2004

The State of External Law's Effect on the Arbitration Process. III. A Commentary on the External Law Papers and IV. Panel Discussion

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Publication Information & Recommended Citation

St. Antoine, Theodore J., co-author. "A Commentary on the External Law Papers." M. Teitelbaum and R. Vercruysse, co-authors. In *Arbitration 2004: Proceedings of the Fifty-Sixth Annual Meeting of the National Academy of Arbitrators*, by The National Academy of Arbitrators; 216-27. Washington, D.C.: BNA Books, 2005

ARBITRATION 2004
NEW ISSUES AND INNOVATIONS IN WORKPLACE DISPUTE RESOLUTION

PROCEEDINGS OF THE FIFTY-SEVENTH ANNUAL MEETING NATIONAL ACADEMY OF ARBITRATORS

Las Vegas, Nevada May 25 - 27, 2004

Edited by

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The Bureau of National Affairs, Inc. Washington, D.C.

Published by BNA Books
1231 25th St., NW, Washington, DC 20037
http://www.bnabooks.com
Printed in Canada

International Standard Book Numbers: 978-1-57018-470-3, 1-57018-470-4
International Serial Number: 0148-4176

III. A COMMENTARY ON THE EXTERNAL LAW PAPERS

MARILYN TEITELBAUM*

I think I have the best of all worlds because I can read these great papers, without having to prepare one of my own, and like all lawyers I like to talk. So, I can share my views, that sometimes diverge from both of the views just presented, particularly the view from the management perspective.

In one part of Ted St. Antoine's paper that was not discussed with you today, he says that the external law question may be a "tempest in a tea pot." My words would be similar—"much ado about nothing." I think there is a fairly easy way to deal with the problem. I, as representative of "the union," used to be the one that was always trying to bring in external law. I still do that, but now I do it in a different way. I agree that the arbitrator's authority comes from the contract and I try to make things easier for the arbitrators by not asking them to decide external law as such. But, if I want the law to be considered, I word the issue in a way that I can argue external law under the contract. For example, if it's an NLRA violation, I may define the issue as, "Did the employer violate the collective bargaining agreement by *unilaterally* changing the terms and conditions of employment?" Or if it's a discharge case involving sex or race discrimination, "Did the employer violate the just cause clause of the contract by discharging the grievant because of her sex."

In the 27 years I've been doing arbitrations, and I do a lot of them, I can't think of any case in which the issue of external law could not be handled this way. If the contract does not mention external law, Title VII, the FMLA, or any other civil rights statute, their basic ideas are already incorporated in every contract that I manage. These ideas are incorporated in a number of ways. A discipline or discharge case is normally covered by the just cause clause. Is there just cause to discharge anyone when to do so is a violation of Title VII or the ADA or the ADEA? If the FMLA is involved, "Did the Company violate the FMLA when it. . . ?" By handling the issue of external law this way, you do not put the arbitrator in the position where you are asking him or her to interpret federal law.

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There's also another provision that I've used to make arbitrators feel more comfortable. Almost every collective bargaining agreement has a clause that says that if any provision of this contract is in conflict with or is a violation of federal or state law, it is void. So to the extent any action of the company, such as a discharge, is in violation of the ADA or ADEA, it cannot be upheld under this contract provision even though the company claims that other provisions allow it. So, the issue of permitting or requiring employees or employers to violate the law does not really arise if you apply this contract clause.

Let me give you a couple other examples. Let's take the FMLA. Let's say the union has agreed to a no-fault absentee policy. But if someone is on an FMLA qualifying leave, the employer cannot charge the employee points while on that leave. And, if the company disciplined the person for reasons that included an FMLA absence, it would violate the just cause provision as well as the FMLA. So I tell the arbitrators about the FMLA while still asking them to decide the case under the just cause clause.

On NLRB issues, the most common matters involve either unilateral change or a discharge or discipline for union activities. Usually we process the case under the just cause provision or as a unilaterally (non bargained) change in the contract. Whatever the case, however, the union is not asking the arbitrator to decide whether the action violates the NLRA. The only possible NLRA violation that I am aware of that may not also be a contractual violation relates to the production of information. If there is nothing in the contract giving the union the right to information, it is not very credible to state the issue as a contract violation. There are some rumblings that the Labor Board may begin deferring charges relating to information requests to arbitration. We have so far successfully argued to the Board that it should not defer those cases, however.

Let's turn to the Americans with Disabilities Act. I used to argue violations of this Act, e.g., reasonable accommodation, disability, etc. Now, partially because the ADA has been interpreted by the courts so restrictively, I use the nondiscrimination clause in the collective bargaining agreement. My position is that the nondiscrimination clause in the contract, combined with a just cause clause, is much broader than the ADA. I approach the problem not by examining the three-pronged definition of disability in the Act (actually disabled, record of disability, perceived as disabled), but by asking such questions as, "Is it reasonable for the employer to

accommodate them in this way? Is their disability interfering with them doing their regular job? And, is there a reasonable way to accommodate them?" In an Ameren case that I had, the employer brought in ADA case law and argued that there was no violation of the ADA. The company was actually thereby asking the arbitrator to decide the case under external law. I argued that the dispute was not one of external law, it was not the ADA, rather, it was the nondiscrimination clause in the agreement, and that clause was not tied to the ADA. My argument won that case.

Furthermore, our position since the Supreme Court's decision in *Wright*[1] is to advise our union clients not to identify specific statutes in their nondiscrimination clause, but simply to say that the parties will not discriminate because of race, sex, etc. We do this because we don't want to make a federal case out of arbitration, and we do not want to prejudice the employee's court case if the arbitrator does not find for him or her. I want the employee to have another bite of the apple because a court case is not an arbitration. If I have a choice, I want to try my employment discrimination case before a jury. If I have a decent case based on just cause, I go for that just cause case. If there is some evidence of discrimination, I throw it in. If there's a lot of evidence, I certainly put that in, but I know as a practical matter that if the arbitrator thinks that there is serious discrimination, he or she will reinstate the employee.

I do not think that the "intent" of the nondiscrimination clause is ever going to have a great impact on the arbitration process for two reasons. First, these nondiscrimination clauses go back 30, 40 years and we are not going to find anybody alive, well enough, interested, and knowledgeable enough to testify to the original intent. Second, the just cause provision and the conflicts clause are going to apply to all discrimination issues regardless of the original intent of the nondiscrimination clause.

With respect to Ted's concern about the seniority case that was reversed on appeal, remember, contracts are renewed every two or three years. If the law changes you can file another grievance or the company can contend that the provision doesn't apply because the law changed. I don't have much concern about the law changing and I don't think you should either because you interpret the contract in light of then-current law.

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[1]Wright v. Universal Maritime Serv. Corp., 525 U.S. 70 (1998).

The point I want to end with is Bob's statement concerning class action relief and that the arbitrator who awarded it would go off his list. I don't want any of you to be intimidated by that promise because you will be added to a lot more lists by doing that.

IV. PANEL DISCUSSION

Moderator: Theodore J. St. Antoine, Past President and NAA Member, Ann Arbor, Michigan
Management: Robert Vercruysse, Vercruysse Murray & Calzone Bingham Farms, Michigan
Labor: Marilyn S. Teitelbaum, Schuchat, Cook & Werner, St. Louis, Missouri

Vercruysse: There are a few things that need to be discussed in light of Marilyn's comments. First, parties do write collective bargaining agreements that are explicit with regard to what the arbitrators can do with civil rights clauses. What they say is that the terms and conditions of this contract shall be applied without regard to race, color, religion, national origin, weight, height, marital status—whatever they want. If that's what the contract says, they are not reaching out and bringing Title VII into the collective bargaining agreement.

Contracts that I've negotiated since 1972 have all contained that clause. And where they do not, I try to get that changed because the union generally does not want to incorporate outside law and put themselves in a situation where we give to arbitrators, clearly and distinctly, the authority to decide discrimination issues. So the parties have the opportunity to give to arbitrators the ability to decide discrimination cases and keep them out of the courts. Unions are very careful, as Marilyn indicated, to make it clear that they're not giving up that second bite of the apple. They want to ensure that they still have the right to file their Title VII case after the arbitrator's already decided that the employer did not discriminate against the employee and terminated him or her for just cause.

Another interesting issue concerns the conflict between seniority rights and the application of Civil Rights statutes. What the employer is trying to do, for example, is make a more diverse work force because the employer has a desire for greater degrees of diversity in the workforce. If seniority consistently controls, as it

does in many of the plants in the rust belt, it's going to be a long time before we see any minority group members becoming skilled tradesmen. So the employer, on the side of trying to do what's right, is pushing the terms of the seniority provisions of the contract in order to try to get people in the workforce.

Another difficult area comes when there is conflict between seniority and the right of the employee to have a better job. An employee with a disability may want to work and may be able to work in the tool crib. But tool crib jobs generally go to higher seniority employees because they are desirable. If you have somebody who is physically disabled and you want to find work for them, that's often a spot for them, and it's a desirable solution under external law. The seniority clause, therefore, stops that employer who wants to try to do the right thing and keep the disabled employee in the work place, making good money.

Both Marilyn and I understand these conflicts and we know how to write language that gives arbitrators the signals about what authority they have. And Marilyn and I also know when to let the courts decide the issue. I think the combination of Mittenthal, St. Antoine, and Meltzer is a powerful combination for you to look at in the historical application of the law and the arbitral law that will allow you to continue to be upheld by all the courts in the world—that's look to the agreement of the parties.

St. Antoine: Before I open the floor to questions, I want to make sure that all of you, especially the non-lawyers, are aware of the two important Supreme Court cases mentioned by Bob and Marilyn. One of them, *Alexander v. Gardner-Denver,* was decided under a collective bargaining agreement in the 1970s. The Supreme Court concluded that an employee, who lost his case in arbitration, could take his claim of a Title VII racial discrimination violation to federal court. The Court essentially reasoned that all the arbitrator was deciding was the contract claim under the collective bargaining agreement and that left open the statutory claim under Title VII. To use a phrase that our friend David Feller often used—"it wasn't a case of two bites at the apple, it was two apples at which you had one bite each."

In the 1990s the Supreme Court decided the famous *Gilmer* case involving a non-union situation in which a stock broker agent had signed an agreement with his employer that all disputes would be decided finally by the arbitrator, including statutory claims. When the employee tried to take an age discrimination directly to court, the employer argued successfully that he was precluded from going

to court because he waived the statutory right to do so. The Court then permitted the arbitrator to decide both the contract claim and the statutory claim. What Bob is pointing out is that parties can write their contracts differently and indeed, in the subsequent *Wright* case, the Supreme Court held that a union might be able to waive an individual employee's right to take his or her complaint to the courts, but to do so, the waiver had to be "clear and unmistakable." It's my impression that most unions are probably not going to enter into any such waiver because they are fearful of the political consequences, e.g., making their black members feel they are somehow being deprived of rights they otherwise would have. Or, as Marilyn alluded to, unions believe that employees should have a chance to get before a judge and jury.

I do wonder whether unions, perhaps with some employers' help, couldn't be persuaded to give up the right to go to court on behalf of their constituents or surrender the right of bargaining unit members to go to court in return for some other employee benefit. Bob pointed out that it costs something like $150,000 or more to litigate a civil rights case, and on the coasts it's more than $200,000. That's a lot of money. Why haven't unions thought more imaginatively about being prepared to waive the rights of the employee to go to court clearly and unmistakably and letting the arbitrator decide it in final and binding fashion as arbitrators do with most other matters? That would be a nice bargaining chip for other benefits for the bargaining unit. I do wonder how often it is an advantage to have that second bite at the second apple. When Mr. Alexander got to federal court, he lost. The arbitrator's decision, in effect, was seconded by the Federal District Court. I would ask both in terms of the conservation of resources and the greatest good for the greatest number, whether it isn't a mistake to insist on always allowing employees to have a second bite at the apple.

Teitelbaum: It's not clear yet to me and I don't think it's clear in the law that if the unions clearly and unmistakably agreed to waive those rights, the employee would be precluded from going to court. Let's say that an arbitrator did find that an employee was discharged because of race. If the arbitrator does not have authority to award the kind of damages that the employee could obtain under Title VII, I'm not sure that the waiver would stand up.

I don't want to prejudice the rights of the employees to go to court for a variety of reasons. First, although we have discovery in arbitration, we don't have the kind of discovery that the employee

has when he or she goes into court. And there are other issues. Arbitration gets the case done faster, but the employee does not have the same damage potential as a court decision.

I would like to go back to my earlier statement about contract language and external law. Is there anyone in the audience who believes if a person was discharged because they were black, that that would not violate the just cause clause? So that takes care of all your discharge/discipline issues. If you found a clause that was in violation of federal or state law and there's a clause in the contract, that anything in violation of federal or state law is void—is there anybody here that wouldn't void out something in violation of federal law such as a no-fault absentee policy applied to FMLA qualified leave? You just don't have this problem if the advocates present it to you correctly. Unfortunately, it looks like a lot of them present it to you "as whether there is a violation of the NLRB or of Title VII." That's not the question.

St. Antoine: Let's get the audience involved. Would you please move up and use the microphone and announce yourselves?

From the Floor: Is there any agency that would facilitate the kind of negotiations that would lead to some sort of consent on the part of the parties to have the arbitrator deal with these things dispositively?

Vercruysse: I serve on the EEO's mediation and arbitration committee in the Michigan area and one of the things we're talking about is trying to get early resolution of discrimination claims by referring them to mediation and also talking about arbitration as another way of resolving those claims.

From the Floor: How about language making the arbitrator's decision final and dispositive? The EEOC will resist that.

Vercruysse: I think we need to work on the EEOC. Marilyn and I both participate in the ABA EEO committee and I participate in the NLRB Developing Labor Law Committee. I think all of us have an obligation to talk about this as a concept that we can work on to get more inexpensive justice. The only thing that we have to make sure of is that the quality of justice stays at a high level.

From the Floor: And that there's full relief.

Vercruysse: Yes. That's why I think the due process protocols that were developed are so important to this concept of allowing arbitration to take over and have a more important role to play in the resolution of the discrimination aspect of the disputes that arise.

From the Floor: Do you recommend it to your employers?

Vercruysse: No. I like the idea of having three judges and then the opportunity to appeal it to the Supreme Court if somebody makes a mistake of law. I know that this is a topic that's being talked about all the time.

From the Floor: I want to stir the pot a little more here. I worry about judicial review in the courts. Take a case where an arbitrator is empowered by the parties to apply external law and then hands down an award. The losing party files in court and raises the now judicially engrafted ground for vacating awards under section 10 of the FAA, i.e., manifest disregard of the law. I think arbitrators should be aware of the fact that if you accept that authority to interpret external law, you may also be allowing the courts to apply a different and a higher standard of judicial review. Of course, the subquestion is this: If you are going to interpret the law because you've been empowered to do so, do you interpret the law as written by the Supreme Court or by the Circuit Court of Appeals in which you're sitting and hearing the arbitration?

St. Antoine: The famous footnote 21 in *Alexander v. Gardner-Denver* may apply here. The footnote, which has been followed by many federal courts, says that if the arbitrator's decision has followed fair procedures and if the arbitrator knows what he or she is doing in terms of the law, that award can be admitted to the federal district court in a subsequent trial and given "great weight." While it isn't dispositive technically, quite a few courts have taken advantage of that footnote and have given great weight to the arbitrator's award on the discrimination claim.

From the Floor: With all due respect, I wrote the only amicus brief in favor of deferral of arbitration filed with the Supreme Court in *Gardner Denver.*

St. Antoine: Maybe you won something in 21.

From the Floor: Footnote 21 may be the result of the brief that I filed. That still, I think, does not reach the issue of the manifest disregard standard, which increasingly the circuit courts are beginning to apply and which the Supreme Court has yet to talk about since *Wilko v. Swan.* It's an open season.

Teitelbaum: I agree with you. That's just another reason not to incorporate specifics on the law into the contract. If the arbitrator tries to apply the ADA, for example, he or she is likely to make some serious mistakes and get the decision reversed. I agree with you.

From the Floor: I question whether a union has the authority to bargain a provision requiring the employee to submit their civil

rights claim to arbitration. I think that it is discriminatory for a union to condition an employee's waiver of that right on his or her right to participate in the grievance procedure.

Teitelbaum: I don't think that there's any way that we could put a clause in the contract that says the employee is obligated to do it. But what we have is a grievance arbitration procedure, in which employees can bring all the grievances they want to bring under the contract. The way I read *Wright,* I don't think that a collective bargaining agreement is ever going to be held to waive the individual employee's rights to go to court on Title VII claims.

Vercruysse: If we take a look at what's happened in *Gilmer,* the Supreme Court has said very clearly that there you can have arbitrators decide statutory rights as long as they've been given the authority to give the remedy. If you do the same thing under a collective bargaining agreement, and I agree that we shouldn't do that, arbitrators are probably going to have that authority to decide statutory issues and the Supreme Court will probably uphold their decisions because arbitrators just don't get reversed anymore. The only time you can really get an arbitrator reversed is if you can show fraud, if you can show that the arbitrator was related to one of the parties or didn't disclose a prior professional relationship with a party. In terms of interpreting the law, maybe it makes sense that if an arbitrator absolutely disregards the law and he's been given the authority to interpret the law, that his award should be subject to being overturned because the parties didn't bargain for the arbitrator ignoring the law.

St. Antoine: Let me get this word in. I think all three of us are in agreement that the Supreme Court has not squarely decided the question of whether a union could clearly and unmistakably waive the right of an individual employee to take a discrimination claim to court, leaving only the arbitration procedure under the collective bargaining agreement as the sole resort.

From the Floor: I thought the Seventh Circuit came in on those other issues since then.

St. Antoine: I don't know of any such decision. In any event, it's clear that it is an issue that the Supreme Court has not resolved. It is also fair to mention that my fellow panelists have agreed, somewhat to my surprise, that unions shouldn't do it in any event. For me that remains an open question. Remember, the union is always subject to the duty of fair representation. I think that unions are going to be very sensitive to the desires of their African-American and female members and they're not going to waive any

such rights without sounding out those important constituencies. I also believe the Supreme Court's original *Alexander v. Gardner-Denver* decision was influenced by the Court's suspicion that the unions of the early 1970s might not be quite as vigorous as they should be in the pursuit of discrimination claims based on race and gender. I think it is rather anomalous that the courts should let an isolated individual employee make an agreement with an employer to waive all those statutory rights but deny a union, with much more equivalent bargaining power, the capacity to do so.

From the Floor: The Railway Labor Act, unlike the National Labor Relations Act, does not have a religious objector shield for union security provisions. I have a union shop agreement and a Seventh Day Adventist who does not pay union dues. The union has cited him and asked the company to terminate him, and the company refused to terminate him. The provisions of the union shop bargaining agreement providing for arbitration say that the only question before the arbitrator is whether the employee violated the union shop agreement and if the arbitrator finds that there is a violation of the union shop agreement, the arbitrator is to direct the company to dismiss the employee. Ms. Teitelbaum, what is the loophole in that case, because you're not dealing with just cause. The employee has counsel, the union has brought the action before the arbitrator saying the arbitrator is limited to the interpretation of the union shop agreement

Teitelbaum: If I were on the employee's side, I would look for things like a clause that said "anything that's in conflict with federal or state law is void" because that would violate the religious discrimination provision of Title VII.

From the Floor: But that would be outside the parameters of the union shop agreement.

Teitelbaum: Correct, but if the union shop agreement as applied to this situation is unlawful, that portion of the union shop agreement would be void under any provision that's in conflict with federal or state law.

St. Antoine: As arbitrator, I apply that union shop clause and let the parties worry about whether they can get it enforced in court.

From the Floor: Would you foresee a situation where motion practice could become very expensive, specifically summary judgment type motions, which essentially could undermine the whole meaning of labor arbitration and that the grievant would have a day in court?

Vercruysse: That happens time and again in individual arbitration cases. If you do a case before the NASD, for example, involving an employee who works as a salaried employee and you enter into motion practice, it saves both parties a considerable expense if there's no way under the law that the person can proceed. Arbitrators, like judges, are loath to extinguish the right of a plaintiff to proceed to a full trial. So the case has to be very clear for you to be successful in that motion practice. Quite frankly, I think motion practice doesn't undermine arbitration. It reinforces arbitration because the purpose of arbitration is to resolve disputes and this is a way of resolving a dispute in a less expensive while still fair fashion.

From the Floor: Do you think it overlegalizes labor arbitration?

Vercruysse: It wouldn't overlegalize because you've been asked to apply the law. As an arbitrator of a collective bargaining agreement, you're not asked to apply the law and give legal remedies; you're asked to reinstate employees, maybe give them back pay. You usually don't give them punitive damages or attorneys' fees. If they give you authority to apply the federal or state law, you would have that authority and so you would be asked to do more legalistic things. But, be careful of what you ask for, because you may get it. The point is, if you got new remedial powers, we would start taking a second look at arbitrators' decisions to see if they misapplied the law. I'm conflicted there. I don't like to appeal arbitrators' decisions because arbitration, in my mind, is final and binding. I may threaten to appeal from time to time just to make sure arbitrators know I can be serious. It's just not what should be done in the normal course of events. It would take an extraordinary event, in my mind, to usurp that principle.

From the Floor: My sense is, at least with the individual employment arbitration, the claimant walks in pretty well prepared by the attorney to understand that this particular procedure is parallel to that of federal court and indeed they could lose on summary judgment. I think the union might have quite a burden if indeed it would agree to such a provision because I think it's going to be difficult to explain to the grievant that the entire case could be dismissed totally on the record.

Teitelbaum: I'm not sure that we will all start doing summary judgment. Usually when you're in court, it's the company trying to do the summary judgment to keep you from the jury. But I agree with Bob. We're going to transform these simple quick arbitrations into complex litigation with expensive discovery. I spend huge

amounts of time when my plaintiffs' discrimination cases go to court, with discovery, depositions, etc. It's just going to be a huge burden and I am going to have to do my arbitration cases differently. Let's be practical: arbitration costs the employee nothing. The union pays for it. If the union has to arbitrate an employee's discrimination case as it would be if tried in court, the costs would be prohibitive.