CHAPTER 9

INTERNATIONAL COMPARISON OF THE ROLE OF NEUTRALS IN RESOLVING SHOP FLOOR DISPUTES

LESSONS FOR ARBITRATORS

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The International Studies Committee (formerly the Overseas Correspondents Committee) of the National Academy of Arbitrators has completed its first major project, "The Role of Neutrals in the Resolution of Shop Floor Disputes," published in the Fall 1987 issue of Comparative Labor Law Journal.[1] As a member of the committe, I was asked to provide some comments on the study from the perspective of an American arbitrator.

Members of the Academy may wonder about the desirability of looking into the resolution of labor disputes in other countries. After all, we know that industrial relations institutions and processes are shaped by unique cultural and legal environments. We are constantly warned that arrangements cannot be transplanted across national boundaries. Why bother, then, to look at what happens elsewhere, other than for academic interest? The purpose is twofold. First, by analyzing the structure and operations of resolution of shop floor disputes in other countries, we can gain a fresh perspective in viewing the underpinnings and dynamics of our own system. Second, although we cannot import systems wholesale, we can learn from experiences and trends in other countries, just as some of them have learned from us. It is not necessary to reinvent the wheel continually; it is only necessary to shape it to our own requirements.

The committee commissioned papers from 12 industrialized countries with active union-management relations: nine from Western Europe (Austria, Belgium, Finland, France, Italy, the Netherlands, Sweden, United Kingdom, West Germany), and one each from Asia (Japan), Australia, and the Middle East

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[1]*The Role of Neutrals in the Resolution of Shop Floor Disputes*, 9 Comp. Lab. L.J. 1 (1987).

(Israel). The authors were provided with a common outline covering settlement of individual employee disputes in the private sector of the economy. The papers were to focus on types of shop floor disputes, mechanisms used to resolve such disputes, and the extent to which neutrals are involved in the resolution. Each paper was to include brief case studies on how an employee dismissal and one other typical shop floor dispute would be resolved. Each set of authors adapted the outline to fit their country's circumstances.

Characteristics of Shop Floor Dispute Resolution

It may be helpful to list the characteristics of a North American grievance procedure for resolving shop floor disputes as follows:

1. As part of collective bargaining negotiations, union and management have agreed to a grievance procedure.
2. The issues that may be brought to the procedure are covered by the collective bargaining agreement.
3. At an early point in the procedure the union acquires a proprietary interest in the outcome as well as a representative role in the procedure.
4. The parties have agreed that there will be no strikes or lockouts while the grievance procedure is in process.
5. Almosts all grievance procedures authorize arbitration for grievances not resolved in the earlier steps of the procedure.

Each of these characteristics is likely to be modified, if not eliminated, when resolving shop floor disputes in the 12 countries included in the study in the following respects:

1. If union and management have negotiated a grievance procedure (a condition not always met), that procedure is not the exclusive vehicle for resolving disputes of individual employees. Nor does utilizing one procedure necessarily preclude using another simultaneously.
2. Complaints of management action involving individual employees are not restricted to matters negotiated by union and management.
3. Individual employees as well as worker representatives outside the union may present and process complaints.

4. Whether or not there are strikes in connection with shop floor disputes depends on the country's laws, the culture of union-management relationships, and the issues involved.
5. Arbitration in the North American sense is uncommon. Binding resolution of grievance issues is not. Where third-party mechanisms are available, however, they tend to operate differently from the arbitration model with which we are familiar.

Let me now elaborate on these characteristics. An immediate difficulty faced by several of the authors was distinguishing rights and interests disputes for the purpose of distinct resolution processes. In Japan, for example, rights disputes are mandatory subjects of bargaining. If two or more employees have similar grievances, they have the option of utilizing joint consultation and the grievance procedure, filing a court suit, or settling the matter in collective bargaining. Where the distinction between rights and interests disputes is recognized, as in Australia and Sweden, the grievance procedure deals with both types of disputes.

A related issue is the use of strikes or other tactics to bring pressure on the employer to resolve shop floor disputes. In several countries (Australia, France, Italy) there is no legal obligation to refrain from striking even if other mechanisms for resolving disputes are available and the dispute has been taken up in the grievance procedure. Shop floor democracy is exemplified most fully in Australia where, following grievance strike action, the results of negotiations between management and shop stewards are subject to approval by a show of hands of the shop participants.

The Role of Law

While the notion of law to protect employee rights has been expanding in the United States, it is more established and more extensive in most countries included in the study. Law covers both substantive and procedural matters. Legal protection against unfair dismissal is common in most countries. In Finland, a legislative act permits shop floor disputes to arise over matters we would consider part of management rights, such as recruiting, staffing, layoff, technological change, and work rules. Law may also prescribe procedural matters. In the Federal

Republic of Germany, a 1972 law required the establishment of grievance procedures, although the law has not been implemented. In Finland, a law allows an employee to go to the labor court if there is no grievance procedure.

Many Western European countries have enacted legislation to provide for the establishment of works councils or employee representatives functioning in similar capacities but with different names. The employer may need to gain the approval of the works council for various personnel decisions, including dismissal, transfer, promotion, and discipline of employees. Thereafter, individuals with grievances have another source and process for protecting their rights.

Law is often the source of dispute resolution systems outside the courts. Legislative initiative established the Conciliation and Arbitration Commission in Australia and Industrial Tribunals in the United Kingdom. The importance of law is underscored by a comment in the Netherlands report, which notes the lack of statutory provision for a dispute settlement system outside the ordinary courts. Far more than in the United States, individuals and parties in other industrialized countries look to the legislature to define rights and to establish procedures to protect and interpret those rights. Thus the law applies to all employees, not just those who are union members or who are covered by collective bargaining agreements.

Grievance Procedures

In most countries there is a grievance procedure, that is, a multistep system whereby the parties attempt to resolve shop floor disputes. The structure of this system depends on the issues involved and on the bargaining structure. Subjects within the exclusive jurisdiction of the works council are usually excluded from the union-management grievance procedure, although the works council may establish a separate procedure for such issues. If the parties involved are unable to resolve the dispute, it may be referred to regional bodies (Belgium, Italy) or national levels (Finland, Sweden) for consideration by an employer federation and the union counterpart. In Japan where enterprise bargaining is the norm, involving other employers or enterprise unions in the resolution of grievances is unthinkable. The grievance procedure thus mirrors the structure of bargaining.

Those countries with grievance procedures place great emphasis on resolving disputes during the course of the procedure or consultation processes without requiring intervention by a third party or resort to another forum. One might expect such an attitude in Japan with its reputation for consensual agreements, yet it is also prevalent elsewhere. The author of the Netherlands report expresses a widely shared opinion:

> If we focus on labour contracts only, an additional reason can be found, in that labour contracts involving a continuing relationship between the employer and the employee. Breaches of the contract of employment and labour disputes are therefore an ideal area for the resolution of disputes by adjudicative means, being Court litigation or formal arbitration.[2]

On the other hand, the authors of the Israeli and Italian reports note that employees may ignore the negotiated grievance procedure and take work-related complaints to court.

Third-Party Intervention

Each country recognizes that it is not always possible to resolve shop floor disputes by direct dealings. Provision must be made where the dispute remains open. The reports describe several forms of third-party intervention; in some countries resort to several forms is possible.

Courts

In all countries in the study, except Australia and the United Kingdom, the court system has a role in resolving shop floor disputes. In most cases a special labor court is assigned this function. The advantages of a labor court are not only its knowledge of industrial practices and its procedures but also its composition. Advocates of American arbitration can identify with the first two advantages more than with the third.

In countries with labor courts the authors noted that proceedings are more informal than those in other courts. However, increasing formality and legalism are creeping into the system. Even in countries without specially designed labor courts, the ordinary courts attempt to concentrate labor cases in specialized benches. For example, rights disputes in Italy are assigned to

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[2] *Id.* at 164.

judges specializing in labor matters, and in Japan special labor benches of the court have been created in major urban areas.

The composition of labor courts is invariably tripartite, with representatives of labor and management serving as lay judges together with the professional judges. The lay judges are usually selected from a list of nominations made by union and employer federations and are appointed for a term of office. They are directed to view matters brought to the court in an objective manner and not as partisan spokesmen. This role is quite different from that adopted by management and union representatives on tripartite grievance arbitration boards in America.

Arbitration

Since the study on resolving shop floor disputes was commissioned by the Academy, the authors paid attention to the role of arbitration in their respective countries. The absence of arbitration was noted in five countries: Austria, Belgium, France, Sweden, and West Germany. Four countries have some provision for arbitration but utilize it rarely in private-sector rights disputes: Finland, Italy, Japan, and the United Kingdom. Only three countries have arbitration experience: Australia, Israel, and the Netherlands.

A closer look at the studies, however, reveals a different pattern from that suggested by this classification. Sweden had extensive experience with arbitration until 1928 when its labor court system was created. Learning why the Swedes exchanged one form of binding dispute resolution for another is instructive. The role of labor courts in Sweden today resembles American arbitration procedures. According to the author, although the court is considered conservative and uninnovative:

> Submitting a dispute to a court involves an element of gambling. One never knows what will come out of it. But one has to live with it. It is a known fact as well that quite a few decisions by the Labor Court have become stumbling blocks, impairing good relations between the parties.[3]

Conciliation boards in Austria and conciliation committees in West Germany act very much like arbitrators. The West German conciliation committee is available for disputes between the employer and the works council, and handles discipline, dis-

[3]*Id.* at 188.

charge, and transfer matters. The decision of the conciliation committee may be overturned by a court only if the committee has exceeded its discretionary power.

Among the countries with arbitration, the Australian Conciliation and Arbitration Commission is a government agency responsible for a wide range of functions in labor relations. The organization of the Commission along industrial lines assures regular monitoring of and familiarity with industry conditions. The Commission and its staff are paid by the government. When the Australian Conciliation and Arbitration Commission assigns one of its members as an arbitrator, it is usually the same person who has attempted to resolve the dispute through conciliation. Thus the conciliation and arbitration processes become integrated in the hearing.

The tenure of arbitrators in Israel appears to be impressive. If the parties to the Basic Agreement between the Histadrut and the Manufacturers' Association or their representatives on the tripartite arbitration board cannot agree on a neutral chairman, the neutral "is drawn by lottery from a panel of ten persons . . . (a list that has not been changed since 1957)."[4] Lest one become envious at the ability of Israeli arbitrators to remain in the good graces of the parties, let me hasten to add that the members of the panel are utilized infrequently. This is due not to their unacceptability but to their high fees. An alternative source of neutral arbitrators in Israel is the Ministry of Labor, which makes available its labor relations officers at no cost to the parties. Israeli parties use this source although they thereby give up the right to select a neutral, and these awards by labor relations officers are questionable under Israeli law.

Other aspects of the Israeli arbitration system are also interesting. Matters excluded from arbitration as a result of successful court challenges are employee rights conferred by statutory labor law and matters of public interest. Although the courts have generally reviewed arbitration awards on narrow grounds, among the reasons for overturning an award have been "violating principles of natural justice" and "ruling in opposition to public policy." The latter sounds like a standard some U.S. courts have adopted in reviewing arbitral awards. Fortunately our courts have not voiced the hostile attitude toward arbitration found in the Israeli judicial system. Israeli labor courts have

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[4]*Id.* at 104.

expressed doubt about the desirability of arbitration of shop floor disputes because they view themselves as best suited for that function. With lack of clear demarcation of authority, labor courts and arbitrators in Israel have a real jurisdictional dispute.

The subject of fees is also highlighted in the West German study. The employer facing a dispute with the works committee bears the entire cost involved in using a conciliation committee. Although the works committee represents all employees, it is not a dues-receiving organization and thus operates with limited funds. The chairman of the conciliation committee negotiates the fee with the employer. The amount of the fee is usually related to the amount at stake in the dispute; the higher the amount at stake, the higher the fee. If the parties appoint "wingmen" on the tripartite board from outside their respective ranks, each of them is entitled to 70 percent of the chairman's fee. The employer is also responsible for the wingmen's fees, although an employer-appointed wingman usually waives the fee. The total fees of the conciliation committee can amount to a substantial sum. Thus West German employers shy away from them and prefer to resolve disputes internally. This financial arrangement does not give the works committee an unfair advantage since it has no right to use economic pressure. The threat of involving the conciliation committee and imposing on the employer the cost of the process, as well as a possible adverse outcome, are major sources of pressure enabling the works committee to obtain a negotiated resolution of the dispute.

Other Third-Party Intervention

Many countries have third-party mechanisms other than labor courts and arbitration to resolve shop floor disputes. These mechanisms are designed in some cases to help the parties reach agreement themselves; in others, decision making is helped along or imposed by the authority of a third party.

A few examples will illustrate the role of these third parties. In Australia, tripartite boards of reference serve in mediation and fact finding functions for rights disputes. The law authorizes the Conciliation and Arbitration Commission to include a provision for a Board of Reference in all certified agreements. Belgium has established 100 Conciliation Committees at the regional and national levels for various industrial sectors. These tripartite committees are chaired by public officials appointed by Royal

decree. In Italy a tripartite conciliation commission operates in each provincial labor office, with the office director presiding. The Netherlands offers parties the possibility of binding advice, which is not arbitration since the results are not legally enforceable. Advice, though informal, may carry more weight when given by the Labor Inspectorate in France. The Labor Inspectorate has the leverage to enforce labor standards and can force the employer to withdraw unlawful rules or decisions involving discipline, safety, and health issues. In Japan, the Labor Relations Commission attempts to get voluntary resolution of unfair labor practice charges, resulting in 70 percent of the charges being settled; 15–20 percent of conciliated disputes involve individual employee rights. Only if conciliation fails does the Labor Relations Commission provide an arbitration committee consisting of three public members of the Commission to issue a binding decision. Only 0.7 percent of the Labor Relations Commission's caseload ends in arbitration. Finally, in the United Kingdom, the Advisory Conciliation and Arbitration Service, a neutral government agency, offers conciliation services. If cases involving employee rights remain unresolved, they may be brought to Industrial Tribunals, independent judicial bodies with a tripartite composition. An unusual feature of the Industrial Tribunal process is the prehearing assessment, which gives the Industrial Tribunal an opportunity to express an opinion about the likelihood of success of a case or a contention, and to warn that continuation of the matter may result in an order for costs against that party. If the case is maintained, awards for costs are not invariably levied, but the threat of such an order serves to reduce the number of cases actually heard.

The consensual nature of many dispute resolution systems carries over into organizations that make final decisions, whether they are labor courts or other mechanisms. These organizations, normally tripartite in composition, usually attempt to conciliate and, if forced to issue an award, do so unanimously. For example, in West Germany the chairman of each labor court panel assigned to a dispute engages in conciliation. Although it is not possible to establish a direct causal relationship between this effort and the disposition of disputes, 38 percent of the cases brought to court are settled, another 40 percent are withdrawn, and the remaining 22 percent are left for the court to decide. The Swedish study reported that 75 percent of the awards announced by the labor court are decided unanimously. The

Industrial Tribunals in the United Kingdom reach unanimous awards in 96 percent of their cases.

Dismissal Standards and Remedies

Although the study addressed shop floor disputes in general, one type of dispute—dismissal—was the focus of particular concern because of its prevalence and importance to employees. Dismissal includes cases of nondisciplinary termination as well as dismissal for cause. Several authors noted that employees are reluctant to file court suits while an employment relationship is in effect; once the employer terminates the relationship, however, employees no longer feel such constraint.

It is interesting to see what standards are applied in dismissal cases. The Belgian Labor Court, for example, uses standards with which American arbitrators are familiar, namely, that the employer must substantiate the dismissal action for the reasons mentioned in the notice of dismissal and with the facts known at the time.

In other countries, however, additional criteria must be met to justify a dismissal action. In Japan, dismissals may be overturned if they lack the reasons required by the rules of employment, amount to excessively severe punishment, or fail to exhaust the joint consultation procedures. In the case of a nondisciplinary termination, an Austrian employer must have just cause but an employee may not suffer "serious consequences." Similarly, a dismissal from employment in the Netherlands requires the approval of the Regional Labor Office. Approval takes at least two months and is conditioned on the dismissal being reasonable and socially justifiable.

As for remedies, some countries provide that an employee be reinstated if the dismissal violates the statute or an agreement, while others do not. In France, reinstatement is limited to members of the works council or union delegates. When reinstatement is not awarded, the remedy is restricted to compensation. The arguments against reinstatement are that many employers have relatively few employees and that dismissed employees find it difficult to regain full acceptance by their original employers. Considering some studies of American workers reinstated by arbitrator awards, the point is well taken.[5]

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[5]*See, e.g.*, Simkin, *Some Results of Reinstatement by Arbitration*, 41 Arb. J. 3, 53–58.

Industrial Tribunals in the United Kingdom offer relatively small compensation awards to unfairly dismissed workers. In Finland, on the other hand, the compensation award is sufficiently large so that an employer is encouraged to voluntarily offer the employee conditions for reemployment in exchange for a reduction in the compensation award. In Japan back-pay awards are reduced by earnings from interim employment up to a limit of 40 percent of wages in the original employment. In Sweden, monetary awards may be punitive as well as compensatory, and compensation for damages may be awarded to unions along with awards to individual employees. This range of remedies poses serious questions about the appropriateness of the American concept of a make-whole remedy. Research is needed on the effects of arbitration awards in dismissal cases on the parties.

Conclusion

The collection of 12 reports dealing with distinct systems of shop floor dispute resolution offers few common themes, but there are some overall conclusions to be drawn from the study.

First, rights of individual employees in other countries are protected by statute to a greater extent than in the United States. All employees, whether organized by unions or not, are afforded protection against employer actions and have access to procedures unavailable to most American workers. The most obvious example is protection against employment at will. These countries have also altered their laws with respect to substantive areas and procedures of shop floor work disputes.

Second, even where parties engaged in collective bargaining have adopted a grievance procedure to resolve rights disputes, that forum is not the exclusive vehicle. Employees almost always have the right to discuss the matter directly with the employer and to file suit over alleged violations of the collective bargaining agreement, works council agreement, or statutes.

Third, parties place great value on arriving at agreement. Ideally, they do so by themselves. In this regard the parties are not only those at the local site but may involve employer and union federations. If parties cannot resolve the dispute by themselves, institutional mechanisms facilitate direct agreement of the parties. A third party has the primary function of serving as conciliator, or a body empowered to give a final award deliber-

ately serves in the conciliation role before resorting to the binding procedure. The success of third-party conciliation reflects a desire to resolve disputes and to avoid imposition of decisions by third parties.

Fourth, every country has one or more third-party mechanisms to issue binding decisions. These mechanisms, specializing in employment and labor relations matters, are designed to be informal and to avoid legal rules of evidence, but the battle to avoid legalisms is being lost on many fronts. The composition of these third-party mechanisms, such as labor courts, underscores the consensual element of dispute-resolution procedures in many countries. These third-party mechanisms are tripartite, and the employer- and union-designated representatives serve as neutrals. The proportion of unanimous awards attests to their success.

What can we learn from the experience of shop floor dispute resolution in other countries? As noted at the outset, we can never import outright social and legal institutions, much as we may admire their operation in other countries. This does not mean, however, that we should dismiss them as irrelevant to our own situation.

Surely we can learn that shop floor disputes are not restricted to the unionized employees, especially as that group becomes a smaller portion of the total work force. Responsible democratic societies insist that all workers receive protection related to their employment status. If other institutions fail to provide protection, society will enact such protection. Society's actions are a reflection that many basic rights accorded citizens are gained via legislation. The enactment of legislation to deal with shop floor disputes does not make resort to the courts inevitable. Other third-party organizations have been developed to deal with disputes the parties cannot resolve.

While awaiting major changes in societal direction, we can also consider lessons of the study with perhaps more immediate application. Change is an almost constant factor in dispute-resolution mechanisms. The institution of the grievance procedure culminating in arbitration is not impervious to change. Increasing legalism, higher costs, and longer delays can only result in additional criticism or arbitration, resistance to its use, and a search for alternatives. Three aspects of resolution of shop floor disputes in other countries might be incorporated into our existing structure. One is to advocate an increase in grievance

mediation, either by arbitrators or other neutrals, to allow parties to retain control of the settlement. A second involves informal prehearing arbitration conferences along the lines of the prehearing assessment of Industrial Tribunals in the United Kingdom. Such an additional step could reduce time spent in arbitration, encourage additional settlements of individual employee disputes, and, if proper cost penalties are assigned, increase the risks of parties who insist on proceeding despite advice to the contrary. A third is to develop tripartite procedures where the parties' representatives act as neutrals rather than as partisan spokesmen in order to foster consensual outcomes. Obviously arbitrators cannot make these changes on their own, but they can promote the underlying concepts and encourage parties to cooperate in adopting these changes. If we begin to think in these terms, the study on shop floor dispute resolution will have made a contribution to this Academy.

Comment—

JACK STIEBER*

Joseph Loewenberg has presented a comprehensive summary of how other countries deal with workplace disputes and pointed out significant differences in the way such disputes are handled under collective bargaining agreements in the United States. He has singled out three aspects of dispute resolution in other countries which, in his opinion, merit consideration in the United States. My comments deal with Loewenberg's suggestions regarding procedures that might be incorporated into our own system, and I propose additional ways in which the United States might benefit from policies and practices of other countries.[1]

Loewenberg suggests that the United States arbitration system might benefit from an increased emphasis on grievance mediation by neutrals, prehearing conferences along the lines used by industrial tribunals in Great Britain, and development of tripartite procedures with parties' representatives acting as neutrals rather than partisans as in the United States.

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[1]This comparison is limited to the United States because it is the system I know best. Many of the observations, however, might be applicable to Canada.

There has been some experience with grievance mediation in the United States in coal mining and a few other industries and in some agreements which provide for an arbitrator to attempt mediation and then to arbitrate the dispute if mediation is unsuccessful, generally known as med-arb.[2]

A significant difference between grievance mediation in other countries and its practice in the United States is that the same body (generally tripartite) which tries to mediate the dispute serves as the arbitration tribunal if mediation fails to achieve a settlement. The most successful experience in the United States has separated the mediation process from the arbitration step if mediation is not successful. Thus, in coal mining, the mediator may not serve as the arbitrator if the dispute is not resolved, and nothing said in the mediation process (including the mediator's advisory opinion) may be used if the case goes to arbitration.[3] It would be interesting to know how the parties and grievants regard combining the mediation and arbitration process in those countries where this system is used. I doubt that a combined mediation-arbitration approach would be acceptable to unions and management in the United States, except possibly under a permanent arbitration arrangement where the parties have developed considerable trust in their arbitrator.

A second suggestion of Loewenberg's, the use of prehearing conferences as employed in Great Britain, appears even less adaptable to the United States. The prehearing assessment, as it is called in Great Britain, was introduced in 1980 to reduce the number of meritless claims by warning claimants that the industrial tribunal considers it unlikely that their claims will succeed and that they risk costs being awarded against them if they insist on pursuing their case to a hearing.

In a comprehensive study of the British system, it was found that during the first two years of this provision's operation, over 80 percent of claimants against whom cost warnings were issued chose not to pursue their cases to a full hearing. Of those who did carry their cases further, 7 percent were successful, and a third of those warned who lost their cases had costs awarded against them.[4] Industrial tribunal members who participate in a pre-

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[2]Goldberg, *The Coal Industry Experiment*, in Arbitration: Promise and Performance, Proceedings of the 36th Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1984), 128.

[3]*Id.* at 129.

[4]Dickens, Jones, Weekes, and Hart, Dismissed: A Study of Unfair Dismissal and the Industrial Tribunal System (Oxford: Blackwell, 1985), 103–104.

hearing assessment may not serve on the tribunal if the case goes to a full hearing. If adopted in the United States, this would require that the prehearing conference be conducted by a neutral who would not be eligible to serve as arbitrator if the case went to arbitration. This approach would almost certainly increase the cost of arbitration and, given scheduling difficulties, would increase the delay in resolving grievances if a full hearing became necessary.

Most of the appellants in Great Britain were discharged from nonunionized companies. They did not have the benefit of a grievance procedure during which their complaints could be considered after screening by a union to determine whether an appeal to an industrial tribunal was justified on the merits. A prehearing assessment might be more appropriate under such circumstances than under a system which provides for several prearbitraton steps with union representation as is the case in the United States.

Finally, there is no evidence that a substantial proportion of arbitration cases in the United States are so devoid of merit as to warrant a prehearing conference. Several studies of discharge cases made over a 40-year period have found that reinstatement, with or without back pay, has been awarded in about half of all cases.[5] Furthermore, since the costs of arbitration are usually borne equally by the union and the employer, there is a built-in deterrent to pursuing grievances to arbitration which have little or no chance of success. This is not true in Great Britain where the state bears the full cost of the industrial tribunals, which contributed to the rationale for the prehearing assessment.

The third suggestion that a tripartite procedure with the parties' representatives serving as neutrals may be a worthwhile idea whose time has not yet come in the United States. As Loewenberg notes, decisions rendered by tripartite panels in other countries are overwhelmingly unanimous. While tripartite arbitration boards are not unknown in the United States, their decisions are rarely unanimous, with either the union or the management representative dissenting. Such dissents are often for the record, even though the decision may have been reached as a result of a compromise engineered by the neutral member in

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[5]Stieber, Block, and Corbitt, *How Representative Are Published Decisions?*, in Arbitration 1984: Recent Law, Panels, and Published Decisions, Proceedings of the 37th Annual Meeting, National Academy of Arbitrators, ed. Walter J. Gershenfeld (Washington: BNA Books, 1985), 180.

order to obtain a majority. There is no evidence that tripartite arbitration is increasing. My own experience has been that, even under agreements that call for a tripartite panel of arbitrators, the parties often agree to disregard the contract and opt for a single arbitrator.

How can we account for this difference in attitude toward and behavior of tripartite panels in the United States as compared with other countries? One reason may be the difference in function between tripartite panels in those countries and arbitrators in the United States. In countries where conciliation and arbitration are combined in a single body, having representation from labor and management is more conducive to reaching a settlement than in the United States where arbitration is an adversary procedure that takes place only after the parties have been unable to resolve the dispute in the earlier steps of the grievance process.

A possible explanation for the high degree of unanimity of tripartite tribunals in other countries is that members of these bodies sit as a labor court or, in the case of Great Britain, as a quasi-court operating within a structure created by law whose decisions may be appealed to a higher tribunal and the courts. Under these circumstances legal considerations take priority over equity judgments, and lay members are inclined to defer to the judgment of the neutral chairman who is often a lawyer or a judge.

Another reason for unanimity of tripartite decisions may be that the labor and management members are drawn from national or industry bodies and not from the union or company in which the dispute has arisen. This means that they are more removed from the individual grievant and the workplace in which the grievance occurs than in the United States, where members of tripartite panels are usually drawn from the same union and company in which the grievance arose. Thus parties' representatives in other countries do not have the same interest or stake in the outcome of cases they decide as those in the United States. For tripartitism in the United States to be comparable to other countries would require having AFL-CIO officials and representatives of employer associations, such as the National Association of Manufacturers or the Chamber of Commerce, represent union and management. Such representation would not be acceptable to either the local union or the company involved in a grievance submitted to arbitration.

Finally, there is no evidence that decisions of tripartite bodies in other countries, even if unanimous, enjoy greater acceptance among appellants or defendant employers than decisions of single arbitrators or partisan tripartite panels in the United States.

My three candidates for learning from the policies and practices of other countries in resolving workplace disputes are: (1) reducing the time lag between occurrence of the incident giving rise to a grievance and the arbitration award; (2) requiring notice before dismissal except in cases of serious misconduct; and (3) providing that all employees, except those in policy-making positions, be protected against unjust discharge.

The most justifiable criticism of grievance arbitration in the United States today is the long delay from grievance occurrence to arbitration award. While arbitrators are occasionally responsible for such delay, the primary fault lies with the parties. It is not unusual for grievances to be appealed to arbitration six months to a year after the incident giving rise to the grievance. Such delays are more understandable and less damaging to grievants in contract interpretation or disciplinary suspension cases than in discharge cases. Disputes over contract interpretation issues may result in negotiations between the parties leading to more acceptable settlements than might result from an arbitration award. Disciplinary suspensions, if found to be without just cause, can be remedied by back-pay awards with little harm to the grievant. Discharged employees, however, are removed from the workplace and often remain unemployed and without medical insurance and other benefits while awaiting resolution of their cases. The economic and psychological toll on the individual cannot be entirely remedied by a "make whole" award if the discharge is eventually ruled to have been without just cause.

Most other countries resolve workplace disputes, and especially discharge disputes, much more quickly than such cases are decided in the United States. A few countries allow workers to remain on the job pending resolution of their grievances, except in cases where their continued employment may present a danger to co-workers or themselves. Only a few agreements in the United States have such provisions.[6] The problem

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[6]Gilliam and Hoffman, *Innocent Until Proven Guilty*, in Arbitration: Promise and Performance, Proceedings of the 36th Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1984), 77.

of elapsed time in discharge cases deserves the highest priority by the parties, arbitrators, and the agencies administering grievance arbitration.

The issue of advance notice of large-scale layoffs and plant closures has been much in the news in recent months. The opposition to this proposal has emphasized the potential impact on competitiveness of United States industry that might result from such legislation. One might ask competitiveness vis-à-vis what countries since most of our trading partners already require advance notice before plant closures or mass dismissals. Some even require employers to receive approval from government authorities before taking such action.

There is no doubt that advance notice legislation would prove disadvantageous to some employers in certain circumstances. Customers might start looking elsewhere to insure future sources of supply. The most skilled and productive workers would be the first to seek and find other employment, leaving a less productive work force during the remaining weeks and months of the company's life. However, against these disadvantages to the employer must be measured the harm, both economic and psychological, to employees about to become unemployed with little or no notice and to their families.

Overlooked in this controversy is a fact which differentiates United States employers from those in most other countries. One reason the absence of advance notice of plant closures is so controversial in the United States is that most employees are not entitled to notice before layoff or dismissal under any circumstances. Other countries have laws which entitle workers to notice before dismissal for reasons other than serious misconduct. The amount of notice, or payment in lieu thereof, is usually tied to service. British law provides that employees receive one week's pay for each month of service up to a maximum of 12 weeks' pay. In Japan the employer must give 30 days' advance notice before dismissal or pay equivalent compensation. While advance notice tied to seniority would not solve all the problems created by plant closures and mass layoffs, it would take some of the heat out of the controversy over this issue.

The United States is the only country that continues to espouse the employment-at-will doctrine for employees not covered by collective bargaining agreements or individual contracts

of employment.[7] Employers have complained about the erosion of the employment-at-will doctrine through recognition of public policy and implied contract exceptions by courts in most states. These exceptions, however, are far too narrow to be of assistance to many discharged workers who may have a justifiable claim of wrongful dismissal. All countries included in the Academy's study provide statutory protection against unjust discharge for all employees, regardless of whether they are unionized.

Contrary to the conventional wisdom that unions would oppose protection against unjust discharge for unorganized workers, the AFL-CIO has endorsed legislation to accomplish this objective.[8] It is time that the United States join other democratic industrialized nations in repudiating the anachronistic employment-at-will doctrine and provide statutory protection against unjust discharge for all workers. As a result of a half century of experience with arbitration, the United States could develop a workable system which would compare favorably with those used in other countries to deal with this problem.

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[7]Stieber, *Employment-at-Will: An Issue for the 1980's*, in Proceedings of the 36th Annual Meeting of the Industrial Relations Research Association, ed. Barbara D. Dennis (Madison: IRRA, 1984).

[8]1987 Daily Lab. Rep. (BNA) No. 34:E-8.