Chapter 2

WORKPLACE ADR: WHAT'S NEW AND WHAT MATTERS?

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Introduction

For two decades I have been studying nonunion workplace dispute resolution and want to use the occasion of the 2007 National Academy of Arbitrators' (NAA) Annual Meeting to share with you and reflect upon the key findings from this research. During this two-decade period, U.S. unionism (and unionism in most other nations) has continued to decline, specifically in the private sector; nonunion firms have increasingly adopted grievance-like employment dispute resolution procedures; and alternative dispute resolution, ADR, has become a common feature of these nonunion dispute resolution systems. It is therefore both timely and important to ask, "What's new and what matters about workplace ADR?" In today's presentation, I will attempt to answer this key question, but I begin by focusing on what is a continuing, though deepening, trend, namely, the decline of private sector unionism.

The Decline of Private Sector Unionism

The causes of private sector unionism's decline are thought to be well known, yet it is not widely known or appreciated that this decline began virtually on the date (in 1955) that the American Federation of Labor (AFL) merged with the Congress of Industrial Organizations (CIO) to form the AFL-CIO. That merger significantly reduced, if not fully eliminated, the competition for unionism among what had been two separate, vigorous organizations, one (the AFL) that sought to organize workers on the basis of their particular occupation, job title, and/or skill set—craft unionism—and the other (the CIO) that sought to organize

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workers of varying occupations, job titles, and skill sets on the basis of their common employment with a single firm—industrial unionism. Just as mergers among firms tend to reduce business competition for customers, so too did the merger of these two dominant labor organizations reduce the competition for workers to become union members-customers. Further in this regard and, by contrast, U.S. public sector unionism grew rapidly during much of the same period in which private sector unionism declined, and this union growth was stimulated by, as examples, the competition among the National Education Association (NEA), the American Federation of Teachers (AFT), and the American Association of University Professors (AAUP) to enroll "teachers" as union members; and the competition between the American Federation of State, County and Municipal Employees (AFSCME) and the Service Employees International Union (SEIU) to enroll health care, clerical, administrative, and operative employees of governments as union members.

In addition and much better known, the decline of private sector unionism during the last half-century, especially the last quarter-century, was also due to major increases in global economic competition, deregulation, and technological change. This triplet of what economists refer to as "exogenous" forces served to substantially reduce the monopoly and oligopoly power of U.S. firms, which meant that those firms could no longer pass on to customers price increases based on cost increases resulting from negotiated collective bargaining agreements with unionized employees. Instead, company after company sought to escape the burden of unionized employee pay and benefits by moving operations and offices to lower cost, typically nonunion, locations within the U.S. (as exemplified during the 1980s by automobile companies' "Southern Strategy"), substituting relatively less expensive capital and technology for unionized labor and, especially notable, by moving operations and offices to offshore locations that featured far lower labor (and other) costs than those that prevailed in the U.S.

These developments were further stimulated—if they needed to be stimulated—by the research of industrial relations and labor economics scholars showing that unionism was significantly (in the statistical sense of this word) positively associated with pay and benefit costs and significantly negatively associated with firms' capital investment, research and development (R&D) expenditure, and profitability. All this meant, in turn, that labor unions

became less and less capable of delivering a pay (and benefit) premium to union members. This "knowledge" became well understood by nonunion workers, including newer labor force entrants, who chose not to become union members (because the cost of union dues was greater than the pay/benefit increases that unions were able to negotiate), and by unionized workers as well who in certain circumstances sought to decertify their unions annually during the 1980s and 1990s.

The Rise of Nonunion Employment Dispute Resolution Procedures

For NAA members, of course, the decline of private section unionism has meant a concomitant decline in the use/incidence of arbitration and, to a lesser extent, mediation, as workplace dispute resolution mechanisms in this part of the economy. In other words, the demand for traditional private sector labor arbitration (and mediation) has declined notably during recent decades. Yet as this audience knows full well, the demand for private sector nonunion employment arbitration (and mediation) has increased markedly during these same recent decades. Why? Because and as noted at the outset, nonunion firms have increasingly adopted one or another type of workplace/employment dispute resolution procedure, and these procedures often include provisions for arbitration, though far less often mediation. Yet, the "why" question remains, that is, "Why have nonunion firms so clearly tipped toward the adoption of such procedures?"

One answer to this question, the simple (-minded) answer, is that these firms seek to avoid or ward off the unionization of their employees by in effect providing a substitute for unionism (that is, union representation). There is no doubt that this "explanation" holds in certain circumstances or cases. As examples, Northrop-Grumman Corporation (which is about 3 percent unionized) and Federal Express Corporation (whose pilots, but not other employees, are unionized) explicitly state that their adoption of nonunion employment dispute resolution procedures was due in large part to a desire to avoid (more) employee unionization. More broadly and fundamentally, however, nonunion firms appear to adopt formal workplace dispute resolution procedures primarily for strategic reasons, namely, the identification of workplace problems, the generation of information about these problems, the diagnosis of underlying reasons for these problems, and the specification

of solutions to these problems. This line of reasoning is consistent with—affirmed by—a large amount of research and practice, which clearly indicates that union avoidance is hardly the sole, let alone dominant, reason for the widespread adoption by nonunion firms of workplace/employment dispute resolution procedures.[1]

Another, more compelling, reason why nonunion firms have increasingly adopted workplace/employment dispute resolution procedures is, as the acronym "ADR" suggests, as an alternative to the litigation of workplace/employment disputes. Consider that from the early 1960s to the mid-1990s, the U.S. Congress passed at least two dozen statutes regulating employment practices, including in the areas of discrimination, workplace safety, pensions, and leaves; similar legislation developed in Canada as well. Further, between 1980 and 2005, there was a 600 percent rise in U.S. federal court suits involving employment disputes—and perhaps even larger increases in such litigation in state and local courts. The median award to (U.S.) plaintiffs who won their employment discrimination cases was $250,000 between the mid-1990s and mid-2000s, and one in nine cases resulted in plaintiffs receiving $1 million or more each.[2] In addition, various cases alleging wrongful termination from employment without reference to a specific statute were increasingly heard by the courts, which typically ruled in favor of plaintiffs on the ground that implicit employment contracts existed between employers and employees, hence, such terminations violated those contracts. The newest area of employment litigation, with California in the lead, involves claims of violation of long-standing federal and state overtime laws, specifically, that employees holding managerial jobs (such as store manager) and being paid salaries are, in reality, non-exempt employees performing work that merits overtime pay if daily or weekly hours worked exceed federal or state specified minimums.[3] Note, too, that, in the U.S., all of these types of cases (that reach trial) are handled

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[1]Colvin, Klaas, & Mahony, *Research on Alternative Dispute Resolution Procedures*, in Contemporary Issues in Employment Relations, ed. Lewin (Champaign, IL: Labor and Employment Relations Association 2006), at 103–47; Feuille & Delaney, *The Individual Pursuit of Organizational Justice: Grievance Procedures in Nonunion Workplaces*, in Research in Personnel and Human Resource Management, eds. Ferris & Rowland (1992), at 10: 187–232.

[2]Colvin, Klaas, & Mahony, *Research on Alternative Dispute Resolution Procedures*, in Contemporary Issues in Employment Relations, ed. Lewin (Champaign, IL: Labor and Employment Relations Association 2006), at 103–47.

[3]Levine & Lewin, *The New 'Managerial Misclassification' Challenge to Old Wage and Hour Law; Or, What is Managerial Work?*, in Contemporary Issues in Employment Relations, ed. Lewin (Champaign, IL: Labor and Employment Relations Association 2006), at 189–222.

by nonspecialist judges. Analytically, therefore, the demand for nonunion workplace/employment ADR can in important part be attributed to the slowness, costliness, and unsatisfactory outcomes of litigation.

Further, and as hardly need be pointed out to members of this audience, certain court decisions have also served further to increase the demand for nonunion workplace/employment dispute resolution procedures generally and arbitration in particular. For example, in its 1991 *Gilmer v. Interstate/Johnson Lane Corp.* decision,[4] the U.S. Supreme Court ruled that a claim of employment discrimination set in the securities industry and filed under the Age Discrimination in Employment Act (ADEA) was subject to binding arbitration. This decision not only affirmed but also extended the reach of mandatory arbitration in employment discrimination cases more broadly. This doctrine was reaffirmed and therefore strengthened in the 2001 U.S. Supreme Court decision in the *Circuit City Stores, Inc. v. Adams* case.[5] Analytically, these decisions served to increase employer demand for workplace/employment ADR, especially mandatory arbitration.[6]

Putting these trends and developments together, out of a U.S. workforce that presently totals about 145 million, roughly 12 million are covered by grievance procedures contained in collective bargaining agreements, all but a handful of these agreements provide for arbitration as the final step of the procedure, and approximately one-tenth of these agreements provide for the mediation of grievances. By contrast, about 45 million members of the nonunion U.S. work force are covered by individual employment contracts, the large majority (roughly 80 percent) of these contracts contains a formal dispute resolution procedure, arbitration is included (typically as the final step) in about one-half of these contracts, and mediation is included in perhaps one-eighth of these contracts. This means that considerably more non-union than unionized U.S. employees are covered by explicit employment contracts, and also that considerably more nonunion than unionized employees are subject to "alternative" dispute resolution procedures, including arbitration and mediation.

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[4]500 U.S. 20 (1991).

[5]532 U.S. 105 (2001).

[6]Colvin, 2004. *Adoption and Use of Dispute Resolution Procedures in the Nonunion Workplace*, in Advances in Industrial and Labor Relations, eds. Lewin & Kaufman (Oxford, UK: Elsevier 2004), at 13: 69–95.

Use of and Satisfaction With ADR

Most of the evidence about "user" satisfaction with ADR comes from studies of and data pertaining to large publicly traded companies. In summarizing this evidence, it is important to first consider the actual use of ADR by these companies. For this purpose, a study by Lipsky, Seeber & Fincher[7] that included a survey of Fortune 1000 (U.S.) companies and that yielded a 60.6 percent response rate (i.e., n = 606), found that the most widely used forms of ADR were mediation (used by 87 percent of companies at least once in the three years prior to the survey) and arbitration (used by 80 percent of the companies at least once in the three years prior to the survey). Next in order of use were mediation-arbitration (40 percent), in-house grievance procedures (37 percent), mini-trials (23 percent), fact finding (21 percent), peer review (10 percent), and ombuds (10 percent). Note that five of these forms of employment dispute resolution—mediation, arbitration, mediation-arbitration, mini-trials, and fact finding—feature the use of a procedure external to the organization, whereas three forms—in-house grievance procedures, peer review, and ombuds—feature the use of a procedure internal to the organization.

Respondents indicated that their favorite form of ADR was mediation (63 percent), with arbitration trailing considerably (at 18 percent). Respondents also indicated that they used mediation and arbitration occasionally (i.e., 43% rated mediation "3," or occasionally, on a five-point scale, and 42% rated arbitration "3"), while about 13 percent said that mediation and arbitration were used frequently, and 30 and 33 percent, respectively, said they were rarely used. Further, about 92 percent of respondents had used mediation and 95+ percent had used arbitration in rights disputes, while more than 60 percent had never used mediation and 64+ percent had never used arbitration in interest disputes. Thus, nearly all large U.S. corporations have had recent experience with ADR (principally mediation and arbitration), use it occasionally, and use it largely in cases of rights disputes.

Three situations stand out in terms of leading companies to use ADR: (1) for particular disputes, an alternative to litigation may be desirable; (2) companies may agree in advance to use mediation or arbitration to resolve future disputes; and (3) companies may

[7]Lipsky, Seeber, & Fincher, Emerging Systems for Managing Workplace Conflict (San Francisco, CA: Jossey-Bass 2003).

be ordered by a court or administrative agency to resolve a dispute through mediation or arbitration. The "triggers" for mediation's use are generally the first and third of these reasons. The trigger for arbitration's use is generally the second of these reasons, with an arbitration provision typically written into an explicit contract. Large proportions of companies regard mediation and arbitration as saving money and time relative to litigation. Furthermore, 83 percent of respondents indicated that they use mediation because it allows the parties to resolve the dispute themselves, 81 percent judged mediation to be a more satisfactory dispute resolution process than litigation, and 67 percent said that it provided more satisfactory settlements than litigation. Regarding arbitration, 91+ percent of respondents indicated that arbitration was required by contract (i.e., agreed to in advance), 60 percent indicated that arbitration was a more satisfactory process than litigation, and 60 percent also said that arbitration had more limited discovery than litigation. Only 35 percent, however, said that arbitration resulted in more satisfactory settlements than litigation.

Among companies that do not use ADR, key reasons include the following: senior managers are opposed, middle managers fear loss of control, ADR is too difficult or complicated to initiate, arbitration and mediation are not confined to legal rules, opposing parties are not willing to consider using ADR, ADR results in too many compromise settlements, and managers lack confidence in neutrals. And, although respondents generally regard mediators as either very qualified or somewhat qualified and regard arbitrators as somewhat qualified, 29 percent expressed a lack of confidence in mediators, 48 percent expressed a lack of confidence in arbitrators, 20 percent said there is a lack of qualified mediators, and 28+ percent said there is a lack of qualified arbitrators.

Analysis of survey data also leads to a three-fold categorization of companies in terms of their conflict management strategies. On this basis, about 9 percent of firms have a "contend" strategy, 74 percent have a "settle" strategy, and 17 percent have a "prevent" strategy. Company size is positively correlated with the prevent strategy, industry concentration is positively associated with the contend strategy, and companies in financial services, insurance, construction, and nondurable goods manufacturing tend to choose the prevent strategy. Other factors influencing the choice of conflict management strategy include a strong-culture organization with team-based work (prevent strategy), an internal ADR champion (prevent or settle strategy), a high exposure

profile (settle strategy), and a precipitating event (settle or prevent strategy). Examples of companies with a contend strategy include Emerson Electric (ADR would undercut senior management's authority and control), Schering-Plough (ADR would threaten middle managers' authority), and Hewlett-Packard (stakes too high to compromise through ADR). Examples of companies with a settle strategy include Kaufman and Broad, Warner Brothers, Universal Studios (the last two companies being strongly influenced by high unionization), USX Corp., and Mirage Resorts. Examples of companies/organizations with a prevent strategy include G.E., Nestle USA, Johnson and Johnson, the U.S. Postal Service, PECO Energy, and Coca-Cola.

In sum, the declining use of arbitration and mediation to help settle workplace/employment disputes in unionized settings has been more—far more—than offset by the increasing use of arbitration and mediation (as well as other methods) to help settle workplace/employment disputes in nonunion settings. Further, although the parties to nonunion workplace/employment disputes, that is, employers and employees, have some concerns about and criticisms of ADR, the fact that they increasingly use one or another type of ADR combined with research showing that most employer and employee participants perceive the ADR process quite favorably, being on average highly satisfied with mediation and mediators and modestly satisfied with arbitration and arbitrators, leads to the conclusion that nonunion ADR is working reasonably well, perhaps even quite well.[8] But this rather sanguine story about ADR needs to be placed in larger context, especially in order to address the question posed in this title of this presentation, namely, "What's new and what matters?" with respect to workplace ADR.

Post-Dispute Resolution Outcomes or What Happens After Disputes are Settled?

In a series of studies conducted in more than two dozen nonunion (or partially unionized) companies since the mid-1980s, I have analyzed what I refer to as post-grievance or post-dispute

[8]Bingham & Chachere, *Dispute Resolution in Employment: The Need for Research*, in Employment Dispute Resolution in the Changing Workplace, eds. Eaton & Keefe (Champaign, IL: Industrial Relations Research Association 1999), at 95–135.

settlement outcomes.[9] Each of these companies has a formal nonunion workplace dispute resolution system in place, with a typical system providing three to four specific dispute resolution levels or steps. In the majority of these systems, the last step features one or another type of management-determined resolution, as examples, a Chief Administrative Officer, a head Human Resources executive, a three-member top management committee, and in two instances a Chief Executive Officer. Several of these systems provide for peer review as an intermediate grievance settlement step, and one provides for peer review as the final grievance step. About one-third of these systems specify arbitration as the final grievance step, with such arbitration being mandatory in all but two instances. Hence, and not surprising, there is far more variation in the type of final grievance settlement step in nonunion workplace dispute resolution procedures than in unionized workplace dispute resolution procedures. Concerning mediation, only about 15 percent of these systems specify this method of workplace dispute resolution, and only one actually requires it.

Regarding the actual use of these systems, levels of settlement, and employer-employee win-loss rates with respect to the disputes that arise there under, consider the following summary data. First, on average five grievances per every 100 employees are filed annually under these nonunion dispute resolution procedures, or approximately one-half the annual grievance filing rate that prevails (again on average) in unionized settings. Second, the vast bulk of nonunion employee grievances are settled at the early steps of the dispute resolution system. In a typical four-step system, for example, about 60 percent of grievances are settled at the first step and another 25–30 percent are settled at the second step. Of the remainder, most are settled at the third step of the dispute resolution system, meaning that between 1 and 5 percent of nonunion employee grievances are settled at the fourth (final) step. Third, the percentage of final step settlements in these companies is higher when arbitration is the final settlement step than when it is not—roughly 4 percent versus 2 percent, respectively,

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[9]Lewin, *Dispute Resolution in the Non-union Firm: A Theoretical and Empirical Analysis*, J. Conflict Resol. 31 (1987), 3: 465–502; Lewin, *Grievance Procedures in Non-union Workplaces: An Empirical Analysis of Usage, Dynamics, and Outcomes*, Chi.-Kent L. Rev. 66 (1992), 3: 823–44; Lewin, *Workplace Dispute Resolution*, in The Human Resource Management Handbook, Part II, eds. Lewin, Mitchell, & Zaidi, (Greenwich, CT: JAI Press 1997), at 197–218; Lewin, *Dispute Resolution in Non-union Organizations: Key Empirical Findings*, in Alternative Dispute Resolution in the Employment Arena, eds. Estreicher & Sherwyn (New York: Kluwer 2004), at 397–403.

of all grievances filed annually. Fourth, and especially notable, employer-employee win-loss rates vary considerably by level of grievance settlement in these nonunion companies. To illustrate, the employer win rate is a bit more than 60 percent and the employee win rate is a bit under 40 percent at first step grievance settlement, whereas these percentages are almost exactly reversed at last step grievance settlement (although employer and employee win rates are each about 50 percent when arbitration is the last settlement step).

Turning from nonunion workplace dispute resolution processes and dynamics to outcomes, it is important to grasp what scholars refer to as the research design that has been most often used to study such outcomes. This is known as a quasi-experimental design ("quasi" because it has not been conducted in a laboratory) and involves selecting matched samples of nonunion employees within a company, some of whom subsequently file grievances under that company's workplace dispute resolution system and others of whom do not; the former are referred to as grievance filers, the latter as grievance non-filers. These two groups are then compared in terms of their job performance ratings, promotion rates, and work attendance rates (1) before, (2) during, and (3) after grievance filing and settlement. In addition, the two groups are compared with respect to their voluntary and involuntary turnover rates after grievance filing and settlement. In effect, the grievance non-filers serve as a (quasi-experimental) control group against which the grievance filers are compared along these four outcome measures.

The main findings from this analysis are as follows. Comparing samples of nonunion employees who subsequently file grievances with similar employees who do not file grievances, the two groups *do not* differ significantly in terms of job performance ratings, promotion rates, or work attendance rates prior to and during the period of grievance filing and settlement. During the one- to three-year period following grievance settlement, however, grievance filers have statistically significantly *lower* job performance ratings and promotion rates and modestly (insignificantly) *lower* work attendance rates than grievance non-filers. Further, during the one- to three-year period following grievance settlement, grievance filers have statistically significantly *higher* turnover rates, in particular, *voluntary* turnover rates, than grievance non-filers. Keep in mind that these findings are based on studies of tens of thousands of nonunion employees ranging across two dozen companies; numerous industries, occupations, and work settings; and

several different time periods. Also keep in mind that these post-dispute resolution outcomes are *not* attributable to any particular set of grievance issues, specific grievance decisions, level of grievance settlement, or method of grievance settlement, including arbitration.

By themselves, these findings appear to call into question the continued viability of nonunion employment relationships for those employees who choose to avail themselves of their employers' dispute resolution systems by filing grievances (and having them settled). But these findings don't have to be taken alone, because similar findings have emerged from the same type of studies that focus not just on nonunion employees but, in addition, on the supervisors of nonunion employees. That is to say, samples of supervisors of nonunion employees who subsequently filed grievances under their companies' dispute resolution systems were selected and matched with samples of supervisors of nonunion employees in the same companies who did not subsequently file grievances. These two sets of supervisors were then compared on the same dimensions as before, namely, job performance ratings, promotion rates, and work attendance rates prior to, during, and after grievance filing and settlement, and voluntary and involuntary turnover rates after grievance filing and settlement. The findings from this analysis tell a very similar story in that the supervisors of (subsequent) grievance filers did not differ significantly from the supervisors of non-grievance filers in terms of job performance ratings, promotion rates, and work attendance rates, either prior to or during the period of grievance filing and settlement. During the one- to three-year period following grievance settlement, however, the supervisors of grievance filers had statistically significantly lower job performance ratings, promotion rates, and work attendance rates than the supervisors of non-grievance filers. Further, supervisors of grievance filers had statistically significantly higher turnover rates than the supervisors of non-grievance filers during the post-grievance settlement period, with the difference in involuntary turnover rates being especially large and significant.[10]

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[10]Lewin, *Dispute Resolution in the Non-union Firm: A Theoretical and Empirical Analysis*, J. Conflict Resol. 31 (1987), 3: 465–502; Lewin, *Grievance Procedures in Non-union Workplaces: An Empirical Analysis of Usage, Dynamics, and Outcomes*, Chi.-Kent L. Rev. 66 (1992), 3: 823–44; Lewin, *Dispute Resolution in Non-union Organizations: Key Empirical Findings*, in Alternative Dispute Resolution in the Employment Arena, eds. Estreicher & Sherwyn (New York: Kluwer 2004), at 397–403.

Similar to the previous analysis, these findings are based on studies of thousands of supervisors of nonunion employees and range across a wide variety of companies, industries, occupations, work settings, and time periods. Also as before, these post-dispute resolution outcomes are *not* attributable to any particular set of grievance issues, specific grievance decisions, level of grievance settlement, or method of grievance settlement, including arbitration. Taken as a whole, this evidence clearly provides an answer to the question "What's new in workplace ADR?" But does this evidence also provide an answer to the question "What matters in workplace ADR?"

My answer to this question is "yes," but this answer does not rest solely on the aforementioned findings. This is in part because quite similar findings have been produced by other scholars using field research methods featuring survey, interview, direct observation, and individual cases, and by still other scholars who have used experimental research designs to study nonunion workplace dispute resolution.[11] It is also in part—in important part—because very similar findings have been produced from studies of post-grievance dispute settlement outcomes in unionized settings ranging from steel manufacturing and retailing to health care and public education.[12] The totality of this evidence therefore tells us that among the things that matter most in workplace dispute resolution, both newer ADR in nonunion settings and older grievance procedures in unionized settings, is the additional deterioration of employment relationships after grievances have been filed and settled.

I say additional deterioration because the filing of grievances by nonunion or unionized employees signals that the employment relationship has to some extent already deteriorated. This reasoning is supported by the influential work of Albert Hirschman, who in *Exit, Voice and Loyalty*[13] sought to explain why some customers who are dissatisfied with a company's products or services do not, as economic theory predicts, simply switch their purchases to

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[11]Klass & DeNisi, *Managerial Reactions to Employee Dissent: The Impact of Grievance Activity on Performance Ratings*, Acad. Mgmt. J. 32 (1989), 4: 705–18; Olson-Buchanan, *Voicing Discontent: What Happens to the Grievance Filer After the Grievance?*, J. Applied Psychol. 81 (1996), 1: 52–63; Olson-Buchanan, *To Grieve or Not to Grieve: Factors Relating to Voicing Discontent in an Organizational Simulation*, Int'l J. Conflict Mgmt. 8 (1997), 2: 132–47.

[12]Lewin & Peterson, The Modern Grievance Procedure in the United States (New York: Quorum 1988); Lewin & Peterson, *Behavioral Outcomes of Grievance Activity*, Indus. Rel. 38 (1999), 4: 554–76.

[13]Hirschman, Exit, Voice and Loyalty (Cambridge, MA: Harvard University Press 1970).

other companies—that is, exit their original companies. Rather such customers stay and fight or, in other words, voice their concerns by complaining to management, and it is these complaining customers, says Hirschman, who are more loyal to their companies than customers who exit (or cut and run). By analogy, employees who file grievances are indeed complaining to management, yet in exercising such voice they demonstrate stronger loyalty to the company than employees who remain silent or those who leave—exit—to take jobs elsewhere.

Hirschman presumed that companies would respond positively to complaining customers and thereby ameliorate and even reverse these customers' deteriorated relationships with their companies. Similarly, a great deal of the labor relations literature and some of the employment relations literature presumes that employers will respond positively to complaining employees and thereby also ameliorate and even reverse these deteriorated employment relationships.[14] The evidence from my studies, however, does not support the latter presumption, in fact, it shows quite the opposite, namely, that nonunion and unionized employees whose employment relationships deteriorate sufficiently such that they are motivated to file grievances subsequently experience further deterioration of their employment relationships after grievances are filed and settled.

Many scholars and some practitioners have interpreted this evidence to mean that despite the ostensible safeguards and protections built into unionized and nonunion grievance systems, employers nevertheless eventually retaliate against employees who file grievances. Although this interpretation appears to be supported by the aforementioned findings about post-dispute resolution outcomes for employee grievance filers (relative to grievance non-filers), it appears to be especially strongly supported by the findings about post-dispute resolution outcomes for supervisors of grievance filers (relative to the supervisors of grievance non-filers). It is still further supported by the findings from studies

[14]Budd, Labor Relations: Striking a Balance (New York: McGraw Hill/Irwin 2005); Kaminski, *New Forms of Work Organization and Their Impact on the Grievance Procedure*, in Employment Dispute Resolution and Worker Rights in the Changing Workplace, eds. Eaton & Keefe (Champaign, IL: Industrial Relations Research Association 1999), at 219–46.

by Lewin and Boroff[15] and Boroff and Lewin[16] showing that in one large unionized company and one large nonunion company, fear of reprisal (for filing grievances) was statistically significantly negatively associated with employee grievance filing. And, in the second of these companies in which supervisory and management employees (up to the mid-management level) were eligible to file grievances under the company's formal dispute resolution system, such employees were the least likely among all employees to actually file grievances, and the significant negative association between fear of reprisal and grievance filing was larger for these employees than for any other employee group.

There is, however, an alternative interpretation of the aforementioned evidence about the post-dispute resolution outcomes of nonunion and unionized dispute resolution systems. This interpretation, which can be labeled "revealed performance" and which is offered largely (although not exclusively) by managers, goes something like this. Employees who file grievances are, on average, poorer performers than employees who do not file grievances. By extension, the supervisors of grievance filers are poorer supervisors than the supervisors of employees who do not file grievances. But this relatively poorer performance is not "revealed"—does not come to light and is not sufficiently focused upon by employers—until grievances are filed and after grievances are settled.[17]

This interpretation, which some, including members of this audience, may be tempted to discount or even discard as being obviously self-serving on the part of management, should nevertheless be considered on it merits. In this regard, it is well known that most employee performance evaluation systems result in actual evaluations that are upwardly skewed rather than "normally" distributed.[18] In other words, most such systems do not fundamentally distinguish excellent from good from average from poor from inadequate performers. But when grievances are filed by employees, whether nonunion or unionized employees, employers are

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[15]Lewin, & Boroff, *The Role of Loyalty in Exit and Voice: A Conceptual and Empirical Analysis*, in Advances in Industrial and Labor Relations, Vol. 7, eds. Lewin, Kaufman, & Sockell (Greenwich, CT: Labor and Employment Relations Ass'n 1996), at 69–96.

[16]Boroff, & Lewin, Loyalty, Voice, and Intent to Exit a Union Firm: A Conceptual and Empirical Analysis, Indus. & Lab. Rel. Rev. 51 (1997), 1: 50–63.

[17]Lewin, *Unionism and Employment Conflict Resolution: Rethinking Collective Voice and its Consequences*, J. Lab. Res. 26 (2005), 2: 209–39.

[18]Lewin, & Mitchell, Human Resource Management: An Economic Approach, 2d_ed. (Cincinnati, OH: South-Western 1995).

spurred to pay closer attention to and perhaps even validate their performance evaluation systems, practices, and measures. In the process of doing so, they discover that grievance filers and the supervisors of grievance filers are "in fact" poorer performers than grievance non-filers and the supervisors of grievance non-filers. Employers then track such performance (differences) more closely, doing so primarily in the post-grievance dispute resolution period, and find that these performance differences not only continue but widen further. This, in turn, results in or explains why grievance filers and their supervisors have lower post-dispute resolution job performance ratings, promotion rates, and work attendance rates, and higher post-dispute resolution turnover rates than grievance non-filers and the supervisors of grievance non-filers.

Additional support for this interpretation is provided by union shock theory and by evidence from employment discrimination and wrongful termination cases that proceed to judicial verdicts.[19] According to union shock theory, when employees choose to unionize and then bargain collectively with employers, those employers are spurred or "shocked" into improving work methods, work processes, and workplace productivity more broadly, sometimes seeking and obtaining union cooperation to achieve these objectives. It is the additional costs imposed by unionization that provide the fundamental motivation in this regard. In employment discrimination and wrongful termination cases that proceed (partly or completely) through trial and in which defendant employers are called upon to produce performance evaluation data, those data typically *do not* distinguish better from poorer performers, thereby further supporting the claim that employers do not pay sufficiently close attention to their performance evaluation systems and practices until shocked into doing so (in this instance, by litigation).

Conclusions and Final Thoughts

Although it is tempting at this point to try to come down in favor of one or the other of these competing interpretations of the evidence about post-settlement outcomes of workplace dis-

[19]Lewin, *Theoretical and Empirical Research on the Grievance Procedure and Arbitration: A Critical Review*, in Employment Dispute Resolution and Worker Rights in the Changing Workplace, eds. Eaton & Keefe (Champaign, IL: Industrial Relations Research Association 1999), at 137–86.

pute resolution systems, I will not do so and will, instead, leave it to individual NAA and other audience members to do so. For my part, I choose to underscore the importance of the evidence about these outcomes and to emphasize once again the larger context, revealed by this evidence, within which the arbitration and mediation of workplace disputes operate. Stated another way, there is on the one hand evidence that arbitration and mediation are effective methods of workplace dispute resolution in both nonunion and unionized settings, and also that for the most part arbitrators and mediators are perceived positively by the parties to workplace disputes. Yet there is on the other hand substantial evidence that arbitration and mediation operate within a much larger economic, organizational, and employment context (dynamic) in which workplace dispute resolution systems and practices are ex-post facto, reactive processes that do not and perhaps cannot fundamentally address the phenomenon of deteriorated employment relationships.

If this is in fact the case, is there a solution at hand? In other words, can workplace/employment relationships be managed such that potential disputes in these relationships can be anticipated and dealt with proactively rather than reactively? For some scholars and practitioners, the answer to this question is "yes." In particular, the emergence and diffusion during the last two decades of so-called high-performance or high-involvement work practices featuring employee consultation, team-based work, organizational decentralization, job broad-banding, variable pay, and business information-sharing with employees appear to have increased employee participation in decision making; de-emphasized, if not fully overcome, adversarial type workplace/employment relationships; and spurred more proactive workplace problem-solving and "alternative" dispute resolution systems and practices, including arbitration, mediation, peer review, fact finding, ombuds, and in-house grievance procedures.[20] Nevertheless, the use of some of these practices, most notably arbitration and to a lesser extent mediation, has also been undeniably spurred by employment/human resource regulation and related employment litigation as well as by the union avoidance objective of some if not many employers.

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[20]Kaminski, *New Forms of Work Organization and Their Impact on the Grievance Procedure*, in Employment Dispute Resolution and Worker Rights in the Changing Workplace, eds. Eaton & Keefe (Champaign, IL: Industrial Relations Research Association 1999), at 219–46.

Therefore, if these twin developments can be said to constitute "what's new" in workplace ADR, they can equally be said to be the factors that will most fundamentally affect "what matters" in ADR in the years if not decades ahead. In my judgment, there are real limits on the diffusion of high-involvement work practices and cooperative labor-management relations, with the main limit being that, even with highly involving work and cooperative labor relations, the distinction and therefore the potential for conflict between those who manage and those who are managed remains ever present. Perhaps ironically, such conflict, especially among nonunion employers and employees, is made (more) manifest by litigation and by the increasingly widespread use of ADR, notably arbitration, under "protective" employment/human resource legislation and related court decisions. Exactly how these forces will play out in the future is problematic, yet one conclusion appears inescapable, namely, there will be a strong, growing demand for employment arbitration and perhaps mediation as well!