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Labor Relations—FLSA Action Not Barred by Prior Arbitration

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LABOR RELATIONS—FLSA ACTION NOT BARRED BY PRIOR ARBITRATION—*Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981).

The petitioners were truckdrivers at the Little Rock terminal of Arkansas-Best Freight Systems, Inc. (ABF). All truckdrivers of ABF were required to make daily safety inspections of their trucks before beginning work. If the trucks passed inspection, the drivers proceeded on their trips and were paid driving time. No wages were claimed for this inspection time. However, when the trucks failed inspection, drivers were required to take the trucks to ABF's repair facility. None of the drivers were paid for the fifteen to thirty minutes that it took to perform these duties.

The petitioners filed a series of grievances under their union's collective bargaining agreement, claiming they were entitled to compensation under article fifty of the agreement, which required ABF to compensate its drivers for all time spent in its service. Pursuant to the labor agreement, the petitioners' union presented these grievances to an arbitration committee, which rejected the claim without explanation. The petitioners then filed suit in the United States District Court for the Eastern District of Arkansas alleging that the pretrip safety inspection and transportation time was compensable under the Fair Labor Standards Act and that the union had breached its duty of fair representation.

The district court addressed only the fair representation issue, finding there was no breach of the union's duty. This ruling was unanimously affirmed by the Eighth Circuit Court of Appeals.[1] With one judge dissenting, the Eighth Circuit also affirmed the district court's refusal to address the petitioners' wage claim under the Fair Labor Standards Act.[2] The United States Supreme Court granted certiorari[3] on the issue of the petitioners' wage claims under the Fair Labor Standards Act and reversed. *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981).

1. Barrentine v. Arkansas-Best Freight System, Inc., 615 F.2d 1194, 1202 (8th Cir. 1980).

2. *Id.* at 1200-01.

3. 449 U.S. 819 (1980).

I. THE NATIONAL LABOR RELATIONS POLICY AND ARBITRATION

A. *Statutory Background*

The statutory genesis of United States labor relations law is the National Labor Relations Act (NLRA) of 1935,[4] which established the basic rights of employees to organize[5] and declared certain employer acts to be unfair labor practices.[6] However, the NLRA placed few, if any, constraints on organized labor; equalizing amendments were needed.[7] In an attempt to remedy these deficiencies, Congress passed the Labor Management Relations Act (LMRA) of 1947,[8] which, among other things, made certain actions by unions unfair labor practices.[9] The NLRA was further amended by the Labor Management Reporting and Disclosure Act of 1959,[10] which was primarily designed to combat corruption and to establish a bill of rights for union members vis-a-vis unions.[11]

The NLRA also established the National Labor Relations Board (NLRB) to implement the NLRA rights to organize and bargain collectively.[12] The NLRB is empowered to resolve unfair labor practice charges and to implement the election and representation provisions of the NLRA.[13] Jurisdiction of federal and state courts is preempted by the Board's jurisdiction when an activity is arguably subject to section seven[14] or section eight[15] of the NLRA (rights of

4. 29 U.S.C. §§ 151-169 (1976 & Supp. III 1979). The NLRA was held constitutional in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

5. Section 7 provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157 (1976).

6. 29 U.S.C. § 158(a) (1976). The unfair labor practices are set out in section 8 of the NLRA. *Id.*

7. THE DEVELOPING LABOR LAW 31 (C. Morris ed. 1971). For a detailed discussion of the one-sidedness of the NLRA and resulting criticism see *id.* at 27-34.

8. Ch. 120, 61 Stat. 136, *as amended by* Pub. L. No. 86-257, 73 Stat. 541 (codified in scattered sections of 29 U.S.C. §§ 141-197 (1976 and Supp. III 1979)).

9. 29 U.S.C. § 158(b) (1976).

10. *Id.* §§ 401-531 (1976 & Supp. III 1979).

11. R. GORMAN, LABOR LAW 6 (1976).

12. 29 U.S.C. § 153 (1976); R. GORMAN, *supra* note 11, at 7.

13. J. JENKINS, LABOR LAW § 2.2 (1968). "The Board does not initiate cases. It investigates and decides only cases which are initiated by private parties, either through the filing of petitions for representation elections, or the filing of charges of unfair labor practices against employers and/or unions." R. SMITH, L. MERRIFIELD, & D. ROTHSCHILD, COLLECTIVE BARGAINING AND LABOR ARBITRATION 49 (1970) [hereinafter cited as R. SMITH].

14. 29 U.S.C. § 157 (1976 & Supp. III 1979).

15. *Id.* § 158 (1976).

employees and unfair labor practices).[16] The unfair labor practice provisions apply to both unions and employers, the union being the exclusive bargaining representative of the employees.[17]

B. *Basic Policies of the NLRA*

The congressional policy behind the NLRA was to promote the peaceful settlement of industrial disputes[18] through the stabilizing influence of collective bargaining.[19] Congress specifically rejected the proposal that violations of collective bargaining agreements be made unfair labor practices and left the enforcement of labor agreements to the "usual processes of the law."[20] In *Textile Workers v. Lincoln Mills*[21] the United States Supreme Court defined "usual processes of the law" and held that federal courts are responsible for fashioning a body of common law to enforce collective bargaining agreements under section 301 of the LMRA.[22] Thus, states are generally preempted from enforcing their own labor relations policies,[23] subject to some exceptions.[24]

In furtherance of its goal of industrial peace and stability through collective bargaining, Congress also declared a national policy favoring the settlement through arbitration of disputes arising under collective bargaining agreements.[25] Fostering this policy, the

16. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959).

17. The union has a statutory duty to represent all employees, both in its collective bargaining and in its enforcement of the resulting collective bargaining agreement. Vaca v. Sipes, 386 U.S. 171, 177 (1967).

18. Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 211 (1964).

19. Drake Bakeries, Inc. v. Local 50, Am. Bakery & Confectionery Workers Int'l, 370 U.S. 254, 263 (1962).

20. R. SMITH, *supra* note 13, at 195-96.

21. 353 U.S. 448 (1957).

22. 29 U.S.C. § 185 (1976). Section 301 allows suits by and against labor unions to enforce collective bargaining agreements.

23. Lodge 76 v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976); Beasley v. Food Fair, Inc., 416 U.S. 653 (1974); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

24. States have concurrent jurisdiction to enforce certain rights created by federal labor law, Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962), and are not preempted in (1) areas of primarily local concern and (2) areas of only peripheral concern to the national labor relations policy, Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978) (trespass); Farmer v. United Bhd. of Carpenters & Joiners, 430 U.S. 290 (1977) (intentional infliction of mental distress); *see* Vaca v. Sipes, 386 U.S. 171, 179-80 (1967) and cases cited therein.

25. 29 U.S.C. § 173(d) (1976); Hines v. Amchor Motor Freight, Inc., 424 U.S. 554, 562-63 (1976). "The arbitration process is a method by which parties to a dispute settle it through adjudication outside the normal judicial system." R. SMITH, *supra* note 13, at 103. For the different types and methods of arbitration see *id.* at 110-13; F. ELKOURI & E.

United States Supreme Court elevated the role of the arbitrator as a force for industrial peace when it decided three cases on the same day in 1960, known as the *Steelworkers Trilogy*.[26] In the *Steelworkers Trilogy* the Court announced a doctrine of judicial self-restraint in cases in which the parties have bargained for arbitration as a means of dispute resolution.[27] The Court held that a collective bargaining agreement which has provisions for arbitration is an effort to erect a system of industrial self government[28] with arbitration the substitute for litigation and industrial strife.[29]

While the issue of whether a claim is subject to arbitration is for the courts to decide, doubts should be resolved in favor of arbitration,[30] and exceptions should not be read into the arbitration clause.[31] The majority in *Steelworkers* made it clear that courts should not weigh the merits of the grievance[32] since it is the arbitrator's construction for which the parties bargained.[33] The arbitrator is not limited to the express provisions of the agreement and is free to use his knowledge of the practices of the industry and the "law of

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ELKOURI, HOW ARBITRATION WORKS 48-78 (2d ed. 1960); and R. GORMAN, *supra* note 11, at 541-43.

26. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

27. R. GORMAN, *supra* note 11, at 551.

28. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580 (1960).

29. *Id.* at 578.

30. *Warrior & Gulf* articulated this rule from the collective bargaining agreement involved in that case and indicated that the power to determine the arbitrability could be vested in the arbitrator by clear language to that effect in the agreement. *Id.* at 587 n.7. Once a dispute is determined to be subject to arbitration, the promise to arbitrate can be specifically enforced. Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).

31. "There is no exception in the 'no strike' clause and none therefore should be read into the grievance clause, since one is the *quid pro quo* for the other." United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567 (1960). See Boys Mkts., Inc. v. Retail Clerks, Local 770, 398 U.S. 235 (1970), and Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957), for the proposition that an agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike.

32. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960). "The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware." United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960).

33. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960). "When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal." United Steelworkers v. American Mfg. Co., 363 U.S. 564, 569 (1960).

the shop."[34] However, the power of an arbitrator is limited. While arbitration is, in a sense, adjudicative, the thrust of what the arbitrator does is to apply the collective bargaining agreement to disputes by interpreting the agreement and using the common law of the shop. He is not a judge and ordinarily cannot resort directly to federal substantive law when ruling on a dispute.[35]

One basic thrust of the national labor relations policy is to encourage industrial self-government through arbitration.[36] In order to prevent the erosion of this national policy, the Court imposed a degree of finality in the arbitration procedure by refusing to allow parties to the arbitration award to bring actions to enforce collective bargaining agreements under section 301.[37] There were few exceptions to this policy of finality, the primary exception being when the union breached its duty of fair representation.[38] However, two cases decided by the United States Supreme Court suggested that more exceptions would be added. In the first of these cases, *U.S. Bulk Carriers, Inc. v. Arguelles*,[39] the Court held that seamen could bring an action under section 301 for wages under the Merchant Seamen Act[40] without invoking the grievance and arbitration procedures under a collective bargaining agreement which provided for resolution of *all* disputes and grievances.[41] In *Iowa Beef Packers, Inc. v. Thompson*[42] the Court granted certiorari to determine whether employees could sue to recover overtime allegedly withheld in violation of the FLSA when their complaint was also subject to resolution under the grievance and arbitration provisions of the col-

34. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

35. The arbitrator draws his authority from the collective bargaining agreement and does not apply substantive law when construing the agreement. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597-98 (1960).

36. So strong is the national policy favoring arbitration, that the NLRB has followed a policy of deferral to arbitration conducted pursuant to collective bargaining agreements. Collyer Insulated Wire, 192 NLRB 837 (1971); Spielberg Mfg. Co., 112 NLRB 1080 (1955). Although the deferral doctrine has been subject to much litigation and variation, the NLRB has recognized the importance of arbitration. *See, e.g.*, General Am. Transp. Corp., 228 NLRB 808 (1977).

37. Unless the collective bargaining agreement provides otherwise, employees must follow grievance procedures set out in the agreement, and they are bound by the decision of the arbitrator. Vaca v. Sipes, 386 U.S. 171 (1967); Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

38. Vaca v. Sipes, 386 U.S. 171 (1967).

39. 400 U.S. 351 (1971).

40. 46 U.S.C. § 596 (1976).

41. The Court held that section 301 did not abrogate the employee's remedy, but provided an optional remedy. 400 U.S. at 356.

42. 405 U.S. 228 (1972).

lective bargaining agreement. However, certiorari was dismissed as improvidently granted when oral argument revealed that under the collective bargaining agreement, grievances could be filed only for violations of the agreement itself—not for all disputes.[43]

Against this background, the Court, in *Alexander v. Gardner-Denver Co.*,[44] held that submission of a discrimination claim to final arbitration did not bar a subsequent de novo title VII suit since Congress had granted individual employees a nonwaivable right to equal employment opportunities. *Gardner-Denver* has been called a "bombshell" which severely weakens the throne of the *Steelworkers Trilogy*.[45] Both critics and supporters recognize that the *Gardner-Denver* exception erodes the arbitration process because of the one-sided limitation on the finality of an arbitration award.[46]

II. THE FAIR LABOR STANDARDS ACT

Developing contemporaneously with the national labor relations policy was the Fair Labor Standards Act (FLSA) of 1938[47] and the case law construing it.[48] The statutory rights created by the FLSA were conferred as private rights, but were passed in the public interest and as such could not be waived or released if such waiver

43. *Id.* at 229-30.

44. 415 U.S. 36 (1974).

45. Note, *The Gardner-Denver Decision: Does It Put Arbitration in a Bind?*, 25 LAB. L.J. 708 (1974). The author states that doubts concerning how far *Gardner-Denver* will be extended could tend to undermine the grievance machinery. *Id.* at 715.

46. Criticisms of the decision are that (1) "the employer is confronted with the possibility of being forced to defend against charges arising from the same set of facts . . . in different forums," Note, 24 CATH. U.L. REV. 126, 132-33 (1974); (2) it is a mistake to give people a "second bite at the apple," 1974 LABOR RELATIONS YEARBOOK 370 (BNA 1975); and (3) the Court failed to recognize arbitration as the central institution in the administration of the collective bargaining agreements, *id.* at 93.

For favorable comments on the decision in *Gardner-Denver* see Note, *Alexander v. Gardner-Denver and Deferral to Labor Arbitration*, 27 HASTINGS L.J. 403 (1975) and Meltzer, *The Impact of Alexander v. Gardner-Denver on Labor Arbitration*, 27 N.Y.U. CONF. ON LAB. 189 (1975). Meltzer claims that *Gardner-Denver* "reaffirms a classic function of the grievance-arbitration process: to protect the interests of individual employees, as well as the interest in industrial order and efficiency." *Id.* at 199-200.

47. 29 U.S.C. §§ 201-219 (1976).

48. Congress enacted the FLSA under its commerce power, declaring that the purpose of the Act was to prevent interstate commerce from becoming "the instrument of competition in the distribution of goods produced under substandard labor conditions." United States v. Darby, 312 U.S. 100, 115 (1941); McComb v. Homeworkers' Handicraft Coop., 176 F.2d 633, 636 (4th Cir. 1949). "Substandard labor conditions were deemed by Congress to be 'injurious to the commerce and to the states from and to which the commerce flows.' " Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 576-77 (1942).

or release contravened statutory policy.[49] The remedy of liquidated damages cannot be waived in the absence of a bona fide dispute between the parties over liability,[50] nor can it be bargained away by bona fide settlements of disputes over coverage.[51]

III. THE FLSA AND ARBITRATION

Early in the development of the FLSA, the United States Supreme Court held that any contract failing to meet the basic policy of the Act could not be used to deprive employees of their statutory rights.[52] The Court made it clear that congressionally granted FLSA rights take precedence over conflicting provisions in collective bargaining agreements.[53] Problems later developed when courts had to decide the impact of a national policy favoring arbitration on the policy behind the FLSA. Most courts held that suits by the Secretary of Labor[54] for violations of the FLSA were not barred by prior arbitration.[55] When faced with actions by individual employees, the majority of courts held that the mere existence of arbitration provisions in collective bargaining agreements could not prevent employees from bringing an action to enforce their FLSA rights.[56] Nor were employees first required to exhaust their remedies under arbitration.[57] However, at least one circuit indicated in dicta that once the election to pursue arbitration was made, other remedies were barred.[58]

In *Satterwhite v. United Parcel Service, Inc.*[59] the Tenth Circuit Court of Appeals held that employees' right to sue under the FLSA

49. Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 704 (1945).

50. *Id.*

51. D.A. Schulte, Inc. v. Gangi, 328 U.S. 108, 114 (1946).

52. Jewell Ridge Coal Corp. v. Local 6167, United Mine Workers, 325 U.S. 161, 167 (1945); Tennessee Coal, Iron & R.R. v. Muscoda Local 123, 321 U.S. 590, 602-03 (1944).

53. *E.g.*, Martino v. Michigan Window Cleaning Co., 327 U.S. 173, 177-78 (1946); Walling v. Harnischfeger Corp., 325 U.S. 427, 430-32 (1945).

54. The Secretary of Labor has authority to initiate actions under the FLSA. 29 U.S.C. § 216 (1976).

55. *E.g.*, Marshall v. Coach House Restaurant, Inc., 457 F. Supp. 946 (S.D.N.Y. 1978); Phillips v. Carborundum Co., 361 F. Supp. 1016 (W.D.N.Y. 1973).

56. Leone v. Mobil Oil Corp., 523 F.2d 1153 (D.C. Cir. 1975) (OSHA-FLSA); Brennan v. Veterans Cleaning Serv., Inc., 482 F.2d 1362 (5th Cir. 1973); Dunlop v. Beloit College, 411 F. Supp. 398 (W.D. Wis. 1976); Phillips v. Carborundum Co., 361 F. Supp. 1016 (W.D.N.Y. 1973); Bailey v. Karolyna Co., 50 F. Supp. 142 (S.D.N.Y. 1943); Abbott v. Beatty Lumber Co., 90 Mich. App. 500, 282 N.W.2d 369 (1979).

57. *E.g.*, Leone v. Mobil Oil Corp., 523 F.2d 1153 (D.C. Cir. 1975); Phillips v. Carborundum Co., 361 F. Supp. 1016, 1021 (W.D.N.Y. 1973).

58. Lerwill v. Inflight Motion Pictures, Inc., 582 F.2d 507 (9th Cir. 1978).

59. 496 F.2d 448 (10th Cir.), *cert. denied*, 419 U.S. 1079 (1974).

was foreclosed by the prior determination of the same claim in arbitration. *Satterwhite*, which became the majority view,[60] limited the reasoning in *Gardner-Denver* to title VII cases, holding that the statutory policy behind title VII was more pointed toward the individual employee than was the FLSA.[61] Although no court reached a result directly opposite to *Satterwhite*, one district court ruled to the contrary when the Secretary of Labor brought the FLSA action after arbitration.[62] While several courts had held that FLSA rights are independent of collective bargaining agreements,[63] none were faced with the exact issue presented in *Satterwhite*. When the Eighth Circuit Court of Appeals was presented with the issue in *Barrentine*[64] it chose to follow *Satterwhite* and held that an employee's right to sue under the FLSA was foreclosed by prior submission of the claim to arbitration. The Supreme Court granted certiorari on this issue.

IV. *BARRENTINE v. ARKANSAS-BEST FREIGHT SYSTEM, INC.*

In *Barrentine v. Arkansas-Best Freight System, Inc.*[65] Justice Brennan, speaking for the majority, recognized that two aspects of the national labor policy were in tension: (1) the labor relations policy encouraging the settlement of labor disputes through collective bargaining and (2) labor statutes affording individual employees specific substantive rights.[66] The national policy favoring collective bargaining and industrial self-government is illustrative of Congress' determination to promote industrial peace.[67] In accordance with this policy, courts usually defer to the arbitration process as a means of resolving disputes arising out of the collective bar-

60. Union de Tronquistas de Puerto Rico Local 901 v. Flagship Hotel Corp., 554 F.2d 8 (1st Cir. 1977); Marshall v. Coach House Restaurant, Inc., 467 F. Supp. 946 (S.D.N.Y. 1978); Atterburg v. Anchor Motor Freight, Inc., 425 F. Supp. 841 (D.N.J. 1977); Abbott v. Beatty Lumber Co., 90 Mich. App. 500, 282 N.W.2d 369 (1979).

61. 496 F.2d at 450.

62. Marshall v. Coach House Restaurant, Inc., 457 F. Supp. 946 (S.D.N.Y. 1978). However, the court followed *Satterwhite* and stated that if the employee had brought the action, principles of res judicata or collateral estoppel would prevent reassertion of a claim previously resolved through arbitration.

63. *E.g.*, Leyva v. Certified Grocers, Ltd., 593 F.2d 857 (9th Cir.), *cert. denied*, 444 U.S. 827 (1979); Brennan v. Board of Educ., 374 F. Supp. 817 (D.N.J. 1974); Hodgson v. Sagner, Inc., 326 F. Supp. 371 (D. Md. 1971), *aff'd sub nom.* Hodgson v. Baltimore Regional Joint Bd., Amalgamated Clothing Workers, 462 F.2d 180 (4th Cir. 1972).

64. 615 F.2d 1194 (8th Cir. 1980), *rev'd*, 450 U.S. 728 (1981).

65. 450 U.S. 728 (1981).

66. *Id.* at 734.

67. *Id.* at 735.

gaining process.[68] However, in rejecting ABF's argument that this policy barred the petitioners from bringing the FLSA claim in federal court, the Court held that different considerations apply when the employee's claim is based on federal statutory rights designed to provide minimum substantive guarantees to individual workers. Not all disputes between an employee and his employer are suited for arbitration under the terms of a collective bargaining agreement.[69]

Refusing to limit the reasoning in *Gardner-Denver* to title VII cases, the Court stated that FLSA rights also could not be waived by contract because this would nullify the purposes of the statute and thwart the legislative policies it was designed to effectuate.[70] The FLSA, like title VII, grants individual employees access to the courts, and arbitration procedures are an inadequate forum for the enforcement of these rights.[71]

The majority noted that FLSA rights could be lost if submission of a claim to arbitration precluded employees from bringing a FLSA suit in federal court. First, even if the employee's claim were meritorious, his union might decide in good faith not to vigorously support the claim in arbitration.[72] Second, even when the union vigorously presents the employee's claim, the employee's statutory rights may not be adequately protected since the arbitrator's role is to apply the "law of the shop" and not the law of the land.[73] Furthermore, an arbitrator's power is derived from the collective bargaining agreement, and he may not have the power to grant the broad range of relief available under the FLSA.

The Court concluded by stating that FLSA rights are independent of the collective bargaining process and are for the protection of the individual workers.[74] Since Congress intended to give individual employees these FLSA rights, the Court held that the petitioners' claim was not barred by the prior submission of their grievance to arbitration.[75]

Chief Justice Burger, joined by Justice Rehnquist, dissented, arguing that the Court's decision ignored the strong congressional

68. *Id.* at 736.
69. *Id.* at 737.
70. *Id.* at 740.
71. *Id.* at 739-40.
72. *Id.* at 742.
73. *Id.* at 743.
74. *Id.* at 745.
75. *Id.*

policy favoring arbitration as a method of resolving labor disputes.[76] He distinguished *Gardner-Denver* because it was based on discrimination in violation of the Civil Rights Act, which is vastly different from the relatively typical and simple wage dispute involved in this case.[77] The Chief Justice argued that this wage claim presented a factual question well suited for disposition by grievance processes and arbitration.[78] He asserted that it increases costs and unnecessarily consumes judicial time to allow one party to an elementary industrial dispute to resort to the federal courts when the parties had already resorted to an established, simplified, and less costly procedure.[79]

Although the majority did not indicate how far its rationale would be carried, a logical extension of the holding in *Barrentine* would allow employees to sue on previously arbitrated claims which involve violation of a protective federal statute.[80] Such extensions should be made on a case by case basis,[81] with the courts balancing the congressional purpose behind the two conflicting policies.[82] The rationale in *Barrentine* should not be limited to federal statutes, but should also be applied to administrative regulations of federal agencies since the agencies are charged with effectuating congressional intent behind such statutes.[83] However, it is doubtful that the ra-

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76. *Id.* at 746 (Burger, C.J., dissenting).

77. *Id.* at 749.

78. *Id.* at 751.

79. *Id.* at 752.

80. In Marshall v. N.L. Indus., Inc., 618 F.2d 1220, 1222-23 (7th Cir. 1980), the court held that giving preclusive effect to an arbitrator's decision would be inconsistent with the statutory purpose behind the Occupational Safety & Health Act (OSHA), 29 U.S.C. §§ 651-678 (1976). *See also* Leone v. Mobil Oil Corp., 523 F.2d 1153 (D.C. Cir. 1975) (OSHA-FLSA); Johnson v. American Airlines, Inc., 487 F. Supp. 1343 (N.D. Tex. 1980) (EEOC-ADEA).

81. "When an employee asserts rights derived from a federal statute, 'the presumption of comprehensiveness of the arbitral remedy is . . . rebutted.' " Tuma v. American Can Co., 373 F. Supp. 218, 229 n.15 (D.N.J. 1974) (quoting U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351, 362 (1971)).

82. Factors which should be considered include (1) the public interest, if any, in the rights being infringed; (2) whether the employee was forced to go through arbitration before pursuing his statutory rights; (3) whether the right can be waived by the employee; (4) whether enforcement of the arbitration award would nullify the purposes of the conflicting statute; and (5) the importance of the right protected, *e.g.*, sex or race discrimination.

83. This is not an argument for blanket application, but for application after undergoing the weighing process discussed *supra* note 82.

In Union de Tronquistas de Puerto Rico Local 901 v. Flagship Hotel Corp., 554 F.2d 8 (1st Cir. 1977), the court was faced with this issue and chose to follow the *Satterwhite* rule. This holding seems to frustrate governmental policy because the administrative agencies are vested with the responsibility of effectuating the governmental purpose behind the statutes.

tionale in *Barrentine* will be extended to allow employees to maintain a similar action under comparable state labor legislation.[84]

Critics may argue that the increasing number of exceptions to the finality of arbitration awards will weaken the national policy of industrial self-government;[85] however, arbitration awards are based on collective bargaining agreements, and the arbitrator does not have authority to invoke substantive law.[86] Therefore, the standard used in ruling on an FLSA claim may necessarily be different than the standard used in considering the same claim brought before an arbitrator under a collective bargaining agreement.[87]

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84. While states are free to legislate in this area, Mitchell v. H.B. Zachry Co., 362 U.S. 310 (1960), they will not be permitted to frustrate the national labor relations policy. *See supra* notes 22-23 and accompanying text.

85. *See supra* notes 45-46 for criticisms of *Gardner-Denver*.

86. Alexander v. Gardner-Denver, 415 U.S. 36, 53 (1974).

87. It is true that the employee does get "two bites at the apple," but this is a necessary cost of protecting individual rights. *See* 1974 LABOR RELATIONS YEARBOOK, *supra* note 46.

The decision in *Barrentine* also prevents unequal treatment for co-employees who decide to file an action in federal court and those who go to arbitration. Since employees do not have to pay for arbitration (the union does), they are more likely to attempt arbitration first. If the dispute is settled under the grievance procedures the employee need go no further, but if the arbitrator decides contrary to the federal statute the employee still has another avenue for relief. This decreases the number of claims going to federal courts and, at the same time, preserves basic protections embodied in the applicable federal statute.