DESIGNING AN IDEAL CONFLICT RESOLUTION DEVICE FOR DISCRIMINATION GRIEVANCES

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A discrimination grievance is a claim alleging discrimination on the basis of race, sex, religion, age or any other protected category. For the purposes of this paper, a discrimination claim will include race and sex claims only. A discrimination claim can arise under contract language and can be pressed through the nondiscrimination clauses or other relevant substantive clauses of the collective bargaining agreement which are allegedly violated. It is also the case that the person may have a statutory basis to his or her employment discrimination claim, under Title VII of the Civil Rights Act of 1964, under the Equal Pay Act of the Fair Labor Standards Act or under the Age Discrimination in Employment Act. It is also the case that this type of claim can be brought under the National Labor Relations Act using the duty of fair representation doctrine.[1]

In a 1974 Supreme Court decision entitled *Alexander v. Gardner-Denver,*[2] the court established the fact that an employee's statutory rights exist independent of his or her contractual rights. In this case, the Supreme Court ruled that an employee's prior submission of a claim to arbitration would not preclude the employee from being awarded a trial *de novo* under Title VII.

The *Gardner-Denver* case generated much concern among both labor and management groups. The fact that an employee would be granted "two bites at the apple" was viewed as a "no win" proposition for employers. From the individual's point of view and in terms of maximizing the values behind the civil rights statutes, the decision was lauded. In terms of what this would do to the process of arbitration and the substantive holdings of arbitration cases, employers and, to a certain extent, unions expressed concern. From the union's point of view, the decision was problematic at best. Although many unions approved of it because it granted more avenues of redress to the workers they represent, many resented it because of the possibility of prolonged appeals of arbitral decisions.

To address this topic, I will pose four questions. First, what elements are desirable in a conflict resolution device for this type of grievance? The most favored means of conflict resolution of contract disputes in this area has been arbitration. However, recently, there has been a great deal of litigation as individuals are beginning to exercise their statutory rights under external laws.

Second, what is the institutional interest of each party, the individual employee, the union, and the employer, in resolving equal employment claims? This may provide some insight as to what is an acceptable conflict resolution device for the parties involved.

Third, how effective is arbitration in resolving this type of claim? This evaluation of the effectiveness of arbitration will be based on the data on the frequency with which the arbitral holding is reversed and reviewed. The data come from a survey which Professor Lamont Stallworth of Loyola University and I conducted on the impact of *Gardner-Denver* in 1983.[3] This provides us with an idea of the amount of impact of *Gardner-Denver.* Effectiveness is defined as producing a result which most closely approximates the result under the statute. Thus, arbitration is considered effective if the arbitrator's decisions are not frequently reversed, assuming they are reviewed. Arbitration is considered ineffective if there is a high proportion of the cases reviewed which are reversed.

Fourth, what are the policy suggestions which have been made to accommodate this new development of "two bites at the apple?" These range from changes in the arbitration hearing to a signed waiver by the employee.

I. WHAT ELEMENTS DO WE WANT IN A CONFLICT RESOLUTION DEVICE?

This discussion can be broken down into the elements that the parties might generally want in a conflict resolution device in general and those which may be specifically desirable in a conflict resolution device for equal employment claims. The traditional elements desired in a conflict resolution device are that it is final and binding, inexpensive, fast, and voluntary rather than coercive in nature.

The first element which is important is finality, the nature of the decision as binding. Under the *Gardner-Denver* doctrine, it is no longer the case that arbitration provides this for equal employment claims. Historically, and under labor law, arbitration was very strong along this dimension.

Another criterion for evaluating a conflict resolution device is cost. Most people favor a less expensive conflict resolution device. On this dimension, arbitration ranks rather well, since although it is not cheap, it is less expensive than prolonged litigation. It is not as inexpensive as an EEOC case which costs the charging party nothing. There may be other costs, such as psychological and time costs, which are substantial to any charging party, but there are not direct costs.[4]

Another important element in a conflict resolution device is speed. On this dimension, arbitration ranks very high. Here again, although it is slower than the parties would like, it is quicker than an EEOC or court result.

An element which is also important is the voluntary nature of the process. This is the great advantage of arbitration: the parties can fashion their own relationship over time and can control the selection of the arbitrator. This voluntary nature of arbitration, as opposed to the coercive nature of litigation is what Congress was trying to maximize when it passed the NLRA supporting the collective bargaining process and the practice of arbitration as the most favored conflict resolution device. This quality implies that there will be a certain amount of acceptability to the parties, even if one party or the other does not agree with the neutral's decision in any one specific case.

The above are probably elements one would desire in a conflict resolution device in general. What are the elements one would want in a conflict resolution device specifically for equal employment claims?

One of the elements which is critical for equal employment claims is the acceptability to the grievant. After all, if the grievant finds the process acceptable, it reduces the likelihood of appealing to the EEOC and to the courts. It is also possible that if the grievant finds the process acceptable to him or her, that the decision may be acceptable to him or her also. This critical quality has led to many suggestions for innovations in the arbitration process, such as the grievant having third party status, having his or her own counsel, or having a voice in the selection of the arbitrator.[5] Although the feeling of the grievant toward the process is important in any type of claim, under labor law it is of greater importance that labor and management find the procedure acceptable than that the grievant does. This is largely due to the deferral policy which exists in labor law. Deferral means that the chance of an individual to appeal is small.[6]

Under equal employment law, and indeed under some other statutes, such as OSHA, the individual is elevated to a status more nearly equal to the two parties. Since the statutes protect individual rights, if the individual is dissatisfied, he or she may shop around for a better forum, or for a forum where he or she expects a different result.

Another element is the amount of procedural fairness. This is particularly important where the aggrieved individual does not have a great deal of confidence in the process. What the parties like most about arbitration, its informality and its lack of reliance on strict rules of evidence, are the aspects which most worried the Supreme Court in *Gardner-Denver*. The court viewed these aspects as weaknesses from the point of view of protecting the individual's rights.

Finally, the quality of the result is important. In a claim involving race or sex discrimination, one arguably should favor a result which maximizes protection for the individual who is wronged. In other words, the result should approximate as closely as possible the protection afforded by the law. Clearly, the implication of the Court's decision is that it is willing to trust the EEOC or the courts more than labor and management (and arbitrators) in the area of protecting the civil rights of black and female employees. On this dimension, arbitration would rank lower generally than litigation or filing an EEOC suit due to the arbitrator's scope and competence, as well as to certain structural and procedural aspects of the hearing.

The criteria by which we can judge whether arbitration is equal to the courts or other fora in terms of quality of the protection of the individual are contained in footnote 21 of the *Gardner-Denver* decision. These were enumerated in the course of the Court discussing how it would decide the amount of evidentiary weight to be accorded an arbitration decision. These are some of the relevant factors which were laid out in footnote 21, which the court considers important:

1.) To what extent does the contract language conform to Title VII?
2.) To what extent does the arbitrator have special competence?
3.) To what extent is the record adequate in regard to the issue of discrimination?
4.) To what extent is there procedural fairness in the arbital forum?

SUMMARY

On balance, arbitration is stronger on many dimensions such as speed, cost, and the voluntary nature of the process. Arbitration is weakest in terms of the quality of the result, the amount of procedural fairness, the acceptability to the grievant and, since *Gardner-Denver*, the element of finality. The question remains: Is arbitration a sufficiently good forum and for what type of case? Since the quality of protection and procedural fairness may be a problem with one type of discrimination grievance more than with another, it may be useful to look at the empirical evidence presented later in this paper to see how important this failing is.

One point that becomes immediately clear is that there is a trade-off between some of these elements. Thus, to the extent that one achieves a better quality result, one may have to do this by investing time and money in the process, i.e., move toward litigation. To the extent one is willing to compromise on maximizing the individual's protection (quality), one can achieve a faster, cheaper process. There is another obvious fact which emerges from this: That is the elements which one party would like are not the same as the ones another party would like.

Thus, the preferences are not homogeneous. It may be useful to discuss the institutional interests of labor, management and the individual grievant.

II. WHAT ARE THE INSTITUTIONAL INTERESTS OF EACH PARTY?

First of all, the interest of the individual is probably best served when the individual can maximize his or her chances of winning. In other words, the individual, such as Harrell Alexander, would want to have access to as many different fora as possible, such as arbitration, the EEOC, and the courts. The individual is interested in the substantive finding in the case, i.e., they seek an outcome which favors them. Although their case may be argued in lofty legal terms, such as preserving due process or preserving the integrity of statutory over contractual rights, the bottom line for the employee is: Did the arbitrator (or the EEOC or the court) find for me or against me?

Alexander v. Gardner-Denver is a case in point. It is fairly obvious that if Harrell Alexander, the aggrieved employee in the *Gardner-Denver* case, had been satisfied with the outcome of the arbitration hearing, i.e., he had been reinstated, he would not have been motivated to raise such erudite legal arguments about his right to his day in court and his right to statutory rights independent of contractual rights. Thus, it is not always the case that an individual wants to maximize the number of fora just for the sakė of it. In fact, an individual would stand to lose if a higher forum reversed what was a lower decision in his/her favor. The interest of the individual is to have access to multiple fora in order to gain a positive outcome at some other level. This is not the only consideration however. The individual wants a fast and inexpensive resolution of the problem, not a positive outcome at any cost.

What is the interest of the employer? The employer generally has an interest in limiting the number of fora through which the claim may be pressed. This is to limit the employer's responsibility and to reach a final resolution of the claim quickly. After all, if the employer has "invested" substantial amounts of effort and money in arriving at the original

outcome (the arbitral decision), the employer may not eagerly embrace yet another review. This may be particularly true where the original outcome was in the employer's favor.

One fact becomes clear: When a case moves from the arbitration forum to the EEOC or court forum, the substantive standards may also change. The court was well aware of the differing substantive protection for the individual under arbitration and under law. To put it briefly, the relevant statute, in this case, Title VII, contains more extensive and thorough protections from discrimination than the provisions of the collective bargaining agreement generally do. It may be easier for an employer to sustain a dismissal or the application of a suspect personnel practice under the language of a contract than under the more strict standards such as the effects test which exist under equal employment case law.

Finally, what is the union's interest? There is no simple answer to this. In any one case, the union's interest may be the same as the individual's: to provide as many different fora as possible through which its members can get a satisfactory result. However, in many cases, there may exist no harmony of interest between the employee and the union. In the extreme cases, the union may be a co-defendant. Or, alternatively, the union may have an institutional interest in settling a particular case, as one among many unsettled cases. It may not want to take the case all the way to the Supreme Court. In fact, the union's pursuit of a particular case may be politically unpopular with its majority white members. Most of the time, unions would favor the expediency of an arbitration solution. They may feel that this should be the final resolution of the conflict since they have probably invested a fair amount of their resources in the arbitration. The more liberal unions may share the same values as the individual by wanting to pursue the greatest number of avenues.

III. EFFECTIVENESS OF ARBITRATION: EMPIRICAL RESULTS:

A. Sample

This study was done in the summer of 1981 based on a survey to a random sample of ABA attorneys in the employment and labor law section. This list was supplemented by a list of labor union attorneys employed directly by labor unions. There were 659 usable surveys. The response rate was 33.2 percent for a 12-page survey. The respondents reported 1761 unique discrimination grievances or claims.

B. Factual v. Legal Claims

One of the first questions which can be answered by looking at the data is, what is the composition of complaints? It can be argued that arbitration was extremely suitable for cases involving factual claims.

Some scholars have made the distinction between cases involving a factual claim of discrimination and those involving issues of law. An example of a factual claim would be a black employee who claims that, but for racial discrimination, he or she would have obtained a bidding or upgrading opportunity. This might involve a claim that the white who got it was not necessarily more well-qualified, using the standards set out in the contract, such as seniority and qualifications. In fact the claim might be that the white employee was less qualified. However, it involves only evidence as to the facts in the case. (Often with this type of case, racial discrimination is not raised as an issue at the hearing; nor is there a claim of a violation of the nondiscrimination clause. The issue of discrimination may be raised much later in the process.)

A case involving an issue of law might involve the same facts but where the employee was claiming that the seniority and posting and upgrading provisions of the contract under which he or she was applying for the opening were unlawful. This type of case occurs where the case law is sufficiently contradictory or unclear, such as the conflicting appeals court rulings regarding pregnancy in the pre-*Gilbert v. G.E.* era. The notion of cases involving issues of law is not entirely academic. After all, there have been many traditional personnel and labor relations practices such as testing, seniority, personnel policies regarding pregnancy leave and pregnancy disability, which have been challenged under the civil rights legislation. Many have been struck down or have been partially revised on the basis of their being discriminatory. The latter type of case involves an issue of law and some scholars have suggested that this type is unsuitable for arbitration for the very reasons that the court enumerated in *Gardner-Denver*.

It is the case that 84 percent of the cases (or 1481) are factual claims. Only 6.6 percent or 117 of them involve an allegation of illegality of

contract. Only 6.3 percent or 111 cases were reverse discrimination cases. Ten percent or 189 cases out of a total of 1898 cases were class action suits. This total (1898) is different from the total 1761 of unique cases. This is because a claim can be classified as two different types of claims.

What this composition suggests is that arbitration may well be a suitable conflict resolution device for the bulk of claims, given that the large majority of arbitration claims involve a factual dispute. Arbitration is not suitable to resolve issues in which the law is unsettled or in which there is a question about the legality of the contract.

C. How Much Review or Reversal is There?

The second question we can answer by looking at the data. How valid were the concerns of the parties about a great deal of review by the EEOC and by the courts and moreover about widespread reversal of arbitral decisions? There are two different fora in which the case may be heard besides arbitration: the EEOC (or the relevant state agency) and the courts.

Arbitral decisions on employment discrimination claims can be reviewed or reversed in either forum. The amount of review and reversal is a way of measuring impact. If there is much review and very little reversal, the impact is *procedural.* If there is a large proportion of cases which are reversed, the impact is *substantive.* It was this latter type of control which the parties worried about losing.

1.) Review and Reversal by EEOC: Of 1761 discrimination claims, 27.4 percent of them or 484, were reviewed by the EEOC. Of the 484 cases which were reviewed, 77 of them or 15.9 percent were reversed by the EEOC.

2.) Review and Reversal by the Courts: Of 1761 discrimination claims, 307 of them or 17.4 percent were reviewed. Of these, 21 or 6.8 percent of them were reversed.[7]

However, to put the chance of reversal in some perspective, it may be useful to ask: What is the chance of reversal, not of those cases which have been reviewed, but of all discrimination cases. Of the total of 1761 cases, there are 21 reversals by the court—or a 1.2 percent reversal rate. In other words there is only a one out of a 100 chance of a reversal by the court. Of the 1761 cases, there were only 77 reversals by the EEOC or a 4.4 percent reversal rate. In other words, there is only a one out of 25 chance of reversal by the EEOC.

3.) Conclusions: It has been shown that there is a high review rate but a low reversal rate. One can tentatively conclude from this that arbitration is a fairly suitable conflict resolution device for equal employment claims, inasmuch as the arbitral results are not being reversed. There is not as much of a substantive change as the parties had feared.

D. How do Labor and Management View the Role of the Arbitrator?

One of the issues raised by the *Gardner-Denver* case is whether the arbitrator should adhere to his traditional role of interpreting a contract or to adopt another role of applying external law. Meltzer's view is that the arbitrator ought to base the decision on the contract, not on the law. Howlett's view is that an arbitrator can incorporate external legal standards into the decision. The results from the survey were that 83 percent of the attorneys viewed the role of the arbitrator as Meltzer does and only 17 percent espouse Howlett's view. Therefore, we can see that the overwhelming majority of the parties, as indicated by their attorneys' responses, favor a traditional view of the role of the arbitrator. Given this, the probability of the parties reconciling their contract language with external law or expanding the scope of the arbitrator's authority to include statutory standards is relatively small.

IV. WHAT ARE SOME POSSIBLE RECOMMENDATIONS?

A. Changes in the Proceeding Itself:

There have been numerous other alterations to the traditional arbitration hearing which have been proposed, mostly inspired by the court's concern about footnote 21. These include: 1.) the participation of the aggrieved individual in the process, through selecting an arbitrator; 2.) allowing the grievant to bring his or her own counsel; and, 3.) changing the hearing process, through applying strict rules of evidence or requiring a court reporder or tape recording of the hearing. The data gathered suggest that there is considerable support for these innovations in theory, but few parties have adopted these changes in practice.

B. Changes in the Selection of the Arbitrator:

Two of the listing services for arbitrators, the American Arbitration Association and the FMCS, keep a list of arbitrators who have special competence in the area of Title VII law. (The AAA service also has recommendations for a special procedure for statutory-related grievances. This involves modifications such as the possibility of each party having counsel, the possibility of discovery and the possibility of a stenographic record. It also has a recommended waiver form for the parties to sign for cases involving statutory-based claims.) Such modified selection devices may help to address the court's concern about the competence of the arbitrator.

C. The Use of a Waiver:

When the *Gardner-Denver* decision was first issued, there was much interest in the use of waivers. This was because of the feeling on the part of the employers that the "two bites at an apple" posed insurmountable problems to them because of the lack of finality. Since employers (and unions) can not surrender the rights of the employees, they could at least make certain that they did not "waste" the employer's or union's money in claims which the grievant was intending to pursue through external channels in any case.

A waiver is a signed statement that an individual is submitting his or her claim to a certain forum in exchange for not taking the case to other fora. Some civil rights advocates consider the use of a waiver to be relinquishing an employee's legal rights under the statute. In the opinion of others, it is a way of getting a final resolution. It might appear at first glance that a waiver combines the best of both worlds, the efficiency of arbitration and the individual protection implied by conformity to external legal standards. There is some empirical support that this latter quality is present by dint of the low reversal rate of arbitral outcomes found in the Hoyman and Stallworth studies cited earlier. However, it is premature to make firm conclusions about this, given some of the weaknesses of waivers.

One question which was asked of labor and management attorneys in the aforementioned study was whether the respondents would favor a statutory amendment which would preclude an individual claimant who "knowingly and voluntarily" permitted his or her claim to be determined in arbitration from subsequently seeking recourse under Title VII.

Seventy-eight percent of the respondents favored this amendment. There are interesting labor and management differences on this issue: 91 percent of the management respondents support this and only 45 percent of the labor respondents support it.

One possible innovation is to have the grievant sign a waiver in exchange for third-party intervention status. According to the data in the above study, the support for this would be overwhelming: 71 percent of the respondent attorneys would support this.

It is questionable how well waivers will withstand legal scrutiny. Many civil rights advocates oppose waivers on the grounds that any waiver of a discriminatee's rights violates the intent of such statutes and thwarts compliance with these anti-discrimination statutes. There is the further problem that even if a party had knowingly and willingly signed a waiver, he or she might later claim that he or she did not know what had been signed. If recent cases are used as an indicator, it may be observed that there is some reluctance on the part of the courts to uphold waivers categorically. The criterion which the courts use in deciding whether to uphold a waiver is how good is the protection of the individual's rights.[8]

SUMMARY

Using the criteria enumerated above, arbitration emerges as a viable means of conflict resolution for discrimination grievances. This is true notwithstanding the fact that *Gardner-Denver* eroded the finality of arbitration. The Court in this case suggested there were weaknesses in terms of the quality of the result and the degree of procedural fairness. Notwithstanding this, the data suggests that there are very few reversals of arbitral decisions by the EEOC and the courts, even though there is much review. In other words, the EEOC and the courts do not find too much fault with the substantive determination of awards. The point is that the large majority of cases involve factual claims only. Both of these facts suggest that arbitration is quite viable for resolving conflict of certain factual claims in the area of race and sex discrimination.

THE PERSISTENCE OF THE *GARDNER-DENVER* RATIONALE

It has now been a decade since *Gardner-Denver*. It may be useful to see how well the *Gardner-Denver* rationale has endured. There has been a series of cases involving what an individual's statutory rights of review by the courts are if an arbitrator has already ruled on an issue. In all the cases, the Court has ruled that prior submission to arbitration does not preclude a statutorily guaranteed cause of private action.

The Court applied the *Gardner-Denver* rationale in each case. The Court acknowledged that arbitration is quite suitable for some types of claims such as factual claims. However, the Court stated that arbitration does not give the same degree of protection as the statute does. The first Supreme Court case establishing this after *Gardner-Denver* was *Barrentine v. Arkansas Best Freight* (450 U.S. 728, 743; 1981). *Barrentine* involved a case where an employee took his case forward under the Fair Labor Standards Act after an unsuccessful wage claim in arbitration. Barrentine was successful in having his case heard under the statute.

There are two other recent cases applying the *Gardner-Denver* rationale. One is *McDonald v. City of West Branch* (CA 6 83-219; April 19, 1983) in which a police officer was discharged and the arbitrator sustained the discharge. The officer then tried to pursue his rights under Section 1983. The Supreme Court ruled that the federal courts should hear the case, using the same reasoning as in *Gardner-Denver*. Finally, there were two companion cases arising under ERISA, *Schneider Moving and Storage Company v. Robbins* (82 U.S. 1860) and *Prosser's Moving and Storage Co. v. Robbins* (82 U.S. 1862). The issue in the latter two cases involved a multiemployer trust fund. The case was brought by the employers who sought to have the union submit a dispute to arbitration before going into federal court. The argument for this was that the dispute involved an interpretation of the contract language. The union had alleged that the employers had not paid their contributions to the fund and thus were seeking relief through the courts under ERISA in order to seek payment. The Federal District Court dismissed the suit pending arbitration and the Court of Appeals reversed and remanded the case. The Supreme Court ruled that there

was no presumption that arbitration was required for disputes between trustees of employee-benefit funds and employers, even where the matter in dispute arises under an interpretation of the contract. In so holding, the Court examined both the trust agreement and the collective bargaining agreement for evidence of that intent.

CONCLUSION

It appears that, as a legal principle of industrial relations law, the *Gardner-Denver* doctrine endures. Specifically, the Supreme Court refuses to replace the statutory protections afforded an individual with those available under the collective bargaining agreement.[9] Because of the degree of protection which is assumed to exist under arbitration, the nature of the proceeding as informal, and the scope of the arbitrator, arbitration seems to be lacking. Certainly, from the point of view of maximizing the grievant's protection, this seems to be true. In terms of empirical evidence, this author is somewhat more optimistic regarding the suitability of arbitration than the courts. However, it is necessary to be extremely cautious nonetheless. The suitability of arbitration is confined to a certain type of case involving factual claims of discrimination, and not for cases involving issues of law.[10] There is a very large amount of review activity on which an evaluation can be made.[11] It appears that, even though there has been a considerable amount of review, there is seldom a reversal of an arbitral award, or at least there are relatively few of them.

There is not as much optimism for innovations such as the use of a waiver[12] because of some of the same reasons which the courts use in frequently nullifying these. The streamlined procedure specifically for equal employment claims seems promising, and more specifically, the use of a roster of experts for potential arbitrators seems a very sensible direction to take.

FOOTNOTES

[1] Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e(1) to e(17) (1976); Equal Pay Act of 1963 of the Fair Labor Standards Act of 1938, 29 U.S.C. 206(d); Age

Discrimination in Employment Act of 1967, 29 U.S.C. 621-634 (1976); National Labor Relations Act, as amended by Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. 153, 158-160, 164, 186, 187, 401-402 (1976); See also Occupational Safety and Health Act of 1970, 29 U.S.C. 651-652 (1976) and Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001-1003. For an analysis of the effects of this external law on arbitration, see Feller, David, "Arbitration: The Days of Its Glory Are Numbered," *Industrial Relations Law Journal,* (June 1977) p. 65-95.

2 *Alexander v. Gardner-Denver,* 7 FEP Cases 81 (1974).

3 Michele Hoyman and Lamont Stallworth, "The Arbitration of Discrimination Grievances in the Aftermath of *Gardner-Denver,*" 39 *Arbitration Journal* 3 (September 1984) p. 49; Michele Hoyman and Lamont Stallworth, "Arbitrating Discrimination Grievances in the Wake of *Gardner-Denver," Monthly Labor Review,* October 1983.

4 Gleason, Sandra, "The Probability of Redress: Seeking External Support" in Forisha, Barbara, and Goldman, Barbara, eds., *Outsiders on the Inside: Women and Organizations* (Englewood Cliffs, N.J. Prentice-Hall, 1981). The costs to a female employee of filing a suit are quite high. These include the cost of lawyers' fees, time, stress, and the possibility of retaliation on the job.

5 Harry Edwards, "Arbitration of Employment Discrimination Cases: A Proposal for Employer and Union Representatives" 87 *Labor Law Journal,* (1976) pp. 265-77; Winn Newman, "Post-*Gardner-Denver* Developments in Arbitration-1975" in *Proceedings of the 28th Annual Meeting of the National Academy of Arbitrators* (Washington, D.C.: Bureau of National Affairs, 1975); Alfred Blumrosen, "Labor Arbitration, EEOC Conciliation and Discrimination in Employment," 24 *Arbitration Journal* 2 (1969) pp. 88-105; Alfred Blumrosen, "Bargaining and Equal Employment Opportunity," in *Fair Employment Practices: Summary of the Latest Developments, 1980.*

6 The Steelworkers Trilogy established this. *United Steelworkers v. American Manufacturing Co.,* 363 U.S. 564 (1960); *United Steelworkers v. Warrior and Gulf Navigation Co.,* 363 U.S. 574 (1960); and *United Steelworkers v. Enterprise Wheel and Car Corporation,* 363 U.S. 593 (1960). Also see *Textile Workers v. Lincoln Mills of Alabama,* 77 S. Ct. 912 (1957). See also the recent cases which tend to favor deferral even where individual as opposed to collective interests are involved. See *United Technologies Corporation* (39 CA 756 et al.; 268 NLRB No. 83) in which the Board ruled it would defer to arbitration in cases alleging individual as well as collective rights. In so ruling, it overruled *General American Transportation Corp.* [228 NLRB 808 (1977)] and returned to the policies set forth in Collyer Insulated Wire [192 NLRB 837 (1971)].

7 Hoyman and Stallworth, *Monthly Labor Review* op. cit.

8 *Lyght v. Ford Motor Co.,* 458 F. Supp. 137 (E.D. Mich. 1978) and *Strozier v. General Motors Corp.,* 442 F. Supp. 475 (N.D. Ga. 1977). The district court, in upholding these waivers, found that the individuals had been involved in the presentation of the case and had been provided with counsel or with access to some expert personnel. However, the U.S. Court of Appeals reversed Lyght recently, holding that the grievant had a right to have his case heard in court notwithstanding a state agency's notice that the grievant's case had been closed after an adjustment had been made. *Lyght v. Ford Motor Co.,* 54 D.L.R. 1981, p. A-8, CA6.

9 A careful reading of the Barrentine, McDonald and Prosser cases indicates the concern the Court has with the interplay between individual rights and collective rights.

10 Harry Edwards *op cit.*

11 "Judge Edwards Defends the Use of Arbitration as Better Means to Settle Labor Disputes" 107 *Daily Labor Report* (June 3, 1982) pp. A-1 to A-2 and D-1 to D-5.

12 In the *Gardner-Denver* case, the court acknowledged the possibility that there might be a grievant who might sign "knowingly and willingly" a waiver of his/her statutory rights. See *Lyght v. Ford Motor Co.* and *Strozier v. General Motors Corp.,* note 8 supra.