Labor Arbitration v. Employment Arbitration

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Attorneys representing employers, employees and unions are frequently confronted with a variety of choices concerning the resolution of disputes. The most fundamental issue is choose the appropriate forum for pursuing a claim, or for raising a defense to a claim. For example allegations of certain types of employment discrimination may be resolved at the United States Equal Employment Opportunity Commission, the New York State Human Rights Division, or the New York City Commission of Human Rights or in Court. However if an employee is working under a collective bargaining agreement or an individual contract of employment that employee may be required to submit his or her dispute to a contractually mandated arbitration procedure. Even within the arbitration framework there is a sharp distinction between arbitrations under collective bargaining agreements ("Labor Arbitration") and arbitration arising from individual contracts of employment ("Employment Arbitration"). Historically, Labor-Arbitration has been given a seal of approval by the Congress and the Courts that placed it in a different context than other types of arbitration. While one might think that there is only a limited distinction between Labor Arbitration and Employment Arbitration, the statutory framework and Supreme Court precedent place Labor Arbitration in a different category than other types of ADR.

When Congress passed the Taft-Hartley or Labor Management Relations Act, it created the Federal Mediation and Conciliation Service ("FMCS"). The FMCS frequently provides mediators who assist unions and employers in negotiating collective bargaining agreements. It also has a panel of arbitrators who are charged with resolving disputes

that arise under the contract. These disputes typically concern either the interpretation of the language of a contract or the imposition of discipline upon an employee.

The statute creating the FMCS provides:

> The settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rate of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes:
> 29 U.S.C. §171 (b).

In addition the statute states:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application on interpretation of an existing collective bargaining agreement. 29 U.S.C. §173(d)

Thus there was a Congressional endorsement of Labor Arbitration which is not typical of other types of ADR.

With the Supreme Court's decisions in the *Steelworkers Trilogy*, arbitration was firmly established in the Industrial Relations Framework of the United States. The three cases are: *United Steelworkers of America v. American Manufacturing Co.,* 363 U.S. 569, 80 S.Ct. 1343 (1960); *United Steelworkers of America v. Warrior and Gulf Navigation Company*, 363 U.S. 574, 80 S.Ct. 1347 (1960), and *United Steelworkers of America v. Enterprise Wheel and Car Corp*., 363 U.S.593, 80 S.Ct. 1358 (1960). In these three cases the bedrock principles of Labor Arbitration were firmly established. In *American Manufacturing* the Court determined that the judiciary has only a minor

role in deciding that a controversy should not be submitted to arbitration.

> The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.
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> The Courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious. The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware. United States v. America Manufacturing, supra at 567. (Emphasis supplied).

Warrior and Gulf Navigation arose from an employer's decision to contract out some work. In holding that the case was in fact arbitrable, Justice Douglas analyzed the statutory framework, and relied upon the strong policy reason for "promoting industrial stabilization" ,and that "A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement." *US Steelworkers v. Warrior and Gulf Navigation Company* supra at 578. Justice Douglas noted that in the

> Commercial case, arbitration is the substitute for litigation. Here [labor management settings] arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreement is part and parcel of the collective bargaining process itself," id.

Crucial for the court was the institutional balance that underlay arbitration clauses in collective bargaining agreements.

> A collective bargaining agreement is an effort to erect a system of industrial self-government. When most parties enter into contractual relationship they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This not true of the labor agreement. The choice is generally not between entering or refusing to enter into a relationship, for that in all probability pre-exists the negotiations. Rather it is between having that relationship governed by an agreed-upon rule of law or leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces.

In addition to placing "labor arbitration" on a pedestal, the opinion in *Warrior v. Gulf* placed "labor arbitrators" on a pedestal.

> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law - - the practices of the industry and the shop - - is equally a part of the collective bargaining agreement although not expressed in it. 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, his 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. Id at 581-582

The Court buttressed its opening in *Warrior Gulf*, with its decision in *US Steelworkers v. Enterprise Wheel and Car Corp. supra*, in that case, the employer refused to make an employee whole following an arbitration award. In *Enterprise Wheel* the Court stated that: "the refusal of courts to review the merits of an arbitration

award is the proper approach to arbitration under collective bargaining agreements." Id at 596. Justice Douglas reasoned:

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

With the *Steelworkers Trilogy*, the principles of Labor Arbitration were firmly laid down. While there has been some erosion in the deference given to the arbitral process over the years, the *Steelworkers Trilogy* has formed the basis of the American Industrial Relations Systems.

Employment Arbitration on the other hand more closely mirrors a traditional commercial relationship then that of labor arbitrations. Indeed there originally was resistance to the expansion of employment arbitration. Unlike labor arbitration where there is a rough but by no means perfect balance between a union and employer, there was a perception that there would be no such balance between an individual employee and his or her employer. In addition issues concerning arbitral procedures and remedies led to a great deal of resistance to the expansion of employment arbitration. Indeed until the Supreme Court's decision in *Circuit City Stores v. Adams*, 532 US 105, 121 S.Ct. 1302 (2001) it was not firmly settled that the Federal Arbitration Act's exclusion for

employees were limited only to "seamen, railroad and employees," and "workers employed in foreign or interstate commerce" in the most limited sense of those terms.

The Supreme's Court decision in *Gilmer v. Interstate/Johnson Lane Corp*. 500 US 20, 111 S. Ct. 1647 (1991) is generally regarded as the impetus for the increase in employment arbitration over the last 20 years. In *Gilmer* the Court held that a provision in the Securities Industries U-4 governed registration forms mandating arbitration of disputes with an employer applies to statutory claims of discrimination. While *Gilmer* was the impetus for a nationwide expansion of employment arbitration, there were other pressures for the expansion of arbitration in the employment setting.

In New York State, during the late nineteen eighties, the New York State Division of Human Rights was experiencing its perennial back load of cases. Pursuant to an act of the legislature, a Human Rights Arbitration Advisory Committee was created. See § 284(a)(ii) of the Executive Law. The Committee under the auspices of the American Arbitration Association ("AAA") and with the involvement of Pauline Kinsella then chair of the New York State Public Employment Relations Board, and a number of prominent members of the labor and employment bar began grappling with the issues that employment arbitrators grapple with today. These issues are:

Neutrality of Arbitrators: Although it is not uniformly true, Labor Arbitrators on the FMCS and AAA labor panels are required to be full time neutrals and may not represent management, unions or individual employees. There is no such requirement for Employment Arbitrators.

Disclosure of Arbitral Conflicts: Because of the rough institutional balance between unions and employers in the labor context, labor arbitrators are generally not

required to make extensive disclosures of their relationships to the parties. Frequently an arbitrator or panel of arbitrators are actually named in the collective bargaining agreement. On the other hand employment arbitrators are required to make extensive disclosures concerning contacts with the parties and the law firms and lawyers representing the parties.

Payment of Administrative Fees and Arbitration Fees: In Labor Arbitration, most collective bargaining agreements provide that both the union and the employer shall share equally in the costs and fees of the arbitration. In Employment Arbitration, the obligation to pay for the costs and fees of arbitration is less clearly denoted. Under the AAA's employment rules, arbitrations which arise under an employer promulgated plan are to be paid for by the Employer. However in certain circumstances, a contract which requires equal sharing of the costs and expenses of arbitration may still require the employee to pay. The New York Court of Appeals has held that if an employee is obligated to pay arbitration expenses and the employee is unable to afford those expenses and the employee would be precluded from vindicating a statutory right, a hearing should be held concerning that employees ability to pay. *Brady v. Williams Capital Group, LP* (2010).

Discovery: Typically except for the exchange of documents there is no discovery in Labor Arbitration. The parties generally flesh out their cases in pre-arbitration grievance meetings. In Employment Arbitration, because statutory rights are frequently at stake a much fuller array of discovery devices are employed including depositions.

Type of Relief that may be Awarded: In Labor Arbitrations the parameters of

relief that may be awarded by the arbitrator are derived from the collective bargaining agreement. In Employment Arbitrations because the arbitrator may be called upon to construe statutory rights, the Arbitrator may be empowered to order relief consistent with the statutory scheme. This might include compensatory damages and depending on the statute attorneys fees.

It should also be noted that in Labor Arbitration the client is almost always the union and not the aggrieved individual, while in Employment Arbitration there is no such distinction.

Although the original panel of arbitrators created under the auspices of the State Human Rights Division had very few cases referred to them, the ideas and issues raised by the panel form the basis of protocols of Employment Arbitration. The due process protocol obtained from these ideas are echoed in the ABA Due Process Protocols for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship; the Employment Rules of the American Arbitration Association, and FINRA.

Practitioners should be aware of the distinctions between Labor Arbitration and Employment Arbitration.