

A COMPARATIVE SURVEY OF PRIVATE SECTOR AND PUBLIC SECTOR ARBITRATION CASES

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ABSTRACT

Rather than examining arbitrator behavior in a single category of cases, this inquiry examines arbitrator behavior across a wide range of cases in both the public and the private sector. Published awards between 1990 and 1995 are categorized using *LAR* numbers so that the classification scheme should be reproducible. Inspection of the relative caseload and the union win rates reveals some notable differences between the public and the private sector. The caseload in the private sector is concentrated on basic job security issues, whereas in the public sector the awards are concentrated on issues concerning wages and hours or other conditions of employment. Unexpectedly, the union win rates in the public sector were higher than in the private sector in six of eight categories of cases.

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Many authors have analyzed data drawn from classes of awards centered on individual issues. For example, Karim and Stone [1] and Karim [2] investigated discharge cases. Thornicroft [3]; Crow, Stephens and Sharpe [4]; and Karim and Haber [5] examined substance-abuse cases. Lavan [6] considered cases involving sexual harassment. Unquestionably, studies of this sort add to one's understanding of decision making in specific classes of cases. The view taken here, however, is that a more comprehensive analysis where decisions are analyzed

across a broad spectrum of cases can yield additional insights into the nature of arbitrators' behavior. Unfortunately, there have been few endeavors in this direction.

In an earlier article, the authors classified and surveyed virtually all private sector labor arbitration awards published in *Labor Arbitration Awards (LAR)* from 1990-1995 [7]. The intent of the present study is to extend both the classification scheme and the survey to public sector awards so that comparisons can be drawn with the results obtained in the private sector.

Two related studies by Dilts and Leonard [8] and by Dilts and Deitsch [9] come closest to the purposes of this inquiry. Both of these studies found that the party bearing the greater burden of proof in an arbitration hearing wins less frequently than its opponents do. The researchers divided awards published in 1984 into three classes: cases that dealt with discipline, those that dealt with procedure and arbitrability, and those that dealt with contract interpretation. In the first two classes, where management bore the burden of proof, it had won less than 50 percent of the decisions. On the other hand, the authors contend that in contract-interpretation cases unions bear the burden of proof. Here they found management had won more than half the decisions. Except for these two articles, the authors were unable to find any prior surveys designed to compare arbitral decision making across a broad range of cases.

The present investigation was carried out in two stages. In the first stage, both private sector and public sector cases were divided into classes according to the numbers under which they are classified in *LAR*. Then, in the second stage, the win rates for unions were computed in each class of cases and comparisons drawn between the profiles of private sector and public sector awards. Through this procedure, the authors hope to gain a general appreciation of the course of arbitration over the period with particular emphasis on the similarities and differences between public and private sectors.

DATA AND METHOD

Virtually all the published awards in volumes 97-104 of *LAR* form the sample for this inquiry [10]. The sample consisted of 1128 private sector awards and 660 public sector awards.

Two considerations were paramount in the construction of eight categories of awards. First, each category should have some intuitive appeal as a general class, distinctly different from the others. Moreover, each category should be broad enough to include sufficient cases in the sample for the win rates to fairly represent arbitrator decision making in that category. Conversely, cases in each category should be sufficiently similar to constitute a homogeneous group. That is, one hopes to avoid the difficulties that would ensue if the union win rate in a category was affected over time simply by shifts in arbitrators' caseloads among different sub-classes of cases within the category. Table 1 presents the eight

Table 1. Categories and *LAR* Numbers

Category	Private Sector <i>LAR</i> Numbers	Public Sector <i>LAR</i> Numbers
Labor Organization	2-25	100.01-100.03, 100.2-100.3
Methods of Settling Disputes (e.g., arbitration cases)	93-94	100.06-100.0785, 100.5523
Change of Operations	80-81, 117, 120-123	100.08, 100.56, 100.62, 100.68, 100.75
Conditions of Employment	111-112, 116, 124	100.15, 100.51-100.5227, 100.58, 100.5901-100.5965, 100.72
Promotions/Demotions	119	100.4, 100.5509, 100.66, 100.7
Wages and Hours	114-115	100.45-100.4825
Discharge	118	100.5501-100.5515, 100.5525-100.552575
Other Discipline	118	100.5503-100.552, 100.5525-100.55257

categories with their corresponding private sector and public sector *LAR* primary-classification numbers that embody the authors' best attempt to balance these considerations.

Two comments concerning the construction of these categories are in order. First, a small percentage of cases with private sector *LAR* numbers nevertheless involved public sector principals. Where this discrepancy was apparent, the authors placed such cases in the public sector. Second, particularly in the public sector, the classification scheme may be incomplete. The categories constructed are based only on those *LAR* numbers reported in the 1990-1995 data set. Because there are myriad classifications in the public sector, additional classification numbers may come into use. As time progresses, the categories would then have to be refined to account for these new numbers.

More generally, any categorization involves subjective judgment. The authors recognize two sources of subjectivity here: 1) that of the *LAR* editors in assigning numbers to individual cases, and 2) that of the authors of the present inquiry in

aggregating the *LAR* numbers into the categories of Table 1. Both the validity and the reliability of the categories created should be closely scrutinized. The authors view the current classification schema as their best attempt to balance the need for categories that are sufficiently broad to have intuitive appeal with the need for categories that constitute homogenous sets of cases. They welcome research designed to test the suitability of the schema with an eye toward its improvement.

The strength of this approach to classification is that it allows for standardized treatment of data. Once adopted, this (or comparable) categorization of cases allows researchers to place cases in classes in an objective manner. Given the same data set, different individuals should classify the data in the same way. In short, the standardized construction of categories fosters the development of reproducible, reliable results [11].

RESULTS AND DISCUSSION

For each category and for the public sector and private sector separately, Table 2 presents the number of cases, the percentage of total cases represented by the category, and the union win rate [12].

Table 2. Counts and Win Rates

Category	Private Sector			Public Sector		
	Count	% of Cases	% Union Wins	Count	% of Cases	% Union Wins
Labor Organization	45	4.0	57.8	46	7.0	58.7
Methods of Settling Disputes	71	6.3	39.4	78	11.8	44.9
Change of Operations	277	24.6	53.8	92	13.9	56.5
Conditions of Employment	107	9.5	59.8	117	17.7	57.2
Promotions/Demotions	72	6.4	43.1	70	10.6	55.7
Wages and Hours	123	10.9	57.7	108	16.4	58.3
Discharge	352	31.2	59.9	77	11.7	58.4
Other Discipline	81	7.2	55.6	72	10.9	68.1

The composition of the caseload over the sampled period differs markedly in the private and public sectors. A two-sample Kolmogorov-Smirnov test [13] reveals that the distribution of the cases in the public sector differs from that in the private sector at the $\alpha = .01$ level ($D_{\text{sample}} = .1581$ and, for $\alpha = .01$, $D_{\text{crit}} = .0799$). Thus, one may be relatively sure that the difference in the caseload distribution does not result from sampling error (i.e., chance). A closer examination of the distributions reveals the underlying cause. In the private sector, over 55 percent of the cases come from two categories: change of operations, and discharge. Given the restructuring of operations that has proceeded apace in the private sector over the past two decades, the authors believe the concentration of cases in these two categories reflect the insecurity of employment in the private sector. That is, most awards seem to concern issues of basic job security. On the other hand, the cases in the public sector are far more evenly distributed across the categories. Although there has been restructuring in the public sector as well, the degree to which jobs have been threatened is far less. Accordingly, cases resulting from change of operations and discharge cases represent only slightly more than a quarter of the total public sector cases. The two categories that have the greatest representation (slightly over one third of the cases) are cases dealing with conditions of employment or wages and hours. The public sector caseload that arbitrators faced, then, seems more oriented toward concerns of securely established, long-term incumbents, rather than insecurities of those threatened with downsizing.

To test for differences between union win rates in the private sector and union win rates in the public sector, tests of differences in proportions [14] were run in each category. None of these differences were significant at even the $\alpha = .10$ level. Thus, any interpretation of the differences in the win rates must be done with great caution and with full recognition that any perceived differences could simply be the result of sampling error [15]. That said, the sample union win rates still provide the best evidence as to arbitrator behavior in each category. Consequently, comparison of union win rates in private sector cases with those in public sector cases can provide a suggestive, if not definitive, indication of the categories where relatively large differences may exist.

During the sample period, unions had greater success in winning cases in the public sector in six of the eight categories. Only in the categories of conditions of employment and discharge were the union win rates in the private sector higher than those in the public sector. Even in these two categories, unions were only marginally (less than 3%) more successful in the private sector than in the public sector. Because of the heavy representation of discharge cases in the private sector, however, the overall union win rate was only slightly higher in the public sector (55.4% in the private sector versus 57.1% in the public sector).

There were two categories where unions were markedly more successful in the public sector. Cases in the areas of promotions/demotions and of discipline other

than discharge filed in the public sector were decided far more often in the unions' favor than were the same kinds of cases filed in the private sector. The union win rates in each of these categories were over 12 percent higher in the public sector. Perhaps one reason for the disparity is that procedures for both promotion/demotion and discipline are more subject to explicit regulation in public sector labor contracts, whereas they tend to be less subject to contract language in private sector labor contracts. Hence, arbitrators would be compelled to give management of private sector companies greater discretion than they would give public sector managers in these matters.

With some notable exceptions, the authors' previous work [7, pp. 435-436] found results in the private sector were broadly consistent with the hypothesis that unions win more frequently when management bears the burden of proof and when it is forced to meet higher standards of evidence to justify its actions. In the public sector, the results are less clear. In all but one category, unions won over 55 percent of the cases. It is true that unions win a high percentage of cases in discipline and discharge proceedings where management bears the burden of proof and must meet high standards of evidence to prevail. It is also true, however, that unions win a similarly high percentage of cases in which the burden of proof is more evenly distributed and where the standard of evidence is simple preponderance (e.g., labor-organization cases and wage-and-hour disputes).

Another puzzling aspect of the data is that, in the public sector, unions win a substantially higher percentage of discipline cases that do not involve discharge than of cases involving discharge. Discharge has been called the labor-relations equivalent of capital punishment. As such, to win a discharge case, management must establish the propriety of its actions with evidence that at least meets the "clear and convincing standard," and sometimes even the "beyond a reasonable doubt" standard. Given that management bears the burden of proof in both categories of cases, it appears irregular that the category in which the standard of evidence is less demanding is also the category in which unions have less success at arbitration. Possibly, because public sector managers face more adverse consequence for failed discharge proceedings than for failed disciplinary proceedings of other types, they may pursue discharge using a more cautious (letter of the law) approach than they would with other types of discipline.

With increased demands for managerial accountability in the public sector, labor contracts there may regulate labor practices to a far greater degree than in the private sector. The authors' prior article suggested that unions seemed to have higher win rates in areas where "external law or explicit contract language is likely to limit managerial prerogatives" [7, p. 436]. If this hypothesis is correct, the relatively high win rates in most categories for unions in the public sector (both historically and relative to the private sector) may have come about because both law and contracts have increasingly restricted management's freedom of action in that sphere.

CONCLUSIONS

In the present study comparing arbitration awards in the private and public sectors, the authors found unexpected differences. Arbitrators in the public sector face a caseload different in composition from that faced by their private sector counterparts. Cases in the private sector seem to be concentrated in areas concerned with basic job security, while cases in the public sector are less concentrated in any area, but seem to be focused more on concerns of relatively secure incumbents. The union win rates obtained in public sector are similar in some categories to those in the private sector, but markedly different in other categories. Moreover, the win rates in the public sector provide only very loose support for the hypotheses that unions win more frequently: 1) when management bears the burden of proof, and 2) when management must meet higher standard of evidence to prevail. The fact that union win rates in the public sector were generally higher than those in the private sector may reflect the fact that public sector labor contracts leave less room for managerial discretion.

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8. D. A. Dilts and E. C. Leonard, Win-Loss Rates in Public Sector Grievance Arbitration Cases: Implications for the Selection of Arbitrators, *Journal of Collective Negotiations in the Public Sector*, 18:4, pp. 337-344, 1989.
9. D. A. Dilts and C. R. Deitsch, Arbitration Win/Loss Rates as a Measure of Arbitrator Neutrality, *Arbitration Journal*, 44:3, pp. 42-47, 1989.
10. A small proportion of the published awards was omitted from the sample for several reasons. The most common omissions were cases in which unions contested other unions, usually in matters dealing with the right to organize.
11. One should note that the category containing discharge cases and that containing other discipline cases have overlapping *LAR* numbers in both the public and the private sector. Yet, it is sufficiently clear from the context of each case whether that case involves discharge of an employee, and therefore this overlap poses little threat to the reproducibility of the data set as a whole.
12. As most authors have done, split awards are counted as union wins. For an award to be counted as a management win, management's actions must be upheld in their entirety.
13. S. Siegel, *Nonparametric Statistics*, McGraw-Hill, New York, pp. 127-136, 279, 1956.
14. J. L. Kenkel, *Introductory Statistics for Management and Economics*, Prindle, Weber and Schmidt, Boston, pp. 334-335, 1981.
15. It was surprising that none of the differences in win rates proved statistically significant in view of the relatively large differences between private and public sector win rates (as much as 12.6 percent) and the large sample size.

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