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CURRENT ISSUES IN ARBITRATION KEYNOTE

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The various panels today will analyze many contemporary aspects of employment, so that, as your keynote speaker, my task is to cover some of the changes that have occurred in the American economy, and to suggest how arbitration and other forms of Alternative Dispute Resolution (ADR) will be used in Workplace 2000.

Collective bargaining and grievance arbitration have played an important role in industrial relations in this country, providing a majoritarian mechanism for resolving labor disputes and creating a fair and just system of contractual democracy. Collective bargaining has generated major improvements in the working conditions, compensation, benefits, and job security of organized workers. Thanks to Taft-Hartley and similar state legislation, millions of employees are covered by contracts, represented by unions, and protected by just-cause provisions backed by binding arbitration.

In recent years, however, unionization, at least in the private sector, has lost momentum. Eighty-five percent of private sector workers work without union protection.

This change has come about due to a variety of social and economic trends. For example:

- Federal and local legislation has been passed, covering *all* workers, protecting specified classifications and minority groups, with enforcement by government agencies, private attorneys, and unions.
- The American workforce has changed, become better educated, more demanding, intercultural, with larger numbers of women. In many cases, companies and workers are insecure, but eager to participate in policy decisions.

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- There has been a shift from industrial to service jobs, from serving a machine to controlling a technology, from massive enterprises to small entrepreneurial units, from local or regional industries to worldwide markets.
- Global competition has increased, so that state and national borders have become less relevant. Information, money, ideas, people flow across national boundaries. Workers and jobs migrate as investors desire.
- Middle management has been eroded. Information is shared throughout the workforce, facilitating participation, eliminating the executive gatekeeper.

These trends have increased the challenge facing union leaders, making it difficult to exchange union services for monthly dues. Organizational drives face at least some of the following handicaps:

smaller units
flat organizations
increased out-sourcing
employers concerned about increased competition
employees who are insecure
more demanding workers
less union solidarity
less union control over dissidents
more litigation
cultural and intellectual communication problems

A growing number of workers are not members of unions. When nonunion employees are terminated or disciplined, their claims have to be processed through government agencies, such as the Equal Employment Opportunity Commission (EEOC), or through the courts. Litigation has become increasingly expensive, slow, and precarious for all concerned.

Employers would prefer not to be sued by their employees, for obvious reasons. As a result, there has been increased interest in creating internal systems of employment dispute resolution: ombudsman, peer review, mediation, and arbitration.

The *Gilmer* case ordered judges to enforce the Federal Arbitration Act, even when the claim involved age discrimination. As a result, many corporate employers are inserting arbitration clauses in their employment contracts or personnel procedures. Others are turning to consensual methods of private dispute resolution, such as mediation or neutral evaluation.

The roots of the Federal Arbitration Act, which the *Gilmer* decision interpreted, are found in commercial arbitration, not in Sec. 301 of the National Labor Relations Act, where *Alexander v. Gardner-Denver* is the law. In *Gilmer,* the claimant was an individual making a claim for money damages, using a private attorney. The issue in *Gilmer* was whether Congress intended age discrimination

claims to fall within the scope of the Federal Arbitration Act, which requires courts to enforce arbitration agreements.

Gilmer is part of a line of cases where organizations are seeking to enforce arbitration clauses: insurance companies against policyholders; hospitals against patients; banks against depositors; brokerage firms against investors.

Corporate America is adopting such arbitration schemes to better serve customers, and to save money. Arbitration can be a more efficient way to resolve business disputes than court litigation. The Federal Arbitration Act makes arbitration a practical alternative.

Some companies may abuse this privilege, attempting to force individuals into arbitration systems that violate the law and are essentially unfair.

Arbitration was a privilege won through legislative action by people who thought that parties should have the right to resolve disputes in their own way. It should not be abused.

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