J. INDIVIDUAL EMPLOYMENT RIGHTS, Vol. 2(4) 319-326, 1993-94

GILMER: A REAL OR IMAGINARY PROBLEM FOR ORGANIZED LABOR?

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ABSTRACT

Compulsory arbitration of individual employee statutory rights is inconsistent with the concept of exclusive representation in a collective bargaining setting. In negotiations or in grievance arbitration, it is not uncommon for unions to be involved in employment disputes where individual employee statutory rights are directly or indirectly implicated. Often these statutory rights can clash with the interest of a majority of the membership and even where there is no clash the complexity of a statutory violation enmeshed with a contract violation may be beyond the scope of a union's ability to provide adequate representation. A solution for unions may rest in providing flexibility in the representation process and allowing employees to use their own representative in disputes that involve statutory claims on the condition that the arbitration decision will not establish a precedent for interpretation of the agreement.

The Age Discrimination in Employment Act (ADEA) [1] is one of the various statutes that established employment rights for individuals which may be included in a collective bargaining agreement. In 1991, the Supreme Court ruled that the compulsory arbitration provisions of the Federal Arbitration Act (FAA) [2], could be used to address an age discrimination claim in *Gilmer v. Interstate/Johnson Lane Corp.* [3] *Gilmer* did not involve union representation, and the court distinguished it from cases that did, which included *Alexander v. Gardner-Denver Co.* [4], where it was held that an employee's use of arbitration to challenge race discrimination did not preclude any right to bring a lawsuit on the same claim. However, the one aspect of *Gardner-Denver* the court indicated it would no longer follow was the view that arbitration was inferior to the judicial process for resolving statutory claims. That rationale raised questions concerning a union's

doi: 10.2190/JNP3-11J3-BP1H-60XR
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obligations in areas where individual employment rights have been established by statute.

GILMER

At first blush *Gilmer* would appear to be a case in which unions would have little or no interest. It did not involve a union or a collective bargaining unit. At issue was an arbitration agreement between a securities representative and the New York Stock Exchange that was part of the registration application. The agreement provided for arbitration of any dispute about a registered representative's employment and Gilmer, age sixty-two, had alleged that his termination was a violation of the ADEA [1]. Faced with the question of whether Gilmer could pursue his claim judicially or whether it was required to be arbitrated, the court concluded that the agreement to arbitrate was enforceable pursuant to the FAA [2].

This was not a surprise, since statutory claims had been arbitrated under the FAA [5]. The problem for organized labor is that *Gilmer* implies that employment matters are subject to compulsory arbitration under the FAA, which could be viewed as a threat to labor's exclusive control over issues it decides to arbitrate.

UNION OPPOSITION TO FAA COVERAGE OF EMPLOYMENT CONTRACTS

The purpose often cited for passage of the FAA in 1925 was to quell judicial hostility to arbitration agreements in commercial settings [6]. However, its application to employment contracts is an issue that remains open. Organized labor's opposition to any application of the FAA to collective bargaining agreements is well-documented and reflected in the FAA legislative history. At the time of its enactment, the American Federation of Labor's Executive Council reported in its annual report that its protest had resulted in the exemption of labor from coverage under the act [7]. The precise language that was finally enacted and has generated great debate is contained in Section 1 of the statute and provides "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

Gilmer unfortunately did not answer the question of whether the FAA could be applied to any employment contract because the court concluded that the agreement to arbitrate was part of a securities application rather than an employment contract and that issue had not been raised in the courts below or before it [3].

ARBITRATION NOT APPROPRIATE FOR ALL DISPUTES

The broad policies favoring arbitration do not cover all disputes and, in particular, statutory claims where Congress indicated an intent to preclude a waiver

of judicial forum and remedies [3, 4]. *Gilmer* was distinguished on both the facts and issues from the *Gardner-Denver* line of cases [4, 8], which involved individual statutory rights in the area of wages and race discrimination. *Gardner-Denver* dealt with whether arbitration of a contract discrimination claim precluded a suit on the same claim on a statutory basis. That decision was not controlled by the FAA, and the dispute occurred in the context of a collective bargaining agreement.

The tension between collective representation and individual statutory rights in *Gardner-Denver* was present in *Gilmer* and a key element in the court's analysis. The factors considered in determining whether the arbitration of a statutory claim under a collective bargaining agreement waived the right to sue were "the difference between contract rights under collective bargaining and individual statutory rights; the potential disparity in interests between a union and an employee; and the limited authority and power of labor arbitrators [3].

THE DIFFERENCE BETWEEN COLLECTIVE BARGAINING RIGHTS AND INDIVIDUAL STATUTORY RIGHTS IS OFTEN NOT CLEAR

The National Labor Relations Act (NLRA) of 1935 [9] and the Labor Management Relations Acvt of 1947 [10] were enacted to reduce industrial strife and to address working conditions by encouraging employees to collectively address and promote their interest. Because individual workers had little power, the assumption was that bargaining power for working conditions would be most effective if exercised through a union selected by a majority of employees [11]. It is for this reason the statutory scheme encourages voluntary resolution of disputes arising from collective bargaining relationships and arbitration as a voluntary system for resolution has been accorded judicial deference [12]. That deference precludes a court from overturning an arbitration award on the mere basis that the court disagrees with the interpretation of the agreement and would have ruled differently. As long as the arbitrator acted within the scope of his authority under the contract and his/her decision is arguably based on the agreement, a court is precluded from overturning the decision [13].

However, Congress did not necessarily intend that the statutory scheme under the NLRA would serve to replace employee rights it had created under other statutes, and the key in determining which rights fall in that area will often turn on the legislative history and language of the statute. This is often not clear, and many of the employment-related rights covered by separate statutes are also mandatory subjects of bargaining under the NLRA. Thus, individual employment rights created by statute often become part of collective bargaining agreements negotiated by parties [14], as evidenced in *Gardner-Denver* [4].

Mandatory bargaining subjects are those that parties are obligated to negotiate if proposals are made. While the NLRA does not require agreement on mandatory

subjects negotiated, failure to reach agreement is evidence of a lack of good faith bargaining and a possible unfair labor practice [15].

There are numerous examples where the collective bargaining process and statutory rights coexist. The most common is in the area of discipline. An employer has the right to discipline an employee under the NLRA, but the reasons and the procedure are mandatory subjects of bargaining [16] and subject to negotiation and arbitration. A contract clause prohibiting race discrimination is a mandatory subject of bargaining [17], although covered by a statute [18] other than the NLRA. Discipline based on race would violate most contracts whether or not it included a specific race discrimination clause, because it would violate the just-cause standard applied to most collective bargaining agreements [19].

There are other examples where the statutory rights may coexist with collective bargaining agreements. For example, while the Employee Retirement Insurance Security Act (ERISA) [20] creates rights regarding pensions, those rights may also coexist under the NLRA and collective bargaining because ERISA protects benefits that are collectively bargained under the NLRA [21]. Likewise, an employee can seek relief under the NLRA and Title VII [22]. Also, federal legislation providing employment benefits to veterans has also been found to coexist with the NLRA [23].

Finally, while it is difficult for a union to waive individual statutory rights, it is not impossible. However, courts are reluctant to find a waiver unless it can be established that the employees being represented made a clear and knowing waiver of their rights through the union's representation [24]. That would be difficult to establish as a practical matter and often the parties agree to language identical to that in the statute to avoid claims of waiver. Thus, whether intentional or not, our national labor policy encourages inclusion of individual employment rights in collective bargaining agreements.

EXCLUSIVITY AND THE DUTY TO FAIRLY REPRESENT—THE POTENTIAL DISPARITY INTEREST BETWEEN A UNION AND INDIVIDUAL EMPLOYEES

A union accorded exclusive representation as a bargaining representative has powers comparable to those of a legislative body in the sense that it can create and restrict the rights of those it represents through the collective bargaining process subject to the requirement that it represent fairly all persons over whom it has this power [25]. While exclusivity has some limitations in the grievance area in that individual employees may present a grievance to the employer and have it adjusted without intervention of the union, that adjustment may not be inconsistent with the collective bargaining agreement and the union must be given an opportunity to be present at the adjustment [26]. This language leaves no doubt that the grievance procedure and resolution of employee conflicts rest in complete

control of the union. That control extends to the theory and strategy used in representation and access to the arbitrator [4].

The tension between collective bargaining rights and individual rights most often occurs in the context of duty-of-fair-representation suits and has been reflected in the long history of union discrimination against minorities [27], another factor that also distinguished *Gilmer* and *Gardner-Denver.*

A union as party to a contract will often be confronted with the problem of balancing individual and collective interests when presented with a grievance. A union's objective will be to maximize overall benefits for as many members as possible, and this may work against particular individuals when processing grievances. The law permits a union to take a position contrary to some of the individuals whom it represents and to support the position of one group of employees over that of another if the conduct is not arbitrary, discriminatory, or in bad faith [28]. The price for industrial peace under our labor policy is that the interest of some employees in a bargaining unit may be subordinated to the collective interest of the majority of workers [29, 30].

The same standard applies to the negotiation of benefits in an agreement where the union need only act in a rational, nondiscriminatory fashion. To establish a violation of this standard in negotiations, the agreement reached must be so far outside a "wide range of reasonableness" that it is wholly "irrational" or "arbitrary" when evaluated in light of what confronted negotiators at time of decision [31].

Thus, even if an employee's claim is valid, the union in good faith might not support it vigorously in arbitration or may refuse to arbitrate it [30, 32, 33]. Compulsory arbitration is therefore inconsistent with these principles because it would mandate the arbitration of all claims, including those a union had no prior obligation to process.

UNION LACK OF EXPERTISE IN STATUTORY CLAIMS MAY BE A POTENTIAL LIABILITY

The lack of trained arbitrators in statutory matters is no longer viewed as a key factor in precluding deferral to arbitration [3, 5, 8]. However, it is a problem for unions when attempting to provide trained advocates from the union ranks. In general, the union's duty to represent is limited to the collective bargaining process and there is no duty to represent an employee in a statutory proceeding [34]. Also, there is no general duty to provide an attorney for representation in any forum [35], and in the vast majority of situations involving grievances, union representation is performed by persons other than attorneys. How effective can a union steward be in representing employees in areas normally the province of the judiciary and lawyers? As it presently stands, a union's duty to represent in collective bargaining matters excuses representation that is negligent, ineffective,

or tantamount to mistakes in judgment [36]. Yet, would or should this be the standard applied to statutory claims?

Even where a union does not intentionally venture into the area of statutory rights, it may be confronted with the problem because where discipline is concerned, if taken for reasons that violate a statute, such as race or sex discrimination, arbitrators will uphold grievances because such reasons will not fit the definition of just cause. The problem is even more complex because a union may be held jointly liable with an employer for race or sex discrimination caused by provisions of a collective bargaining agreement the union negotiated and enforced [37].

IN STATUTORY MATTERS UNIONS SHOULD ALLOW EMPLOYEES TO USE THEIR OWN REPRESENTATIVE

The question then is: How should a union proceed when it has a case that has statutory implications. I would suggest the answer can be found in the relief often given in breach-of-duty-of-fair-representation cases involving denial of access to the grievance process. It is not uncommon in such cases for the union to be ordered to permit the employee to file the grievance and to have his/her own representative in the grievance arbitration process [38]. The union, by providing the forum and procedure, has provided a valuable service, and no substantive rights have been waived [5]. If there is concern that a decision may have a negative prospective impact on the bargaining unit or interpretation of the contract, the parties could agree that any award would have no precedent value in future grievances or negotiations.

ENDNOTES

1. 29 U.S.C. § 621 et seq. (Supp 1986).
2. 9 U.S.C. § et seq. (1925).
3. 111 S Ct 1647 (1991).
4. 415 US 36, 94 S Ct 1011 (1974).
5. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473* US 614, 87 L Ed 2d 44, 105 S Ct 3346 (1985); *Shearson/American Express Inc. v. McMahon* 482 US 220, 96 L Ed 2d 185, 107 S Ct 2332 (1987); *Rodriguez de quijas v. Shearson/American Express, Inc.* 490 US 477, 104 L Ed 2d 526, 109 S Ct 1917 (1989).
6. *Scherk v. Alberto-Culver Co,* 417 US 506, 510, n 4, 41 LEd 2d 270, 94 S Ct 2449 (1974).
7. Proceedings of the Forty-Fifth Annual Convention of the American Federation of Labor, 52 (1925).
8. *Barrentine v. Arkansas-Best Freight System Inc.,* 450 US 728, 67 L Ed 2d 641, 101 S Ct 1437 (1981); *McDonald v. City of West Branch,* 466 US 284, 80 L Ed 2d 302, 105 S Ct 1799 (1984).
9. 29 USC §§ 151 et seq.

10. 29 USC §§ 141 et seq.
11. *NLRB v. Allis-Chalmers Mfg. Co.,* 388 US 175, 180, 18 L Ed 2d 1123, 87 S Ct 2001 (1967).
12. *Steelworkers v. American Mfg.,* 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960).
13. *United Paperworkers International Union v. Misco, Inc.* (1987, US) 98 L Ed 2d 286, 108 S Ct 364, 124 BNA LRRM 3113.
14. 29 USCS § 158(d).
15. *NLRB v. Wooster Div. of Borg-Warner Corp.* (1958) 356 US 342, L Ed 2d 823, 78 S Ct 718, 42 BNA LRRM 2034.
16. *Electri-Flex Co v. NLRB* (1978, CA7) 570 F2d 1327, 97 BNA LRRM 2888, cert den (US) 58 L Ed 2d 256, 99 S Ct 280 99 BNA LRRM 2743.
17. *U.S. Postal Service* (1992) 308 NLRB No. 189.
18. 42 USCS §§ 2000e et seq.
19. *Bruno's Inc. and United Food and Commercial Workers, Local* 1657, 89-2 ARB §§ 8571 CCH Labor Arb Awards.
20. 29 USCS § 1001 et seq.
21. *Malone v. White Motor Corp.* (1978) 435 US 497, 55 L Ed 2d 443, 98 S Ct 1185.
22. *De Malherbe v. International Union of Elevator Constructors* (1977, ND Cal) 438 F Supp 1121, 19 BNA FEP Cas 1581.3.
23. *Droste v. Nash-Kelvinator Corp.* (1946, DC Mich) 64 F Supp 716, 17 BNA LRRM 760.
24. *NLRB v. Magnavox Co. of Tennessee* (1974) 415 US 322, 39 L Ed 2d 358, 94 S Ct 1099, 85 BNA LRRM 2375.
25. *Steele v. Louisville & N.R. Co.* (1944) 323 US 192, 89 L Ed 173, 65 S Ct 226, 9 BNA FEP Cas 381, 15 BNA LRRM 708.
26. 29 USCS § 159(a).
27. *Steel Workers v. Weber,* 443 US 193, 61 L Ed 2d 480, 99 S Ct 2721 (1979).
28. *Humphrey v. Moore,* 375 US 335, 349 11 L Ed 2d 370, 84 S Ct 363 (1964); *Ford Motor Co. v. Huffman,* 345 US 330, 337.
29. *Vaca v. Sipes,* 386 US 171, 182 17 L Ed 2d 842, 87 S. Ct 903 (1967).
30. *Emporium Capwell Co. v. Western Addition Community Org.,* 420 US 50, 62, 43 L Ed 2d 12, 95 S Ct 977 (1975).
31. *Air Line Pilots Assn., Int'l v. O'Neill* (1991, US) 113 L Ed 2d 51, 111 S Ct 1127, 136 BNA LRRM 2721, 118 CCH LC 10597.
32. *Barrentine v. Arkansas-Best Freight System Inc.,* 450 US 728, 67 L Ed 2d 641, 101 S Ct 1437 (1981).
33. *Teamsters, Chauffeurs Local Union 59* (1986) 280 NLRB 1420, 123 BNA LRRM 1327.
34. *National Treasury Employees Union v. Federal Labor Relations Authority* 800 F.2d 1165 (D.C. Cir. 1986).
35. *National Treasury Employees Union v. Federal Labor Relations Authority* 721 F.2d 1402 (D.C. Cir. 1983).
36. *United Steelworkers of America v. Rawson,* (1990, US) 109 L Ed 2d 362, 110 S Ct 1904.

37. *Waters v. Wisconsin Steel Works,* 502 F 2d 1309, (7th Cir. 1974) cert den 425 US 997 (1976).
38. *San Francisco Web Pressmen and Platemakers' Union v. National Labor Relations Board* 794 f.2d 420 (9th Cir. 1986).

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