Bringing Fairness and Due Process to Employment Arbitration

Arnold M. Zack

Employment agreements for arbitrating statutory disputes often favor the employers who drafted them. A special Task Force has developed a Due Process Protocol establishing standards of fairness in arbitrator qualification, training and selection, employee representation, discovery, compensation of mediators and arbitrators, and the authority of the arbitrator. This article traces the evolution and adoption of the protocol by state, federal, and designating agencies.

For the past fifty years, arbitration of employment disputes has been limited to issues arising only from the union-management relationship. Protective workplace legislation has expanded markedly in recent years. But the cost and delays of using administrative and judicial enforcement forums calls for an expanded role for workplace arbitration as a speedier, less expensive forum where the parties can be assured of their choice of experienced qualified decision makers.

While 95 percent of collective bargaining agreements provide the right to arbitration, only 15 percent of the workforce is currently represented under collective bargaining. Still, the impact of the arbitration process has been profound and its basic principles provide the starting point for developing arbitration standards for employment disputes out-

Arnold M. Zack is a Boston-based consultant/arbitrator in private practice and former President of the National Association of Arbitrators. Correspondence may be addressed to him at 170 West Canton St., Boston 02118.

0748-4526/96/0400-0167$09.50/0

side of collective bargaining. These negotiated procedures have been fine-tuned by years of arbitration, resulting in a standard of due process and fairness endorsed by the U.S. Supreme Court in 1960 in the well-known "Steelworkers Trilogy" cases respecting the decisions of the arbitrators as establishing and monitoring "the law of the shop." High standards of impartiality, increasing respect for the process, and the integrity of arbitrators themselves have also contributed to the establishment of the arbitration profession.

Workplace Disputes Outside Collective Bargaining

Although arbitration decisions of issues covered by a collective bargaining contract have consistently been upheld by the courts as final and binding (since the Steelworkers' Trilogy), the same is not true when the issue involves an employee's statutory rights. Ever since the decision of the U.S. Supreme Court in the case of *Alexander v. Gardner-Denver*,[1] the courts have retained their discretion to interpret the statute without regard to the arbitrator's decision.

Moreover, nonunion employees seeking to enforce their statutory rights must utilize the court system despite its often costly and time-consuming procedures and legal fees. This has effectively restricted access to the relief to the most affluent minority of the workforce with the resources and time to pursue such actions. For most people earning $30,000 or less per year, such legislative protections are unaffordable and therefore unenforceable.

Some employers have unilaterally established their own internal arbitration systems to resolve statutory issues, a notable example of which are the procedures established by companies in the securities industry. There, to get registered as a security agent, employees must sign a commitment to submit any disputes to the employer-promulgated arbitration system. The structure has been employed by security companies to require submission of all sorts of employment disputes including claims that otherwise would be processed before the Equal Employment Opportunity Commission (EEOC) and the courts.

These arbitration procedures are not bound by any external standard of fairness or due process. There is no union counterpart with whom to negotiate such standards, nor is there the guidance of any code of professional responsibility. In most cases the employer selects the arbitrator and pays the arbitrator. That funding employer, rather than the claimant is, of course, the source of repeat work. The employer's rules may deny the employee a right of representation, may deny access to any discovery or depositions, and may limit the award to be rendered.

In the 1991 case of *Gilmer v. Interstate/Johnson Lane Corp.*[2] the U.S. Supreme Court upheld the legality and enforceability of these arbi-

tration decisions in the securities industry case. Other cases are now awaiting adjudication at various stages of the legal process. Thus we have the irony of employer-crafted arbitration schemes — lacking many essential due process features — being endorsed by the Supreme Court, while collective bargaining arbitration agreements negotiated by unions and management to assure fairness and due process are not enforceable when the award deals with statutory issues.

The shortcomings of this system led the 9 June 1994 *Wall Street Journal* to characterize it as a "rigged game" and an "industry fraud." Arbitrators are not required to be conversant with or even follow the law, and are charged with being one-sided, unfair, and incompetent. As the *Journal* article (p. B1) noted:

> So grim are the prospects for most women who go through the securities industry arbitration process that lawyers say they now often advise their clients not to bother with arbitration at all. Instead they urge women to take modest settlements and walk away. . . . The arbitration process. . . has come under fire recently for weighing unfairly against all discrimination plaintiffs, not just women.

The Protocol

The deficiencies of the arbitration procedures implemented unilaterally by employers in the securities and other industries motivated a number of those in the labor-management arbitration field to search for ways to design an arbitration system that conformed to accepted standards of due process. An important impetus to this effort came from the Commission on the Future of Worker-Management Relations, chaired by Professor John Dunlop of Harvard University. In June, 1994 the Commission issued its *Fact-Finding Report* which stressed the need to develop private dispute resolution alternatives for employees "whose earnings are too low to cope with the high costs and contingency fee requirements of private lawyers" in the burgeoning field of employment disputes. That universe is further pressured by the backlog of 100,000 cases pending before the EEOC, and by the four-fold increase in the Federal Court caseload while the budget and staffing of the judiciary remains static.

Professor Dunlop asked me to work with others to develop an arbitration procedure that would extend the due process protections of labor-management arbitration to the arena of employer-promulgated arbitration of statutory issues. To follow up on this request, a number of us organized a Task Force on ADR in Employment. The Task Force consisted of labor and management representatives from the American Bar Association's Employment Law Section, and representatives of the

American Arbitration Association, the American Civil Liberties Union, the Federal Mediation and Conciliation Service, the National Academy of Arbitrators, the National Employment Lawyers Association and the Society of Professionals in Dispute Resolution.

The task force members met periodically over a ten-month period, exchanging proposals and ideas over how to structure a fair arbitration procedure. In May of 1995, a unanimous agreement (except for one issue) was reached on the following "protocol" or set of due process standards that we believe should be built into arbitration procedures used to resolve employment disputes involving statutory rights.

The one issue on which we agreed to disagree was what the "triggering event" should be to initiate the procedure. Some task force members maintained an agreement to submit all disputes to arbitration should never be made a condition of employment. Instead, a decision on whether or not to use arbitration should be made after a dispute occurs and a complaint is registered with an employer and/or the relevant government agency. At the other extreme were those who felt that arbitration would only prove effective if the arbitration procedure was agreed to as a condition of employment. In between, there were those who felt the procedure was applicable to pre-employment disputes as long as there was an option to decline to participate, and those who felt that the procedure should be chosen for use only after a dispute had arisen. We also differed on the meaning of the term "voluntary" as well as on the triggering event to initiate the process. Regardless of these differences, however, we agreed that the following elements should be included in arbitration procedures dealing with statutory rights:

- the employee's right of representation;
- discovery;
- mediator and arbitrator qualifications and training;
- selection process;
- compensation of mediators and arbitrators; and
- authority of the neutral.

Following is a brief explanation of key features of each of these elements.

The Employee's Right of Representation. The right of the individual to representation in any challenge to the employer's action is inherent in the collective bargaining model, but lacking in many employer-promulgated systems. To provide such assistance, the protocol entitles employees to be represented by any individual of their own choosing.

Although it permits the arbitrator to award attorney fees as part of any remedy, the protocol does encourage employers to offer a financial subsidy to the employee to cover the costs of representation. Many employers already offer such assistance in their existing systems.

Discovery. In situations where an employer is charged with statutory violation and at the same time possesses most of the documentation and evidence necessary to pursue the charge, there is need for some measure of prehearing discovery (i.e., access to the relevant information needed to prepare the case). In the labor-management model, that evidence is obtained through the several steps of the grievance procedure. The arbitrator is also empowered to ask for additional evidence or witnesses, or to draw an adverse inference from any failure to cooperate. While seeking to avoid the cumbersome rules of judicial discovery and accompanying delays, the protocol does provide for discovery under the supervision of the arbitrator.

An additional tool to rectify the imbalance between the employer as a frequent user of the arbitration scheme and the employee using it for the first time, is access to information about the potential arbitrators. The protocol provides access to the names of parties who have used the listed arbitrators in the past. This provides a way for the parties to review the arbitrators' performance and prior awards.

Mediator and Arbitrator Qualifications and Training. The task force was particularly concerned with the need to insure the mediators and arbitrators involved are well trained in the applicable laws and able and willing to make decisions and awards consistent with those the parties would get if they pursued their case before a government agency or court. Some of these neutrals might come from the ranks of current labor mediators or arbitrators; however, there is a critical need to add more women and people of color to this group. Moreover, all mediators and arbitrators will need to be well trained in both the processes of mediation and arbitration and in the substantive content and remedies available under the applicable laws. We expect a number of organizations, such as the American Arbitration Association and others, to create training programs to prepare neutrals to carry out these roles.

Selection Process. Once listed on their roster, a designating agency (such as the AAA) will provide disputants with a panel of neutrals certified as knowledgeable about the relevant law and procedures. The parties would then either choose a name from this panel or ask the agency to appoint someone from the panel. It would of course be the responsibility of the neutral to disclose any preexisting or present relationships which might be perceived as constituting a conflict of interest.

Compensation of Mediators and Arbitrators. Although the labor-management model anticipates joint funding of the selected neutral as a means of encouraging impartiality, the disparity of economic resources in employee complaints against employers effectively precludes parity of payment in the statutory arena. Employees should contribute to the funding, but the amount of their contribution might vary depending on their prior salary or ability to pay relative to the resources of the employer. Whatever sharing rule is followed, however, should not influence the neutral. We propose the designating agency arrange for the sharing and pay the arbitrator directly without revealing the contributors or the share each paid. Such fees in any regard may be a subject in establishing the distribution of costs and remedy.

Authority of the Neutral. While the job of the mediator will be to help the parties reach agreement on the disputed issues, the responsibility of the arbitrator is to: conform to applicable agreements, statutes, regulations and procedures; determine the time and place of hearings; permit reasonable discovery; preserve order at the hearings; rule on arbitrability, procedures and rules of evidence; and issue a written opinion and award resolving the issue. For the procedure to fulfill its purpose, the arbitrator must also be empowered to award whatever relief would be available in a court of law.

Scope of Review. Task force members debated at length whether the arbitrator's decision should be as final as held in the *Gilmer* decision or subject to full judicial review. Some proposed an agency deferral policy similar to that used by the National Labor Relations Board under its *Speilberg* Doctrine. The end result was recognition that the courts would determine the issue. We therefore agreed to the following: The arbitrator's award should be final and binding, and the scope of review should be limited.

Implementation of the Protocol

The protocol is likely to get its first test in the mediation and arbitration procedure established by the Massachusetts Commission Against Discrimination (see the following article, this issue). Moreover, the public sector counterpart to the Dunlop Commission, namely, the Secretary of Labor's Task Force on Labor-Management Relations in State and Local Governments, is about to issue a report that recommends adoption of the protocol for resolving disputes involving the statutory rights of state and local government employees. Finally, the Department of Labor is planning to announce its intent to use the protocol to offer the options of mediation and/or arbitration for resolving disputes in a number of

agencies within its jurisdiction. The American Arbitration Association and J.A.M.S./ENDISPUTE have adopted the principles contained in the protocol for processing all their employment arbitration cases.

These and other initiatives that may follow should test the utility of these procedures for bringing a more equitable system of justice to a larger range of individuals covered under employment laws than is now the case. Only time will tell if it realizes this objective.

NOTES

1. Alexander v. Gardner-Denver Co., 94 S.Ct. 1011, 1974.
2. Gilmer v. Interstate/Johnson Lane Corp., 111 S.Ct. 1647, 1991.
3. Men's club; riding crop and slurs: How Wall Street dealt with a sex bias case *Wall. Street Journal* Page B1, 9 June 1994.