

## ARBITRATION AT A LARGE NONUNION HOSPITAL

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### ABSTRACT

This study examines the experience of a large nonunion hospital that adopted arbitration as the final step of its grievance procedure. It focuses on the reasons for the adoption of the process despite the usual opposition of nonunion employers to arbitration and looks at the operation of the procedure, including the role of the employee advisor, who was hired and paid by the hospital to represent employees in arbitration. The study considers the reasons for the demise of arbitration after 25 years of apparently successful operation. It ends with a number of conclusions about nonunion arbitration procedures based on the experience at the hospital as well as reports regarding other nonunion arbitration systems.

The arbitration of workplace disputes has been the rule for union-represented employees for many years. A significant reason for the adoption of the process was the National War Labor Board's policy during World War II of encouraging employers and unions to include binding arbitration in their contracts. This practice is reflected by the fact that the Bureau of Labor Statistics reported that in 1949 83% of the contracts in its files required the arbitration of unresolved grievances [1, p. 18].

At the same time a very limited number of nonunion employers adopted arbitration for employment-related matters. In 1950, Bambrick and Speed studied 57 nonunion companies that had grievance procedures and found only two that included arbitration [2]. Thirty-six years later, McCabe surveyed 78 nonunion members of the National Association of Manufacturers and found that six had arbitration [3].

During the late 1980s and the 1990s, many more nonunion employers adopted arbitration. A 1986-87 survey by Delaney, Lewin, and Ichniowski of 495 business lines included in the Compustat financial performance data file revealed that for four occupational groups, approximately half had grievance procedures and 18.6% to 24.1% of those procedures included arbitration [4]. Similar findings were reported by Wager for Atlantic Canada (New Brunswick, Newfoundland, Nova Scotia, and Prince Edward Island), where 400 of 1,194 nonunion employers had grievance procedures and 81 of them had arbitration [5].

The employers' motivation for the adoption of arbitration is clear. In the late 1980s and the 1990s they faced a substantial increase in liability because of the growing number of lawsuits being filed against them under the Age Discrimination in Employment Act, Title VII of the Civil Rights Act, and the Employment Retirement Income Security Act, and the larger judgments being won by plaintiffs [6]. The trend was accelerated by the U.S. Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Co.*, where the court held that an employee was bound by his preemployment agreement to arbitrate his claim under the Age Discrimination in Employment Act (ADEA) [7].

The arbitration procedures that employers instituted in the late 1980s and 1990s did not resemble the arbitration procedures in union contracts. They were designed by employers and frequently lacked even elementary due process guarantees. More importantly, the new arbitration procedures were limited to statutory claims, leaving employees with no procedure to address routine employment disputes.

Perhaps because of the relatively small number of nonunion arbitration systems addressing the full range of employment matters, such procedures have been the subject of relatively little research. Only two studies examined in detail the adoption and operation of such procedures. Littrell considered the arbitration process at Northrop, and Wolf examined the arbitration system at TWA [8, 9]. In addition to these two studies, McCabe provided brief overviews of six arbitration procedures, and Berenbeim offered a profile of one [3, 10].

This study attempts to fill some of the gaps in the literature. It examines the arbitration process that existed for 25 years at a large nonunion hospital in a major metropolitan area. The article considers the reasons the hospital adopted arbitration; examines the operation of the process, including the role of the employee advisor, who was hired by the hospital to assist employees in presenting their grievances; and looks at the factors involved in the demise of the process. The study relies on the comments of the employee advisor, hospital officials, union representatives, and arbitrators who heard cases at the hospital. Wherever possible, the experience of the hospital is compared to the experience of other nonunion employers that had adopted arbitration. The article ends with some preliminary conclusions about nonunion arbitration.

### ADOPTION OF ARBITRATION

During the 1960s the hospital had a grievance procedure that was similar to many other nonunion grievance procedures. It consisted of three steps beginning with the employee's immediate supervisor. The second step involved an appeal to his/her department head. The final step consisted of a decision by the hospital administrator.

Two events occurred in the late 1960s that brought about a change in the procedure. At that time, unions in the metropolitan area were actively attempting to organize hospital employees. The Service Employees International Union organized housekeeping and other employees at three hospitals. The state affiliate of the American Nurses Association won the right to represent registered nurses at a number of area hospitals.

While some hospital officials indicated that the motivation for the adoption of a new grievance procedure with arbitration as the final step was a desire to provide due process rights to employees, union avoidance appears to have been a significant factor. This is reflected in the comments of the employee advisor who stated that the new procedure "was truly initiated because it seemed to be the way to provide employees the same amenities regarding fair employment practices as found in most collective bargaining agreements in unionized organizations" [11, p. 14]. However, the employee advisor acknowledged, "in addition, the process was developed as a form of union avoidance" [11, p. 14].

At the same time that union organizing was taking place, a management change occurred at the hospital. A new personnel director, who had experience in unionized settings, was hired by the hospital. When he discovered that few grievances were being filed, he concluded that there was a problem with the existing procedure. The personnel director believed that a final decision by a neutral arbitrator would enhance the credibility of the procedure and encourage employees to use it. He and an attorney from a major law firm in the area designed a new grievance procedure that included arbitration as its final step. The change was supported by top management at the hospital and was approved by the hospital's board.

The events leading to the adoption of arbitration by the hospital appear to be the same ones that led Northrop to embrace arbitration [8]. It adopted arbitration in 1946, shortly after hiring a new industrial relations manager. While the implementation of arbitration may have reflected the desire of company founder John K. Northrop to treat employees fairly, the threat of unionization also played a role. In 1945 the company had faced two union elections and, although it prevailed in both cases, it evidently concluded that it needed a new approach to conflict resolution.

The experience at the hospital and Northrop is consistent with the conclusions reached by Berenbeim, who drew on a survey of 778 large companies [10]. He

reported that the “executives of two companies that did not have arbitration recognized its absence as an effective political weapon in the hands of a union” [10, p. 19]. Berenbeim also noted, “some labor relations executives whose companies do not use [arbitration] feel that no [grievance] system can be entirely credible without it” [10, p. 20].

There is some empirical support for the role of union avoidance in the adoption of arbitration. Delaney and Feuille, using the Compustat data, found that while the adoption of grievance procedures by nonunion firms did not appear to be a result of a desire to remain union-free, there was a positive but weak association with two of their measures of the desire to remain nonunion and the adoption of arbitration among companies with grievance procedures [12].

### EMPLOYEE ADVISOR

One of the important concerns in nonunion arbitration is providing representation for aggrieved employees. In a unionized setting, grievants are represented by union staff representatives or attorneys provided by the union. Where there is no union, employees can attempt to represent themselves or can hire an attorney, or employers can provide representation.

The hospital solved the employee representation problem by hiring an employee advisor. Employees could consult her before initiating a grievance. At step two, they were required to file written grievances with the employee advisor, who then arranged the step-two meeting with the appropriate department head. At the step-three hearing before a grievance review committee, the employee advisor assisted the employees in presenting their cases.

The employee advisor saw her role in arbitration as different from that of a union staff representative or other employee representative in a unionized setting. She described herself as a “coach” [11, p. 20]. The employee advisor indicated that she assisted employees in preparing for the hearing, including writing opening and closing statements. In addition, she reported that she assisted employees in questioning witnesses.

Many of the arbitrators who decided cases under the hospital’s procedure saw the employee advisor as much more than a coach [13]. One arbitrator indicated that she “gathered evidence and presented it nicely.” Another arbitrator stated that the employee advisor “did a credible job eliciting testimony.” A third arbitrator went so far as to describe the employee advisor as a “superb advocate” who was “not afraid of her adversary” [13].

The employee advisor was obviously in a somewhat difficult position. She was hired and paid by the hospital, yet her job was to represent employees in disputes with the hospital. A former hospital official indicated that the employee advisor was “extremely knowledgeable,” but suggested that “there was a fine line that the employee advisor could not go beyond” [11, p. 25].

## ARBITRATION PROCESS

An important consideration is the scope of the arbitration process, i.e., the range of issues that are subject to arbitration. At the hospital, a grievance was broadly defined as “a specific complaint by the employee that the established policies and procedures, wage and salaries scales, or personal benefits are not being properly administered” [14]. Arbitration, however, was limited to disciplinary cases involving a suspension of more than five days or a discharge.

While the scope of the arbitration process was quite restricted at the hospital, nonunion employers have generally restricted the range of arbitrable issues. At Northrop, the employee handbook indicated that employees could arbitrate “when they [felt] they have not been treated in accordance with company policy” [8, p. 37]. Berenbeim’s review found that nonunion arbitration procedures were reserved for “very carefully defined subject matter” [10, p. 18].

At the hospital the selection of an arbitrator was handled just as under many collective bargaining agreements. The arbitrator was jointly chosen by the employee advisor and the hospital’s human resources administrator from a list provided by the American Arbitration Association. Hospital officials reported that the employee advisor was familiar with many area arbitrators and had no difficulty in selecting arbitrators favorable to employees’ cases.

Other nonunion employers use different methods to select arbitrators. McCabe’s examination of six arbitration systems found that in some cases either the employee or employer selects the arbitrator from a list obtained from the American Arbitration Association or the Federal Mediation and Conciliation Service, and in other cases the employer and employee attempt to agree on an arbitrator [3]. In one case the employee selects an arbitrator from a list of “nationally prominent arbitrators” prepared by the employer [9].

While an arbitration hearing at the hospital generally resembled a hearing in a unionized setting, there were some significant differences. First, the parties were not represented by trained and experienced arbitration advocates. As indicated above, the employee was represented by the employee advisor, who was hired and paid by the hospital. The hospital was represented by the employee’s immediate supervisor, department head, or an administrative officer from the department involved. The hospital representatives were assisted in preparing for arbitration by members of the employee relations staff.

Most of the arbitrators who heard cases at the hospital did not believe that their role in the hearings was different from arbitration hearings in unionized settings. They indicated that they relied on the presentation of the employee advisor and asked questions only to the extent they needed to clarify testimony that had been elicited by the employee advisor. One arbitrator, who was quite critical of the process, complained that the advisor simply directed the employee to tell his story to the arbitrator.

Different observations have been made regarding the other nonunion arbitration systems. Littrell commented, regarding arbitration hearings at Northrop:

Where an employee represents himself, his lack of knowledge of the procedure often unduly delays the proceedings; the imbalance of the experience and skill of the grievant vis-à-vis an employee relations professional forces the arbitrator to take a more active role than he might otherwise do; the arbitrator, if he feels that contest is uneven may unconsciously give the grievant the benefit of more doubts than he is really entitled to; and, finally, as in one case, an arbitrator may even refuse to render a decision due to the lack of adversary counsel [8, p. 40].

In commenting on the arbitration process that existed at TWA, Wolf stated:

. . . the absence of union representation gives the company and the arbitrator a special responsibility to assure that the employee receives the proper support and assistance throughout [9, p. 33].

In unionized settings, the costs associated with arbitration are seldom a problem. The usual arrangement is that each side pays for its own representatives and the cost of the arbitrator is split by the employer and the union. The difficulty in nonunion arbitration is that employees seldom can afford to hire an attorney to represent them or pay half of the arbitrator's bill.

The hospital decided to free employees from both of these costs. As indicated above, it hired an employee advisor to assist employees in arbitration. In addition, the hospital's policy required it to pay the entire cost of the arbitrator.

Other nonunion employers have made similar arrangements. McCabe indicated that employers generally pay for the arbitrator and frequently provide at least some assistance to the employee in preparing for arbitration [3]. At TWA, where the company provided employees with representation from the employee relations department, employees could still opt to engage a lawyer at their own expense [9]. Otherwise, the company paid all the costs associated with the arbitration.

## USE OF ARBITRATION

The arbitration process had regular but only modest use, considering that the hospital employed approximately 5,000 people. Between 1971 and 1992, 85 cases were arbitrated [11]. While the hospital averaged nearly four per year, in some years there was only one arbitration, but in other years six cases were heard.

The profile of the employees using the process is unremarkable. The number of arbitration cases by job classification is shown in Table 1 and generally mirrors the composition of the workforce. The record indicates that 88% of the employees in arbitration were minorities and 56% were males. However, minorities represent only approximately 35% of the workforce, and males accounted for only 25% of employment.

The type of offenses for which employees were suspended or discharged is shown in Table 2. While some of the offenses are specific to the hospital environment, the majority of the cases involve the same issues as heard by arbitrators in other places.

The data show that employees fared well in arbitration. Grievances were sustained in full or in part in 45% of the cases. The numbers are too small to draw any conclusions regarding who prevails by job classification or sex. However, the grievances of minorities were sustained in 41% of the cases, compared to 70% for white employees.

The limited data from other studies on the use of arbitration suggest that the hospital's experience is typical of many of the nonunion employers that have adopted arbitration. Bambrick and Speed's profile of a company employing approximately 5,000 people revealed that it had arbitrated only one case in three years [2]. In a conference at Michigan State University, it was reported that Polaroid had had 10 arbitration cases in 20 years, while American Optical had averaged three arbitrations per year [15]. On the other hand, Berenbeim reported that one company had 26 arbitrations the previous year, and Wolf indicated that in 1985 TWA had 24 terminations appealed to its tripartite Systems Review Board [9, 10]. Unfortunately, McCabe's profiles of six arbitration procedures did not consider the number of cases that were arbitrated [3]. None of the studies considered who had filed for arbitration, which issues had been brought to arbitration, or who had prevailed in arbitration.

**DEMISE OF ARBITRATION**

After 25 years of what appeared to be the successful use of arbitration, the hospital eliminated it. The final step of the grievance process became the Peer Resolution Committee [16]. This committee consists of two employees and

Table 1. Arbitration Utilization  
by Job Classification

	Cases
Service	49
Clerical	15
Technical	10
Laborers	8
Professional	2
Total cases	84

Table 2. Reasons for Discipline

Threats/fighting	14
Insubordination	13
Theft	11
Attendance	10
Work performance	10
Conduct detrimental to patient care	9
Sleeping on duty	4
Conduct detrimental to hospital services	4
Under the influence of drugs/alcohol	3
Behavior offensive to others	2
Falsification of time card	1
Gambling	1
Solicitation	1
Unauthorized absence from post	1
Total number of arbitrated cases	84

one member of management. It conducts hearings where the hospital and the employees make opening and closing statements, call witnesses, and submit documents. Employees are assisted by an employee advisor and an employee relations specialist helps the department representative who presents the hospital's case.

One of the reasons offered for the hospital's decision to eliminate arbitration was a concern about the costs associated with the process. One hospital official noted that it cost \$1,200 per case to arbitrate three or four cases per year excluding the pay of the employee and witnesses [17, pp. 43-44]. This is consistent with Berenbeim's finding that the management of nonunion companies has opposed arbitration based on the costs of the process including arbitrators' fees, the cost of providing employee representation, and the loss of work time by witnesses [10].

While concerns about the costs associated with arbitration may have been a factor in the hospital's decision to eliminate arbitration, the primary reason is clear. An employee relations official acknowledged that middle management, including the department heads who were directly involved in the process, had never had complete trust in arbitration [11, p. 23]. He reported that they felt that they had lost some authority by having outsiders make final and binding decisions in disciplinary matters [11, p. 23].



The same opposition to arbitration existed at TWA. Wolf noted:

It will come as no surprise to [experienced arbitrators] that managers often don't take kindly to seeing a terminated employee reinstated. What may be less obvious is that the backlash in this case can be rather severe, and has led to some high level pressure to eliminate the [grievance] procedure or at least the use of arbitrators [9, p. 32].

Top management had a different view of the arbitration process. They saw it as providing employees with at least the appearance of fairness that was lacking where the final decision in a disciplinary matter was left to a management official. More importantly, top management recognized the value of binding arbitration in their desire to remain nonunion.

By the 1990s the balance between the concerns of middle management and top management changed. While middle managers continued to oppose binding arbitration, union organizing efforts at area hospitals tapered off. With the reduced threat of unionization, top management acceded to the complaints/desires of middle managers and eliminated arbitration.

## CONCLUSIONS

A number of conclusions can be drawn from the experience of the hospital and other nonunion employers who adopted arbitration. First, arbitration is instituted for a variety of reasons. Union avoidance is surely part of the motivation, but so is a desire to provide fairness and due process. Further, the adoption of arbitration is often associated with the arrival of an employee relations official with experience in a unionized environment where arbitration is the norm.

Second, many nonunion companies have wrestled with the question of who should represent employees in arbitration. Employees cannot adequately present their own cases, and most employers are unwilling to pay employees to hire their own lawyers. The hospital's decision to hire a person to serve as an employee advisor appears to have worked well. However, it may have been that the hospital had the good fortune of hiring the right person for the difficult position of working for the hospital while representing employees who have a grievance against it.

Third, arbitrators who are accustomed to working in unionized settings may have to make adjustments if they choose to hear nonunion cases. In many instances, they will find advocates, particularly on the employee side, who are less effective than those they normally encounter. Arbitrators, therefore, may feel compelled to take a more active role in the arbitration hearing.

Fourth, it is difficult to sustain arbitration in a nonunion environment. There are always supervisors and managers who are opposed to arbitration and once those who have championed and supported the process leave the employer,

the opponents of the process may persuade top management to abandon it. In addition, if the threat of unionization diminishes, the rationale for entrusting decisions to outside arbitrators will be weaker.

Finally, there is a larger and more philosophical issue related to nonunion arbitration. Many union officials oppose nonunion arbitration as nothing more than a union prevention tactic and, in some instances, have spoken out strongly against it. Paul Zalusky, a former research director of the AFL-CIO stated:

Employer-promulgated arbitration without worker representation in the design and operation of the plan is a sham. It discredits arbitration as a process, and its growth and support by the arbitration community marks a low point in the ethical standards of the profession [18, p. 182].

Arbitrators have expressed differing views regarding nonunion arbitration. Benjamin Aaron stated:

My own experience has led me to decide that I don't want to serve as an arbitrator in those cases. I felt that we were going through some kind of charade and I felt uncomfortable. If it seems to me that the cards have been stacked a little bit or a great deal on the side of the company, I prefer not to arbitrate in those cases, so I don't accept them any more [15, p. 20].

A different view was expressed by Joseph Gentile. He recognized that some argue that arbitration systems adopted by nonunion employers are inherently flawed and favor management but concluded:

. . . even in a flawed process, an aggrieved employee is ultimately better off with a knowledgeable arbitrator, familiar with traditional labor-management arbitration than a judge or commercial arbitrator without experience in the industrial sector [19, p. 158].

Nonunion arbitration procedures represent a fruitful area for further research. First, a survey needs to be done to ascertain the extent of nonunion arbitration. The only extensive survey was done nearly 20 years ago. It may be that the hospital that is the subject of this study is not the only nonunion employer to have abandoned arbitration. Second, data needs to be gathered on the utilization and outcomes of a sample of nonunion arbitration procedures. The modest use of the arbitration process and the results at the hospital may or may not mirror the experience of other nonunion employers. Finally, an attempt must be made to assess the extent to which nonunion arbitration provides real due process and fairness for nonrepresented employees.

## ENDNOTES

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