systems will not be accepted by employees.

In response to observations by the Chair about the enormous amount of regulation of the American workplace, as exemplified by the large number of cases litigated under the wage-hour law, McDowell noted the Department of Labor's (DOL's) pilot project on ADR but also cited a Supreme Court decision that an individual may not settle a (FLSA?) case without DOL approval. Should there be a system of labor courts, as some have suggested? Commissioner Kochan asked whether the large number of administrative agencies might not argue in favor of a one-stop employment dispute agency, a more streamlined administrative process to parallel the availability of ADR. Bakaly said he was concerned about adding another administrative layer, and argued that ADR can solve the problem of multiplicity of forums, and that the criticisms of it raised by other witnesses can be resolved by such means as making awards public.

Attorney McDowell stated that when the administration of the Age Discrimination in Employment Act and the Equal Pay Act were moved to EEOC, the caseload didn't drop. In response to Kochan's question of whether he would want one administrative forum, he said that it might not be politically feasible, but some consolidation may be possible, Maltby stated that consolidation is attractive, and that ADR seems to be a necessary evil. He remains concerned about the privatization of civil rights enforcement, which "isn't the same as privatization of trash collection." Tobias pointed out that public expectations have risen with regard to workplace justice, contributing to the movement for a national just cause statute. The Commission should try to persuade Congress to do right, but, if this does not succeed, then it needs to educate companies. He recounted dealing with an officer of a Fortune 500 company who had never heard of mediation or arbitration. "Outside California, a lot of education needs to be done."

Attorney Bakaly stated that a system needs to be in effect for future disputes. Commissioner Freeman asked what happens at MIT if cases are not resolved. Rowe responded that various types of ADR are employed and that in some 20 years only three cases went to trial, which MIT won; "Of course, a system is only as good as its next five years." Kochan stated that it is clear parties need to be involved in design of the system. Making the link to prior hearings, he observed that employee involvement in a nonunion setting to design such a system would probably be illegal. Under the common law the law of the shop grew out of the union system. The question is how to bring employees into the system and build on what we've learned. Maltby referred the Commission to the ACLU's Electromation brief, which pointed out ways to interpret 8(a)(2) to permit such EI. Dunlop noted the Commission has this brief. McDowell said that employers should be able to set up ADR without violating the NLRA; he mentioned the ongoing controversy over mandated health and safety committees under the OSHA reform legislation.

The afternoon session began with a presentation by Judith L. Lichtman, President of the Women's Legal Defense Fund, accompanied by

Heidi Hartmann, Executive Director, Institute for Women's Policy Research, Francine Moccio, Assistant Executive Director of the YWCA, and Sheila B. Coates, President of Black Women United for Action. Lichtman stated that one of the major changes in the work force has been the vastly increased participation of women, yet their earnings and opportunities lag behind men's. Contingent workers have also increased, and these are mostly women. As demonstrated by papers presented to the October labor law conference sponsored by the Women's Bureau, unionism benefits women, and therefore barriers to effective union organization impede women. Labor law should be amended to ensure, for example, the sharing of salary information so that pay inequities can be attacked openly. There are practical and structural obstacles to unionizing of women, for example because of their prevalence in temporary jobs, etc. With respect to ADR, Lichtman asserted that employers shouldn't be able to coerce a choice between one's job and the statutory right to be free of discrimination. Standards for a fair system are spelled out on page 25 of her written statement, including that the system must be fully voluntary, neutrals should have expertise in EEO law, and certain situations such as class actions or those involving significant policy questions are ill-suited for ADR.

Dr. Hartman referred to the WB papers and said that the Commission should make more time to hear from women's groups and representatives of other disadvantaged people. Moccio noted the difficulty of many unions in getting to a first contract after recognition is finally achieved. She said the panel was "not here as QWL-busters" but to bring a breath of reality to the proceedings. Coates stated that real gains for employment of women of color have occurred only in the public sector. Labor law reform, she believes, should include stronger enforcement of civil rights acts and the NLRA. Commissioner Marshall asked what should be done about the dilemma that the labor laws were crafted in a time and under assumptions that don't accommodate a contingent workforce (e.g. they postulated mass production industries providing stable employment for, basically, white men.) Lichtman replied, that much attention needs to be paid to the definition of employee, and that an ongoing DOL study examining independent contractors should be useful (Dunlop: the Commission has full access to that study).

Commissioner Kochan stated that the panel seemed ambivalent about ADR and that it should do some more thinking about what alternative system would well serve working women. Critics of the process need to suggest design principles. Lichtman replied that she was not ambivalent about ADR: that under some circumstances it can work, but she would strongly oppose a system that deprives workers of their legal rights. To the standards mentioned in her paper she would add a fifth: to prohibit the requirement to choose the use of arbitration prospectively. Kochan asked if there is a dispute resolution system that would enhance the rights of women. The response was there are a host of union-developed committees to review matters voluntarily before going to the grievance system. But the notion of an employer-developed system to review employer sins smacks of 1930s company unionism. There needs to be equal representation on both sides.

The final panel featured presentations and reaction by law professors Clyde Summers (Emeritus, University of Pennsylvania); Katherine Stone, Cornell University; Theodore St. Antoine, University of Michigan; and Leroy Clark, Catholic University. Summers noted that he has a 120 page article on the topic that takes essentially the following positions: Arbitration as part of ADR is unacceptable to redress legal rights unless it is voluntary and agreed to only after a dispute arises. If individual legal rights are to be arbitrated, the differences with grievance arbitration should be noted: grievance arbitration has been through a sort of discovery in the preliminary investigative process, development of facts at early stages; for many top arbitrators, deciding legal rights is not their expertise: a special panel of neutrals should be provided. Because of the "repeat customer" factor, grievance arbitrators are appropriately selected by striking names (from, e.g., FMCS or AAA panels), but under a nonunion system selection should be by rotation from a special panel.

Professor Summers too cited existing arbitration required in the federal district courts in Philadelphia: three panels of lawyers give awards that are not binding but which are useful in indicating to parties their likelihood of success in court. Fewer than three percent of cases end up in court. Montana has a general unjust discharge statute that permits either party to request arbitration. The refusing party must pay attorney fees if it loses in court. But arbitration is almost never used: Summers wondered if this is "just Montana," or if it will take more time for the litigation syndrome to wear off. Summers concluded that unions can represent employees, for example in enforcing legal rights, even if they haven't achieved majority recognition status. The Commission should urge unions "to get off their duffs" and start representing employees without NLRB elections.

Professor Stone stated her view that courts have shown too much deference to arbitration. The waiver of statutory rights potentially nullifies any effort to legislate on behalf of workers. The role of arbitrators is said to be the central feature of our collective bargaining system, yet CBAs are not contracts entitled to judicial protection. Her testimony noted some of the same defects of subjecting legal rights to arbitration that were cited by other witnesses: lack of due process; no effective right of appeal; inadequate remedies; invisible decisions; no political accountability. The basis of the Steelworkers trilogy was that CBA arbitrators have a special knowledge of the law of the shop. This expertise does not apply when the subject is statutory rights.

The conventional wisdom holds that arbitration is more supportive of an ongoing relationship, faster, cheaper, etc., but there is actually little data on this. This concept of workplace democracy may not accord with reality. The preeminence of the CBA may have a paradoxical effect in that there has been a vast expansion in the preemptive scope of section 301 of Taft-Hartley in state courts (much broader than the preemptive effect given to other laws) so that unorganized workers may now have more protections for employment rights than union workers, given the explosion in new statutory rights in state law (e.g., privacy). While statutory rights have been thus extinguished, the growing weakness of many unions means that they cannot obtain strong protections for workers through collective

bargaining. Stone's specific recommendations include legislation to state that section 301 is not intended to preempt state and federal statutory protections, to reaffirm the broad interpretation of the Federal Arbitration Act's exclusion of employment contracts (and reverse Gilmer). Commissioner Freeman asked whether "second-class justice is worse than zero class justice." Stone stated she would prefer to address the problem by designing a streamlined judicial procedure, adopting methods such as small claims court processes, calendar preferences, and possible courts of special labor expertise.

Professor St. Antoine began by noting that at this late stage in the day one should not expect much imaginative novelty, to which the Chair replied that the Commission is looking for wisdom, not novelty. The witness apologized for indulging in his "own private frolic" but mentioned his involvement in the Uniform Laws Commission Draft Model Employment Termination Act project. (see my notes on the working group meeting in East Lansing, October 13, 1993, where St. Antoine also spoke.) He noted that some 60 million employees in the US are subject to the employment at will doctrine, and we are the only major industrialized democracy in that condition, flying in the face of the ILO's recommendation that all employees be subject to good cause dismissal protections. Exceptions to the doctrine are observed by about 45 jurisdictions, so that employees can at least challenge dismissals in court (employees win about three-fourths of cases heard by juries). The model act provides a sensible tradeoff by protecting employee rights while eliminating crushing damage awards. However, the act, introduced in about 12 states thus far is "not going anywhere fast." Therefore, a bold measure by this Commission would be to recommend a national just cause statute, to put us in line with every civilized country and eliminate state by state competition based on business climate.

Professor St. Antoine also urged the group to think boldly and to address employer objections that they are not troubled that employees have rights but object to the number of procedures employers must go through to justify their decisions to terminate. The Commission should consider a merger of key federal agencies, at least those (EEOC and NLRB) concerned with remedying discrimination.

In response to a dissent from Stone about the skepticism with which labor lawyers view the alleged "freedom of contract" of individual employees, St. Antoine noted that the uniform law commission rejected an amendment that would have limited the selection of arbitration to after the dispute arises. "Political reality" supports the impression that employees should be given the freedom to contract for arbitration in advance. He believes that the employer's savvy about the selection of arbitrators is overstated. (He cited someone who had chosen HIM because he was a "Saint.") He stated that we don't presently know the limits of Gilmer or the weight that will be accorded to awards under other circumstances. He urged that Gilmer be extended and Gardner-Denver be cut back, and he cited three influential Federal judges who agree with this position, including former colleague at Michigan Judge Harry T. Edwards of the DC Circuit. Judge Edwards used to be opposed to arbitration of legal rights but changed his mind (even with respect to unorganized workers) because of his experience on the bench.

Arbitration is a less hostile environment and if reinstatement is sought, it works more meaningfully if it is the result of arbitration, not litigation. Arbitration should, however have the power under the agreement to provide statutory remedies, and St. Antoine would question any agreement that says the arbitrator does not have that power. Remedies may be a matter of public policy, but he has not made up his mind on whether agreements that bar such remedies should be permitted. St. Antoine strongly agrees with Stone that the courts have gone too far with respect to 301 preemption, and that the Supreme Court handed down a simple minded, perverse interpretation. He referred the Commission to an article by Michael Harper of Boston University. In sum, in his view ADR does save time, money, and psychic wear and tear.

Professor Clark shares Summers's and Stone's skepticism about arbitration, especially in employment discrimination areas. Care should be taken if an ADR system is set up, to structure it fairly, and to consider issues such as the scope of discovery and who pays the arbitrator: if the employer pays, he doesn't really have to pay too much attention to whom he chooses. Arbitrators are often embarrassed if the employer is represented by counsel and the plaintiff is pro se. Clark would like to see research on parallel complaints traveling through the two systems, comparing costs and levels of satisfaction. He noted that the 1991 civil rights statute stated that arbitration should be explored "where feasible." He finds Gardner-Denver attractive for one reason -- if employers want a cheaper process, they should get to that result through a system that, into which employees buy. The choice should be voluntary. Employment discrimination is a qualitatively different situation. The case may involve layoffs because of the economic situation, not truly discrimination. Arbitration can be used to wash out such cases. Commissioner Voos asked if just cause legislation would reduce litigation in discrimination cases. Union-based cases would still go to the NLRB, while other federal and state law claims would be treated under the model law.

Chairman Dunlop asked the panel to think about the implications of Congress creating rights without enforcement, with backlogs growing like wildfire and the breakdown of "business as usual." St. Antoine said this was a strong argument to permit and authorize voluntary procedures. Summers responded that one reason we have so many laws and litigated cases in this country is that US employers have rejected collective bargaining. If the workers were 40 percent unionized, we'd have one-third the number of cases. The costs of litigation have been underestimated, moreover, since many lawyers won't start a case unless a recovery of at least \$25,000 is anticipated. Some legal enforcement results in transaction costs to 75 percent. Dunlop said he had been educated today regarding the cautions of moving arbitration from the field of CBAs to public rights, and asked if court sponsored "mini-arbitration" might be expanded.

Professor Stone suggested that the Commission might raise the resource problem in its reports. Arbitration can be used as an adjunct to the court system but this is not similar to private arbitration because it retains full judicial review and has none of the other due process shortcomings. A court- or statutorily-authorized arbitration as adjunct to a public process could be useful, but one subject to public scrutiny, not a privatized system. Dunlop noted that the

present system isn't capable of taking care of the volumes of cases involved without a major restructuring. He asked about the usefulness of employment tribunals such as in Great Britain, or labor courts as used in other nations. St. Antoine said that the idea of a National Employment Relations Board would simplify the process for employers, employees and unions, but it wouldn't by itself solve budgetary problems. He cited sage advice once given him that no public agency should undertake too many unpopular tasks, or it will end up with no budget at all. The woeful conclusion may be that "American taxpayers don't want to pay for civilization."

Professor Summers asserted that industrial tribunals won't solve our problems. They are more costly and time-consuming than labor courts. What about "justice?" Nothing in any other country equals the fairness of our grievance arbitration system. Summers said that the Commission is "not David:" "It isn't capable of solving massive problems without resources." The Commission, he challenged, should say that "Congress is acting like frauds." Stone, on the other hand, would explore the special tribunal route, as long as it's public and publicly accountable.

Chairman Dunlop stated that when he ran the wage and price control program, regulations provided that any case should be appealed only to one circuit court in DC -- a de facto specialization that worked very well. What about a separate circuit court for employment cases, with an appeal to that Supreme Court only on the basis of a constitutional question? Summers replied that there would be advantages to concentration in one circuit but that there would still be diversity at the trial level. A labor court system with special procedures designed for efficiency might be desirable, but it's going to cost money. St. Antoine noted that most cases get no farther than the circuit court level, and state his preference for specialization at the district level and review by generalists.

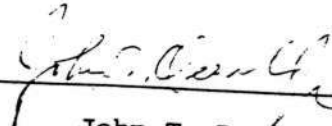
Commissioner Kochan said that the discussion had been very helpful but that everyone seemed to be seeing only a little piece of the problem. We need a more integrated solution: effective workplace representation and dispute resolution, better internal processes, development of expertise in private arbitrators, and judicial and public processes that ensure the effective enforcement of public rights. He expressed the view that it's all that complicated, but requires a return to first principles. Summers said that an effective employee representation system is required for effective internal dispute resolution processes. "Once the lawyers get their hands on it, it's a problem." He'd prefer unions, but if not, then some form of employee representation plan. St. Antoine agreed with Kochan's contention that it wouldn't be hard to train a cadre of arbitrators in statutory cases. The same types of factual questions are presented, and they would not find that much difficulty in dealing with these cases.

The Chair thanked the professors for pushing back the frontiers of ignorance and welcomed their wisdom and inventiveness to deal with these questions when the Commission reaches the stage of making recommendations.

The discussion having concluded, Chairman Dunlop adjourned the meeting at approximately 4:30 p.m.

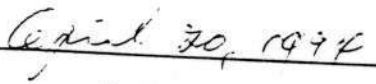
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April 6, 1994.

Certified by:



John T. Dunlop

Chairman



Date