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How and Why Labor Arbitrators Decide Discipline and Discharge Cases. An Empirical Examination.

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**ARBITRATION 2007
WORKPLACE JUSTICE FOR A
CHANGING ENVIRONMENT**

**PROCEEDINGS OF THE SIXTIETH
ANNUAL MEETING
NATIONAL ACADEMY OF ARBITRATORS**

San Francisco, California

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than would be imposed by employers as a disciplinary sanction. We also cautiously affirm the role of delay in reducing a grievant's chance of reinstatement.

On the other hand, our data give reason to question the assumption that arbitrators typically retain jurisdiction when they issue back pay awards. We observe the Seven Tests being far less influential in actual assessment of just cause than the literature would suggest. Our results also indicate that arbitrators invoke heightened proof requirements, such as "clear and convincing evidence" and "beyond a reasonable doubt" much less frequently than claimed in the literature or found by prior studies, even in cases where employees have been charged with criminal conduct.

This presentation is the beginning of our efforts to draw from our newly compiled data set the most empirically valid picture of the nature of decisionmaking in discipline and discharge labor arbitration yet attempted. We plan to continue these explorations in a future book and subsequent articles that will also include the application of more sophisticated statistical techniques.

II. HOW AND WHY LABOR ARBITRATORS DECIDE DISCIPLINE AND DISCHARGE CASES: AN EMPIRICAL EXMINATION—COMMENTS

THEODORE J. ST. ANTOINE*

Laura Cooper, Mike Bognanno, and Steve Befort (CBB) have made a major contribution to our understanding of the decisional process in the arbitration of discipline and discharge cases. Nels Nelson has carefully examined their methodology and the reasons their study holds so much greater potential for drawing sound conclusions than previous efforts based on considerably more limited data bases. My comments will deal with a particular theme that runs through the study: the extent to which it confirms or challenges a number of the generalizations about arbitrators' views set forth in the NAA's *The Common Law of the Workplace*, published in 1998 and revised in 2005.¹

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¹St. Antoine, ed., *The Common Law of the Workplace: The Views of Arbitrators*, 2d ed. (BNA Books 2005).

Let me first say a word about the origins, philosophy, and modus operandi of *The Common Law*, because I think they say a lot about the credibility of the resulting product. The work was the brainchild of Arnold Zack, Academy President in 1994–95, with his principal co-conspirators being his successor Presidents, Ted Weatherill and George Nicolau. *The Common Law* was designed to commemorate the 50th Anniversary of the NAA in 1997 by summing up some of the leading arbitral principles developed over its first half century. Many veteran arbitrators rarely published their decisions and media attention often focused on the sensational case rather than the more typical. Although there had been good encyclopedic treatments, it was felt that a fairly short, authoritative overview would be more useful to the less experienced arbitrator or advocate.

Arnie caught me in a weak moment, enjoying a light teaching load while visiting at Cambridge University, and I agreed to be editor of the volume. We next rounded up 15 star performers among Academy members to do the hard job of writing on everything from arbitral practice and procedure to remedies in arbitration. And then, in a move I considered very important, we enlisted the aid of an advisory group of eight former Academy Presidents, chaired by Dick Mittenthal. They went over at least one chapter each, and did not hesitate to criticize and suggest improvements. The 15 writers and I engaged in numerous debates over drafts covering the more sensitive areas. Selected portions of early drafts dealing with some of the most controversial issues were placed before the entire membership attending three different general meetings as well as some of the regional meetings of the Academy. When there was respectable support for different positions on certain issues, we would include the various points of view. The upshot, I believe, reflected arbitral thinking in the United States and Canada as accurately as could be ascertained in the judgment of a highly able and experienced group of arbitrators. But, of course, it did not constitute the sort of actual head count we have before us today.

What, then, do the comparisons have to tell us? As might be expected, the empirical study supported the validity of a number of the generalizations contained in *The Common Law*. Thus, as seen in decisions reducing employer discipline, “most” arbitrators do adopt the principle of progressive discipline, even though a particular collective bargaining agreement may say nothing about the subject. Not surprisingly, arbitrators “generally” enforce last-

chance agreements. On the famous (or infamous) Seven Tests of Arbitrator Carroll Daugherty for "just cause," CBB report that in only about 9 percent of the decisions they studied did arbitrators rely on them. *The Common Law* concedes that the Seven Tests have been "influential," but cites a "critically convincing" alternative view by Professor John Dunsford. Naturally, the areas I find most interesting are those in which the empirical study seems to refute the positions taken by *The Common Law*.

For example, there may be a conflict concerning the retention of jurisdiction when the arbitrator determines that back pay is appropriate and remands the case to the parties to compute it. *The Common Law* states: "Such a remedy is usually, but not always, accompanied by a retention of jurisdiction by the arbitrator in the event that there is a subsequent dispute over the amount" (emphasis added). The CBB empirical study indicated that in 432 cases where the employee was reinstated with full or partial back pay, the arbitrator did not retain jurisdiction about 73 percent of the time. But the precise question asked of the data was whether the arbitrator "expressly" retained jurisdiction to resolve any subsequent disputes. That is a big difference. Although I invariably retain jurisdiction in such situations in an ad hoc appointment, I do not feel any such need when I am handling a case as a permanent arbitrator or as a member of a board of arbitrators. There the understanding of everyone is that the issue will come back for a final ruling if the parties are not able to resolve it. In addition, an entirely plausible argument can be made that an award that provides for back pay but does not compute it and does not deal with such natural additional questions as mitigation of damages is actually an interim award, and must be regarded as implicitly retaining jurisdiction if the award is not to be treated as defective for lack of completeness and finality. At any rate, I think it deserves further inquiry whether, at least in such a common situation as the resolution of computation issues in back pay cases, the arbitrator and the parties assume that retention of remedial jurisdiction is implicit. Incidentally, at the Academy's Business Meeting today a motion was adopted to modify the Code of Professional Responsibility to permit an arbitrator to retain remedial jurisdiction even over the objection of one of the parties.

The question of the quantum of proof required in discipline and discharge cases is another area in which the generalizations of *The Common Law* may be at odds with the findings of the CBB empirical study. I should first note that this does not involve the

quite distinct issue of the *burden* of proof. As CBB observe, it seems universally accepted, at least in labor arbitration (nonunion employment arbitration may vary, depending on the particular contract), that the employer bears the burden of proving there was just cause or good cause for the discharge or other discipline imposed. But on the quantum, or amount, of proof needed, there is a wide range of views.

Section 6.10 of *The Common Law*, covering quantum of proof, was hammered out after considerable discussion among the work's authors and editors. It reads essentially as follows (emphasis supplied):

- (1) For *most* arbitrators, the normal quantum of proof required in disciplinary cases is "preponderance of the evidence." For a *minority*, it is "clear and convincing evidence."
- (2) When the employee's alleged offense would constitute a serious breach of the law or would be viewed as moral turpitude . . . , *most* arbitrators require . . . "clear and convincing evidence." *Some* require proof "beyond a reasonable doubt" but . . . *most* hold that the criminal-law standard . . . has no place in . . . arbitration.

The Common Law adds: "Some arbitrators reject the very idea of a quantum of proof as a distracting legalism. Others argue that it is impossible to avoid at least an implicit quantum requirement."

The CBB empirical study stated that in the whole body of 2,055 discipline cases, 78 percent of the arbitrators did not specify a quantum of proof and so the authors assumed a "preponderance of the evidence" standard. Only 10 percent said "clear and convincing" and fewer than 2 percent said "beyond a reasonable doubt." That validated *The Common Law's* conclusion as to discipline cases generally. When it came to 1,034 cases involving possible crimes or matters of moral turpitude, however, the empirical study apparently disputed the assertions of *The Common Law*. Here CBB found that 84 percent still applied the preponderance standard, while only 13 percent required clear and convincing evidence and a mere 3 percent insisted on proof beyond a reasonable doubt. Even in the 97 cases where a crime had actually been charged in the criminal justice system, the figures changed only modestly to about 76, 16, and 8 percent, respectively.

The first reaction, regrettably, has to be that my learned colleagues and I, who put *The Common Law* together, were simply

wrong, and that any future editions will have to be revised accordingly. The conclusion would thus be that the majority view is that the "preponderance of the evidence" standard prevails in all discipline and discharge cases, even those involving possible crimes or matters implicating moral turpitude. Of course, such an admission is to be made, and such a conclusion is to be accepted, only as a last resort. But seriously, I do believe that one underlying assumption in the CBB analysis must be probed before *The Common Law* throws in the towel. As the authors state it: "[W]e are assuming that an unstated quantum of proof is equivalent to a stated standard of 'preponderance of the evidence.'" That surely is not self-evident.

One of the oldest and most systematic of labor arbitration systems is the Board of Arbitration established by U.S. Steel and the Steelworkers, and chaired over the years by such luminaries as Sylvester Garrett, Al Dybeck, and now Shyam Das. The Board has strenuously resisted ever articulating exactly what is its quantum-of-proof standard. Decisions will simply say that that the Board is "convinced," "persuaded," or "satisfied," or use similar language in reaching a result. Does that mean that the same quantum is required when employees have been charged with theft, and their reputations in the community and their likely future employability are at stake, as when they are charged with excessive absenteeism? I cannot answer that question with any certainty, either for the Board of Arbitration or for all the other arbitrators who do not spell out precisely the standard that they are applying in such discipline and discharge cases. But, it really must be answered one way or another, if *The Common Law* formulation is to retain its present specificity. Perhaps a future edition will have to hedge, however, saying "some" arbitrators do this and "others" do that. In any event, I am one of those who believe that there must be some implicit standard even when none is articulated. Implicitly there could be the same "preponderance of the evidence" standard in all cases, or there could be the more demanding "clear and convincing" standard in charges of moral turpitude.

Two other factors may be at work, age and geography. I like to think that the authors and editors of *The Common Law* were a reasonably distinguished lot. But in a field like ours, distinction tends to come at a price—years in service, and gray hairs. That would be especially true of our Presidential Advisory Group. So, it is possible that some of the ideas and positions set forth in *The Common Law* reflected the thinking of a somewhat older generation than

would be true of the more heterogeneous group of 81 arbitrators who decided all the cases submitted to the Minnesota Bureau of Mediation Services since the early 1980s. Part of the trend toward the “legalization” of the arbitration process that we see as a departure from former practices unique to arbitration may include a willingness to adopt more of the standards of the civil courts. That could include heavier reliance by younger or newer arbitrators on the courts’ single quantum of proof in civil cases, namely, a preponderance of the evidence, rather than the more specialized approach of veteran arbitrators in requiring a higher standard of clear and convincing proof when an employee is charged with conduct involving moral turpitude. There may well be other generational implications going well beyond quantum of proof that would be worth searching out in this empirical study.

In assessing the CBB study, another factor that may need more investigation is simply geographical, to determine whether Minnesota is a fair reflection of the country as a whole. Here I am not thinking specifically of quantum of proof—no reason immediately occurs to me why attitudes on that should vary from region to region. The Minnesota data have the advantage over published decisions that they are nearly all-encompassing for their time period and are not dependent on the subjective selection process of some editorial board. But I do have the impression that in some ways relations between employers and unions are more relaxed—dare I say “kinder, gentler”?—in the Midwest generally, and in Minnesota specifically, than in some other parts of the country.

What would be the reaction, for example, to an employer’s calling the grievant as its first witness in a disciplinary case? There is certainly a logical basis for such a move—in John Kagel’s colorful phrase, employers are simply trying to “nail the jelly to the tree”—to put grievants on record before they have heard the testimony of other witnesses and can adjust their stories accordingly. And, of course, there is, strictly speaking, no First Amendment right of silence in a private arbitration. But, for many persons it goes against the grain to let the employer, which has the burden of proof in a discipline case, start making its case out of the grievant’s own mouth. Might arbitral attitudes on that and other matters differ from one section of the country to another? So I am not yet prepared to accept the CBB sample as necessarily universal in its application. But, at the very least, it is a goldmine of worthwhile data, and we are all much indebted to its intrepid excavators.