Unfair Dismissal: Emerging Issues in the Use of Arbitration as a Dispute Resolution Alternative for the Nonunion Workforce

Eva Robins

Follow this and additional works at: https://ir.lawnet.fordham.edu/ulj

Part of the Dispute Resolution and Arbitration Commons

Recommended Citation
Available at: https://ir.lawnet.fordham.edu/ulj/vol12/iss3/2

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.
I. Introduction

Employment or termination at-will has been the recognized concept of employment in our history. Certain types of employees, however, have been protected from the possibility of termination at-will, without cause. Among these are those whose employment rights arise out of law or contract if they could prove the termination violated the rights established by law, or violated a clear contractual right to continued employment. The employee then would have access to the courts or agencies of government charged with enforcement of a

---

*The author is an arbitrator and mediator of labor disputes. She has experience in developing and administering grievance review procedures for nonunionized personnel and has arbitrated disputes involving terminations of supervisory, managerial and professional employees. Past President of the National Academy of Arbitrators; former Deputy Director of the New York City Office of Collective Bargaining, formerly affiliated with the New York State Board of Mediation; member of the United States Foreign Service Grievance Board; member of the New York Bar. LL.B. St. John's University School of Law.


2. The principle is widely accepted that both federal and state laws may be enacted and survive a constitutional challenge even though they limit the common law employment-at-will rule. See infra note 3 for examples of statutes.
protecting statute.³ Labor-management agreements, by providing for an employer's right to discharge only for just cause,⁴ increased the security of employees subject to that contract and protected them from the possibility of termination at will, without cause. If an employer violated such a contractual commitment by discharging without just cause, the employee, under an arbitration clause in the agreement, could seek reinstatement, with or without back pay and other benefits. Likewise, an agreement individually entered into between an employer and, for example, a high-level manager, for a specified term of years, also might be violated by a discharge of that manager during the term of the agreement, and require the payment of a sum of money. Thus, in essence, senior managers also enjoy an exception to at-will termination. The categories of employees who have been subject to at-will termination include those who are not included in a union-represented bargaining unit for which a contract limits discharge to just cause,⁵ and those employees who are not covered by any written contract.

The increase in support for collective bargaining, resulting from the passage of federal and state labor laws beginning in the late 1930's⁶

---


4. The employment-at-will rule was modified by Congress when the labor laws of the 1930's were enacted. See infra note 6 and accompanying text. After the unions were established, collective bargaining agreements began to require that an employer have a legitimate reason for terminating an employee. Unions negotiated collective bargaining provisions which prohibited employers from discharging an employee in the bargaining unit except for “cause.” In an effort to describe the kind of “cause” necessary to sustain termination of employment, subsequent contracts used modifiers such as “good,” “just,” “reasonable” and “proper.” The power to decide the issue has been given to arbitrators. See generally C. Updegraff, Arbitration and Labor Relations (1972).

5. See supra note 1 and accompanying text.

resulted in a substantial increase in contractual provisions for security against discharge without just cause. Most of these contracts provide prohibitions against discharge except for just cause. In addition, they provide for a system of impartial determination of just cause in the specific case. There has been utilization of the just cause test in nonunion operations, where management believed it to be appropriate, or where it was believed to be an effective device to avoid unionization. Employers have found the just cause concept to be acceptable, even if not provided by union contract, and have developed their own means of making a final and binding determination of just cause. This has been done through either an internal hearing system or a system employing a neutral party, and in most instances companies that have elected to provide an unbiased determination of just cause have established the system unilaterally.

Applying the concepts of fairness, equity and the justness of the cause to discharges of nonunionized personnel, claims of unjust, unfair dismissal have been recognized in the courts as valid, whether based on implied contract or on tort. Levels of professional, supervisory and managerial personnel, not previously recognized as having job protections against unjust dismissals, have found in the courts an opportunity to have the justness of their terminations reviewed and decided. The courts, however, may not be the best forum for resolution of nonunion employment disputes because of the extensive delays in achieving lower court decisions, the prolonged appeal procedures and the high costs inherent in the court system. Thus, there is presently a need for the examination, development and implementation of

7. See M. Trotta, Arbitration of Labor-Management Disputes 218-21 (1974) [hereinafter cited as Trotta]. Ten years ago, Trotta reported on what appeared to be a "trend toward providing some type of grievance procedure for nonunionized employees." Id. at 218. In an informal survey, he obtained information from 34 companies that stated that they had grievance procedures. The grievance procedures fell into four categories: (1) informal open-door policies; (2) policy statements in employee handbooks which allow employees to present their individual complaints to supervisors and ultimately to the General Manager; (3) formalized grievance procedures which involve a number of defined steps prior to being presented to the General Manager for final resolution; and (4) grievance procedures which end in binding third-party arbitration. Id. Some of the companies he interviewed which have these grievance procedures are TWA, Northrup Corp., Ohio Power & Light Co., Kodak, General Mills, Pekin-Elmer and Harris Intertype. Id.

8. See DeGiuseppe, supra note 1, at 23 n.101.

9. This Article will not review the caselaw and stated rationale in the significant decisions because it has been extensively written on and is beyond the scope of this Article. See supra note 1 and accompanying text.
alternative solutions to nonunion termination problems at the workplace.

This Article reviews the concept of just cause as a test for termination of employment and its applicability to the nonunion workforce.\(^{10}\) It addresses the feasibility of applying dispute resolution mechanisms found workable in labor-management relations under union contracts to employment-at-will disputes.\(^ {11}\) It further outlines the standards and criteria utilized in the arbitration process and recognizes some problems of proof,\(^ {12}\) evidence,\(^ {13}\) remedy\(^ {14}\) and procedure that will arise from the application of alternative methods of resolution to nonunion disputes. Finally, this Article identifies a substantial number of issues that need to be resolved if arbitration of just cause for termination of nonunionized personnel is to be successful.\(^ {15}\)

II. Just Cause as a Test for Termination

The just cause concept as the test for termination of employment developed in the unionized sector and in a small number of nonunionized employer-employee relationships.\(^ {16}\) It rests on equity and protects the employee from being dischargeable at will. The employer is not obligated to retain an employee who is not fulfilling the requirements of the job or who engaged in improper or prohibited behavior. Thus, the once unquestioned right of management to hire or terminate employment at will has changed, if the labor contract so provides, to the employer's obligation not to discharge an employee unjustly.

Nonunion operations that accepted the concept of just cause for white collar or blue collar employees have adopted varying procedures. Some employers adopted the union contract type of procedure and had the decision of just cause determined by an impartial third person.\(^ {17}\) In other situations, the president of a company, or its personnel director, became the last decision-making step of the procedure.

---

10. See infra text accompanying note 16.
11. See infra notes 37-44 and accompanying text.
12. See infra notes 55 & 56 and accompanying text.
13. See infra note 57 and accompanying text.
14. See infra notes 58-74 and accompanying text.
15. See infra text accompanying note 72.
16. See supra note 7 and accompanying text.
17. In selecting the impartial third person, some employers use either The American Arbitration Association (AAA) or the Federal Mediation and Conciliation Service (FMCS).
The effectiveness of the system used depended on the employees' confidence in the system's impartiality. The recognition of just cause as a requirement for the discharge of an employee, whether it arose because of union recognition as a bargaining agent and the negotiations that followed, or because of the employer's perception that it was required to apply such a test to termination, frequently was used as a recruiting device, offering to employees the application of equity and the discouragement of favoritism, cronyism, discrimination or other such practices.

There were employers, managers and supervisors who did not embrace the concept of just cause. The concepts of employment-at-will and termination-at-will were deeply engrained and the development of alternative approaches to termination problems at the workplace were resisted. Complaints about labor contracts turned on the catchphrase “but with a union contract, you can’t fire anyone,” meaning that, for the union group, management had given up its right to terminate at will and had agreed, perhaps unwillingly, to a contractual provision substituting a requirement for just cause in place of the at-will concept.

III. The Nonunion Workforce

There were exceptions to the coverage of just cause protections, such as (1) supervisors or other employees who were not included in bargaining units, (2) management and professional personnel who did not have collective bargaining status, (3) covered employees who

18. See supra note 4 and accompanying text.
19. See supra note 1 and accompanying text.
20. Section 14 (a), 29 U.S.C. § 164 (a) (1976), provides in part: Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.
21. Section 2 (3) of the NLRA, 29 U.S.C. § 152 (3) (1976) provides that The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual having the status of an independent contractor, or any individual employed by an
were not represented, and (4) those who were not covered by specifically stated contractual protections. It was not customary to think in terms of job rights for management and the higher levels of supervision, but, rather, in terms of the right of an employer to hire or terminate at will. Thus, unless an individual contract between an employer and an employee provided job security protections or a means of ending a relationship that had become unhappy, job protections were not considered, sought or provided.

The large group of employees who were neither managerial, professional or supervisory nor in bargaining units, also were considered to be employed at-will. For example, the policies of employer organizations that would not permit women to hold jobs after they married or imposed age limits for employees who met the public, such as receptionists and secretaries, were widespread. Terminations at will also occurred when a new manager or supervisor came into a department. Terminations unrelated to the quality of an individual's skills, performance, preparation, qualifications, and promotability were not unusual. Dismissals were usually not explained as the result of the individual employee's failings; they were at-will and did not need to be explained. An important factor affecting covered employees was the concern of some managements that the excessive utilization of discharge might produce union representation. That inhibition was not present, however, for managerial, professional or higher levels of supervisory employees.

The development of review procedures for nonunion personnel and sometimes for first-line supervisory personnel was aimed at allaying the discontent of employees who knew they were subject to termination at will. These procedures served a useful purpose in translating the just cause concept of labor agreements into the relationships with nonunion covered employees, and with noncovered supervisory, technical, professional, and managerial personnel. Thus, a right of termination remained, but where a review procedure existed, it became a part of the employer-employee relationship with the right to terminate limited only by a just cause requirement. This could be reviewed

employer subject to the Railway Labor Act [45 U.S.C. §§ 151-188 (1976)], as amended from time to time, or by any other person who is not an employer as herein defined.

See also Fair Labor Standards Act (FLSA) of 1938, § 3, 29 U.S.C. § 203 (e) (1976) ("employee" includes any individual employed by an employer except for any employee who is an immediate family member engaged in agriculture).

22. See supra note 7 and accompanying text.
at some level in management in a unilaterally developed grievance process, with the final step either an internal one\textsuperscript{23} or an impartial one,\textsuperscript{24} using an arbitrator selected from a panel obtained from one of the designating agencies.

Nonunion review procedures generally have not been effective remedies for managerial or upper levels of supervisory, technical, or professional employees. Where such an employee has been terminated, he or she has relied on the courts for redress of claimed discrimination,\textsuperscript{25} improper termination, and claimed violation of a contractual right or tort. For example, personnel booklets,\textsuperscript{26} which review employer personnel policies and practices, health and pension plans, and give employees other information which they might need to function, became recruitment tools for all employee levels, except for top officers and top level management. Some of these booklets have been found to contain "words of promise" in describing pension, sick

23. See supra note 7 and accompanying text. The record of internal grievance procedure systems established voluntarily by employers does not prove that nonunion employees will be completely protected from at-will dismissal. First, only a handful of employers have adopted voluntary arbitration for nonunion employees. Address by Prof. Stieber, Proceedings Ann. Meeting Indus. Relations Research Ass’n Annual Meeting (Dec. 29, 1983), reprinted in Daily Lab. Repr., No. 2, D-4 (Jan. 5, 1984). Second, one study has indicated that nonunion complaint systems enjoy little credibility among employees and that terminations are rarely appealed through such systems. CONFERENCE BOARD, NONUNION COMPLAINT SYSTEMS: A CORPORATE APPRAISAL (1980); POLICIES FOR UNORGANIZED EMPLOYEES PFP Survey No. 125 (BNA) (April 1979).

24. The American Arbitration Association and progressive employer representatives have supported voluntary employer action, including impartial arbitration, for discharged nonunion employees. See, e.g., PROTECTING UNORGANIZED EMPLOYEES AGAINST UNJUST DISCHARGE, 4-20 (J. Stieber & J. Blackburn eds. 1980); Schauer, Due Process for Nonunionized Employees, 31 PROCEEDINGS ANN. MEETING INDUS. RELATIONS RESEARCH ASS’N 180 (1979).

25. See Note, Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception, 96 HARV. L. REV. 1931, 1940-41 (1983). A review of 92 wrongful discharge cases revealed that 84 of the cases involved plaintiffs from the primary labor market. Id. at 1941. As one commentator has noted, "Typical job titles of plaintiffs in wrongful discharge cases are company vice-president, sales manager, marketing director, foreman, physician, sales representative, pharmacist, department manager, etc." Address by Prof. Stieber, Proceedings Ann. Meeting Indus. Relations Research Ass’n (Dec. 29, 1983), supra note 23, at D-3.

leave and other plans in which length of service has a relationship to the amount of benefit. They appeared, to some, to be a commitment of continuing employment unless just cause for termination could be shown. Court decisions in lawsuits claiming violations of contractual rights in a termination of employment which relied on the implied contractual commitment contained in the booklets have produced revisions in the language of booklets and statements of the right to discharge at will. But recruitment of new employees, particularly for the technical, professional and managerial groups, may suffer as a result of the expressed reservation to dismiss at will.

Except as provided in collective bargaining agreements, in individual employer-employee contracts of employment, or in specially devised review procedures for covered or noncovered employees, termination at will, until recently, remained an employer's right, whether or not there was a showing of just cause. In recent years, employees have sought redress in the courts for a claimed contract violation or a tortious act. These nonunion employees successfully have pursued claims of unjust dismissal and have been awarded substantial compensatory and punitive damages on implied contract, tort, discrimination or other statutory violation theories.

IV. Labor Dispute Resolution Mechanisms

Court awards of damages for unjust dismissal for executive and managerial personnel or for technical or professional employees have


28. See, e.g., Touissant v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 292 N.W.2d 880 (1980) (company personnel policy providing that employee could not be discharged except for cause may become part of employment contract by either express written or oral agreement or employee's "legitimate expectations"). But cf. Novosel v. Sears, Roebuck & Co., 495 F. Supp. 344 (E.D. Mich. 1980) (discharged employee did not have right to "just cause" determination where employment application signed by employee stated that employment was at will).

29. See DeGiusepppe, supra note 1, at 45.

30. See supra notes 4-6 and accompanying text.

31. See supra notes 7, 23 & 24 and accompanying text.

32. See supra note 25 and accompanying text.

33. See DeGiusepppe, supra note 1, at 24-34.
been substantial and warrant a comparison with the grievance procedure remedies that result in arbitration. Grievance claims under union contracts heard by arbitrators generally seek reinstatement with full back pay, seniority and benefits. But the remedy for contract violation or tort in the courts has been money damages rather than reinstatement. Moreover, there are problems with the court system that are not inherent in the arbitration process, such as extensive delays in achieving lower court decisions, the time-consuming appeal procedures and the high costs incurred. Because of these deficiencies in court processes, interest has been expressed in applying existing labor dispute resolution mechanisms found workable in labor-management relations under union contracts to employment-at-will disputes.

A. Labor Dispute Resolution Mechanisms Using Third Party Neutrals

Three dispute resolution mechanisms have potential for use in employment-at-will cases. The first mechanism is mediation, which has been significantly used in achieving labor peace in the negotiation of labor contracts. It has not achieved similar results in the mediation of grievance disputes arising during the term of the labor contract perhaps because, unless it is clear that a contract does exist, or that there has been a termination in which just cause is in dispute, mediation cannot be expected to achieve more than a nuisance settlement on both sides. Furthermore, mediators have no power except the ability to make public disclosure of the intransigence of either party, or both, which is a questionable practice. Therefore, it is unlikely in the present stage of termination-at-will postures that the differences among the courts and among lawyers can be accommodated and reasonable results obtained through the use of mediation.

34. Id.

35. For a discussion of the remedies, see M. Hill & A. Sinicropi, Remedies in Arbitration, 40-96 (1981) [hereinafter cited as Hill & Sinicropi].

36. For example, money damages that are awarded five years after an individual is discharged unjustly at age sixty may have little value.

37. A few practitioners believe that mediation has promise, but evidence supporting this claim is unsubstantiated. But cf. Development of the Law of Individual Rights and Responsibilities in the Work Place, 1983 A.B.A. Sec. Lab. & Emp. L., at 45-47 (committee advocates mediation similar to that used in The Coal Industry Mediation Project and The Fair Workplace Program).

The second mechanism is fact-finding with recommendations. In this process a neutral person conducts a hearing, obtains as much evidence and testimony as the parties are willing to furnish, perhaps attempts mediation, and makes findings and recommendations which the parties are free to accept, reject or use as a basis for further negotiations.\(^3\) Although fact-finding with recommendations has been used in public sector labor relations and has been an effective tool in contract negotiations, it has not been used in public sector grievance disputes. Because there is a fundamental question regarding the existence of an agreement of employment and the limitation of termination to instances of shown cause in employment-at-will disputes, it is reasonable to doubt that fact-finding with recommendations could be a useful dispute resolution activity in these cases.

The third mechanism is grievance arbitration. In labor-management contracts, grievance procedures are provided as the system of private jurisprudence,\(^4\) generally with the employment of a neutral arbitrator as the final step of the grievance procedure. Arbitrators are selected by the parties from lists supplied in accordance with their agreement by a designating agency\(^5\) or through whatever method they find acceptable. While procedural and jurisdictional issues, as well as questions of rights, would have to be determined before a system of arbitration could be engaged, those requirements are not impossible to fulfill. In the arbitration process, absent provisions to the contrary, a final and binding decision is made that is not subject to appeal except in extraordinary circumstances of error or of the arbitrator exceeding his jurisdiction.\(^6\) It results in an award and an opinion which respond to the question submitted to the arbitrator.

Grievance arbitration, developed under labor contracts, attempts to avoid overburdening the process with pre-hearing jockeying for position. Thus, recognizing the need for speed in moving from an action, to a grievance, to a hearing, to the decision of the arbitrator, parties utilizing arbitration have avoided the time-consuming and delaying discovery process. They have preferred to use a grievance procedure developed by them to meet their own needs. This is not

\(^3\) See TROTTA, supra note 7, at 24-25.
\(^4\) See supra note 4 and accompanying text.
\(^5\) See TROTTA, supra note 7, at 55-62.
always successful, but for employers and unions who opt for development of a workable relationship between themselves, a well-handled grievance procedure neither "gives away the shop" nor insists, forever, on its own interest to the exclusion of all others.

Grievance procedures generally have been successful in labor-management relations in the private sector. Advocates trained in litigation and lacking knowledge of collective bargaining, contract administration and the responsibility of each party for contributing to the relationship between the parties sometimes seek to bring into the arbitration process aspects of litigation, such as the discovery process. Parties experienced with collective bargaining, however, recognize the obligation to continue to treat arbitration as a private system, without obligation to emulate court processes. Thus, while some effort has been made by practitioners to introduce aspects of the judicial process into arbitration, the resistance of employers, unions and arbitrators has been steady and largely successful.

Neither mediation nor fact-finding with recommendations, at this stage of the at-will processes, appears to be the most appropriate dispute resolution mechanism for the nonunion workforce. Therefore, arbitration may be the only process able to function as the dispute resolution mechanism in at-will cases. The willingness of employers, individual employees or groups of employees to utilize a process that generally has been successful in the resolution of disputes for unionized personnel is unclear. Further discussion and analysis of the arbitration process is needed to present a clear understanding of its possibilities.

B. The Arbitration Process

In arbitration, arbitrators and the parties are involved in deciding if a discharge was just and proper considering the circumstances

43. Approximately 96% of all collective bargaining agreements contain procedures for the settlement of disputes through mutual discussion and arbitration. The Bureau of National Affairs (BNA) reports that grievance procedures were found in 99% of the contracts sampled in a recent study. In addition, arbitration is called for in 96% of the sample contracts, 98% in manufacturing and 94% in nonmanufacturing. BNA, Basic Patterns in Union Contracts 6 (1979).

44. In the author's experience, this is less true in the public sector, where arbitrability disputes abound, and this acts as a detriment in the arbitration process. Moreover, in the federal sector, the subjects of bargaining are limited, union and employer representation skills are not comparable with the private sector, and the grievance process is overly technical. The author believes that the parties involved
present. Arbitrators are asked to evaluate the severity of an offense, to consider the full circumstances of the triggering incident that preceded the termination, to determine if the judgment of the employer's supervisory or managerial people was sound, and to decide if discharge was the appropriate remedy for the offense. To regulate the arbitration process, parties have developed generalized criteria and standards\textsuperscript{45} to determine when just cause for the termination of an employee's employment has been shown. These criteria and standards have been examined by arbitrators who have refined them and added others.\textsuperscript{46} As needs and special cases arose, unions and employers have added to and modified the criteria and standards.

Arbitrators seeking to determine the existence of cause in a particular case and to evaluate that cause must judge the quality of a witness's credibility and recollections.\textsuperscript{47} They receive information provided by the parties, but they may ask for additional information. In essence, the parties submit to a neutral third party the judgments they have been unable or unwilling to make for themselves in order to resolve a dispute.

In a particular case, an arbitrator may be obliged to consider criteria and standards recognized and examined by other arbitrators in determining just cause, although not precisely in the labor contract.\textsuperscript{48} Mere assertion is not sufficient to persuade arbitrators that just

\begin{quote}
have not learned to move away from sparring and toward development of the skills of labor relations and dispute resolution.
\end{quote}

\textsuperscript{45} However, as Trotta, supra note 7, explains, “Unfortunately, no standards exist for defining “just cause“ . . . . Although arbitrators apply commonly accepted industrial and community standards, through their decisions they have collectively influenced the concept of what constitutes just cause.” Id. at 236.

\textsuperscript{46} Id. at 237.
\textsuperscript{47} Id. at 101. In a paper delivered before the National Academy of Arbitrators, Edgar A. Jones cautioned that anyone driven by necessity of decision to fret about credibility, who has listened over a number of years to sworn testimony, knows that as much truth must have been uttered by shifty-eyed, perspiring, lip-licking, nail biting, guilty-looking, ill at ease, fidgety witnesses as have lies issued from calm, collected, imperturbable, urbane, straight-in-the-eye perjuries. Jones, Problems of Proof in the Arbitration Process, Proceedings of the 19th Annual Meeting of the National Academy of Arbitrators 208 (1966).

\textsuperscript{48} Although the following list is extensive, it is not exclusive. The criteria and standards examined by arbitrators include:

1. The “law of the shop,” which covers offenses that traditionally have been treated as grounds for discharge. In addition, the employer must have consistently described the offenses as severe.
cause does or does not exist. The arbitrator asks for evidence\textsuperscript{49} to support the claims asserted. Rules and regulations applied occasionally and with varying emphasis\textsuperscript{50} do not support termination based on a claim of violation of those rules and regulations. In multi-plant operations under the same union contract, the varying attitudes of a large number of supervisors results in making a rule less than absolutely enforceable. Generally, the arbitrator considers the facts of the particular case, plant considerations, the probable effect on the plant

\textsuperscript{2} The pattern of consistent enforcement of rules and regulations which were made known to all employees.

\textsuperscript{3} The case histories in the same company and/or plant which demonstrate that the rules and regulations were enforced.

\textsuperscript{4} Whether the offense warrants immediate suspension of the employee or whether an investigation and meetings with the union should precede suspension.

\textsuperscript{5} The pattern of severe discipline for certain offenses to ensure safe working conditions. For example, smoking in a prohibited area in a paint factory, physical threat to fellow employees, supervisors or customers, theft and similar offenses.

\textsuperscript{6} The offenses involving serious criminal action, even if they occur off-premises, because of the effect public knowledge might have on an employer, employees or the union.

\textsuperscript{7} The length and quality of employee's service.

\textsuperscript{8} Whether the offense that triggered the termination occurred; whether it was as serious as it is maintained to have been.

\textsuperscript{9} Whether the employee had been warned on prior occasions for a similar offense.

\textsuperscript{10} Whether there are extenuating circumstances. Was the employee provoked into adverse behavior?

\textsuperscript{11} Whether there are grounds for mitigating the penalty.

\textsuperscript{12} The general "arbitral authority" as it is derived from publications of awards, articles, and speeches.

\textsuperscript{13} The arbitrator's sense of equity and his subjective judgment of the seriousness of the incident involved, the record and the circumstances which led to the discharge.

\textsuperscript{14} The basic test, recognized by many arbitrators, is whether the employee can be relied upon to meet the normal requirements of the job. For example, discipline cases which involve extended and repetitive absences from the job, drug and alcohol abuse cases.

\textsuperscript{15} Whether another chance is warranted? This requires a judgment the arbitrator believes, from the evidence, that the employee who is responsible for the offense has learned a lesson and will not repeat the offense.

\textsuperscript{49} See infra notes 44 & 47 and accompanying text.

\textsuperscript{50} See F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 643 (3d ed. 1973) [hereinafter cited as ELKOURI & ELKOURI]. "Arbitrators have not hesitated to disturb penalties, assessed without clear and timely warning, where the employer over a period of time had condoned the violation of the rule in the past—lax enforcement of rules may lead employees reasonably to believe that the conduct in question is sanctioned by management." \textit{Id}. 
and on supervision if the discharge is sustained or reversed, and the probable effect on the union. The arbitrator considers the customary procedures in that plant under the applicable contract language in similar instances, and considers if the discipline in that case is consistent with the discipline usually given for similar offenses.

Although the arbitrator will not apply his or her "own brand of industrial justice," it is a fallacy to imply that the arbitrator does not bring to each case his own experience of what is or is not equitable or just under the circumstances of that case. "Arbitral judgment is not excluded or sacrificed because of the effort to avoid dispensing one's own brand of industrial justice." When the parties ask for a decision on the cause for discharge there is substantial room for the exercise of arbitral judgment.

The difference among the various terms used by unions and employers to describe the kind of "cause" they agreed on has become blurred and the words frequently are used interchangeably. But where there is evidence of negotiating significance in the selection of the term used, arbitrators will attempt to apply the parties' meaning. Thus, if the contract language historically provided for "just cause" as the limitation for discharge, but in the recent negotiation the parties agreed to change that to "reasonable cause," most arbitrators will seek information from the parties concerning who sought the change and the parties' understandings of the significance of the change.

C. Burden of Proof and Evidence Requirements in Labor Arbitration

Arbitration differs significantly from the court system, and if there is to be arbitration of at-will dismissal cases, the differences concerning who has the burden of proof and which type of evidence

reaches the decision-maker need to be resolved. In the arbitration of discharge cases, it is generally accepted that the burden of proof rests on the employer,\textsuperscript{55} to demonstrate that the discharge was for just cause. There is a minority, however, that does not believe that a true burden of proof exists in arbitration. This minority\textsuperscript{56} contends that, in discharge cases, the employer who frequently has greater access to the facts, has an obligation to proceed first at a hearing. He must produce (1) evidence as to the basis upon which a discharge was effectuated; (2) what the facts and circumstances were; (3) why the employer decided to discharge rather than to assess a lesser discipline; (4) why some discipline is warranted; and (5) why the employer believes the arbitrator should sustain the employer's position that discharge is the appropriate discipline. It is then the burden of the union to present its argument regarding the significance of the incident and the factual dispute as well as its argument concerning the inappropriateness of

\textsuperscript{54} See Hill & Sinicrope, supra note 34, at 4-6; Elkouri & Elkouri, supra note 50, at 257-58.

In discharge or discipline cases the most important evidence generally comes in the form of testimony of witnesses, the facts which led to the disciplinary action being of great importance. If, however, there is not disagreement as to these facts and if the primary issue is one concerning proper punishment, then the past record of the employee and evidence of past disciplinary action taken in similar cases enter the picture in a major capacity.

Id. at 257.


\textsuperscript{56} In a recent address to the National Academy of Arbitrators, Edgar A. Jones, Jr. offered the following thoughts on the role of burden of proof in decisional thinking:

In this process of making up my mind, however, I have not found the time-honored legal "burden of proof" very helpful. It is, after all, an act of judgment to decide that a party has not "borne the burden"; the "burden" formula, therefore, is only one of inquiry, not conclusion. I have no quarrel with a trier who finds it a decisionally helpful thinking aid; it is important to be aware, however, that the formula has at least the potential of obscuring the actual mental process of deciding to the "yes" or the "no" to the claimant.

Jones, An Effort to Describe One Person's Decisional Thinking, in Decisional Thinking of Labor Arbitrators and Federal Judges as Triers of Fact: Selected Discussion Materials and Problems 164-65 (1980).
discharge. Whether this constitutes a burden of proof on the employer or not, it is clear that arbitrators expect the employer to come forward first and show why the employee was terminated and why termination should be sustained, with the union then presenting its evidence and argument.

It is also important to note that the rules of evidence applicable in the courtroom do not apply to the arbitration hearing. Nevertheless, arbitrators generally do control the presentation of a case at a hearing. This is not because "anything goes" but because the arbitrator desires to have the maximum available information to make a judgment. Arbitration is a private system developed by employers, unions and arbitrators to serve the useful purpose of resolving labor disputes at the workplace in an expeditious manner, using arbitrators who have a knowledge of collective bargaining and labor relations. Arbitrators are careful to avoid giving weight to questionable evidence and testimony, but evidence that does not have much relevancy might nevertheless be introduced and received in evidence, frequently without opposition, because the parties want the arbitrator to have as much information as possible before reaching a decision.

D. Remedies in Labor Arbitration

Remedies in court procedures differ substantially from those in the arbitration process. Generally, the remedy in arbitration is reinstatement58 with monetary damages of back pay,59 seniority and benefits. The remedy in court includes monetary damages both for back pay and for the future probable working years of a wrongfully discharged employee, but not reinstatement. Damages for the future probable working years of a wrongfully discharged employee are unusual in arbitration because of the practice of reinstatement.

57. See, e.g., Harvey Aluminum, Inc. v. United States Steelworkers, 64 L.R.R.M. (BNA) 2580, 2581 (C.D. Cal. 1967) ("[i]t is well established that rules of evidence as applied in court proceedings do not prevail in arbitration hearings"). This has been the rule under the common law. See cases cited in 6 C.J.S. Arbitration § 85 n.96 (1975).

58. See, e.g., Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941). The Court stated that, "[w]ithout such a remedy [reinstatement] industrial peace might be endangered because workers would be resentful of their inability to return to jobs to which they may have been attached and from which they were wrongfully discharged." Id. at 443.

59. For a discussion of the complexities that exist in formulating backpay awards in discharge and disciplinary cases, see Hill & Sinicrope, supra note 34, at 54-91.
If arbitration of just cause for termination of nonunionized personnel is adopted, standards will be required for awarding compensatory and punitive damages, attorney fees or interest, which are customarily awarded in court proceedings for contract or tort claims. Whether the remedy of reinstatement with full back pay is suitable in cases of executive removal later determined not to have been for just cause, or whether the monetary award of the courts would be more useful and realistic is an unsettled issue. Because remedies in the courts are more extensive than those customarily found in arbitration, parties opting for arbitration as a means of resolving a dispute regarding the just cause for the termination of a managerial or nonorganized employee must decide how much authority is to be given to the arbitrator in determining the remedy.

V. Translation of Concepts of Just Cause to the Nonunion Situation

Arbitration of employer-employee disputes has not been limited to unionized employees. It has been utilized in nonunionized operations in which employers wanted to furnish employees an opportunity for review of the circumstances of their discharge and a neutral examination of just cause as applied to that case. It also has been used by an employer where some covered employees are represented by unions, but other covered employees, in other units or plants of the same company, have not opted for representation. In such situations, the criteria recognized by the employers and made known to the arbitrators generally are the same for the nonunion group as they would have been for a union group. There will have been a calculated decision that the policies and procedures applicable to the union groups would be applied in exactly the same fashion to the nonunion group. The nonunion group, however, does not have union presence and representation, union contract provisions or union memory of past cases. It is different because the employee either represents himself, finds a representative from among employer officials (if permitted) or retains an attorney. Although the individual would pay counsel expenses, the full bill of the arbitrator would be paid by the employer. This is a source of some disquiet to most

60. See supra note 7 and accompanying text.
61. Id.
arbitrators who prefer to have the bill divided equally between both sides in an arbitration case.

There are numerous problems raised by the possibility of substituting a dispute resolution system, borrowed primarily from the unionized sector, for court proceedings in the nonunion field. Arbitration originally developed because of the need for a hearing and decision-making function without prolonged delays or excessive costs. Arbitration involves remedies which are not customarily utilized by the courts, and it follows procedures and concepts not found in court processes. But, as demonstrated, where arbitration is an adopted system for employment disputes in nonunionized units, these differences have not precluded the use of arbitration. On the contrary, they have produced more careful development of solutions to the problems raised.

The just cause concept of termination discussed above was unique to the unionized situation for many years. The criteria and standards applicable to just cause discharge, and recognized by arbitrators, refer to the contractual commitment made by an employer to limit his right of discharge to just cause only. There are five groups within an employer organization who could be protected by just cause limitation or discharge: (1) covered employees (white collar, blue collar, technical, professional) unionized and subject to a union contract; (2) covered employees (white collar, blue collar, professional, technical) not unionized but subject to uniform, general policy and benefits; (3) foremen or lower level supervisors, not unionized; (4) middle management, professionals and department heads, not unionized; and (5) top levels of management and executive officers.

Initially, only persons in group one were given the job protection of the just cause limitation on discharge. Subsequently, through specific programs unilaterally adopted by some employers, nonunionized employees in covered levels, group two, were given the job protections of just cause limitations and the right of review, sometimes by a neutral arbitrator. But these were a very small percentage of the numerous

---

62. See supra notes 58 & 59 and accompanying text.
63. See supra note 7 and accompanying text.
64. See supra note 48 and accompanying text.
65. See supra note 21 and accompanying text.
66. Id.
67. See supra note 20 and accompanying text.
68. See supra note 7 and accompanying text.
employees in this second group. Depending on the wording of personnel booklets or other documents of employment, persons in groups two, three and sometimes four, recently have been held to have implied promises of continuity of employment unless just cause were shown for termination. In addition, regardless of handbooks, there have been indications, in some states or districts, of judicially recognized protections against unfairness for employees at all levels, without a contractual or statutory guarantee of fair treatment.

Whether charges are based on a contractual claim, claims of age discrimination, or claims of inequity and unfairness, the concept of termination at-will has taken a severe blow in many states or districts, with courts awarding high compensatory and punitive damages.

Employers have not been satisfied with this result.

If parties opt for arbitration to determine the existence of just cause for the termination of nonunionized personnel, the following issues need to be addressed:

1. Will arbitration continue to be a process largely defined by the parties and the arbitrator or will there be a concerted effort to enact a uniform arbitration law?

2. Will the less formal process prevalent in labor arbitration (and even in commercial arbitration) be replaced by the more formal processes carried over from the courts? For example, will discovery, transcripts, and briefs become part of the process?

3. Will the arbitration process continue to be final and binding, without appeal on the merits?

4. Will court concepts of plaintiff’s burden of proof cause changes in the generally recognized arbitration practices?

5. What will be the sources and limitations of the arbitrator’s authority? Without a collective bargaining agreement, will the parties be expected to enter into an agreement to arbitrate? Will arbitration continue to be a voluntary process?

69. See supra notes 27 & 28 and accompanying text.
70. See supra notes 1 & 5 and accompanying text.
71. See DeGiuseppe, supra note 1, at 23-34.
72. Based on the experience of the author as an arbitrator, these are the most relevant issues that need to be examined.
6. What will substitute for a grievance procedure to allow the parties to exchange information about their positions before the arbitration hearing?

7. Will the criteria and standards for measurement of just cause be the same for nonunion personnel, up to and including management, as they are for union represented personnel under a labor contract? Will the standards be the same, for example, for a vice president terminated at-will because he was approaching retirement, and therefore pensionable, as for a clerk? How does one determine the criteria applied in the past, if any?

8. Are concepts of corrective, progressive discipline as applicable to middle management as they are to a plant employee? How are standards dealing with drug and alcohol use, or abuse, to be applied to an officer of a company, to a first line supervisor or to a truck driver?

9. Is the standard for off-premises behavior the same for a supervisor as it is for one of the employees supervised? Is there a more demanding standard for restraint and exemplary conduct from a supervisor than from the employee supervised?

10. Will a different set of behavior standards be developed for executive management as contrasted to a supervisor of a department?

11. Will the standards and criteria be developed through case experience in arbitration on an employer-by-employer basis, or through court decisions under a statute, which have precedential value?

VI. Conclusion

There is presently a concern with the survival of the right of employers to discharge employees not specifically protected by a contractual just cause limitation. No dispute exists that an employer's right to terminate an employee for inadequate performance, improper behavior or other failures will continue, assuming just cause under those circumstances can be proved. But the freedom exercised by managements to discharge regardless of the absence of cause, without obligation to make a persuasive showing of cause has been severely circumscribed in some jurisdictions. The unquestioned right to terminate may be lost even in the jurisdictions that have been unwilling to
recognize contractual rights as existing through employee manuals and other such documents.

If the principle of just cause is extended from the labor contracts to the nonorganized levels, and to supervisory, professional and managerial levels, employment-at-will concepts may survive only for the executive, policy-making levels of an enterprise. If lawsuits involving employment-at-will discharges continue to increase, there will be problems in processing such suits in the court system because of the extensive delays and expenses inherent in court procedures and the burdensome cost of appeal procedures. These limitations place persons claiming unjust treatment at a vast disadvantage.

Dispute resolution mechanisms which have been effective in labor-management relationships may need to be developed to resolve the increasing number of cases involving discrimination in termination of employment, at-will discharge without cause and similar situations. Whether just cause for termination in the nonorganized sector is to continue to be a matter for the courts or is to be resolved through arbitration or another dispute settlement mechanism, the differences in the processes, concepts, standards and criteria, burden of proof, standards of evidence and proof, remedies, and the authority of the decision-maker will have to be accounted for and accommodated.

73. See supra note 36 and accompanying text.
74. See supra notes 37, 39 & 40 and accompanying text.