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The Changing Face of Liberalism in Workplace Democracy: the Shift from Collective to Individual Rights

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by:

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Introduction

The 1960s and 1970s saw a drastic change in the liberal conception of workplace equality. Post-war liberals defined equality in terms of collective rights, with labor law and unions epitomizing this conception. The civil rights generation, on the other hand, thought equality to be based in the rights of the individual. As new laws upholding individual civil rights proliferated, employers found themselves increasingly bound by incompatible legal duties under the two parallel systems governing labor rights.

Through their union agreements, employers were bound to treat all employees identically; administering vacations, bonuses, and promotions according to seniority as outlined in the collective bargaining agreement. However, the civil rights statutes demanded deviation from these agreements at times by requiring employers to take into consideration individual employee circumstances. Thus with the recognition of individual rights in a time when most workplace decisions were governed by contracts upholding collective rights, a question arose: where the rights of the collective and the rights of the individual are opposed, to which do we give primacy?

This question quickly became the subject of dispute in both labor dispute mechanisms: the courts and the labor arbitration regime. A survey of each system's approach to the problem reveals very different procedural methods of resolution leading to equally different substantive outcomes. In close cases, labor arbitrators tended to side with employers who followed the collective bargaining agreement, often in contravention of the new civil rights statutes. I propose that this pattern arose not from differing views as to what the substantive law should be, or even from racial animus, but rather, from the inherent structural limitations of the labor arbitration process as it stood in the early 1970s.
The role of labor arbitrators had traditionally been limited to interpreting the collective bargaining agreement within the four corners of the document, and I propose that the arbitration mechanisms were simply not equipped to take cognizance of laws outside this limited purview. I also suggest that employees’ conflicting access to individual rights, depending on whether they went through the union grievance process or straight to court, may have led to a changed view of labor law’s role for the average worker. Labor law no longer represented the *avant garde* of the liberal workplace democracy. Rather its structures now acted to inhibit the movement that the courts and society in general were making towards individual rights. This structural deficit may in turn have led to a social movement away from unionization.

This paper focuses on a narrow time frame in the early 1970s, after the civil rights movement was underway, but before labor law and its internal dispute resolution mechanisms had the chance to harmonize themselves with the new conception of equality. It is in this period that the clash of collective rights and individual rights become most apparent within the dispute resolution mechanisms.

I. The Classic Labor Paradigm

Liberals of the post-World War II labor movement sought to transform the “anarchy of the marketplace, which exploited workers, into the harmony of a modern cooperative capitalism, which protected workers.”¹ These industrial pluralists of the 1940s and 1950s focused upon the creation of legal rules and administrative processes to resolve workplace conflicts—as opposed to leaving these decisions to unchained employer discretion.² Under this system, workplace

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² *Id.*
democracy was conceptualized “in process terms—outcomes or fairness were to be irrelevant. . .”\(^3\)

The legislation which most obviously embodies this pluralistic liberalism is the National Labor Relations Act (or Wagner Act, after Robert F. Wagner) enacted in 1935.\(^4\) This statute limited the means by which employers could react to workers’ organizing efforts, by explicitly granting employees the right to collectively bargain and requiring the employer to bargain with the employees’ appointed representatives.\(^5\) Collective bargaining consisted of negotiation between representatives of both the union and employer regarding the terms and conditions of employment.\(^6\) Under this system, the parties would attempt to predict common employment scenarios, e.g. hiring, firing, overtime, vacation, and agree in advance as to how these events should be handled. This bargaining would culminate in a contract called the collective bargaining agreement (“CBA”). By delineating procedures to be implemented in given situations, the CBA protected employees from employer whims and in this way guaranteed “equal” treatment. The CBA created workplace equality by guaranteeing identical procedural treatment across the bargaining unit and thus ensured the same predictable level of benefits and opportunities to all employees. Equality for liberals of this era then, meant the right to identical procedural treatment in the workplace and uniform methods of grievance resolution for those disputes that did arise under the CBA.

II. The Individual Rights Movement: Title VII and Affirmative Action

\(^5\) *Id.*
The 1960s saw several changes to the legal environment which would drastically change the backdrop upon which collective bargaining occurred. Title VII of the 1964 Civil Rights Act\(^7\) imposed a statutory obligation on employers and unions not to discriminate against any individual with respect to his hire or discharge, or with respect to his “compensation, terms, conditions, or privileges of employment because of such individual’s race, color, religion, sex or national origin.”\(^8\) Equally significant was an executive order\(^9\) which required major government contractors to adopt affirmative action programs to ensure that “applicants are employed, and that employees are treated during employment, without regard to their race, color, sex, or national origin . . . including . . . upgrading or transfer.”\(^10\) These broadly sweeping civil rights laws, aimed at protection of individual rights, quickly became a source of conflict in the labor dispute resolution structure, which had as its core purpose the protection of collective rights.

These laws demonstrated a dramatic shift in liberalism to a focus on the sanctity of individual rights as opposed to rights of the collective. “[C]ertain democratic norms w[ere] subordinated” by the labor movement to allow for the collective bargaining process, but under the new civil rights laws, certain rights of the individual could not legally be subordinated for any reason.\(^11\) Whereas post-war labor liberalism aimed to protect the worker by preventing individualized assessment and discretion on the part of the employer, Title VII insisted upon it. These new laws had at their core a fundamentally different conception of workplace equality than was found in the classic labor paradigm, and they proscribed duties on the part of the employer which conflicted with the classic conception of collective rights.

\(^8\) Id.
\(^10\) Id.
\(^11\) Brody, supra note 3, at 178.
III. A Structural Problem Reaches Labor Dispute Mechanisms

Employers attempting to follow both the new civil rights laws and the CBA began to find themselves in situations where they were unable to satisfy obligations to both. An employer with few minority employees might need to perform a layoff but find that the next person in line for layoff under the CBA is African American. Laying off that person however, could put the employer at risk of Title VII liability. On the other hand, skipping the minority worker and laying off the next, non-minority employee, would put them in the position of violating the CBA. Employers in these situations faced potential violations no matter which action was chosen. This conflict of employer duties carried the confusion created by this clash of rights from the shop floor into the labor dispute resolution mechanisms themselves.

The questions posed by these conflicts broke new ground for labor arbitrators by requiring them to look to laws external to the CBA. Traditionally, arbitrators were tasked with resolving disagreements over the meaning of provisions in the CBA through interpretations of the contract terms within the four corners of the document.12 Their only duty then was to interpret the CBA as it was written, applying basic contract principles, and determine whether the parties had complied with their mutually agreed upon duties.13 The disputes arising under the civil rights laws though, required arbitrators to step from their usual role as contract interpreters, into the role of full fledged adjudicator. This new role raised questions of arbitrator competency, not only as to the substantive law involved but even as to the arbitrator's authority to decide these disputes. Arbitration is a private forum where the “arbitrator receives his authority from the

13 See id.
parties to the collective bargaining agreement.”

His power to resolve the dispute is derived from party agreement within the contract. Thus it was unclear whether consideration of Title VII and other laws not explicitly agreed to in the CBA came within the scope of arbitrator authority.

Arbitrators became increasingly vexed as to the interface between their obligations to the CBA and new job discrimination laws. The question arose in arbitration after arbitration—to what extent are arbitrators competent to handle “legal” issues in employment discrimination cases? That is, when could an arbitrator address issues arising outside the closed realm of the collective bargaining agreement?

The arbitrators' own answers to these questions were far from uniform. In numerous cases, arbitrators undertook to construe Title VII and apply it to the grievances. However, in numerous other cases, arbitrators took the view that his responsibility and authority was to interpret and apply the CBA, and the Civil Rights Act was beyond his scope of authority. Whichever side of the line an arbitrator fell on, the vast majority of arbitrators informed their decisions as to their competency by consulting the arguments of one of two scholars: Bernard Meltzer and Robert Howlett.

(a) Howlett and Meltzer

According to Bernard Meltzer, the arbitrator could not look beyond the CBA. His two main arguments for this position concerned the parties’ consent and the arbitrator’s competence. According to Meltzer, “[t]he parties ha[d] consented only to the arbitrator’s construing their

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15 See ELKOURI & ELKOURI, supra note 12 at 331-33.
16 Id. at 331, fn. 34.
17 Id. at 332, fn. 35.
contract, not his conforming it to applicable law. And arbitrators are not competent—in the sense of qualified—to rule on questions of law."\(^{19}\) For these reasons, according to Meltzer, arbitrators were bound to respect “the agreement that is the source of their authority and should leave to the courts or other official tribunals the determination of whether the agreement contravenes a higher law. Otherwise arbitrators would be deciding issues that go beyond not only the submission agreement but also arbitral competence.”\(^{20}\)

Howlett, on the other hand, argued that “[t]here [wa]s a responsibility of arbitrators . . . to decide, where relevant, a statutory issue, in order that the [National Labor Relations Board], consistent with its announced policy, may avoid a decision on the merits, and the statutory policy of determining issues through arbitration may be fulfilled.”\(^{21}\) According to Howlett, “each contract includes all applicable laws.”\(^{22}\) He thus infers that an arbitrator charged with construing a contract is also authorized to interpret applicable law.\(^{23}\)

(b) Problems with the Scholars’ Theories as Applied: the Edwards Study

Several problems with these scholars’ arguments become immediately apparent when applied in the real world. First, Howlett’s position assumes an arbitrator has the ability to know

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\(^{22}\) Id. at 83

\(^{23}\) Sovern, supra note 19, at 31. At the same time, even Howlett recognized that there would be times when the arbitrator should not bring external law into play. “When an arbitrator meets one of those cases which might better be determined by the NLRB or EEOC (or some other agency), he may determine the General Counsel or the Commission, with its power of investigation, is in a better position to secure evidence than is an under—or non represented employee whose dispute has been submitted to arbitration. He should advise the parties to withdraw.” Howlett, supra note 21 at 92-93.
his competence and when to withdraw. The self-reported statistics from arbitrators at this time though, show that most were not.

Harry T. Edwards conducted a survey of all the United States members of the National Academy of Arbitrators in 1975 in an attempt “to determine . . . the extent to which arbitrators are competent to handle ‘legal’ issues in employment discrimination cases.” According to this study, only seventy-seven percent of the arbitrators had ever read a Title VII employment discrimination case. Only fifty-two percent regularly read advance sheets to keep abreast of current labor developments. Only fourteen percent indicated they felt confident they could accurately define and explain the relevant law with regards to: “bona fide occupational qualification,” “reasonable accommodation/undue hardship,” and “preferential treatment.” Despite these facts, seventy-two percent of the respondents indicated that they “felt professionally competent to decide legal issues in cases involving claims of employment discrimination.”

To break these statistics down further, fifty percent of arbitrators who said they had never read employment decisions or advance sheets still thought they were professionally competent to decide legal issues involving claims of race, sex, national origin or religious discrimination. A full seventy percent of respondents who indicated they did not regularly read advance sheets or

24 Harry T. Edwards, Arbitration of Employment Discrimination Cases: An Empirical Study, in COLLECTIVE BARGAINING AND LABOR ARBITRATION 1049 (2d ed., 1979). “The survey questionnaire was sent to 409 persons; 200 arbitrators responded to the questionnaire . . . . The average years of arbitration experience among respondents was twenty-one years (with a range from four to forty years). The percentage of survey questionnaires returned from each region of the United States was approximately the same (the lowest percentage was in the southeast where forty percent of the arbitrators returned their survey questionnaire; the highest percentage was from the State of Michigan where nearly sixty-three percent of the arbitrators answered the survey questionnaire.)” Id. at 1049.
25 Id. at 1049.
26 Id.
27 Id. at 1050
28 Id.
29 Id.
30 Id. at 1051.
keep abreast of current developments under Title VII, nevertheless found themselves professionally competent to pass judgment on these legal issues.\textsuperscript{31} In the end, only fourteen percent of the total group of respondents indicated that they felt they were both “(1) professionally competent to decide legal issues in cases involving claims of employment discrimination and (2) able to define” terms relevant to determinations of employment discrimination.\textsuperscript{32} From these statistics, “it is obvious that many arbitrators d[id] not believe that these factors [we]re relevant measures of the professional competence of arbitrators to decide legal issues in cases involving claims of employment discrimination.”\textsuperscript{33} These statistics quite arguably call into question Howlett’s assumptions about the ability of arbitrators to know when to withdraw.\textsuperscript{34}

Meltzer’s proposition has problems of its own. He argues staunchly that legal issues should be left to the courts and arbitrator should stick to what they know: contract interpretation. The first problem with this position is that it creates a likelihood that arbitrators will come to decisions that are illegal to enforce. An employer acting in conformance with the CBA, but contrary to Title VII, would “win” his labor dispute in a Meltzer-arbitration because looking only at the four corners of the document, the employer has acted in conformance with his duties. But enforcement of any proposed remedy would be illegal because the employer has acted contrary to Title VII. Thus Meltzer's proposition increases the likelihood of great inefficiencies, which completely negates the proposition that arbitration is a way to conserve scarce judicial resources. Further it increases the possibility of arbitral decisions against public policy.

\textsuperscript{31} Id.
\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} Even those arbitrators who admitted they believed themselves incompetent to adjudicate these cases were in fact passing judgment. Fifty percent of those who felt they were not competent said they had nevertheless heard one of these cases in the past year. Id. at 1052.
Another problem with Meltzer’s proposition that arbitrators should leave it to the courts
to decide civil rights issues was that most employees going through the arbitration process at this
time never made it to court. While employee-grievants were not foreclosed by arbitration from
pursuing their legal remedies under Title VII, the Edwards study seems to show that arbitration
was quite often, the only proceeding the employee engaged in.

Apparently, employment discrimination charges were filed with the Equal Employment
Opportunity Commission (“EEOC”) or the courts in only twenty-five percent\(^{35}\) of all the
employment discrimination cases heard in arbitration for that year.\(^{36}\) I propose that a possible
reason for this dearth of EEOC filings was a lack of legal counsel leading to employee ignorance
of their additional legal options. Legal representation in arbitration proceedings was a rarity for
individual employees, and hardly common for union represented employees. According to the
Edwards study, employees were personally represented in only nine percent of arbitrations,\(^{37}\)
while their unions had legal representation in only fifty-three percent of the proceedings.\(^{38}\)

Whatever the reason for the low number of appeals to outside entities, it appears that for
the vast majority of grievants, arbitration was both the first and last stop. Thus, if employees did
not have their Title VII remedies addressed in arbitration, they were not likely to have them
addressed at all.

IV. Emergence of Arbitration Patterns

Amid the uncertainty of the arbitrator’s competence to consider outside law, two general
scenarios began to play themselves out repeatedly in arbitration decisions. In Scenario One, an

\(^{35}\) Employment discrimination charges were filed with the EEOC or the courts in only 84 out of 328 of all the
employment discrimination cases heard in arbitration for that year. \(Id.\) at 1053.

\(^{36}\) \(Id.\) at 1053.

\(^{37}\) \(Id.\)

\(^{38}\) \(Id.\) It is interesting to note that employers were represented seventy-six percent of the time.
employer violates the CBA by attempting to comply with Civil Rights laws outside the CBA. In these situations, the arbitrators almost uniformly find for the employee. In Scenario Two, the company takes some action in conformance with the CBA but in contravention of Civil Rights laws. In this situation the outcome is almost always in favor of the employer.

Without the appropriate background knowledge, it would seem that this pattern is likely due to racist tendencies of arbitrators and the labor dispute resolution process. No doubt some were. But I propose that often, it was the structure of the arbitration process, more than the substance of the arguments or the identities of the parties, which led to these divergent outcomes.

(a) Case studies: Scenario One

Hollander & Company

The arbitration of Hollander & Company is a paradigmatic example of an arbitrator’s decision process under Scenario One. This proceeding concerned the layoff of two senior white employees who claimed their termination was adverse employment action not in conformance with the CBA. In 1968, when the bargaining unit involved was first recognized, the employer had eighteen employees, seven of whom were black. Subsequently, the employer was forced to lay off part of its workforce, after which only four black employees remained. In 1975, two additional layoffs became necessary. The next two people in line for layoff, by virtue of their seniority under the CBA, were two black employees. Noting that laying off these employees would bring the employment ratio down to two black employees out of a total of

39 Hollander, supra note 13.
40 Id. at 817.
41 Id.
42 Id.
43 Id.
44 Id.
eighteen, the employer's attorney advised that further layoffs of black workers would probably result in violation of Title VII and the Civil Rights Act of 1866. For this reason, the two black workers were retained and two white workers were laid off instead. The two white workers then filed grievances against the employer for its failure to follow the CBA.

During arbitration, the parties could not agree on the framing of the issue. The employer posed it as: “Are the seniority provisions of the collective bargaining agreement subordinate to the Civil Rights Acts of 1866 and 1964?” The union framed it as: “Did the Employer violate Article VI of the contract by laying off [these employees]?” The arbitrator, on the other hand, found it was first “necessary to consider what arbitrators had said about their own authority to deal with the conflicts between the collective bargaining agreement and the law and to determine whether Congress and the courts have provided sufficient guidance for arbitrators where such conflicts exist.”

Thus, this arbitrator explicitly acknowledges that a threshold question in any inquiry of this kind must be to what extent the arbitrator can even consider outside law. The arbitrator then framed the issue as: “where a conflict exists between the law . . . and the CBA, from which should the arbitrator draw his authority?”

The union took a position similar to Meltzer’s, arguing that the arbitrator is “without jurisdiction or authority to determine whether federal or state law controls this question. [He] can only interpret the collective bargaining agreement. Only federal courts can apply and

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45 Id.
46 Id.
47 Id.
48 Id.
49 Id. As the company had admitted that the layoffs were not in accord with the CBA, acceptance of the latter definition would have resulted in the a de facto win for the union.
50 Id. at 818.
interpret federal statutes." The employer did not contend that an arbitrator can always look to outside law, but rather argued that certain language in their CBA allowed for the arbitrator to consider outside law in this particular instance. The language to which the employer referred read: “Should differences arise between the Employer and the Union or any employee of the company, such difference shall be settled in the following manner:” The company argued that this broad definition of grievance—simply stated as “differences”—implied that grievances under this CBA were not limited to matters arising under the CBA, and thus the outside law as well as the CBA must be considered.

The arbitrator begins his analysis of the scope of his own authority with a very Howlett-like statement: “Although [the arbitrator] may not be hired to apply and interpret federal and state law the arbitrator cannot escape the legal framework that surrounds the employment relationship and helps shape the collective bargaining agreement.” In summarizing the arguments of Howlett and Meltzer the arbitrator lays out a brief survey of current published labor arbitration decisions, which he found “show[ed] wide differences on this question.” In the end the arbitrator reaches a less than satisfying conclusion in the typical fashion of arbitrators wrestling with these issues.

In the final analysis, an arbitrator’s position on this matter of law versus agreement must rest on his conception of the arbitration process, the clarity of the law and the role ascribed to arbitration by the legislature and the courts. Neither arbitrators nor legal scholars speak with a single voice on this matter, in fact, the voices are particularly divided. This arbitrator regards the institutional role of arbitration to be that of a private forum endowed by employers and unions with

51 Id. at 817.
52 Id. at 818.
53 Id.
54 Id.
55 Id.
56 Id.
the authority to interpret and apply the CBA. The first loyalty of the arbitrator is to the agreement. It is the document which he must follow.\textsuperscript{57}

However, after coming to this Meltzer-like conclusion, the arbitrator adds a Howlettian caveat, noting that despite his duty to the agreement, the arbitrator “works within a framework of national policy created by legislatures and the courts.”\textsuperscript{58} He goes on to explain that as to national policy, the Supreme Court and Congress had made it clear that the use of arbitration to conserve scarce judicial resources was to be encouraged and thus an “arbitrator is following national policy when he performs his usual task.”\textsuperscript{59} Conflicts arise in civil rights cases, he explains, “because a national policy is not yet clear enough to give requisite guidance to the arbitrator.”\textsuperscript{60} The arbitrator notes that while “[s]ome courts have interpreted Title VII so as to allow the continuation of seniority systems even where the application of seniority principles in layoff would cause blacks and females to suffer disproportionately,”\textsuperscript{61} others have modified seniority systems where such systems have continued the effects of past discrimination.\textsuperscript{62}

After recognizing the two competing national policies at issue, namely arbitration and anti-discrimination, and lamenting the paucity of guidance from the courts or congress as to which should win out over the other, the arbitrator throws up his hands: “[o]ne of the branches of government will ultimately have to decide whether Title VII takes precedence over collective bargaining agreements and under what conditions.”\textsuperscript{63}

After all of his discussion regarding theories of arbitral competence and national policy, the arbitrator gives into his frustration and falls back on a classic labor interpretation of the

\textsuperscript{57} Id. at 819.

\textsuperscript{58} Id.

\textsuperscript{59} Id.

\textsuperscript{60} Id.

\textsuperscript{61} Id. (citing Jersey Central Power and Light Co. v. Local Union 327, etc. of IBEW, 508 F.2d 687 (3d Cir. 1975)).

\textsuperscript{62} Hollander, supra note 13, at 819 (citing Watkins v steelworkers Local 2369, 516 F.2d 41 (5th Cir. 1975)).

\textsuperscript{63} Hollander, supra note 13, at 820.
contract, essentially ignoring the outside law. He finds that upholding the employer's interpretation and allowing the company to skip over some employees in line for layoff and choose others, would constitute a modification of the CBA and “[t]he terms of the present agreement [did] not give the arbitrator any such authority.” Thus, he held that the grievants were entitled to recall by the employer.

It is clear that this arbitrator did not make his decision based on determinations substantive civil rights law, nor did he perform any conflicts of law analysis or attempt to discern whether the CBA had primacy over the civil rights laws. He merely concluded that he, in his capacity arbitrator drawing sole authority from the parties to the contract, did not have the power to consider the civil rights laws and therefore he treated them as nonexistent. Without reference to the civil rights laws, he came to the only conclusion possible: he could not allow the employer to skip over employees of its choosing because (1) it was against the directives of the CBA; and (2) it would constitute a modification that the CBA gave him no power to make.

The outcome of this decision was thus completely dependent upon the arbitrator's conception of his powers and authority as defined by labor law. This decision represents a paradigmatic example of an arbitrator's struggle with his authority and duty, culminating in a decision which completely abrogates employer duties and employee rights under the civil rights statutes.

Mountain State Telephone & Telegraph Co.

The arbitrator in Hollander, supra, spent a good portion of his decision discussing the lack of guidance from Congress and the Courts as to the national policy of Title VII. Note that in Hollander, the employer's reason for its actions was an attempt to comply with the general

64 Id. at 821.
mandate in the language of Title VII; it was under no particular judicial order to desegregate, it had no approved affirmative action plan, and its CBA contained no antidiscrimination provisions from which an arbitrator might draw some authority. A number of arbitrators during this period, including the one in *Hollander*, opined that if such directives were in place or such guidance was provided within the CBA, an arbitrator might then be invested with the authority to consider outside law.  

An example of such an instance is *Mountain State Telephone & Telegraph Co.*  

This arbitration concerned four alleged violations of the parties’ CBA, each involving the employer's implementation and application of its “Affirmative Action Program and Transfer, Promotion and Upgrade Plan.”

Originally the matter included several individual grievances, but the parties later agreed to withdraw those and submit in their place four hypothetical fact scenarios. The stipulated fact scenarios were “purposed to identify and delineate the most serious problems involving the Affirmative Action Program” and the parties agreed that each was to be treated as a separate grievance to be determined by the arbitrator. The grievance which relates to this paper is grievance number four:

Grievant Senior filed a transfer request and was not awarded the requested position. Non-employee was hired to fill the position requested by grievant Senior. Grievant Senior is a Caucasian female, and non-employee is a Black female. The Company hired non-employee, since there were no Black females in the job classification in the office where the opening occurred. In the city

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65 See *Hollander, supra* note 13 at 820. The arbitrator noted that in some arbitrations, court decrees or approved affirmative action programs have provided the necessary guidance, but in the instance before him the company simply relied on its duties under Title VII at large.
67 *Id.* at 317.
68 *Id.*
69 *Id.*
70 *Id.*
involved there are at least two Black females employees with greater seniority than grievant Senior but such employees did not have on file transfer requests. Grievant Senior was qualified to assume the job which was filled by the Company hiring a non-employee. The sole reason for grievant Senior not being awarded the job described on the transfer request was the company’s application of its Affirmative Action override.\textsuperscript{71}

Unlike the situation in \textit{Hollander}, the employer in \textit{Mountain State} was acting pursuant to an approved affirmative action program and both parties agreed that the arbitrator could look to outside law as a basis for his decision. What is more, the CBA actually included an anti-discrimination provision setting forth the parties’ mutual promise not to “unlawfully discriminate against any employee because of such employee’s race, color, religion, sex, age or national origin.”\textsuperscript{72} Thus none of the procedural restrictions identified by the \textit{Hollander} arbitrator exist here; the parties agree the arbitrator is competent to consider outside law, and the CBA includes the parties' agreement to promote non-discriminatory policies thereby seemingly bringing questions of discrimination within the arbitral scope. Further, the outside law involved reaches beyond the generic Title VII decree, including an agreed upon affirmative action program promulgated under a consent decree and approved by the court which provided positive guidance as to which law the arbitrator should follow. Yet, even in this scenario, the arbitrator seems unable to transcend his historical role.

The decision starts out promisingly: “[I]t is obvious whenever there is a direct conflict in judicial proceedings between a collective bargaining agreement and Federal law the latter will prevail, and any arbitration award ignoring or contravening it will be of no practical effect.”\textsuperscript{73}

The arbitrator surmises that if the “arbitration process is to continue to have practical value in

\begin{flushright}
\textsuperscript{71} \textit{Id.}
\textsuperscript{72} \textit{Id.} at 318.
\textsuperscript{73} \textit{Id.}
\end{flushright}
cases involving alleged discrimination in employment, such cases must be entrusted to arbitrators of special competence, who should give full consideration to Title VII and, by inference, other relevant Federal statutory and administrative law in deciding the case.” 74 He even goes on to say that in order for the employer to comply with Title VII’s mandate of a “bona fide” seniority system, an employer may “unilaterally implement and Affirmative Action Program designed to correct the effects of past discrimination perpetuated by an existing although otherwise non-discriminatory system.” 75 But just as the arbitrator appears to be widening his scope, he quickly retracts it.

He warns that despite the new civil rights laws, “[t]he collective bargaining agreement remains a binding contract between the parties, except in such specific instances as it may be shown to be unenforceable because of a direct conflict with the parties’ legal obligations as defined by statute, administrative order, or court decree.” 76 This interpretation puts the burden on the employer to prove that there is no way to follow the CBA provision without putting themselves in direct conflict with their statutory duties.

He explains that court acceptance of the affirmative action program deeming it in compliance with federal law “d[id] not make performance of the seniority provisions of the collective bargaining agreement impossible in every instance.” 77 The decree in this proceeding authorized the company to set aside the seniority criteria “only if it is unable to meet its intermediate (affirmative action) targets within the statute time frames using these criteria” 78 and as such was not a grant of unfettered discretion. “Implicit in the Decree is a requirement that the

74 Id.
75 Id. at 328.
76 Id. at 327.
77 Id. at 329.
78 Id. at 329.
Company make a careful good faith determination that application of the affirmative action override is a matter of real necessity, and that it be able to document this finding.\textsuperscript{79} The arbitrator determines that the employer’s stated reason for diverging from the CBA, that “there were no Black females in the job classification in the office where the opening occurred,” did not indicate that the “Company was unable to meet that target within the stated time frame under normal seniority criteria.”\textsuperscript{80} Hence the arbitrator found that the employer had “failed to make a careful, good faith determination that it was unable to meet intermediate affirmative action targets within the applicable time frame without an affirmative action override,” and found its actions thus violated the CBA. In other words, according to this arbitrator, even where there is a court decree requiring an affirmative action program, the employer cannot diverge from the CBA to comply with that decree unless they can first prove it is the only way to comply with the CBA. This is a very narrow allowance from an arbitrator who purports to be construing and upholding federal anti-discrimination law.\textsuperscript{81}

(b) Case Studies: Scenario Two

\textit{Gulf State Utilities Co.}

\textsuperscript{79} Id.

\textsuperscript{80} Id.

\textsuperscript{81} \textit{See also} Bliss & Loughlin Industries, Inc., 64 Lab. Arb. Rep. (BNA) 146 (1974) (McKenna, Arb.). In this decision the company’s contract included a seniority provision. The company promoted a black employee with less seniority than a white employee to conform with its approved affirmative action program. The arbitrator finds that where a company must choose between federal law and the CBA, it must follow federal law. However, he also finds that because there has been no judicial proclamation that the provision of the CBA which creates the seniority system is discriminatory, there was real conflict between federal law and the CBA. Because the employer was not in a position of choosing between federal law and the CBA, they were bound to the contract and so diverging from the contract was a violation. \textit{Id.}; \textit{see also} USM Corp., 69 Lab. Arb. Rep. (BNA) 1051 (1977) (Gregory, Arb.) (finding that any deviation from the CBA is illegal; arbitrators should leave the interpretation of outside law to the courts).
Scenario Two involves arbitrations of grievances in which an employer takes some action in conformance with the CBA but in contravention of the civil rights statutes. In contrast to the outcomes in Scenario 1, here, the arbitrators side almost uniformly with the employer.

*Gulf State Utilities Co.* involved the grievance of a black employee who alleged that his demotion was motivated by racial animus.\(^{82}\) The grievant had been hired as a Laborer in September of 1968 and was promoted to Helper Electrician in December of 1970.\(^{83}\) In November of 1971 though he was demoted, and in response, he resigned.\(^{84}\) He began preliminary grievance procedures with his union but filed a complaint with the EEOC before the process was completed.\(^{85}\) After further discussion between the parties the employer reemployed him in March of 1972.\(^{86}\) The grievant was then placed in a similar position to his previous one, Mechanics Helper, and was told he was in a six month trial period.\(^{87}\) However, he was demoted a second time in September of 1972, to Laborer II.\(^{88}\) This time the parties went through all stages of the grievance process.\(^{89}\) The end result was that the employer agreed to develop a test which could be given to the grievant in a final effort to examine the accuracy of the original decision to demote him.\(^{90}\)

The parties agreed to frame the issue as: “Did the company violate the current labor agreement in reducing [the grievant] from Mechanic Helper . . . to Laborer II . . . ?”\(^{91}\)

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\(^{83}\) *Id.* at 1063.
\(^{84}\) *Id.*
\(^{85}\) *Id.*
\(^{86}\) *Id.*
\(^{87}\) *Id.*
\(^{88}\) *Id.* at 1064.
\(^{89}\) *Id.*
\(^{90}\) *Id.*
\(^{91}\) *Id.* The grievance also included a separate charge that the test was not in compliance with applicable standards but it is not necessary for the purposes of this paper to discuss that portion of the arbitration decision. *Id.*
The arbitrator recognizes from the outset that the matter involves “issues related solely to the contract and it also involves issues related to public law and its interpretation. Thus the major question is whether he should look only at the contract and ignore the law, or should both be included in his deliberations in arriving at a final decision?”\textsuperscript{92} He notes that the discrimination claims created by Title VII inject a “new dimension” into run of the mill labor arbitration.\textsuperscript{93}

Given the bargaining experience of the company and the established experience in the representation of its members by the [union], the subject arbitration normally would be a routine case and one that ordinarily should not require more than one day for a hearing. However, the passage of the Civil Rights Act of 1964 is adding a new dimension to what had once been considered to be routine arbitration hearings.\textsuperscript{94}

Par for the course, he then sums up the arguments of Meltzer and Howlett as well as the arguments of several other scholars.\textsuperscript{95} The arbitrator settles on the Howlettian model and finds that the “case meets the test of competence and consent” coming to the “inevitable conclusion that he must consider the applicable federal law in arriving at a decision in the subject case.”\textsuperscript{96} He explains that use of the outside law is proper because it is “helpful in interpreting the agreement to consider the law.”\textsuperscript{97} Further, “[t]he contract is compatible with the law, and in those cases where dual interpretation is possible, the arbitrator will avoid construction which would be invalid under a higher law. It is consistent with national labor policy to pursue such a course . . . .”\textsuperscript{98} He also recognizes that one of the main arguments against the consideration of outside law is that that arbitrator derives his authority from the parties to the contract, but

\textsuperscript{92} Id. at 1067.
\textsuperscript{93} Id. at 1062.
\textsuperscript{94} Id.
\textsuperscript{95} Id. at 1067.
\textsuperscript{96} Id. at 1070.
\textsuperscript{97} Id.
\textsuperscript{98} Id.
explains that he believes the only way to effectuate the wills of the parties is to consider outside law. “[M]ost parties, and especially those in the subject case, expect [the arbitrator] to deal with their problem effectively, and to the extent possible, conclusively. This he cannot do if he ignores Title VII of the Civil Rights Act of 1964.”

The employer allegedly demoted the grievant because it found him to be unqualified for the Helper position. According to the employer, this finding was based on the opinions of five supervisors who thought that the grievant “lack[ed] . . . mechanical aptitude, [had an] inability to recognize and select the right tools, and . . . lacked . . . inquisitiveness.” The union responded to these allegations with the argument that the standard of performance of a Mechanic Helper was not defined in any written material and so any evaluation of the grievant’s performance would be entirely subjective. The arbitrator was not swayed, “it is customary for management to place a heavy reliance on its supervisors in the determination of ability.” Possibly more telling of the arbitrator’s reasoning was the next line of the decision: “Arbitrators consider the opinions of supervisors to be quite important in this regard.”

The arbitrator also noted that the existence of a trial period bode well for the employer. “[I]t is considered to be a very positive factor in evaluation, for arbitrators generally hold that the ability to perform the job, or the lack of ability, may be demonstrated by a trial or break-in period on the job.” The arbitrator marches through the list of job qualifications and finds the supervisor’s assessment of the grievant conclusive in each instance, ultimately agreeing with the

99 Id.
100 Id. at 1077.
101 Id.
102 Id.
103 Id.
104 Id.
105 Id.
106 Id.
employer that the grievant was unqualified. His determination relied almost solely on the evaluations of the supervisors, despite the fact that these evaluations were wholly subjective and mostly undocumented.

After finding that the grievant was not qualified for the Helper position, the arbitrator turned to the question of whether the demotion was arbitrary, capricious, or discriminatory.\textsuperscript{107} There were two on the job incidents cited by the grievant which he felt showed the racist attitudes within the company. In one incident, a “mechanic told him to watch where he was going and called him a ‘black bastard.’”\textsuperscript{108} In the other, a mechanic called him “boy” when he was at the welding bench.\textsuperscript{109} The grievant later approached the mechanic about it, and the mechanic allegedly pulled a knife and said “What do you want Nigger?”\textsuperscript{110} In response, the grievant picked up a pipe and a mop and the two confronted each other.\textsuperscript{111} In the end, no blows were struck and the incident ended.\textsuperscript{112} The grievant felt that this incident set him apart from other employees in the shop and that he was treated differently afterwards.\textsuperscript{113}

The arbitrator made no real inquiry as to how this incident truly affected the grievant’s work environment. By the time of the arbitration, the mechanic involved was deceased and so with little discussion, the arbitrator found “there was no way to corroborate that incident.”\textsuperscript{114}

With these matters set easily aside, the arbitrator points to several factors which he believes lean away from a finding of discrimination. First, he felt that the six month trial period which allowed for objective determination of skill, counseled against a finding of

\begin{footnotes}
\footnotetext[107]{Id. at 1085.}
\footnotetext[108]{Id. at 1092.}
\footnotetext[109]{Id.}
\footnotetext[110]{Id.}
\footnotetext[111]{Id.}
\footnotetext[112]{Id.}
\footnotetext[113]{Id.}
\footnotetext[114]{Id.}
\end{footnotes}
discrimination.115 “A major test of the fairness of a trial period relates to the instructions and assistance received by the employee. . . . Where instructions and assistance [are] lacking” or given “in greater measure to one employee than to another, arbitrators have tended to rule that the trial period was unfair.”116 The arbitrator held that the employer had passed this test of fairness, basing this finding in great part on statements of the company’s vice president. The vice president testified he had told the grievant “that [the grievant] would be treated the same as any other employee” and that he had instructed the supervisors “to make sure [the grievant] got adequate attention.”117

In the final section of his discussion regarding the charges of discrimination, the arbitrator looked to the company’s past history “in regards to blacks.”118 He explained that “the failure to achieve a desired level of employment by a member of a protected class is not ipso facto racial discrimination. There must be evidence of a general pattern of discrimination or specific examples which contributed to the failure to achieve the desired level.”119 The arbitrator looked to the grievant and union to provide evidence to prove these propositions. He also cited the grievant’s own case as evidence that there was no discrimination on the part of the employer. He felt that the grievant’s initial promotion tended to show that the employer did not act discriminatorily to blacks. He also noted that “[o]ther blacks have performed well, and with no allegations of racial discrimination being suggested by anyone.”120 Based on this evidence, and

115 Id. at 1086.
116 Id.
117 Id. at 1086.
118 Id. at 1095.
119 Id.
120 Id.
because the union could not prove discrimination, the arbitrator found “no evidence of a general pattern of racial discrimination against blacks.”

In the end, the arbitrator denies the grievant relief because “there was no ‘clear and convincing’ proof by the union that the grievant was qualified or that the company’s argument that he was not qualified was incorrect. Nor was there ‘clear and convincing’ proof that the demotion was arbitrary, capricious, or discriminatory, either generally or racially.”

The arbitrator gives no explanation from where he derives the clear and convincing standard. He does not even expressly acknowledge its use in his discussion, mentioning it as if an afterthought in his award determination.

(c) Arbitral Competence and Employee Access to Rights

_Gulf State Utilities Co._ exemplifies the difficulties employees faced in trying to access their Title VII remedies through the labor arbitration regime—even when an arbitrator endeavored to consider outside law. The _Gulf State_ arbitrator held for the employer because the employee had not proven his case by clear and convincing evidence. Title VII puts no such proof burden on the employee. Further, the employee is never required to prove actual discrimination under any standard. Title VII requires only that an employee make out a _prima facie_ case. A _prima facie_ case is not the equivalent of a determination of actual discrimination; it merely requires the employee produce evidence from which discriminatory animus may be inferred. This is a very minor burden that comes nowhere near the requirement set forth by the _Gulf State_ arbitrator.

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121 Id.
122 Id. at 1097 (emphasis added).
At the time of this arbitration, the Supreme Court had already laid out the test for a *prima facie* case of discrimination in the hiring context and courts quickly applied this to on the job practices as well.\(^{124}\) In *McDonnell Douglas Corp. v. Green*, the Supreme Court held that:

> [T]he complainant in a Title VII trial must carry the initial burden under the statute of establishing a *prima facie* case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he . . . was qualified for [the] job . . .; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.\(^{125}\)

This standard was not meant to be an inflexible rule though and the Court noted that “[t]he facts necessarily will vary in Title VII cases, and the specification . . . of the *prima facie* proof required from respondent is not necessarily applicable in every respect to differing factual situations.”\(^{126}\) Nowhere in the jurisprudence of the day was there ever the need for the employee to prove actual instances of discrimination, let alone by clear and convincing evidence. If an employee could establish his *prima facie* case, the burden was on the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.\(^{127}\)

In *Gulf State Utilities*, the employer’s articulated nondiscriminatory reason for the adverse action was that based on the supervisors’ subjective evaluations the grievant was unqualified. Even prior to *McDonnell Douglas*, employment decisions “based on subjective, rather than objective, criteria” were found to “carry little weight in rebutting charges of discrimination.”\(^{128}\) Further, where the employer does articulate a reasonable, non-discriminatory purpose for an employee’s dismissal, *McDonnell Douglas* requires the employee be given the

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\(^{125}\) Id. Though *McDonnell Douglas* dealt with a refusal to hire, the analysis was quickly applied to cases discriminatory discharge etc. See Long v. Ford Motor Co., 496 F.2d 500 (1974).


\(^{127}\) Id. at 803.

\(^{128}\) See Moore v. Board of Education of Chidester School District No. 59, Ark., 448 F.2d 709 (8th Cir. 1971); see also Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971).
chance to prove that the articulated reason was pretextual.\textsuperscript{129} “Other evidence that may be relevant to any showing of pretext includes facts as to the [employer’s] treatment of [employee] during his prior term of employment . . . and [the employer’s] general policy and practice with respect to minority employment.\textsuperscript{130} In short, the employee “must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a cover up for a racially discriminatory decision.”\textsuperscript{131} In \textit{Gulf State Utilities}, it is not apparent that the grievant was given such a chance.

In \textit{Gulf State} we see the precise arbitral deficiencies postulated by the Edwards study playing out in the real world. The method of analysis followed by the \textit{Gulf State} arbitrator shows a complete lack of understanding of employment discrimination law under Title VII. Despite the fact that he undertook to apply outside law he lacked the proper competence to see the employee’s rights effectively redressed. While he purported to review the possibility of discrimination under Title VII, he performed no real Title VII analysis. Being unfamiliar with the civil rights statute, the arbitrator gives its violation much less weight than is due. He subordinates its provisions to the CBA by imposing a clear and convincing standard of proof upon the grievant and follows his trained tendency of towards deference to the CBA.

\textbf{V. Summary of Findings and Conclusion}

These arbitration decisions demonstrate the challenges faced by arbitrators in deciding issues concerning conflicts between the CBA and the outside law, Title VII in particular. Because of their classic role in subordination to the CBA, and their concomitant duty to refrain from looking to outside law for their interpretations of that contract, labor arbitrators had a

\begin{footnotesize}
\begin{enumerate}
\item \textit{McDonnell Douglas}, 411 U.S. at 804.
\item \textit{Id.} at 804-05 (citing Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970).
\item \textit{McDonnell Douglas}, 411 U.S. at 804-805.
\end{enumerate}
\end{footnotesize}
particularly difficult time with the injection of these new rights into their decision processes. In situations where the CBA was violated, the arbitrator’s natural tendency born of experience and training, was to find a violation on the part of the employer. On the other hand, when the employer followed the CBA, the arbitrator often lacked the close familiarity necessary to determine whether or not there had been a violation of the outside law. This lack of familiarity undoubtedly added to the arbitrator’s natural tendency to give greater weight to CBA provisions than to the outside law. Of course, these problems arose only if and when the arbitrator found himself competent to consider the outside law in the first place. If the arbitrator found himself incompetent, the Title VII law would never even enter into the equation and any violation of the CBA was unacceptable, no matter what the outside law dictated. Thus employees attempting to address their Title VII rights through the labor arbitration process in the 1960s and 1970s found themselves fighting an uphill battle, even as their counterparts in the courts saw nationally publicized victories. While the structure of a court proceeding included proof burdens in the employees’ favor, the structure of a labor arbitration gave more credence to the provisions of the CBA, which by its nature upheld collective rights at the expense of individual rights. The effect of these structural differences was that a unionized employee, whose first step in any workplace dispute was labor arbitration, found his Title VII remedies only sporadically enforced. Society at large had made a shift from a definition of equality centered in collective rights to one centered on the individual. Labor law’s inability to make that shift because of its inherent legal structure, left it a relic in a time of change and may even have helped lead to the downfall of union organization as the dominant example of progressive workplace democracy.