I suspect that most arbitrators will take these cases. Union representation in employment dispute cases could well be among the fastest growing segments in the employment dispute world.

Conclusions

The probability of growth in nonunion mediation and arbitration activity involving employment disputes is strong. The approaches may involve model dispute resolution laws, statutory-based cases, employer-promulgated plans, and employment contracts. The greatest growth will likely involve statutory claims and employer-promulgated plans inclusive of employment contracts. Much confusion exists about the role of the parties, neutrals, and appointing agencies in these plans, but some of this may shake down over the next few years. Our continuing education sessions will be helpful as we seek consensus on minimum standards in these plans for arbitrators who elect to take these cases.

My expectation is that such cases will be a significant part of the workload for at least half of our membership. Some members will choose not to take them, however. Those who accept them will probably be arrayed along a continuum of minimum standards under which they will serve as arbitrators. Our discussions of the issues involved are likely to attract a number of officials from nonunion employers to our meetings. On the surface, much of what we do will look very much like what we have been doing in the past. Closer scrutiny suggests that significant differences both of degree and kind will be present.

Finally, to answer the membership problem I raised at the beginning, I anticipate that one of our new members will be the arbitrator with 45 labor-management and 45 employment cases. That applicant will probably be admitted when we meet at the refurbished Del Coronado Hotel in San Diego in 2004. I look forward to seeing you there.

PART II. JUSTICE AND THE WRONGFULLY TERMINATED

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In the last 20 years at least a half dozen members of this Academy have strongly argued that all employees, whether organized or not,

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should have a right to legal protection against wrongful or abusive termination. Two such arguments were made at our annual meetings: by Theodore St. Antoine when we met on Maui in 1981,[1] and by Howard Block in his presidential address in 1991.[2] Implicit in all of these addresses and writings is the suggestion that arbitration would provide a better way—justice for all who have been wrongfully terminated.

I do not disagree with the underlying thrust of the ideas put forth by these distinguished predecessors. But, as the arbitration of grievances over discharges has developed in the United States and Canada, I fear the remedial practices ordinarily used will not provide many of those wrongfully terminated with much justice. Here I think specifically of those unrepresented by unions and refer to the reinstatement remedy customarily provided. In this "kinder and gentler" society, to borrow this twice-used phrase, reinstatement may be insufficient to remedy or protect those who have been unjustly deprived of their jobs. This thought arises as I consider the "new roles" we are increasingly asked to fill.

First, what are the facts? Jack Stieber, who has studied unjust discharges as much as anyone, has concluded that reinstatement, with or without back pay, is awarded in about half of all discharge cases going to arbitration.[3] He estimates that about 150,000 wrongfully discharged but unrepresented employees would be reinstated each year if they could appeal to an impartial arbitrator or tribunal.[4] Canadian experience in the unionized sector seems much like that of the United States, with reinstatement of about half of discharged grievants who are able to go to arbitration.[5]

None of the industrialized democracies of the world follow our North American practice of reinstating wrongfully terminated employees. While most European labor courts have authority to order

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[1]St. Antoine, *Protection Against Unjust Discipline: An Idea Whose Time Has Long Since Come*, in Arbitration Issues for the 1980s, Proceedings of the 34th Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1982), 43.

[2]Block, *The Presidential Address: Toward a "Kinder and Gentler" Society*, in Arbitration 1991: The Changing Face of Arbitration in Theory and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1992), 12.

[3]Stieber, Block, & Corbitt, *How Representative Are Published Decisions?* Part II, in Arbitration 1984: Absenteeism; Recent Law, Panels, and Published Decisions, Proceedings of the 37th Annual Meeting, National Academy of Arbitrators. ed. Gershenfeld (BNA Books 1985), 172, 180–81.

[4]Stieber, *Recent Developments in Employment-at-Will*, 36 Lab. L.J. 557 (1985); letter to The Chronicle, Apr. 1993, at 5.

[5]Heenan, *As the Parties See It: III. A Canadian Advocate's View*, in Arbitration—Promise and Performance, Proceedings of the 36th Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1984), 60, 63.

reinstatement, they exercise it only with great reluctance, in as little as 2 percent of all cases.[6] The chief reason for this failure to reinstate is the European neutrals' conclusion that nonunion workplaces provide little support or protection for the reemployed worker.

Most American commentators who argue for arbitration of the grievances of unrepresented, terminated employees are aware of this foreign attitude but dismiss it as inconsequential. For example, Ted St. Antoine concluded, "I see no reason for precluding reinstatement out of an exaggerated regard for the employee's psychic well-being.... I would grant reinstatement when it seemed appropriate, and let the employee decide what use to make of the award."[7] In the face of this unconcern, however, there is a recent body of research suggesting that regard for employee well-being following reinstatement is not inconsequential, and that arbitral reinstatement of the nonunion, unrepresented employee is often of small benefit to the wronged individual.

One of the regrettable consequences of the academic divorce of industrial relations from human resources is that scholarly research in each field is now published in separate journals and neither group pays much attention to the findings of the other. Certainly the Academy's Committee on Alternative Labor Dispute Resolution, of which I confess I was a member, never considered the findings of human resource scholars when we recommended, "a significantly broader institutional role for the Academy with respect to the arbitration of employment disputes outside the context of a collective bargaining agreement."[8]

What are the relevant human resource findings? First, nearly half of all nonunion firms have grievance procedures, though they are usually titled complaint, due process, or appeal procedures rather than refer to grievances per se.[9] More important, those who use these grievance procedures receive, in the following year, lower performance ratings and lower rates of promotion. And, most noticeably, they have higher turnover rates.[10] Users of these

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[6]Goldman, *Introduction to a Twelve Nation Study*, 9 Comp. Lab. L.J. (1987), 4.

[7]St. Antoine, *supra* note 1, at 59–60.

[8]*Appendix B: Report of the Committee to Consider the Academy's Role, if Any, With Regard to Alternative Labor Dispute Resolution Procedures*, in Arbitration 1993: Arbitration and the Changing World of Work, Proceedings of the 46th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1994), 325, 340–46.

[9]Lewin, *Grievance Procedures in Non-Union Businesses* (Columbia Univ. Inst. of Indus. Rel. 1991).

[10]McCabe & Lewin, *Employee Voice: A Human Resource Management Perspective*, 34 Cal. Mgmt. Rev. 112, 114 (1992).

procedures often are simply not there a year later. Apparently the use of "voice" leads to early "exit."

"Aha!" you say: Nonunion management takes reprisal against those who grieve. Perhaps so, but this does not explain another human resource finding. The immediate supervisors of these aggrieved employees show the same subsequent low performance and promotion ratings and the same high exit rates as their aggrieved subordinates. We Academy members are concerned with fairness and equity to employees. I see no reason why our concern should not extend equally to first-line supervisors as well as to those whom they supervise. At any rate, what seems evident from the human resource studies of nonunion grievance procedures is that reinstatement of an unrepresented employee is a very weak reed.[11] Those whom management wants to be rid of will eventually be gone, and sooner rather than later. One of our late, most esteemed members, William Simkin, found this same result had become more frequent in recent years among the unionized workers whom he had reinstated.[12] Another member, I.B. Helburn, demonstrated that only the rare individual whom we find without fault and completely exonerate, one whom we put back to work with a total make-whole remedy, is likely to be considered by management a satisfactory employee who is welcome for the future.[13]

If the reinstatement remedy we award in almost all unjust discharge cases has increasingly become an inadequate remedy for deserving employees, what is the alternative? Far more frequently than now, we should consider the possibility of back pay or damages without reinstatement. I realize this is not unheard of. Marvin Hill and Anthony Sinicropi cite two such awards in their book,[14] one by this year's distinguished speaker, William Gould. I know of two more occasions where arbitrators utilized back pay without reinstatement. Frances Bairstow adopted this approach in a case where the employer had wholly ignored the contractual due process requirements but where, on the merits, the grievant had physically abused an elderly convalescing patient.[15] The other case

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[11]Lewin, *Grievance Procedures in Non-Union Workplaces: An Empirical Analysis of Usage, Dynamics, and Outcomes*, 66 Chi.-Kent L. Rev. 823 (1992).

[12]Simkin, *Some Results of Reinstatement by Arbitration*, 41 Arb. J. 53 (1986).

[13]Helburn, *Seniority and Postreinstatement Performance*, in Arbitration 1990: New Perspectives on Old Issues, Proceedings of the 43rd Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1991), 141.

[14]Hill & Sinicropi, Remedies in Arbitration, 2d ed. (BNA Books 1991), 182–83.

[15]*Gulfport Convalescent Center v. Food & Commercial Workers Local 1625* (Bairstow 1993) (unpublished opinion).

is one of my own. It involved a situation where the grievant had committed no dischargeable offense but whose gun-craziness and explosive temper made managers genuinely fearful of their own and other employees' safety.[16] I'll not soon forget my emotion when, after a meeting where I told the parties he would receive a year's back pay but not reinstatement, the grievant turned to me and with great hostility asked, "What's this snake, this COBRA, you say they'll give me?"

Confirmation of my hypothesis that damages rather than reinstatement may often be a remedy preferred by the unjustly discharged can be gained from our recent experience with so-called wrongful termination arbitrations. These involve white-collar employees, usually exempt from the National Labor Relations Act, whose potential or actual suit for unjust termination or breach of contract is voluntarily converted to arbitration. In Southern California, where these cases are apparently most common, these disputes come to arbitration by agreement of counsel or at the suggestion of overburdened judges. I have no hard data on these recent wrongful termination arbitrations, but I undertook a nonrandom sampling of them. I queried arbitrators whom I know to be active in this field, district directors of the American Arbitration Association, and members of the so-called plaintiff's bar. All those who answered my enquiries confirmed my own experience. Requests for reinstatement in wrongful termination arbitrations are extremely rare; damages almost always are the preferred remedy.

I was able to track nearly 75 of these wrongful termination arbitrations, all heard in the last two years. Reinstatement was requested as a remedy in only four of them. In fact, in several the employer had offered reinstatement, but the plaintiff's attorney, for obvious reasons, strongly rejected that remedy. In none of the 75 was reinstatement granted even where deserved, apparently because the arbitrator, like some early American judges, believed the employment relationship had been irremediably harmed by the discharge. Finally, damages rather than reinstatement is so much a part of our Southern California practice that members of the plaintiff's bar often prefer arbitrators who are not Academy members. Rightly or wrongly, they feel labor arbitrators are not accustomed to granting the size of awards typically given deserving plaintiffs in such cases. Remedial amounts of a quarter of a million

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[16] *U.S. Borax & Chem. Corp. v. Longshoremen (ILWU) Local 30* (Rehmus 1993) (unpublished opinion).

dollars and up have become routine—though not to many of us. This reminds me of the time that a generous contributor to Cornell's ILR School apologized to me, saying, "I'm sorry it isn't more. I can remember when a million dollars was real money."

But, you may respond, these wrongful termination cases involve white-collar, exempt employees: Blue-collar workers are different. I doubt it. English experience with wrongfully terminated, unrepresented blue-collar employees is that they overwhelmingly prefer damages to reinstatement.[17] This is true even though English damage awards are usually low, only two or three months' wages. North American blue-collar workers are far more familiar with changing their workplace and with unfamiliar job requirements than their British, European, or Japanese counterparts. Thus, it seems that wrongfully discharged North Americans would welcome damages and the chance to seek a new job as much as the world's other blue-collar workers.

Another body of arbitral experience seems to support this view. John Shearer, Joan Dolan, and several other Academy members regularly or occasionally during the course of their hearings ask the parties to make one last effort to settle the grievance themselves. Some of these cases, of course, involve discharges. In 2 or 3 of 10 of them, the parties do settle. While these arbitrators who make a special effort to encourage voluntary settlements during their hearings do not consider the basis for such settlements their business, they are sometimes told that the employer has, with union acquiescence, "bought out" the employee's interest in the job.[18] This is, of course, the same as damages. My information about these cases is too fragmentary to permit any analysis or firm conclusion, but it does suggest that employers, grievants, and their unions are at times comfortable with dollars in lieu of reinstatement as the appropriate remedy for individuals who have been unjustly discharged.

I think this area of remedies for unjust discharge may be one where our new roles may require us to rethink one of our labor-management roles. Obviously, wrongful termination arbitration is not a substitute for the strike. But then, in these times neither is

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[17]Wood, Hepple, & Johnson, "United Kingdom," in *The Role of Neutrals in Shop Floor Disputes*, 9 Comp. Lab. L.J. 206 (1987).

[18]Letter from John Shearer to Charles Rehmus (Dec. 21, 1993); letter from Joan Dolan to Charles Rehmus (Jan. 22, 1994).

grievance arbitration. If and when we act as a substitute for litigation, it seems to me perfectly appropriate for an arbitrator, rather than leaving the back-pay remedy up to the parties as we so often do, to take evidence on the damages suffered by the claimant and render an award in dollars and cents. This is what courts and commercial arbitrators do. When we function in their place, there is little reason we should not do the same. Wrongful termination cases suggest that damages are the preferred remedy. Why not consider whether the same award might sometimes be equally welcome in labor-management discharge cases?

Rendering a damage award can help to eliminate the trap I mentioned earlier, that of a due process failure but an evidently guilty grievant. Damages may be the only good remedy for the employee management seems likely to get rid of anyway. And back pay or damages without reinstatement may provide some help also for the first-line supervisor who often is punished by management for allowing a grievance to rise above the shop floor.

David Feller once told us, "the arbitrator's function is not to award damages."[19] But David made it clear that he was speaking of the remedies he believed were implicit in the parties' negotiated agreements. No such implicit remedies exist in many of arbitration's new roles. I doubt implicit remedies exist for discharges except by our common practice when the parties regularly ask us, "If not, what shall be the remedy?" It may be that the common law of our shop makes the answer to this question, "Reinstatement." But this is only our own past practice. Reinstatement was established as the appropriate remedy by the early greats—Ralph Seward, Bill Simkin, Dave Cole, and Harry Platt, to name only a few—and accepted by the rest of us as received wisdom.

The statutory and legal framework in which we live and work today is much different from that of the 1940s and 1950s. Then few laws allowed individuals to claim substantial damages. Beginning in the 1960s, however, with the passage of legislation providing protections enforceable by individual suits in federal and some bellwether state courts, substantial damage remedies became common. But the union movement appears to have fallen behind in the remedies it requests of us and we routinely grant.

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[19]Feller, *Remedies in Arbitration: Old Problems Revisited*, in Arbitration Issues for the 1980s, Proceedings of the 34th Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1982), 109, 111.

I conclude with only a suggestion. Even where a labor contract is in force, we might rethink our almost invariable use of reinstatement as the appropriate remedy for wrongful discharge. If not, we risk slipping out of the mainstream of those who provide justice in our society.