ARBITRAL REACTION TO ALEXANDER V. GARDNER-DENVER CO.: AN ANALYSIS OF ARBITRATORS' AWARDS APRIL, 1974-1980

DISSERTATION

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The purposes of this study were: (1) to present data resulting from an analysis of the ninety-seven published grievance-arbitration awards involving issues of racial discrimination occurring between April 1, 1974, and December 31, 1980; and (2) to determine from the data how labor arbitrators have reacted to Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

The Supreme Court held that labor arbitration was a "comparatively inappropriate" forum for the resolution of employment discrimination disputes. However, the Court said that an arbitral award could be "accorded great weight" by a lower court when certain relevant factors are present in an award. The cases were analyzed to determine the extent to which arbitrators responded to the factors set forth in the Gardner-Denver decision.

The findings and conclusions are as follows:

1. In over two-thirds of the cases the parties executed a labor contract incorporating provisions similar to that of Title VII into the antidiscrimination clause. The presence of such a clause enables the arbitrator to base the award on an interpretation of Title VII.

2. Arbitrators referred to public law associated with Title VII in forty-three per cent of the cases. Arbitral reference to relevant statutory, judicial, or administrative authority in this study indicates an increase in attempts to apply Title VII policy considerations to racial discrimination disputes.

3. The awards did not reveal any special effort by the arbitrators to provide the procedural fairness prescribed by Gardner-Denver.

4. Predominately, the arbitrators included in the study had a legal background. Over one-half were also members of the National Academy of Arbitrators. While these data show considerable arbitral experience, they do not necessarily connote special competence in deciding Title VII issues.

5. The overall response of the arbitrators in this study indicated little or no desire to specifically follow the guidelines set forth in the Gardner-Denver decision.

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CHAPTER I

INTRODUCTION

Since the enactment of Title VII of the Civil Rights Act of 1964, as amended (4), the American industrial relations system has undergone dramatic changes in labor-management relationships. A significant development within the system has been the use of labor arbitration to solve disputes involving claims of employment discrimination (8, p. 210).

There has evolved much discussion and debate as to the propriety of using the grievance-arbitration process to resolve grievances where statutory and contractual issues overlap (12, p. 42). The controversy has centered on the question of whether the arbitral forum can be used as a vehicle to effectively adjudicate grievances involving employment discrimination.

Wolfson examined the relationship between social policy and Title VII arbitrations and concluded that arbitration can, under specified guidelines, "fulfill its role in promoting industrial peace under the policy of equal employment opportunity" (18, p. 178). Others recognize the increased importance of Title VII arbitration when they speak of the application of the "common law" of the process to

discrimination grievances (10, p. 22). Blumrosen's study of several arbitral awards of employment discrimination grievances revealed the dilemma facing the arbitrator who must rule on interrelated contractual and statutory issues (2).

The arbitral quandary of having to decide discrimination questions was also noted by Meltzer (11). He recognized the problems encountered by labor arbitration when it interacts with the remedies provided by Title VII and posed three questions which have remained partly unanswered:

> First, how should arbitrators handle Title VII issues that overlap with issues concerning the interpretation or application of a collective bargaining agreement?
>
> Second, when such overlap exists, under what circumstances, if any, should an arbitral determination . . . bar an employee from involving his or her Title VII remedy?
>
> Third, when a Title VII remedy overlaps with a remedy under a collective bargaining agreement under what circumstances, if any, should an individual claimant be required to exhaust the grievance-arbitration procedure (11, p. 21).

Platt also pointed to some additional practical problems posed by the arbitrator's use of public law to decide discrimination issues (14). He voiced concern over the conflict between the private arbitration procedure and statutory remedies for discrimination in employment in the following statement:

> If law does become involved in an arbitration award, to what extent does the arbitrator engage in legal interpretation without usurping areas which

> Congress and State legislatures have placed in the hands of administrative agencies and courts? What kind of award would be appropriate where the arbitrator finds such a conflict (14, p. 405).

In another examination of the relationship of private arbitration and Title VII disputes, Gould concluded that arbitration should play more than a minor role in dealing with employment-discrimination complaints (8, p. 234).

It now seems apparent that labor arbitration is a major component of the collective bargaining process and has gained a large measure of respectability among those familiar with its operation. In addition, arbitration is favored by the existing national labor policy and strengthened by expanded use, especially since 1945 (6, p. 15). Moreover, the United States Supreme Court, in three separate cases known as the "Steelworkers' Trilogy" (17), validated the use of arbitration by concluding that it will work best if it constitutes the final method for solving disputes arising from the labor contract. The Court held that the judiciary should not overrule an arbitrator merely because of a disagreement over interpretation of the labor contract. Also the Court recognized the abilities used by the arbitrator in applying and interpreting the labor agreement to the "common law of the shop" in order to meet the specialized needs of the parties (17, pp. 581-582).

Despite the largely favorable treatment and general acceptance of the arbitral forum by the judiciary, the U.S.

Supreme Court in Alexander v. Gardner-Denver Co. (1) ruled that an employee who received an adverse arbitration award regarding a claim of racial discrimination was not precluded from also pursuing his statutory claim under Title VII. The Court said: "Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII" (1, p. 58). However, the Court also sought to accommodate the national labor policy favoring labor arbitration and the federal policy to eliminate employment discrimination by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause and his cause of action under Title VII. The Supreme Court said that the federal court should consider the employee's claim de novo and that "the arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate" (1, p. 60). The Court provided some guidance as to the factors of an arbitral award that could be considered by a lower court. These factors are set forth in footnote 21 from the Gardner-Denver decision:

> We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective-bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may

> properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. But courts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum (1, p. 60).

Statement of the Problem

The Supreme Court decision in Alexander v. Gardner-Denver Co. made it clear that a grievant who lost at arbitration was not foreclosed from pressing his claim of discrimination under Title VII. The Court did not fully answer, however, what the future role of labor arbitration in Title VII disputes would be. The Gardner-Denver decision touched on the question by saying that district courts could give such weight to prior arbitral awards as deemed appropriate to aid in a determination. The Court also said that lower courts could be guided in their use of prior awards by the relevant factors set forth in footnote 21.

Sufficient time has passed since the Gardner-Denver decision to determine arbitral reaction to the Supreme Court's ruling. This research is made to ascertain that reaction.

The primary question to be answered by this study is what has been the effect of the United States Supreme Court decision in the Alexander v. Gardner-Denver Co. case on arbitral decision making in labor arbitration awards involving racial discrimination disputes?

Purpose of the Study

This study has a twofold purpose. The first is to present the results of the analysis of the ninety-seven published arbitration cases involving issues of racial discrimination between April 1, 1974, and December 31, 1980. The second purpose is to determine from the above-mentioned analysis how labor arbitrators have responded to the Alexander v. Gardner-Denver Co. decision in cases related to racial discrimination.

Significance of the Study

A hallmark of the grievance-arbitration process is the reliance by both labor and management upon it as a voluntary mechanism for the peaceful resolution of internal disputes. Grievances alleging racial discrimination continue to be decided by arbitrators. These types of disputes, coupled with the guidelines of the Gardner-Denver decision, have imposed broader responsibilities upon all parties to the arbitration process.

Continued reliance upon labor arbitration to resolve employment discrimination disputes will be determined in large part by the finality of such arbitral awards. Finality in turn, should be significantly influenced by arbitral reaction to the ruling in Gardner-Denver. This study has assembled the analyses of ninety-seven published awards involving issues of racial discrimination, including use of relevant literature pertaining to the arbitration-Gardner-

Denver nexus. A thorough search of sources revealed that no previous doctoral research has been conducted to analyze arbitral reaction to Gardner-Denver (13).

Scope of the Study

This study examines the reaction of arbitrators to the ruling in Alexander v. Gardner-Denver Co. by investigating ninety-seven racial discrimination arbitrations. Data from each award were collected, classified, and analyzed; the resulting findings and determinations are presented. The awards represent arbitral decisions from April 1, 1974 (immediately following the Gardner-Denver decision), to December 31, 1980.

Design of the Study

The investigation of the published post-Gardner-Denver arbitration awards was conducted by utilizing the research technique of content analysis (7). Dyer defined content analysis as "a procedure that systematically and objectively identifies specific characteristics of a document" (5, p. 183).

Definition of the Universe

Universe (or target group) is defined by Tuckman as "that group about which the research is interested in gaining information and drawing conclusions" (16, p. 91). Research utilizing content analysis usually contains a sampling design of the content by choosing a representative sample

of content from the universe of interest (5, p. 184). This study, however, analyzes the published arbitration awards involving issues of race discrimination that occurred from April 1, 1974, to December 31, 1980. According to Borg and Gall, including all of the content specifically pertinent to the research is not unusual in many content analysis studies (3, p. 363). Also where the universe to be studied is relatively limited, other similar research has included all the items of that universe in the study (13, p. 7). Moreover, it has been shown that the content analysis technique is useful when data accessibility is a problem (9, p. 644).

Research Procedure

Collection of Data

This study examines the content of all published arbitral awards in order to determine how arbitrators have decided race discrimination grievances in light of the Gardner-Denver ruling. Certain data were extracted so that specific characteristics of the award can be systematically and objectively identified. The heart of content analysis is the categories into which the data are coded (5, p. 183). Coding is defined as "the process whereby raw data are systematically aggregated into units which permit precise description of relevant content characteristics" (9, p. 644). Holsti shows that the data coding format serves as a link

between the extracted data and the theory or hypotheses of a study (9, p. 644).

Accordingly each of the racial discrimination arbitrations are analyzed by utilizing the general format of research categories and questions used by Nyanibo (13, pp. 8-9). Because of the unique nature of this study, however, modifications were made where necessary. The categories and questions are as follows.

I. Antidiscrimination Clause.--Does the contract contain such a provision or does the arbitrator rely on another provision to rule on the grievance? What is its similarity to Title VII (i.e., does it expressly invoke the antidiscrimination language of Title VII)? Does the provision incorporate applicable federal and state law and regulations?

II. Application of Public Law Associated with Title VII.--Does the arbitration award cite federal or state law or agency decisions and guidelines? Are federal or state court decisions cited? Are other arbitral decisions (either by the same or another arbitrator) cited?

III. Issue of Race Discrimination.--Is the issue a Title VII issue? Is the issue raised in the arbitration hearing?

IV. Issues Involved.--What specific types of racial discrimination issues (discipline, discharge, etc.) were before the arbitrator? How often was each issue presented?

V. Degree of Procedural Fairness.--Was the grievant (and union) represented by private counsel? Did the parties have full opportunity to examine and cross-examine witnesses and to present testimony?

VI. Arbitrators Involved.--What was the background of each arbitrator? How many of the arbitrators were members of the National Academy of Arbitrators (NAA)?

Classification of Data

To obtain information based upon the categories of research questions, the following classifications are established:

I. Antidiscrimination Clause

- A. Present in contract
- B. Not included

II. Antidiscrimination Clause

- A. Similarity to Title VII
  1. Same or substantially same as Section 703(a) of Title VII of the Civil Rights Act of 1964, as amended.

2. Incorporation of other applicable federal and state law or regulations.

B. Other Applicable Clauses

III. Race Discrimination Issue

A. Title VII Issue

1. Yes

2. No

B. Raised During the Hearing

1. Yes

2. No

IV. Issues Presented to be Arbitrated

A. Arbitrability, nonarbitrability

B. Hiring, employment (testing, application forms, and so forth)

C. Promotions (trial periods, training programs, seniority, tenure qualifications, selection for apprenticeship programs, and so forth)

D. Job benefits (retroactive damages, transfers and so forth)

E. Discharge

F. Discipline (reprimands, suspensions, demotions, and so forth)

G. Layoff and recall

H. Other (not classified elsewhere)

V. Application of Public Law by Arbitrators

A. Federal and state statutes

B. Federal and state court decisions

C. Agency precedence and guidelines

D. Arbitral precedence

E. Other

VI. Other Authority Cited by Arbitrator

A. Contract language

B. Past practice

C. Merits of cases

D. Intent of parties

E. Other

VII. Procedural Fairness at Hearing

A. Representation for grievants

1. Attorney

2. Union representation

3. Other

B. Representation for Union

1. Attorney

2. Union representative

3. Other

C. Representation for Employees

1. Attorney

2. Employer's representative

3. Other

D. Witness Examination and Cross-examination

1. Yes

2. No

3. Not indicated

VIII. Arbitrators Involved

A. Background

1. Legal

2. Other

B. Membership in the National Academy of Arbitrators (NAA)

1. Member

2. Nonmember

3. Not indicated

This study utilizes frequency counts of the data as it occurred within each arbitration award with the results presented in tabular form. Included is not only observations of objective categories, but also content categories involving inference or evaluation by the researcher (3, p. 364). The data taken from the content classification system are also represented by their respective percentages and proportions.

The last step of this study was to conduct an in-depth investigation of the data to discover how arbitrators have specifically reacted to the guidelines of the Gardner-Denver decision. Salient patterns and trends were identified and conclusions drawn. Analysis and interpretation of the data appearing subsequent to the Gardner-Denver ruling provide a better understanding of arbitral adjudication of racial discrimination grievances.

Limitations of the Study

A total of ninety-seven arbitral awards involving an issue of racial discrimination was analyzed in this study. The awards represent the available published decisions occurring within the period April 1, 1974, to December 31, 1980. Sources for the awards include Labor Arbitration Reports, published by the Bureau of National Affairs; Labor Arbitration Awards, published by Commerce Clearing House; American Arbitration Awards and Labor Arbitration in Government, published by the American Arbitration Association; and Public Sector Arbitration Awards, published by the Labor Law Press. Another source investigated for additional awards was the Labor Agreement Information Retrieval System (LAIRS), a data bank listing all grievance-arbitration awards involving an agency of the United States government. However, a search of L.A.I.R.S. by the U.S. Office of Personnel Management in Dallas, Texas, did not reveal any awards involving racial discrimination during the period under study.

These several sources were investigated and each award containing an issue of racial discrimination was extracted. The awards from the time period shown in this study are not all the arbitrations conducted where race was an issue. This is because every award is not published; a reason for this is that neither the Federal Mediation and Conciliation Service nor the American Arbitration Association will release

an award to be published unless the parties have consented. Also the collective bargaining agreement itself may prohibit publication without mutual consent of labor and management. Hence, the awards in the study from the sources shown were the ones available for analysis.

Definition of Terms

Arbitration.--"A proceeding voluntarily chosen by the parties who want to solve a dispute with the help of an impartial judge of their own mutual selection. The judge's decision, based on the merits of the case, is usually final and binding upon the parties involved" (6, p. 2).

Grievance arbitration.--The most common type of arbitration. It involves settlement of disputes that arise over the interpretation or application of an existing collective bargaining agreement. The arbitrator interprets and applies the meaning of the contract provision in question on the basis of the case presented by the parties. A decision is rendered when the dispute cannot be settled at the lower levels of the grievance procedure. The parties agree to be bound by the decision of the chosen arbitrator (15, pp. 34-35).

Employment discrimination.--As stated in Section 703(a) of Title VII, it is unlawful for an employer.

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against

any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate or classify his employees or applicants in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, sex, or national origin (4).

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CHAPTER II

REVIEW OF RELATED LITERATURE

Introduction

The purpose of this chapter is twofold:

1. To examine the emergence, growth and conflict between the federal labor policy which supports the private settlement of disputes through the grievance-arbitration process and the national commitment to eradicate employment discrimination; and

2. To review the literature that has dealt generally with the employment discrimination-labor arbitration relationship and particularly with arbitral reaction to Alexander v. Gardner-Denver Co. (4).

Three broad categories are included in this chapter. First, the various attempts to eliminate discrimination in the workplace are examined. The capstone of these efforts is Title VII of the Civil Rights Act of 1964, as amended (18). Title VII and other governmental remedies specifically enacted to achieve equal treatment in the workplace are highlighted. In addition to Title VII and its related remedies, an examination of fair employment issues raised under the nation's labor laws is also included.

The second section reviews the evolution of the labor arbitration process. Emphasis is placed not only on its institutional framework, but also on its general acceptance by both the federal judiciary and governmental agencies.

Third, the relationship between the labor arbitration process and employment discrimination is shown. Special problems resulting from the relationship and existing prior to the Supreme Court's ruling in Alexander v. Gardner-Denver Co. are also examined. The Gardner-Denver decision is analyzed to show the Court's view of arbitration's role in the settlement of employment discrimination disputes. Various reactions to the ruling are also reviewed.

The National Policy to Eliminate Employment Discrimination

There exists several remedies aimed at eliminating the social injustice of discrimination in employment in the United States. To a large degree the various remedies have been effectuated due to growing protests over persistent practices of job discrimination. Along with public expressions of protest are economic disadvantages of unemployment (76). The following statement of the problem is noteworthy:

> The principal measure of progress toward equality will be that of employment. It is the primary source of individual and group identity. In America, what you do is who you are: to do nothing is to be nothing; to do little is to be little. The equations are implacable and blunt, and ruthlessly public (69, p. 124).

Efforts to eliminate employment discrimination culminated in the enactment of Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, religious belief, sex, or national origin (18). Primary responsibility for enforcement was given to the Equal Employment Opportunity Commission (EEOC) which originally was limited to the use of informal persuasion, conference and conciliation techniques. Those methods were later strengthened with the passage of the Equal Employment Opportunity Act of 1972 (33). A key provision in the 1972 Act enlarged the enforcement powers of the EEOC by authorizing it to bring a suit in federal district court on behalf of a claimant. The amendments also increased the reach of Title VII to nearly all public and private sector organizations; labor unions and employment agencies are also covered.

Along with Title VII and its later amendments, there are other coextensive governmental remedies designed to eliminate employment discrimination. The Equal Pay Act of 1963 (34) amended the Fair Labor Standards Act (37) by requiring equal pay for equal work. Essentially, the law prohibits pay differentials based on sex.

Another federal government remedy is found in the Age Discrimination in Employment Act of 1967 (2) which protects persons between the ages of 40 and 70 from a wide range of discriminatory practices in employment. The law not only

prohibits arbitrary age discrimination, but it also seeks to promote the employment of older workers based on ability rather than age. Coverage of the law extends to public and private sector employers, labor unions and employment agencies.

Other legislative remedies are also available to safeguard employees from employment discrimination. The Vocational Rehabilitation Act of 1973 (88), for example, protects handicapped persons. Also the Vietnam-Era Veterans' Readjustment Act of 1974 (87) requires firms holding government contracts to take affirmative steps to hire and promote qualified veterans of the Vietnam-era and disabled veterans.

In addition, employees may also seek to remedy employment discrimination on the basis of race, sex and national origin under two nineteenth-century laws, the Civil Rights Acts of 1866 (16) and 1871 (17). These two laws are not enforced by any agency of the government but have been used in court actions where Title VII does not specifically apply (66, p. 10). Many states have also enacted fair employment statutes which are often more comprehensive than Title VII and cover employers not subject to the federal law.

The various aforementioned laws are also augmented by federal Executive Orders 11246 (35) and 11375 (36) which create for federal contractors and subcontractors the additional obligation of taking "affirmative action" in their employment practices regarding women and minority groups.

The Office of Contract Compliance Programs (OFCCP) administers the Executive Orders by establishing and enforcing the regulations that pertain to affirmative action programs.

While Title VII and related legislation provide for broad relief from illegal employment practices, there are also other avenues of relief found in the nation's labor laws. The doctrine of the duty of fair representation has been developed by the courts and the National Labor Relations Board (NLRB) to deal with discrimination by labor unions (71). This doctrine was developed to protect black members deprived of work opportunities by the white majority in a collective bargaining unit (47, p. 457).

The doctrine was first mentioned in Steele v. Louisville and Nashville R.R. (79), a case brought under the Railway Labor Act (68). In Steele, the Supreme Court said that because the majority choice is imposed upon all in the bargaining unit, the union is bound to represent all members fairly and without discrimination. The Supreme Court also applied the doctrine to the National Labor Relations Act (NLRA) (62) in Vaca v. Sipes (86) where the Court defined the concept. It said that to breach the duty of fair representation, a union must have been hostile or acted in bad faith, processed grievances in an arbitrary or perfunctory fashion, or acted negligently toward a member of the collective bargaining unit (86, p. 178). Prior to the Vaca decision, the

NLRB, in a case not involving racial discrimination (60), held that a breach of the duty of fair representation was an unfair labor practice since it unlawfully restrains and coerces employees in the exercise of their statutory rights. The discrimination issue was applied, however, in the Hughes Tool Co. case where the NLRB found that a union breached its duty of fair representation when it maintained segregated locals and refused to process grievances of its black members (51).

The conception and application of the duty of fair representation doctrine shows that the nation's labor laws can also be used to alleviate a union's racial practices. While the remedies contained in the NLRA may not be as broad as those available under Title VII, the NLRB can afford an administrative remedy to aggrieved minority members by issuing cease and desist orders enforceable in the federal courts.

The existence of several avenues of relief available to victims of discriminatory employment practices underscore the national commitment to eliminate such practices. Of the various remedies, those avenues primarily available to alleviate racial discrimination in employment are the following:

1. Title VII of the Civil Rights Act of 1964;
2. The Equal Employment Opportunity Act of 1972;
3. The Civil Rights Act of 1866 and 1871;
4. Executive Order 11246 and Executive Order 11375;

5. State and local fair employment agencies;

6. A union's duty of fair representation under the National Labor Relations Act (as amended);

7. The grievance-arbitration machinery provided for in the labor agreement.

Of these forums, Title VII is the most comprehensive and significant. The interpretation and enforcement of other remedies are often influenced by court decisions rendered in Title VII cases (66, p. 9). Often a judicial determination is required when a conflict occurs between remedies available to resolve a claim of employment discrimination. Such a conflict was evident between the labor arbitration process and Title VII prior to the Alexander v. Gardner-Denver Co. decision. Prior to analyzing that ruling and its impact on the labor arbitration-Title VII relationship, it is necessary to trace the development of the conflict by examining the role of arbitration in the federal labor policy.

Grievance Arbitration and the National Labor Policy

Labor arbitration as practiced within the industrial relations system of the United States has developed into a well-accepted procedure for dispute resolution (83, p. v). Over 95 per cent of all labor management contracts in the private sector provide for grievance procedures with arbitration as the terminal step (45, p. 1). Arbitration has also become widely used by public-sector employee groups to

resolve impasses (31, pp. 10-11). Its use in several different employment settings is described by Aaron as a "fundamental theme in the industrial relations system that appears in numerous variations based upon pragmatic considerations" (1, p. 162).

The growth in the use of grievance arbitration has been largely due to the recognition of the following advantages over litigation: (1) its saving of time and expense; (2) its use of non-technical language and procedures; (3) its flexibility in fitting the award to the particular case; and (4) its informal and private hearing (56, pp. 4068-69). As a substitute for work stoppages, arbitration also serves to foster cooperative efforts to settle potentially trouble-some complaints. Moreover, the Supreme Court has recognized that the arbitration process by airing even "frivolous" grievances, may have long-run therapeutic values for the participants (85, p. 367).

Widespread acceptance of the grievance arbitration process in the Unites States began during World War II with the formation of the National War Labor Board (NWLB) a tri-partite panel with the authority to hear and decide labor disputes which threatened the wartime production effort (39, p. 15). The NWLB heard over 20,000 cases during its three-year existence; most of the cases involved disputes over the terms of collective bargaining agreements (31, p. 15). The major impetus given to grievance arbitration

by the NWLB was its policy of requiring the use of clauses providing for arbitration of future disputes over the interpretation of application of an existing labor agreement (67, p. 9). An analysis of the experiences with labor arbitration in the wartime period and thereafter is provided by Fleming:

> The years between 1941 and 1957 made clear that grievance arbitration was not only a device for settling differences of opinion over the meaning and interpretation of contracts. It was also related to bargaining strategy, to human relations within the plant, and to organization imperatives within the union and management structures. It was not, however, much concerned with the law, and that is what distinguishes the next period--after 1957 (39, p. 21).

Legal Status of Arbitration

Although the law has played a limited role in labor arbitration, the process has become "federalized" as to legal status (31, p. 26). Fleming states that federal court decisions "have had an important effect in making both the arbitration agreement and the award enforceable and have set the stage for the establishment of other rules by court action" (39, p. 28).

Under Section 203(d) of the Labor Management Relations Act of 1947 (57), Congress indirectly set forth its support for arbitration as the method agreed upon by the parties for the settlement of grievance disputes. That legislative intent received support from the Supreme Court in Textile Workers of America v. Lincoln Mills of Alabama (81). The

case involved an interpretation of Section 301 of the LMRA which authorizes suits in federal courts for violations of collective bargaining agreements. The Court ruled that the provision can also be applied to agreements to arbitrate grievance disputes. The decision interpreted Section 301 to be substantive, i.e., it consisted of legal rights and principles, not merely procedural rules. Lincoln Mills resolved the question of whether courts could enforce collective bargaining agreements to arbitrate unresolved grievance disputes. The Court's decision stated:

> . . . the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can best be obtained in the case (8, p. 455).

The Lincoln Mills decision evoked considerable discussion (25) over the Court's interpretation of Section 301 vis a vis labor arbitration. Trotta (83, p. 109) views the decision as the beginning of a pattern of cases evidencing judicial approval and encouragement of the use of arbitration.

That pattern of support was enlarged by three cases decided by the Supreme Court in 1960. Known as the "Steelworkers' Trilogy" (85), the Court reexamined the questions of enforcement of arbitration agreements and arbitration awards. Prior to the Court's decisions, there was some

concern that the Lincoln Mills ruling would lead to increased judicial interference in the arbitral process (67, p. 247). Cox (25) was also troubled over judicial unfamiliarity with labor arbitration in particular and industrial relations in general. These misgivings, however, were largely dispelled by the "Steelworkers' Trilogy."

Two of the cases (85, pp. 564, 574) involved suits for specific performance of agreements to arbitrate and the third (85, p. 593) was for enforcement of an arbitration award. The central issue in all three decisions was whether a federal court, in determining the enforceability of arbitral agreements and awards, could delve into the merits of grievances or arbitration awards (56, p. 10324). The Supreme Court ruled that the lower court in each case had exceeded its authority by injecting itself into the merits of grievance-arbitration disputes. The following statement demonstrates the Court's concept of an arbitrator's role:

> The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts . . . . 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 . . . (85, p. 582).

The Court also called for judicial enforcement of an arbitral award even though a court may disagree with the arbitrator's interpretation of the agreement. The Court said:

> 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 to the problem. This is especially true when it comes to formulating remedies. There is need for meeting a wide range of situations . . . an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own kind of industrial justice. He may, of course, look for guidance from many other 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 his obligation, courts have no choice but to refuse enforcement of the award (85, p. 597) (Emphasis added).

The "Steelworkers' Trilogy" has had a significant impact on the use of arbitration in the industrial relations system (75). Prasow and Peters state that the decisions greatly strengthen the arbitration process by drawing the formal lines of authority between the arbitrator and the courts (67, p. 257). The important "Trilogy"-related propositions are summarized as follows.

1. Arbitration is an integral part of the industrial relations system.

2. As long as the arbitrator remains within the boundaries of the contract, he has the right to fashion an award.

3. It is not the function of the courts to look into the merits of a grievance dispute.

4. An arbitral award should be enforced unless the arbitrator has exceeded his authority under the agreement in reaching a decision.

Subsequent to the "Trilogy," there are several other examples of Supreme Court decisions having an effect on the arbitration process. Each case shows continued encouragement for the use of labor arbitration. A summary of each case follows.

Dowd Box Co. v. Courtney (26): State and federal courts have concurrent jurisdiction under Section 301 of the LMRA to enforce arbitration agreements.

Drake Bakeries Inc. v. Local 50, Bakery Workers (27): An employer's claim for damages resulting from a union's breach of a non-strike provision is arbitrable where the arbitration clause is broad enough to cover all disputes between the parties.

Boys Markets, Inc. v. Retail Clerks Union, Local 770 (11): An employer was allowed injunctive relief against a union's strike in breach of a no-strike clause where the underlying issue of the strike was itself arbitrable. This proarbitration decision overrode the anti-injunction provisions of the Norris-LaGuardia Act of 1932 (63).

John Wiley & Sons, Inc. v. Livingston (55): The Court held that a merger did not free the successor employer from an obligation to arbitrate disputes under an agreement to which he was not a party.

Vaca v. Sipes (86): The Court enunciated a union's duty of fair representation; failure to completely process a meritorious grievance can result in an individual suit under Section 301.

Gateway Coal Co. v. United Mine Workers (40): In a wildcat strike to protest mine safety conditions, the union was compelled to arbitrate the dispute over safety. The Court enjoined the strike on the grounds that the action violated the no-strike agreement--the quid pro quo for an arbitration clause.

Emporium Capwell Co. v. Western Addison Community Organization (32): In this case, a group of non-white workers sought to remedy pending racial discrimination grievances through independent actions--picketing and the distribution of handbills urging a consumer boycott. The Court held that the available grievance-arbitration machinery was to be used to challenge racial discrimination practices, not self-help efforts by a few employees.

The review of the selected Supreme Court decisions directly or indirectly affecting arbitration shows the range of "judicial inventiveness" used to endorse and strengthen the process. Prasow and Peters note that the cases "provide a frame of reference which not only imparts a logical flow to the Supreme Court's rulings, but also establishes a necessary base for an analysis of judicial attempts to fashion a body of federal law on labor arbitration" (67 p. 273).

The NLRB and Arbitration

The question of whether and to what extent an arbitrator may consider statutory issues in resolving a grievance

dispute has been debated by observers for several years (24). A clear example of arbitral reliance on statutory matters is evident in situations involving dual jurisdiction where an arbitrator is called upon to interpret and apply the provisions of an agreement to a dispute which also involves an unfair labor practice under Section 8 of the LMRA (89). The overlap of an arbitrator's jurisdiction with that of the NLRB (or other enforcement agency) is not uncommon since most labor contracts are patterned after existing labor laws.

The NLRB, besides having authority to oversee representation elections, is also authorized to prevent and cure unfair labor practices. This power, however, is to be unaffected "by any other means of adjustment or prevention that has been established by agreement law or otherwise" (57, Sec. 160). The LMRA does not expressly direct the NLRB to act in unfair labor practice cases; the law merely empowers the agency to do so. With this somewhat flexible guideline, the NLRB has deferred such disputes to arbitration in accordance with the intent of the national labor policy (82, pp. 331-332). The Supreme Court's decision in Carey v. Westinghouse Electric Corp. (14) also showed support for NLRB deference to arbitration. The Court said:

> As a general rule, the existence of the NLRB remedies do not preclude seeking a judicial or arbitral remedy for the same or overlapping controversy under the terms of the collective bargaining agreement . . . . The bare fact that

> the union might have sought similar relief under Section 8 would not oust the court of jurisdiction to enforce the agreement to arbitrate (14, p. 265).

Judicial sanction of the NLRB policy of deferring to arbitration awards has been an important development in labor-management relations (52). The key issue is whether the NLRB, or the courts, should defer to an arbitration award where a statutory right and a contractual right overlap, but only the contractual right has been submitted to and adjudicated by an arbitrator.

The deferral policy was clearly set forth by the NLRB in its Spielberg Manufacturing Co. decision (78). The case involved the company's refusal to reinstate strikers for alleged picket line misconduct. Both sides agreed to submit the dispute to an arbitration panel which supported the refusal to reinstate. In the union's subsequent unfair labor practice charge, the NLRB did not consider the legality of the strikers' actions but dealt only with the issue of whether or not to be bound by the existing award. In deciding to honor the award, the NLRB set the following conditions for deferral: (1) fair and regular arbitration proceedings; (2) consent by all parties to be bound by the arbitral award; and (3) compatibility of the award with the policies and purposes of the LMRA (78, p. 1082).

The Spielberg doctrine does not create automatic NLRB acceptance of all awards dealing with statutory issues. Trotta shows that there also must be adequate notice and

representation, the arbitrator must rule on the Section 8 issue, and the award must be unambiguous before deferral is made (83, p. 133).

In 1971, the NLRB's Spielberg doctrine was expanded to include deference to contract grievance-arbitration procedures available to the parties but not yet invoked. In Collyer Insulated Wire (19) the NLRB set forth five factors which it would consider in a case where deference would resolve both an unfair labor practice issue and a contract interpretation issue. The five factors influencing a deference decision are (1) the history of the collective bargaining relationship; (2) an absence of anti-union animus; (3) the willingness to arbitrate; (4) the scope of the arbitration clause; and (5) the suitability of the dispute to resolution by arbitration (19, p. 842). The Board in Collyer did, however, retain jurisdiction over the dispute and would exercise its authority where it is evident that the parties were not prompt in invoking arbitration or that the arbitral award does not meet the requirements of the Spielberg doctrine (19, p. 843). Isaacson and Zifchak state that the NLRB's deference policy found in Collyer "represents the culmination of more than two decades of case law according ever-greater stature to the arbitral process" (52, p. 1389).

Under both the Spielberg and Collyer doctrines, NLRB deferral to private arbitration when contractual interpretation and statutory violations overlap is viewed as a

means of augmenting the national labor policy and settling industrial disputes. Encouragement of the use of arbitration by the NLRB has been cause for considerable discussion. Covington (23, p. 93) states that the deferral policy has had an overall positive effect on the labor-management relationship because of less interference with the arbitral forum. Getman (41), however, generally opposes the deferral policy because of the NLRB's unwarranted delegation of its powers to the arbitral forum.

As noted by Truesdale (84), the NLRB's policy of deferring certain statutory issues to the arbitration process has undergone some changes since its inception in Spielberg and expansion in Collyer. For example, in Suburban Motor Freight, Inc. (80), the NLRB ruled that it would not defer to arbitral decisions in unfair labor practice cases unless the statutory issue was both presented to and considered by the arbitrator. The essential objective, however, has remained intact. That is, the Board has attempted to stimulate internal settlement of disputes through procedures agreed upon and utilized by private parties.

The evolution of a national labor policy generally favoring the use of grievance-arbitration methods to resolve industrial disputes is evident in Supreme Court endorsement, NLRB's deference, and the parties' overwhelming acceptance of the process (43, p. 210). Judicial treatment of arbitration has provided a "realistic division of authority and expertise

between the arbitrator and the courts and has created a strong basis for deference to arbitral awards" (54, p. 849).

Arbitration and the Resolution of Racial Discrimination Grievances

The rise of arbitration and its endorsement as the preferred method for settling labor disputes results in special problems when it is used to resolve racial discrimination grievances. The enactment of Title VII typifies the conflict between the federal labor policy which encourages the use of the grievance-arbitration procedure and the national policy to eliminate employment discrimination (48, p. 904). Such a conflict occurs when a grievance under the labor contract is based on the anti-discrimination provision of the agreement.* The result is an overlap between the grievance-arbitration process and Title VII.

The use of arbitration to resolve claims of discrimination is not specifically mentioned in Title VII. However, it appears that Congress intended to provide an individual with multiple remedies against employment discrimination (20).

Where labor arbitration is used to resolve racial discrimination grievances, the arbitrator is often called upon

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*Recent surveys show that over 83 per cent of labor contracts contain provisions prohibiting employment discrimination.

to interpret and apply overlapping Title VII and contractual standards. The role of law in arbitration proceedings has been the subject of much discussion and debate (31, pp. 325-328).

Meltzer presents four points that pertain to the controversy.

1. The arbitrator may consider applicable law where the provision is ambiguous.

2. Arbitrators should not invalidate an agreement by interpreting an agreement provision that is repugnant to an applicable statute.

3. An arbitrator should render an advisory opinion concerning a law where the parties so stipulate.

4. But where there is obvious conflict between the agreement and statute, the arbitrator should respect the agreement and ignore the law (59, pp. 1, 15, 31).

The fourth point has generated some disagreement among arbitrators. Howlett, for example, takes an opposite view and argues that "since each labor contract includes all applicable law as part of the 'essence of the collective bargaining agreement' referred to by the Supreme Court," an arbitrator has a duty to the parties to interpret and apply statutory issues (50, p. 33).

Alternative viewpoints seeking a compromise between the Meltzer and Howlett approaches to the role of law in arbitration have been voiced. Richard Mittenthal's position, a refinement of an earlier view by Cox (24), is that even though "the arbitrator's award may <u>permit</u> conduct forbidden by law but sanctioned by the contract, it should not

require conduct forbidden by law even though sanctioned by contract" (61, p. 50). At the same time Mittenthal would permit the enforcement of statutory obligation.

> When an arbitrator refuses to enforce a statutory obligation, his award is 'final and binding' with respect to the contract. The grievant has no contract question to take to court. He may pursue his statutory rights in the appropriate forum, but such a suit has nothing to do with the contract (61, p. 52).

In addition Sovern uses four criteria to guide an arbitrator's application of law: (1) the arbitrator is qualified; (2) the legal issue is intertwined with the issue in dispute; (3) the alleged misconduct violative of the contract is required by the law; and (4) the courts lack primary jurisdiction over the legal issue(s) raised (77, p. 38).

While much of the debate over the role of arbitration vis a vis statutory issues has generally dealt with NLRA-related issues, there has also been ample discussion over arbitration of equal employment opportunity issues (22). Feller states that the increase in employment-related public legislation will tend to weaken private arbitration (38, p. 83). A more hopeful view by Edwards sees a constructive role for arbitration in adjudicating public law disputes (30). There are three reasons for Edwards' optimism: (1) the less than pervasive weakening impact the relevant statutes have had on collective bargaining; (2) no clear evidence of a decrease in grievances after the statutes are enacted; and (3) the suitability of certain issues involving

public law for arbitrable decisions (30, p. 85). In a review of arbitral and judicial decisions in the area of employment disctimination, McKelvey concluded that "the civil rights movement is pressing the industrial relations system to accommodate to (its) demands" (58, p. 353). Coulson believes that such accommodation of Title VII issues is possible with the use of voluntary arbitration because the parties "will have less to fear from government agencies, from class actions in federal court and from lost production . . ." (21, p. 4).

The various positions taken advocating the use or non-use of labor arbitration in resolving racial discrimination disputes depends in large part on the relative strengths and weaknesses of the process. There are several advantages to using arbitration in discrimination cases. For example, it is a remedy readily available to discriminatees that is relatively expeditious. In 1976, the E.E.O.C. was faced with a backlog of over 120,000 cases (43, p. 235), and discrimination charges can remain unsolved for over three years (90, p. 26). Also arbitration is a relatively inexpensive process when compared to a judicial proceeding. In addition, Edwards shows that where a discrimination claim requires a contract interpretation, the parties may prefer to use their own private process rather than the judiciary (28, p. 265). Another advantage is the traditional finality of the arbitration process where both sides agree to be

bound by the decision. Also, according to Siegel, arbitration could be effective in discrimination cases where the award deals only with factual issues and leaves issues of law for the court (73, p. 150). Brodie points to the informal nature of the arbitral proceeding that helps create a favorable climate for airing discrimination claims (12, p. 356). Moreover, grievance-arbitration should continue to be utilized to solve discrimination disputes as unions are obliged under the "duty of fair representation" doctrine to process all such claims in a non-perfunctory manner (28, p. 266).

However, there are also several limitations to using arbitration to resolve discrimination disputes. Brodie sees an inherent disadvantage in the nature of the majoritarian aspect of the collective process; i.e., an individual's discrimination grievance may be compromised by unlawful bargaining (12, p. 357). Edwards adds that the private system of arbitration should not be used to enforce civil rights issues despite its judicial and administrative support in other areas (28, p. 266). Elkouri and Elkouri also comment on the inappropriate nature of labor arbitration as a forum to remedy discrimination claims (31, p. 46). In addition, Brusch (13, p. 55) states that an arbitrator's source of authority, the labor contract, restrains him from altering the agreement's language in order to remedy discriminatory practices. A more practical reason that may

limit the use of arbitration is the escalating costs of the arbitral process itself (42, p. 165). Bloch is concerned that "small unions or weak firms may be 'arbitrated to death' and thus legitimate interests of workers may be bargained away because of lack of funds to process (discrimination) cases" (8, p. 628). Another disadvantage--to an employer, especially--is that arbitration is just one of a number of different forums in which they must defend employment discrimination cases. Finally, there is the question of whether arbitrators process the requisite expertise to rule on legal issues in discrimination grievances. Edwards' study of members of the National Academy of Arbitors revealed that 72 per cent of the respondents indicated that they felt professionally competent to decide Title VII issues (29). However, Edwards believes that these arbitrators probably would not actually apply a public statute even under ideal conditions (29, pp. 267-268).

The various advantages and limitations of using arbitration to resolve employment discrimination cases have also been applied as a result of analyses of actual awards in Title VII discrimination cases. McKelvey's pre-Gardner-Denver study of arbitral and judicial decisions involving sex discrimination issues resulted in three generalizations.

> 1. Arbitrators in general, in this field (of employment discrimination), are reluctant to administer public policy . . . .

2. The courts for the most part adhere to the same principle, refusing to cede jurisdiction to arbitrators, although some have expressed a preference for arbitration rather than the courts as a forum for solving these disputes.

3. There are signs of the emergence of a new Spielberg doctrine of deference to arbitral awards which meet criteria yet to be established (50, p. 353).

Gould's interest in racial discrimination grievances resulted in a call for remedial action to "patch up" the institutional deficiencies of arbitration (44, p. 65). Gould calls for third-party intervention in the arbitration process, i.e., participation by the black worker(s) in arbitration with separate representation by an individual or organization in which he has confidence (44, p. 59).

Blumrosen made two studies of awards involving race discrimination grievances prior to the Gardner-Denver decision. In the initial study, he concluded that

> If a claim for employment discrimination arose in the ordinary course of arbitration, . . . the arbitrators appeared to be doing a reasonably good job. However, if the agreement itself contained a discriminatory feature, the arbitrator felt bound by the agreement (9, p. 105).

In the second study, Blumrosen was concerned with the types of conditions present in racial discrimination arbitrations that would enhance the possibility of broader judicial acceptance of the award. Those conditions are where

1. The arbitrator is asked to apply Title VII law to the contract as interpreted;

2. The employees can individually participate in the arbitration hearing;

3. The opinion reflects a competent application of the statute to the situation;

4. The arbitral remedy was sufficient to cure the discrimination practice (10, p. 156).

Harris' study of arbitral awards was conducted to assess the hypothesis that "arbitration serves as a means of introducing social change into labor-management relations" (46, p. 19). After reviewing fifteen awards involving claims of race discrimination and decided prior to 1974, Harris rejected the hypothesis because arbitrators were "bound to a strict constructionist view of the contract" (46, p. 29). In a similar study, Wolkinson inquired into the efficacy of labor arbitration in assuring black workers equal job opportunities (92). His review of arbitral awards showed that with more union "commitment to combatting employment at the plant level, then the (grievant) would have the necessary encouragement to resort to the arbitration process for relief" (92, p. 84).

Much of the literature examined thus far has, for the most part, attempted to determine the proper scope of arbitral authority in adjudicating employment discrimination disputes. The controversy is grounded in the conflict between the federal labor policy which emphasizes the use of arbitration for the settlement of labor disputes and a national policy to ensure equal opportunities in the workplace. A solution to the controversy is envisioned by Blumrosen:

> There is only one institution in our society capable of the difficult tasks of articulating the meaning of modern anti-discrimination statutes in the complex setting of labor relations. The courts must speak before the less formal processes can operate effectively. Once the courts speak forcefully and clearly on the substantive law then the arbitrators will have guidance . . . (9, p. 105).

Alexander v. Gardner-Denver Co.

The evolving relationship between arbitration, Title VII, the labor laws add the federal courts was clarified by the Supreme Court in Alexander v. Gardner-Denver Co. (4).

The specific issue addressed by the Court and stated by Justice Powell was:

> We must decide under what circumstances, if any, an employee's statutory right to a trial de novo under Title VII may be foreclosed by prior submission of his claim to final arbitration under the nondiscrimination clause of a collective bargaining agreement (4, p. 38).

In a unanimous decision, the Court ruled that an adverse arbitral award does not preclude a grievant from seeking statutory relief for his claim of racial discrimination. The decision permits an employee to file a grievance under an antidiscrimination provision of the labor contract and concurrently or subsequently assert a Title VII claim in another forum (48, p. 905). The Court noted that an employee's contractual right to redress discrimination is to remain a viable option. However, the decision emphasized the independent, statutory nature of the Title VII remedy also available to the grievant.

Background of Gardner-Denver.--The case involved a black employee, Harrell Alexander, who was hired by the Gardner-Denver Co. and placed in the maintenance department at the company's plant in Denver, Colorado. He was employed for over three years before being discharged in September, 1969. During his tenure with the company, he was promoted to a trainee position as a drill operator and retained this position for approximately fifteen months until his discharge. The company based the termination on Alexander's alleged poor work performance shown by his production of an excessive number of defective parts (4, p. 38).

On October 1, 1969, Alexander filed a grievance under the collective bargaining agreement maintaining that he had been "unjustly discharged" and requesting to be "reinstated with full seniority and pay" (4, p. 39). In the grievance there was no mention or claim of racial discrimination. Under the labor contract, the company had the prerogative to hire, suspend, or discharge employees for just cause. The agreement also included a provision prohibiting employment discrimination against any employee or applicant. The contract also called for a five-step grievance process with final and binding arbitration as the fifth step.

Alexander's grievance moved through the first three steps of the grievance-arbitration process, and at the fourth step Alexander charged that racial discrimination was the cause of his discharge. There was no evidence that

the claim had been raised earlier (4, p. 42). Prior to the arbitral hearing, Alexander filed a claim with the Colorado Civil Rights Commission which later referred the complaint to the EEOC. At the arbitration hearing, the grievant testified that he had gone to the Colorado Civil Rights Commission because he "could not rely on the union" (4, p. 42). The union introduced evidence that other employees had also produced excessive scrap material and that the unsatisfactory trainees were usually transferred rather than discharged. Alexander's grievance was denied by the arbitrator who ruled that the discharge was for just cause--poor work performance shown by the accumulation of excessive scrap. The award was silent as to the grievant's claim of racial discrimination (4, p. 42).

Some months later, the EEOC determined that there was no reasonable cause to believe that a violation of Title VII had occurred. Subsequent to the EEOC's findings Alexander filed suit in federal district court. The district court granted the company's motion for summary judgment and dismissed the claim (5). The lower court held that Alexander was bound by the arbitral award and precluded from further action under Title VII because: (1) the issue of discrimination had been raised during the grievance procedure; and (2) he had elected to follow that process. The Tenth Circuit Court of Appeals affirmed the

District Court ruling (6), and the Supreme Court agreed to hear the case on a writ of certiorari.

Analysis of the decision.--The Supreme Court's decision in Alexander v. Gardner-Denver Co. represents an effort to define the boundaries of the Title VII-arbitration relationship. To accomplish this the Court addressed the following issues: (1) the intent of Congress in enacting Title VII; (2) the doctrine of election of remedies; (3) Alexander's prospective waiver of his statutory rights; (4) the extent of arbitral authority; (5) duplicate relief for the grievant; (6) the effect on an employer's incentive to arbitrate Title VII issues; (7) federal court deferral to arbitration; and (8) the weight to be accorded an arbitral award.

The Court looked first at the legislative history of Title VII and reasoned that it was the intent of Congress that an individual be able to eliminate employment discrimination through the use of other parallel or overlapping remedies. Moreover, the Court found that there was nothing in the history of Title VII that suggested that Alexander's voluntary reliance on arbitration barred him from seeking a later judicial remedy or divested the courts of jurisdiction. The Court reasoned that "the clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination" (4, pp. 48-49).

The Court also rejected the doctrine of election of remedies which pertains to pursuit of remedies that are legally or factually inconsistent (7, p. 610). The doctrine was a major part of the company's argument that Alexander be barred from seeking Title VII relief. The Court disposed of the argument when it said:

> That doctrine, which refers to situations where an individual pursues remedies that are legally or factually inconsistent, has no application in the present context . . . . The distinctly separate nature of contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums. The resulting scheme is somewhat analogous to the procedure under the National Labor Relations Act, as amended, where disputed transactions may improve both contractual and statutory rights . . . . There, as here, the relationship between the forums (arbitration and the NLRB) is complementary since consideration of the claim by both forums may promote the policies underlying each. Thus the rationale behind the election-of-remedies doctrine cannot support the decision (of the court) below (4, pp. 49-51).

In addition, the Court rejected the "waiver" concept as a reason for denying Alexander's Title VII action. The argument that the grievant's prior submission of his claim to arbitration constituted a binding waiver with respect to his rights under Title VII was quickly dismissed by the Court. It said:

> The actual submission of petitioner's grievance to arbitration in the present case does not alter the situation. Although presumably an employee may waive his cause of action under Title VII as part of a voluntary settlement, mere resort

> to the arbitral forum constitutes no such waiver. Moreover, a contractual right to submit a claim to arbitration is not displaced simply because Congress also has provided a statutory right against discrimination. Both rights have legally independent origins and are equally available to aggrieved employee (4, p. 52).

The arbitrator's authority in cases involving Title VII disputes was also addressed in Gardner-Denver. The Court described the arbitrator as "proctor of the bargain whose task is to effectuate the intent of the parties" (4, p. 53). Thus the Court placed the arbitrator's powers squarely within the agreement and said that he must interpret and apply that agreement in accordance with the "industrial common law of the shop" (4, p. 53). Relying on its earlier decision in Enterprise Wheel and Car Corp. (85, p. 593) from the "Steelworkers Trilogy," the Court said that if an arbitral decision is based "solely upon the arbitrator's view of the requirements of the enacted legislation," and not on the labor contract, then the arbitrator "has exceeded the scope of his submission," and the award is unenforceable (4, p. 53). The Court also held that because the arbitrator is created by private parties within a system of self-government, his authority extends only to the resolution of contractual rights, "regardless of whether certain contractual rights are similar to, or duplicative of the substantive rights secured by Title VII."

The company also argued that to allow Alexander to submit his claim of discrimination to both arbitration and

federal court would give him "two strings to his bow" while the employer is bound by the arbitral award (4, p. 54).

The Court did not see an unfair advantage for the employee since the arbitral decision is final and binding on both parties. Moreover, the Court stated that by "instituting an action under Title VII, the employee is not seeking a review of the arbitrator's decision. Rather, he is asserting a statutory right independent of the arbitration process" (4, p. 54).

The Court also discounted the argument that a decision allowing the employee to use both the grievance-arbitration process and the judicial forum to remedy a discrimination claim would drastically reduce an employee's incentive to arbitrate and thus "sound the death knell for (labor) arbitration" (4, p. 54). The Court maintained that an arbitration clause in the collective bargaining agreement is advantageous to both the employer and the employee. The point made by the Court is that by entering into an arbitration agreement, management receives a no-strike pledge from the union (4, p. 54). Justice Powell's opinion also emphasized the economic advantages of the grievance-arbitration machinery to quickly and inexpensively solve disputes, including Title VII grievances (4, p. 55). In addition, the opinion stated:

> Where the collective bargaining agreement contains a nondiscrimination clause similar to Title VII, and where arbitral procedures are fair and regular, arbitration may well produce a settlement satisfactory to both employer and employee (4, p. 55).

In what could be termed the "Spielberg analogue," the company also contended that the federal courts defer to arbitral decisions in discrimination claims where: (1) the claim was before the arbitrator; (2) the contract prohibited the form of discrimination charged; and (3) the arbitrator had authority to rule and set a remedy on the charge (4, p. 56).

Encouragement for a deferral standard in Title VII arbitration was established earlier by the Fifth Circuit Court of Appeals in Rios v. Reynolds Metals Co. (70). In Rios the Court set forth the following conditions influencing a deferral decision:

> We hold that the federal district court in the exercise of its power as the final arbiter under Title VII may follow a like procedure of deferral under the following limitations. First, there may be no deference to the decision of the arbitrator unless the contractual right coincides with rights under Title VII. Second, it must be plain that the arbitrator's decision is in no way violative of the private rights guaranteed by Title VII, nor of the public policy which inheres in Title VII. In addition, before deferring, the district court must be satisfied that (1) the factual issues before it are identical to those decided by the arbitrator; (2) the arbitrator had power under the collective agreement to decide the ultimate issue of discrimination; (3) the evidence presented at the arbitral hearing dealt adequately with all factual issues; (4) the arbitrator actually decided the factual issues presented to the court; (5) the arbitration proceeding was fair and regular and free of procedural infirmities (70, p. 58).

The Supreme Court was suspicious of the more demanding deferral standard found in Rios saying that adoption of the

deferral rule would greatly increase the cost, time and complexity of the arbitral process. Also the court saw more litigation, not less, occurring if employees elected to reject arbitration in favor of a court action (4, p. 59).

The Court saw several other defects in the deferral rule. First, such a rule would violate the intent of Congress in placing the final enforcement of Title VII with the federal courts. Second, the arbitrator's competence is mainly limited to solving contractual issues, not statutory issues. Third, the fact-finding process of arbitration is not the same as judicial fact finding; that is, arbitration records are sometimes incomplete, and the rules of evidence do not apply (4, p. 59).

The Supreme Court's decision leaves little doubt of its desire to keep Alexander's Title VII rights intact and his avenues of relief open. However, the decision in Gardner-Denver does not forbid the arbitration of employment discrimination cases. At the end of the opinion, the Court stated that an arbitral decision could properly be admitted as evidence and "accorded such weight as the court deems appropriate" (4, p. 60). In an effort to more clearly define the evidentiary weight to be accorded an arbitration award, the Court inserted footnote 21, in which the Court seemed to hedge on the question of deferral. The footnote specifies certain relevant factors that courts should consider when reviewing an award. The Court said:

> We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective-bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. But courts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum (4, p. 60).*

Reaction to Gardner-Denver

In an analysis of the Gardner-Denver ruling, Williams views footnote 21 as a sensitive and positive attempt to accommodate the law of the shop with the law of the land (90, p. 36). According to Williams, the footnote explicitly recognizes the respect in which the arbitrator is already . . . on his or her strongest grounds; that is, where the discrimination issue before the arbitrator is a question of fact rather than law (90, p. 37). In his study of arbitral and judicial reaction to Gardner-Denver, Jacobs concluded that footnote 21 has tended to confuse rather than clarify

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*Upon remand and after a de novo trial, the district court reached the same result as the arbitrator--that Alexander had in fact been discharged for just cause.

the Title VII-arbitration relationship (53, p. 627). Jacobs' sampling of arbitral awards revealed a wide range of reaction from narrow interpretations of the agreement to awards giving full consideration to applicable laws and cases. The survey, in Jacobs' words, indicates that the Supreme Court did not sufficiently clarify the interplay between arbitration and the courts in Title VII matters (53, p. 630).

Another review of post-Gardner-Denver cases examined how arbitrators responded to job discrimination issues (22). Conducted by the American Arbitration Association, one variable surveyed was the range of authority given the arbitrator in discrimination cases. The results of the survey, according to Coulson, indicated that

> Arbitrators are willing to determine job discrimination issues, within the scope of their contractual authority, often applying legal principles. Most arbitrators recognize that job discrimination laws can have an effect on the parties' contractual rights (22, p. 151).

The Gardner-Denver decision clearly showed that an employee's resort to grievance-arbitration did not deprive him from also seeking relief under Title VII. However, other unresolved issues are evident from the decision. For example, Schlei and Grossman raise the following questions left unanswered by Gardner-Denver

1. What weight will district courts give to prior arbitral awards and what criteria will determine the weight--the factors in footnote 21 or the standards found in Rios or both?

2. Will the Court's decision make employers and unions more likely to include provisions dealing with cases of discrimination?

3. Is an arbitrator to be confined to the parties' collective bargaining agreement, as the Court suggests, or may the arbitrator apply the law of the land (72, pp. 954-955)?

According to Gould, the key question concerns the future role of the arbitrator in Title VII cases (43, p. 220). Oppenheim, as quoted by Aksen, agrees saying that

> [A]rbitrators will continue to decide cases involving alleged discrimination, and in some instances, E.E.O.C. actions will also be brought. However, this does not diminish the role of arbitration or the arbitrator, and whatever accommodation must be made will come in the future (3, p. 31).

Chapter Summary

The enactment of Title VII of the Civil Rights Act of 1964 serves as the capstone of the ongoing national policy to eliminate employment discrimination in the United States. In addition to Title VII, there are several other avenues available to persons who have claims of employment discrimination. Besides Title VII relief, employees may also assert their claim of racial discrimination under the grievance-arbitration procedure of a collective bargaining agreement; a state fair employment agency; Executive Order 11246, as amended; the Civil Rights Acts of 1866 and 1871, and the National Labor Relations Board under an unfair

labor practice charge or the fair representation doctrine (72, p. 943).

The grievance-arbitration process has also emerged as a well-accepted private method for resolution of industrial disputes. The national policy favoring labor arbitration has been stimulated by Supreme Court endorsements and the National Labor Relation Board's deferral policy. Arbitration, however, has often had to deal with complex issues of public law which are part of a grievance dispute. Arbitral adjudication of race discrimination disputes has resulted in a conflict between the two policies, the objectives of which are to eliminate employment discrimination and encourage the use of a private means to solve labor disputes.

The Supreme Court decision in Alexander v. Gardner-Denver Co. sought to accommodate the two conflicting policies. Whether the Court was successful remains an open question (64). Nevertheless the decision does give minority workers independent protection under Title VII. Gardner-Denver clearly indicates that an employee's unsuccessful use of the grievance-arbitration process will not restrict his statutory relief under Title VII. The Court held that labor arbitration is one of several remedies intended by Congress to be used by employees with claims of racial discrimination. However, arbitration is to supplement, not replace, the Title VII remedy.

It would seem that Gardner-Denver relegates arbitration to a secondary role in the resolution of racial discrimination cases. Some observers, however, are optimistic about arbitration's future in Title VII cases (3, pp. 25-26). Edwards, for example, in a survey of post-Gardner-Denver legal developments, concludes that:

> Arbitration of employment discrimination cases should not be forbidden. However, arbitrators should be viewed only as limited partners in the Title VII enforcement effort. The bulk of the workload, at least with respect to difficult and important cases, must be carried by the EEOC and the courts (28, p. 277).

The long-term effect of the Gardner-Denver decision on the grievance-arbitration process is still being shaped. What that effect will be should be influenced by how arbitrators decide racial discrimination cases in light of the guidelines of Alexander v. Gardner-Denver Co. (53).

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CHAPTER III

ANALYSIS OF THE DATA

This chapter is divided into two parts. In the first part the data from ninety-seven labor arbitration cases involving issues of racial discrimination are presented. Case data are classified according to the major categories of research questions formulated for study and set forth in Chapter I. An in-depth analysis of the data relevant to each category is made in order to determine the effect of Alexander v. Gardner-Denver Co. on arbitral decision making in racial discrimination cases. Frequency counts are utilized to present the data. Along with the frequency distributions, the analysis also shows the percentage relationship of the variables within each category. The analyzed data are presented in tabular form.

The second part of this chapter contains summaries of each of the ninety-seven grievance-arbitration awards involving racial discrimination disputes. Each case is grouped under the specific issues to be decided in order to examine arbitral reaction to the post-Gardner-Denver cases.

Presentation of the Data

Table I shows the major sources of the arbitrators' authority in each of the cases.

TABLE I

PERTINENT CONTRACT PROVISIONS

Contract Provision	Number of Cases	Per Cent
Management Rights	33	34.02
Seniority	37	38.15
Discharge or Discipline for "Proper Cause"	15	15.46
Grievance-Arbitration Procedure	2	2.06
Other (Consent Decrees, Agency Settlement Agreements or Conciliation Agreements)	10	10.31
TOTAL	97	100.00

Table I indicates that in 34.02 per cent of the cases a management rights provision was pertinent to the dispute. Seniority clauses were applicable in thirty-seven of the cases while "proper cause" provisions occurred in 15.46 per cent of the disputes. Grievance-arbitration clauses involving questions of time limits or procedure were relevant in only two cases. In ten cases, or approximately 10 percent of awards, consent decrees and agency-initiated agreements were treated as provisions of the contract.

The pertinent contract provisions were, in most of the cases, applicable along with the underlying antidiscrimination clause. Sixty-three or 65 per cent of the ninety-seven awards actually contained such a clause. The specific types

of issues submitted to arbitration are summarized in Table II.

TABLE II

SPECIFIC TYPES OF RACIAL DISCRIMINATION ISSUES DECIDED

Issues	Number of Cases	Per Cent
Arbitrability	1	1.03
Hiring (employment referral, testing, application forms)	5	5.16
Promotion & Job Vacancies (seniority, training, trial periods, selection for apprenticeship)	37	38.14
Job Benefits (transfers, leave, vacations, premium pay)	3	3.09
Discharge	38	39.18
Discipline (reprimands, suspensions, demotions)	6	6.19
Layoff and Recall	4	4.12
Other	3	3.09
TOTAL	97	100.00

Most frequently evident were the combined issues of discharges and discipline, which occurred in approximately 45 per cent of the cases. Issues involving promotions and job vacancies appeared in thirty-seven cases, or in 38 per cent of the disputes.

Table III indicates to what extent arbitrators cited public law associated with Title VII.

TABLE III

CITATIONS OF PUBLIC LAW BY THE ARBITRATORS

Citations	Number of Cases	Per Cent
Federal or State Law or Agency Precedence Only	17	17.52
Federal or State Judicial Decisions Only	4	4.12
Arbitral Precedence Only	5	6.19
Law and Judicial Decisions	20	20.62
Judicial Decisions and Arbitral Precedence	3	3.09
Law & Arbitral Precedence	4	4.12
All three	6	6.19
None	37	38.15
TOTAL	97	100.00

The arbitrators cited federal or state law or agency (EEOC or OFCCP) guidelines in 48.45 per cent of the cases, and referred to judicial decisions in approximately 34 per cent of the cases. Arbitral precedence was cited in fifteen of the ninety-seven awards.

In addition to public law-related citations, Table IV shows other authority cited by the arbitrators in their decisions.

TABLE IV

AUTHORITY CITED BY THE ARBITRATORS

Authority	Number of Cases	Per Cent
Contract Language	77	79.38
Custom and Past Practice	9	9.28
Business Necessity	1	1.03
Intent of the Parties	10	10.31
TOTAL	97	100.00

The authority referred to most frequently was contract language; it was pertinent in approximately 79 per cent of the cases. Business necessity was cited only once; however, past practice and intent of the parties were relied upon in approximately 20 per cent of the cases.

Table V shows the number of arbitrators with and without legal training. Biographical information was obtained from both Labor Arbitration Reports (4) and Labor Arbitration Awards (5). The sources revealed that fifty-seven of the arbitrators had legal backgrounds, while twenty-five of them did not have legal training.

Table VI shows that forty-six (or 47.42 per cent) of the arbitrators held membership in the National Academy of Arbitrators (NAA).

TABLE V

BACKGROUND OF THE ARBITRATORS

Background	Number of Arbitrators	Per Cent
Legal	57	58.77
Nonlegal	25	25.78
Other (Information not available)	15	15.45
TOTAL	97	100.00

TABLE VI

ARBITRATORS HOLDING MEMBERSHIP IN THE NATIONAL ACADEMY OF ARBITRATORS (NAA)

Arbitrators	Number of Arbitrators	Per Cent
Member	46	47.42
Non-member	31	31.95
Other (not indicated)	20	20.63
TOTAL	97	100.00

Table VII reveals that in approximately 42 per cent of the cases the employer was represented by legal counsel, and that in 26 per cent of the cases, only the designated non-legal representatives appeared for the employer.

TABLE VI

REPRESENTATIVES FOR EMPLOYERS IN ARBITRATION PROCEEDINGS

Representatives	Number of Cases	Per Cent
Employer's Attorney Only	41	42.27
Employer's Representatives Only	25	25.77
Attorney and Representatives	24	24.74
Other (not indicated)	7	7.22
TOTAL	97	100.00

Table VIII indicates that in 10.31 per cent of the cases the grievants were represented by an attorney plus the union's representatives. In one instance an individual, non-union grievant was represented by private legal counsel. In approximately 50 per cent of the cases, only the union's representatives appeared for the grievants.

Table IX shows that in only fifteen awards (or 15.46 per cent) did the arbitrator indicate that the parties were afforded full opportunity to examine and cross-examine witnesses. In over 85 per cent of the cases there was no reference to the existence of the cross-examination opportunity.

TABLE VIII

REPRESENTATIVES FOR THE GRIEVANTS IN ARBITRATION PROCEEDINGS

Representatives	Number of Cases	Per Cent
Union's Attorney Only	31	31.96
Union's Representatives Only	48	49.48
Attorney and Representatives	10	10.31
Attorney for Individual Grievant	1	1.03
Other (not indicated)	7	7.22
TOTAL	97	100.00

TABLE IX

EVIDENCE OF OPPORTUNITY TO EXAMINE AND CROSS-EXAMINE WITNESSES

Evidence	Number of Cases	Per Cent
Yes	15	15.46
No	0	0.00
Other (not indicated in the award)	82	84.54
TOTAL	97	100.00

Table X records how employers and grievants fared in the ninety-seven awards. The employer was approximately three times more successful than the grievant. Sixty-four, or 66 per cent, of the grievances were denied, while 21, or 21.63 per cent were sustained.

TABLE X

SUMMARY OF ARBITRAL DECISIONS

Decision	Number of Cases	Per Cent
For the Employers (grievance denied)	64	66.00
For the Grievants (grievance sustained)	21	21.63
Other (sustained and/or denied in part)	11	11.34
Not Arbitrable	1	1.03
TOTAL	97	100.00

Summaries of the Cases

Summaries of the ninety-seven arbitration cases are presented. The cases are grouped according to the issue pertaining to each. Each case is summarized according to Nyanibo's criteria (7, p. 63) as follows:

(1) case #;

(2) the pertinent contract provisions;

(3) a synopsis of the facts;

(4) the issues to be resolved;

(5) the arbitrator's award; and

(6) a comment by the writer pertaining to each of the decisions.

The cases studied are grouped under the following issues:

Arbitrability, nonarbitrability;

Hiring, employment (testing, application forms, and so forth);

Promotions (training programs, trial periods, seniority, selection for apprenticeship, and so forth);

Job benefits (transfers, leave, vacations, and so forth);

Discharges;

Discipline (reprimands, suspensions, demotions, and so forth);

Layoff, rehire, recall; and

Other (not classified elsewhere).

Arbitrability
Case 1 (Citation--64 LA 361)

Pertinent contract provisions.--Article II. Section C contains an antidiscrimination clause. Article VI describes the grievance procedure and union representation. Article XVI contains provisions involving discharges and disciplinary suspensions.

Synopsis of the facts.--Grievant was a young black male who claimed that his discharge was a result of racial discrimination. In arbitration it was held that the dismissal was not justifiable, although there was cause for disciplinary action. The grievant was reinstated with no back pay. No judgment was issued regarding the discrimination charge. Upon returning to work the grievant had a poor attendance record which continued over several months. The grievant was placed on a five-day suspension pending discharge. In accordance with Article XVI, Section A, Paragraph 3, the grievant was granted a hearing with management and his union representative. After the hearing the grievant was notified of his dismissal. Another grievance was then filed.

Issues to be resolved.--Did the grievant comply with the time limit for filing a grievance as set forth in the contract?

Arbitrator's award.--The grievance was not arbitrable because it was not filed within the time limits specified in Article XVI, Section A, Paragraph 5 of the agreement (Award #9).

Comment.--The issue of arbitrability rendered the issue of racial discrimination moot.

Hiring
Case 1 (Citation--79-2 ARB 8601)

Pertinent contract provisions.--Article II stipulates that the union will furnish the number of competent journeymen and apprentices as required by the company. Article XXX provides that contractually-established working conditions shall not be abridged except as provided in a new contract. Applicable also is an EEOC Settlement Agreement signed by both parties and designed to provide greater employment opportunities for minority groups.

Synopsis of the facts.--A well-established procedure used to hire journeyman union members was discontinued by the employer on the basis of the EEOC Agreement, a binding supplement to the negotiated labor contract. The union contended that the affirmative action program was not meant to nullify existing contract provisions and traditional hiring practices.

Issues to be resolved.--What is the effect of the EEOC Settlement Agreement on established hiring procedures?

Arbitrator's award.--The employer's action was improper (Award #79).

Comment.--When contractual hiring practices are inconsistent with the principles of an affirmative action program, they may be nullified. However, where such practices do not

conflict with an equal employment opportunity plan, they may continue.

Case 2 (Citation--72 LA 1234)

Pertinent contract provisions.--Article II, Section 6 covers non-discriminatory treatment patterned after the language of Tiele VII. Article VI, Section 11 deals with the employee's transfer rights based on seniority considerations.

Synopsis of the facts.--A senior white employee grieved when his request for transfer to an open mechanic trainee position was denied in favor of a recently hired black employee. The grievance alleged that the company misused its managerial discretion and discriminated against the grievant. The company chose the trainee because it had used an invalidated test and feared EEOC charges.

Issue to be resolved.--Did the company violate Article II, Section 6 of the contract?

Arbitrator's award.--The grievance was sustained and the grievant placed in the trainee position (Award #46).

Comment.--Reverse discrimination will be found where the overall evidence shows inequitable policies in favor of minority employees.

Case 3 (Citation--63 LA 1064)

Pertinent contract provisions.--Article VIII, Section 12 provides that the company shall abide by the principles of nondiscrimination embodied in the New York State Law Against Discrimination and the federal civil rights laws with respect to age, sex, race, creed, color, or national origin.

Synopsis of the facts.--When the employer hired no minority applicants to fill eighteen positions, the union claimed a violation of Article VIII, Section 12 and filed a separate complaint with the EEOC. Test results of the thirty-nine applicants were submitted at the hearing. Test results for the five minority applicants indicated that all passed, and three scores were better than most of the hirees' results. The company contended that it was relying on the poor past performance records of minority employees in the particular position.

Issue to be resolved.--Did employer violate Article VIII, Section 12?

Arbitrator's award.--The Grievance was sustained. The employer was directed to interview three of the minority applicants previously rejected for the next three open positions. Close monitoring of the process was also ordered (Award #63).

Comment.--Special screening procedures can be devised by arbitrators to cure an employer's discriminatory hiring practices.

Case 4 (Citation--79-2 ARB 8597)

Pertinent contract provisions.--Article II is a broad management rights clause. Article III calls for compliance with state and federal fair employment laws and prohibits discrimination because of race, creed, color, religion, national origin, age, political orientation, sex, sexual orientation, or non-disabling handicaps. Article XIX entitled "Maintenance of Conditions," provides that wages, hours, and conditions of employment be maintained during the life of the agreement.

Synopsis of the facts.--The union protested when an executive order from the mayor mandated changes in hiring and promotion procedures in order to "screen in" more minority groups. The grievance protested what was termed "a unilateral change in working conditions" in violation of Article XIX. The employer contended that the change was needed to more nearly reach its affirmative action goals. It also showed that previous city mandates had not been protested by the union. The union countered that it would not accept an executive order which unilaterally changed the collective agreement. The city argued that the arbitrator should not consider outside law in his decision.

Issue to be resolved.--Does the executive order constitute a violation of the agreement?

Arbitrator's award.--The grievance was sustained (Award #20).

Comment.--Unilateral actions that modify terms and conditions of employment are violations of the labor contract.

Case 5 (Citation--72 LA 1223)

Pertinent contract provisions.--Article II, Section 1, prohibits discrimination against an employee or applicant for reason of race, sex, age, color, national origin, or religion. Article II, Section 2, provides that selection of applicants for referral to jobs shall be on a nondiscriminatory basis. Article I, Section 2 states that where a provision of the agreement violates a statute or regulation of a governmental agency, that provision will be null and void. Article VII, Section 2 states that "all disputes and grievances of any kind are arbitrable."

Synopsis of the facts.--Subsequent to a court determination that the use of an exclusive hiring hall was discriminatory against minority job applicants, the employer requested removal of the hiring hall provision from the agreement. The union wanted to only modify the provision to include separate lists of minority applicants. The company

grieved the issue of continued compliance with an unlawful provision. The grievance was disputed by the union because the arbitrator lacks jurisdiction to rule on modifications of the agreement, e.g., elimination of the hiring hall.

Issues to be resolved.--Are the employers excused from compliance with a provision that has been found to be a violation of Title VII? Does the arbitrator have jurisdiction to decide the employers' grievance?

Arbitrator's award.--The grievance was sustained (Award #66).

Comment.--The arbitrator had jurisdiction where the arbitration clause was very broad, and he felt competent to interpret judicial precedent or pertinent statutes. Also the employer need not abide by a provision that violates the law where the union produced no evidence to show that it is ceasing its discriminatory referral practices.

Promotions
Case 1 (Citation--79-2 ARB 8486)

Pertinent contract provisions.--Section 2-A states that seniority "shall govern in all cases of lay-offs, rehiring, transfer, and promotion" based upon competency for work required. Section 21 provides that any portion of the contract contravened by Federal mandate will be amended with the remainder of the agreement unchanged.

Section 22 includes an antidiscrimination clause. Section 18 outlines the grievance procedure and provides that the arbitrator shall have no jurisdiction to alter the intent of the contract.

Synopsis of the facts.--The grievants claimed that the company failed to comply with the agreement's departmental seniority provisions to be used to determine lay-offs and displacements. The company did not institute departmental seniority because of an affirmative action plan instituted to comply with federal mandates. The conflict between contractural and statutory rights was presented to arbitration.

Issue to be resolved.--Did the company violate the contract by failing to follow departmental seniority instead of an affirmative action plan required by the federal government?

Arbitrator's award.--An interim award was issued which directed the company and the union to seek clarification from federal agencies concerning the contradictions between the collective bargaining agreement and federal requirements (Award #57).

Comment.--In this particular case the arbitrator saw conflicts between contractural and statutory rights which were beyond his jurisdiction.

Case 2 (Citation--76-1 ARB 8193)

Pertinent contract provisions.--Article III, Section 3, contains an antidiscrimination clause. Article IV contains a broad management rights clause. Article IX provides for seniority.

Synopsis of the facts.--Four black furnace operators who had filed for transfer to a job vacancy as a maintenance-mechanic were rejected for the vacancy. The four employees filed a grievance claiming violation of Article IX and III of the agreement. It was shown that none of the applicants were able to demonstrate that they were qualified for the position based on previous training or work experience. The applicants were given explanations of the company's policy and an opportunity to complete another transfer request form. None of the grievants accepted this offer.

Issues to be resolved.--Did the company violate contract provisions dealing with posting of vacancies, and did it discriminate against the grievants on the basis of race?

Arbitrator's award.--The grievance was denied, and the company was directed to post job vacancies as provided in Article IX. (Award #4).

Comment.--The arbitrator found no evidence of racial discrimination. The competence of the four grievants to

fill the job vacancy was considered; the arbitrator emphasized the grievant's lack of proper job qualifications.

Case 3 (Citation--63 LA 63)

Pertinent contract provisions.--Article X. Unit seniority provisions were to be applied rather than plant seniority.

Synopsis of the facts.--In an effort to comply with Executive Order 11246, the company determined that plant seniority rather than unit seniority as stated in the collective bargaining agreement would be the determiner in issues related to seniority. This determination was made to favor "affected employees" black employees hired before March 31, 1968, who were initially assigned to all-black units). The union had no quarrel with protection for minority groups by using plant seniority, but by the same token argued that protection under Article X should also be enforced.

Issue to be resolved.--Should the grievants be compensated for work to which they were entitled under the unit seniority provision in the collective bargaining agreement?

Arbitrator's award.--The grievances were denied. The arbitrator stated, "The umpire cannot give effect to the agreement in a situation where it has been barred by a federal order." (Award #14).

Comment.--The arbitrator saw federal mandates as changing the effect of the collective bargaining agreement.

Case 4 (Citation--62 LA 849)

Pertinent contract provisions.--An antidiscrimination provision similar to Title VII is present. Article II gives exclusive management rights to the company unless otherwise stated in the contract. Article IV provides for a grievance procedure, and Article XXXVI provides for selection of trainees in a craft training program.

Synopsis of the facts.--The company did not consider scores on a general aptitude test when hiring blacks for an apprenticeship program in order to ensure compliance with its affirmative action guidelines. The action was taken because of the belief that the test could not be validated under EEOC selection guidelines.

Issue to be resolved.--Did the company violate the collective bargaining agreement by eliminating a general aptitude test as a standard for selection in order to comply with the company's Affirmative Action Program?

Arbitrator's award.--Grievance denied. (Award #12).

Comment.--The arbitrator's position was that the statutory rights supercede contractual rights.

Case 5 (Citation--75 ARB 8657)

Pertinent contract provisions.--Paragraphs 70 and 87 provide for upgrading of employees within the department when a job vacancy exists.

Synopsis of the facts.--A black employee was given the opportunity to be assigned to an upgraded position. In the upgraded position he was teamed with a "very experienced" welder who after ten days ascertained that the grievant's skills were not appropriate for the job. The grievant was downgraded to former position and filed a grievance citing race discrimination.

Issue to be resolved.--Did the company violate the labor agreement when it returned grievant to his former job following a trial period in an upgraded position?

Arbitrator's award.--Grievance denied. Arbitrator found no evidence of race discrimination. (Award #80).

Comment.--Contract provisions which allow minority groups to upgrade their positions based upon demonstrated skills and qualifications for the position were upheld. A key factor considered is the extent of a company's efforts to assist and upgrade the minority trainee.

Case 6 (Citation--64 LA 1121)

Pertinent contract provisions.--Article IX, Section 3 allows for arbitration under grievance procedure. Article XIV contains a broad antidiscrimination clause.

Synopsis of the facts.--The company was accused of racial discrimination because it denied grievant a promotion. At a hearing concerning his grievance, the grievant wished to withdraw his grievance from arbitration based on a decision to pursue the matter in district court. The arbitrator advised the grievant of his contractual rights and explained the effect of the Alexander v. Gardner-Denver decision. The arbitrator was later notified by grievant's attorney of the decision to withdraw the grievance.

Issue to be resolved.--Did the company violate its antidiscrimination policy by denying the grievant a promotion?

Arbitrator's award.--No award was made as to the allegations of discrimination. The grievance was dismissed when the employee withdrew to seek other remedies. (Award #11).

Comments.--The arbitrator indicated that the employee is barred from arbitrating the grievance because of his knowing and willing choice to "bypass the arbitration procedure."

Case 7 (Citation--64 LA 310)

Pertinent contract provisions.--Article III provides that the parties "shall comply with all Federal and state laws." Article IX of the agreement states that "seniority shall be on a department basis." Also applicable is an Affirmative Action Compliance Program (AACP) in force under Executive Order 11246.

Synopsis of the facts.--A grievance was filed when the company gave departmental seniority equal to plant seniority to minority group employees in accordance with its AACP. The union argued that since the employees were transferring to another bargaining unit, their seniority should be on a departmental basis pursuant to the agreement.

Issues to be resolved.--Could the company bypass the contract's seniority clause and transfer black workers under the provisions of a separate AACP?

Arbitrator's award.--The grievance was denied. (Award #25).

Comment.--The arbitrator reasoned that to sustain the grievance would cause the parties to violate the AACP which has the full force and effect of law. The arbitrator also discussed the discriminatory nature of departmental seniority systems.

Case 8 (Citation--69 LA 243)

Pertinent contract provisions.--Clause providing for seniority based on continuous service as determinant for promotions and assignments. Equal employment opportunity (EEO) consent decree calling for development of lines of progression and promotional practices.

Synopsis of the facts.--The union filed a grievance when the company established lines of progression from one department to another in order to afford minority employees opportunities for upgrading their skills. The grievances protested the unilateral nature of the company's action. The company justified its decision upon the requirements of the EEO consent decree.

Issue to be resolved.--May the company unilaterally create lines of progression?

Arbitrator's award.--Yes, grievance denied. (Award #86).

Comment.--The arbitrator would not alter the company's ongoing plan even though it was unilaterally implemented. Part of the dispute was deferred to an internal Audit and Review Committee.

Case 9 (Citation--69 LA 1051)

Pertinent contract provisions.--Article VI. Seniority: Promotions and assignments will be determined primarily by

departmental seniority . . . . Article VII. Nondiscrimination clause patterned after Title VII. Article V. Arbitration: Powers of an arbitrator are stated with limitations on changing or nullifying a provision which may conflict with federal law or agency directives.

Synopsis of the facts.--The company posted job notices outside the department where the vacancies occurred and based its decision on plant-wide seniority when it awarded one of the vacancies to a minority employee. A white worker with greater departmental seniority filed a grievance protesting the company's action. The union argued that the agreement should not be superceded by the provisions of an affirmative action program; the case is therefore not arbitrable if the arbitrator may have to alter the labor agreement. The company admitted its nonconformity to the agreement but said the remedial action was mandatory and dictated by federal law. Moreover, nonconformance of the AAP would result in cancellation of a government contract.

Issues to be resolved.--Is the case arbitrable? Was it proper to award the position to a minority worker?

Arbitrator's award.--The arbitrator has the jurisdiction to decide the case. The company acted improperly--grievance sustained. (Award #88).

Comment.--The arbitrator decided the case under the terms of the agreement and stated that he would "leave to the courts the interpretation of the various antidiscrimination laws."

Case 10 (Citation--66 LA 669)

Pertinent contract provisions.--Section 13. Seniority. Consent Decree I. Plant continuous service is required for all purposes in which such a measure is being utilized.

Synopsis of the facts.--A grievance was filed by the union on behalf of a member with unit seniority who was not selected for a new position. A black employee with longer plantwide seniority was selected under the provisions of the Consent Decree. There were questions over the relevancy of the seniority lists given the timing of the Consent Decree.

Issue to be resolved.--Was the grievant properly denied the position?

Arbitrator's award.--Grievance denied. (Award #83).

Comment.--The company must use the criterion of continuous plant service to determine job assignments.

Case 11 (Citation--80-1 ARB 8023)

Pertinent contract provisions.--Sections 10 and 29 pertaining to seniority. Seniority will apply in the selection

of a working foreman classification. He/she shall continue to accumulate his/her seniority after his/her appointment as foreman.

Synopsis of the facts.--The grievance was filed by the union on behalf of the member because the grievant was not able to assume foreman position on the second shift. According to the union, the member could request such a change based upon his company-wide seniority and current classification as a foreman on the first shift. The company denied that it was obligated to assign senior foremen to requested shifts; the company also denied discrimination on the basis of race in the grievance.

Arbitrator's award.--The grievance was denied based upon the stipulation in the language of the contract. There was no evidence to support the claim of racial discrimination (Award #45).

Comment.--The company must set forth criteria for company-wide seniority versus position seniority.

Case 12 (Citation--77-1 ARB 8007)

Pertinent contract provisions.--Section 4-7: The provisions of the agreement will be applied to all employees without regard to race, color, religion, national origin, or sex.

Paragraph 1 of Consent Decree I enjoins the parties from discriminating in any aspect of employment on the basis of race, color, sex, national origin, or religion.

Synopsis of the facts.--A black worker in the middle of the seniority list in his position wanted a demotion in order to be most senior worker in the lower position. A demotion would make him first in line for an impending vacancy. Four such demotions had been granted--all to white workers. However, there was no vacancy in the lower position at the time of the grievant's request. The demotion request was denied.

Issue to be resolved.--Did the company discriminate by denying the grievant's request for demotion?

Arbitrator's award.--Grievance denied. (Award #86).

Comment.--The arbitrator found the conditions quite different for the previous four demotions. There the workers had less experience and training than the grievant; the demotions were in their best interests. Also other blacks had been granted demotion requests at various times.

Case 13 (Citation--75 LA 181)

Pertinent contract provisions.--Article XVIII. Non-discrimination: The company and union agree that all provisions of the contract shall apply to all employees with

no discrimination on account of race, creed, color, sex, age, or national origin. Article III. Management rights.

Synopsis of the facts.--A black apprentice electrician grieved when he was not awarded a position of journeyman. He claimed racial bias on the part of the company when the posted job was filled by a white employee. Besides bias, the grievant claimed that the training program was poorly administered thus hampering his promotion. The company showed the grievant to be a "borderline" applicant who lacked motivation.

Issue to be resolved.--Did the company racially discriminate against the grievant when it denied him the position?

Arbitrator's award.--Grievance denied. The company decision was based on grievant's lack of competency. Award #35).

Comment.--Despite some evidence of racial bias, the award was based on management's good-faith determination that the applicant lacked the requisite qualifications. The arbitrator deferred to the judgment of operational supervisors.

Case 14 (Citation--66 LA 687)

Pertinent contract provisions.--Section 13. Seniority: Length of continuous service will be the primary determinant

in considerations for promotion. Consent Decree I and Affirmative Action Plan which provide for job continuous service to be utilized.

Synopsis of the facts.--Two combined grievances protested the discontinuance of the practice of using "job" continuous service as the basis of selecting daily work assignments and substituting instead plant continuous service as required by the Consent Decree. The complaint alleged "illegal" use of the Consent Decree.

Issue to be resolved.--Were the workers' "rights" denied by application of the seniority provisions of the Consent Decree instead of long-term plant practices unique to the steel mill?

Arbitrator's award.--The grievances are denied. (Award #84).

Comment.--Despite long-held job assignment practices unique to a particular plant, the provisions of a Consent Decree are to be applied uniformly.

Case 15 (Citation--64 LA 146)

Pertinent contract provisions.--Article 80b provides for seniority in filling job vacancies. Article IX: No discrimination.

Synopsis of the facts.--Two qualified employees applied for the same job vacancy. A less senior black was awarded the position based upon affirmative action guidelines. The company contended that it would not be able to promote minority workers to skilled positions as required by OFCC regulations if it followed the provisions of the agreement.

Issue to be resolved.--Did the company violate contract provisions by awarding job to a less senior minority applicant?

Arbitrator's award.--(1) Company violated Article 80b by not promoting the most senior employee; (2) Grievant is to be awarded disputed position with recompense for losses sustained. (Award #15).

Comment.--Here the arbitrator remained within the literal boundaries of the collective bargaining agreement. He decided that the seniority clause had not been found to be discriminatory, and OFCC regulations should not result in reverse discrimination.

Case 16 (Citation--69 LA 857)

Pertinent contract provisions.--Section 6. Seniority: Transfers will be on the basis of seniority consistent with ability; transfers will not be considered if an employee who has less than six months' service in the department from which he seeks a transfer.

Synopsis of the facts.--Grievant contends that seniority contract provisions were violated when a less senior black was awarded a job vacancy based on an affirmative action agreement not specifically set forth in the contract provisions but rather in a "memorandum of understanding." The company argued that the arbitrator's jurisdiction does not extend to the grievance because the legality of the company's action in Title VII matters will be determined by the courts.

Issue to be resolved.--Do the contract provisions supercede Federal mandates?

Arbitrator's award.--Grievance denied. (Award #44).

Comment.--This case shows an arbitrator who interprets and applies the contract in the context of the requirements of an Affirmative Action Program, even where the AAP alters the labor contract.

Case 17 (Citation--67 LA 453)

Pertinent contract provisions.--Article X. Seniority: Seniority will determine the employee to be promoted to any vacancy, with due consideration given to such factors as potential ability and present ability.

Synopsis of the facts.--A senior black female applicant for a posted job vacancy claimed she was a victim of

discrimination when the company required her to provide a transcript of her college training. She contended that she was the only applicant requested to supply evidence of previous educational training, and the company had not required present job holders to verify such training.

Issues to be resolved.--Did the company discriminate against the grievant by deciding not to promote her to a vacant position--a decision based upon the submission of educational data not previously required of others promoted to the same job.

Arbitrator's award.--Grievance is denied because of misleading and inapplicable college course work, evidence of large number of black workers hired, and failure of grievant to show that her college training compensated for her lack of present ability to perform work on the desired job. (Award #3).

Comment.--Although no specific antidiscrimination clause was cited, the arbitrator found no evidence to support the grievant's claim that she was denied a promotion based upon race. The arbitrator relied on statistical evidence that the company employed black employees in excess of the local percentage standard.

Case 18 (Citation--64 LA 316)

Pertinent contract provisions.--Article II. Nondiscrimination: "Neither the company nor the union shall

unlawfully discriminate against any employee on account of the employee's race, color, religion, sex, age, or national origin. Appendix A, Section 11. Seniority: Seniority will govern in the promotion of workers where all other qualifications are equal. Pertinent also is the company's Affirmative Action Program (AAP) and Transfer Plan legally required.

Synopsis of the facts.--A black employee who passed a qualification test was awarded a vacant position over a senior white worker who failed the same exam. The union contended that the agreement should not be superceded by the AAP because the company could meet its targets for minority utilization "within the stated time frame and under normal seniority conditions" under the terms of the labor contract. The company's argument was based on the relationship between the contract and federal law. It contended that the AAP and Transfer Plan were legal requirements which must be applied to the present situation. The company insisted that the arbitrator look beyond the contract and apply federal law where applicable if the award is to have any effect.

Issue to be resolved.--Should the provisions of the collective agreement or the AAP be followed in the promotion decision?

Arbitrator's award.--The arbitrator sustained the grievances of the senior worker. (Award #60).

Comment.--The arbitrator concluded that he has an obligation to consider Title VII law in the employment discrimination grievances appearing in this case. Citing Gardner-Denver and the intent of the parties, he interpreted and applied federal law where applicable.

Case 19 (Citation--74 LA 301)

Pertinent contract provisions.--Article XIII, Section 15 stipulates: "The terms and the provisions of this uniform Agreement and the local Supplementary Agreements thereto shall apply without discrimination because of race, color, religion, sex, age, or national origin."

Synopsis of the facts.--The grievance was filed by the union in behalf of seven black members who cited race discrimination when five white employees were assigned seniority over seven black employees. Seniority was assigned according to the following criteria: (1) date of employment, (2) time shift commenced, and (3) call times. Assignment of the five white employees was based on the above criteria.

Arbitrator's award.--Grievance denied. (Award #10).

Comment.--The company's criteria for seniority assignments was valid if black employees received equal opportunities in hiring practices.

Case 20 (Citation--68 LA 155)

Pertinent contract provisions.--Section VI. Seniority: Job seniority given first preference in promotions. Memorandum of Understanding to modify contract in accord with Affirmative Action Plan (AAP) which gives plant seniority precedence over job seniority.

Synopsis of the facts.--In order to meet requirements set forth by the OFCC for federal contractors under E.O. 11246, the company modified the seniority provisions of the labor contract. Certain minority workers were part of an "affected class" and mill seniority, not job tenure, was to determine promotion when minorities competed against white workers. The subsequent promotion of a black employee over other whites bidding for the position, resulted in a grievance. The union said the company misrepresented the modifications and acted capriciously in the promotion.

Issue to be resolved.--Was the promotion proper in accordance with the Memorandum of Understanding?

Arbitrator's award.--The arbitrator sustained the grievance. (Award #43).

Comment.--The intent of the parties in formulating and signing the Memorandum was the key consideration for the arbitrator. He said that where there was no past wrong to

be corrected, the arbitrary use of the Memorandum to promote a less senior worker was a violation of the contract.

Case 21 (Citation--75 LA 387)

Pertinent contract provisions.--Article XXV. Management Rights. Article XXVI. No Discrimination: Neither the company nor the union shall discriminate against any employee on account of race, sex, creed, nationality, color, religion, or age.

Synopsis of the facts.--A bakery manager position was not awarded to a black female after she rejected management's request that she take an interim job for evaluation purposes. She declined the evaluation and training because of the lack of a guarantee of immediate promotion and pay increase. Evidence showed grievant's limitations in other areas.

Issue to be resolved.--Was the grievant denied promotion and training opportunities because of race discrimination?

Arbitrator's award.--No evidence of racial discrimination found. (Award #68).

Comment.--Efforts by management to provide opportunities for training and possible promotion overrode the charges of discrimination. Management's right to direct the work force is emphasized.

Case 22 (Citation--65 LA 197)

Pertinent contract provisions.--Section V. No Discrimination: The parties shall not discriminate against any employee because of race, color, sex, religion, or national origin. Section VI. Seniority: Job seniority given first preference in promotions.

Synopsis of the facts.--The parties, in order to comply with Executive Order 11246, signed a memorandum with the OFCC which modified the seniority and job promotion provisions of the agreement. The memorandum accepted plant seniority as the chief criterion for advancement within lines of progression for black workers. When a black female was promoted to a clerical position over a more senior white female, the latter grieved contending that the open position involved competition between a "nonaffected" class member and herself. Moreover, she argued that where abilities are equal, seniority is to be the chief determinant. The company's position included evidence of its desire to comply with its Affirmative Action Plan, similar past practice of placing junior blacks, and citation of case law and arbitral precedence to support its action.

Issue to be resolved.--Did the company violate the agreement by promoting the junior black instead of the more senior white employee?

Arbitrator's award.--The employer was not justified in awarding the job to the black employee. (Award #42).

Comment.--The decision was based on the unilateral nature of the company's action, contrary past practice, the granting of "fictional" seniority to the grievant, and the grievant not included as part of the "affected class" as defined in the AAP.

Case 23 (Citation--AAA 194-17)

Pertinent contract provisions.--Article VIII. Seniority: Union members will be given prior consideration with qualifications and seniority used as bases for promotion; seniority is the key determinant where qualifications are equal. Article XIX. Nondiscrimination: There shall be no discrimination in any way because of race, creed, color, national origin, or membership or nonmembership in a union.

Synopsis of the facts.--The Laboratory was attempting to comply with an affirmative action program (AAP) pursuant to requirements issued by the OFCC in order to correct its underutilization of minorities and women. This arbitration occurred after the Laboratory selected a black employee over a more senior white employee. The union contended that the choice was a obvious violation of the labor contract. The Laboratory argued that it must comply with the applicable executive order which required affirmative action to correct minority underutilization.

Issue to be resolved.--Did the Laboratory violate the seniority-promotion provision of the labor agreement?

Artibrator's award.--The Laboratory erred in selecting the junior black employee. (Award #8).

Comment.--The arbitration award was based on the grievant's clearly superior ability to perform the work. There was no compelling evidence that his selection would violate the AAP.

Case 24 (Citation--AAA 195-9)

Pertinent contract provisions.--Appendix C. Seniority: When choosing an employee for a position the company is to "consider length of service insofar as the conditions of the business and the abilities of the employees permit." Also applicable here was a Consent Decree and Affirmative Action Program in force in the company.

Synopsis of the facts.--The company chose a less senior black employee over a white employee to fill a switchman position. A grievance was filed protesting the violation of the seniority clause; the company justified its action as being part of its legal obligation under the federal court's consent decree. Further, the provisions of the decree were pertinent "conditions of business" that permitted the company decision.

Issue to be resolved.--Did the objective of fulfilling its equal employment responsibilities under the consent decree supercede the company obligation under the seniority clause of the labor agreement?

Arbitrator's award.--The company was justified under its affirmative action plan, to choose the less senior minority employee. (Award #74).

Comment.--Strict compliance with a federal order is necessary, even though a violation of the labor agreement may result.

Case 25 (Citation--AAA 207-9)

Pertinent contract provisions.--Article VI. Job Changes: Before new jobs are created or changed in the plant, management will meet with the union and confer on crew size and rates of pay. Article XVII. Operative Control: Management has the right to plan, direct, and control the plant operations.

Synopsis of the facts.--The company had signed a Conciliation Agreement with the EEOC which gave minority employees the right to bid for job openings on the basis of plant rather than departmental seniority. The EEOC Agreement was to supercede the contract in the event of a conflict between the two. When the company began staffing a

certain department contrary to the EEOC Agreement, a black employee threatened to file an EEOC charge. When the company revised its procedure and posted the new jobs under the terms of the EEOC agreement, the union grieved under Article VI and also filed an 8(a)(5) charge (refusal-to-bargain) with the NLRB which deferred the charge to arbitration under the Collyer doctrine.

Issue to be resolved.--Did the company refuse to negotiate concerning its decision to treat an operation as a new department and staff it in accordance with the provisions of the Conciliation Agreement?

Arbitrator's award.--No violation of the collective bargaining agreement was found. (Award #94).

Comment.--Where the company's attempt to abide by the provision of the Conciliation Agreement resulted in the union's claim of a contract violation, the arbitrator held that the right of management to plan and staff the plant are primary.

Case 26 (Citation--68 LA 1091)

Pertinent contract provisions.--Non-discrimination. The company and union mutually agree and pledge that neither party will discriminate against any person because of race, creed, color, sex, or national origin.

Synopsis of the facts.--A vacant leaderman position was not assigned to the black grievant who had worked in the position on a temporary basis. The job was awarded to a white employee from outside the department. Refuting the union claim of discrimination, the company contended that the grievant was unqualified and would receive an unprecedented "double-jump" promotion if assigned the job.

Issue to be resolved.--Was the company's decision to deny the promotion racially motivated?

Arbitrator's award.--The decision to deny the grievance was based upon the following: (1) vacant position had been held by a black employee; (2) position required a qualified mechanic; (3) grievant was ill-prepared for the job; and (4) management has unilateral right to award a "double-jump" promotion. (Award #48).

Comment.--Management prerogatives in the assignment of qualified employees was considered to override claims of racial bias. The arbitrator relied solely on application and interpretation of the pertinent contractual provisions.

Case 27 (Citation--69 LA 803)

Pertinent contract provisions.--Article II. Neither the company nor the union shall in any manner discriminate against anyone because of race, color, creed, national

origin, ancestry, sex, or age in conformity with the statutes relating thereto.

Synopsis of the facts.--The grievant claimed that he was not allowed to train for an open position because of his race. The union processed the grievance alleging violation of Article II after the position was filled by a white employee who had a poor attendance record. Evidence presented at the hearing showed that the grievant was disinclined to follow orders and otherwise unreliable. Other evidence showed a large increase in the percentage of black hirees and supervisors.

Issue to be resolved.--Did the company violate Article II by not placing the grievant in the vacant position?

Arbitrator's award.--No racial discrimination evident--grievance denied. (Award #58).

Comment.--The arbitrator concluded that management's right to decide job assignments is paramount. In finding no evidence of racial discrimination, the arbitrator relied not only on the company's large percentage of black workers but also on the grievant's poor performance record.

Case 27 (Citation--70 LA 4)

Pertinent contract provisions.--Article IV, a detailed antidiscrimination clause, states in part that "all hiring,

promotion practices, and other terms and conditions of employment shall be conducted in a manner which does not discriminate on the basis of race, color, religion, age, sex, creed, or national origin." Article VIII dealing with seniority and defining "qualified" as possession of the necessary mental and physical capacity, knowledge, skill and experience to perform a job satisfactorily within a reasonable period of time, not to exceed fifteen working days.

Synopsis of the facts.--The grievant, a black employee, was denied a promotion to an assembler position after failing to answer seventy-five per cent of blueprint reading questions; three qualified white employees were assigned the positions. The union contended that the test was unrelated to the job and no help was given the grievant during the fifteen-day trial period.

Issue to be resolved.--Did the employer violate the antidiscrimination clause when it disqualified the grievant from the assembler position?

Arbitrator's award.--In denying the grievance, the arbitrator concluded that: (1) the test was relevant and given to all job bidders; (2) the trial period was not a time to learn the job, but a time to demonstrate one's ability to perform; and (3) the contract did not forbid giving the test. (Award #51).

Comment.--Here the arbitrator relied on evidence that the grievant could not perform satisfactorily and decided for the company.

Case 28 (Citation--AIG 1183)

Pertinent contract provisions.--Article XV pertaining to the specific methods and steps to be taken in the job promotion sequence.

Synopsis of the facts.--The Union filed a grievance protesting the propriety of a promotion procedure where two employees were upgraded. One of the employees, a black, asserted at the hearing that the Union showed racial bias by not following the proper procedure in processing the grievance. That is, the Union appeared motivated to protest the promotion procedure only when the black employee was promoted.

Issues to be resolved.--Did the employer improperly promote the two workers? A second issue, not formally stipulated but addressed by the arbitrator, was whether the Union's challenge to one of the promotions was racially motivated.

Arbitrator's award.--The promotions were proper in that both met all the noncompetitive career promotion conditions set forth in the contract. As to the individual assertion

by the black promotee, the arbitrator found no evidence of racial discrimination in the Union's actions. (Award #82).

Comment.--Arbitrator Goldman gave some consideration to the discrimination question before deciding the primary issue. He first cited Gardner-Denver's emphasis on arbitration's private and contractual nature. He then stated that an arbitrator should not allow his award to serve as a vehicle for racial discrimination. To do otherwise, he said, "would violate the ethics of the public service nature of labor arbitration."

Case 29 (Citation--71 LA 1215)

Pertinent contract provisions.--Special Agreement signed by the parties to adjudicate individual Title VII claims via grievance arbitration where issues of promotion and job vacancies are present.

Synopsis of the facts.--A black employee applied for a posted job vacancy and tied with another bidder, a white female, for the position. The company later eliminated the job saying that it had mistakenly posted it. The black grievant claimed he was denied the job because of his race; the company said the job was eliminated for reasons of efficiency. A simultaneous charge filed with the EEOC by the grievant resulted in a finding of no reasonable cause that there had been a Title VII violation. The union

contention was that the job was eliminated only after it was learned that a black worker was one of the two top bidders.

Issue to be resolved.--Was the job eliminated in order to keep the black worker from the job?

Arbitrator's award.--Racial considerations accounted for the company's decision. (Award #92).

Comment.--The arbitrator's decision was based on a series of actions by a variety of company officials which resulted in "disparate treatment" for the grievant. The findings of the previous EEOC investigation were not considered to be conclusive.

Case 30 (Citation--64 LA 869)

Pertinent contract provisions.--The union and company signed a Settlement Agreement which disposed of prior Title VII disputes and established a special grievance and arbitration procedure to adjudicate claims of employment discrimination where promotions or assignments are at issue.

Synopsis of the facts.--The grievant, a black, was demoted from his position when there was a change in equipment. His hourly rate was reduced as a result of the demotion. He also claimed that he was denied reassignment to his former job when the replacement equipment was

installed. The union claimed that the action was part of a systemic pattern of discrimination existing at the plant because of the departmental seniority system. The company contended that there was no evidence of racial bias in its actions. It also argued that the grievance was not an individual claim as authorized by the special agreement; the company also would not provide pre-hearing information.

Issue to be resolved.--The key issue became whether the company was obligated to furnish personnel data demanded by union in order to substantiate the Title VII claim and calculate a back pay award.

Arbitrator's award.--The grievance was sustained. The grievant is to be reinstated, and the data must be provided before a full remedy can be calculated. (Award #93).

Comment.--In an effort to expedite Title VII grievances, the Settlement Agreement was signed by the parties. The Agreement, however, limited the arbitrator's jurisdiction to disputes involving promotions and job vacancies, alleged contract violations, and claims of discriminatory conduct by other employees.

Case 31 (Citation--64 LA 413)

Pertinent contract provisions.--Applicable is an affirmative action plan stipulation that calls for a number of

steps to recruit, promote, and utilize minority workers and women.

Synopsis of the facts.--The stipulation called for specific time limits for the completion of certain affirmative action steps. When the time elapsed with no visible action taken by the employer, the union filed a grievance alleging that the agency failed to comply with the stipulation. The agency contended that it had made an effort to comply and that part of the stipulation was invalidated by Executive Order 11491.

Issue to be resolved.--Did the agency comply with the stipulation?

Arbitrator's award.--There was substantial, but not total, compliance. The award ordered specific steps be taken within sixty days of the award. (Award #65).

Comment.--Since 1978, the Civil Service Reform Act has given broader authority to the grievance-arbitration process in the federal government.

Case 32 (Citation--74 LA 494)

Pertinent contract provisions.--Article IV. Promotions and assignments: The Board has the right to promote and assign its employees in accordance with the law and state regulations.

Synopsis of the facts.--A black male teacher was not awarded vacant position in an adult education program. The white teacher placed in the position had considerable experience teaching adult students; the grievant had none.

Issue to be resolved.--Did the Board discriminate against the grievant?

Arbitrator's award.--No discrimination shown. (Award #71).

Comment.--A charge of racial discrimination must be supported by facts; the arbitrator was surprised at the weakness of the claim.

Case 33 (Citation--78-1 ARB 8219)

Pertinent contract provisions.--Article IV. Fair Treatment: Any claim by a teacher that there has been a violation to the right of fair treatment may be brought in the form of a grievance.

Synopsis of the facts.--The grievant, a black science teacher with nine years' experience, was not appointed department head at a middle school. She protested when a white teacher with similar credentials but less experience was assigned the position. The union presented statistical evidence alleging a pattern of racial discrimination in staffing of department head positions. The employer

responded that it objectively weighed ten criteria to determine the best qualified teacher for promotion.

Issue to be resolved.--Was the grievant treated unfairly (the victim of racial discrimination)?

Arbitrator's award.--No evidence of racial discrimination. (Award #54).

Comment.--Evidence of discrimination must be compelling to sustain the grievance. That is, it must be shown that the grievant was significantly more qualified and that her not being promoted "could reasonably be explained only on the basis of her membership in the black race."

Case 34 (Citation--AAA 199-14)

Pertinent contract provisions.--Appendix C. Seniority: Length of service shall be taken into account in the promotion of employees insofar as the conditions of business and abilities of employees permit. Article X. Nondiscrimination: Neither party shall discriminate against any employee because of such employee's race, color, religion, age, sex, or national origin. (Also in effect was a signed Consent Decree and Affirmative Action Program.)

Synopsis of the facts.--The company, in an effort to comply with objectives of its AAP, filled a vacancy with a qualified junior black female. The white grievant, with

twenty-five years of service, grieved citing a violation of Appendix C. The company argued that its action was justified since compliance with the Consent Decree was a mitigating condition of business under Appendix C.

Issue to be resolved.--Given the existence of the restrictions of the governmental order, did the company violate the contract?

Arbitrator's award.--No violation of the contract was found. Grievance denied. (Award #73).

Comment.--After a lengthy discussion of the Gardner-Denver case and the differences between arbitral and judicial authority, the arbitrator emphasized that his decision was based solely on the particular facts of the case. The award also contained an "examination of matters concerning the execution and administration of Federal law."

Case 35 (Citation--79-1 ARB 8125)

Pertinent contract provisions.--Section 69 provides for the sequence of layoff "when it becomes necessary to reduce the number of employees. . ." Section 70 provides for bumping privileges according to seniority. Article XII, Section 92 reads: "The arbitrator shall have no power to detract from, alter, change, or modify any of the provisions of the Agreement or any other agreement supplemental hereto."

Also applicable is a Training Supplement allowing for selection of minority groups (affirmative action) in the apprentice program.

Synopsis of the facts.--In 1969 the company registered its apprentice training program with the Department of Labor Appprentice Bureau. The company and the union entered into a special training program in the 1971-1974 contract. During the life of the contract, few minorities applied for training and no minorities passed the qualification tests. A reprimand by the Atomic Energy Commission resulted with a Training Supplement revision in the 1974-1977 contract making acceptance into the apprenticeship program easier. A black with less seniority than the white grievant passed the qualifications test and began work as a millwright apprentice. When the senior white was laid-off in October of 1977, he sought to bump the new apprentice according to contract provisions. The bump was denied and a grievance was filed.

Issue to be resolved.--Was senior worker denied bumping privileges as set forth in the contract?

Arbitrator's award.--"The affirmative action program was the agreement and by making such an agreement, the Union effectively modified seniority rights, as well as bumping rights as they apply to these facts." (Award #29).

Comments.--The arbitration award complied with minority rights guaranteed through affirmative action programs in industry.

Case 36 (Citation--72 LA 892)

Pertinent contract provisions.--Section 7. Seniority: Stipulates seniority provisions as a factor for filling job vacancies. Grievance and dispute procedures outlined in Section 16. Section 22. Miscellaneous: Lists compliance with federal and state law as well as an antidiscrimination agreement. Memorandum of the Agreement agrees to establishment of an apprenticeship program in compliance with Federal Bureau of Apprenticeship guidelines.

Synopsis of the facts.--A grievance was filed citing reverse discrimination in the company's selection of individuals for an apprenticeship program. It was the grievant's claim that blacks and Spanish-surnamed employees with less seniority were chosen for the training program. The company charged that the grievance was not arbitrable because the grievance was not timely filed.

Issues to be resolved.--Did the company discriminate by not selecting the grievant for a training position? Was the grievance timely filed?

Arbitrator's award.--The company's selection process was not discriminatory and did not violate the contract. The grievance was timely filed and arbitrable. (Award #49).

Comment.--The arbitrator placed the burden of proof upon the grievant in establishing discrimination. The grievant could not establish such proof.

Job Benefits
Case 1 (Citation--AAA 246-1)

Pertinent contract provisions.--Article IX deals with seniority and states that vacation priority will be governed by bargaining unit seniority. In a Memorandum of Understanding that included the terms of the company's concilation agreement with the EEOC, the parties agreed to rely on plant instead of unit seniority. However, there was no reference to the use of seniority for vacation scheduling.

Synopsis of the facts.--A white employee protested when his preference for vacation time was not granted. His grievance claimed that the company had given priority to minority workers based upon plant instead of unit seniority. The company said that it was following the spirit and intent of its EEOC agreement by using plant seniority. The union argued that the policy was a violation of Article IX.

Issue to be resolved.--Did the company violate the contract?

Arbitrator's award.--The grievance was sustained. Employees were to be allowed to take vacations by unit seniority. (Award #95).

Comment.--Despite efforts to alleviate the effects of discriminatory seniority systems, in a Memorandum of Understanding, arbitrators will interpret the collective bargaining agreement and apply it accordingly.

Case 2 (Citation--AIG 2067)

Pertinent contract provisions.--Article IX is a broad provision outlining management rights. Article XIII states in part that transfers and reassignments between precincts will be determined mainly by seniority--provided the officer is qualified. Also included is a "modified seniority" clause which considers other factors in addition to seniority.

Synopsis of the facts.--Each year the Detroit Police Department sent two or three officers to a nearby island to help patrol during the summer months. The Department decided to increase the number of black officers to be transferred because of the large number of black patrons of the island. Seniority was not a major consideration in the temporary reassignment decision. The union charged a violation of Article XIII. The Department contended that it had acted properly and in accordance with past practice under the "modified seniority" provision.

Issue to be resolved.--Did the employer violate the provisions of the contract by choosing black officers over more senior white officers?

Arbitrator's award.--The grievance is denied. (Award #19).

Comment.--In some unique situations race must be considered when making a transfer decision.

Case 3 (Citation--78-2 ARB 8474)

Pertinent contract provisions.--Article III is an anti-discrimination clause which prohibits discrimination against union members and calls for compliance with applicable discrimination statutes. Article XII is a broad provision outlining the rights of management.

Synopsis of the facts.--A black female employee filed a grievance after she was refused a one week personal leave without pay in order to attend to family matters. A similar request by a white employee had been granted. The company's decision was based on the uniform policy of not granting leave when an employee has unused vacation time. The grievant had three weeks of vacation remaining. Also the grievant refused offers by management to review her request. The union stressed the inconsistency in the application of the personal leave policy.

Issue to be resolved.--Was the denial based upon considerations of race?

Arbitrator's award.--The grievance was denied. (Award #30).

Comment.--Consistent and uniform application of policy is a strong defense against allegations of discrimination.

Discharges
Case 1 (Citation--70 LA 979)

Pertinent contract provisions.--Article VI. Seniority: Entitlement to seniority rights after four months' probationary period. Article XVIII. Nondiscrimination Policy.

Synopsis of the facts.--A new black grievant was discharged during his probationary period for unsatisfactory performance. He charged race discrimination in that he received less training and assistance than other employees. Company evidence showed uniform training procedures and lack of prejudice on the part of supervisors.

Issues to be resolved.--Was the dismissal racially motivated?

Arbitrator's award.--The grievance was denied (Award #6).

Comment.--Company practices and treatment of the grievant do not show discriminatory intent.

Case 2 (Citation--AAA 232-6)

Pertinent contract provisions.--Section 4. Discrimination and coercion clause which applies the agreement to all employees without regard to race, color, sex, age, religion, and natural origin. Article XVII. Management Rights.

Synopsis of facts.--A black employee was discharged for using abusive language to a supervisor. The incident was one of many documented in the personnel record. The grievant stated that he had been the subject of name calling, racial epithets and overall disrespectful treatment. The company submitted the grievant's poor work record and showed contradictions in the testimony to substantiate its action. An EEOC claim was pending at the time of the hearing.

Issue to be resolved.--Was grievant discharged for just cause?

Arbitrator's award.--Grievance denied (Award #27).

Comment.--Claim of discrimination was not substantiated. Arbitrator relied on evidence of past misconduct and latest incident to find cause for dismissal.

Case 3 (Citation--AAA 253-1)

Pertinent contract provisions.--Preamble contains a broad antidiscrimination clause. Article II outlines the

rights of management and Article VII provides for a grievance procedure and arbitration.

Synopsis of the facts.--The grievant was discharged after overall poor performance ratings and substandard output. No improvement was evident after counseling and opportunity for improvement. The union contended that the discharge was based on the grievant's being "unadaptable" to the work--an unjustified conclusion. Racial discrimination was also alleged to be an underlying cause of the discharge.

Issue to be resolved.--Was grievant discharged for cause?

Arbitrator's award.--Yes, grievance denied (Award #63).

Comment.--The company's overall case showed that grievant was dismissed for poor performance. The burden was on the union to establish a case for racial discrimination. The arbitrator relied on previous arbitrations and labor law criteria to form the decision.

Case 4 (Citation--74 LA 806)

Pertinent contract provisions.--Managements Rights. Article XVIII. Nondiscrimination.

Synopsis of the facts.--The grievant was discharged after a period of increasingly poor work performance.

Despite the proper training period and counseling by supervisors, the black employee failed to meet minimum work standards. The main union defense was disparate treatment of the grievant where others were not so severly disciplined for defective work. Also the union claimed the grievant was selected for discipline because of her race.

Issue to be resolved.--Was discharge for cause?

Arbitrator's award.--Yes, grievance denied (Award #90).

Comment.--Contentions of racial bias based on insupportable evidence will obviously not stand. The arbitrator outlined the basis of a prima facie case.

Case 5 (Citation--72 LA 559)

Pertinent contract provisions.--Article 2 states that an employee must work for a forty-five-day trial period during which time discharge without recourse is possible except where discrimination is apparent.

Synopsis of the facts.--Black employee was discharged during his probationary period because of unexcused absences. The union argued that the employer, which screens and hires for another corporation, had acceded to that corporation's unwarranted demands to discharge the grievant and had discriminated on account of race. While the company did not have to give reasons for firing a probationary employee

(except where discrimination was involved), it presented evidence of the grievant's work habits, past employment records, and absences to justify its decision to dismiss.

Issue to be resolved.--Did the company deprive the probationary employee of his rights?

Arbitrator's award.--Grievance denied (Award #5).

Comment.--No evidence whatsoever of racial discrimination.

Case 6 (Citation 80-1 ARB 8146)

Pertinent contract provisions.--Article III contains union referral rights of "qualified employees" as well as a nondiscrimination clause.

Synopsis of the facts.--A charge of reverse discrimination was filed by a white worker who was dismissed in favor of a black worker. The company said that the dismissal was necessary because of a lack of work. The union said the real reason for the company action was to create an opening for a minority worker in order to meet affirmative action commitments.

Issue to be resolved.--Was the grievant discriminated against in favor of a black employee?

Arbitrator's award.--Yes, reverse discrimination occurred (Award #75).

Comment.--Where the contract calls for no discrimination, the arbitrator can include reverse discrimination. Interpretation and application of the contract is made without regard to the prevailing social considerations of the time.

Case 7 (Citation--75 LA 439)

Pertinent contract provisions.--Article I. Recognition: Section B deals with nondiscrimination. Rules and Regulations of the Company: Rules against theft set forth. Article VII: Provides for just cause in discharge cases.

Synopsis of the facts.--A black worker was discharged for theft of company property. Union representatives stated that the grievant was merely removing scrap, that others guilty of theft had received only a layoff, and that the punishment was too severe. Also statistical evidence was submitted to show disparity in treatment of black versus white offenders.

Issues to be resolved.--Was there racial discrimination? If not, was the discharge an appropriate penalty?

Arbitrator's award.--No discrimination. Discharge appropriate (Award #7).

Comment.--Evidence of planned and premediated theft justified the discharge. Statistical evidence was insufficient to show discrimination existed.

Case 8 (Citation--AAA 219-3)

Pertinent contract provisions.--Article III. Nondiscrimination. Article VI. Management responsibilities to discipline and discharge employees.

Synopsis of the facts.--A black employee with five years of service violated plant safety rules by allegedly speeding in a company truck and smoking in a restricted area. He also used abusive language when confronted. The union argued that other white employees had the same violations with no discipline resulting.

Issue to be resolved.--Was the company guilty of racial discrimination.

Arbitrator's award.--Grievance denied (Award #36).

Comment.--The burden of proof is on the union to show evidence of discrimination; the arguments were ineffective to prove discrimination. However, absent proof of willfulness, the discharge was reduced to a suspension.

Case 9 (Citation AAA 208-3)

Pertinent contract provisions.--Article VII. Discharge for cause.

Synopsis of the facts.--A black employee was fired because he refused to obey orders. His repeated insubordination was his refusal to sign bills of lading. He claimed that another white employee had also not signed the freight bills but the company ignored that behavior.

Issue to be resolved.--Was there just cause for the dismissal?

Arbitrator's award.--Discharge reduced to suspension with loss of pay and seniority (Award #37).

Comment.--Arbitrator Ipavec found no evidence of discrimination based on the facts. The company was justified in disciplining the first violator of the order. The award emphasized the well-accepted rule of "work now, grieve later."

Case 10 (Citation--AIG 2663)

Pertinent contract provisions.--Article XI. Nondiscrimination. Article III. Probationary requirements for new employees.

Synopsis of facts.--A female black probationary employee was discharged because of prolonged and excessive problems of absenteeism and tardiness. She claimed that her discharge was based on discrimination, that subjective evaluations were

given, and no timely warning was given that her job was in jeopardy.

Issue to be resolved.--Was the discharge based on race discrimination?

Arbitrator's award.--Grievance denied (Award #91).

Comment.--The arbitrator found "no discrimination within the meaning of Title VII." The union did not meet the burden of proving the allegations from the facts.

Case 11 (Citation--78-2 ARB 8068)

Pertinent contract provisions.--Article III sets forth the prerogatives of management to direct the operation of the business, including discharge for just cause.

Synopsis of the facts.--A minority employee claimed he was the victim of discrimination when he was discharged for failing to reveal a prior felony conviction on his employment application. He claimed that he had openly discussed the incident with a personnel manager who advised him to omit the information. Very little evidence as to the discrimination charge was produced. The personnel manager refuted the grievant's testimony.

Issue to be resolved.--Was the employee discharged for cause?

Arbitrator's award.--The discharge was justified (Award #76).

Comment.--Claims of discrimination must be supported by evidence.

Case 12 (Citation--AIG 2133)

Pertinent contract provisions.--Article XVI. Nondiscrimination clause similar to Title VII language.

Synopsis of the facts.--A probationary employee, after being warned of his excessive clerical errors and after a period of supervisory observation, was discharged when he failed to improve. The union claimed that racial bias motivated the discharge and showed some supporting evidence of supervisory prejudice. The employer indicated the unacceptable error rate of the grievant and contended that no prima facie case for race discrimination had been made.

Issue to be resolved.--Was the discharge racially motivated?

Arbitrator's award.-- Discharge was upheld (Award #26).

Comment.--The employer was not held to a "reasonable cause" standard where a probationary employee was involved and where reasonable job requirements were not met.

Case 13 (Citation--AIG 1692)

Pertinent contract provision.--Article II provides for nondiscriminatory treatment of employees and is patterned after Title VII. Article IV provides for arbitration where the City may have discharged a worker without just cause.

Synopsis of the facts.--Disciplinary proceedings were initiated against a black supervisor who altered the time sheets of his two sons who were in his work unit. During the proceedings more discrepancies were found, and incriminating evidence was pilfered by "unknown" sources. The union protested a decision to discharge contending that the employer had not properly trained the grievant in proper record keeping procedures.

Issue to be resolved.--Was the grievant discharged for cause?

Arbitrator's award.--Employer's action was not arbitrary (Award #17).

Comment.--The record of evidence showed no racial bias on the part of the employer.

Case 14 (Citation--75 ARB 8109)

Pertinent contract provisions.--Section 2. Discharge and Discrimination: Provides for discharge for good reason

and a pledge by both parties to abide by state and federal antidiscrimination laws.

Synopsis of the facts.--A new black truckdriver was discharged during his probationary work period after unexplained absences and delays in making deliveries. Even though the grievant had a few "problems," the union contended that discharge was too severe and said that the action was racially motivated. The contract permits unwarranted discharge of a probationary employee except where there is discrimination. The company submitted its hiring and discharge records to counter the charge of discrimination. An ongoing Affirmative Action Program was also presented by the company.

Issue to be resolved.--Was the employee terminated for racial reasons?

Arbitrator's award.--The discharge was upheld (Award #32).

Comment.--Evidence of efforts by the company to hire and retain black workers influenced the arbitral decision.

Case 15 (Citation--71 LA 886)

Pertinent contract provisions.--Section I. General Purpose: Both parties agree not to discriminate because of race, sex, age, color, creed or political belief as required by Federal Statute. Section III. Management Rights.

Synopsis of the facts.--The company fired a black worker for striking a union committeeman. The attack was provoked, said the grievant, by the atmosphere of racial animosity existing in the plant and caused by the company's discriminatory employment practices. The grievant also stated that he was not fairly and thoroughly represented by the union during the grievance-arbitration procedure. The charge of racial discrimination was first raised at the arbitration hearing.

Issue to be resolved.--Was the discharge justified?

Arbitrator's award.--Grievance denied (Award #81).

Comment.--Unprovoked attack on a fellow employee is intolerable. Allegations of racial discrimination should be raised in a timely manner.

Case 16 (Citation--71 LA 96)

Pertinent contract provisions.--None stated in the award although there were allusions to management rights, discharge-for-cause, and antidiscrimination clauses.

Synopsis of the facts.--The company discharged a fifteen-year black employee after he had struck his supervisor. The incident was the culmination of many threats of bodily harm by the grievant to several co-workers. Also shown was a record of excessive absenteeism. The union stated that the

grievant was the subject of racial harassment from the supervisor (also a black). Also the union said that the company knew of and tolerated the situation.

Issue to be resolved.--Was the discharge warranted?

Arbitrator's award.--Yes, grievance denied (Award #28).

Comment.--No justification found whatsoever for a charge of race discrimination. The company must make its workplace safe by removing employees with "propensities to harm others."

Case 17 (Citation--68 LA 536)

Pertinent contract provisions.--Article 4 entitled "Seniority, Layoffs, Rehiring and Discharge" states in Section F that the company has the right to discharge for just cause.

Synopsis of the facts.--A black janitor was discharged for a variety of work-related violations including not working, reading in a closet and unauthorized use of telephone. The grievant had previously filed charges with the EEOC claiming that he had a right to the actions because he was a victim of race discrimination and unequal treatment.

Issue to be resolved.--Was the discharge for just cause?

Arbitrator's award.--Grievance denied (Award #72).

Comment.--Arbitrator could not find any support whatsoever for the allegations.

Case 18 (Citation--63 LA 1262)

Pertinent contract provisions.--Article 7.07(e) states that an employee shall lose seniority when absent for three days without notifying the company.

Synopsis of the fact.--The grievant was discharged for failing to report absences for three consecutive days. Although a friend of the grievant called for her on two days, there was no direct contact between the employee and the company. The union charged racial discrimination and offered evidence to show less harsh discipline given to previous violators of the same contract provision.

Issue to be resolved.--Was the discharge based on racial discrimination?

Arbitrator's award.--Grievance denied (Award #97).

Comment.--Evidence that a work rule is applied uniformly to all employees will negate charges of discrimination.

Case 19 (Citation--63 LA 3)

Pertinent contract provisions.--Article VI calls for union representation in a disciplinary action. Article VII gives certain powers to the arbitrator. Article VIII involves

discharge for proper cause. Article XLI is a broad anti-discrimination clause.

Synopsis of the facts.--After two weeks of arguments, the discharged black male grievant struck a black female co-worker. The union provided evidence that other altercations had not resulted in discharge. Also it emphasized the "hearsay" nature of the company evidence. The company, in turn, stressed the hearsay nature of the grievant's race charges. It also produced evidence of several warnings given to the grievant to refrain from heated arguments at work.

Issue to be resolved.--Was the company's action in violation of the contract?

Arbitrator's award.--Discharge upheld (Award #52).

Comment.--Hearsay evidence is insufficient to support a claim of race discrimination.

Case 20 (Citation--73 LA 345)

Pertinent contract provisions.--Three clauses are pertinent: "Management Rights," "General Working Conditions," which set forth disciplinary offenses, and "Equal Employment Opportunity" which provides for full compliance with "State and Federal laws, regulations and executive orders dealing with fair employment practices . . ."

Synopsis of the facts.--The black grievant refused four separate times to carry out an order given by his foreman. The refusals resulted in a heated argument with abusive language from the grievant. The resulting discharge was protested by the union which said the company was "out to get" the grievant because he had filed charges with the EEOC. It also said the discharge policy had been applied in an uneven manner.

Issue to be resolved.--Did the company violate the contract and discriminate against the grievant?

Arbitrator's award.--The discharge was sustained (Award #13).

Comment.--Discrimination charges must be supported by the facts. The allegations of uneven application of rules do not sustain the grievant's case.

Case 21 (Citation--64 LA 397)

Pertinent contract provisions.--Nondiscrimination prohibits discrimination based upon race, color, creed, national origin or ancestry. Discipline and Discharge clause outlines management's procedures and reasons for maintenance of discipline.

Synopsis of the facts.--A black employee was discharged for insubordination by his supervisor, also a black. Previous

violations of work rules involved sleeping on the job, taking long breaks and lunch periods. After warnings and reprimands, the behavior still did not change. The grievance alleged racial discrimination and cited disparate treatment.

Issue to be resolved.--Was the discharge for just cause? Was the grievant the victim of discriminatory treatment?

Arbitrator's award.--The grievance was denied (Award #22).

Comment.--Where the arbitrator must rely solely on the grievant's own largely unsupported testimony, a charge of discrimination is difficult to uphold.

Case 22 (Citation--65 LA 25)

Pertinent contract provisions.--Article 601 prohibits the unjust discharge of any employee. Also pertinent is a broad antidiscrimination clause which incorporates applicable provisions of Federal law.

Synopsis of the facts.--Black employee was discharged for using abusive and obscene language to his supervisor, an American Indian. The grievance claimed unjust discharge and racial discrimination, the latter allegation was not apparent until the last step in the grievance procedure. The grievant had also filed a charge with the EEOC over the same incident, and at arbitration the union offered no evidence as to the discrimination claim.

Issue to be resolved.--Was the discharge for just cause?

Arbitrator's award.--The discharge was set aside and reduced to a two-week disciplinary layoff where evidence showed some provocation (Award #31).

Comment.--A charge of racial discrimination is especially weak where the supervisor involved is himself a minority employee.

Case 23 (Citation--62 LA 934)

Pertinent contract provisions.--Article XI calls for immediate accident reports to be filed. Article XXV provides for issuance of a warning notice prior to discipline or discharge.

Synopsis of the facts.--A black employee who altered a freight bill to indicate 1,000 extra gallons of fuel was discharged. Fellow workers were allowed to use the gasoline for their private autos. Grievant claimed his dismissal was not for cause but racially motivated.

Issue to be resolved.--Was discharge for cause?

Arbitrator's award.--The grievance was denied. There was no evidence of racial discrimination (Award #96).

Comment.--Despite the company's urging that it would be useless for the arbitrator to rule on the race issue in light of the Gardner-Denver decision, the arbitrator found no evidence to support the grievance. Further, the arbitrator said, "It would appear to be premature . . . to simply abandon the practice of arbitration in cases of discrimination."

Case 24 (Citation--74-2 ARB 8427)

Pertinent contract provisions.--Article XV prohibits discharge unless for proper cause. Article VIII bans discrimination because of race, color, sex, religion, natural origin, membership or non-membership in a union.

Synopsis of the facts.--The grievant was discharged for leaving a work area without proper permission. Claiming racial discrimination, the union showed evidence of less severe penalties for white workers guilty of the same rule infraction. The company showed a history of uniform discipline for the offense including several discharges. The grievant also was shown to have a very poor attendance record.

Issue to be resolved.--Was the discharge for proper cause?

Arbitrator's award.--The grievance was denied (Award #50).

Comment.--Disparate disciplinary measures for the same offense does not indicate racial bias per se. Mitigating circumstances are considered to justify the disparity.

Case 25 (Citation--65 LA 400)

Pertinent contract provisions.--The company manual, "Working with Northrop," is applicable and considered as binding as a contract. The manual contains a grievance-arbitration procedure. Also indicated are rules for progressive penalties for substandard workmanship.

Synopsis of the facts.--The company has very few union-affiliated employees--especially among its technical group. A systems analyst was discharged for sustained poor work performance. It was shown that the company hired the analyst unaware of his lack of qualifications and did not assist his acquisition of such qualifications when the deficiencies became known. Grievant charged racial discrimination in an individual action represented by his own counsel.

Issue to be resolved.--Was the discharge for cause?

Arbitrator's award.--Discharge was changed to a layoff with full recall rights except to the previous position. Also it was ordered that the grievant's supervisor be cited for his unsatisfactory performance while overseeing the black grievant's work progress. The arbitrator also looked

beyond the manual and considered the matter in light of Title VII (Award #64).

Comment.--An employer should assist a deficient minority employee where management is partly to blame for the employee's poor performance.

Case 26 (Citation--69 LA 439)

Pertinent contract provisions.--None cited in award itself, but involved are the rights of management to discipline and discharge for cause. Also an antidiscrimination clause is alluded to.

Synopsis of the facts.--Black delivery driver was discharged after several incidents where he disregarded plant rules. The incidents ranged from assault on a co-worker to improper vehicle maintenance. The grievant claimed racial discrimination and offered employment data to statistically verify the claim.

Issue to be resolved.--Was discharge for cause?

Arbitrator's award.--Grievance denied (Award #2).

Comment.--Statistical evidence of the racial composition of the work force is irrelevant in cases of individual discharge.

Case 27 (Citation--70 LA 146)

Pertinent contract provisions.--Section 3 and 8 include "just cause" provision for discharge and grievance procedure.

Synopsis of the facts.--Grievant, a black male, was discharged for allegedly striking a foreman. There were no witnesses present who could verify the incident. The foreman, however, showed physical signs of having been hit and voluntarily took a polygraph test concerning his version of the incident. The grievant was discharged for striking the foreman after he had received a five-day suspension while the evidence was reviewed. The grievance was filed charging the company with violating the agreement which allows discharge only when "just cause" has been demonstrated. The grievance also charged racial discrimination as motivation for the discharge.

Issue to be resolved.--Was the discharge racially motivated? Was there just cause shown for the company's position?

Arbitrator's award.--Grievance denied. Evidence demonstrated that the foreman's version of the incident was valid and that striking a foreman was a "serious breach of plant discipline" (Award #87).

Comments.--The arbitrator rendered his decision based upon the evidence with the burden of proof concerning "just

cause" resting with the company. The discrimination charge was "completely unjustified."

Case 28 (Citation--71 LA 1205)

Pertinent contract provisions.--Article 2, Section 2, Jurisdiction of the agreement does not cover "temporary" employees. Section 4 includes the company's right to manage. Article II, Sections 1 and 2 contain job classifications and wage schedules. Article 9 refers to absences from work. Article 10 is a general clause stating company policy in regard to contract work and major overhauling of equipment.

Synopsis of the facts.--The grievant, a black male, was hired when the company was under an affirmative action program. After a six-month probationary period grievant's job qualifications were deemed unsatisfactory and discharge was recommended. It was decided, however, that the grievant remain conditionally while further efforts were employed to train him. With additional training, his job performance continued to be judged unsatisfactory and the grievant was fired. The company assisted the grievant in regaining his former job. The grievant filed a complaint with the EEOC. A grievance was filed charging the company with violation of contract by discharging the grievant without cause.

Issue to be resolved.--Did the company violate the agreement by discharging the grievant and was the discharge racially motivated?

Arbitrator's award.--Grievance denied (Award #77).

Comments.--Evidence demonstrated that the grievant did not possess the requisite verbal and quantitative skills to qualify for position as mechanic's helper. The company went beyond its obligations by trying to give the grievant additional training which the arbitrator characterized as "reverse discrimination."

Case 29 (Citation--72 LA 769)

Pertinent contract provisions.--Article 5 contains nondiscrimination clause. Article VI provides for a sixty-day probationary period; if employment is obtained at the end of the sixty days, seniority is established on the original date of employment. Grievance procedures may not be used by employee during probationary period unless discrimination is alleged.

Synopsis of the facts.--Grievant was discharged on the fifty-ninth day of his employment as a machinist. Job requirements include general knowledge and experience in machine shop operations. The machinist must determine what operation he must perform and what tools he must use to conclude the operation. The general foreman evaluates each new employee's abilities during the sixty-day probationary period. During his tenure as foreman twenty-five probationary employees were assigned to him. Six employees were

discharged for failure to pass probationary requirements; of those six the grievant was the only black. A grievance was filed following discharge charging the company with racial employment discrimination.

Issue to be resolved.--Was the discharge of the probationary employee a result of racial discrimination?

Arbitrator's award.--Grievance denied (Award #67).

Comments.--On the basis of evidence presented racial discrimination was not determined as the cause for termination.

Case 30 (Citation--AAA 233-7)

Pertinent contract provisions.--Article 3 establishes management's rights. Article 7 allows for filing of a grievance in the event of a discharge or layoff within three days. Written rules posted by employer detailing three classes of offenses.

Synopsis of the facts.--The grievant, a black man, was initially suspended and then discharged by the white foreman following a "heated argument" with the foreman. The company contends that the grievant was discharged for insubordination while the union position was that the grievant argument was the grievant's "emotional reaction to past practices of

racial prejudices and discrimination directed toward the grievant."

Issue to be resolved.--Did the company violate the agreement by discharging the grievant?

Arbitrator's award.--Grievance denied (Award #1).

Comments.--The decision evolved around the grievant's past discipline record. The racial discrimination factor was not the issue in the arbitrator's opinion because "whatever the motivating factor, the grievant's reaction violated shop rules."

Case 31 (Citation--AAA 187-17)

Pertinent contract provisions.--Section 10 involves conditions for discharge. Employers shall have the right to discharge any employee for insubordination, theft, drunkenness, incompetency, or failure to perform work as required, or to observe safety rules and regulations and the employer's house rules, which must be conspiciously posted, or soliciting employer's customers while on that employer's payroll, but shall not discriminate against anyone because of union membership. Maintenance Agreement--continuation of former employer's workers for thirty days.

Synopsis of the facts.--Grievant was discharged for reading a newspaper while on duty as a janitor. This

behavior was observed twice before discharge by the supervisor. Conflicts in the evidence appeared in regard to warnings and whether the incidents took place after work was completed. A grievance was filed alleging racial discrimination motivated by the grievant being Japanese. The grievance also states that "just cause" was not shown in the discharge.

Issue to be resolved.--Did the company violate the terms of the contract by discharging the grievant?

Arbitrator's award.--The grievance is sustained in part. The grievant was to be reinstated with back pay and given a three-day disciplinary suspension (Award #89).

Comments.--The award was made in accordance with the issue of "just cause." The racial discrimination issue was not sustained.

Case 32 (Citation--67 LA 682)

Pertinent contract provisions.--Article X of the contract allows for discharge for "just cause."

Synopsis of the facts.--Grievant, a black male, was hired by contractor as a general laborer and laid-off because of lack of work. The grievant was later rehired by the employer and assigned to be a carpenter tender on a crew. When the crew's regular carpenter tender returned to work,

grievant was assigned to a second crew. The foreman of the second crew asked that the grievant be reassigned because he was not performing his job duties adequately. The grievant returned to the first crew and requested assignment to a third crew; the request was honored. While on the third crew, grievant complained that he didn't want to be a carpenter's helper because "It's too much of a hassle and I need to get away before I punch somebody." The employer discharged grievant on the premise that his peer relationships were not conducive to the work environment. A grievance was filed as a result of the discharge.

Issues to be resolved.--Did the employer show "just cause" in terminating the grievant? Was the termination a result of racial discrimination?

Arbitrator's award.--Grievance denied (Award #34).

Comments.--The evidence demonstrated that the employer showed "just cause" in discharging the grievant.

Case 33 (Citation--77-1 ARB 8235)

Pertinent contract provisions.--Article 2 sets forth management rights. Article 5 contains nondiscrimination clause. Article 23 outlines grievance procedure.

Synopsis of the facts.--The employer in this instance is a general construction contractor. The union represents

a unit of building laborers employed by the contractor. The company's workers were laid off as demand fluctuated. The grievant was discharged when evidence showed that work was available. A grievance was filed citing racial discrimination as a cause for discharge.

Issue to be resolved.--Did the employer racially discriminate against the grievant by discharging him from employment?

Arbitrator's award.--The grievance was upheld with reinstatement and full compensation awarded the grievant (Award #39).

Comments.--The arbitrator remained within the boundaries of the collective bargaining agreement.

Case 34 (Citation--77-2 ARB 8498)

Pertinent contract provisions.--Article 5, Section 4 allows for discharge for "voluntary quitting, cause, retirement, overstaying a leave of absence, failure to report to work as set forth in Article 5, Section 2E, and unexcused absence from work for more than three days." Article 3 includes management rights.

Synopsis of the facts.--The grievant used bogus doctor's excuses for five periods of absences. He sold a false prescription form to another employee. The grievant was

given an opportunity to resign for offenses listed but refused. The grievant claimed racial discrimination at the third step grievance meeting, because another employee, a white man, had been given a two-week layoff for a similar offense. The white employee claimed that he got the bogus excuses from the grievant.

Issue to be resolved.--Did the company violate the provisions of the contract in discharging the grievant and did the company commit racial discrimination in this instance.

Arbitrator's award.--The grievance was denied and the discharge was upheld (Award #70).

Comments.--The evidence and the contract provisions were clear.

Case 35 (Citation--76-2 ARB 8457)

Pertinent contract provisions.--Article 15, Section 15.1 allows for discharge of anyone incapable or incompetent, or "one who fails to perform a reasonable day's work as assigned."

Synopsis of the facts.--The grievant, a black male employee, was terminated by the company because of excessive tardiness and absence from work. Due to this discharge, grievance was filed citing racial discrimination by the company. The union position was that the discharge was too severe, harsh, unwarranted, and racially motivated. The

company denied charges stating that termination was provided for in the collective bargaining agreement.

Issue to be resolved.--Was the grievant discharged fairly by the company and without discrimination?

Arbitrator's award.--Grievance denied. Grievant was discharged for just cause in accordance with the terms of the collective bargaining agreement (Award #69).

Comments.--The arbitrator contends that his authority is "limited to the scope of the issue submitted to him." The decision discusses the statutory rights of the employee under Title VII and cites several related federal court cases to support his findings.

Case 36 (Citation--64 LA 930)

Pertinent contract provisions.--Article V, Section 1, grants employer the right to determine territorial assignments. Article V, Section 2, allows for grievance procedure. Article 15, Section 1, contains discharge causes. Article 15, Section 3, provides discharged employees with more than three years' service with the company severance pay.

Synopsis of the facts.--Due to a merger of two companies, a reduction of the sales force was warranted. Ninety-eight sales territories were organized and ninety-eight salesmen had to be selected from 134 employees on the combined roster.

Application of straight seniority would have resulted in undesirable terminations. Along with the discussion of terminating six senior salesmen, there was a problem about the retention of "minority" salesmen. The company decided to keep ten black salesmen out of fourteen. A grievance was filed on behalf of those individuals who saw lack of adherence to straight seniority as a violation of the contract.

Issue to be resolved.--Was the employer justified in reducing the sales force and terminating salesmen, including minority-group persons, on the basis of comparative evaluations of service rather than on the basis of straight seniority?

Arbitrator's award.--The employer did not violate the agreement (Award #61).

Comments.--A unique position of a merger warranting the management decision to reduce the sales force was not spelled out in the contract. The contract provisions dealing with management's decision-making rights were adhered to, and no violation of the terms of contract occurred.

Case 37 (Citation--66 LA 155)

Pertinent contract provisions.--A "just cause" provision in the contract is referred to but not numbered.

Synopsis of the facts.--The grievant, a "Mexican" male, was involved in at least six incidents which allegedly violated company policy prior to his discharge. The final incident involved his leaving his work station without permission. In the grievance the union charged that termination was too severe a punishment for the alleged offense, and that the discharge was racially motivated.

Issues to be resolved.--Did the company demonstrate "just cause" in firing the grievant? Was the discharge due to racial discrimination?

Arbitrator's award.--The charge of racial discrimination against the company was dismissed for insufficient evidence. The company was ordered to reinstate the grievant with restoration of benefits. The discharge was to be modified to a disciplinary suspension (Award #41).

Comments.--The arbitrator made his determination as it applies to the language of the agreement. The racial discrimination issue was invalidated due to lack of evidence substantiating the claim.

Case 38 (Citation--75 ARB 8051)

Pertinent contract provisions.--Article 3, Section 8, provides for grievance procedure in the event of a layoff or discharge. Article 14, Section 1, contains a management's

rights clause. Article 14, Section 23, contains a non-discrimination clause patterned after Title VII.

Synopsis of the facts.--Grievant, a black male, was discharged for assaulting another employee, a white male, with a steel bar causing facial lacerations. The grievant was initially suspended pending an investigation of the incident.

Issue to be resolved.--Did the company demonstrate "just cause" in firing the grievant or was the discharge racially motivated?

Arbitrator's award.--Grievance denied (Award #33).

Comments.--The preponderance of evidence demonstrated "just cause" with no evidence shown to substantiate a charge of racial discrimination.

Discipline
Case 1 (Citation--80-2 ARB 8387)

Pertinent contract provisions.--Article 25 contains "proper cause" provision in determining discipline procedures.

Synopsis of the facts.--The grievant, a black male, refused to reveal the contents of a brown paper bag. The company alleged that the grievant had broken five company rules in connection with the paper bag incident and assessed the grievant a twenty-day suspension. A grievance was subsequently filed.

Issues to be resolved.--Did the twenty-day suspension constitute excessive punishment under the "proper cause" provision of the contract.

Arbitrator's award.--The arbitrator found (1) the twenty-day suspension to be "unreasonable," (2) there was proper cause for a three-day suspension, (3) grievant is entitled back pay and benefits for period of suspension which exceeded three days (Award #39).

Comments.--Initially the company sought removal of the arbitrator from the case because of his inquiries into possible racial discrimination which was not specifically stated as an issue in the grievance. In the ruling the arbitrator interpreted the decision of the Supreme Court in footnote 21 of the Gardner-Denver case "to require development of an adequate record where the sub-issue of potential racial discrimination appears, as in the instant case."

Case 2 (Citation--65 LA 1122)

Pertinent contract provisions.--No specific contract provision was stated but a "proper cause" clause was alluded to.

Synopsis of the facts.--The grievant's employment record had shown the grievant had violated several company rules over a three-month period. These infractions included

excessive tardiness, disregard for safety rules, and intimidation of fellow employees. The grievant, a black male, received a seven-day suspension for reading a pamphlet during working hours and "directing provocative language" at his supervisor.

Issues to be resolved.--Was the suspension excessive and did it indicate racial discrimination on the part of the company?

Arbitrator's award.--The suspension was justified and the grievance was dismissed and denied. No evidence of racial discrimination was substantiated (Award #47).

Comments.--The arbitrator in determining whether racial discrimination was involved based his decision on the "just cause" provision of the agreement and found the suspension justified.

Case 3 (Citation AAA 209-12)

Pertinent contract provisions.--Article 3, Section 3, contains a nondiscrimination clause.

Synopsis of facts.--The grievant, a black male, was given a four-week suspension for striking a white employee, "T." The altercation occurred after the grievant drove a forklift into a truck driven by "T." "T" responded with verbally abusive language whereupon the grievant struck

him. The union contended in the grievance that the suspension was racially motivated and excessive.

Issues to be resolved.--Did the company violate the nondiscrimination clause of the contract by assessing the four-week suspension without pay?

Arbitrator's award.--Grievance denied (Award #53).

Comments.--Evidence of other suspensions assessed indicated a range of reasonable suspension periods. The arbitrator found the four-week suspension a reasonable time period. In addressing why "T" had not been disciplined, the arbitrator found this issue to be outside of his authority since he may not impose a penalty in the present situation.

Case 4 (Citation 78-1--ARB 8003)

Pertinent contract provisions.--Section L provides for bona fide execuses for absence from work. Section Q contains a nondiscrimination clause. Section R outlines management responsibilities. Section S prohibits strikes and lockouts giving the company sole discretion in the discipline of an employee involved in "any strike, slowdown, or interruption of work schedules . . ."

Synopsis of facts.--Twenty-one "minority" employees failed to report to work following a demotion of a black

foreman. None of the employees were able to provide the company with bona fide excuses. Each absent employee was issued a three-day suspension.

Issues to be resolved.--Were the suspensions acts of racial discrimination on the part of the company.

Issues to be resolved.--Were the suspensions acts of racial discrimination on the part of the company.

Arbitrator's award.--The grievances were denied (Award #55).

Comments.--There was no sufficient evidence to substantiate the charge that the suspensions were racially motivated.

Case 5 (Citation--62 LA 1061)

Pertinent contract provisions.--Article 2 contains management rights clause. Article 10 provides for employee classification standards.

Synopsis of facts.--During a period from 1965-1967 the EEOC started an investigation into possible racial discrimination at Gulf States Utilities. The grievant was initially hired on September 3, 1968, as a laborer. He was promoted December 6, 1970; on November 26, 1971, he was demoted, which prompted a resignation. The grievant filed a grievance as

well as a charge with the EEOC. In March of 1972 the grievant was rehired as a mechanics helper on a six-month trial basis. The grievant was demoted a second time, seven months later. At the grievance procedure's second step, a test was given the employee to measure the grievant's specific skills knowledge. The grievant failed the test and his grievance was denied. The grievance proceeded to arbitration. In the meantime, the EEOC investigation into promotion practices at the company resulted in findings of discrimination on the part of the company and union. The arbitrator emphasized that the union must ensure the grievant a fair and just representation. The burden was on the company to prove there was no racial discrimination involved in the demotion of the grievant.

Issues to be resolved.--Did the company violate the terms of the agreement by demoting the individual and subsequently giving him a test to ascertain his job qualifications? (The use of the testing procedure was invalidated by EEOC guidelines.)

Arbitrator's award.--"The special test given to the grievant was found to be generally (not racially) discriminatory and a violation of the agreement." However, the evidence presented prior to the demotion did not indicate that the grievant was actually qualified for the position

from which he was demoted. The grievance for grievant's return to the helper classification was denied (Award #38).

Comments.--The arbitrator supported his decision by reference to EEOC guidelines, the Gardner-Denver decision, and the grievant's statutory rights under Title VII. He found that the issue was solely one of fact and rules accordingly.

Case 6 (Citation AIG 1219)

Pertinent contract provisions.--Article 2, Section 2, contains a nondiscrimination clause. Article 4 outlines management rights in "directing the activities of the department, determining levels of service and methods of operation . . . The right to hire, lay-off, transfer and promote; to discipline or discharge for cause . . ."

Synopsis of facts.--The grievant, a black female, was involved in a verbal argument with another female employee. During the argument the grievant struck the other employee across the face with some papers. The incident was reported by the employee who was struck. The two employees' explanations were similar except as to the exact words used by the white employee when she called the grievant a name. A review of employment records of both employees resulted in an oral reprimand for the white employee and a seven-hour suspension for the grievant. A grievance was filed to protest the

suspension on the grounds that it was excessive and racially motivated.

Issues to be resolved.--Did the city violate section of the agreement which provides for nondiscrimination of employment practices and "just cause" for suspensions?

Arbitrator's award.--The grievance was denied. The city had acted in accordance with the collective bargaining agreement in suspending the grievant. No evidence of racial discrimination was established (Award #18).

Comments.--The decision was in accordance with the disciplinary policy stated in the agreement.

Layoff, Recall, and Rehiring
Case 1 (Citation AAA 200-11)

Pertinent contract provisions.--Article XIII provides that relative to layoffs, that employees with the least seniority shall be first laid off. However, a displaced employee may accept a lower position based on seniority considerations or take a voluntary layoff.

Synopsis of facts.--The grievant, a black female, was bumped from her job during a work force reduction. She was entitled to exercise her seniority and bump into a lower job classification or take a voluntary layoff. She chose the former course and bumped a white female with less

seniority. The grievant claimed race discrimination in that she was not fully informed of the duties of the new job, that she was made to do heavy lifting and other duties which her white female predecessor had not performed. The company stated that the grievant was treated the same as every other employee and was fully informed as to the job duties.

Issues to be resolved.--Did the company discriminate against the grievant during the layoff procedure?

Arbitrator's award.--Grievance denied (Award #23).

Comments.--Not every difference in treatment is necessarily discriminatory.

Case 2 (Citation AIG 2395)

Pertinent contract provisions.--Article IX provides that in the case of layoff, the employee with the least seniority will be laid off first. Also the employer had signed an affirmative action agreement with the Massachusetts Commission Against Discrimination (MCAD).

Synopsis of facts.--Six grievants employed as Provisional Junior Clerks were laid off when they were not certified on a Civil Service eligibility list. Three minority Provisional Junior Clerks also on the list were retained. The employer stated that the retention of the three was necessary to

comply with the requirements of the MCAD agreement. The union sought reinstatement of the six with greater seniority.

Issues to be resolved.--Did the employer violate the provisions of Article IX?

Arbitrator's award.--The grievances were sustained and the grievants "made whole" (Award #21).

Comments.--Attempts to achieve affirmative action objectives do not justify a violation of the collective agreement where no override provision is present.

Case 3 (Citation PSAA 807104)

Pertinent contract provisions.--Article V, Rule 35, prohibits discrimination on the basis of race, sex, color, creed, national origin, religion or union membership. Article VII, Rule 43, provides for an assignment to light duty for employees who have been partically incapacitated from an illness or injury incurred on or off the job. A panel of physicians shall certify the medical condition of such employees. The employee must not be able to perform his original duties before assignment to "light duty" will occur.

Synopsis of facts.--The black grievant asked for back pay because the company failed to return him to "light duty"

after an accident. The company denied the "light duty" because there was no medical evidence that he could not perform his original duties. Further, such "light duty" work did not exist at the time of the request. The employee had previously filed several charges with the EEOC and contended that the company was retaliating by not reassigning him.

Issues to be resolved.--Did the company violate Article VIII, Rule 35, of the contract? Did the company also violate the nondiscrimination provision?

Arbitrator's award.--The grievance was sustained with monetary relief granted (Award #25).

Comment.--Where the evidence reveals no "reasonable" attempts by management to comply with the terms of the agreement, the grievance is sustained. The preponderance of evidence also may reveal a chain of events from which may result in a finding of discrimination.

Case 4 (Citation 64 LA 816)

Pertinent contract provisions.--Article XXVII provides that the employer will not discriminate on the basis of sex, race, creed, color, religion, age or national origin as protected by law. Article VI calls for layoff decisions to be based on seniority.

Synopsis of facts.--The company had been reducing its work force by the "last in, first out" method. Since minority employees had less seniority, they were the first to be laid off. When another layoff was imminent, the company's attorney warned that a violation of Title VII and the Civil Rights Act of 1866 was possible if more black workers were laid off. The two remaining blacks were retained, and the two grievants were laid off. The company admitted its action did not follow the seniority provision of the agreement but said it was necessary to avoid violating federal laws.

Issues to be resolved.--Does federal law take precedence over the seniority provisions of the private labor agreement?

Arbitrator's award.--The grievances were upheld. The grievants were recalled and given back pay minus earnings during the layoff period (Award #40).

Comments.--The arbitrator would not subordinate the terms of the agreement to federal law.

Other Miscellaneous Cases
Case 1 (Citation 73 LA 286

Pertinent contract provisions.--Article 31, Section (a), contains a nondiscrimination clause. Article 24 details

the policy concerning new or changed jobs and changes in hourly wage rates.

Synopsis of facts.--The union filed the grievance on behalf of a black employee. The grievant, a head storekeeper, had his work period altered so that in the afternoon he was to work as a material handler. While on vacation, the grievant's white substitute was not required to operate a forklift as material handler. In the grievance, a claim of racial discrimination was made because the black employee's substitute was not required to perform the same job as the grievant.

Issues to be resolved.--Did the company violate the grievant's rights under the nondiscrimination clause of the treaty?

Arbitrator's award.--"The grievance is sustained only to the extent that the employee who replaces the grievant when he is on vaction or absent from work shall be required to operate a forklift whenever the occasion arises . . ." (Award #24).

Comments.--Changes in job duties can result in racial discrimination in regard to terms or conditions of employment.

Case 2 (Citation 79-2 ARB 8339)

Pertinent contract provisions.--Article 1, Section 3. Federal and state statutes will supercede contract provisions

where there is a conflict. Article 6, Section 1, states that a grievance will be waived if not filed within thirty days of the incident. Article 10 provides for pay rates per category and classification. Article 9, Section 4, contains the job description for janitor.

Synopsis of facts.--The grievant hired by the company in 1956 as a janitor has remained in that position throughout his tenure with the company. Twice the grievant has sought a change in position but request was denied. The grievant had received one merit pay increase of five cents per hour during his twenty-three year service. A refusal of a request for a merit pay increase in 1978, prompted filing of the grievance. The grievant is the company's only black employee.

Issues to be resolved.--Was the company's denial of a merit increase a violation of the employee's rights guaranteed in the non-discrimination clause of the contract?

Arbitrator's award.--The grievance was upheld because of the company's lack of affirmative compliance according to the non-discrimination clause set forth in the contract (Award #16).

Comment.--An arbitrator may direct an employer to be more diligent in undertaking its affirmative action commitments.

Case 3 (Citation 66 LA 709)

Pertinent contract provisions.--Article 9, Section 3, outlines the jurisdiction of the arbitrator. It provides that the arbitrator "shall not have jurisdiction or authority to add to, detract from, or alter in any way the provisions of this agreement." Article 8 deals with plant seniority and states that "the employee with the longest plant seniority and from the unit in which the vacancy occurs shall receive first preference." Consent Decree I was designed to remedy discrimination practices and provided for restructuring of seniority practices. The effect on collective bargaining: The terms of this Decree "shall be fully binding on the companies and the union . . ."

Synopsis of facts.--Grievance was filed on behalf of a machine operator who bid for and was transferred to a position with a lower job classification. The grievant was not allowed to retain the rate assigned to his former position. The grievance claimed violation of the Consent Decree I and Article 8.

Issues to be resolved.--Is the grievant entitled to rate retention as stipulated in the Consent Decree entered into by the parent company?

Arbitrator's award.--The arbitrator determined that the rate retention is not applicable to the plant in question

because it was not named specifically in the Consent Decree (Award #78).

Comment.--The principles of the Consent Decree are not binding on the parties where there is evidence of a genuine misunderstanding on both sides as to the effect of the Decree.

Chapter Summary

This chapter has presented data resulting from the analysis of the ninety-seven published grievance-arbitration awards involving issues of racial discrimination and occurring from April, 1974, to 1980. The cases have been summarized according to the specific issue pertinent to each. Each summary is followed by the writer's comment on the arbitrator's award.

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CHAPTER IV

SUMMARY, FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

This chapter summarizes the research procedures utilized in this study and presents the findings concerning arbitral reaction to Alexander v. Gardner-Denver Co. in cases where racial discrimination was an issue. The findings are presented as they relate to each specific category of issues. Inferences are drawn from the data as to the effect of the Gardner-Denver decision on arbitrators' awards in racial discrimination cases. These inferences are based on the results of this study and related research findings.

The literature review examined the development of two national policies: the national policy to eliminate employment discrimination and the federal labor policy that encourages the use of the grievance-arbitration process. The fair employment policy has had a lengthy development, the capstone of which was the passage of Title VII of the Civil Rights Act of 1964. Title VII, along with its amendments in 1972, represents the major legislative attempt to eradicate employment discrimination based on race, color, sex, religion or

national origin. Other remedies for bias in the workplace were also noted. Included were the following: (1) the Civil Rights Acts of 1866 and 1871; (2) the Equal Pay Act of 1963; (3) the Age Discrimination in Employment Act of 1967; (4) Executive Orders 11246 and 11375; (5) the doctrine of fair representation; and (6) state laws for equal employment opportunity.

The place of grievance arbitration in the federal labor policy was also examined. The labor arbitration process has developed into a well-accepted method to solve internal disputes largely because of its endorsement by federal court decisions and the deferral policies of the National Labor Relations Board.

Conflict between the two developed policies is evident when an employee has a claim of racial discrimination and seeks to redress it based on his contractual remedy, the grievance-arbitration clause of the collective bargaining agreement. The review showed the conflict that occurs when the grievant's contractual rights overlap with his statutory rights under Title VII. The evolution of the conflict and its influence on the nation's industrial relations system was also developed.

The Supreme Court attempted to resolve the policy conflict in the Alexander v. Gardner-Denver Co. decision. The Court said that a prior arbitral award does not preclude a grievant from seeking statutory relief for a claim of racial

discrimination. The Court's ruling was examined and emphasis placed on its attempt to define the boundaries of the arbitration-Title VII relationship. In its decision, the Court emphasized that labor arbitration was a comparatively inappropriate forum to resolve the statutory issue of racial discrimination. However, the ruling did not prohibit the use of arbitration in employment disputes. Arbitrators have continued to hear and decide employment-discrimination grievances subsequent to the Gardner-Denver decision.

In order to determine arbitral reaction to Alexander v. Gardner-Denver Co., ninety-seven published arbitral awards involving issues of racial discrimination were examined and the data analyzed. The cases represented the published race discrimination arbitrations from April, 1974, to December, 1980. This study, which is historical and descriptive in nature, employed the research technique of content analysis. The population of the study consisted of the ninety-seven published arbitration awards.

Data from each award was analyzed so that specific characteristics of the award could be systematically and objectively identified. This was accomplished by utilizing a format of pertinent questions which enabled the data to be accumulated into research categories and subcategories. The data or content of each award were classified and counted; frequencies and percentages were then recorded. The cases were summarized according to the specific arbitral issue

pertaining to each. A comment followed each case summary in order to show the reaction of the arbitrator to the race discrimination question.

Summary of Arbitral Reaction to the Specific Issues

Arbitrators have had time to react to the Gardner-Denver decision. The effect of the decision on arbitral decision making in awards related to issues of racial discrimination is summarized below. Emphasis is placed on specific efforts by arbitrators to follow the Supreme Court's guidelines in Gardner-Denver as well as their application of public law to the settlement of private disputes.

Arbitrability

Where there exists a question of procedure that affects an arbitrator's authority, e.g., timely filing of a grievance, arbitrators will sometimes deny the right to proceed with arbitration before hearing the merits of the case. In the one case examined involving arbitrability, Arbitrator McDermott said that where the parties have established a specific time limit for filing grievances protesting disciplinary action, "the arbitrator has absolutely no authority to set aside that time regardless of his personal feeling with respect to the merits of the grievance" (Award #9, p. 365.).

Hiring, Employment (Job Referral, Placement of Labor)

Where an arbitrator is faced with a conflict between an EEOC Settlement Agreement and the collective bargaining agreement, his decision may be based on the compatibility of the two. For example, where a long-established practice of hiring certain union members is consistent with the principles of equal employment, the grievance is sustained.

Job placement decisions made at the expense of a qualified white employee in favor of a new minority worker are not acceptable. An employer's concern over the possibility of an EEOC investigation is not a sufficient argument. Also, arbitrators will order specific remedies for hiring practices where statistical employment data create a prima facie case of discrimination.

Arbitrators will also restrict an employer's attempt to expand an affirmative action policy where the action constitutes a unilateral change in the agreement's employment practices. Cases where a union's exclusive referral system is discriminatory are decided for employers who are excused from following the hiring procedure. Arbitrators will look beyond the language of the contract in such cases. Arbitrator Dworkin, for example, in response to an objection to his application of Title VII law, said that he felt competent to apply the statute and judicial precedent even though "whatever is awarded herein is manifestly subject to the preemptive review of any appropriate judicial authority," (Award #79, p. 1227).

Promotions, Seniority (Training Programs, Trial Periods)

The cases under the broad category of promotions often involve arbitral reference to statutory and case law. The overlap of Title VII with the contract understandably causes some problems for arbitrators. For example, arbitrators will issue an interim award and await clarification from federal agencies over a particular question.

Arbitrators will, however, decide cases where there is conflict between the contract and law in the form of a consent decree or a conciliation agreement with the EEOC. For example, arbitrators are willing to allow a company to bypass a contract's seniority clause and transfer or promote minority workers in accordance with the seniority provisions of a separate affirmative action program. Some arbitrators will not render a decision which would result in the violation of a federal law. An employer's unilateral changes of lines of progression in order to comply with a consent decree will also be upheld. Awards in cases of this type often require interpretation and application of Title VII law. Arbitrator Christensen concluded that Gardner-Denver

> left open the possibility that the incorporation of rules in a contract which are parallel to legal restrictions along with the special competence of the arbitrator might make the arbitral decision of critical importance in a subsequent judicial proceeding. (Award #73, p. 12).

Other arbitrators will not give precedence to agency-imposed changes to the labor contract where the affirmative

action program has inherent inequitable restrictions. In addition, the employees sometimes insist that the arbitrator only rule on the contractual provisions and ignore Title VII law. Arbitrator Platt's reaction to the argument is noteworthy. He said that "such changes 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." (Award #60, p. 326). Also in cases where the contract and law conflict, promotions of minority workers are rejected where there are substantial differences in qualifications and abilities. A lack of evidence that promotions of more senior white employees is violative of an EEOC agreement will result in a decision for grievant. The inference of reverse discrimination is present in such cases where white workers allege violations of seniority provisions.

In cases where the issue is not complicated by the presence of mandated affirmative action programs, arbitrators will follow the contractual provisions and interpret them accordingly. In such cases, charges of discrimination must be supported by compelling evidence. Management's past efforts, for example, to provide opportunities for training, will nullify allegations of bias. Also management's right to assign qualified employees is often upheld under a broad management rights clause. Evidence of the black grievant's

experience, qualifications and training will be fully examined at the hearing.

Job Benefits and Employee Rights

Issues involving job benefits and employee rights can be difficult when the subject is of great personal interest to individual employees. For example, the scheduling of vacation time can become a problem when the parties' past practices are altered by an EEOC conciliation agreement. In one case the arbitrator decided that the established procedure of scheduling based upon departmental seniority was to remain intact. The arbitrator's reasoning, which involved considerable reliance on both arbitral and judicial precedence, emphasized the contractual nature of the matter.

Granting or denying leaves of absence is usually a prerogative of management. However, such determinations by management should be reasonable and fair. In a case where a black worker protested what she perceived to be an inconsistent and discriminatory application of a leave policy, the arbitrator denied the grievance after discovering that the grievant did not fully inform management of her reasons for the request. Management was not able to make an informed decision due largely to the grievant's own actions.

Discipline

Management's right to discipline is restricted by the federal labor laws and antidiscrimination statutes; it is

also restricted by the "just cause" provision usually present in labor contracts. Arbitrators in the discipline cases examined were faced with a variety of circumstances in which statutory and case law were applied.

Arbitrator Williams, in a case involving demotion of a black employee, wrote a lengthy award emphasizing his adherence to the Gardner-Denver guidelines. (Award #38). The decision to deny the grievance was based on the employee's inability to perform on the job. Included in the opinion was an interpretation of Gardner-Denver in which Williams said that the case serves to encourage the continued use of arbitration in discrimination cases. He also stressed his special competence, his efforts to meet the criteria of procedural fairness, and his full consideration of the grievant's Title VII Rights.

In another discipline case a suspension was reduced for being unfair and discriminatory. The arbitrator's inquiry into the area of racial discrimination was protested by the company. It contended that since neither party had specifically raised the issue, the inquiry was an abuse of his authority. In answering the company argument, Arbitrator Herman cited arbitral precedent where arbitrators considered a possible violation of federal law when deciding whether management's action was proper. He insisted that it was his obligation to look into the possibility of discrimination when it is raised by the facts. His action was in accordance

with the Gardner-Denver ruling which, Arbitrator Herman said "requires the development of an adequate record where the sub-issue of potential racial discrimination appears." (Award #59, p. 4731).

Discharge

The fundamental premise in discharge cases, as in awards involving discipline, is that an employer shall not dismiss an employee without "just cause" (3, p. 612). Discharge cases usually involve a conflict between a management rights clause and the requirement of proper cause. The cases involving discharge also include the additional issue of bias based upon an antidiscrimination provision.

Arbitrators in discharge cases will not sustain a grievance based on insufficient supporting evidence. For example, allegations of inconsistent discipline or discharge penalties for the same or similar offense will be unacceptable where no specific intent to discriminate was present. Arbitrator Yarowsky ruled on the claim and stated that his decision on the racial issue was not final and binding as a result of the Gardner-Denver case. Nevertheless, he did follow the contract and rule on the discrimination question. (Award #97, p. 1265).

In another case involving discharge of a black employee, the award reduced the dismissal to a suspension after the union submitted no evidence on the discrimination issue. The union based its action on the Gardner-Denver decision, reasoning that any arbitration of a Title VII claim would be futile.

It urged the arbitrator to only deal with the "just cause" question and disregard statutory matters. Although Arbitrator Marshall recognized his limitations under Gardner-Denver, he stated that federal laws necessarily influence all contractual relationships, including labor contracts. Mr. Marshall also said that "arbitrators cannot give their exclusive attention to those matters which are specifically set forth within the four corners of a collective bargaining agreement." (Award #31, p. 27).

Employers have also urged arbitrators to ignore racial questions. One company's argument that any award would lack finality was ignored by Arbitrator Cohen. He ruled on the discrimination question because it was the union which sought arbitration on the issue. Regarding the effect of Gardner-Denver, he said:

> Although the decision has unsettled the relationship between Title VII and private arbitration of labor-management contract disputes, it is premature for industrial relations practitioners simply to abandon the practice of arbitration in cases of disputes involving questions of discrimination (Award #96, p. 936).

Discharged white employees have also filed grievances claiming reverse discrimination under an antidiscrimination clause. In one case where the union argued that the discharge was motivated by management's desire to fill a vacancy with a black employee in order to meet its affirmative action commitments, the arbitrator emphasized that his duty was only to deal with the contractual issue. In sustaining

the union, Arbitrator Sergent recognized the conflict between the reverse discrimination question and the need to correct social injustices; however, he stated that he was "limited to interpretation and application of the bargained-for agreement without regard to the prevailing social considerations of the time." (Award #75).

Arbitrators have also required standards of proof which were related to judicial requirements. When a union failed to support a claim of discrimination, the arbitrator cited the U. S. Supreme Court's guidelines for a prima facie case found in McDonnell Douglas Corp. v. Green (8). The arbitrator said that the grievance could not be sustained where "little more than bare claims of racial bias were unsupported by evidence." (Award #90, p. 810).

In a case where statistical evidence was submitted by the union to support a claim of disparate treatment of the discharged grievant, the arbitrator reviewed at some length the federal courts' treatment of similar cases under statutory law. He applied the judicial rulings and decided that there was insufficient evidence of disparate treatment. He concluded that "even if he were considering the matter under federal law, there would appear to be insufficient evidence of the requisite degree of discriminatory motivation and intent." (Award #7, p. 445). In cases involving the use of statistics to establish an inference of discrimination, arbitrators will not usually sustain the grievance unless the evidence is accompanied by proper supportive facts.

Management's failure to provide a proper training program for minority workers can be an extenuating factor in a discharge based upon poor performance. Arbitrators will reduce the discharge where it appears that the black worker is placed in a position beyond his training through management error. This type of situation will often necessitate application of public law. Arbitrator Rose concluded that:

> While the Arbitrator's responsibility is to judge the facts in relation to the contract, his conclusions may not ignore or be in derogation of public policy as enunciated in the appropriate statute. Accordingly the Arbitrator has considered the matter in the light of Title VII of the Civil Rights Act of 1964 (Award #64).

Layoff, Recall and Rehire

Management's right to determine the number of employees to be included in a layoff is restricted in most contracts by seniority provisions. These issues, like those of promotion decisions, are often in conflict with a company's affirmative action objectives.

Cases involving opposition between the two have resulted in arbitral decisions which have upheld the seniority rights of employees. Arbitrators will base their awards in such cases upon a special provision which gives the affirmative-action procedure precedence over a specific contract clause. For example, a decision to lay off senior employees and retain several newly-hired workers in order to meet the objectives of a state order was held to violate the collective agreement.

In another instance where management feared a possible Title VII action, a decision was made to discontinue following the seniority provision in layoffs because the reductions resulted in a "last in, first out" situation. The arbitrator would not consider the law, relying instead on the parties' private agreement. An opposite ruling would have resulted in arbitration of new contract terms.

Discrimination claims also are evident in cases where "bumping" rights are exercised. When a black employee replaced a less senior employee during a layoff and subsequently claimed race discrimination because she was made to perform duties not performed by her predecessor, the arbitrator denied the grievance. His decision emphasized the company's compliance with the bumping procedure and concluded that "not every difference in treatment is discriminatory." (Award #13, p. 7).

Other Issues

Situations where job duties are changed to favor a white worker have been decided for the minority worker. Arbitrators will fashion an award that seeks to remedy the inequity resulting from the receipt of equal pay for discriminatory work duties. Arbitrators will also order management to devise training programs and hold communications sessions in order to be more attentive to the problems of minority workers.

Summary of Findings

An analysis of pertinent contract provisions used as authority by arbitrators showed that seniority and management rights clauses were the most frequently mentioned, accounting for approximately 72 per cent of the ninety-seven cases included in this study. Discharge or discipline for "proper cause" provisions were cited in almost 16 per cent of the cases, while only 2 per cent of the cases reflected a reliance on provisions outlining the grievance procedure. In over 10 per cent of the cases the results of a consent decree, an agency settlement agreement, or a conciliation agreement incorporated into the contract were relied upon by the arbitrators. Sixty-five per cent of the ninety-seven awards actually included an antidiscrimination clause along with the above-mentioned pertinent contract provisions. These findings are to be expected since employers rely heavily on management rights and "proper cause" to justify their actions. (9, p. 164).

Of the several specific types of racial discrimination issues to be settled, the most frequent issues were those of discharge and discipline which combined to account for approximately 45 per cent of the cases. Promotion and job vacancy disputes appeared in thirty-eight per cent of the cases. The thirty-seven cases involving promotion are indicative of the problems that arise when, for example, established seniority systems conflict with promotion policies under an affirmative action program.

The arbitrators cited federal or state law or agency (EEOC or OFCCP) guidelines in approximately 48 per cent of the cases. References to judicial decisions were made in 34 per cent of the disputes. In over 82 per cent of the awards the arbitrator considered statutory law and related guidelines in fashioning the award. These results show that the arbitrators included in this study were not likely to ignore public law associated with Title VII when deciding racial discrimination grievances.

In addition to the use of public law, the authority most frequently referred to was the language of the collective bargaining agreement itself. The agreement was cited in approximately 79 per cent of the cases. These figures suggest that although the arbitrator is cognizant of public law, he places heavy reliance upon the specific language contained in the parties agreement.

Fifty-seven of the arbitrators for whom background information was obtained had legal training; twenty-five had a nonlegal background. Information on the remaining fifteen arbitrators was not available.

Forty-six, or over 47 per cent of the arbitrators deciding the cases reported in this study, held membership in National Academy of Arbitrators (NAA). Non-member arbitrators were chosen in approximately 32 per cent of the cases. Prerequisites for membership in the NAA include considerable arbitral experience and current acceptability by the parties.

In approximately 67 per cent of the cases the employer was represented by legal counsel. This figure is contrasted to that of the union (acting for its member in the arbitration proceedings) which retained legal counsel in forty-two or 43 per cent of the cases.

The arbitrator did not explicitly mention availability of the opportunity to examine or cross-examine witnesses in almost 85 per cent of the awards. Such information was present in the remaining 15 per cent of the cases. The opportunity to examine and cross-examine witnesses is one standard of procedural treatment. Although most of the awards examined in this study were not explicit as to the parties' opportunity to cross-examine, Holger states that it can be inferred that such "procedural safeguards" are present in arbitral proceedings because of increasing judicial scrutiny (6, p. 570).

The case analyses indicated that the arbitrators sometimes considered and ruled on the issue of race discrimination even though it was not raised by the parties. In ninety of the cases the issue of racial discrimination was actually raised. However, in ninety-three cases the arbitrator's award included a ruling on racial bias.

The summary of arbitral decisions contained in this study reveal that in 66 per cent of the cases the arbitrator decided for the employer and denied the grievance. In approximately 22 per cent of the awards the grievance was sustained. In the remaining 12 per cent, the arbitrator partially sustained or

partially denied the grievance. These findings show that arbitration cases involving racial disputes are not likely to be successful. The outcome of these cases can also be contrasted with overall arbitration win-lose ratios of 60 per cent and 40 per cent respectively (4, p. 213).

Conclusions Drawn from the Findings

Many of the cases relating to the place of arbitration in racial discrimination cases were considered by the Supreme Court in Alexander v. Gardner-Denver Co. One critical question left unresolved was the future role of arbitrators in such cases (4, p. 220). The Court ended its opinion by saying that an arbitration award could be used in a federal court and "accorded such weight as the court deems appropriate" (2, p. 60). Justice Powell added a note which Aksen characterized as the Court's effort to show its support for the federal policy favoring arbitration (1, p. 26). Aksen describes the Court's guidelines in the following manner:

> Thus, (1) if a labor arbitration gives full consideration to the employee's Title VII rights, (2) if the collective agreement contains antidiscrimination language substantially in conformance with Title VII, (3) if procedural fairness has been accorded the discriminatee in the arbitral forum, (4) if the record discloses that the discrimination issue was dealt with adequately, and (5) if the arbitrator has the requisite special competence to deal with the discrimination issue, then federal district courts may accord the award "great weight" (1, p. 27).

How arbitrators have reacted to the Gardner-Denver decision will determine arbitration's place in employment discrimination

disputes. Inferences as to that reaction can be drawn from the findings of the ninety-seven racial discrimination awards examined in this study.

Arbitral authority is derived from the collective bargaining agreement itself, and authority to decide employment discrimination grievances has become a common feature in most labor contracts (4, p. 210). This study revealed that both employers and unions continue to use arbitration to resolve race-discrimination grievances. Their use of arbitration is based on antidiscrimination clauses which very often incorporate the language of Title VII and other relevant statutes. As the parties continue to use the private arbitration process to settle public issues of race discrimination, it will be important that the antidiscrimination clause contain provisions similar to that of Title VII in order to increase the possibility of a satisfactory and final settlement. This study has shown that arbitrators will not ignore the law, especially where they feel that it is incorporated into the contract by an unambiguous clause. In Gardner-Denver, the Supreme Court endorsed the presence of such provisions patterned after Title VII.

> Where the collective bargaining agreement contains a non-discrimination clause similar to Title VII and where procedures are fair and regular, arbitration may well produce a settlement satisfactory to both employment and employee . . . (2, p. 55).

The passage and development of Title VII and other public law governing employer-employee relations has had a

substantial impact on collective bargaining. As labor and management groups attempt to mold their agreements to reflect the increasing legislative regulation of employment, arbitrators are deciding cases where contractual and statutory issues are intertwined. To what extent will arbitrators interpret and apply public law in deciding racial discrimination cases? This study has shown that arbitrators' use of public law appeared in fifty of the ninety-seven cases.

These results suggest that arbitrators have not been reluctant to consider public law to aid their decision making in most of the ninety-seven post-Gardner-Denver cases. Reliance on public law is evident where the contract incorporates federal law into the antidiscrimination clause. Where the clause is less specific, arbitrators will look to statutes and relevant cases in order to avoid issuing an award that is in violation of public law or agency policy. These findings differ from Gould's pre-Gardner-Denver study which found references to public law and cases in only five of the fifty-one awards involving racial discrimination disputes (4, p. 213).

In the period subsequent to the Gardner-Denver decision, however, it is evident that the arbitrators included in this study have often referred to and relied upon public law. A key reason for the increasing consideration of factors extrinsic to the contract is the arbitrator's desire that his award be final and binding. An award that is inconsistent with agency guidelines and court decisions relevant to Title VII will almost certainly not be "accorded great weight" by a court (5, p. 437).

In the Gardner-Denver decision, the Court's footnote also stressed that a Title VII arbitration proceeding should provide procedural fairness. A procedurally fair hearing affords all parties to the dispute a full opportunity to participate. This includes the right to representation by counsel, the right to present testimony, and the right to examine and cross-examine witnesses. This study found that employers were represented by legal counsel in sixty-six cases while the union's attorney was present in forty-one of the ninety-seven cases. These findings indicate that the individual grievant with a discrimination claim must rely on his union's representative at the proceeding. Individual representation or co-representation with the union seems to have been discouraged.

Evidence of the opportunity to examine and cross-examine witnesses at the hearing, was indicated in only fifteen of the awards examined. In each the arbitrator included a statement expressing the availability of that procedural aspect. Elkouri states that arbitrators usually uphold the right of cross-examination, but not as strongly as is done in a judicial proceeding (3, p. 269).

The special competence of arbitrators to solve racial discrimination disputes was also emphasized by the Supreme Court in Gardner-Denver. This study relied on the available background information as to tbe arbitrators' legal training and membership in the National Academy of Arbitrators (NAA).

Fifty-seven of the eighty-two arbitrators for whom the information was available had a legal background. Forty-six of the arbitrators held membership in the NAA. Requirements for membership in the NAA include considerable arbitral experience as well as acceptability by both labor and management groups. This background data suggest that the parties may prefer experienced arbitrators with legal training to hear disputes of racial discrimination. However, according to Oppenheimer and LaVan, arbitrators who are familiar with the particular industry and employment-discrimination law may be more acceptable to the respective parties (10, p. 16).

The examination of the ninety-seven labor arbitration awards involving racial discrimination disputes reveals that arbitrators have been unpredictable in their response to Alexander v. Gardner-Denver Co. Some of the awards indicated that the arbitrators specifically attempted to follow the Supreme Court's guidelines. Other arbitrators, however, were uncertain of their latitude in solving discrimination grievances and limited themselves to a narrow interpretation of the contract. The uncertainty and overall cautious approach by arbitrators to Title VII-related disputes indicates the need for clarification of the arbitral role in adjudicating such disputes.

Recommendations for Further Study

The results of this study have suggested the following recommendations for further study. The recommendations are made

with the view that additional information will be needed about the long-term effect of Alexander v. Gardner-Denver Co. on arbitral decisions. The recommendations should also assist in determining the efficacy of labor arbitration in resolving employment-discrimination disputes.

1. It is suggested that a similar study be conducted at a future date to compare and contrast the results of the studies and assist in determining the long-range effect of Gardner-Denver on arbitral awards.

2. A study is proposed to examine judicial decisions involving an application and interpretation of Gardner-Denver. Such a study is recommended to resolve the following questions raised but unanswered by the Supreme Court: What weight will district courts give to prior arbitral awards, and what criteria will determine the weight?

3. An empirical study is suggested to investigate how individual labor arbitrators deal with employment discrimination disputes. The study should emphasize procedural as well as substantive aspects of the arbitrator's dispute resolution process.

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APPENDIX

APPENDIX

ARBITRATION CASES INCLUDED IN THE STUDY WITH ARBITRATORS AND DATE OF AWARD LISTED RESPECTIVELY*

Assigned Award No.	Employer	Grievant/Union	Date of Award	Arbitrator	Source of Case (Citation)
1	Abex Corporation	International Molders & Allied Workers	5/18/78	Charles Ipavec	AAA 233-7 (AAA)
2	Aggregates and Concrete Association	IBT	8/8/77	J. J. Griffin	69 LA 439 (BNA)
3	Airco, Inc.	USW, Local 3164	9/15/76	Robert J. Ables	67 LA 453 (BNA)
4	Alabama Metallurgical Corp.	IUEW	2/4/76	J. Reese Johnston	76-1 ARB 8193 (CCH)
5	American Stevedoring Corp.	IBT	3/20/79	Robert J. Ables	72 LA 559 (BNA)
6	Amoco Oil Co.	OCAW	5/10/78	Raymond Britton	70 LA 979 (BNA)
7	A. O. Smith Corp.	USW	6/15/80	W. W. Petrie	75 LA 439 (BNA)
8	Argonne National Laboratories	SEIU, Local 321	12/19/74	Arthur A. Malinowski	AAA 194-17 (AAA)
9	Armco Steel Corp.	Zanesville Armco Independent Org.	3/5/75	Thomas McDermott	64 LA 361 (BNA)
10	Armstrong Rubber Company	URW, Local 303	2/16/80	Ralph Williams	74 LA 301 (BNA)
11	AVCO Aerostructure Inc.	IAM, Local 735	6/12/75	Robert Moberly	64 LA 1121 (BNA)
12	ASG Industries	United Glass and Ceramic Workers, Local 496	4/26/74	Robert Foster	62 LA 849 (BNA)
13	Bechtel Power Corp.	IBT, Local 83	8/12/79	Donald Daughton	73 LA 345 (BNA)
14	Bethlehem Steel Corp.	USW	6/5/74	Seymour Strongen	63 LA 63 (BNA)
15	Bliss & Loughlin Industries, Inc.	IAM, Local 2040	12/19/74	Joseph McKenna	64 LA 146 (BNA)

*See attachment for explanation of labor union and association abbreviations

APPENDIX--Continued

Assigned Award No.	Employer	Grievant/Union	Date of Award	Arbitrator	Source of Case (Citation)
16	California Pellet Mill Co.	IAM, Local 1096	5/29/79	Barbara Doering	79-2 ARB 8339 (CCH)
17	City of Boston	SEIU, Local 285	6/23/76	Thomas P. Lewis	AIG-1692 (AAA)
18	City of Eugene, OR	AFSCME, Local 1724-A	12/5/74	Leroy R. Smith	AIG-1219 (AAA)
19	City of Detroit	DPOA	3/8/78	E. J. Forsythe	AIG-2067 (AAA)
20	City of Detroit	Senior Accountants, Analysts & Appraisers Association	10/12/79	William P. Daniel	73 LA 717 (BNA)
21	City of Springfield	AFSCME, Local 1596	7/23/79	Edward Pinkus	AIG-2395 (AAA)
22	Colgate-Palmolive Co.	OCAW, Local 5-114	4/17/75	A. Dale Allen	64 LA 397 (BNA)
23	Colt Industries	IBEW, Local 1658	8/4/75	Paul M. Herbert	AAA 200-11 (AAA)
24	Container Corp. of America	USW	7/23/79	Alexander Freund	73 LA 286 (BNA)
25	Copolymer Rubber & Chemical Corp.	IAM, Local 1366	1/23/75	J. D. Dunn	64 LA 310 (BNA)
26	County of Orange	OCEA	6/16/78	William Levin	AIG-2133 (AAA)
27	Crown Central Petroleum	OCAW, Local 4-227	5/11/78	John A. Bailey	AAA 232-6 (AAA)
28	Del Monte Corp.	IAM, Local 115	7/11/78	J. J. Griffin	71 LA 96 (BNA)
29	Dow Corning Corp.	USW, Local 12934	1/4/79	G. T. Roumell	70-1 ARB 8125 (CCH)
30	Duff-Norton & Co.	USW	10/15/78	T. W. Butler	78-2 ARB 8474 (CCH)
31	FSC Paper Corp.	UPIU	7/23/75	Philip Marshall	65 LA 25 (BNA)
32	Food Employers Council	IBT, Local 70	5/12/75	Arthur Jacobs	64 LA 811 (BNA)
33	Gates Rubber Co.	URW, Local 154	4/9/75	John Caraway	75 ARB 8051 (CCH)
34	George Sollitt Const. Co.	Laborers International Union	10/21/76	Amedeo Greco	67 LA 682 (BNA)

APPENDIX--Continued

Assigned Award No.	Employer	Grievant/Union	Date of Award	Arbitrator	Source of Case (Citation)
35	Georgia Power Co.	IBEW, Local 84	6/24/80	J. Ross Hunter	75 LA 181 (BNA)
36	Getty Oil Co.	OCAW, Local 8-898	4/2/77	Arthur Sloane	AAA 219-3 (AAA)
37	Great Lakes Canning, Inc.	IBT, Local 293	4/2/76	Charles Ipavc	AAA 208-3 (AAA)
38	Gulf States Utilities Co.	IBEW, Local 2286	5/3/74	J. E. Williams	62 LA 1061 (BNA)
39	Hayes & Nicoulin, Inc.	Kentucky Laborers Union, Local 576	5/5/77	Orville Andrews	77-1 ARB 8235 (CCH)
40	Hollander & Co.	IBT	5/12/78	Milton Edelman	64 LA 816 (BNA)
41	Intalco Aluminum Company	Bellingham Metal Trades Council	1/15/76	Robert L. Burke	66 LA 155 (BNA)
42	International Paper Co.	UPIU, Local 3980	8/5/75	J. Earl Williams	65 LA 197 (BNA)
43	International Paper Co.	IPIU	2/8/77	F. J. Taylor	68 LA 155 (BNA)
44	International Paper Co.	UPIU	11/4/77	F. J. Taylor	69 LA 857 (BNA)
45	ITT Continental Baking Co.	BCWIU, Local 65	11/1/79	P. M. Williams	80-1 ARB 8023 (CCH)
46	ITT Continental Baking Co.	IBT, Local 29	6/4/79	J. Ross Hunter, Jr.	72 LA 1234 (BNA)
47	ITT Rayonier, Inc.	UPIU	12/1/75	Paul Hardy	65 LA 1122 (BNA)
48	Jacksonville Shipyards, Inc.	IBU, Local 805	6/14/77	Edward Maxwell	68 LA 1091 (BNA)
49	Jefferson Chemical Company	IAM, Local 1792	4/30/79	Barnett Goodstein	72 LA 892 (BNA)
50	John Sexton & Co.	RWDSU	9/18/74	W.G. Seinsheimer	74-2 ARB 8427 (CCH)
51	Joy Manufacturing Company	USW, Local 8356	12/30/77	F. Matthews	70 LA 4 (BNA)
52	Kimberly-Clark Corp.	UPIU, Local 704	7/17/74	Alex Simon	63 LA 3 (BNA)

APPENDIX--Continued

Assigned Award No.	Employer	Grievant/Union	Date of Award	Arbitrator	Source of Case (Citation)
53	Leeds & Northrup Company	UAW, Local 1350	5/3/76	Samuel Jaffe	AAA 209-12 (AAA)
54	Little Rock Public Schools	LRCTA	12/12/77	P. Davis	78 ARB 8219 (CCH)
55	Longview Fiber Co.	UPIU	12/16/77	Robert Mueller	78-1 ARB 8003 (CCH)
56	Louisville Water Company	AFSCME, Local 1683	6/20/80	Rankin Gibson	PSAA 807104 (LLP)
57	Max Factor Co.	ILWU	6/30/79	E. A. Jones	70-2 ARB 8486 (CCH)
58	Midwest Tanning Company	Leather Workers Union, Local 47	10/22/77	Herman Rauch	69 LA 803 (BNA)
59	Mobil Oil Corp.	OCAW	6/16/80	Stuart Herman	80-2 ARB 8387 (CCH)
60	Mountain States Telephone Co.	CWA	12/23/74	Harry H. Platt	64 LA 316 (BNA)
61	NDC Distributing Company	Wholesale Delivery Drivers' & Salesmans' Union	3/10/75	E. A. Jones	64 LA 930 (BNA)
62	New Jersey Zinc Co	USW, Local 5075	12/29/79	C. Allen Foster	AAA 253-1 (AAA)
63	New York Times, Inc.	Newspaper Guild of New York	11/15/74	Maurice Benewitz	63 LA 1064 (BNA)
64	Northrop Corp.	Individual Grievant	8/18/75	Syd Rose	65 LA 400 (BNA)
65	Office of Economic Opportunity	AFGE, Local 2677	1/30/75	Walter Maggiolo	64 LA 413 (BNA)
66	Operating Engineers Employers Inc.	IUOE, Local 542	7/10/79	Jay Kramer	72 LA 1223 (BNA)
67	Paccar, Inc.	UAW, Local 710	3/27/79	Henry Grether	72 LA 769 (BNA)
68	Safeway Stores, Inc	RCU, Local 73	7/11/80	A. Dale Allen	75 LA 387 (BNA)
69	Safeway Stores, Inc	RCU, Local 7?	7/19/76	W. L. Gray	76-2 ARB 8457 (CCH)
70	Schauer Mfg. Corp.	IAM, Local 34	10/13/77	Walter Seinsheimer	77-2 ARB 8498 (CCH)
71	School Board of Palm Beach Cty.	PBCCTA	2/15/80	John C. Manson	74 LA 494 (BNA)

APPENDIX--Continued

Assigned Award No.	Employer	Grievant/Union	Date of Award	Arbitrator	Source of Case (Citation)
72	South Bend Tool Company	IAM	3/25/77	Duane L. Traynor	68 LA 536 (BNA)
73	Southwestern Bell Telephone Co.	CWA	4/10/75	Thomas Christensen	AAA 199-14 (AAA)
74	Southwestern Bell Telephone Co.	CWA, Local 6329	2/10/75	Richard Mittenthal	AAA 195-9 (AAA)
75	Struck Construction Co.	IUOE, Local 181	1/8/80	S. H. Sergent	80-1 ARB 8146 (CCH)
76	Texas Refinery Corp.	IAM, Local 1591	1/23/78	P. M. Williams	78-1 ARB 8068 (CCH)
77	Texas Utilities	IBEW, Local 2337	1/3/79	L. S. Mewhinney	71 LA 1205 (BNA)
78	Titanium Metals Corp.	USW, Local 5644	4/5/76	Harry Dworkin	66 LA 709 (BNA)
79	Toledo Blade Co.	International Mailers Union	11/3/79	Harry Dworkin	79-2 ARB 8601 (CCH)
80	Trane Inc.	UAW	2/5/75	Robt. McIntosh	74 ARB 8657 (CCH)
81	Union Camp Corp.	UPIU	10/12/78	James C. Duff	71 LA 886 (BNA)
82	United States Naval Ordinance Station	IAM, Local 830	9/13/74	Alvin L. Goldman	AIG 1183 (AAA)
83	United States Steel Co.	USW	3/31/76	James R. Beilstein	66 LA 669 (BNA)
84	United States Steel Co.	USW, Local 1104	4/26/76	Sylvester Garrett	66 LA 687 (BNA)
85	United States Steel Co.	USW, Local 4889	1/7/77	S. Das	77-1 ARB 8007 (CCH)
86	United States Steel Co.	USW	6/30/77	Helen Witt	69 LA 243 (BNA)
87	United States Steel Co.	USW	12/5/77	John H. Powell	70 LA 146 (BNA)
88	USM, Corp.	USW, Local 3571	10/10/77	Charles Gregory	69 LA 1051 (BNA)

APPENDIX--Continued

Assigned Award No.	Employer	Grievant/Union	Date of Award	Arbitrator	Source of Case (Citation)
89	Victory Building Maintenance	SEIU, Local 22	6/18/74	Leo F. Lightner	AAA 187-17 (AAA)
90	VRN International	IBEW, Local 1978	3/24/80	W. Gary Vause	74 LA 806 (BNA)
91	Wayne County Labor Relations Board	Wayne County Sheriff's Local 5029	9/22/80	George T. Roumell	AIG-2663 (AAA)
92	Weyerhaeuser Co.	IWA, Local 515	12/13/78	Charles Carnes	71 LA 1215 (BNA)
93	Weyerhaeuser Co.	IWA, Local 515	3/18/75	Ralph C. Barnhart	64 LA 869 (BNA)
94	Weyerhaeuser Co.	UPIU	1/10/76	A. H. Keally	AAA 207-9 (AAA)
95	Weyerhaeuser Co.	UPIU, Local 1423	6/22/79	Theodore J. St. Antonine	AAA 246-1 (AAA)
96	Whitfield Tank Lines, Inc.	IBT, Local 492	5/1/74	Sanford Cohen	62 LA 934 (BNA)
97	Whitaker Cable Corp.	IBT, Local 552	12/6/74	Sol Yarowsky	63 LA 1262 (BNA)

KEY TO LABOR UNION ABBREVIATIONS

AFSCME	American Federation of State, County and Municipal Employees
AFGE	American Federation of Government Employees
BCWIU	Bakery and Confectionary Workers International Union
CWA	Communications Workers of America
IAM	International Association of Machinists
IBEW	International Brotherhood of Electrical Workers
IBT	International Brotherhood of Teamsters
IBU	International Boilermakers Union
IUOE	International Union of Operating Engineers
IWA	International Woodworkers of America
LRCTA	Little Rock Classroom Teachers Association
OCAW	Oil, Chemical and Atomic Workers
OCEA	Orange County Employees Association
PBCCTA	Palm Beach County Classroom Teachers Association
RWDSU	Retail, Wholesale and Department Store Union
RCU	Retail Clerks Union
SEIU	Service Employees International Union
UAW	United Automobile Workers
UPIU	United Paperworkers International Union
URW	United Rubber Workers
USWA	United Steelworkers of America

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