

VI. THE IMPACTS OF ALTERNATIVE DISPUTE RESOLUTION ON WORKPLACE OUTCOMES

Inequalities in Access to Justice in the Workplace

ALEXANDER J. S. COLVIN
The Pennsylvania State University

This report examines variation in workplace dispute-resolution procedures and connects this variation to the issue of inequality in access to justice in the workplace. Variation in workplace dispute resolution in the United States is driven by a number of factors, including the narrowing coverage of union representation; differences in pressures for union substitution practices; variation in legal pressures on organizations; differences in conflict management strategies; and variation in human resource strategies. Examination of data from a 2003 survey of establishments in the telecommunications industry indicates that, even within a single industry, we can find wide variation in the structure, usage, and impact of workplace dispute-resolution procedures. Alternative policy options that might be pursued to reduce inequality in access to justice are examined, including development of a labor court system; mandatory requirements for workplace dispute-resolution procedures; and increasing legal incentives for the development of procedures.

Introduction

Growing variation in employment conditions is a central issue in considering the impact of new patterns of work and employment relations. Much

Author's address: Department of Labor Studies, The Pennsylvania State University, University Park, PA 16802

attention in this area has focused on the existence, causes, and consequences of growing inequality in income and other economic outcomes for employees. By contrast, relatively little attention has been paid to the issue of inequality in the access to justice in the workplace. Whereas some nonunion employees and virtually all unionized employees have access to procedures for resolving disputes in the workplace, many nonunion employees lack access to any procedures, and others are offered only ineffective procedures for ensuring fairness. This report describes the causes and extent of variation in workplace dispute resolution and discusses the consequences and policy implications of inequality in access to justice in the workplace.

Sources of Variation in Workplace Dispute Resolution

In most countries, it is possible to describe a general system for how employment relations conflicts in the workplace are resolved in that country. For example, employee complaints may be handled in the workplace by a works council or resolved through a system of labor courts. By contrast, in the United States when an employee complains of some type of injustice or unfair treatment in the workplace, it is not possible to provide a general answer to the question of how such a dispute can be resolved. As with many other aspects of work and employment relations, a central characteristic of workplace dispute resolution in the United States is the high degree of variation between different organizations. The variation that exists, both between unionized and nonunion workplaces and among nonunion workplaces, has a number of sources.

The first, and most obvious, source of variation in workplace dispute resolution in the United States to note is the contrast between unionized and nonunion workplaces. Since the 1950s, dispute resolution in unionized workplaces has almost universally occurred through multistep grievance procedures culminating in binding arbitration (Lewin and Peterson 1988). Traditional descriptions of workplace dispute resolution in the United States focused on these union grievance-arbitration procedures. As in other areas, however, the declining rate of union representation means that this form of workplace dispute resolution is increasingly available only to a limited segment of the workforce, concentrated in certain industries. On the other hand, it is also important to recognize that the threat of union organizing retains the power to influence employment conditions in many nonunion workplaces. In particular, there is a penumbra of nonunion workplaces located in industries where unions retain a substantial presence, whose employment relations are strongly affected by the desire of management to remain nonunion by substituting for the potential benefits of unionization. As a result in industries such as autos and telecommunications, we see nonunion employers adopting

relatively substantial dispute-resolution procedures in large part to reduce the threat of unionization (Colvin 2003a, 2004).

A second source of variation in workplace dispute resolution is variation in the degree to which organizations are subject to and feel the need to respond to pressures from the legal system. Although general employment laws can provide a basis for greater uniformity in employment conditions, the American system of litigation is relatively episodic in nature, with organizations being only periodically subject to significant involvement in major employment litigation. For example, an organization may go many years with only limited involvement in litigation and then experience a sudden upsurge in numbers of cases and potential damages as a result of a triggering event such as organizational downsizing (Colvin 2004). Organizations that have experienced an upsurge in litigation may feel pressure to introduce workplace dispute-resolution procedures to help prevent similar litigation in the future. By contrast, organizations that have not experienced upsurges in litigation may not feel the pressure to introduce such procedures.

Exacerbating the differences due to variation in pressures from litigation on organizations is a third factor, variation in conflict management strategies. Organizations vary widely in how they respond to similar pressures from employment conflicts. In a series of case studies, Lipsky, Seeber, and Filcher (2003) observed that the companies they studied split into three different categories of conflict resolution strategy, what they referred to as the “contend,” “settle,” and “prevent” strategies. They found approaches to workplace dispute resolution in the organizations varied with these management strategies, from “contending” organizations rejecting the adoption of any workplace dispute-resolution procedures to “preventing” organizations moving beyond basic dispute-resolution procedures to the development of sophisticated conflict management systems. A related factor leading to variation in workplace dispute resolution is the relatively high degree of variation in management approaches to work and employment relations in the United States (Katz and Darbishire 2000). Evidence suggests that variation in management human resource strategies and workplace practices is linked to variation in the adoption of workplace dispute-resolution procedures (Colvin 2003b).

Evidence of Variation in Workplace Dispute Resolution

To what degree do we see evidence of variation among organizations in the extent of access to workplace justice? In this section, I will present results from a survey of workplace level variation in dispute-resolution procedures and activity that suggests wide differences in the ability of employees to appeal effectively management decisions they view as unfair. The data for this study was collected in a 2003 survey of establishments in the telecom-

munications industry. A university-based survey team administered the survey questionnaire. The individual respondent was the senior manager for the establishment. To ensure representativeness, the sample was stratified by size, SIC code, and state location. The response rate among eligible establishments contacted was 68 percent. The size of the sample for the analysis presented here was 475 establishments.

An initial question to address is what is the extent of variation in the presence and structure of dispute-resolution procedures in the workplace? We can think of a range of types of dispute-resolution procedures in American workplaces. At one extreme are unionized workplaces, with their characteristic multistep grievance procedures culminating in binding arbitration. Of the 475 establishments in the sample, 130 (27.4 percent) were unionized establishments with this category of procedure. At the other extreme are nonunion establishments with no formal dispute-resolution procedures at all. In the sample, 95 establishments (20.0 percent) fell into this category. Between these extremes are nonunion establishments with some type of formal dispute-resolution procedure, comprising 52.6 percent of the sample, or 250 establishments. This final category can be further subdivided on the basis of the structure of dispute-resolution procedures, which vary widely in nonunion workplaces. A relatively basic way to divide the nonunion procedures is between more complex and simpler procedures. For the present analysis, procedures were categorized as complex if they contained at least one element from among peer review, management appeals boards, mediation, and arbitration or if the procedure included four or more steps. Procedures that did not meet these criteria were classified as simple nonunion procedures (i.e.,

TABLE 1
Variation in Workplace Dispute Resolution in the Telecommunications Industry

	Union Workplaces	Complex Nonunion Procedures	Simple Nonunion Procedures	Nonunion Workplaces Without Procedures
Percent of Workplaces	27.4 (<i>n</i> = 130)	19.8 (<i>n</i> = 94)	32.8 (<i>n</i> = 156)	20.0 (<i>n</i> = 95)
Employee Appeal Representation (%) [°]	100	74.7	59.4	0
Overall Grievance Rate ^{°°}	15.7	2.5	2.4	0
Discipline Appeal (%) ^{°°}	42.2	6.8	5.0	0
Employee Appeal Win (%) ^{°°}	10.8	5.8	2.6	0
Discipline Reversed (%) ^{°°}	7.9	1.5	0.4	0

Differences across groups significant at the $p < .05$ (°) and $p < .01$ (°°) levels.

they consisted of procedures of one to three steps in which single managers reviewed and decided the employee's grievance). Overall 94 establishments, or 19.8 percent of the sample, had complex nonunion procedures, whereas 156 establishments (32.8 percent) had simple nonunion procedures. Even this basic division of establishments into four different categories of workplace dispute-resolution type reveals substantial variation, with at least approximately 20 percent of establishments in each category.

Comparison of other features of dispute resolution in these four categories reveals that, even with this relatively simple categorization, we can see substantial variation between workplaces. For example, whereas representation of employees by the union at grievance hearings is a fundamental feature of all union procedures (and legally mandated by the duty of fair representation), under nonunion procedures it is management's choice whether to permit representation of employees at hearings. In the sample, employee representation was allowed in 74.7 percent of complex nonunion procedures, but only in 59.4 percent of simple nonunion procedures. Finally, in the group of nonunion workplaces with no dispute-resolution procedures, there is, by definition, no representation of employees in appeal hearings.

To what degree are these differences in the structure of dispute-resolution procedures reflected in differences in usage of the procedures and conflict resolution activity? To help answer this question, we can examine the differences across the four categories in a series of measure of workplace conflict resolution.

One of the most common measures of workplace conflict is the grievance rate, typically measured as the overall annual number of grievances filed per 100 employees. Grievance rates are generally thought to be higher in union than in nonunion workplaces. In this sample, grievance rates were higher in unionized establishments, averaging 15.7 per 100 employees, than in establishments with either complex nonunion procedures, at 2.5 per 100 employees, or simple nonunion procedures, at 2.4 per 100 employees.

A limitation of the overall grievance rate as a measure of workplace conflict is that it does not account for differences in the types of disputes that are grievable under different procedures or differences in the number of potentially grievable events occurring in the workplace (Colvin 2003a). A more directly comparable measure that controls for both of these factors is the discipline appeal percentage, which is measured as the percentage of disciplinary decisions appealed by employees through the grievance procedure. Comparing this measure, we find a similar split between unionized establishments, with an average discipline appeal percentage of 42.2 percent, and complex nonunion procedures, at 6.8 percent, and simple nonunion procedures, 5.0 percent. When we turn to employee win rates in these discipline

appeals, we see a similar union-nonunion split, as well as differences between complex and simple nonunion procedures. Whereas employees won 10.8 percent of discipline appeals under union procedures and 5.8 percent of appeals under complex nonunion procedures, they won only 2.6 percent of appeals under simple nonunion procedures. When we factor together both the likelihood of employees appealing discipline decisions and the likelihood of winning those appeals, we see further differences in the overall percentage of all discipline that is reversed through appeals. Whereas 7.9 percent of disciplinary decisions in unionized establishments were reversed on the basis of employee grievances, 1.5 percent of disciplinary decisions were reversed in establishments with complex nonunion procedures, and only 0.4 percent of disciplinary decisions were reversed in establishments with simple nonunion procedures. It is also worth noting that, by definition, 0 percent of disciplinary decisions were reversed through grievances in nonunion establishments with no dispute-resolution procedures.

The picture that emerges of workplace dispute resolution in the United States is one of wide variation from workplace to workplace. The segment of the workforce that remains unionized continues to have robust grievance-arbitration procedures that are frequently used by employees to challenge management decisions and often lead to the overturning of disciplinary decisions. At the other extreme, many workplaces continue to lack any dispute-resolution procedures for resolving disputes, leaving employees to rely on the goodwill of management in making decisions affecting their employment. In between, we have many nonunion workplaces with some type of dispute-resolution procedure, but these vary both in structure and effectiveness. Some nonunion workplaces have only simple procedures where employee appeals only relatively infrequently lead to the overturning of management decisions. Other nonunion workplaces have more complex procedures that are more frequently used to overturn management decisions, albeit still at much lower levels than in unionized workplaces.

Implications of Variation in Workplace Dispute Resolution

These wide variations between workplaces reflect a characteristically American system of employer-centered provision of access to justice in the workplace. In the vast majority of workplaces that are nonunion, whether to adopt a dispute-resolution procedure, what structure to use and how effective to make it, is entirely at the discretion of management. Some companies, on the basis of their human resource management or conflict resolution strategies, may choose to provide employees with reasonably effective procedures, other choose to deny effective means of appealing management decisions. Even in the more limited number of unionized workplaces, the presence of

unionization and resulting availability of union grievance-arbitration procedures is arguably in large measure influenced by employer decisions on how to resist or avoid unionization. This variation in the provision of workplace justice is part of the more general pattern of relatively wide interorganizational variation in work and employment conditions in the United States (Katz and Darbishire 2000). It is analogous to the situation with employee benefits where the American employer centered system leads to wide variation and inequalities in provision of healthcare, pensions, and other benefits.

Whether these variations matter depends on how we view dispute resolution and the ability of employees to appeal unfair management decisions in the workplace. If our criteria is solely one of efficiency, the variation between workplaces is an unproblematic function of different management choices in how to operate the business. On the other hand, if we view goals such as the provision of equity and voice in employment relations as important (Budd 2004), we need to be concerned about inequalities between employees in different workplaces in the availability of effective procedures for appealing unfair management decisions.

If we are concerned about remedying inequalities in access to justice in the American workplace, what alternative approaches are available? One alternative found in many other countries is the establishment of a public system of labor courts, available to hear and resolve employee complaints of unfair treatment in the workplace. The idea of a general system of public labor courts or tribunals is not unknown in the United States, where it received particular attention as a response to the increase in employment litigation in the 1980s and 1990s. To date, however, only the state of Montana has established a type of public employment tribunal system, and proposals in other states that at one time were receiving substantial attention have not advanced in recent years. In part, this likely reflects reduced employer concerns over judicial erosion of the employment-at-will doctrine, which became overhyped in 1980s and 1990s, resulting in reduced employer interest in a grand bargain of improved employee access to workplace justice through an American version of a labor court system, including some sort of just cause standard, and limitation of the damages available through litigation in the general court system. Beyond practical difficulties in assembling the political support needed to obtain adoption of a public labor court system, there are also weaknesses in such a system that should be recognized. The most important weakness is that labor courts operate outside of and at a remove from the workplace. One of the great strengths of the union grievance-arbitration system is that it provides a procedure that operates within the workplace and operates as an integral part of the employment relations system of the work-

place. An advantage of the development of more substantial dispute-resolution procedures in nonunion workplaces is that they operate as part of the employment relations system of those workplaces and their decisions become integrated into the management human resource decision-making process.

What approaches might encourage the adoption of more substantial, effective dispute-resolution procedures within nonunion workplaces? The most direct approach would be a legal requirement for the adoption of dispute-resolution procedures, containing standards for their structure and rules of operation. An analogy here would be to legal requirements for the adoption of workplace health and safety committees, found in Oregon and some Canadian provinces, or the European requirements for the adoption of works councils. This direct approach is one that individual states could experiment with, though it is worth recognizing that it runs counter to the traditional emphasis in American public policy on incentives and indirect approaches rather than direct legal mandates. An alternative, indirect approach could build on a combination of greater incentives for adoption of procedures and encouragement of desired employer conflict management strategies. In the area of incentives, the two key external motivations for adoption of procedures are union avoidance and litigation avoidance (Colvin 2003b). Although union avoidance remains a powerful motivation for employers where unions retain an organizing threat, in the absence of union growth this motivation will continue to be limited in the extent of employers it affects. By contrast, litigation avoidance is a more general, yet also substantial, motivation for employers. To the degree that reduced legal exposure for employers can be conditioned on adoption of effective dispute-resolution procedures, we can expect increased adoption of procedures. Employer responsiveness to this type of incentive can be seen in the relatively rapid adoption of mandatory arbitration procedures that effectively substitute for and bar employee access to the courts following the Supreme Court's 1991 decision in *Gilmer v. Interstate/Johnson Lane*. Unfortunately, mandatory arbitration is a system of alternative dispute resolution that poses dangers from a due process perspective (Stone 1996; Bingham 1997) and also suffers from the same weakness as a labor court system in operating at a remove from the workplace. An alternative model might be that propounded in the area of sexual harassment following the Supreme Court's 1998 decisions in *Faragher* and *Burlington*, in which the Court recognized an employer defense of the availability of effective complaint procedures and the employee's unreasonable failure to use them. The features of this type of defense that differentiate it from the way mandatory arbitration operates based on *Gilmer* are that the procedure serves only as a defense and

does not bar access to the courts and that it is conditioned on the effectiveness of the complaint procedures. A similar defense based on the availability and nonuse of effective dispute-resolution procedures in other types of employment litigation might encourage the adoption of more substantial and effective nonunion procedures, while avoiding some of the problems of mandatory arbitration on the *Gilmer* model.

References

- Bingham, Lisa B. 1997. "Employment Arbitration: The Repeat Player Effect," *Employment Rights and Employment Policy Journal*, Vol. 1, no. 1, pp. 189–220.
- Budd, John. 2004. *Employment with a Human Face: Balancing Efficiency, Equity and Voice*. Ithaca, N.Y.: Cornell University Press.
- Colvin, Alexander J. S. 2003a. "The Dual Transformation of Workplace Dispute Resolution." *Industrial Relations*, Vol. 42, no. 4, pp. 712–35.
- Colvin, Alexander J. S. 2003b. "Institutional Pressures, Human Resource Strategies, and the Rise of Nonunion Dispute Resolution Procedures." *Industrial and Labor Relations Review*, Vol. 56, no. 3, pp. 375–92.
- Colvin, Alexander J. S. 2004. "Adoption and Use of Dispute Resolution Procedures in the Nonunion Workplace." *Advances in Industrial and Labor Relations*, Vol. 13, pp. 69–95.
- Katz, Harry C., and Owen R. Darbishire. 2000. *Converging Divergences: Worldwide Change in Employment Relations*. Ithaca, N.Y.: ILR Press.
- Lewin, David, and Richard B. Peterson. 1988. *The Modern Grievance Procedure in the United States*. New York: Quorum.
- Lipsky, David B., Ronald L. Seeber, and Richard D. Fincher. 2003. *Emerging Systems for Managing Workplace Conflict*. San Francisco: Jossey-Bass.
- Stone, Katherine V. W. 1996. "Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990's." *Denver University Law Review*, Vol. 73, pp. 1017–50