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"NLRB PERSPECTIVE: *GILMER* AND TITLE VII CLAIMS"

YVONNE T. DIXON
National Labor Relations Board
Washington, D.C.

Gilmer v. Interstate/Johnson Lane Corp. [1], involving, as it does, an individual claimant under the Age Discrimination in Employment Act (ADEA), does not have any immediate application to cases arising under the National Labor Relations Act (NLRA). Further, the Supreme Court reserved for another day the issue of whether the Federal Arbitration Act [2] could be used to compel agreements to arbitrate that are contained in employment contracts [3]. However, NLRA case law can contribute to this discussion. Gilmer argued to the Court that it would be inconsistent with the ADEA to require him to arbitrate his statutory claim of discrimination, because of the inadequacy of arbitration procedures. These asserted inadequacies included 1) the possibility that the arbitrator would be biased; 2) discovery would be more limited than in federal district court litigation; 3) arbitrators often do not issue written opinions, which makes it difficult to obtain effective appellate review; 4) and arbitrators cannot provide for broad, equitable relief and class actions. The Court rejected these assertions, finding them "far out of step with our current strong endorsement of the federal statutes favoring [arbitration] as a method of resolving disputes [3, at 1121].

The Court also rejected Gilmer's assertion that enforcement of his agreement to submit disputes to arbitration would conflict with the Court's decision in *Alexander v. Gardner-Denver Co.* [4]. In that case, the Court held that an arbitration award under a collectively bargained grievance/arbitration procedure did not preclude a *de novo* trial in federal district court on a Title VII claim based on conduct that was the subject of the grievance. The Court distinguished *Garner-Denver* as follows:

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> . . . [W]e stressed that an employee's contractual rights under a collective-bargaining agreement are distinct from the employee's statutory Title VII rights. . . . We also noted that a labor arbitrator has authority only to resolve questions of contractual rights. [He or she] does not have the "general authority to invoke public laws that conflict with the bargain between the parties." . . . 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."
>
> Since the employees [in the *Gardner-Denver* line of cases] had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions. Second, because the arbitration in those cases occurred in the context of a collective bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case [3, at 1123].

Gilmer's arguments about the adequacy of arbitration to resolve claims of statutory violations are very similar to arguments made to the National Labor Relations Board (NLRB), which has many years of experience in resolving claims alleged to violate both a collective bargaining agreement and the National Labor Relations Act. Where the employer and the union have agreed to resolve contractual claims under a grievance/arbitration procedure, the board has developed a deferral policy that has three aspects:

NLRB DEFERRAL TO COLLECTIVELY BARGAINED PROCEDURES

Pre-Arbitral Deferral: Collyer Insulated Wire [5]

The *Collyer* deferral policy [5] may be applicable if an unfair labor practice charge is filed concerning a matter cognizable under the grievance and arbitration procedures of an existing collective bargaining agreement. The board will hold the charge in abeyance if the charged party is willing to arbitrate the matter and waive any contractual time limitations that would prevent the filing of a grievance over the matter. The board adopted this policy in 1971 to encourage the expeditious private settlement of industrial disputes through the use of procedures freely negotiated by the parties. Under this policy, the board will defer the processing of charges under most sections of the act [6].

Pre-Arbitral Deferral: Dubo Manufacturing Co. [7]

The board would also defer processing a charge under the *Dubo* policy [7]. When a matter is for some reason not deferrable under *Collyer,* and the substance

of the charge is arguably a violation of the act, the regional director may administratively defer further proceedings on the charge when the parties are voluntarily processing the matter through the grievance and arbitration machinery under the contract; and there is a reasonable chance that the use of the arbitration machinery will resolve the dispute.

Deferral to Arbitrators' Awards: *Spielberg Manufacturing Co.* [8]

The third type of deferral is to the outcome of the grievance/arbitration process. Under *Spielberg* [8], if the investigation of the unfair labor practice charge discloses that the substance of the unfair labor practice is arguably a violation of the act and has been resolved through the parties' binding grievance machinery, usually through an arbitration award, the regional office will review the award and dismiss the charge if:

1. the proceedings were fair and regular;
2. all parties agreed to be bound;
3. the contractual and unfair labor practice issues were factually parallel [9];
4. the arbitrator was presented generally with facts relevant to resolving the unfair labor practice allegations; and
5. the decision is not clearly repugnant to the purpose and policies of the act.

A *Spielberg* review is also given in cases where the charge has been deferred under *Dubo* or *Collyer.*

The board also will apply these deferral principles to settlement agreements between the employer and the authorized collective bargaining representative, even if the employee grievant opposes the settlement [10].

Application of These Policies in Recent Decisions

Recent decisions by the board show how these policies are applied to actual disputes. In *August A. Busch & Company* [11], the unfair labor practice complaint alleged that the employer unlawfully refused to bargain about plant safety issues. The genesis for the dispute was a fatal workplace accident. The union demanded bargaining over worker safety and health in the warehouse. The employer responded that the issues the union sought to raise could be referred to the existing contractual joint management and labor safety committee for resolution, and thus there was no need to negotiate separately. The employer argued that the case should be deferred under *Collyer,* and the board agreed.

The board noted that *Collyer* deferral is appropriate when "the dispute arose within the confines of a long and productive collective-bargaining relationship; there is no claim of employer animosity to the employees' exercise of protected rights; the parties' contract provided for arbitration in a very broad range of disputes; the arbitration clause clearly encompasses the dispute at issue; the

employer has asserted its willingness to utilize arbitration to resolve the dispute; and the dispute is eminently well-suited to such resolution" [11, slip op. 4]. All of these factors were met in this case. The contract clause recited that the union or individual employees had the right to present grievances, and the arbitration process encompassed all grievances. Although the contract did not *require* either party to use it to resolve disputes, it was available to the parties, and it is the *availability,* the board said, that triggers the deferral doctrine. As arbitration was available to the union, the *Collyer* requirement was satisfied, and deferral was appropriate.

Conflict of Interest Between Employee and Union Representative

Collyer deferral was not appropriate in *Amsted Industries* [12]. There, the employee was discharged for threatening physical harm to the union president. In the same encounter, the employee threatened to resign from the union and complained about his loss of a day's pay which, he believed, violated the contract. He filed an unfair labor practice charge alleging that the union had responded to his complaint in an arbitrary fashion and that his discharge was in retaliation for his engaging in the protected activity of threatening to resign from the union. The employer and the union advised the administrative law judge they were willing to arbitrate the discharge. The judge refused to defer, and found on the merits that both the union and the employer had violated the act. The employer and the union filed exceptions, and also filed a joint motion with the board to supplement the record with an arbitration award pertaining to the discharge. The board denied the motion, because the union's interests were adverse to the employee with respect to the discharge, "given their conflicting positions in this proceeding" [12, slip op. 1, n. 3].

Arbitrator Did Not Consider the Statutory Issue

In two recent cases, the board did not defer to an arbitrator's award because the *Spielberg* criteria were not met. In *ACF Industries* [13], the arbitrator had found the elimination of a unit job and assignment of the work to nonunit employees did not violate the collective bargaining agreement, even though he noted that the employer had laid off the employee and abolished the job because the employee had exercised bumping rights to the job under the collective bargaining agreement. The employer argued that the board should defer to the award. The administrative law judge declined to defer, stating:

> Under the circumstances, I find that the "contractual and unfair labor practice issues are not factually parallel." The Arbitrator was only concerned with contractual authority for the action taken. The propriety of Employer retaliatory conduct for Section 7 activities or Employer unlawful purpose

> were [sic] not before him.
>
> In any event, assuming that the "contractual and unfair labor practice issues" were "parallel," I find the Arbitrator's decision—upholding the Employer's actions in retaliation for [the] employee['s] . . . and the Union's persistence in grieving and attempting to enforce rights under the collective bargaining agreement—is "clearly repugnant to the purposes or policies of the Act" and "not susceptible to an interpretation consistent with the Act" [13, slip op. 9].

Similarly, in *Advanced Transportation Co.* [14], the board did not defer to an arbitral award, finding the employer had discharged an employee for just cause: the alleged falsification of records and a verbal exchange with a supervisor. The board said:

> There is no evidence that the arbitrator was presented with or considered facts concerning [the employee's] protected concerted activities, the Respondent's antiunion animus and its pattern of discriminatory conduct, and whether the Respondent's claimed basis was a pretext. Thus, the contractual [and] unfair labor practice issues were not factually parallel [14, slip op. 1].

Flaws in Arbitration Procedure

In two recent cases, the board did not defer to the arbitrator's award because of flaws in the procedure. In *United Parcel Service* [15], the administrative law judge rejected the employer's argument that the board should defer to an arbitration award on a discharge. The evidence showed the employer had refused to provide the union with information relevant to the discharge and the chair of the arbitration panel had refrained from requiring the employer to present the evidence during the proceeding.

In *Hoffman Air & Filtration Systems* [16], the collective bargaining agreement contained a provision that the arbitrator could not "make any recommendations for future action by the Company or the Union" [16, slip op. 1]. One of the unfair labor practice allegations was that the employer had threatened a union steward with discipline, and the employer argued that, since it was willing, the matter should be deferred to the grievance/arbitration procedure. The board disagreed, because of the contractual limitations placed on the arbitrator's remedial authority:

> The contract language would prevent an arbitrator from imposing the functional equivalent of a "cease and desist" remedy by the Board, for such a remedy is directed at future actions. Deprived of the authority to impose the equivalent of a "cease and desist" remedy, an arbitrator would be unable to fashion any appropriate remedy for the alleged threat. Accordingly, we find that deferral is not warranted [16, slip op. 3].

Award Not "Palpably Wrong"

In *Catalytic, Inc.* [17], the board applied *Spielberg* principles to a settlement reached during the grievance procedure. The unusual factor in this case was that the settlement was opposed by the employee and his local union. However, the actual collective bargaining representative was the international union, which agreed with the employer that the employee's discharge grievance should be resolved by making him eligible for immediate hire without back pay. The board said this resolution was not "clearly repugnant" within the meaning of *Olin,* saying:

> In *Olin,* supra, the Board stated it would not require an arbitrator's award to be totally consistent with Board precedent. Rather, the Board will not find an award to be "clearly repugnant" unless it is "palpably wrong." In this case, the fact that [the employee] may not have received all the relief to which he [or the local union] believed that he was entitled to does not render the settlement "palpably wrong." Indeed, we find no indication that the resolution of the grievance is repugnant to the Act. Rather, the parties' settlement involved a compromise, with both sides making concessions and with [the employee] being made available for immediate rehire [17, at 383, footnotes omitted].

The settlement also satisfied the *Olin* requirement that the unfair labor practice issue be considered during the process. The board said:

> Where, as here, a settlement is reached prior to arbitration, the criterion is satisfied when the contractual issue and the unfair labor practice issue are factually parallel, and the parties were generally aware of the facts relevant to resolving the unfair labor practice issue [17, at 383].

The board also deferred to the arbitrator's award in *Southern California Edison Company* [18]. The complaint alleged that the respondent had unilaterally implemented various drug and alcohol testing programs and search practices. The employer argued that the award upheld its actions. It had argued to the arbitrator that the collective bargaining agreement allowed it to "make reasonable provisions for the safety of employees" and reserved to the employer "the right to draft reasonable safety rules for employees and to insist on the observance of such rules." The arbitrator found that the challenged drug tests were directly related to safety considerations, and that the contract clauses giving the employer the right to establish reasonable safety rules obviated any violation of the NLRA. The arbitrator then found the challenged drug testing rules to be reasonable and denied the grievance.

The issue before the board was whether the arbitrator's award finding that the union had waived its right to demand bargaining was clearly repugnant to the NLRA. The board noted that:

> the "clearly repugnant" test requires that the party urging nondeferral . . . must show that the decision to which deferral is sought is "palpably wrong," i.e., "not susceptible to an interpretation consistent with the Act" [18, slip op. 4, citing 9, at 573-4].

Counsel for the general counsel argued that the arbitrator used the wrong test to determine whether, by agreeing to the contract clauses relied upon the employer, the union had waived its right under the NLRA to bargain about drug testing policies. Under outstanding board law, such a waiver will not be lightly inferred, but must be clear and unmistakable. The safety clause was couched in general terms, did not make specific reference to drug and alcohol testing, and the arbitrator cited no evidence that drug testing was discussed during negotiations.

The board, however, noted that it had "deferred to arbitration decisions which find that language in a general management-rights clause authorizes unilateral changes in terms and conditions of employment by an employer" [18, slip op. 5]. It noted that it would defer to an award "even if neither the award nor the clause read in terms of the statutory standard of clear and unmistakable waiver" [18, slip op. 5-6, citing 19, at 135-36]. The board went on to say:

> Thus, an award can be susceptible to the interpretation that the arbitrator found a waiver, even if the arbitral award does not speak in those terms. Further, given such a finding of waiver, the mere fact that the Board would not have found a waiver is insufficient by itself to establish repugnance. The Board will determine whether a particular award is "clearly repugnant to the Act" by reviewing all the circumstances, including the contractual language, evidence of bargaining history and past practice presented in this case [18].

The board then concluded that this arbitrator's award was susceptible to an interpretation consistent with the act, and was not "palpably wrong." Accordingly, *Spielberg* deferral was appropriate.

MAY A UNION LAWFULLY WAIVE AN EMPLOYEE'S RIGHTS UNDER *ALEXANDER V. GARDNER-DENVER*?

In *Alexander v. Gardner-Denver Co.* [4], the Court considered the issue of whether a collective bargaining agreement that contained grievance/arbitration provisions operated to waive an employee's right to later file a Title VII action in court. The Court acknowledged that a union could waive certain employee rights, such as the right to strike. The Court characterized these waivable rights as pertaining to collective action "to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for unit members" [4, at 87]. In contrast,

> Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian process, but an individual's right to equal employment opportunities. . . . Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible to prospective waiver [4, at 87].

An adverse arbitrator's decision would also not be dispositive of the Title VII claim:

> [T]he arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective bargaining agreement, and he must interpret and apply that agreement in accordance with the "industrial common law of the shop" and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties . . . [4, at 87].

The Court also refused to devise a "deferral" rule, by which the court would defer to arbitral awards on discrimination claims if the claim was before the arbitrator, the contract prescribed the type of discrimination alleged, and the arbitrator had the authority to rule and to devise a remedy. The Court said:

> The purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal [4, at 88; 20].

Since arbitration is not inherently inconsistent with the Age Discrimination in Employment Act, may an employer and a union negotiate a contractual provision requiring employees to first proceed with their claims within the negotiated grievance/arbitration procedures? As the Court noted in *Gardner-Denver*, unions can waive certain rights on behalf of the employees whom they represent. In *Metropolitan Edison Co. v. NLRB* [21], the Court said:

> This Court long has recognized that a union may waive a member's statutorily protected rights, including "his right to strike during the contract term, and his right to refuse to cross a lawful picket line." Such waivers are valid because they "rest on the premise of fair representation" and presuppose that the selection of the bargaining representative "remains free." Waiver should not undermine these premises. Thus a union may bargain away its members' economic rights, but it may not surrender rights that impair the employees' choice of their bargaining representative" [21, at 3270, footnotes omitted; 22].

In a footnote, the Court contrasted its position on waiver under the NLRA with its position in *Gardner-Denver*:

> The union contends that *Alexander v. Gardner-Denver Co.*, . . . demonstrates that the individual right not to be discriminated against may never be waived. In *Gardner-Denver,* however, we noted that waiver would be inconsistent with the purposes of the statute at issue there. As discussed above, the National Labor Relations Act contemplates that individual rights may be waived by the union so long as the union does not breach its duty of fair representation [21, at 3270, n. 11].

Two board decisions reflect the limits on the union's ability to waive employees' rights. In *Universal Fuels, Inc.* [23], the union and employer had agreed to a contractual provision that just cause for discipline included "misrepresentation in connection with any employee benefit" and "misrepresentation of any material fact in connection with any claim concerning his employment or his pay" [23]. It was contended that this provision interfered with the employees' right to discuss problems regarding employment, including disagreement with their union's positions regarding contractual provisions. The board concluded that a restriction on the employees' right to complain about their union's actions was an unenforceable waiver relating to their choice of bargaining representative.

On the other hand, in *Prudential Insurance Company* [24], a waiver of *Weingarten* rights was found to be enforceable. The contract contained a provision that the union would not interfere with the right of the employer to interview an employee without the grievance committee being present. On the other hand, a bargaining unit employee has the right under the NLRA to insist on union representation at investigatory interviews [25]. The board noted that this right exists only where there is a collective bargaining representative; unrepresented employees have no right to demand the presence of a fellow employee at such interviews. The board went on to say:

> Thus, although the *Weingarten* right is triggered only by an employee's request, and although that employee alone may have an immediate stake in the outcome of the interview, it is clear that the exclusive bargaining representative also has an important stake in the process.[13] Consequently, because the union's duty of fair representation allows for flexibility in collective-bargaining negotiations with the employer, the *Weingarten* right, like the right to strike, is subject to being waived by the union.

> [13]as noted in Sears, the Supreme Court's opinion in Weingarten "contemplated that the [union] representative safeguard not only the particular employee's interest, but also the interests of the entire bargaining unit" [24, at 209].

Tying together all these threads, it could be argued that a union and employer could lawfully agree that an employee should first present a discrimination claim to an arbitrator. *Gilmer* suggests arbitration is not incompatible with discrimination claims. Further, such a provision would not interfere with the employees' free choice of a bargaining representative. Although Gilmer himself would have only limited judicial review of any arbitral award [3, at 1122, n. 4], *Gardner-Denver* supports a bargaining unit employee's right to seek *de novo* review if he or she is dissatisfied with the outcome of the grievance process. In *Gilmer* the court recognized that, in the collective bargaining context, the union represents the employee, and thus there is a "tension between collective representation and individual statutory rights . . . [3, at 1123]. An argument could be made that such a clause is not per se unlawful since arbitration is an appropriate vehicle to resolve collective bargaining disputes. However, in light of *Gardner-Denver,* a clause that attempted to preclude an employee from obtaining a *de novo* review of his discrimination claim at the end of that process may be questionable. It does not appear that the NLRB has yet ruled on such a case.

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Ms. Dixon is a member of the District of Columbia Bar, and an attorney with the Office of the General Counsel of the National Labor Relations Board. At the time this article was prepared, Ms. Dixon was the Acting Deputy General Counsel. The views expressed in this article are not necessarily those of the General Counsel or the Agency.

END NOTES

1. 111 S. Ct. 1647, 55 FEP Cases 1116 (1991).
2. 9 U.S.C. § 1, *et seq.*
3. 55 FEP Cases at 1119, n 2.
4. 415 U.S. 36, 7 FEP Cases 81 (1974).
5. *Collyer Insulated Wire,* 192 NLRB 837 (1971).
6. Sections 8(a)(1), (3), and (5) and 8(b)(1)(A), (b)(2), (b)(3), and 8(b)(1)(B). See *United Technologies Corporation,* 268 NLRB 557 (1984).
7. *Dubo Manufacturing Co.,* 142 NLRB 431 (1963).
8. *Spielberg Manufacturing Co.,* 112 NLRB 1080 (1955).
9. *Olin Corporation,* 268 NLRB 573 (1984).
10. *Postal Service,* 300 NLRB 196 (1990). See also *Alpha Beta Co.,* 273 NLRB 1546 (1985), enf. sub. nom. *Mahon v. NLRB,* 808 F.2d 1342 (9th Cir. 1987).
11. 309 NLRB No. 111 (1992).
12. 309 NLRB No. 140 (1992).
13. 310 NLRB No. 22 (1993).
14. 310 NLRB No. 147 (1993).
15. 311 NLRB No. 97 (1993).

16. 312 NLRB No. 63 (1993).
17. 301 NLRB 380 (1991).
18. 310 NLRB No. 211 (1993).
19. *Motor Convoy,* 303 NLRB 135, 136 (1991).
20. The Court also questioned the adequacy of arbitral procedures, a position which it disavowed in *Gilmer.*
21. 460 U.S. 693, 112 LRRM 3265 (1983).
22. In *Metropolitan Edison,* it was held that the union could agree that its officers must take affirmative steps to bring an illegal work stoppage to an end, notwithstanding those officers' right under the NLRA to refrain from union activities.
23. 298 NLRB 254 (1990).
24. 275 NLRB 208 (1985).
25. *NLRB v. J. Weingarten,* 420 U.S. 251 (1975).

Direct reprint requests to:

Yvonne T. Dixon
National Labor Relations Board
1099-14th Street, N.W.
Room 8800
Washington, D.C. 20570