Unions and Workplace Justice

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Abstract

The ground-work principle of America's labor movement has been to recognize that first things come first. The primary essential in our mission has been the protection of the wage-worker, now . . . to free him from the tyrannies, petty or otherwise, which served to make his existence a slavery.

Samuel Gompers, President, American Federation of Labor, 1911

Introduction

There is no more elementary principle of the American labor movement than the need to free workers from the tyranny of arbitrary treatment. The assurance of justice regarding the central concerns of one's working life is essential to human dignity. It is this assurance that unions deliver. This is likely to be absent in the nonunion sector, where employment at will is the rule. It its true that American law provides a patchwork of protections, and nonunion employers have created justice systems. The question is how the court system and the nonunion justice systems compare to labor arbitration in protecting worker rights and interests.

The Just Cause Requirement

In all collective bargaining agreements, workers have the right to be disciplined or discharged only for just cause. "Just cause" has been defined a number of ways. Philip Selznick (1969) says that it is simply the avoidance of arbitrary treatment by the employer. This means that employer actions must be in pursuit of legitimate business ends and reasonably related to those ends. Moderation in pursuit of business objectives is required, with some consideration being given to the interests and dignity of the employee. The employer must be even-handed in dealing out discipline, and the penalty must fit the crime.

The distinguished arbitrator Harry Platt has said that the employer has the right to discipline employees where this is needed for the sake of efficiency, but the action must be just and equitable and be such as to be appealing to persons who were reasonable and fair-minded (Baer 1972). Abrams and Nolan (1985) say that discipline can be levied only where an employee "has failed to meet his obligations under the fundamental understanding of the employment relationship" (pp. 611–12). There are some other requirements, such as industrial due process and progressive discipline for minor offenses. Probably the most comprehensive and simple definition is Selznick's—that workers are protected from arbitrary treatment (see also Wheeler and Nolan 1992).

The Union Grievance Procedure

The second main characteristic of the union justice system is the grievance procedure. Routinely included in collective bargaining agreements, it provides procedural due process. The right of the worker to

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have the grievance heard at multiple levels of management is built into this system. Perhaps most important, the worker has the right to have a trained advocate at every stage of the process. The National Labor Relations Board in a recent case, *IBM Corp.* (2004), has held that nonunion workers, unlike union-represented workers, do not have *Weingarten* rights—the right to have someone else accompany them in a disciplinary interview (*NLRB* v. *Weingarten* 1975). This is a difference between the union and nonunion sectors that cannot be overemphasized. Having a skilled advocate from the very beginning of the discipline process is an advantage that is not replicated in any of the nonunion justice systems. The Bush-appointed board's anti-employee decision in *IBM Corp.* may be to the advantage of unions, as it creates another difference between the rights of employees who are represented by a union and those who are not.

The capstone of the grievance process is labor arbitration. Despite its failure to always live up to its promises of inexpensive and informal processes, labor arbitration does provide a ruling by an outside expert as to whether discipline is supported by just cause. An aspect of the labor arbitration system that is sometimes overlooked is placing on the employer the burden of proof of misconduct. In contract and statutory litigation in the courts, it is the party claiming that its rights have been violated that has the burden of proving its case. In labor arbitration the employer loses if it cannot prove misconduct by at least a preponderance of the evidence. Sometimes the proof by clear or convincing evidence, or even beyond a reasonable doubt, is required.

Nonunion Justice Systems

Outside of the collective bargaining system there are two other types of processes available to employees. Justice processes are provided by the courts and by the policies of nonunion employers. The courts enforce protective labor legislation such as Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and other legislative protections of workers. They have also devised common law remedies for terminations of employment where public policy is violated, where there is a violation of an implied in fact or implied in law contract, or the termination is performed in an abusive manner (Bennett-Alexander and Hartman 2009).

In recent years a diverse set of justice systems has developed in nonunion firms. There are "soft" systems, such as open door policies, ombudspersons, and mediation. These do not lead to a result that the employer is bound to accept. There are also "hard systems"—peer review and employment arbitration—that lead to a conclusion that is binding on the employer.

Open door policies invite workers with complaints to raise them with their immediate supervisor and, if not satisfied with the result, with upper level managers. Sometimes this can go to the highest reaches of the management hierarchy. These policies have been around for some time. In 1980 they were reported to be quite common among large firms (Foulkes 1980). The chief problem with these policies is the reluctance of workers to use them for matters of any importance, at least in part because of fear of retaliation.

Mediation, where a neutral person attempts to facilitate an agreement that resolves a dispute over alleged misconduct on the part of a worker, has recently come into fairly widespread use. It is sometimes used in combination with one of the hard systems. It is widely admired. It has very little down side and can at times produce results that are satisfactory to both the employee and management.

An *ombudsperson* is an employee of the firm who has the role of consulting with employees who have problems and then advocating on their behalf. The usefulness of this system depends on the independence of the ombudsperson from management influence. This is difficult to deliver, given that the ombudsperson, like other employees, is dependent on management for a career within the firm. Even if the ombudsperson is in fact independent, having employees perceive independence is another matter.

The hard systems reflect a significant movement among nonunion employers to mimic the union system. This may be done out of a genuine desire to provide industrial justice or a desire to avoid unions or litigation. There is some evidence that peer review systems were initially developed primarily for union avoidance purposes, and employment arbitration mainly to avoid the costs and risks of litigation in the courts (Wheeler, Klaas, and Mahony 2004).

Peer review involves a committee composed of a majority of rank-and-file employees, usually along with some managers, led by a human resources staff person as a facilitator. An employee with a complaint

can file it with the committee. Ordinarily, the committee can make a final and binding decision on the grievance. Although the committee becomes a "labor organization" within the meaning of that term under the National Labor Relations Act if it merely makes a recommendation to management, some procedures provide for this, the employer taking its chances on the procedure never being challenged. If the employer is found to be in violation of Sec. 8 (a)(2) of the act, the only consequence would be the company's being forced to abandon peer review or set up a system that is in compliance with the law. There is no penalty unless the employer fails to act as directed by the National Labor Relations Board.

Employment arbitration is grievance arbitration in a nonunion setting. Such procedures are established by employers. Current employees or job applicants agree to take claims against the employer to arbitration under a system established by the employer in lieu of going to court. An interesting twist on this is raised in the case of *14 Penn Plaza LLC* v. *Pyett* (2007), which is, at this writing, before the Supreme Court. In this case the union, the Service Employees International Union (SEIU), agreed in the collective agreement that employees would be barred from going to court on statutory claims such as Title VII discrimination claims, being required instead to arbitrate these issues. The Supreme Court will have to decide, after avoiding the issue for several years, whether the union has the authority to make this agreement on behalf of the workers that it represents. Current law, as it has stood since *Alexander* v. *Gardner-Denver* (1974), allows employees to have two bites at the apple, going to either an arbitrator or the courts or both.

The hard systems are a more plausible substitute for unions and the courts because they furnish the employee with a result that binds the employer as well as the employee. However, they do have their weaknesses. As will be discussed below, they do not have as high a likelihood of a favorable result for the employee. Furthermore, each system has problems. Since the peer review panels are trained and operated by management, in the person of a human resources staff member, the degree to which they are independent of management is questionable. Also, peer review procedures may be abolished if they do not meet management expectations that they will be tougher on employees than managers would be. Employment arbitration is also designed and set up by management. It lacks employee representation until the final stage and is an adhesive contract imposed by management fiat (Wheeler, Klaas, and Mahony 2004).

Research Comparing the Union and Nonunion Systems

Stimulated primarily by the growth of employment arbitration, since the early 1990s a substantial body of research and writing on nonunion workplace justice has come into being. Employment arbitration was given a boost by its approval in two U.S. Supreme Court cases, first *Gilmer* v. *Interstate/Johnson Lane* (1991) and then *Circuit City Stores* v. *Adams* (2001). In these cases the Supreme Court held that agreements between employers and employees that any claims against the employer would be taken to arbitration, and not the courts, were enforceable under the Federal Arbitration Act (FAA), which had been in effect since 1925. These decisions were highly controversial, but they clearly established in the law the principle that an employer could require an applicant for employment or a current employee to sign away their rights to go to court (including the right to a jury trial under the Civil Rights Act) and instead go to arbitration under a system devised by the employer. What's more, since the federal law is supreme, this prevents the states from legislating otherwise. Prompted mainly by the desire to avoid the expenses of litigation and the tender mercies of juries, a large number of employers have adopted employment arbitration systems.

Although put in place to avoid lawsuits, these systems have given rise to a great deal of litigation over their enforceability. Over a period of nearly 20 years the courts have built up a body of common law covering the requirements for a valid agreement. The bottom line appears to be that carefully drawn procedures that substantially comply with the "due process protocol" devised by a number of concerned groups, including the National Academy of Arbitrators, the American Arbitration Association and others, are enforceable in the federal courts.

An interesting framework for research comparing outcomes in union and nonunion justice systems has been posited by John Budd and Alex Colvin (2008). They suggest comparing the various systems as to the degree to which they deliver equity, efficiency, and voice to the parties. According to them, labor arbitration "has a relatively strong provision of voice and especially equity, but cost, speed and flexibility issues reduce its efficiency" (p. 475). Looking at the other "hard" systems, peer review is seen as an attempt to provide greater

equity and voice than are available under other management installed systems. Employment arbitration "can be usefully seen as altering the relative mix of efficiency, equity, and voice" (p. 475). The court system is seen as strong as to equity and voice, but weak as to efficiency.

Nonunion systems have become increasingly common, particularly in large organizations (Colvin, Klaas, and Mahony 2006). A 2008 review of the literature (Olson-Buchanan and Boswell 2008) notes that most research on employer–employee dispute resolution in the last few years has focused on these nonunion systems of employment dispute resolution. However, the baseline to which these systems are often compared remains the union grievance and arbitration system. It is clear that one of the motivations for such procedures' being adopted by companies is to avoid unions by imitating a union process. There appear to be advantages to employers to having a justice system. A number of studies show an association between unions and lower turnover, and there is some evidence that this is tied to the intensity of use of union grievance procedures (Colvin, Klaas, and Mahony 2006). But the Olson-Buchanan and Boswell review (2008) cites several older studies of union grievance and labor arbitration structures linking higher grievance rates to lower productivity and higher unit production costs.

What are the determinants of outcomes of an alternative dispute resolution process? Colvin, Klaas, and Mahony (2006) found that in both labor arbitration and the various nonunion systems these were very similar. Work history, provocation of the conduct, allegations of employer wrongdoing, the nature of the offense, the employer's failure to comply with procedural requirements, and other mitigating circumstances were all found to be of some importance across alternative dispute resolution procedures.

Probably the most interesting question raised in the recent body of research on workplace justice is whether labor arbitration produces more favorable results for employers or employees than do other systems of workplace justice. Also, if one side or the other has the advantage, what accounts for this?

Beginning in 2001, along with two colleagues at the University of South Carolina, I embarked on a research project to examine the experience under various systems of workplace justice. We were funded by the W.E. Upjohn Institute for Employment Research, which also published a volume reporting the results of this research, *Workplace Justice Without Unions* (Wheeler, Klaas, and Mahony 2004). We also went beyond the analysis reported in this volume to do a more rigorous analysis of a portion of the data (Klaas, Mahony, and Wheeler 2006).

Workplace Justice With and Without Unions

We began our study by comparing the proportion of wins by employees in published labor arbitration, employment arbitration, and federal district court cases. We found that employees had won in labor arbitration 52% of the time, in employment arbitration in 33% of the cases overall (22% where a discrimination statute was involved, 56% where an employment contract was involved), and 16% in federal district court (1987–2000; Wheeler, Klaas, and Mahony 2004). Looking just at these numbers, employment arbitration comes out looking reasonably good compared to both labor arbitration and federal district courts. The problem with this analysis is that it fails to take into account variations among the cases heard in the various forums.

Using a policy-capturing approach in which the subjects were presented with a variety of scenarios, we were able to estimate the effects of the type of decision-maker (labor arbitrator, employment arbitrator, etc.) on the outcome of disciplinary cases when they are considering the same cases. This sort of analysis had only been done once before (Bingham and Mesch 2000), but the researchers were unable to find significant effects of the difference between labor and employment arbitration.

In our study, we found that employees were significantly more likely to prevail in labor arbitration than in any of the other procedures studied. Employees would have won 55% of the time in arbitration. Labor court judges from other countries were close behind, finding for the employee in 51% of the cases. Next came human resource managers (46%) and peer review panelists (45%). Jurors found for employees 38% of the time. Last were employment arbitrators, who found for the employee only 33% of the time under a contract with a for-cause requirement and 25% where a statutory issue was involved (Wheeler, Klaas, and Mahony 2004).

A more sophisticated statistical analysis (Klaas, Mahony, and Wheeler 2006) comparing the responses of labor arbitrators, employment arbitrators, and jurors confirmed our findings. We found that jurors and employment arbitrators were significantly less likely than labor arbitrators to find for the employee. As expected, the differences from labor arbitration were greater for employment arbitrators than for jurors. We also found that different elements of the cases had different effects on labor arbitrators, jurors, and employment arbitrators. Differences were found among labor arbitrators, employment arbitrators, and jurors as to the effects on their decision of different aspects of the case such as work history, provocation by the supervisor, and failure of the employer to abide by its own procedures.

Why do we find differences between decisions made by labor arbitrators and those of other decision-makers, particularly employment arbitrators? First, there are differences in the issues in these cases. A labor arbitrator determines whether the employer has proved just cause, at least by a preponderance of the evidence. An employment arbitrator in a statutory case, similarly to a juror, determines whether the employee has proved that the employer broke the law by discriminating against him or her. So in the event that the fault of the employee is indeterminate, the employer loses in labor arbitration but wins in employment arbitration of statutory issues. In some employment arbitration cases involving a company policy or contract of employment, the arbitrator imposed the burden of proof on the employer. The importance of the allocation of the burden of proof is apparent from our analysis of published employment arbitration cases, showing that where the employer had the burden of proof the employee won in 60% of cases.

Another difference between labor arbitration and employment arbitration that is very striking is differences in the backgrounds of the arbitrators. Among employment arbitrators, 47% had previously served as employer advocates. While we do not have the percentage of labor arbitrators who have this background, we would expect it to be much lower, given the requirement of the Federal Mediation and Conciliation Service and the American Arbitration Association that a labor arbitrator be a neutral in order to be listed by them and submitted to the parties for selection to hear a case.

Another difference between employment and labor arbitration is that some of the decision rules appear to differ. Only 46.6% of employment arbitrators surveyed by us responded by stating that they would overturn a termination for violating a clearly unreasonable rule. It is believed that 100% of labor arbitrators would do this. Also, 33.3% of employment arbitrators said that they would uphold a termination so long as the employer acted in good faith. It is believed that virtually no labor arbitrators would do this.

Conclusions

From the standpoint of the employee it is clear that a union grievance and arbitration system is much more desirable than either the courts or employment arbitration. For one reason, the employee is more likely to win in labor arbitration. Perhaps more importantly, unlike a nonrepresented employee, the union worker has a union officer at her side from the very beginning of the discipline process. Under *Weingarten*, there is the right to have a union representative present, whereas the nonunion employee has no right to have anyone, including a fellow employee, present with him, let alone advocating for him.

From my experience as a labor educator performing and observing the training of union stewards, I have been impressed with the quality and dedication of the persons who fill this role. These are the foot soldiers of the labor movement. For little or no compensation, and often much grief, they represent workers. In the main, they do this competently. It is at the very earliest stages of a grievance that the facts are ascertained and the attitude of management often becomes fixed. Stewards who are trained to listen well, view grievances critically, and diligently ascertain what actually occurred in an incident involving an employee are a crucial part of the union's workplace justice system. It is this element of a union grievance procedure that, try as they might, managers cannot match in nonunion settings. While the focus of research, including my own, has been on who wins once a grievance goes to arbitration, it is probably more important to know what goes on in the early stages of an employee's grievance being handled.

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