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LABOR GRIEVANCE ARBITRATION IN THE UNITED STATES

MARK E. ZELEK*

I. INTRODUCTION

In the United States, the relationship between labor unions and employers is primarily governed by written collective bargaining agreements negotiated and entered into by the parties themselves. These agreements are generally for a relatively short fixed term (often three years) and are enforceable in court by either party against the other. Among the subjects typically covered in collective bargaining agreements are rates of pay, employee discipline, seniority, sub-contracting, and union security. If a subject is not covered in the agreement, employees generally have no remedy under the American system.[1]

Over ninety percent of American collective bargaining agreements provide for some form of grievance procedure, ending in arbitration, to resolve all disputes over the application or interpretation of the agreement.[2] Under grievance procedures, the parties first attempt to settle any alleged contractual violations through negotiations at successive levels of union and management.[3] If they cannot settle the dispute, it is submitted for resolution to an independent third party arbitrator, whom they have mutually selected.[4] The parties may, for example, select an arbitrator to settle

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1. M. HILL & A. SINICROPI, REMEDIES IN ARBITRATION 26 (1981).

2. The term "arbitration" as used in this discussion refers to "grievance" arbitration only. Completely excluded is the subject of "interest" arbitration which is arbitration over terms to be included in a collective bargaining agreement. In the United States, interest arbitration is most common in the public sector where employees generally are not permitted to strike. Typically, when the parties are unable to negotiate a satisfactory contract at the bargaining table, an arbitrator or panel of arbitrators is empowered by statute to listen to the parties' positions and make findings as to appropriate contract terms. *See* H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE 121 (2d ed. 1987).

3. F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 120 (3d ed. 1973).

4. D. NOLAN, LABOR ARBITRATION LAW AND PRACTICE IN A NUTSHELL 16 (1979).

a dispute over the interpretation of contract language relating to pay rates, seniority or contractual limitations on firing or other disciplinary action against an employee. Generally, the arbitrator's decision cannot be appealed to the courts or any other government agency.[5]

II. Advantages of Labor Arbitration

The major advantage of grievance arbitration—and no doubt the main reason for its widespread acceptance in the United States—is that it enables labor and management to settle their differences while the contract is in effect without strikes or lockouts.[6] When a union agrees to arbitration, it gives up the right to strike over arbitrable disputes. Contracts that provide for arbitration generally contain clauses prohibiting strikes and lockouts over arbitrable disputes.[7] Moreover, the United States Supreme Court has held that employees violate a collective bargaining agreement by striking over an issue which is subject to binding arbitration under the agreement, even if the agreement does not contain an express no-strike clause.[8] Thus, while a dispute is resolved through the grievance arbitration system, work at the plant or office normally continues peacefully and without interruption. If there is a work stoppage, the employees involved can be disciplined, and if the strike is supported by the union, the employer can sue for damages.[9]

Grievance and arbitration procedures also guarantee that the collective bargaining agreement's provisions will be enforced without the necessity of resorting to a breach of contract suit in court.[10] As with commercial arbitration, labor arbitration is generally quicker and significantly less expensive than courtroom litigation. Moreover, labor arbitrators are theoretically better suited than American court judges to resolve disputes under collective bargaining agreements. Labor arbitrators are chosen by the parties, presumably because of some mutual trust both sides have in them, and because they often have a special expertise in the practices of

5. M. Hill & A. Sinicropi, *supra* note 1, at 17.
6. H. Perritt, *supra* note 2, at 128.
7. D. Nolan, *supra* note 4, at 53-61.
8. Local 174 Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962).
9. M. Hill & A. Sinicropi, *supra* note 1, at 149, 154.
10. H. Perritt, *supra* note 2, at 128.

the industry in which the grievances arise.[11] Thus, they are better able to fashion a decision all sides can tolerate. This is significant because, unlike most courtroom litigants, employers, employees, and unions have a day to day relationship and must be able to "live with" the judgment or award rendered.

III. HISTORICAL BACKGROUND

Despite its current widespread use, grievance arbitration is a relatively recent phenomenon in the United States. It was not generally accepted until World War II, although impartial umpires had been used to settle disputes in certain industries since the turn of the century.[12]

Until the World War II, most unions strongly opposed allowing an arbitrator to resolve their disputes with management. Instead, they preferred to use strikes and picket lines to pressure employers. Unfortunately, this often led to violent confrontations between workers and employers and disrupted the American economy.

In turn, many employers were reluctant to allow an outsider to tell them how they should run their own businesses. Furthermore, most employers believed that arbitrators would be sympathetic to unions.

During World War II, the National War Labor Board ordered the inclusion of grievance arbitration clauses in all labor-management contracts.[13] The Board believed that in order to prevent strikes which would threaten the production of war materials,[14] it was essential to have a grievance arbitration mechanism to give employees an opportunity to air and resolve their complaints. Arbitration worked very well during the war and its positive role in the war effort was widely recognized.

IV. STATUTORY AND CASE LAW BASIS OF ARBITRATION

After the war, the United States Congress and the courts began to support labor arbitration. In 1947, the United States Congress expressly declared in the Labor-Management Relations Act,

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11. R. BRITTON, THE ARBITRATION GUIDE: A CASE MANUAL 57-59 (1983).
12. H. PERRITT, *supra* note 2, at 124-27.
13. *Id.* at 127.
14. R. BRITTON, *supra* note 11, at 2, 5.

more commonly known as the Taft-Hartley Act,[15] that it favored arbitration over strikes or litigation for resolving industrial disputes.[16]

Thereafter, a series of United States Supreme Court decisions established three basic legal principles which laid the foundation for grievance arbitration as it exists today in the United States. The first rule of law is that arbitration agreements are legally enforceable in the courts. Before this rule was adopted, problems with the arbitration process arose when parties to collective bargaining agreements containing arbitration clauses refused to arbitrate or ignored an arbitrator's decision. In its *Textile Workers v. Lincoln Mills* decision,[17] the Supreme Court held that Section 301 of the Taft-Hartley Act[18] allowed a party to bring suit in federal court to compel the recalcitrant party to submit the dispute to arbitration or to force compliance with the arbitrator's decision.[19] In deciding whether to issue such an order, the court will apply the second and third rules of law which were established by the Supreme Court in three important cases that have become known as the "Steelworkers Trilogy."[20]

The second rule is that, in actions to compel a party to arbitrate, courts presume disputes to be arbitrable. The Supreme Court has prohibited lower courts from deciding the merits of a grievance filed under contracts with arbitration clauses and has restricted them to inquiring whether the claim, on its face, is gov-

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15. Labor Management Relations (Taft-Hartley) Act, 1947, ch. 120, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141-187 (1982 & Supp. V 1987)).

16. Section 203(d) of the Act provides, in pertinent part:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

29 U.S.C. § 173(d) (1982).

17. Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).

18. Section 301(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (1982).

19. Comment, *Unsuccessful Employee Arbitrants Bring Wrongful Discharge Claims in State Court: the Accommodation of Public and Private Adjudication*, 35 BUFFALO L. REV. 295 (1986) (authored by Michael G. Whelan).

20. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Corp., 363 U.S. 564 (1960).

erned by the contract.[21] If the claim is even arguably covered by the contract, the correct action for the court to take is to order arbitration. A court may only decide that the dispute is not arbitrable if the agreement provides very strong evidence that the parties intended that the claim be excluded from arbitration.[22] The significance of this rule is that it restricts parties to the agreement from using the courts rather than arbitrators to decide their disputes. In practice, there are very few disputes which a party cannot force into arbitration if the collective bargaining agreement contains a typically broad arbitration clause.[23]

The third rule of law from the Steelworkers Trilogy is that, in actions to force a party to comply with an arbitrator's award, judicial review of the arbitrator's decision is extremely limited. A court may not overturn an arbitrator's award simply because it disagrees with the arbitrator's construction of the agreement or thinks that the arbitrator did not apply correct interpretation principles. As long as the award "draws its essence" from the collective bargaining agreement, it may not be overturned or modified in any way.[24] As a result of this rule, labor arbitration is final and binding. Unlike trial court decisions, very few arbitration awards are appealed and virtually none are actually modified by the reviewing court. Instead, a union or an employer which strongly dislikes a particular arbitration decision will generally wait until shortly before the agreement's expiration date and attempt to negotiate a new agreement on the subject of the decision.

Beyond these three principles—that arbitration agreements are legally enforceable, that disputes are presumed to be arbitrable, and that judicial review is extremely limited—there are very few U.S. statutes or court decisions which influence the arbitration process. The reason for this lack of influence is that, with the significant exception of airlines and railroads which are required to arbitrate their disputes under the Railway Labor Act,[25] arbitration

21. American Mfg. Co., 363 U.S. at 564.

22. Warrior & Gulf Navigation Co., 363 U.S. at 574.

23. M. Hill & A. Sinicropi, *supra* note 1, at 6, 25.

24. Enterprise Wheel & Car Corp., 363 U.S. at 599. *See also* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987) (a court may not refuse to enforce arbitration award on public policy grounds based on "general considerations of supposed public interest," but only when it conflicts with some explicit public policy that is well-defined and dominant in laws and cases).

25. 45 U.S.C. §§ 151-188 (1982).

is largely a creature of private contract between labor and management.

IV. Grievance Procedure

As indicated earlier, a grievance is an assertion that the collective bargaining agreement has been violated. Although employers, under some contracts have the right to file grievances, the vast majority of grievances are complaints by employees that the employer is not treating them as required under the collective bargaining agreement.[26]

Probably the most common grievance is that an employee was fired or otherwise disciplined without "just cause" as is required under virtually all contracts.[27] Another typical grievance is that the employer violated seniority rights contained in the collective bargaining agreement by giving promotions, assignments, and overtime to less senior employees. Other issues which often arise involve what an employee's job duties actually are, the performance of work by employees who do not belong to the union such as supervisors or salaried employees, the subcontracting of work previously performed by union employees to non-union outsiders, and the calculation of cost-of-living payments required under the contract.

The grievance process usually consists of three or four steps which must occur within rigid time limits.[28] As a first step, the employee or shop steward usually must notify the immediate supervisor of the grievance within a few days of the action which prompted the grievance.[29] If no settlement is reached, the grievance may be appealed "up the ladder" to higher levels of the management hierarchy. Depending on the agreement, a written grievance may be filed either at the first step or any subsequent step.[30]

It should be noted that in the United States the union, and

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26. F. Elkouri & E. Elkouri, *supra* note 3, at 109.

27. In the United States, non-union employees generally do not have any such protection and can be fired for any non-discriminatory reason or no reason at all. *Id.* at 610-11. It is noteworthy that only 13% of private sector employees in the United States are union members. *Big Labor Losing Big, and Stakes get Higher*, Chicago Trib., Sept. 4, 1989, at C1, col. 2.

28. F. Elkouri & E. Elkouri, *supra* note 3, at 146-54.

29. H. Perritt, *supra* note 2, at 135.

30. *Id.*

not the employee, normally controls the grievance process.[31] The reason for this is that the union, under the Taft-Hartley Act, is the exclusive representative of employees. The union has the discretion to determine if the grievance has merit. In an appropriate case, the union can decide not to go forward with a grievance and this decision is generally binding on the employee.[32] An employee whose union has declined to proceed with his or her grievance (or which loses an arbitration) can sue the union for violating its duty of fair representation but will win only if he or she can show that the union acted in bad faith and that the claim was meritorious.[33] The fact that the union may have acted negligently or exercised poor judgment is generally not sufficient.[34]

V. THE ARBITRATOR

If a matter cannot be resolved by the union and the employer after all the grievance steps have been exhausted, it eventually is submitted to an arbitrator for resolution. Although most labor arbitrators are lawyers, many laymen such as college professors in economics or political science also serve as arbitrators.[35]

The manner for selecting an arbitrator varies. In some industries arbitrators are designated in collective bargaining agreements to hear all grievances that reach arbitration. However, under the majority of contracts, an *ad hoc* arbitrator or arbitration board must be selected by agreement of the parties for each dispute referred to arbitration.[36] This typically involves rejecting individuals from the list of arbitrators and then choosing from the remaining arbitrators on a list based on order of preference.[37] As one can imagine, the evaluation of potential arbitrators and the selection of the person or persons most likely to make a decision favorable to your side is very important. In the event that the parties fail to agree on the arbitrator within a specified length of time, most agreements provide that an impartial agency, like the American

31. *Id.*
32. *Id.*
33. *See* Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Vaca v. Sipes, 386 U.S. 171 (1967).
34. *See* Camacho v. Ritz-Carlton Water Tower, 786 F.2d 242 (7th Cir. 1986), *cert. denied*, 477 U.S. 908 (1986).
35. F. ELKOURI & E. ELKOURI, *supra* note 3, at 90, 94.
36. R. BRITTON, *supra* note 11, at 54.
37. *Id.* at 64.

Arbitration Association, will supply the arbitrator.[38]

VI. THE ARBITRATION HEARING

Once chosen, the arbitrator usually communicates with the parties to arrange a hearing. The parties normally decide on the location of the hearing. Arbitration hearings are normally held in such places as company offices, hotel conference rooms or lawyer's offices, rather than courtrooms.[39] Present at the hearing are the arbitrator or panel of arbitrators, the employer's representatives in charge of processing grievances, and the grievant and his representative. The grievant is often represented by the union rather than by a private attorney. For the most part, arbitrations are closed to the public.[40] A court reporter is present only if requested by one of the parties, who must then pay the cost; otherwise the arbitrator simply takes detailed notes.

Compared with courtroom trials, labor arbitrations are very informal.[41] Often they are more like a meeting than a trial. There are no formal pleadings and little or no discovery.[42] Thus, a lawyer who prepares a case for arbitration often has limited knowledge of what the other side's defense will be.

Moreover, although arbitrators preside over the hearing and control the procedures followed, they are generally very liberal in their application of the rules of evidence. Arbitrators are not required to observe legal rules of evidence except in the rare case where the contract expressly provides for it.[43] When confronted with an objection to the introduction of a specific piece of evidence such as hearsay testimony, arbitrators often admit the evidence and comment that they will "take it for what it's worth." By so doing, they are using the rules of evidence not to determine whether that evidence is admissible, but rather to determine the weight it should be given.[44] This flexible approach is probably due to the informality of arbitration proceedings and the fact that an

38. S. CABOT, LABOR MANAGEMENT RELATIONS ACT MANUAL 18-4 (1978). *See also Federal Mediation and Conciliation Service: Arbitration Policies, Functions and Procedures,* Lab. Rel. Rep. (BNA) LRX 5015-18 (March 25,1985).

39. R. BRITTON, *supra* note 11, at 113.

40. *Id.* at 114.

41. *Id.* at 108.

42. O. FAIRWEATHER, PRACTICE AND PROCEDURE IN LABOR ARBITRATION 121 (1973).

43. S. CABOT, *supra* note 38, at 18-6.

44. *Id.*

arbitrator's refusal to hear all material evidence may be grounds for a court to overturn the award.[45]

With the significant exception of discharge and discipline cases, the party who submitted the grievance to arbitration, usually the union, generally must put his or her case on first and has the burden of proof.[46] In discharge and discipline cases, the employer is always required to proceed first and has the burden of proof.[47] Arbitrators vary on the weight of this burden. Some arbitrators, especially where an employee is fired for activity which is criminal in nature, such as theft, require the employer to prove each element of the offense "beyond a reasonable doubt." Others, however, consider arbitration to be civil in nature and therefore proof must only be by a "preponderance of the evidence" no matter if the arbitration concerns contract interpretation or the discharge and discipline of an employee.[48]

At the beginning of the hearing both sides are given the opportunity to make opening statements.[49] Thereafter, they have the chance to present all relevant evidence and testimony. Whether the testimony is to be given under oath is decided by the arbitrator and the parties, however, arbitrators do have the power to administer oaths.[50] Leading questions on direct examination are permitted, although they of course limit the weight that the testimony will be given.[51] After direct examination, the adversary can cross-examine the witness. Since arbitrators want to secure all the facts, cross-examination is often not limited to matters that were brought out on direct.[52] Recross and redirect examination are generally allowed. A witness in an arbitration will rarely be cut-off and some arbitrators even ask witnesses at the conclusion of their testimony whether they want to say anything else.

After all the evidence is heard, the parties are generally entitled to make closing statements.[53] In many cases, the parties are permitted to submit post-hearing briefs depending on the arbitra-

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45. *See* Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955).
46. D. NOLAN, *supra* note 4, at 132. *But see* S. CABOT, *supra* note 38, at 18-11.
47. D. NOLAN, *supra* note 4, at 133.
48. *Id.* at 134, 135. *See also* S. CABOT, *supra* note 38, at 18-11.
49. F. ELKOURI & E. ELKOURI, *supra* note 3, at 224.
50. *Id.* at 221.
51. *Id.* at 226.
52. R. BRITTON, *supra* note 11, at 126.
53. F. ELKOURI & E. ELKOURI, *supra* note 3, at 224.

tor and industry custom.[54]

VII. THE ARBITRATION AWARD

After the hearing is finished, the arbitrator makes a decision by weighing all the evidence presented.[55] Often, the arbitrator accompanies the award with a written opinion stating the reasons for the decision. In making their decisions, labor arbitrators have enormous discretion. Because the arbitrator derives his power solely from the collective bargaining agreement, awards decided under different agreements and court decisions on similar issues, are not binding.[56]

Furthermore, the agreement itself usually provides little guidance as to how a particular dispute should be resolved. Often, the arbitrator is called upon to apply or interpret generalized provisions such as "an employee shall not be discharged except for just cause."[57] This is not surprising since it would be virtually impossible for the parties to anticipate the wide range of disputes which can arise in an employment relationship and probably undesirable to even attempt to provide for them all in one written agreement.

In reaching a decision, arbitrators commonly place great weight on how they believe the parties should act in the interest of promoting good labor-management relations. Often, decisions are also based on what the past practice of the parties has been in similar circumstances.[58] In the specific context of discharge and discipline cases, arbitrators typically consider factors such as whether the company gave the employee previous warnings, whether it conducted a fair investigation, how it has treated other employees who did the same thing, and whether the "punishment" is too severe for the act committed.[59]

The arbitrator also has wide discretion to decide what relief is appropriate, so long as the relief is not inconsistent with the collective bargaining agreement.[60] For example, in discharge cases, arbitrators will typically order the employer to reinstate the employee

54. *Id.* at 230.
55. *Id.* at 233.
56. R. BRITTON, *supra* note 11, at 165.
57. S. CABOT, *supra* note 38, at 14-2.
58. R. BRITTON, *supra* note 11, at 163.
59. H. PERRITT, *supra* note 2, at 129.
60. M. HILL & A. SINICROPI, *supra* note 1, at 20.

and pay him for the time he missed if they conclude that the employer did not have "just cause" for the firing.[61] However, punitive damages or attorney's fees are seldom appropriate unless the agreement expressly allows them.[62] As noted earlier, arbitration decisions are rarely appealed.

VIII. Conclusion

In this writer's opinion, grievance arbitration works well in the United States. Because of arbitration, strikes which interrupt production and paychecks are very rare while collective bargaining agreements are in effect. Moreover, the parties secure a decision by someone they themselves picked, much faster and for much less costs than if they went to court. Although the losers always grumble, both unions and employers are generally satisfied with the present system.

61. *Id.* at 42.
62. *Id.* at 184, 204.