Chapter 19

INVITED PAPER: REVISITING THE ELEMENTS OF JUST CAUSE—AN ANALYSIS OF SURVEY RESPONSES FOR THE CASE OF THE MISSING MONEY

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Introduction

Labor arbitrators, as opposed to professional advocates, are expected to be neutral and to shed their background experiences as labor or management representatives when deciding a difficult disciplinary case. In fact, it often is the case that someone with a clear prior affiliation will be unacceptable to the other party.[3] The authors of this study aimed to test the desired nonpartisanship of arbitrators against a counter-concern that arbitrators may display biases in their decisions based on their past experiences**.**

The assumption that arbitrators and non-arbitrators are able to remain neutral when presented with a case with labor and management parties was examined after an audience survey at a session during the annual meeting of the National Academy of Arbitrators (NAA) in San Diego, California, in May 2011.[4] The session was entitled, "Revisiting the Elements of Just Cause: The Case of the Missing Money." At the session, features of an arbitration hearing in a discipline case were presented by advocates. Decisions then were rendered by a panel of five arbitrators and by six members of system boards of adjustment in the airline industry. For the purposes of later evaluation of the correlates of rendered decisions, survey forms were distributed to those in attendance. In addition to previous work domain (i.e., labor or management),

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[3]Julius G. Getman, *Labor Arbitration and Dispute Resolution,* Faculty Scholarship Series, Paper 4403 (1979).

[4]Barry Winograd, *Revisiting the Elements of Just Cause: The Case of the Missing Money,* in Arbitration 2011: Varieties of the Arbitration Experience, Proceedings of the 64th Annual Meeting, National Academy of Arbitrators 327 (Mark I. Lurie & Nancy Kauffman eds., 2011).

other employment and demographic factors were also used as variables predicting individuals' rendered decisions. Thus, this was an exploratory investigation (i.e., it was atheoretical, with no explicit directional hypotheses) testing not only the effect of arbitrators' and advocates' prior work history on their decision in a case, but also the potential effects of their country of residence, sex, years in the field, and arbitrator status.

Prior investigations have explored the relationship among biographical characteristics (age, sex, etc.) and arbitrator decisions, and found mixed results. For example, Fleming[5] found no differences in the decisions of more and less experienced arbitrators who made multiple rulings after reading several case transcripts, whereas other investigations[6] found that arbitrators who were older and/or more experienced tended to decide in favor of management more often than did younger and/or less experienced arbitrators. Regarding gender, Bemmels,[7] in a study of gender effects in discharge arbitrations, found that male arbitrators gave deferential treatment to grievants based on grievant gender, such that female grievants were 86 percent more likely to have their grievances sustained and 32 percent more likely to receive a full reinstatement than were male grievants. However, later work by Bemmels,[8] using the decisions of 489 arbitrators, found very little evidence of associations among arbitrators' background characteristics (i.e., previous and current occupation, region, education, gender, and age) and their decisions. To our knowledge, no existing studies have explicitly examined the association between a history of labor or management background and the decision rendered in a labor versus management case.

A condensed version of the relevant key facts was presented at the San Diego meeting, along with the testimony of the grievant, Bill Smith, and closing arguments by counsel for the company and the union. In the scenario, Mr. Smith was 20 years old and worked for ABC Beverage Distribution for a year without incident

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[5]ROBBEN W. FLEMING, THE LABOR ARBITRATION PROCESS (1965).

[6]Nels E. Nelson & Earl M. Curry, Jr., *Arbitrator Characteristics and Arbitral Decisions*, 20 INDUS. REL. 312–17 (1981); Laura Cooper, Mario Bognanno, & Stephen Befort, *How and Why Labor Arbitrators Decide Discipline and Discharge Cases: An Empirical Examination,* in ARBITRATION 2007: WORKPLACE JUSTICE FOR A CHANGING ENVIRONMENT, PROCEEDINGS OF THE SIXTIETH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 8–12 (Stephen E. Befort & & Patrick Halter eds., 2008).

[7]Brian Bemmels, *Gender Effects in Discharge Arbitration,* 42 INDUS. LAB. REL. REV. 63 (1988).

[8]Brian Bemmels, *Arbitrator Characteristics and Arbitrator Decisions,* 11 J. LAB. RES. 181–92 (1990).

prior to his termination. The events leading to Mr. Smith's dismissal involved his discovery of $400 in a bag on the floor of a restroom at the Sunnyhills country store, a market on his regular route. The restroom was marked "employees only," but drivers were permitted to use it. After putting the bag with the money in his pocket, Mr. Smith continued with his duties by shelving sodas at that store and at others. Later on his route, Mr. Smith threw the bag away and put the money in his wallet. He did not place the money into a pouch that drivers carry for collections from customers. Mr. Smith did not inform anyone that he found the money, but promptly turned it over when his supervisor at the end of the shift asked whether he found money during the day. The supervisor had been alerted about the loss by the store owner. At the time Mr. Smith handed over the money, he admitted to his supervisor that he would have kept it had he not been asked about its whereabouts. The next day, after the supervisor conferred with ABC's owner, Mr. Smith was fired for "dishonesty." It was noted that, six months prior to the incident, ABC also fired an employee who had taken a bottle of champagne from the back of a store. After Mr. Smith was dismissed, his union grieved, citing the just cause provision in the collective bargaining agreement. The dispute was taken to arbitration.

Participants and Procedure

Following the presentation of the case, paper surveys were distributed and completed by the people in attendance. Audience members were asked to provide demographic and occupational information, as well as report the level of discipline they felt most appropriate for the employee. Of those who responded to the questions of residence and attorney status, 135 (85 percent) reported being from the United States, 20 (13 percent) reported being from Canada, and 105 (61 percent) reported that they were trained as attorneys.

Approximately two thirds (n = 165, 68 percent) of the audience members identified themselves as arbitrators, and one third (n = 76, 32 percent) identified themselves as non-arbitrators. The respondents tended to have lengthy service in the field of law: 63 percent had more than 20 years in the field, with a mean of close to 15 years. Regarding history of domain affiliation, roughly 37 percent listed service as neutrals, 23 percent as representing

labor, 20 percent as representing management, and 18 percent reported affiliations with more than one category.

The Decision

The descriptive information regarding the decisions rendered by the respondents are summarized in Table 1. For the purpose of analyzing the responses, the disciplinary outcome categories were divided into four groups: (1) dismissal, (2) reinstatement without back pay, (3) reinstatement with a suspension, and (4) warning or no discipline. The collapsing of response groups was for the purpose of increasing statistical power due to low endorsement rates for some response categories.

Table 1. Endorsement of Disciplinary Ruling Categories (N = 43)

Disciplinary Ruling	**Analysis Group**	***n***	**Percentage by DR**	**Percentage by AG**
Dismissal	1	81	33.89	(1) 33.89
Reinstatement without back pay	2	36	14.81	(2) 14.81
Reinstatement with 30-day suspension	3	29	11.93	
Reinstatement with 5-day suspension	3	34	13.99	(3) 28.80
Reinstatement with 1-day suspension	3	7	2.88	
Reinstatement with warning only	4	42	17.28	
No discipline	4	14	5.76	(4) 23.04

Notes: Analysis Group = the group into which rulings were combined for analysis purposes; *n* = number of people endorsing that ruling; Percentage by DR = percent of audience members who endorsed that specific level of discipline; Percentage by AG = percent of audience members who endorsed a level of discipline within that Analysis Group.

Analytic Approach

To determine the associations among one's affiliation, attorney status, years of experience, etc. with one's rendered decision, statistical procedures for categorical data (i.e., having a fixed number of categories as opposed to a continuum) were implemented. Specifically, the chi-square test of independence and the Fisher's exact test[9] allowed us to test the assumption that respondents rendered decisions equally across backgrounds, professions, countries of residence, etc. In the event that respondents' decisions were in fact related to these variables, these statistical assumptions would not be met, and the specific statistical tests would yield a significant result.

Results

The results of models testing the association between decision rendered and multiple variables of interest (e.g., domain of experience, sex, country of residence) are presented in this section, followed by a more extensive discussion of their implications. Though domain of past (and present, in the case of advocates) experience was the primary variable of interest in this study, other factors were included in order to explore the potential influences on decision-making with greater breadth.

Domain of Experience

Regarding respondents' background affiliation, there was a significant association between those with a labor background and the decision rendered (X^2 (9) = 27.67, $p < .01$). Only 9 percent of the labor respondents approved dismissal, compared to 41 percent of management respondents. Similarly, 41 percent of those with a labor connection favored reinstatement with a warning or no discipline, whereas only 20 percent with a management connection endorsed that outcome. Overall, this yielded a significant effect of the labor domain only, indicating that those with a labor affiliation were less likely to dismiss and more likely to give no discipline than would be expected if one's domain was unrelated to one's decision. (Note that the null hypothesis or "default" in this chi-square test was that domain of experience and decision

[9]Ronald A. Fisher, *On the Interpretation of x2 From Contingency Tables, and the Calculation of P,* 85 J. Royal Stat. Soc'y 87–94 (1922).

rendered are statistically *unrelated*. Therefore, from this significant finding [i.e., a rejection of the null hypothesis], one can conclude that these two variables are related. Specifically, having prior work experience in the labor domain was associated with more lenient rulings.) When using this sample, no such association was found among those with a management background.

Follow-up analyses were conducted separately on arbitrators and non-arbitrators in order to determine if one of these subsets were driving this effect. Indeed, analyses on the separate samples yielded different results. Specifically, non-arbitrators with a labor affiliation were less likely to rule to dismiss, and those with a management affiliation were more likely to rule to dismiss than would be statistically expected (X^2 (9) = 21.58, $p < .01$). Among arbitrators, however, one's pre-arbitration domain of work was not related to their ruling.

Arbitrator Status

A significant overall effect of arbitrator status was found (X^2 (3) = 9.99, $p < .05$), such that non-arbitrators were less likely to rule to dismiss and more likely to give a warning or no discipline than would be statistically expected. Specifically, 39 percent of arbitrators favored dismissal, compared to 27 percent of non-arbitrators. In contrast, 33 percent of non-arbitrators ruled to reinstate with either a warning or no discipline, whereas only 18 percent of arbitrators opted for that outcome.

Country of Residence

Using a statistical test designed for smaller sample sizes (the Fisher's exact test) Canadian respondents were found to be significantly more likely to rule "in the middle" of the disciplinary ladder, by favoring reinstatement without back pay or reinstatement with a suspension. Canadian respondents ruled in this way more often than ruling for dismissal, at one extreme, or minimal or no discipline, at the other extreme (Fisher Exact Test significant at $p < .001$). This finding is tempered with a note of caution: only 65 percent of respondents ($n = 158$) indicated their country of residence when providing survey responses.

Other Factors

There were no significant effects of one's sex, attorney status, or years of experience on ruling.

Conclusions

This study aimed to assess the degree to which certain variables were related to individual rulings in a disciplinary case. One's domain affiliation (e.g., labor, management), arbitrator status, and country of residence were all found to be associated with one's disciplinary ruling. Regarding the domain of an advocate's work (i.e., labor, management, neutral, or "more than one"), the findings suggest that labor-affiliated individuals did not rule in favor of dismissal as frequently as would be expected statistically, and they ruled in favor of minimal or no discipline more often than expected. Note that, in the overall analyses with arbitrators and non-arbitrators combined, there were no significant differences in rulings found within the other domain categories (management, neutral, or "more than one"), thus, the significant overall effect of domain was driven by the responses of those who identified as having a labor background. Findings from separate analyses conducted on arbitrators and non-arbitrators, however, suggest that the effect of background domain was only present among non-arbitrators (and that, in addition to the effect of a labor affiliation being driven by non-arbitrators, an effect emerged among non-arbitrator management advocates that did not appear when the sample was combined for analysis). From these results, one can presume that an arbitrator is more likely than a non-arbitrator to set aside bias from past advocacy, at least when ruling on Bill Smith's dismissal. When taken together with the finding that non-arbitrators were found not to rule as expected but arbitrators did rule as expected, the results suggest that non-arbitrators with labor affiliations comprise the group most likely to incorporate bias into their ruling.

Perhaps surprisingly, no association between respondents' years of experience in the field of arbitration and their decision was present in the data. Thus, though some research[10] has found, and

[10] *See* note 6 *supra*.

those in the field might speculate, that those with more years of experience (both arbitrators and non-arbitrators), would be more likely to favor dismissal than an arbitrator with fewer years of experience, this was not so, according to the data.

Limitations and Considerations for Further Study

The survey results from the San Diego program are not based on a "full blown" arbitration hearing, with multiple witnesses and extended argument. Nor were decisions rendered after the submission of post-hearing briefs, which come weeks later, when immediate impressions might fade. Instead of these customary features of an arbitration case, an abbreviated hearing format was utilized in San Diego, with but a single witness and closing arguments. Moreover, the witness, Bill Smith, was well-prepared, articulate, and contrite during his testimony. As is openly acknowledged within the field of arbitration, witnesses' composure, compliance, and appearance of remorse all influence arbitrators' decision-outcomes, as does the professionalism and competence of the attorneys, which were also of a high level in this presentation. The extent to which these factors—individually or together—influenced decision-outcomes for those in the audience is impossible to examine, due to the fact that there was no "control" case with a more unruly witness or less-experienced attorneys. Although the controlled nature of the study (i.e., all respondents heard the same testimony from the same witness and attorneys, and they were given the same amount of time to deliberate) was valuable for the current purposes, future manipulation of these relevant factors would provide insight into the degree of their power and influence. Additionally, a survey of audience responses to a one-page written summary of the facts of the case (without discussion of Smith's remorse or composure) might yield different results regarding the justification of his dismissal. Further, regarding the structure and completeness of the responses, a survey benefiting from detailed audience responses regarding demographic information, especially for past arbitrator experience, age, and years of service in the field, might provide a more precise understanding of factors that may potentially influence arbitrator decision making.