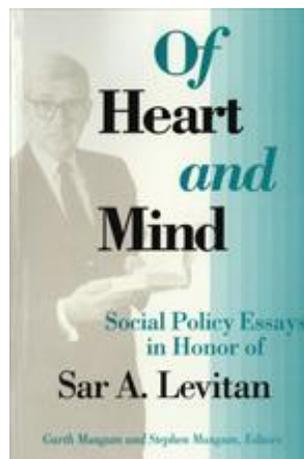

Upjohn Institute Press

The Prospects for Arbitration in the Nonunion Sector

Trevor Bain
University of Alabama



Chapter 17 (pp. 357-369) in:

Of Heart and Mind: Social Policy Essays in Honor of Sar A. Levitan

Garth L. Mangum, and Stephen Mangum, eds.

Kalamazoo, MI: W.E. Upjohn Institute for Employment Research, 1996

DOI: 10.17848/9780585280295.ch17

The Prospects for Arbitration in the Nonunion Sector

Trevor Bain

Rights disputes arise from the claim of an aggrieved worker that there has been a violation of a collective agreement, of the provisions of work rules, of unilateral management policies, including disciplinary rules, or of provisions of an individual contract of employment. There may also be situations in which management claims that its rights have not been respected. This is different from interest disputes, which are disagreements over the terms of a collective agreement. Collective bargaining contract negotiations are a legislative process through which the law of the workplace is jointly determined. The usual mechanism for resolving disputes over rights in the unionized setting in the United States is a joint labor-management grievance procedure with the final step of binding arbitration. Without this judicial system, every time there is a dispute over the application of the contract at the workplace a strike is necessary to resolve the issue by force. Or, every time one party chooses to ignore the contract it can be enforced only by a strike or a lockout. The grievance procedure culminating in arbitration makes contract administration viable.

Grievance procedures are not new to labor-management relations (Fleming 1965). The first recorded instance of voluntary arbitration in the United States took place in 1865 in a dispute involving the iron puddlers of Pittsburgh (Smith 1992). The best known grievance procedure during the early twentieth century was established in a 1911 agreement between Hart, Schafner and Marx clothing manufacturers and the Amalgamated Clothing Workers Union. Employee representation plans in the 1920s are characterized as a large grievance commit-

tee through which management could learn of workers' complaints (Chamberlain 1951). Employee representation plans that sought to avoid the union were declared illegal under the National Labor Relations Act (1935). But the greatest growth in grievance arbitration began during World War II. The National War Labor Board (WLB) encouraged unions and employers to include an arbitration clause in their agreements and sometimes required it. When the parties didn't agree on an arbitrator, the WLB appointed one. President Truman convened a Labor-Management Conference in 1945, and George Taylor of the University of Pennsylvania reported that one of the few agreements by the parties to that conference was that arbitration would be the final step in a grievance procedure (U.S. Department of Labor 1994). This laid the foundation for the practice of ending the grievance procedure with the final step of arbitration. That was an important change from the 1920s employee representation plans, which were internal plans without the use of an impartial neutral. Arbitration became the *quid pro quo* for ending strikes. The grievance procedure eliminated strikes over grievances and brought stability and predictability to the bargaining relationship.

Federal statutes that affect the grievance procedure and arbitration in the private sector are the Labor-Management Relations Act (LMRA) in 1947 and the Railway Labor Act (RLA) in 1926. The LMRA, Section 301, authorizes suits in federal courts for violation of collective agreements and, in 1959, the Supreme Court held that Section 301 authorized federal district courts to enforce arbitration provisions in collective bargaining agreements. In 1960, the Supreme Court, in three cases termed the "Steelworkers' Trilogy," took major steps to fashion a federal law of labor arbitration that gave legal substance to an arbitrator's award. The results of these three cases can be summarized as: the courts should send to arbitration all disputes subject to the arbitration clause; interpretation of the agreement is for the arbitrator and not the courts; courts should not reject an award unless the arbitrator exceeded the authority under the contract; courts should not reexamine the merits of a grievance; and awards need not be set aside for incompleteness. Many of the states followed the direction of the federal government, and by 1975, three-fourths of the states had enacted an arbitration statute.

The grievance procedure culminating in final and binding arbitration that developed in the unionized sector became so admired that it has been adopted as alternative dispute resolution (ADR) to resolve disputes related to divorce, the environment, construction, consumer claims, and customer claims against brokerage firms. While practitioners and scholars of labor arbitration continue to debate arbitration's future in the unionized sector, the discussion of its application to the nonunion sector has exploded.

The final report of the Commission on the Future of Worker-Management Relations (1994), usually called the Dunlop Commission, encourages the development of in-house dispute resolution procedures, while the Worker Representation and Participation Survey conducted by Freeman and Rogers (1995) reported that the majority of respondents were favorably disposed to using arbitration to resolve disputes. The question is whether what works so well in the unionized sector and appears to work well in many other ADR situations can be an effective means of employee protection in nonunion employment.

The objectives of this paper are to assess the current coverage and legal status of nonunion arbitration; evaluate what has been learned from private sector labor arbitration as a guide to the nonunion sector; examine the issues related to the use of arbitration in the nonunion sector; present some recommendations for improving its use; and assess the probability of its success in the nonunion sector.

Coverage and Legal Status

Considerably less is known about the extent and nature of alternative dispute resolution procedures for nonunion employees than for union employees. A Conference Board study (Berenbein 1980) surveyed the nonunion companies and concluded that two-thirds of them had adopted some type of grievance procedure by 1978. A survey conducted by Ichniowski and Lewin (1988) found that about one-half of nonunion business lines in each occupational group have a procedure for processing employee grievances with a low of 43.7 percent for managers and a high of 54.4 percent for production workers. They also reported that the growth in ADR procedures is more recent in the non-

union sector than the union sector, covering 5 percent of all occupational groups in 1960 and growing by four to five times between 1960 and 1980.

Arbitration is increasingly being used in statutory rights cases. The motivation for the employer to initiate ADR is less union avoidance than the fear of court suits and large settlements for the employee, particularly with regard to employment discrimination claims. The popular literature indicates that employers favor ADR to court litigation but that they initiate mechanisms which do not use third-party neutrals. A recent survey of 2,000 businesses with 100 or more employees by the U.S. General Accounting Office (1995) found that all private employers used some type of internal ADR procedure to resolve discrimination suits. Negotiation and fact finding were used most often, while arbitration was one of the least common approaches; some employers using arbitration make it mandatory for all workers.

The possibility of arbitrating employment discrimination claims arose after the passage of the Civil Rights Act of 1964. In *Alexander v. Gardner Denver Co.*, the Supreme Court held that the employees' right in a unionized setting to sue under Title VII was not precluded by the arbitrator's award.¹ However, the Supreme Court's attitude toward arbitration of statutory claims has changed. In the case of *Gilmer v. Interstate/Johnson Lane Corp.*, Gilmer, a brokerage employee, was required to sign an agreement to arbitrate any controversy arising out of employment or termination of employment.² Gilmer filed a complaint against his former employer under the Age Discrimination in Employment Act and the Supreme Court held that his claim was required to go to arbitration. Ever since *Gilmer*, more employers are moving toward employees signing agreements to arbitrate all disputes arising out of their employment. Advantages to the employer of such an agreement are: the avoidance of punitive damages under the 1991 amendments to Title VII, and the ability to keep arbitration decisions confidential. The Equal Employment Opportunity Commission has also announced that it will initiate a voluntary ADR program using mediation to handle some of the nearly 100,000 discrimination charges it receives each year. The program will select employees and employers to work with a neutral mediator to settle disputes.

Lessons from the Union Sector

ADR procedures vary in formality, ranging from an informal “open door policy,” through a corporate ombudsman, to a grievance and arbitration procedure. Lewin and Peterson (1988) identify the four functions of the grievance procedure as compliance, adjudicative, administrative, and political. The grievance procedure also introduces the notion of fairness, or distributive and procedural justice, into the workplace. Gordon (1988) defines distributive justice as the perceived fairness of the allocation of company resources among employees and procedural justice as the perceived fairness of the process through which decisions are made to allocate company resources. The literature on union grievance procedures can be divided into three areas by following the steps of the grievance procedure: (1) determinants of grievance initiation and activity, (2) determinants of grievance resolution and settlement, and (3) determinants of grievance effectiveness. To adapt this literature to the nonunion firm we substitute the employee handbook for the contract and employee-management relations for union-management relations.

With regard to the determinants of grievance initiation and activity, grievance initiation can be viewed by employers as a benefit to the firm because it can serve as a voice for worker discontent. Workers may choose to initiate grievances rather than exit the company or stay away from work, both of which are costly to the firm. The research indicates that the process can be improved with programs that provide employees and supervisors with the skills to effectively use the grievance procedure (Bemmels, Reshef, and Stratton-Devine 1991). Changes in technology and stress in the work environment were also likely to increase grievance activity (Peach and Livernash 1974, Muchinsky and Maassaran 1980).

With regard to the determinants of grievance resolution and settlement, the clearer the contract language with regard to the rights and facts of a grievance, the more likely it is to be resolved (Meyer and Cooke 1988). A case’s resolution also effects relations between employees and management (Gordon and Bowlby 1988). When a case is settled in favor of management, relations deteriorate between the employee and both lower- and higher-level management, but the rela-

tionship is unchanged when the grievant wins. Lewin and Peterson (1988) conclude that the larger the unit, the higher the steps at which grievances were settled and the slower the speed of settlements. Expedited grievance procedures were found to raise the employees' and managers' perceptions of the equity of a grievance settlement, and experience in handling a grievance also affects resolution.

With regard to the determinants of grievance effectiveness, the principal benefits to employees from the grievance procedure are that it provides a mechanism for due process and that it can be perceived as providing a procedure for fairness in dealing with the issues (Gordon 1988). For the union, it demonstrates the union's role in representing the membership. The benefits for management may include a reduction in work slowdowns and improvement in the company's economic performance. The possibility of multiple benefits leads researchers to agree that effectiveness is not a single concept (Clark and Gallagher 1988), but instead depends on which party is being discussed. Compared with a conventional contract, the union-management relationship is a continuing one. The same can be said for the employee-employer relationship, and the benefits of a grievance procedure or the settlement of a grievance may extend into the future.

Additional measures of effectiveness are related to the grievance procedure as providing a mechanism for workplace justice or procedural justice and serving as a collective voice for union members. The grievance procedure can provide procedural justice, since it lays out how decisions are made, and distributive justice, since there are consequences of the decisions. Gordon and Miller (1984) find little research that either supports or refutes the contention that grievance procedures promote workplace justice. With regard to the common law rights of workers, Knight (1986) concludes that the grievance process has not expanded rights beyond the specific contract.

It is difficult to come up with a simple conclusion or set of conclusions of the grievance process based on the literature (Peterson 1992). There are, however, several conclusions that can be drawn from the research. A labor-management contract that is clear and free of ambiguities reduces grievances and leads to early settlements. The same analogy can be used for the employee handbook. Feedback to union officials and management also assists early settlements. This analogy can be used for employees and management. Finally a good industrial

relations climate, for both union and nonunion firms, reduces grievance filing, speeds settlement, and increases productivity.

Issues in Adaptation

If employers were to initiate a grievance procedure that results in final and binding arbitration, a process which currently does not exist in most organizations, what are the issues to be resolved?

First is the issue of a contract between the employer and employee. The employer has made the rules of employment and may or may not have set them down in an employee handbook. If not, there is no contract, or law of the workplace, for the employee to work with. The right to challenge management decisions and the procedure for doing it have to be clearly set out in some communication, such as a handbook, that every employee knows about and is required to read.

Second is the acceptance of arbitration by employees. Insight into how employees view arbitration as a vehicle for resolving disputes over employment issues is provided by the Freeman and Rogers survey (1995). A large fraction of employees view courts and agencies as vehicles for resolving disputes concerning employment issues. However, when asked whether they would prefer an alternative system to deal with disputes in which an elected committee of employees and management would jointly choose an outside arbitrator to resolve the dispute, approximately 55 percent of employees said they would prefer the alternative system, while 37 percent wanted to go to court or to an agency. The employees who responded to the survey were favorably disposed to using arbitration to resolve disputes, but most employees want such a system to be jointly administered by employees and management. This result addresses the issue of perceived fairness and justice.

Third is employee representation. In the union setting, the employee is represented by the union but few employees have the ability to present their own case effectively. Even the most effective employee would face experienced management representatives. Employees could be represented or accompanied by fellow employees, but they would still not possess the expertise that management has in presenting their

case to the arbitrator. Therefore, effective representation involves the expense of hiring a lawyer. Without the union there should be some provision for an employee advocate or the perception of justice may be undermined. Eighty-two percent of the employees (Freeman and Rogers 1995) want a system in which "expert help" is available to the grieving employee.

Fourth is the selection of an arbitrator. The evidence indicates that the selection of a neutral outside party, especially in the formation of the procedure, is important. Employees must perceive the arbitrator as fair and competent. A controversy exists within the National Academy of Arbitrators (NAA) as to whether members should hear grievances under arbitration procedures established by nonunion employers. In a survey conducted by Nye (1994), more than 90 percent of the arbitrators indicated a conditional willingness to serve and more than 54 percent had done so.

Fifth involves compensation for the arbitrator. The employee may not be able to pay part of the arbitrator's compensation, particularly if there has been a discharge. The perception of procedural and distributive justice that both parties should accept may not be present if the issue is not resolved to the employees' satisfaction and the arbitrator has been paid by the employer. Forty-three percent of respondents to the Freeman and Rogers Survey (1995) want management and employees to pay the expenses of the system.

Sixth is enforcement of the arbitrators award. There is at present no machinery for enforcement other than the courts. If the employer ignores the arbitrator's decision, the grievant has no choice but to employ a lawyer and go to court for enforcement.

Seventh is whether employers can require employees to use ADR as a condition of employment. By almost a 4-1 margin, employees believe that such a requirement should be illegal (Freeman and Rogers 1995). There are currently some limitations to the employers' ability to force employees to arbitrate their claims of employment discrimination. No case requiring arbitration of an employee's claims, not even *Gilmer*, has expressly overruled *Alexander v. Gardner Denver Corp.*, which suggests that unionized employees claiming discrimination may still pursue judicial claims separate and distinct from their claims under the collective agreement. Whether the court would extend this right in the nonunion setting hasn't been decided. The cases requiring

arbitration of discrimination claims have all involved some agreement other than an employment contract as the vehicle imposing the obligation to arbitrate. In *Gilmer* and other securities industry cases it was a stock exchange registration agreement that contained the arbitration agreement, and in *Williams v. Katten, Muchin & Zavis*, the law firm's partnership agreement imposed the obligation to arbitrate³ Another consideration limiting the trend to force arbitration stems from a recent decision by the U.S. Court of Appeals for the 9th Circuit. In *Prudential Insurance Co. of America v. Lai*, it was held that an employee must have knowingly agreed to waive the right to a judicial forum in order to be forced to arbitrate discrimination claims.⁴ The Supreme Court on October 2, 1995 let stand this ruling.

Finally, the employee's agreement to arbitrate employment disputes must also be voluntary. A federal district court in Houston recently ordered an employer to cease and desist from requiring employees to sign an arbitration agreement; employees who refused to sign were fired. The court held that forcing employees to give up their right to resort to the courts for resolution of employment discrimination claims violated Title VII.

Recommendations

Companies use ADR to reduce litigation costs, to avoid unions, or to increase employee satisfaction. Appeals procedures vary in formality, ranging from the least formal "open door policy," through a corporate ombudsman, to a grievance and arbitration procedure. The Brown and Root System described in the Dunlop Report (U.S. Department of Labor 1994b), includes an open door policy, successive steps, mediation, and arbitration. A great deal of the research on this topic is anecdotal. Some of it is reported by Peterson and Peterson (1987). If arbitration is to be the only recourse available to employees short of exiting the company, then arbitration must be seen as neutral. The values and expectations of employees may determine the acceptance of a formal grievance procedure (Gundry and Briggs 1993). Employees who identify with the organization are less likely to need a formal procedure and less likely to go as far as arbitration (Boroff 1994). The

payoff to the employee is not as apparent as the payoff to the employer. With the limited judgment authority available to arbitrators, the cost to the company is significantly less than a comparable lawsuit. Therefore, employer-initiated arbitration is likely to expand in all sized firms and not just in large and medium-size firms where most human resources innovations occur. The GAO report (1995) found no statistically significant difference in use of arbitration based on business size.

The GAO report also echoes what many critics of employer-initiated grievance systems have said: employers use ADR to resolve discrimination complaints, and fairness is not always part of these systems. Quality standards that should be implemented to bring fairness to non-union arbitration procedures are identified by the Dunlop Commission (1994) as:

- a neutral arbitrator who knows the laws in question and understands the concerns of the parties
- a fair and simple method by which the employee can secure the necessary information to present his or her claim;
- a fair method of cost-sharing between the employer and employee to ensure affordable access to the system for all employees
- the right to independent representation if the employee wants it
- a range of remedies equal to those available through litigation
- a written opinion by the arbitrator explaining the rationale for the result
- sufficient judicial review to ensure that the result is consistent with the government laws

The Future

Arbitration provides employees and employers with a great deal of flexibility to resolve employment relationship disputes without resorting to the courts. It can be quicker, less costly, and less adversarial, as long as both parties view it as providing an equitable forum. While the parties may disagree over the results of arbitration in the unionized set-

ting, the process is viewed as being fair. However, the same cannot be said for arbitration in the nonunion setting. There is considerable inequality in economic power between employees and employers in the nonunion setting, and in order for arbitration to succeed as an alternative to the courts, equity and fairness standards have to be assured for employer-initiated procedures. This may require installing some institution or activity that gives nonunion employees some of the economic power they gain in the unionized setting, including binding arbitration.

NOTES

- 1 415 U.S. 147 (1974)
2. 500 U.S. 20 (1991)
3. 837 F Supp. 1430 (N D 211 , E D , 1993).
4. 66 FEP Cases 933 (9th Cir. 1994)

References

- Bemmels, Brian, Yonatan Reshef, and Kay Stratton-Devine. 1991. "The Roles of Supervisors, Employees, and Stewards in Grievance Initiation," *Industrial and Labor Relations Review* 45, 1 (October): 15-30.
- Berenbein, Ronald. 1980. "Nonunion Compliant Systems: A Corporate Appraisal." Report No. 770, The Conference Board.
- Boroff, Karen. 1994. "The Probability of Filing a Grievance," Proceedings of the Forty-Fifth Annual Meeting, Industrial Relations Research Association Madison.
- Chamberlain, Neil W. 1951. *Collective Bargaining*. New York: McGraw-Hill.
- Clark, Paul F. and Daniel G. Gallagher. 1988. "Membership Perceptions of the Value and Effect of Grievance Procedures", Industrial Relations Research Association, *Proceedings of the Fortieth Annual Meeting*, Madison.
- Fleming, R.W. 1965. *The Labor Arbitration Process*. Urbana, IL: University of Illinois Press.
- Freeman, Richard, and Joel Rogers. 1995. *Worker Representation and Participation Survey: Second Report of Findings*. Princeton, NJ: Princeton Survey Research Association.
- Gordon, Michael E. 1988. "Grievance Systems and Workplace Justice: Tests of Behavioral Propositions About Procedural and Distributive Justice," Industrial Relations Research Association, *Proceedings of the Fortieth Annual Meeting*, Madison.
- Gordon, Michael E., and Roger L. Bowlby. 1988. "Propositions About Grievance Settlements: Finally, Consultation with Grievants," *Personnel Psychology* 41: 107-123.
- Gordon, Michael E., and Sandra J. Miller. 1984. "Grievances: A Review of Research and Practice," *Personnel Psychology* 37, 2 (Spring,): 117-146.
- Gundry, Lisa, and Steven Briggs. 1993. "The Cultural Context of a Grievance Process; Employee Values and Expectations in Dispute Resolution," *Journal of Business and Psychology* 8: 129-140.
- Ichniowski, Casey, and David Lewin. 1988. "Characteristics of Grievance Procedures: Evidence from Nonunion, Union, and Double-Breasted Businesses," Industrial Relations Research Association, *Proceedings of the Fortieth Annual Meeting*, Madison.
- Knight, Thomas R. 1986. "Feedback and Grievance Resolution," *Industrial and Labor Relations Review* 39, (July): 585-548.
- Lewin, David, and Richard B. Peterson. 1988. *The Modern Grievance Procedure in the United States*. New York: Quorum Books.

- Meyer, David, and William Cooke. 1988. "Economic and Political Factors in Formal Grievance Resolution," *Industrial Relations* 27, 3 (Fall): 318-335.
- Muchinsky, Paul M., and Mounawar A. Maassaran. 1980. "Work Environment Effects on Public Sector Grievances," *Personnel Psychology* 33 (Summer): 403-414.
- Nye, David. 1994. "Issues in Alternative Labor Dispute Resolution: Views of Members of the National Academy of Arbitrators." Dissertation, Auburn University.
- Peach, David A., and Robert E. Livernash. 1974. *Grievance Initiation and Resolution: A Study in Basic Steel*. Boston: Graduate School of Business Administration, Harvard University.
- Peterson, Richard B. 1992. "The Union and Nonunion Grievance System." In *Research Frontiers in Industrial Relations and Human Resources*, David Lewin, Olivia S. Mitchell, and Peter D. Sherer, eds. Madison: Industrial Relations Research Association.
- Peterson, Richard B., and Mark R. Peterson. 1987. "Toward a Systematic Understanding of the Labor Mediation Process." In *Advances In Industrial and Labor Relations*, D. Lewin, D.B. Lipsky, and D. Sockell eds. Greenwich, CT: JAI Press.
- Smith, Clifford E. 1992. "Introduction to the NAA Survey." In *Labor Arbitration in America*, Mario F. Bognanno and Charles J. Coleman, eds. New York: Praeger.
- U.S. Department of Labor and Department of Commerce, *Fact-Finding Report*, Commission on the Future of Worker-Management Relations, 1994a.
- U.S. Department of Labor and Department of Commerce, *Final Report*, Commission on the Future of Worker-Management Relations, 1994b.
- U.S. General Accounting Office. 1995. "Employment Discrimination: Most Employers Use Alternative Dispute Resolution." GAO/HEHS-95-150, Washington, DC, July.