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Losing Ground: The Recharacterization of the RLA's Minor Dispute and Solutions to Recapture Lost Claims

M. Scott Barnard

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M. Scott Barnard
EMPLOYMENT LITIGATION over statutory claims, wrongful discharge, and work-related torts causes an enormous burden that is difficult for the American judicial system to support. It is equally difficult for plaintiffs and defendants involved, because litigation is costly and cases can drag on for years before an outcome is reached. This is particularly troubling in the airline industry, where quality and effective transportation mandate a relatively problem-free workplace.

For example, between 1971 and 1993, employment cases filed in federal court have increased by almost 430%. In 1993, the Equal Employment Opportunity Commission (EEOC) received nearly 90,000 discrimination charges, compared with approximately 9000 in 1966. As a result, employers and employees alike are turning to alternatives to litigation, such as arbitration, as a quick and inexpensive means of settling disputes arising in the workplace. Arbitration through the Railway Labor Act system boards has been the standard in the highly unionized air-

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3 Id. See also Corporate Legal Times Roundtable, Catch 22: Informed Legal Employees Sue More Training, ADR Offer Best Hope of Halting Surge in Disputes and Defense Costs, Corp. Legal Times, June 1995, at 34 (Andrew Steinberg, associate general counsel for American Airlines, Inc., stating that the number of discrimination charges filed against American Airlines has at least tripled since 1990).
line industry, but recently employers have concerns about the ability to use arbitration to resolve every employee dispute.\(^5\)

The Railway Labor Act (RLA) is the statute regulating the railroad and airline industries. The RLA authorizes the creation of system boards to resolve minor disputes, that is, disputes between employees and the airlines regarding the interpretation and application of agreements concerning rates of pay, rules, and working conditions.\(^6\) These system boards supposedly have exclusive jurisdiction to resolve minor disputes,\(^7\) but recently, some courts have allowed certain types of claims to escape the arbitral provisions of the RLA and be pursued in court.\(^8\) This is spurred, in part, by judicial concerns about an employee’s right to a judicial forum.\(^9\)

This Comment will discuss the possibility that courts may begin allowing some union employee claims to bypass the arbitral provisions of the RLA and provide some possible solutions to this problem. First, the Comment will give a brief synopsis of the Railway Labor Act, which is the regulatory framework within which employers in the airline industry are required to structure almost all of their union employee agreements. This section will focus on the evolution of the ambiguous phrase “minor dispute,” which is the benchmark to determine if disputes are to be mandated for arbitration under the RLA. This section will also discuss a new willingness by some courts to allow employees to

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\(^9\) Panken et al., *supra* note 7, at 687. “There are judges who view trial before judge and jury as a ‘right’ bestowed by Congress, rather than merely an alternative forum. These judges attempt to find ways around the direction set forth in *Gilmer*.” *Id.* See also Hawaiian Airlines, Inc. v. Norris, 114 S. Ct. 2239, (1994); Felt v. Atchison, Topeka & Santa Fe R.R., 60 F.3d 1416 (9th Cir. 1995); Gay v. Courlon, 60 F.3d 83 (2nd Cir. 1995); Hirras v. National R.R. Passenger Corp., 44 F.3d 278 (5th Cir. 1995); Bates v. Long Island R.R., 997 F.2d 1028 (2nd Cir. 1993).
pursue their claims in court, rather than within the RLA framework.

The Comment’s focus will then shift to potential solutions which will require that all employee disputes be sent to arbitration. The Comment will address the possibility of incorporating federal civil rights statutes and unwritten customs into collective-bargaining agreements as a way to invoke RLA jurisdiction. Finally, the Comment will address the use of mandatory arbitration agreements as a means of recapturing employee disputes determined to be outside the jurisdiction of the RLA. The Comment will explore the benefits of arbitration, modern use of mandatory arbitration agreements, problems modern courts and other groups have had with mandatory arbitration clauses, and precautions employers should adhere to when drafting these agreements.

II. THE RAILWAY LABOR ACT AND JURISDICTION OF THE “MINOR DISPUTE”

Congress passed the RLA as a statutory scheme for final and binding resolution of railroad employee grievances.\(^\text{10}\) The RLA was originally passed only to help regulate the railroad industry, but the fledgling airline industry petitioned Congress in 1936 to include the airline industry under the scope of the Act, since both industries were marked by the use of collective bargaining.\(^\text{11}\) One of Congress’s goals in passing the RLA was to remove a large number of transportation employee causes of action from the judicial forum to avoid interruptions to commerce.\(^\text{12}\) There were concerns that disputes between major labor groups and carriers in the airline or railroad industries could quickly bring transportation to a standstill.\(^\text{13}\)

As a result, the duty to use the RLA’s arbitral provisions is statutory and unconditional, thus eliminating the authority of the courts in connection with the process of contract interpreta-

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tion as much as possible to expedite resolution.\textsuperscript{14} It is clear that Congress did not intend to strip any employees of their rights, but rather to install a program that would resolve disputes faster than courts and with the same or similar results. The RLA mandates arbitration through system boards for what are termed by the Act as "minor disputes."\textsuperscript{15} Airline and railroad industries are required to create these system boards, which typically consist of an equal number of employee and union members.\textsuperscript{16} In the event of a deadlock, the parties may pick an additional neutral member whose decision is binding on both parties.\textsuperscript{17}

The RLA requires that all minor disputes which arise "out of grievances, or out of the interpretation or application of agreements concerning . . . rules, or working conditions" be submitted to final and binding arbitration before system boards set up by either the airline or the railroad.\textsuperscript{18} While the language of the Act was very clear about the quick and final nature of the arbitration through system boards, what was not originally clear was which situations constituted "minor disputes." It was particularly difficult to understand how to apply the RLA framework to the specific categories of employment disputes.

Courts eventually established that adjustment boards were the only tribunals with proper jurisdiction over work-related claims falling under the category of "minor dispute."\textsuperscript{19} Therefore, any cause of action brought in a court or before an administrative


\textsuperscript{15} Id. at 336.

\textsuperscript{16} Id. at 359.

\textsuperscript{17} Id.


\textsuperscript{19} Walker v. Southern Ry. Co., 385 U.S. 196 (1966) (per curiam). The United States Supreme Court held, while interpreting the RLA, that the "[p]rovision for arbitration of a discharge grievance, a minor dispute, is not a matter or voluntary agreement under the RLA; the Act compels parties to arbitrate minor disputes before the National Railroad Adjustment Board established under the Act." \textit{Id.} at 198 (citing Brotherhood of R.R. Trainmen v. Chicago River & Ind. Ry. Co., 353 U.S. 30, 34 (1957)) (emphasis added). This decision reinforced the idea that the system boards maintain exclusive jurisdiction of all minor disputes, including those involving employment disputes. \textit{Id.}
agency would be dismissed for lack of proper subject matter jurisdiction.\textsuperscript{20} The RLA requires employees to use its arbitration provisions for minor disputes in order to realize Congress's intent to avoid gridlock in America's transportation industries.\textsuperscript{21} If employees were given a choice of forum, groups of employees could choose to go to court, knowing that the delay it would cause could give them a strategic bargaining advantage over their employers. This would inevitably cause the possible strikes and work shortages the authors of the RLA had specifically attempted to avoid.

III. THE BROAD INTERPRETATION OF "MINOR DISPUTE"

Essentially, the concept of "minor dispute" serves as a gate to determine the kinds of disputes that are allowed to enter arbitration under the RLA. As a result, determining what factors comprise a minor dispute becomes very important, because the methods and forum of resolution hinge on how the dispute is characterized. Initially, the factors that courts should use to distinguish a "minor dispute" from a normal dispute were elusive, but the definition became more comprehensible over time as different courts announced what situations should be construed as "minor disputes."

A. THE BURLEY COURT'S DEFINITION OF "MINOR DISPUTE"

The Supreme Court first addressed the term "minor dispute" in \textit{Elgin, J. \& E. Railway Co. v. Burley}.\textsuperscript{22} In \textit{Burley}, a group of employees sued the railroad for violating the employees' collective-bargaining agreement, arguing that they were required by the company to put in time that violated specific time allocations within the collective-bargaining agreement. After the Labor Board (a type of system board expressly authorized by the RLA to address the dispute) took up the matter, a great deal of controversy ensued about whether the union, involved on behalf of the workers, had the authority to release individual claims or submit them to the Labor Board. Also, the validity of


\textsuperscript{22} 325 U.S. 711 (1945).
the judgment and conclusive effect of the Labor Board's award, as well as the scope of the Labor Board's authority, was questioned.

The *Burley* Court paved the way for the modern interpretation of the RLA dispute resolution provisions by determining that Congress had "distinguished disputes concerning the making of collective agreements . . . [from] . . . disputes over grievances."23 The Court stated that:

The [minor] dispute relates either to the meaning or proper application of a particular provision [from a collective-bargaining agreement] with reference to a specific situation or to an omitted case. In the later event the claim is founded upon some incident of the employee relation, or an asserted one, independent of those covered by the collective-bargaining agreement, e.g., claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created for the future.24

The *Burley* definition spans a broad range of claims because it seemingly allows for preemption by the RLA for all claims arising from any incident of employment. The language "incident of employment" encompasses such a wide variety of actions, it makes a precise definition difficult at best. Since almost all claims could in some way be tied to "an incident of employment," a great deal of cases were preempted by the mandatory arbitration provisions of the RLA under *Burley*.25

B. THE CONSOLIDATED RAIL COURT'S DEFINITION OF "MINOR DISPUTE"

The definition of the phrase "minor dispute" was further clarified by the Supreme Court in the 1989 case *Consolidated Rail v. Railway Labor Executives Ass'n*.26 In *Consolidated Rail*, the union attempted to secure an injunction against a mandatory drug-testing program that was implemented by the railroad. The

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24 *Burley*, 325 U.S. at 723.
25 Schoolman, supra note 20, at 725. See Majors v. U.S. Air, Inc., 525 F. Supp. 853, 857 (D. Md. 1981) ("So long as [a] claim is founded on some incident of the employment relation, it is immaterial, for purposes of coverage by the [RLA], whether the claim is expressly covered by the collective-bargaining agreement, or is independent of that agreement.") (citing *Burley*, 325 U.S. at 723); Melanson v. United Air Lines, 931 F.2d 558, 564 (9th Cir. 1991).
union contested the program because the collective-bargaining agreement required that this type of action by the railroad be first cleared by union members. Consolidated Rail, attempting to relegate the dispute to the RLA's arbitral provisions, argued that the dispute was minor, because it could be resolved simply by interpreting the existing collective-bargaining agreement. But the plaintiffs contended that the lack of a federal cause of action would rob a party of other remedies that might be afforded by a court of law, but that would essentially be denied by mandatory arbitration.

The Court announced that "[w]here an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties' collective-bargaining agreement. Where, in contrast, the employer's claims are frivolous or obviously insubstantial, the dispute is major."27 The Court ultimately agreed with Consolidated Rail, finding that the dispute was minor because the drug-testing program was justified under the collective-bargaining agreement.28 As a result, the only method by which employees in the airline and railroad industries could reach the judicial forum with a minor dispute were instances in which federal law provided independent grounds upon which the employee could litigate the claim. Consolidated Rail only reinforced the effects of Burley, requiring airline and railroad workers to resolve disputes in the administrative agencies set up by the RLA, if the disputed action was "arguably justified" by the applicable collective-bargaining agreement.29 But the Consolidated Rail case also indicated the Court's willingness to scrutinize collective-bargaining agreements closer to ensure that the RLA is being properly invoked.30

IV. MAJOR REVISION: THE HAWAIIAN AIRLINES COURT'S DEFINITION OF "MINOR DISPUTE"

Airlines and railroads were able to use arbitration effectively under the Burley and Consolidated Rail definitions because virtually all disputes were mandated to RLA arbitration. However, the definition of "minor dispute" suffered a major revision in the Supreme Court's recently decided Hawaiian Airlines v. Nor-

27 Id. at 299.
28 Id. at 320.
29 Campbell & Javits, supra note 6, at 358.
30 Id.
The Court scaled back the kinds of causes of action that could be recaptured under the arbitration provisions of the RLA, making it difficult for airlines to bring all employee disputes in arbitration.

In Hawaiian Airlines, a mechanic was fired after refusing to sign a maintenance log which would have indicated to the Federal Aviation Administration (FAA) that the airplane he was servicing was in need of repair. Norris disagreed with his superiors that the airplane was safe and when he refused to sign a routine safety report, he was fired. Norris then sued the airline in state court for retaliatory discharge in violation of Hawaii's Whistle Blower Protection Act.

Initially, the Hawaiian Supreme Court allowed Norris to bring his claim in state court, bypassing the RLA. When the case was appealed to the United States Supreme Court, attorneys for the airline argued that the Hawaiian Supreme Court decision was basically an attempt to rewrite the plain language of the 1926 Railway Labor Act in the name of public policy, undercutting Congressional intent. But the United States Supreme Court rejected this line of reasoning by the airline that the RLA "requires employees to submit all employment-related claims to arbitration, not litigation." Justice Harry Blackmun wrote that "whether federal law preempts a state law establishing a cause of action is a question of congressional intent... [n]o proposed interpretation demonstrates a clear and manifest congressional purpose to create a regime that broadly preempts substantive protections extended by the [s]tates, independent of any negotiated labor agreement."

During oral argument before the Court, Justice Blackmun was concerned that the only prong of protection Norris could invoke against a wrongful discharge was state law. This would allow the dispute to go to court, because it would involve a violation of rights by an employer, which, in

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53 Clinton Administration Favors Giving Airline Mechanic a Chance at State Remedy, DAILY LAB. REP., Apr. 29, 1994, at D5 [hereinafter Clinton Administration].
55 Hawaiian Airlines, 114 S. Ct. at 2239.
56 Supreme Court Says Railway Labor Act Can't Preempt Tort Suits, LIABILITY Wk., June 27, 1994; see also Mary L. Kandyba, Protecting Railroad Workers with the ADA, TRIAL, Mar. 1, 1995 ("[T]he Court's rejection of the preemption argument on the state tort claims logically compels the conclusion that the railroad worker's rights to pursue a federal law claim under the ADA should not be impeded by the RLA.").
turn, is something the courts would likely have an interest in hearing. This application of the whistle blower statute was con-
doned by the Clinton administration because it seemingly fur-
thered employee rights, directly contradicted the intent of the
RLA to have all minor disputes decided in arbitration to protect
the operation of the nation’s transportation industries.\textsuperscript{37}

The Supreme Court ultimately agreed with Norris, allowing
the mechanic to bypass arbitration and litigate his claim in
court.\textsuperscript{38} This marked a substantial change in the interpretation
of “minor dispute,” because for the first time the Court shifted
from a preference for the Congressionally mandated arbitration
provisions of the RLA and the Federal Arbitration Act to a pref-
ference for employee civil rights.

Where the \textit{Burley} and the \textit{Consolidated Rail} decisions allowed
for any type of employment related cause of action to be classi-
fied as a “minor dispute,” the Court held in \textit{Hawaiian Airlines}
that the language of the RLA mandated that the only claims that
could be preempted from state law were those that could be spe-
cifically tied to the collective-bargaining agreement.\textsuperscript{39} The
Court distinguished the obvious inconsistency of this decision
with the \textit{Burley} case by classifying that Court’s broadly inter-
preted phrase “founded upon some incident of the employment
relationship” as dicta.\textsuperscript{40} The Court in \textit{Hawaiian Airlines}
reasoned that the case in \textit{Burley} only involved the interpretation of
the collective-bargaining agreement and did not directly involve
any causes of action arising outside of the collective-bargaining
agreement.\textsuperscript{41} Any rulings setting standards for claims outside of
a collective-bargaining agreement did not affect the \textit{Burley} case
and were mere dicta.\textsuperscript{42} As a result, the \textit{Hawaiian Airlines} deci-
sion set a new standard restricting preemption by the RLA to
those claims that would require interpretation or application of
an RLA agreement and allowed those claims which could be re-
solved without looking at such a collective-bargaining agree-
ment to go to the judicial forum, bypassing the RLA’a
mandatory arbitration provisions.\textsuperscript{43}

\textsuperscript{37} \textit{Clinton Administration}, \textit{supra} note 33, at D5.
\textsuperscript{38} \textit{Hawaiian Airlines}, 114 S. Ct. at 2251.
\textsuperscript{39} \textit{Id.} at 2244-45.
\textsuperscript{40} \textit{Id.} at 2250 (citing Elgin, Joliet & E. Ry. v. Burley, 325 U.S. 711, 723 (1945)).
\textsuperscript{41} \textit{Id.}
\textsuperscript{42} \textit{Id.}
\textsuperscript{43} \textit{Id.}
This new framework for RLA preemption fashioned in Hawaiian Airlines was partially borrowed from the Court’s previously established method of dealing with cases involving Section 301 of the Labor Management Relations Act (LMRA). The LMRA also preempts state law only in instances where the state law claims are dependent on interpretation of the collective-bargaining agreement. The preemption rules governing the RLA and the LMRA were so similar, that the Court applied the same holding to both acts.

The major result from the Hawaiian Airlines decision is that the “minor dispute” classification will require a fact determination about whether the employment dispute is so intertwined with the collective-bargaining agreement as to invoke the exclusive arbitral jurisdictional provisions of the RLA. However, employers are troubled by the idea that each case will involve a separate fact determination to decide in which forum it should be adjudicated. The time required for this type of fact finding partially negates the efficiency effects of arbitration.

Some critics believe that the Hawaiian Airlines decision will open the floodgates for employees, already protected by collective-bargaining agreements, to bring multi-million dollar tort claims under state and federal law. Further, this litigation explosion will undermine the purpose of the RLA, which is to provide stability and predictability in the vital transportation industry. This also creates concern among airline and railroad employers due to uncertainty about the ability to submit all claims to the system boards for arbitration. The benefits of the RLA’s arbitration provisions will be severely impaired if employees are allowed to recharacterize disputes as claims existing outside the collective-bargaining agreement or to add claims outside the collective-bargaining agreement to their dispute merely to escape arbitration.

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44 Lingle v. Norge Div., Inc., 486 U.S. 399 (1988) (rejecting an employee’s claim in a NLRA case that the state claim prohibiting retaliation after filing a workers’ compensation claim was preempted by § 301 of the LMRA, the Court decided that preemption by the LMRA occurs only when resolution of the dispute involves a direct interpretation of the collective-bargaining agreement).

45 Campbell & Javits, supra note 6, at 364.

46 Roman, supra note 8, at 2C.

47 Brown & Aponte, supra note 5, at 370.

48 Id.
V. RECONFIGURING IN LIGHT OF HAWAIIAN AIRLINES: THE HIRRAS CASE

Before Hawaiian Airlines was decided, the Fifth Circuit Court of Appeals addressed an RLA claim in which a railroad worker brought a Title VII sex discrimination claim against the railroad, alleging a hostile work environment. In that case, Hirras v. National Railroad Passenger Corp., the plaintiff argued she should be allowed to pursue her claim in court because the union waived her individual rights in the collective-bargaining agreement. Ultimately, the case hinged on which standard for employment arbitration the Fifth Circuit would apply. The plaintiff argued that Alexander v. Gardner-Denver Co., one of the early Supreme Court decisions dealing with arbitration in the union setting, controlled.

In Gardner-Denver, the Court held that arbitration provisions did not preclude a federal court discrimination suit that derived its cause of action from Title VII. The Court determined that if arbitration was an employee’s only remedy for violations of his or her civil rights, then a union and employer could act in concert to discriminate without reprieve. Because this violated the congressional intent of the federal civil rights statutes, it was not permitted by the Gardner-Denver Court. The Court said that there were “different tracks for different rights ... statutory or constitutional rights are to be enforced in the courts and contractual rights are to be settled through arbitration.”

The Court in Gardner-Denver relied on four factors when deciding to allow the union employee to pursue her grievance in court. First, the Court believed that arbitrators had neither the experience nor the authority to adjudicate claims involving Title

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49 10 F.3d 1142 (5th Cir. 1994).
50 415 U.S. 36 (1974); see also United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960); United Steelworkers v. American Mfg., 363 U.S. 564, 569 (1960). “The Steelworker Trilogy,” as it is known, was the Supreme Court’s strong endorsement for the use of arbitration within the union setting for claims arising under collective-bargaining agreements. But these decisions have been limited, by many, as having application only to working relationships within the context of a unionized workplace. However, the cases set the trend for a liberal policy from the judicial branch favoring arbitration.
52 Id. at 52.
VII. Second, arbitral fact finding procedures were not believed to be sufficient and, as a result, deprived employees of their federal rights under Title VII. Third, arbitrators had no responsibility to issue a written opinion. And, fourth, the court was concerned about the union’s control over the way that the employee’s grievance was presented to the arbitrator. The general distrust of arbitration displayed by the Court reflected the majority view at the time—that arbitration was not yet a perfect dispute resolution mechanism and, as a result, should be used sparingly.

But the defense in Hirras argued a newer line of cases that reflected a newfound acceptance of arbitration. Since the Gardner-Denver decision, arbitration had made substantial advances and had come to be regarded by the judiciary as a fully acceptable alternative to the courthouse. This faith in arbitration was also acknowledged by Congress when it passed the Federal Arbitration Act, which requires the judiciary to defer to a policy favoring arbitration.

As arbitration began to gain credibility in the legal community, the Supreme Court began to give it more support in its decisions. This is heartily apparent in Gilmer v. Interstate Johnson/Lane Corp., where the Court held that the contractual waiver of the judicial forum was acceptable because there was no loss of substantive rights in arbitration. Another Fifth Circuit case, Alford v. Dean Whitter Reynolds, Inc., continued the policy espoused in Gilmer, extending the enforcement of mandatory arbitration

54 Gardner-Denver, 415 U.S. at 56-57.
55 Id. at 57-58.
56 Id. at 58.
58 Stephen Goldberg et al., Dispute Resolution: Negotiation, Mediation, and Other Processes 211 (2d 1992).
60 500 U.S. 20 (1991). A 62-year-old stockbroker filed a suit under the Americans with Disabilities Act after being fired by his employer. The plaintiff’s New York Stock Exchange registration application stated that he agreed to arbitrate any controversy arising out of the employment or termination of employment. Id. The Court found this agreement to be enforceable and as a result, coupled with the liberal policy favoring arbitration in the Federal Arbitration Act, prohibited the plaintiff from the judicial forum, requiring that the cause be heard in arbitration instead. Id. at 21.
clauses to claims involving sexual harassment.\textsuperscript{61} Some critics argue that the \textit{Gilmer} case virtually overturned the cautious approach to arbitration set forth in the \textit{Gardner-Denver} case and paved the way for stronger enforcement of arbitration agreements between employers and employees.\textsuperscript{62} However, this is not necessarily true, since the cases were decided on different policies.

The \textit{Hirras} court was forced to choose between two radically different interpretations of arbitration. The \textit{Gardner-Denver} case attempted to check the pro-arbitration policies espoused by the Court in the Steelworker Trilogy by deferring to a strong interest in the civil rights of employees and the ability to litigate those claims in the federal forum.\textsuperscript{63} \textit{Gilmer}, on the other hand, relied on the Federal Arbitration Act, which was passed by Congress to implement the use of alternative dispute resolution to help alleviate a backlog of cases in the court system.\textsuperscript{64}

\textsuperscript{61} 939 F.2d 229, 230 (5th Cir. 1991) (The court followed the rationale behind the \textit{Gilmer} decision to enforce a mandatory arbitration clause because of the similarities between the ADEA (dealt with in \textit{Gilmer}) and the Title VII cause of action in the \textit{Alford} case).

\textsuperscript{62} See Evan J. Spelfogel, \textit{Legal and Practical Implications of ADR and Arbitration in Employment Disputes}, 11 Hofstra Lab. L.J. 247 (1993) (stating that several issues are left unanswered in light of \textit{Gilmer}, such as whether the \textit{Gilmer} decision will be extended beyond stockbroker U-4 agreements to apply to employee handbooks, manuals, and applications. The article also addresses the applicability of the \textit{Gilmer} decision to the airline and railroad industries and how the courts are still undecided about how far to extend this new strict enforcement of mandatory arbitration clauses.). \textit{See also Arbitration: Suits Challenge Mandatory Arbitration as Depriving Employees of Their Rights}, \textit{Daily Lab. Rep.}, Mar. 3, 1995, at 3. (Daniel Newland, an attorney with Kauff, McClain \& McGuire in San Francisco, said “What’s ironic is that the reason why the \textit{Gilmer} Court was able to apply the FAA to the employment dispute was because the NASD agreement was not a contract of employment, but a registration agreement, which included a provision to arbitrate employee disputes.”).


\textsuperscript{64} See Paul W. Cane \& Nancy L. Abell, \textit{Employer Interest in Arbitration May be Revived by \textit{Gilmer} Case}, \textit{Nat’l L.J.}, Oct. 7, 1991, at 33. The \textit{Gilmer} court did not specifically come to grips with the issue of the applicability of the FAA to the case, but instead skirted around the issue with different judges applying the FAA in different ways. \textit{Id.} Two dissenting judges believed that the FAA did not apply to any employment-related disputes between employers and employees in general. \textit{Id.} The majority did not address the issue because it was not filed in a timely manner. \textit{Id.} The majority relied primarily on the fact that the ADEA would not be hindered by having its cause of action arbitrated, and the arbitration procedure was determined to be fair. \textit{Id.}
The Hirras court ultimately chose to rely on Gilmer and Alford, instead of Gardner-Denver, finding there were no federal or Congressional policies which prohibited contracting discrimination claims to arbitration.65 The Hirras Court followed the trend of pro-arbitration cases and reaffirmed the validity of arbitration as a successful and fair means of resolving disputes. The Court also determined that the dispute could be characterized as a "minor dispute" under the RLA and, as a result, was required to be arbitrated.66

The Court cited four reasons why it would not follow the plaintiff's argument that the Alexander line of cases was controlling: (1) this line of cases did not address the issue of whether the RLA requires arbitration of an airline or railroad employee's Title VII claim that arises out of the conditions experienced in the workplace; (2) "there is no statutory barrier to submitting [to the RLA arbitration boards'] questions involving the interpretation of statutes or case law,"67 (3) the RLA guarantees the right that the claim will be heard before [RLA arbitration boards],68 and (4) the RLA (like the Federal Arbitration Act) reflects a liberal policy favoring arbitration.69 For all of these reasons, the Court upheld the district court's dismissal of Hirras' claim for lack of subject matter jurisdiction because the RLA preempted her grievance.70

The Court made its "minor dispute" determination through facts that linked the grievance to the workplace and, applying the definition produced in Burley, determined that the cause of action was a "minor dispute" because it was "founded upon some incident of the employment relationship . . . independent of those covered by the collective [bargaining] agreement, e.g. claims on account of personal injuries."71

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66 Id. at 1149.
67 Id. at 1147 (citing Richmond, F. & P. R.R. v. Transp. Communications Int'l Union, 973 F. 2d 276, 279 (4th Cir. 1992)).
69 Hirras, 10 F.3d at 1147-48.
70 Id.
71 Id. (citing Burley, 325 U.S. at 723; Morales v. Southern Pac. Transp. Co., 894 F.2d 743, 745 (5th Cir. 1990)) (stating that claims "which grow out of the employment relationship can constitute 'minor disputes' under the Act, even when the claims do not arise directly from the collective-bargaining agreement"); Calvert v. Trans World Airlines, 959 F.2d 698 (8th Cir. 1992) (concluding that the RLA preempted an intentional infliction of emotional distress claim).
When Hirras appealed to the Supreme Court, the *Hawaiian Airlines* decision had just been handed down, redefining the important definition of "minor dispute" for the RLA.\(^{72}\) As a result, Hirras's case was remanded by the Supreme Court to the Fifth Circuit for further consideration in light of the *Hawaiian Airlines* decision.\(^{73}\) The Fifth Circuit did an about face in its ruling in *Hirras* due to the Supreme Court's modification of "minor dispute." The *Hirras* court stated that "[t]he terms of the [collective-bargaining agreement] at issue in this case are not relevant to the resolution of Hirras's claims because the collective-bargaining agreement contains no provision related to sexual harassment, much less any provision that could be interpreted to give Amtrak the right to accommodate sexual harassment or Hirras the right to work in a non-hostile environment."\(^{74}\)

In the *Hirras* court's first ruling, the court mentioned in a footnote that the issue was not whether the RLA preempts Title VII, but rather how to accommodate the interests that underlie the RLA and Title VII.\(^{75}\) The court was placed in a difficult position because both the arbitral provisions of the RLA and statutory civil right protections have valid justifications, but their policies seem to collide head on. Title VII was passed to specifically protect individual employee rights. By allowing the employer to manipulate the means by which employees could bring their civil rights claims, the employer could theoretically hinder the fairness of the adjudication.

Additionally, the court realized that the federal government is concerned with protecting employees who are perceived to be in an unequal bargaining position in the workplace. Critics quickly point out the irony that the government tells employees how concerned it is with their civil rights, but then turns around and allows the employer to proscribe the forum in which the employee must have his dispute heard.\(^{76}\)

But as this happens, the effectiveness of the RLA's arbitration provisions deteriorate because employers cannot rely on the sys-


\(^{73}\) *Hirras*, 10 F.3d at 1142.

\(^{74}\) 44 F.3d 278, 283-84 (5th Cir. 1995).


\(^{76}\) See, e.g., Joseph Z. Fleming, *Grievances and Arbitration for the Organized Employer*, ALI-ABA COURSE OF STUDY: BASIC EMPLOYMENT & LAB. L. IN DEPTH, July 8, 1996, at 437, 443 ("individual rights are eclipsing collective rights").
tem boards to handle all cases. Courts are faced with protecting individual rights without destroying the arbitration system. Apparent.

Apparently between these two competing policies, the Hawaiian Airlines decision announced a new preference for an employee's right to a judicial forum that courts, like the one that decided Hirras, are required to follow. This creates a dangerous trend because it invites interruption to the airline industry by submitting the airlines to "costly, protracted lawsuits and to inconsistent and often contradictory obligations." The new trend in Hawaiian Airlines provides airline employees the opportunity to bypass the arbitral mechanisms of the RLA and reap virtually unlimited tort damages by labeling their claims as something other than a breach of contract, even if the same facts would support that the claim should be preempted.

VI. CONTINUED CHANGE: THE FELT CASE

Another example of the corrosion of the RLA's arbitration provisions occurred in the recent case of Felt v. Atchinson, Topeka & Santa Fe Railway Co. In Felt, the Ninth Circuit made the first post-Hawaiian Airlines RLA mandatory arbitration ruling, deciding that Title VII claims were not required to be subjected to the arbitral mechanisms of the RLA. The Felt case involved a railroad clerical employee who was laid off in 1983 after working at the railroad for twelve years. As part of his membership into the union, Felt was given protective pay during the periods he was not employed on the condition that he would be able to work temporary assignments as they became available. A position became available for Felt, but it required him to work on Saturdays, which was forbidden by his religion. Instead, Felt worked at the position on a temporary basis, switching with other employees to work for him on Saturdays. When the position became available permanently, Felt was forced to turn it down because of his religious beliefs. As a result, Felt lost both his protected pay and his severance pay when his office in Los Angeles was closed in 1987.

Initially, the district court properly dismissed the claim because it fell under the previous definition of "minor dispute,"

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77 Coleman & Coleman, supra note 53, at 58.
78 Brown & Aponte, supra note 5, at 378.
79 Id.
80 60 F.3d 1416 (9th Cir. 1995).
81 Id.
82 Id. at 1418.
and was, therefore, preempted by the RLA.\textsuperscript{83} However, in light of the \textit{Hawaiian Airlines} decision, the court was forced to reconsider whether Felt's cause of action constituted a "minor dispute."\textsuperscript{84}

The court held that Title VII rights existed independently of Felt's collective-bargaining agreement.\textsuperscript{85} As a result, they did not fall under the \textit{Hawaiian Airlines} definition of "minor dispute," although it would have fallen under the definition espoused in \textit{Burley} and \textit{Consolidated Rail}.\textsuperscript{86} The court also relied on its previous ruling in \textit{Prudential Ins. Co. v. Lai}, in which the court held that a Title VII plaintiff may be required to arbitrate her claims only if "she [or he] has knowingly agreed to submit such claims to arbitration."\textsuperscript{87}

The \textit{Lai} case brought a great deal of attention to the concept of a "knowing waiver" of the right to a judicial forum, without much guidance. Knowing waivers become important because if airline employers realize that certain causes of action are able to escape the arbitral provisions of the RLA, then mandatory arbitration agreements can be used to recapture these types of claims. But these types of agreements would likely only be enforceable upon evidence of a knowing waiver on the part of the employee.\textsuperscript{88}

\textbf{VII. INCONSISTENT RESULTS: THE BATES CASE}

Another departure from the pro-arbitration policies of the RLA took place in the Second Circuit case of \textit{Bates v. Long Island Railroad, Co.}\textsuperscript{89} In \textit{Bates}, former employees of Long Island Railroad brought action against their employer under the Rehabilitation Act of 1973 for wrongful termination because of their respective disabilities, without attempting to reasonably accom-

\textsuperscript{83} Id.

\textsuperscript{84} Id.

\textsuperscript{85} Id. at 1419-20.

\textsuperscript{86} Id.

\textsuperscript{87} Id. (citing Prudential Ins. Co. v. Lai, 42 F.3d 1299, 1305 (9th Cir. 1994)) ("Congress intended there to be at least a knowing agreement to arbitrate employment disputes before an employee may be deemed to have waived the comprehensive statutory rights, remedies, and procedural protections prescribed in Title VII"); see also Michael A. Faillace, \textit{Recent Developments Under Title VII and Section 1981}, 547 PLI/Lit. 331, 392 (1996) (demonstrating that employees cannot be deemed to have waived their statutory rights under Title VII unless there is a knowing agreement to arbitrate such employee disputes).

\textsuperscript{88} See discussion Part IX, A infra.

\textsuperscript{89} Bates v. Long Island R.R., 997 F.2d 1028 (2nd Cir. 1993).
The primary issue on appeal was whether the district court had subject matter jurisdiction over the case, or whether the case was preempted under the definition of “minor dispute” under the RLA.\textsuperscript{91} The court in \textit{Bates} determined that \textit{Gilmer} relied on the Federal Arbitration Act’s liberal policy favoring arbitration when determining that \textit{Gilmer}’s statutory civil rights claim was subject to arbitration.\textsuperscript{92} However, the Second Circuit distinguished this case from \textit{Gilmer} by explaining that \textit{Gilmer} was decided under the Federal Arbitration Act, and the Federal Arbitration Act specifically excludes railroad and airline employees, such as the employees in \textit{Bates}.\textsuperscript{93} The court further distinguished the two cases by pointing out that \textit{Bates} involved a collective-bargaining agreement, while \textit{Gilmer} did not.\textsuperscript{94}

The \textit{Bates} court relied on the \textit{Gardner-Denver} line of cases to hold that the arbitral forum may be inappropriate in some instances, such as this case, to protect the rights of the employees.\textsuperscript{95} This ruling was made in spite of the fact that there were portions of the plaintiff’s allegations that could require the interpretation or application of the collective-bargaining agreement in order for the dispute to be properly resolved.\textsuperscript{96} Thus, \	extit{Bates} rekindled the dying flames of \textit{Alexander} that seemed to have been all but extinguished by \textit{Gilmer} and its progeny. More directly than the \textit{Hawaiian Airlines} decision, the \textit{Bates} decision demonstrates a willingness by some courts to put the rights of individuals above the Congressional intent and purpose behind the RLA. \textit{Bates} reasserts the importance of employee rights and injects a volatile variable into the mix, and makes it difficult for employers to gauge how the courts stand on RLA preemption of minor disputes, and uncertain whether to rely on the RLA as an effective tool for arbitration.

\textsuperscript{90} \textit{Id.} at 1030.
\textsuperscript{91} \textit{Id.} at 1034.
\textsuperscript{92} \textit{Id.} at 1033-34.
\textsuperscript{93} \textit{Id.} at 1034.
\textsuperscript{94} \textit{Id.}
\textsuperscript{95} \textit{Id.} at 1033-34 (citing Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 735 (1981)) (“[W]hen an employee’s statutory civil rights have been violated, arbitration should not be the sole avenue of protection, unless Congress has so specified.”); \textit{Gardner-Denver}, 415 U.S. at 53-54, 59-60 (1974) (“[A]rbitration is an inappropriate forum for the final resolution of civil rights claims.”).
VIII. SOLUTIONS TO RECAPTURE DISPUTES TO ARBITRATION

Decisions such as Hawaiian Airlines, Burley, and Hirras create uncertainty for airline employers about the ability of the RLA arbitration procedures to dispose of all employee disputes. As a result, employers are forced to turn to alternatives in hopes of recapturing any employee disputes that courts may allow to escape the RLA. Three possible alternatives for employers include (1) incorporating federal civil rights into the collective-bargaining agreement, (2) using unwritten customs and procedures to capture claims, and (3) implementing mandatory arbitration agreements to cover any claims that might be outside the jurisdiction of the RLA.

A. INCORPORATING FEDERAL CIVIL RIGHTS STATUTES INTO THE COLLECTIVE-BARGAINING AGREEMENT

In Felt, the collective-bargaining agreement stated that work rules would be applied in compliance with federal statutes, but there was no specific agreement in the collective-bargaining agreement to arbitrate Title VII disputes. It seemed that the court might have forced Felt to arbitrate his claims if the collective-bargaining agreement had specifically discussed civil rights statutes (perhaps by including them in their entirety) and ordered that such claims should be arbitrated under the provisions of the agreement. Employers could possibly rein in these claims by incorporating federal civil rights statutes into the collective-bargaining agreements, making claims brought under their theories subject to the mandatory arbitration provisions of the RLA.

First, some critics might argue that courts are already distraught at the fate of employees' rights at the hands of mandatory arbitration clauses, and that incorporation of the civil rights statutes into the agreements will not be any different. However, when civil right statutes are integrated into the collective-bargaining agreement, the employee becomes aware of the specific rights that will be subject to the arbitration provisions of the RLA. When the employee agrees to the collective-bargaining agreement, this becomes a waiver of the judicial forum, as long as the employee agrees to the collective-bargaining agreement without duress and with full knowledge of the facts and

97 Felt v. Atchison, Topeka & Santa Fe Ry. Co., 60 F.3d 1416 (9th Cir. 1995).
consequences of being relegated to an arbitral forum for disputes. Employers would have to demonstrate that the risks associated with waiving a judicial forum were explained to the employee and that the employee determined he would be satisfied resolving disputes through arbitration. While it is uncertain whether the use of the collective-bargaining agreement in this manner will meet the knowing waiver test required by Lai, it will likely suffice since there will be direct evidence that the employee was shown the rights and kinds of claims that would be mandated when signing the collective-bargaining agreement.

Second, incorporation of civil rights statutes into an agreement shows good faith on the part of the employer and indicates a desire for employees and employers at all levels to be aware of the law and to abide by it. While the employees and employer are obviously bound by federal law, the regulations take on a special meaning when they become part of the official company policy. But the employer may have difficulty actually proving the degree of knowledge an employee had, especially if a union acts as the employee’s agent.

B. A Backdoor for Recapturing Claims: Unwritten Customs and Procedures

Hawaiian Airlines, as well as Burley, discussed that there are certain unwritten customs and procedures that could be categorized as minor disputes under the RLA. This portion of the Hawaiian Airlines decision acts as a conduit, capturing a wide range of claims arising out of the workplace and, in effect, reinstating the basic language of Burley, albeit through different means.

Unwritten customs can be implemented to expand the scope of RLA preemption into the arena of federal civil rights. When employees bring claims, such as those under Title VII and the ADA, employers could capture the claim under the arbitra-

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100 Hawaiian Airlines v. Norris, 114 S. Ct. 2239 (citing RLEA v. Norfolk & W., 833 F.2d 700, 704-05 (7th Cir. 1987) ("[I]t is common practice to omit from written [RA] agreements non-essential practices that are acceptable to both parties." The dispute is "minor" if it arises from "implied" job conditions.)); Elgin, Joliet & E. Ry. Co. v. Burley, 325 U.S. 711 (1945).
101 Panken et al., supra note 7, at 681.
102 Schoolman, supra note 20, at 727.
tion provisions of the RLA by demonstrating the claim's association to the workplace. Because most of these claims occur in the workplace setting and are in violation of unwritten "norms" of accepted behavior (such as discrimination), companies could argue that these claims require arbitration.

However, because federal statutory rights are involved, courts have been reluctant to immediately deny plaintiffs access to the judicial forum without evidence that a knowing waiver took place, either by the individual or within the employment contract resulting from collective bargaining. Still, the unwritten norms of the workplace is one more method by which disputes could be characterized as within the employment context and brought under the arbitral provisions of the RLA.

C. MANDATORY ARBITRATION

1. The Benefits of Arbitration in the Workplace

The most promising method of recapturing claims, which courts deem outside the jurisdiction of the RLA, appears to be through the use of mandatory arbitration agreements. This type of commercial arbitration is different from the system board form of arbitration used in the RLA, because in the commercial form, the claimant conducts his or her own representation before the arbitrator. The individual in commercial arbitration may assert individual statutory rights in arbitration, free from concerns that may accompany union representation in the collective-bargaining context. This would eliminate some of the concerns courts have voiced about the use of RLA arbitration for civil rights.

The arguments favoring arbitration are overwhelming. In 1993, the accounting firm of Deloitte & Touche conducted a survey of 246 corporate attorneys from Fortune 1000 companies, which found that of the firms that had used arbitration, sixty-seven percent found a savings over the expense that would have been incurred in litigation. The firms that saved by using arbitration reported savings between eleven and fifty percent over

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103 Id.
105 Id.
106 Panken et al., supra note 7.
litigation. By effectively using mandatory arbitration to reduce legal expenses and having all disputes settled through some sort of arbitration (either RLA or otherwise), an airline can price its product more competitively, resulting in lower ticket prices for consumers.

Unions have been implementing mandatory arbitration for decades and are strong supporters of its use. The Air Line Pilots Association (ALPA) is a heavy user of mandatory arbitration, with between 300 and 500 grievances submitted to binding arbitration each year. The ALPA uses arbitration for the same reasons that the use of arbitration has increased nationwide: time and cost savings over expenses normally associated with protracted litigation. In addition to these two primary benefits, arbitration provides several other benefits to airlines.

One benefit is that the arbitration hearing is private, and the arbitrator’s award is usually confidential, unless the parties agree otherwise. This helps employers keep settlement figures and statistics confidential from the general public. The concern of employers is that if certain individuals were to find out about settlements given to dismiss employee suits or judgments received at trial, it might demonstrate that the employer is vulnerable, prompting certain employees to file similar suits in hopes of cashing in on a large settlement or jury award.

Another benefit to the employers is that today’s arbitrators are usually individuals who understand both the law and the dynamics of the workplace. Often times, a judge may not have had any experience within the workplace, especially one as de-

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110 Id. *See also* Corporate Legal Times Roundtable, *supra* note 3, at 34 (Andrew Steinberg, general counsel of American Airlines, stating that he “firmly believes that alternative dispute resolution is the wave of the future and the only acceptable means of resolving the huge number of employment claims out there”).


manding and safety intensive as the airline industry.\textsuperscript{114} As a result, the judge most likely will be unknowledgeable as to some of the complexities of the job and may inadvertently take a pro-employee slant in deciding the case.\textsuperscript{115} In contrast, an arbitrator will often have experience in the workplace, and, possibly, in the airline industry itself. With knowledge of both sides of the equation, arbitrators are better suited to reach an acceptable compromise that will benefit both employee and employer.

Another advantage an arbitrator has over a judge is that an arbitrator often only decides cases within a particular field.\textsuperscript{116} Arbitrators will usually be very experienced in a particular area of the law because they have decided several similar types of cases. This is different from judges, whose dockets usually involve a multitude of cases spanning the legal spectrum.\textsuperscript{117} A judge may not have the high degree of experience deciding matters in the complicated area of employment law, particularly airline employment law with its mixed union and non-union make-up. Employment law is a very specialized, technical field that is often times difficult to grasp. A judge having little or no experience with employment cases may not follow the requirements of the law in a particular case, but instead does what he or she feels is right, without taking into proper consideration the intent of Congress.

A final advantage an arbitrator has over a judge is that, at the state level, where judges are elected, a judge may feel pressure

\textsuperscript{114} Garry G. Mathiason & Pavneet S. Uppal, \textit{Evaluating and Using Employer-Initiated Arbitration Policies and Agreements: Preparing the Workplace for the Twenty-First Century}, 1994 ABA/ALI COURSE OF STUDY: EMPLOYMENT DISCRIMINATION \& CIV. RTS. ACTIONS IN FED. AND ST. CTS. 875, 879; see also Corporate Legal Times Roundtable, \textit{supra} note 3, at 34 (Andrew Steinberg, general counsel of American Airlines, stating that "airline safety is our paramount goal, [and] we have a fairly rigorous medical examination process that results in disqualifying people from safety-sensitive positions—whether it's the pilots, flight attendants or even ground service personnel coming into contact with aircraft. That has resulted in a large number of claims under the ADA. We have opposed those cases vigorously because it is really part of our safety program.").

\textsuperscript{115} \textit{Supreme Court Allows Fired Worker to Sue Airline in State Court}, \textit{Aviation Daily}, June 21, 1994, at 463 (reporting that the Air Transport Association was displeased with a recent Supreme Court case allowing an employee to escape the arbitral provisions of the RLA and sue in state court, and stating “[w]e had hoped the court would be more sensitive to the burdens placed on carriers by the multitude of state laws addressing discharge issues and the need for uniformity in employment relationships in the aviation and rail industries”).

\textsuperscript{116} Mathiason & Uppal, \textit{supra} note 114, at 879.

from employment rights groups or corporations that the judge’s handling of a particular case may affect the judge’s prospects for reelection.\textsuperscript{118} Such pressure may cause a judge to ignore the law and rule in a manner that best serves his re-election needs. With arbitration, the arbitrator has no such pressure because he is usually picked through the consent of both parties. It is in the arbitrator’s best interest to be fair, because if he clearly favors one side over the other, it could affect his reputation within the legal community as an acceptable arbitrator.

Also, an arbitrator can be a better alternative than a jury trial because juries may hold biases that invalidate decisions. A majority of jurors are employees rather than employers, and as a result, will be more inclined to align themselves with the employee’s position in a dispute. Given an opportunity through jury duty to rectify any perceived inequities between worker and boss, jurors will often penalize what they believe to be “deep pockets” of the employer.\textsuperscript{119}

Finally, an arbitration decision is very difficult to appeal and can only be vacated on very narrow grounds.\textsuperscript{120} This is beneficial in two ways. First, the finality of the decision is not postponed while the lawyers battle through round after round of appeals until all appeals are exhausted. The decision is virtually irrefutable, allowing both sides to put the dispute behind them and go on with their lives, rather than suffer a prolonged appeal process that could drag on for years. Second, this provides both parties with financial savings which otherwise would have been applied to attorneys’ fees as the dispute waged on through the various appeals.

The above benefits of commercial arbitration appear to provide an adequate solution, allowing the employer to recapture employment disputes which courts are allowing to escape the arbitration provisions of the RLA.

2. \textit{Concerns that Mandatory Arbitration Debases Individual Rights}

In some cases, however, courts have been reluctant to enforce mandatory arbitration clauses that restrict potential plaintiffs from the judicial forum because individual civil liberties are in-

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\textsuperscript{120} Mathiason & Uppal, \textit{supra} note 114, at 880.
volved—the same reasons courts have allowed some employee disputes to be pursued outside the framework of the RLA.\textsuperscript{121} This is especially true in cases where statutory claims, such as Title VII or the ADA, are the employees' cause of action.\textsuperscript{122} The competing policies surrounding arbitration make deciding which interests are more important difficult for courts.\textsuperscript{123}

While many labor and employment advocacy groups support the use of arbitration as a quick and efficient method of dispute resolution, many of the same groups condemn the use of \textit{mandatory} arbitration clauses because the groups think it eliminates the employees' choice of forum.\textsuperscript{124} These groups believe employees should possess a choice of judicial forum if the employee decides it will be more fair for one reason or another.\textsuperscript{125} The importance placed on this choice is not an endorsement or condemnation of one system or another, but merely an affirmation of allowing the employee, normally perceived to be in an


\textsuperscript{122} See EEOC v. River Oaks Imaging & Diagnostic, 63 U.S.L.W. 2733 (S.D. Tex. 1995). The defendant was found to be using a mandatory arbitration policy to retaliate against employees in violation of Title VII. The court determined that River Oaks Imaging was barred from implementing a policy that required employees to submit all claims to alternative dispute resolution as a condition of employment. \textit{Id.} This case, however, does not necessarily set a precedent against mandatory arbitration, but rather the use of mandatory arbitration clauses as a \textit{retaliatory} measure against employees. \textit{Id.} As a result, the enforcement of mandatory arbitration clauses still remains largely undecided in the employment context. \textit{Id.} This broad challenge to mandatory binding arbitration agreements demonstrates the current opposition arising regarding the ADR process. Giovagnoli, \textit{supra} note 111, at 571.


\textsuperscript{124} The EEOC issued a policy condemning the use of mandatory arbitration because it "shut[s] off the employee's access to the EEOC" which was deemed to be "unfair". David E. Rovella, \textit{EEOC Says No to Forced Arbitration, But Policy May Backfire by Increasing the Agency's Backing}, \textit{NAT'L L.J.}, June 5, 1995, at B1. \textit{See also Dunlop Commission: Panel Strongly Endorses the Use of ADR, But Opposes Mandatory Arbitration}, \textit{DAILY LAB. REP.}, Jan. 10, 1995, at D4. The Dunlop Commission, a ten-member panel headed by former Secretary of Labor John Dunlop, was charged with examining the best methods of dealing with workplace disputes. \textit{Id.} The panel's conclusion was that arbitration and alternative dispute resolution are efficient methods of resolving workplace disputes, but that mandatory arbitration goes too far because it strips employees of the right to choose in which forum they would like to have the dispute decided. \textit{Id.} The panel apparently believes the right to a courtroom trial is a natural right belonging to the employee that can only be extinguished through a knowing waiver. \textit{Id.}

unequal bargaining position with the employer, to wield some power by deciding the forum for the dispute. The EEOC states that the use of mandatory arbitration as a condition of employment is unfair because it severely limits employee access to the benefits of the agency. Some believe that this stance by the EEOC indicates that they are willing to sue any employer implementing a mandatory arbitration policy on behalf of the employee. While the EEOC has begun to implement this new anti-mandatory arbitration policy, it has yet to apply it to the railroad and airline industries. The EEOC has relied on the Gardner-Denver line of cases when making its point in court, which is similar to the arguments made by the plaintiff in Hirras v. Amtrak, and discrediting the Gilmer line of cases as robbing employees of their judicial rights. The EEOC has argued, however, that, with civil rights statutes, Congress did not intend for discrimination claims to be dismissed "if an employee fails to pursue arbitration."

The EEOC is not the only governmental group that seems to be concerned with mandatory arbitration. Federal agencies such as the General Accounting Office and the Office of Federal Contract Compliance Programs are presently exploring possibilities and conducting studies which should put the validity and fairness of mandatory arbitration clauses in doubt. These organizations' public anti-mandatory arbitration stance adds to the uncertainty of using mandatory arbitration, which has an inhibiting effect on employers who are hesitant to adopt such clauses for fear of the consequences.

3. Judicial Acceptance of Mandatory Arbitration

Recent decisions like Gilmer and its progeny have paved the way for the use of mandatory arbitration clauses by employers through endorsements of its use. In Gilmer, the Court reversed the distrust of arbitration in Gardner-Denver and its progeny, rely-

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126 Abrams, supra note 104, at 561.
127 Rovella, supra note 124, at B1.
128 Id.
129 EEOC Argues That Sex, Disability Claims Are Not Subject to Mandatory Arbitration, DAILY LAB. REP., July 21, 1994, at D5.
130 Id. (stressing that Congress did not mean that arbitration was the only method by which an aggrieved employee could pursue a discrimination cause of action).
ing instead on the Federal Arbitration Act and its liberal policy favoring arbitration. Since *Gilmer*, many employers have begun to enforce mandatory arbitration policies against their employees.

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Supreme Court decided that statutory rights may be the subject of an arbitration agreement, enforceable pursuant to the Federal Arbitration Act: "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; [instead,] it only submits to their resolution in an arbitral, rather than a judicial, forum."

Also spurring an increased use of mandatory arbitration clauses are the civil rights statutes, such as Title VII, the ADA, the Family and Medical Leave Act, and others which contain language reflecting a liberal policy towards the use of arbitration. For example, the Civil Rights Act of 1991 encourages arbitration when it states: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini-trials and arbitration is encouraged to resolve disputes arising under the Acts or provisions of Federal laws amended by this title."

With so many competing variables, it becomes increasingly urgent that employers in the airline industry know the boundaries of applying mandatory arbitration so that this effective alternative can retain its value. Despite this apparent endorsement by the judiciary and Congress, the enforcement of mandatory arbitration clauses is a battle that is still being waged.

4. Congressional Intent Concerning Arbitration in Civil Rights Statutes

Some critics attempt to overcome the pro-arbitration policy written into the civil rights statutes by arguing that the legislative history of both the new Civil Rights Act and the ADA indicates that the use of ADR is supposed to "supplement rather than sup-

132 See Coleman & Coleman, supra note 53, at 52. See also supra notes 60-71 and accompanying text.
135 Id.
As an example, critics often cite Senator Dole's remarks made during the debate over the passage of the Civil Rights Act of 1991 and the arbitration provisions therein which encouraged arbitration. Senator Dole stated that arbitration should be used only "where the parties knowingly and voluntarily elect to use these methods." This statement, however, seems to allow mandatory arbitration in cases where consent to such a provision is given knowingly by the employee. An employee can voluntarily and knowingly submit him or herself to a mandatory arbitration provision in an employment contract and will still be acting in the spirit of Senator Dole's comments.

Also worth noting is Representative Edward's statement that the arbitration provision in the Civil Rights Act is intended to be consistent with decisions such as Alexander v. Gardner-Denver Co., . . . which protects employees from being required to agree in advance to arbitrate disputes under Title VII and to refrain from exercising their right to seek relief under Title VII itself. . . . [n]o approval whatsoever is intended of the Supreme Court's recent decision in Gilber [sic] v. Interstate Johnson Lane Corp. . . . or any application or extension of it to Title VII. This statement condemning the policies behind the Gilmer case is clear-cut and seems to leave no room for misinterpretation. However, when there is unambiguous language in a statute that conflicts with subsequent legislative history, the unambiguous language of the statute will be found controlling by the courts. Despite the legislative intent of Representative Edwards, the arbitration provisions in the civil rights statutes specifically allow employers and employees to execute contracts that bind them to arbitration in all disputes, including those disputes involving federal civil rights.

5. Congressional Attempts to Prohibit Mandatory Arbitration

Some members of Congress have acknowledged that the federal statutes' liberal policy towards arbitration may permit mandatory arbitration clauses as a condition of employment and have attempted to counter this by introducing two bills in the

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136 Panken et al., supra note 7, at 691.
139 See Panken et al., supra note 7, at 690.
House and the Senate prohibiting mandatory arbitration. In the House, three representatives, Representative Patricia Schroeder (D-Colo.), Representative Edward Markey (D-Mass.), and Representative Marjorie Margolies-Mezvinsky (D-Pa.), have sponsored a bill which would reverse the landmark case of *Gilmer v. Interstate/Johnson Lane Corp.* by prohibiting any anti-discrimination law “to be overridden by contract, other federal statutes of general applicability, or by any other means.”

The bill is intended to close the loophole opened by *Gilmer* that Representative Schroeder says allowed employees to “give up rights at the time of hire.” The bill arose out of concerns about the use of mandatory arbitration clauses in the securities industry, but would apply to all employers that are regulated by federal anti-discrimination laws.

A similar bill was introduced in the Senate by Senator Russell Feingold (D-Wis.). Referring to the Supreme Court’s *Gilmer* decision, Senator Feingold told the Senate floor, “Employers can tell current and prospective employees, ‘if you want to work for us, you’ll have to check your rights at the door.’ This practice must be stopped now.” This legislation would specifically amend several federal anti-discrimination laws, including Title VII, the Age Discrimination in Employment Act (ADEA), the ADA, and the Rehabilitation Act of 1973 to prohibit mandatory arbitration of claims. Neither bill would prohibit employees from voluntarily submitting to arbitration clauses with their employers.

Senator Feingold’s concern is that mandatory use of arbitration policies by employers will erode the individual liberties of citizens who use the courts to secure their right to equal opportunity for employment. The flaw is this argument is that it assumes arbitration will be an inadequate forum to protect employee rights. The evidence proves otherwise. Arbitration has been proven to be an adequate alternative to the judicial

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141 *Id.*

142 *Id.*


144 *Id.*

145 *Id.*

146 *Id.*

147 Panken et al., *supra* note 7, at 681.

148 *Id.* at 687.
forum, even superior in some ways such as the time it takes to complete and the cost involved. Therefore, the argument that an employee is being deprived of his civil rights simply because he is being required to argue in arbitration is without merit. In the case of Shearson/American Express, Inc. v. McMahon,\textsuperscript{149} the Supreme Court explained its belief in the fairness of arbitration, stating that

the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights . . . there is no reason to assume at the outset that arbitrators will not follow the law; although the judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute.\textsuperscript{150}

Arbitration will not be struck down by the courts simply because of an amorphous suspicion that arbitration will be somehow unable to protect the rights of workers.\textsuperscript{151}

6. Interest Groups Lobby to Ban Mandatory Arbitration

Some attorneys have also expressed a strong disapproval of mandatory arbitration clauses because of the perceived sacrifice of employee rights accompanying such a provision. For instance, two recent cases in San Francisco are challenging the fairness of mandatory arbitration.\textsuperscript{152} Cliff Palefsky, a partner with McGuinn, Hillsman & Palefsky, represents the plaintiff in one of the cases. He stated that mandatory arbitration programs are being instigated because defendants "get better results from arbitrators than from jurors."\textsuperscript{153} Palefsky believes that mandatory arbitration is akin to stealing people's rights because "[a]rbitration is not a justice system," but an attempt at a quick finality.\textsuperscript{154}

Other attorneys involved in the arbitration process are quick to disagree, citing new rules proposed by the American Arbitration Association that will mirror a court's approach to applying the law. Kirby Wilcox, a partner at San Francisco's Morrison &

\textsuperscript{149} 482 U.S. 220, 232 (1987).
\textsuperscript{150} Id.
\textsuperscript{151} STEPHEN B. GOLDBERG ET. AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 211 (1992).
\textsuperscript{152} Arbitration: Suits Challenge Mandatory Arbitration as Depriving Employees of Their Rights, DAILY LAB. REP., Mar. 3, 1995, at D28.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
Foester, believes that while arbitration is an expedited mechanism, the parties "don't leave [their] rights at the door."\textsuperscript{155}

The criticism of these rules, which offer plaintiffs more protections than would be afforded in the judicial forum, is that arbitration will become an alternative court system which will soon suffer from the same problems that required alternative dispute resolution in the first place.\textsuperscript{156} It is important that arbitration be a form of expedited adjudication of disputes and not become too bogged down in time delay aspects, thus eliminating the usefulness of the process. On the other hand, it is also important that arbitration does not become so streamlined that the parties lose their rights in an effort to resolve the dispute as quickly as possible. In light of the courts' continuing endorsement of mandatory arbitration of employment claims and the advantages associated with it, both employers and employees have good reason to pursue opportunities to arbitrate, rather than litigate, their claims.\textsuperscript{157}

\textbf{IX. RATIONALE FOR USING MANDATORY ARBITRATION AGREEMENTS TO SUPPLEMENT THE RLA}

Many employers have been unwilling to adopt mandatory arbitration clauses for use in employment contracts because the law is in a state of flux. It is difficult for employers to implement an arbitration program in the workplace on a long-term basis when the program's validity may be called into doubt. Some employers have expressed that they want the law to be more settled with regards to alternative dispute resolution and the benefits to be more apparent.\textsuperscript{158}

\textsuperscript{155} \textit{Id.}


\textsuperscript{158} \textit{Employers Reluctant to Embrace Mandatory Arbitration, Survey Finds}, Daily Lab. Rep., Apr. 30, 1992, at A14. Gary Green, the Air Line Pilot Association's counsel, states that he is confident that the "tension arising out of the individual statutory rights and collective contractual rights is too great for the Supreme Court to impose mandatory arbitration." \textit{Id.} Green believes that the Supreme Court will uphold the arbitration agreements in almost all instances, but when faced with federal civil rights, the Court will not uphold the agreements. \textit{Id.} He believes that when contractual rights are imposed on the majority, the Supreme Court will be concerned about the individual's choice of forum being forfeited without due process. As a result, most mandatory arbitration clauses will be struck down. \textit{Id. But see Machson & Monteleone, supra note 1, at 34.} Andrew Steinberg, the
Other employers point out that the flexibility of the judicial system works to the employers' benefit because it persuades employees to settle out of fear that litigation could be very expensive and drag on for years. These employers realize that time and money are on their side and choose not to give up these bargaining chips by adopting arbitration procedures. But by using arbitration, businesses can characterize and plan for the losses attributable to disputes by employees, aiding in the long-term planning and economic forecasts.

A. Knowing Waiver

Concerns that mandatory arbitration will be forced on employees are problematic in that the Supreme Court will not actually be "imposing" mandatory arbitration. Rather, the employees would be signing a contract as they choose whether or not to work under the conditions present in the employment contract. This is analogous to the type of health plan a company might have. If a potential employee finds out in the interview process that the health plan is not comprehensive and is subsequently offered a job, he does not have to accept the job. The decision then becomes one of deciding between the job or a better health plan. Similarly, the employee in the airline industry could be given a choice at employment whether to accept the policy of resolving employee disputes through arbitration. A mandatory arbitration provision in a contract can be enforced if all of the required elements of contract formation are present such as consideration, mutuality of performance, etc., and there is no evidence of fraud, disproportionate bargaining capacity between parties, or unconscionability. The courts, therefore, are not imposing anything, but are only upholding contracts that the employees or their agents (the union) have entered into. The application of a mandatory arbitration provision as a condition of employment becomes no different than the application of provisions for a starting wage, a vacation or sick-leave policy or requiring the signing of a confidentiality agreement—

general counsel for American Airlines, believes that arbitration does not necessarily take away the jury right, but instead serves as a mechanism to help sort out the hundreds of thousands of cases that are without merit. Steinberg feels that because of the volume of the employment cases that the system is having to deal with, arbitration's quick resolution could serve as the floodgate to stop the over abundance of cases in the courts. Id.

all elements that could be supported contractually by consider-
ation.\textsuperscript{160} Consideration is thus given by the offer of a job or, in
cases of existing employees, in the form of some benefit of
higher pay or better privileges in exchange for the signing of
the mandatory arbitration agreement.\textsuperscript{161} Some critics argue that
there is unequal bargaining power when a potential employer
makes a mandatory arbitration provision conditional on employ-
ment for a potential hire.\textsuperscript{162} The employee, however, has the
choice of refusing and working at another company that does
not institute such a policy. Mutuality of performance is accom-
plished when the employee signs the agreement and, as a result,
is allowed to work for the employer.

The agreement will not satisfy the tenets of contract law if the
employee is deceived into signing the clause or if the clause is
not properly explained so that the waiver is not made with full
knowledge of the provisions.\textsuperscript{163} This includes instances in which
the employee has not been informed by his agent, the union,
that he is going to be required to bring his disputes to arbitra-
tion. But as long as the employee is fully aware of the agree-
ment that he is entering, then it will be upheld by the courts as a
valid contract. It will also be very difficult to prove the agree-
ment as being unconscionable because of the Supreme Court’s
recent endorsement of arbitration coupled with the Federal Ar-
bitration Act (Congress’s pro-arbitration message) and the arbi-
tration provisions of many of the federal civil rights laws.\textsuperscript{164}

While the phrase “mandatory arbitration” is indicative of a
non-consensual act, the choice is actually completely consensual
in nature. The provision is only mandatory if the individual
chooses to accept the job offer and all of the contingencies com-
ing with it, including a contingency that all disputes must be
adjudicated in an arbitral forum.\textsuperscript{165} The choice being made is
not whether a dispute will be heard, but rather where the dispute
should be decided.

\textsuperscript{160} Evan J. Spelfogel, \textit{Legal and Practical Implications of ADR and Arbitration in

\textsuperscript{161} It is unlikely that an employer would be able to terminate an existing em-
ployee for refusing to sign a mandatory arbitration agreement because of unfair
bargaining considerations.

\textsuperscript{162} Abrams, \textit{supra} note 104, at 550, 561.

\textsuperscript{163} \textit{See} Prudential Ins. Co. v. Lai, 42 F.3d 1299 (9th Cir. 1994), \textit{cert. denied}, 116

\textsuperscript{164} \textit{See supra} notes 67-71 and accompanying text.

\textsuperscript{165} Spelfogel, \textit{supra} note 160, at 264.
An employee’s waiver of access to a judicial forum in no way indicates a foregoing of justice. The Supreme Court affirmed the fairness of arbitration in Mitsubishi, stating “[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”

B. FUNDAMENTAL FAIRNESS IN ARBITRATION

To preserve the fairness of arbitration, it is important that the employee is offered many of the same rights and remedies that one would find in the judicial forum. This not only makes arbitration fair, but also allows the defendant to show the court, if the forum is challenged, that while the employee waived the judicial forum, there was no harm because arbitration offered the same substantive rights as those in a trial.

One way that employers can insure that substantive rights are protected is to subscribe to a formal set of arbitration rules for the hearing. The American Arbitration Association has issued a set of rules that protect rights of all parties involved in the arbitration. Kirby Wilcox, a partner at San Francisco’s Morrison & Foerster, said about the new rules: “[Y]ou are getting something close to the type of hearing that you would have had, had you had a bench trial in state or federal court.” These types of arbitration rules, which protect the parties’ rights, lend credibility to the arbitration and decrease the chances that a court might find the hearing unfair upon appeal. The rights worthy of protection include the employee’s right to be represented by an attorney. Also, there should be a minimal level of discovery present so that all of the facts of the dispute can be adequately presented by both sides. The amount of discovery that is allowed must not only satisfy the employer’s economic

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168 Id.
171 Aquino, supra note 167, at 1.
173 Id.
goals but also satisfy due process, a difficult balance to strike.\textsuperscript{174} Too little discovery begins to circumvent the protection of rights standards set forth in \textit{Gilmer}, but too much discovery will simply be a copy of the inefficient court system.\textsuperscript{175}

The selection of the arbitrator is another key element to the fairness of the arbitration. The arbitrator should be chosen by both sides from a pool that is marked by demographic diversity.\textsuperscript{176} This is an area which most critics of mandatory arbitration point to as having serious deficiencies.\textsuperscript{177} Many plaintiffs groups argue that ninety percent of arbitrators are older, white males, and, as a result, will have a bias toward the employer.\textsuperscript{178} If the company is allowed to select the arbitrator, a court may strike down the agreement because it would be unconscionable for the employer not only to impose the forum the employee must have his claim heard in, but also the individual who will hear it. On the other hand, the plaintiff should not be allowed to select the arbitrator for exactly the same reasons. The best solution is to allow the parties to act in concert together where an arbitrator is selected that both parties accept.

It is also important that the arbitrator chosen has some experience in the past with labor and employment statutes and can rule fairly in this complex area of the law without having to rely on "gut feelings." This also ensures that both sides become educated as to the application of employment law to possibly prevent future disputes in the workplace.

\textbf{X. CONCLUSION}

\textit{Hawaiian Airlines} marked the beginning of what has become a troubling trend in the airline industry—allowing employees to pursue civil rights claims outside the arbitral provisions of the RLA. \textit{Hawaiian Airlines} and its progeny not only undermine employers' ability to rely on the RLA, but also subject these employers to protracted litigation which drains company time and

\textsuperscript{174} Barclay & Carmell, \textit{supra} note 131, at 24.

\textsuperscript{175} Id.

\textsuperscript{176} Arbitration, \textit{supra} note 172, at D6.

\textsuperscript{177} But see \textit{Gilmer}, 500 U.S. at 20 ("Gilmer first speculates that arbitration panels will be biased. However, '[w]e decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators . . . .'
\textsuperscript{178} Aquino, \textit{supra} note 167, at 1.
money, possibly interfering with transportation services to the nation.

Employers have three options to recapture these lost employee claims to arbitration: (1) incorporate federal civil rights statutes into the collective-bargaining agreement, which may require the contractual review of the RLA system boards; (2) attempt to use “unwritten customs” as a means of forcing review of the collective-bargaining agreement and reinstating the jurisdiction of the RLA; or (3) require employees to sign mandatory arbitration agreements to compel any dispute that courts deem outside the jurisdiction of the RLA to arbitration. While it is apparent from some of the cases cited and competing policies discussed in this Comment that mandatory arbitration is in a state of flux, employers should find comfort in *Gilmer* and its progeny which demonstrate a decided trend towards the enforceability of these agreements. Mandatory arbitration agreements appear to be the most promising way for airline employers to enjoy the full benefits of arbitration as they did pre-*Hawaiian Airlines*. Through mandatory arbitration, ground lost to the recharacterization of “minor disputes” can be regained through contracts submitting any dispute outside the RLA to arbitration.

Finally, it is worth noting that for mandatory arbitration agreements to work, employers must fashion the agreements in a manner indicating a knowing waiver on the part of the employee as well as references to federal civil rights statutes that are intended to be included within the arbitration provisions. When drafting the mandatory arbitration agreements, the employer must be certain that (1) the employee makes a knowing waiver of the judicial forum when he or she signs, (2) the arbitration contain enough of the elements of a courtroom trial so that substantive rights are protected (but the process is somewhat stripped down so as to retain its time savings value), (3) the selection of the arbitrator involves both parties, and (4) all of the elements of contract law are satisfied when the agreement is made. If these four goals can be accomplished, then airline employers can continue to rely on arbitration as an efficient and cost-effective means of employment dispute resolution.