

WAS HARRY SHULMAN RIGHT?: THE DEVELOPMENT OF ARBITRATION IN LABOR DISPUTES

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I. EARLY JUDICIAL RELUCTANCE: *WILKO V. SWAN*

In 1952, a customer brought suit against the partners of a securities brokerage firm under section 12(2) of the Securities Act of 1933 (“Securities Act”),¹ alleging misrepresentation.² The firm moved to stay the trial on the grounds that the agreement between the parties specified that “arbitration should be the method of settling all future controversies.”³ The district court denied the motion, determining that enforcing the arbitration clause would be “[in]consistent with the policy and language as expressed by Congress in the Securities Act.”⁴ The court of appeals reversed, holding that Congress intended to favor arbitration in the Securities Act, and failed to express intent to forbid arbitration in suits brought pursuant to section 12(2).⁵ The Supreme Court, in reversing the court of appeals, concluded that requiring arbitration would deprive the plaintiff of advantages Congress intended him to have in a suit at law.⁶ The Court noted that, “[a]s their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators’ conception of the legal

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¹ 15 U.S.C. §§ 77a–bbbb (2000).

² See *Wilko v. Swan*, 346 U.S. 427, 428–29 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

³ *Id.* at 429–30.

⁴ *Wilko v. Swan*, 107 F. Supp. 75, 79 (S.D.N.Y. 1952), *rev’d*, 201 F.2d 439 (2d Cir. 1953).

⁵ *Wilko v. Swan*, 201 F.2d 439, 445 (2d Cir. 1953), *rev’d*, 346 U.S. 427 (1953).

⁶ See *Wilko*, 346 U.S. at 438.

meaning of such statutory requirements as 'burden of proof,' 'reasonable care' or 'material fact,' . . . cannot be examined."⁷

II. A CHANGING PARADIGM: SHULMAN'S HOLMES LECTURE

In 1955, Dean Harry Shulman of Yale Law School, who also served as permanent arbitrator under the collective bargaining agreement between the United Auto Workers Union and Ford Motor Company, delivered the prestigious Oliver Wendell Holmes Lecture at Harvard Law School.⁸ His lecture described the relationship between labor arbitration, productivity, and industrial relations in a large manufacturing enterprise.⁹ He noted that due to the pressure of the negotiation process, collective bargaining agreements inevitably contain areas in which disagreement between the parties is inevitable, such as seniority and discipline.¹⁰ Shulman concluded that at its best, labor arbitration is preferable to court litigation for such disputes because the arbitrator is in a position to consider the industrial relations implications of the decision and to become familiar with the parties and their specific needs.¹¹ In dealing with the most complex and deeply felt issues, Dean Shulman argued that the arbitrator's role is "creative more than interpretive."¹² Because the arbitrator is a creature of the parties, and not bound by adherence to precedents, legal doctrine, or the rule of law, he has wider latitude than a judge. He argued that "[a]nswer[s] in the form of rules or canons of interpretation is neither practical nor

⁷ *Id.* at 436. The Court determined that Congress enacted the Security Act to protect the rights of investors and forbid any waiver of those rights. While the arbitration process has many advantages in commercial controversies, the Court found that Congress' intent to protect investors' rights through the Act was better effectuated by holding the arbitration agreement invalid. *Id.* at 438.

⁸ See Harry Shulman, Dean and Sterling Professor of Law, Yale Law Sch., Reason, Contract, and Law in Labor Relations, Address at the Oliver Wendell Holmes Lecture at Harvard Law School (Feb. 9, 1955), in 68 HARV. L. REV. 999 (1955).

⁹ See *id.* at 1002. Shulman also notes that while this analysis may have a broader application, it is important to view it through the lens of a multi-tiered organization where the employer is represented and acts through "hundreds or thousands of representatives" throughout the organizational structure. *Id.*

¹⁰ See *id.* at 1005-07.

¹¹ See *id.* at 1016 (discussing the proper function of an arbitrator in the context of a collective bargaining agreement).

¹² *Id.*

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helpful. . . . In the last analysis, what is sought is a wise judgment.”¹³

According to Shulman, it is the limited nature of the arbitrator’s jurisdiction and his role as the servant of the parties that enables him to give wise answers to difficult questions of interpretation.

He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. . . . He is rather part of a system of self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective agreement. They are entitled to demand that, at least on balance, his performance be satisfactory to them, and they can readily dispense with him if it is not.¹⁴

Shulman noted that the arbitrator is expected to and should play a more active role in the process than would be appropriate for a judge because his decision should frequently be based on subtle non-legally relevant criteria.

And so, for several reasons, the arbitrator cannot simply sit back and judge a debate. He must seek to inform himself as fully as possible and encourage the parties to provide him with the information.

His choice from the more or less permissible interpretations of the language of the agreement, keeping the basic conceptions in mind, requires an appraisal of the consequences of each of the possibilities. . . . The effects on efficiency, productivity, and cost are important factors to be considered. So are also the effects on the attitudes and interests of the employees.¹⁵

After praising the process, Shulman concluded by urging the courts to let the process work without judicial involvement.

When it works fairly well, it does not need the sanction of the law of contracts or the law of arbitration. It is only when the system breaks down completely that the courts’ aid in these respects is invoked. But the courts cannot, by occasional sporadic decision, restore the parties’ continuing relationship;

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 1018. In order to play his proper role, Shulman argued, the arbitrator needs to be generally knowledgeable about the enterprise, which means that he should feel entitled to socialize on occasions and to use his private time with the parties to learn about the needs and the understandings of an enterprise. Also, the arbitrator may on occasion try to resolve a case by a form of persuasion rather than decision.

and their intervention in such cases may seriously affect the going systems of self-government. When their autonomous system breaks down, might not the parties better be left to the usual methods for adjustment of labor disputes rather than to court actions on the contract or on the arbitration award? I suggest that the law stay out—but, mind you, not the lawyers.¹⁶

III. JUDICIAL ACCEPTANCE AND MISAPPLICATION OF SHULMAN'S WORK IN THE STEELWORKERS TRILOGY

With labor arbitration thriving fifteen years after World War II, the Supreme Court reconsidered its legal status in three cases brought by the Steelworkers Union that became known as the "Steelworkers Trilogy."¹⁷ Two of the cases involved the promise to arbitrate¹⁸ and one, the enforceability of an arbitrator's award.¹⁹ All were decided for the union, and in these cases the Court announced a new policy of judicial support for arbitration. Relying heavily on Dean Shulman's article, the Court used the industrial relations expertise of arbitrators, along with the apparent success of the process, as reasons for making both the promise to arbitrate and arbitral decisions enforceable by the courts.²⁰

Its picture of the process, largely derived from Shulman's article, stressed the advantages of a private system of justice and the special competence of arbitrators:

The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, [and] his

¹⁶ *Id.* at 1024.

¹⁷ *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960).

¹⁸ *Am. Mfg. Co.*, 363 U.S. at 564; *Warrior & Gulf Navigation Co.*, 363 U.S. at 577–78.

¹⁹ *Enter. Wheel & Car Corp.*, 363 U.S. at 595–96.

²⁰ *See, e.g., Warrior & Gulf Navigation Co.*, 363 U.S. at 581 (discussing Shulman's explication of arbitrators performing functions outside of the competence of the court).

judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.²¹

While accepting arbitration agreements as judicially enforceable, the Court did not refer to Shulman's suggestion that "the law stay out" because the advantages of arbitration stem from its voluntary and private features.²²

IV. THE SUCCESS OF LABOR ARBITRATION

In attributing the success of labor arbitration to the special knowledge of arbitrators, the Court mistakenly assumed that Shulman's description of the process was accurate in the great majority of labor cases. As a permanent umpire, Shulman had an opportunity to learn about the auto industry in general and the Ford Motor Company in particular. However, most arbitrators are not that fortunate. They are chosen for particular cases by companies and unions in a wide variety of industries, and may know little if anything about the common law of the plant or the state of labor relations. It is difficult to understand how arbitrators generally can lay claim to special knowledge about industrial relations. Most arbitrators do not have prior management experience, and are unlikely to have been union officials. Additionally, they rarely have experience working at the jobs about which they are deciding. Academic experience or work as a neutral party with the National Labor Relations Board ("NLRB") or some other decision-making agency is common, but these backgrounds do not provide knowledge of the day-to-day realities of labor relations. Such experience is, in fact, quite similar to the experience of judges before serving on the bench.

The success of labor arbitration is actually attributable to its being centered in collective bargaining. Through labor arbitration, the parties continue to refine their bargaining. Their agreement takes on a more precise meaning, and issues not dealt with during formal negotiations are resolved in a way likely to

²¹ *Id.* at 582.

²² Shulman, *supra* note 8, at 1024.

recognize their interests and priorities. This process is enhanced by the system of private selection of arbitrators.

The Court and some commentators have assumed that one of arbitration's major advantages is informality, but that is not always the case. The procedures used vary, but they frequently involve presentation of cases through lawyers, oaths, subpoenas, transcripts, briefs, and carefully written awards following a common form and citing precedent.²³ Arbitration and the grievance procedure that precedes it often serve to legalize the administration of a unionized enterprise to a remarkable extent.

The collective-bargaining relationship and collective agreement give considerable power to arbitration awards. Primarily they provide the substantive standards to be applied and make the results acceptable to the parties. Because both sides develop a strong interest in the smooth functioning of the process, arbitration awards are routinely obeyed and infrequently challenged.²⁴ The other provisions of the agreement serve to protect the integrity of the process.²⁵

Understanding the success of arbitration helps to understand its limits and weaknesses. It is not a good process for effectuating legal rights, and it is not likely to be successful where the parties are significantly unequal in resources, familiarity with the process, or knowledge of the standards to be applied.²⁶ The interconnection between labor arbitration and

²³ For example, the Alternative Dispute Resolution Act of 1998 sets forth the various powers that an arbitrator has in the federal court system. *See* 28 U.S.C. §§ 655(a)(1)–(3) (2000) (listing affirmative powers of arbitrators); § 656 (applying Rule 45 of the Federal Rules of Civil Procedure to subpoenas for an arbitration hearing).

²⁴ *See, e.g., Mich. Family Res. v. Serv. Employees Int'l Union, Local 517M*, 475 F.3d 746, 751–52 (6th Cir. 2007) (reaffirming the Steelworkers Trilogy and the important role of arbitration by redefining the scope of inquiry and judicial intervention in appeals of arbitration decisions).

²⁵ For example, they limit managerial discretion to fire and lay-off, and thereby make it difficult for employers to undercut the impact of an unfavorable award through retaliation.

²⁶ The American Arbitration Association has attempted to mitigate this by formulating a Consumer Due Process Protocol, the product of a multi-year effort involving a number of legal organizations, which is designed to ensure a roughly even playing field procedurally. *See* AM. ARBITRATION ASS'N, CONSUMER DUE PROCESS PROTOCOL, STATEMENT OF PRINCIPLES OF THE NATIONAL CONSUMER DISPUTES ADVISORY COMMITTEE, PRINCIPLE 1, <http://www.adr.org/sp.asp?id=22019> (last visited Mar. 11, 2007) (“All parties are entitled to a fundamentally-fair ADR process.”) (emphasis added).

collective bargaining means that grievance systems in other situations without this feature will be vastly different.

V. SUBSEQUENT DEVELOPMENTS IN JUDICIAL ENFORCEMENT

In the aftermath of *The Trilogy*, the courts and the NLRB developed a series of rules that eroded the voluntary nature of the process and imposed on both labor and management obligations that they did not voluntarily assume. Thus, in *Local 174, Teamsters v. Lucas Flour Co.*,²⁷ the Court held that a clause in a collective agreement providing for the settlement of disputes through arbitration should, as a matter of federal law, be construed as a promise by the union not to strike over issues subject to arbitration, even where the contract did not contain a no-strike clause.²⁸ The Court rested its holding primarily on the grounds that “a contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare.”²⁹

The *Lucas Flour* decision demonstrates the Court’s willingness to use an essentially intention-defeating construction of agreements in order to pursue the policy of encouraging the use of arbitration rather than strikes for settling disputes about the interpretation of agreements. Thus the private consensual nature of the process was ignored in pursuit of a policy ostensibly based on it.

The new policy favoring arbitration was also used to overturn the Court’s earlier position that the Norris LaGuardia Act³⁰ prohibited injunctions against strikes in breach of a no-strike clause whenever the underlying issue that led to the strike was arbitrable.³¹ The Court declared that its earlier opinion represented “a significant departure from our otherwise consistent emphasis upon the congressional policy to promote the peaceful settlement of labor disputes through arbitration.”³²

²⁷ 369 U.S. 95 (1962).

²⁸ *See id.* at 104–05.

²⁹ *Id.* at 105.

³⁰ 29 U.S.C. §§ 101–15 (2000).

³¹ *See* *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 252–53 (1970) (reversing its ruling in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962), which precluded federal courts from enjoining strikes in breach of no-strike agreements).

³² *Id.* at 241.

It was soon apparent that the Court's policy favoring arbitration needed to be harmonized with the jurisdiction of specialized agencies, such as the NLRB and the Equal Employment Opportunity Commission. Issues about the meaning of the National Labor Relations Act ("NLRA")³³ and Title VII³⁴ were regularly embedded in labor grievances. For example, in determining whether an employee was properly disciplined, an arbitrator might be required to decide under a just cause standard whether the action that comprised the basis of the discharge was protected by section 7 of the NLRA or Title VII of the Civil Rights Act.³⁵ Overlaps with the NLRA were particularly common and needed to be harmonized with the Court's earlier decisions stressing the unique competence of the Labor Board to interpret its meaning.³⁶

On the other hand, in deciding whether unilateral employer conduct violated the employer's duty to bargain under the Act, the Board would have to determine whether the right to take such action was granted to the employer by the management's rights clause of the agreement. Thus the arbitrator's jurisdiction might include statutory interpretation and the Board's contract determination, even though arbitrators rarely addressed statutory issues, were frequently not experts within the meaning of the NLRA, and the Board rarely interpreted collective agreements.³⁷

The problem of resolving conflicts of jurisdiction could arise in two major procedural settings: when an employer asked the Board to defer its processes pending arbitration, or when an employer requested the Board to accept an arbitrator's award as settling an unfair labor practice claim. Thus, deferment was invariably urged by employers and fought by unions. Insofar as Congress might be looked to for guidance in resolving this

³³ 29 U.S.C. §§ 151-69 (2000).

³⁴ 42 U.S.C. §§ 2000e to e-17 (2000).

³⁵ Some feel that the collective interests as recognized in the NLRA conflict with the individual interests protected by Title VII in areas such as racial discrimination in the workplace. *See, e.g.*, E. Christi Cunningham, *Identity Markets*, 45 *HOW. L.J.* 491, 560-61 (2002) (describing the potential clash between the possible waiver of Title VII rights in arbitrating under the NLRA).

³⁶ *See, e.g.*, *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346-47 (1953) (describing the broad authority of the NLRB in interpreting the NLRA).

³⁷ *Balt. & Ohio Chi. Terminal R.R. Co. v. Wis. Cent. Ltd.*, 154 F.3d 404, 410 (7th Cir. 1998) ("The arbitrability of statutory claims entails that arbitrators can decide questions of statutory interpretation . . .").

difficult issue, it seemed to favor a policy of Board decision-making whenever the NLRA was involved. Section 10(a) of the NLRA provides that the Board's power to "prevent any person from engaging in any unfair labor practice . . . shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . ." ³⁸

Nevertheless, without waiting for instruction from the Court, the Labor Board quickly adopted a broad policy of deferring to arbitration. In *Collyer Insulated Wire, Gulf & Western Systems Co.*,³⁹ the Board announced that it would refuse to proceed with cases that could be the subject of a grievance in a system leading to arbitration.⁴⁰ The Board declared:

We are especially mindful . . . [of] the policy of this nation to avoid industrial strife through voluntary resolution of industrial disputes The long and successful functioning of grievance and arbitration procedures suggests to us that in the overwhelming majority of cases, the utilization of such means will resolve the underlying dispute and make it unnecessary for either party to follow the more formal, and sometimes lengthy, combination of administrative and judicial litigation provided for under our statute.⁴¹

The dissenters argued that adding the element of compulsion to the process would hurt rather than help arbitration, and that "to construe the Steelworkers trilogy as a displacement of the Board's processes where the parties could have arbitrated a dispute under their contract is a misreading of those important decisions."⁴²

Although the Board retains jurisdiction to review the arbitrator's decision when it applies the Collyer doctrine, it does not in fact review arbitration awards.⁴³ It announced in *Olin Corp.*⁴⁴ that it would accept the arbitrator's award and dismiss the unfair labor practice charges whenever the contractual issue was "factually parallel" to the unfair labor practice issue, the arbitrator was "presented generally with the facts relevant to

³⁸ 29 U.S.C. § 160(a).

³⁹ 192 N.L.R.B. 837 (1972).

⁴⁰ *Id.* at 842–43.

⁴¹ *Id.* at 843.

⁴² *Id.* at 848 (Member Fanning, dissenting).

⁴³ *Id.* at 842 (majority opinion).

⁴⁴ 268 N.L.R.B. 573 (1984).

resolving the unfair labor practice,” and the arbitrators decision was not “palpably wrong.”⁴⁵ That the Board itself might decide a case differently does not make it “palpably wrong,” a standard met only when the award was “not susceptible to an interpretation consistent with the Act.”⁴⁶

The *Collyer* and *Olin* doctrines are now regularly applied to charges of unfair labor practices based on employer disciplining of employees for actions claimed to be protected by section 7, as well as to unilateral employer action which the union claims constitute a refusal to bargain. Their applicability to individual employee rights cases has been widely criticized by commentators who stressed the fact that NLRA issues are frequently ignored in arbitration and that arbitrators are generally not experts in its intricacies.⁴⁷ Thus, a policy developed because of the success of voluntary collective bargaining that has been used to force parties to accept a process that they have not chosen.

The separation of the policy favoring arbitration from its roots in voluntarism became clearer in 1985, when the Supreme Court announced in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*⁴⁸ that an agreement to arbitrate “[a]ll disputes, controversies, or differences” meant that arbitration was required to resolve an allegation of an antitrust violation.⁴⁹ If the reasoning of the *Wilko* case were still good law, the Court would have insisted that antitrust claimants were entitled to the benefit of a judicial determination of their claims’ validity. Instead, the Court simply recited that “‘questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration’ There is no reason to depart from these guidelines where a party bound by an arbitration agreement raises claims founded on statutory rights.”⁵⁰

⁴⁵ *Id.* at 574 (quoting *Int'l Harvester Co.*, 138 N.L.R.B. 923, 929 (1962)) (internal quotation marks omitted).

⁴⁶ *Id.*

⁴⁷ See, e.g., Douglas E. Ray, *Individual Rights and NLRB Deferral to the Arbitration Process: A Proposal*, 28 B.C. L. REV. 1, 1-2 (1986) (describing the Board's deferral policy to private arbitration as negatively impacting the individual rights protection sought by the NLRA).

⁴⁸ 473 U.S. 614 (1985).

⁴⁹ *Id.* at 617 (internal quotation marks omitted).

⁵⁰ *Id.* at 626 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983)).

The next major step in the expansion of the policy favoring arbitration, *Gilmer v. Interstate/Johnson Lane Corp.*,⁵¹ involved requiring arbitration in a dispute regarding a claim of illegal discrimination. The arbitration process to which the Court deferred in *Gilmer* was a long way from the voluntary, mutually developed grievance system that gave birth to the Trilogy. Plaintiff, Gilmer, had been required as a condition of employment to register with the New York Stock Exchange. His registration application provided “that Gilmer agree[d] to arbitrate any . . . controversy . . . arising out of [his] employment or termination of employment.”⁵² He was terminated in 1987, and brought suit in federal district court claiming that his discharge was based on his age, and therefore violated the ADEA. In response, defendant, Interstate, filed a motion to compel arbitration of the ADEA claim. The district court denied Interstate’s motion, based on the Supreme Court’s decision in *Alexander v. Gardner-Denver Co.*⁵³

The Supreme Court held, however, that Gilmer was required to arbitrate his discrimination claim. It based its decision in part on the 1925 Federal Arbitration Act,⁵⁴ which made promises to arbitrate enforceable. It did not even refer to the conclusion adopted in *Wilko* (and reiterated in *Gardner-Denver*) that arbitrators are not well equipped to pass on legal issues under specialized statutes. The Court treated as settled law the fact that the policy favoring arbitration permitted, indeed required, that statutory venues be bypassed. Its reasoning was hardly persuasive: “[B]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”⁵⁵

The Court expressed no doubt about the ability of arbitrators to deal adequately with statutory rights and insisted that, unless a statute specifically prohibited an agreement to arbitrate, one should be enforced:

We also are unpersuaded by the argument that arbitration will undermine the role of the EEOC in enforcing the ADEA. An

⁵¹ 500 U.S. 20 (1991).

⁵² *Id.* at 23 (first alteration in original) (internal quotation marks omitted).

⁵³ 415 U.S. 36 (1974).

⁵⁴ 9 U.S.C. §§ 1–16 (2000).

⁵⁵ *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors*, 473 U.S. at 628).

individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action. . . . Moreover, nothing in the ADEA indicates that Congress intended that the EEOC be involved in all employment disputes.⁵⁶

The Court in *Gilmer* distinguished *Gardner-Denver* on the grounds that it involved a collective bargaining agreement, while the arbitrator in *Gilmer* would be dealing solely with the statutory claim:

“In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence.”

. . . We further expressed concern that in collective-bargaining arbitration “the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit.”⁵⁷

There is something remarkably perverse in the Court's distinction between rights under a collective bargaining agreement and those that stem from an individual contract between an employer and employee. The Court was worried about “the tension between collective representation and individual statutory rights,”⁵⁸ but not by the inequality in arbitration procedures between a large corporation and individual employees. The clear implication is that statutory forums need to be protected in the collective bargaining contract because the key role of the union would put it in a position to

⁵⁶ *Id.* at 28. In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001), the Court held that the Federal Arbitration Act applied generally to employment disputes, thereby increasing *Gilmer's* importance. The Court in *Gilmer* simply assumed that arbitration would adequately protect statutory rights. It perfunctorily dismissed *Gilmer's* claim that the contract by which he agreed to arbitrate was not really a voluntary waiver of his statutory remedy, but one based on unequal bargaining power. “Mere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.” *Gilmer*, 500 U.S. at 33.

⁵⁷ *Gilmer*, 500 U.S. at 34 (quoting *Gardner-Denver*, 415 U.S. 36, 49–50, 58 n.19 (1974)).

⁵⁸ *Id.* at 35.

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undercut the interests of the employees it represents. Because of the presence of the union, however, an employee is far better off in arbitration than he or she would be acting alone. Representing the employee in the preliminary stage of the grievance process, the union investigates on behalf of the employee, provides a lawyer or staff member to handle the arbitration hearing, provides the employee with representation at the hearing, and is involved in choosing and paying for the arbitrator.

The Court in *Gilmer* did not consider the practical obstacles to the individual employee in the arbitration context. To prevail at arbitration, the employee must locate and pay for a knowledgeable lawyer—not an easy task. Employment lawyers generally avoid arbitrators and arbitration cases. They believe that they are less likely to be awarded legal fees, that arbitration provides for less discovery, and that it offers less potential for a class claim. Employment discrimination cases require lots of discovery and typically involve considerable expenditure. Lawyers' fees are rarely awarded. Similar problems still exist, but to a much lesser extent when the employee has access to an administrative agency. If a case can be brought before the NLRA, the agency investigates and provides a lawyer if it agrees with the employee. The EEOC, while less likely to be available, does the same if it is willing to take on the case.

Thus, the arbitration process, given legal sanction initially by virtue of its voluntariness and its success in the context of collective bargaining, has been expanded to deprive individuals of statutory forums and rights in situations in which the basis for any policy favoring arbitration is present, even if it seems remote at best.

CONCLUSION

Reviewing the development of the law dealing with labor arbitration since the Trilogy gives little reason for enthusiasm. The law has become increasingly technical and has led to a series of rules involving courts in the interpretation of collective bargaining agreements in a manner that ignores or thwarts the intention of the parties. The Trilogy has been used to add technicality and unnecessary distinctions to the granting of injunctions against strikes in violation of no-strike clauses. It has also been relied on to needlessly deprive workers of the

statutory forum provided by Congress to remedy unfair labor practices by employers. Over the years, scorched earth litigiousness inexorably has taken a pernicious toll on some of the best features of labor arbitration. The Shulman model of the arbitrator as the sage counselor to the parties, subtly contouring and molding the evolving labor management relationships, has been transmogrified into a very different sort of process—the very sort that Harry Shulman warned against when he urged the courts to stay away from the process.

Of course, it is impossible to know how the law might have developed had the Court followed Shulman's advice to keep its hands and judgments off the process. It seems almost certain, however, that labor arbitration as a voluntary process would have continued to thrive because both labor and management benefited from it.

My own belief is that the use of arbitration in grievance processing would have continued to thrive because both labor and management benefited from it, and both knew how useful it was. In this regard, it is instructive that the Trilogy itself did not arise until many years after labor arbitration became the common final step for the handling of grievances. In the meantime, the parties continued to use it and, as they had promised, to obey arbitral awards whether or not agreed with. The parties would have had no other choice. Except in the rarest cases, both sides can get along with the simple remedy of striking arbitrators whose opinions they find oppressive. Indeed in the absence of legal support, they would have been forced to accept awards without question and to permit arbitrators to resolve questions of arbitrability. While the Labor Board might have continued to defer to arbitration in cases where the main issue was contract interpretation, it might well have continued to hear cases in which the issue concerned the nature of protected activity or other rights under the Act. This would have been a much wiser policy than that reflected in the Board's current automatic deferral in the face of misconstruing and ignoring statutory rights.

Even today reconsideration of the core wisdom of Harry Shulman's view of arbitration might help to reinvigorate the mutual benefits of what was, and should be, a mutual commitment by management and labor to resolve their own disputes without judicial intervention.