

**A DIALOGUE ON A CONTEMPORARY ISSUE:  
THE *HOOTERS* CASE: A COMMENT**

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**ABSTRACT**

An increasing number of nonunion employees are covered by individual ADR agreements requiring them to arbitrate employment disputes as a substitute for judicial remedies. *Hooters* illustrates what can happen to arbitration in the unorganized sector, where bargaining power between employers and employees is notoriously unbalanced. With proper controls to ensure due process, arbitration could be a welcome final solution for all workforce problems in the unorganized sector.

About 20 years ago, when I first recommended arbitration as a dispute-resolution mechanism for nonunion employees at a meeting of human resource managers in St. Louis, Missouri, a management attorney on the panel laughed at my naivete and suggested that as an arbitrator I might be trying to drum up business for myself and my colleagues. Sometime later, after the procedure was named Alternative Dispute Resolution (ADR), organizations interested in arbitration, as well as the courts, began actively encouraging employers to adopt such a system as a way of avoiding the delay and costs of formal litigation. Today an increasing number of nonunion employees are covered by individual ADR agreements, many signed as a condition of employment, requiring them to arbitrate employment disputes as a substitute for judicial remedies. As Charles Coleman ably pointed out, the *Hooters* case is an example of ADR gone wild [1].

Arbitration of grievances arising under collective bargaining agreements has been standard operating procedure for almost 100 years, but with the built-in checks and balances of the organized labor market. *Hooters* illustrates what can

happen to arbitration in the unorganized sector, where bargaining power between employers and employees is notoriously unbalanced. Under the *Hooters* rubric it is easy to understand why many employers in recent years have experienced a complete about-face in their attitude toward arbitration for nonunion employment disputes [2].

Using arbitration for interpretation of collective bargaining agreements was approved by the U.S. Supreme Court in the 1960s' *Trilogy* cases only because the 1947 Taft-Hartley (Labor Management Relations) Act seemed to require it [3]. Not until *Gilmer* [4] and its progeny in the 1990s, however, did employers begin to take a second look at arbitration for nonunion employees, but then only as a substitute for litigation. The New York Stock Exchange broke new ground when it mandated arbitration for brokers under its jurisdiction. Although it is now voluntary, employment applicants still feel considerable pressure to sign such agreements.

A 1995 report of the U.S. General Accounting Office estimated that nearly all private employers use ADR for discrimination allegations of nonunion employees [5]. But most employers continue to confine arbitration to statutory application because the existence of law-enforcement agencies mandates that complaints of violation be addressed. Without that regulatory incentive, employers tend to avoid arbitration because they equate it with outside interference, akin to unionization without the limitations of a collective bargaining agreement. According to management, it makes good business sense to control the procedure so that it operates to their advantage. *Hooters* says clearly that employers will no longer get away with an unfair process.

*Hooters* is a classic case of an employer's use of superior bargaining power to coerce employees into agreeing to an unfair procedure for resolution of employment disputes. An individual seeking employment is required to sign such an agreement or else lose a job or job opportunity. It has all the elements of a one-sided, ham-handed approach to what should be a voluntary procedure with even-handed rules to assure due process for all parties involved. At the urging of the National Academy of Arbitrators and the labor bar, most arbitrator-appointing agencies have adopted extensive rules for nonunion arbitration generally known as the Due Process Protocol and do not permit an employer to use their administrative facilities unless the nonunion arbitration plan is employee-friendly and fair [6].

If *Hooters* raised the proper issues in connection with employer-promulgated arbitration, it performed a useful service. From a human resource management point of view, with proper controls to ensure due process, arbitration could be a welcome final solution for all workforce problems in the unorganized sector, not merely those alleging law violation [7]. Credibility remains the highest hurdle between employer and employees. Assurance that all grievances may ultimately be resolved by an impartial neutral can bring good faith to resolution of workplace disputes. Employees would be more likely to accept management decisions if they knew that those decisions were subject to scrutiny by an impartial and

knowledgeable outsider. The end result would be enhancement of management credibility and proof of fair dealing toward employees as well as reduction of litigation costs.

### REFERENCES

1. *Annette R. Phillips v. Hooters*, 76 FEP Cases 1757 (S.C.S.C. 1998).
2. Cf. Society for Human Resource Management, *Legal Report*, "Achieving Workplace Justice Through Binding Arbitration," p. 1; "The War in the Workplace Must End, But Arbitration Is Not The Answer," p. 5; Arlington, Va., 1994 (a debate between two management attorneys).
3. *Steelworkers Trilogy*, 363 U.S. 564, 574, 593 (1960).
4. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).
5. United States Government Accounting Office, *Employment Discrimination: Most Employers Use Alternative Dispute Resolution*, GAO/HEHS-95-150, Government Printing Office, Washington, DC, 1995.
6. For a reprint of the Due Process Protocol, see Joyce M. Najita, ed., *Arbitration 1995: New Challenges and Expanding Responsibilities*, Proceedings of the Forty-Eighth Meeting of the National Academy of Arbitrators, BNA: Washington, DC, 1996, pp. 298-304. See also American Arbitration Association, *Guide for Employment Arbitrators*, 1997, New York, NY.
7. Cf. Gladys W. Gruenberg, "Employer-Promulgated Arbitration," *Proceedings of the Spring Meeting*, Industrial Relations Research Association, Madison, WI, 1996, pp. 508-510.

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