

(WORKING PAPER SERIES - 137)

CONFLICTS BETWEEN EMPLOYER
AND
EMPLOYEE GOALS,

by

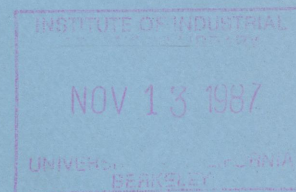
Daniel J.B. Mitchell*

*Daniel J.B. Mitchell
Director
Institute of Industrial Relations
U.C.L.A.
Los Angeles, California 90024-1496
(213) 825-4339

and

Professor
Graduate School of Management
U.C.L.A.

DRAFT: August 1987



INSTITUTE OF INDUSTRIAL RELATIONS (Los Angeles)
UNIVERSITY OF CALIFORNIA,
① LOS ANGELES

CHAPTER 10:

Conflicts Between Employer

and

Employee Goals

Draft chapter of "Human Resource Management: An Economic Approach"

© Daniel J.B. Mitchell

Chapter 10: Conflicts Between Employer and Employee Goals

I. An Example of a Potential Complaint: Working Hours.

- i. Hours per Week.
- ii. The Scheduling of Weekly Hours.
- iii. Work Hours and Leisure Hours.
- iv. Hours and Employer/Employee Frictions.

II. Formal Grievance and Arbitration Procedures.

- i. Considerations for the Arbitrator.
- ii. Arbitration Remedies.
- iii. Managerial Authority.
- iv. The Legal Status of Arbitration.
- v. The Duty of Fair Representation.
- vi. Criticisms of the Arbitration Process.
- vii. An Economic Interpretation.
- viii. Exit and Voice.

III. Complaint Resolution in the Future.

- i. Public Intervention.
- ii. Alternative Forums.

Wrongful Discharge Litigation.

EEO as a Forum.

Workers' Compensation as a Forum.

Limitations on Layoffs.

- iii. Private HRM Responses.

Chapter 10: Conflicts Between Employer and Employee Goals

The simple economic model of the labor market suggests that there cannot be real conflict between employer and employee goals unless some non-competitive element is present. Workers in the abstract might want to be paid more for their services than they actually receive. But in an atomistic market place, employees must "accept" what the auctioneer declares to be the wage which clears the market. The fact that they choose to work at the going wage must mean that, at the margin, workers are being paid what their time is "worth" to them. Only a non-competitive element, such as a union or minimum wage, law might lead to "rents" being paid to workers.

Similarly, (atomistic) employers would like -- other things equal -- to pay less than they actually do for labor. But they cannot pay less than the going rate and expect to hire any workers. That is, in the simple economic model, employers, too, must accept the market wage.

It must also be the case, whatever employer complaints there may be, that workers who are hired are not "overpaid." The word "overpaid" -- in the context of the simple auction model -- could only mean being paid more than marginal revenue product. And profit-maximizing employers would not hire workers who did not, at the margin, return a revenue equal to their cost. Only non-

competitive elements, such as employer monopsony or legal ceilings on wages (as during government programs of wage/price controls), could depress wages below marginal revenue product levels.

These same considerations from the simple economic model apply to nonwage conditions of work such as risk of injury or illness, pleasantness or unpleasantness of surroundings, or amicable or uncongenial supervision. The model predicts that wage premiums would compensate workers -- in a market clearing sense -- for elements in the workplace leading to disutility. Thus, risky jobs would pay more than safe ones and distasteful jobs more than pleasant ones. In this view, the market harmonizes employer and employee interests, so long as competition prevails.

Despite this picture of workplace serenity, we know that tensions do arise between employer and employee, even where unions, monopsony, or similar deviations from the auction market are not involved. As in other facets of human resource management, it is necessary to go beyond the simple economic model if we are to understand the underpinnings of employer/employee frictions. It is not necessary, however, to abandon the notion of rationality on the part of employees and employers; rather it is a matter of introducing fixed costs of

decisions, mobility costs, and the inherent vagueness of implicit contracts.

Before considering particular examples, it is useful to distinguish between two types of employee expressions of dissatisfaction: complaints and grievances. Grievances are forms of complaint, but standard HRM parlance defines them as allegations that a "right" of the employee is being (or has been) violated by the employer. In a union situation, grievances are allegations that a right contained in the union contract--explicitly or indirectly -- is being abrogated by the employer. Union-sector grievances are normally processed through a formal grievance system, with a series of hierarchical appeals to employer representatives. If not resolved through such appeals, these grievances can be taken to arbitration ("rights" arbitration) for a final and binding resolution by an outside neutral.

In a nonunion setting, grievances also can arise, but they will refer to violations of unilaterally-determined management policies -- perhaps as spelled out in a company handbook-- rather than of provisions of a union-management contract. Generally, nonunion grievance procedures are less formal than those in the union sector; management may simply announce that it has an "open door" approach, meaning that employees can take their grievances to higher management officials who will be

willing to listen. Nonunion grievances usually are subject to final resolution by a top company official such as the CEO. However, a few nonunion companies deliberately imitate standard union practice and provide for rights arbitration.

Complaints are more general than grievances. Employees may be dissatisfied about almost any condition of work. They may dislike their supervisors, for example, or their benefit packages, or their pay rates. Workers may resent being subject to layoff when business conditions worsen. They may feel that working conditions are too hazardous or be angered by mandatory assignments of overtime work.

But unless company policies or union contracts are being violated regarding supervisory selection, benefits and pay, layoff rules, safety, or work assignments, the above-mentioned complaints are not subject to remedy by grievance procedures. These dissatisfactions -- though real -- are not complaints over "rights." Those complaints the employee has about working conditions -- where no right is alleged to be violated -- are akin to the "interest" disputes described in the previous chapter. The employee wishes that the policy or contract were different than it actually is, and thus is not protesting a violation.

A union worker might want to have his/her union make demands on the employer to alleviate such non-grievance complaints during contract negotiations. But although union officials are sensitive to the desires of members, there is no guarantee that the union will actually place a given complaint on its bargaining agenda. Even if it does bring the complaint to management's attention, the union may have other, higher-priority items about which to bargain; it may drop the complaint in exchange for something else. And even if the union puts the complaint as a top-priority item, it may not be successful in compelling management acceptance of its position.

A nonunion employee can, as an individual, threaten to quit if improvements are not made. Unless the employee possesses a relatively unique talent (as might be the case for a film star, high level executive, or top scientist), this threat may not produce substantial results. However, nonunion management might be sensitive to employee dissatisfactions -- possibly for reasons of union avoidance and possibly as a cost minimizing strategy-- and might take steps to alleviate the problems identified.

Nonunion firms with progressive HRM policies may survey employees to detect complaints and/or train and sensitize supervisors to do so. But as in the union case, there is no guarantee that employee complaints will be resolved. Management may be aware of a complaint, and even be concerned about its

effect on morale, but feel that the solution would be too costly to implement.

The next section takes up an example of a potential source of employee complaints, the quantity and scheduling of working hours. First, there is discussion of why hours-related complaints might arise, as well as options that employers might consider as remedies. Then the analysis turns to the processing of grievances under formalized grievance handling systems. Finally, likely future developments in complaint resolution in the future are considered.

I. An Example of a Potential Complaint: Working Hours.

Hours supplied by individuals to the employer can differ in both quantity and schedule. Individuals can supply more or less hours per year, e.g., working in some seasons, but not others. Within a week in which hours are supplied, work may be part time rather than full time, may or may not include overtime hours, or might or might not involve multiple employers (moonlighting).

Given a level of hours supplied per week, precisely which hours of the day are worked is normally important to employees. An individual might work on a day shift or on a night shift, for example, or might or might not work on weekends. There are numerous employees who fall into the various categories that have

been listed, i.e., part-time or full-time, day shift or night shift; in that sense the U.S. labor market is quite flexible.

However, the labor market can be flexible -- in the sense that a variety of alternative hours supplied and schedules are found -- and yet employees may still have complaints about their assigned working time. As has been discussed in a previous chapter, one of the characteristics of the labor market is that it often does not "clear"; there are individuals willing to work at going wage rates who do not find jobs. This deviation from the simple auction market (which always clears) has its counterpart in hours and working schedules, too.

i. Hours per Week.

Just as individuals may have trouble finding any jobs at all, those with jobs may not find jobs which readily match their own preferences with regard to working time. Some individuals who prefer full-time work to part-time, nevertheless must take part-time employment because they cannot find full-time positions. That is, they are willing to work full-time at the going wage (or perhaps less), and yet find there are "no vacancies" for such jobs. Others may wish that they could work part-time but, when faced with an alternative of full-time or no time (i.e., no job), opt for the former.

In 1985, for example, special questions were added to the Current Population Survey dealing with preferred workweek length. Employees were asked whether they preferred the same hours with same pay that they actually had to alternatives of either fewer hours with less pay or more hours with more pay. Of those responding, 64.9% preferred the status quo, 7.6% preferred the few hours/less pay option, and 27.5% preferred more hours/more pay.¹ That is, roughly a third preferred a different hours/pay option to the actual situation.

Generally, males were more likely than females to prefer the more hours/more pay option (30.6% vs. 25.5%). Higher paid workers, including managers and executives, were more likely than others to prefer fewer hours/less pay. Those working long workweeks were more likely to want fewer hours; those working short workweeks tilted in preferences toward more hours.

Of course, there are many economists who, faced with this type of evidence, would argue that these stated preferences are not really symptoms of a disequilibrium in the labor market. A semantic issue is involved here about whether someone who "voluntarily" takes a job with hours different from those he/she asserts to be preferred is or is not in equilibrium. However, it is the same semantic issue which has led some economists over the years to argue that unemployment is a "voluntary" form of

leisure, i.e., that there is no such thing as involuntary unemployment.

In a certain, narrow sense these arguments are correct. Any situation in the labor market can be described as voluntary. However, inherent in the concept of an employee is an agreement whereby the employed individual agrees to accept the authority of someone else to impose tasks and conditions.² The authority is not absolute; employees may refuse to undertake assignments which involve grave safety or health risks, for example, even if they must quit to do so. Acceptance of authority, however, implies that detailed recontracting (re-negotiations of the pay/conditions agreement) will not take place over every issue that arises. In particular, an assignment of working time is typically just that -- an assignment -- which may not be wholly agreeable to the employee.

The real question for readers of this volume is whether it is a help or a hindrance to human resource managers to view the labor market as always producing tranquil equilibria with no important implications for the firm. Just because all employment arrangements are ultimately "voluntary," should employee dissatisfactions be ignored. The answer is "no." It is useful to view employee dissatisfaction as potentially costly to the employer and to consider appropriate HRM responses.

Indeed, the labor market itself abounds with evidence that employee dissatisfactions with its outcomes are not mere illusions. For example, the Current Population Survey suggests that deviations from preferred hours move cyclically with unemployment. Consider Table 1, which compares the movements in the aggregate unemployment rate with movements in the percent of employees who reported that they worked less than 35 hours because of "economic reasons." These reasons consist mainly of employee-reported "slack work" (not enough demand by the employer) and "could only find part-time work."³ During the course of the economic slump and subsequent recovery which began in 1979, overall unemployment and "involuntary" part time work moved together.

Since there is no reason to suppose that employee tastes for reduced hours rise with the unemployment rate, it must be concluded that some workers find themselves "stuck" in job situations which do not match their hours preferences. Specifically, as the unemployment rate rises, they have progressively more difficulty finding desired working hours. These workers have a complaint about the working arrangements they end up "accepting," but not a grievance.

But the complaint vs. grievance distinction, while important in terms of the formal processing of grievances, may not matter very much for human resource management. Workers unhappy with

Table 1 -

**Unemployment and Proportion of Employees
Reporting That They Work Less than Full Time
Due to Economic Reasons, 1979-86**

| Year | Total Unemployment Rate ¹ | Employees Working Less Than Full Time for Economic Reasons as Percent of All Employees ² |
|------|--|---|
| 1979 | 5.8% | 3.7% |
| 1980 | 7.1 | 4.5 |
| 1981 | 7.6 | 4.9 |
| 1982 | 9.7 | 6.5 |
| 1983 | 9.6 | 6.5 |
| 1984 | 7.5 | 5.7 |
| 1985 | 7.2 | 5.4 |
| 1986 | 7.0 | 5.3 |

¹Civilian labor force.

²Persons at work in the nonagricultural sector.

Note: Full-time work is defined as 35 or more hours per week.

Source: Data from Current Population Survey appearing in Employment and Earnings.

their hours -- however that dissatisfaction may be classified-- might well quit when economic conditions improve, thus inflicting future turnover costs on the firm. They might also be less productive than other workers whose hours preferences more closely match those of the employer, a cost which must be borne in the present.

On the other hand, it is not necessarily the case that workers who find themselves working fewer hours than they would otherwise like will resent the employer or exhibit behavior which reduces firm profitability. Much depends on the circumstances which led to the hours decision and how it is explained to the employees. Some employers have policies, which they articulate to employees, of reducing hours per week before engaging in layoffs. Such policies often go under the heading of "work sharing."

Workers in these work-sharing firms may appreciate the job security being offered. They might regard the reduced hours as a temporary measure; the fact that the employer avoids layoffs may be seen as a good-faith continuance during hard times of the employer/employee implicit contract. A few states have actually accommodated their unemployment insurance systems to work sharing programs, permitting partial benefits to be paid (in specified circumstances) for partial workweeks lost.⁴

- Even without formal work-sharing arrangements, it is common practice for employers who normally work overtime to reduce overtime hours before engaging in layoffs. According to the survey cited earlier, workers are more likely to express a preference for more hours/more pay than for hours/pay reductions. Hence, these overtime reductions probably create worker dissatisfaction, other things equal. But, again, when seen as part of a layoff avoidance strategy, workers may -- on balance-- appreciate management's effort to maintain employment.

ii. The Scheduling of Weekly Hours.

Although it is common to think of "normal" work schedules as "9-to-5," the single most frequent full-time daily schedule is actually 8-to-5.² Most work shifts occur during the daytime, although some firms have evening and night shifts. In a formal sense, the heavy general bias toward daytime work is due to the position of the Sun in the sky, and to the internal biological rhythms of human beings. However, the precise scheduling of hours -- within the daytime period -- is a complex matter.

There is a wider area of determination involved in shift scheduling than just individual employer and employee preferences. For example, when the government announces that there is to be a move from daylight savings time to standard time or vice versa on a specific date, almost every workplace shifts

its schedule relative to solar time by one hour. Thus, there is a heavy element of external coordination involved. Workplaces schedule operating hours at certain times because other workplaces -- with which they do business -- are also going to be open. In addition, retail businesses, such as snack bars, adjust their hours to the "normal" breakfast, lunch, and dinner hours which are produced by the schedules of other workplaces.

The fact that a government announcement greatly facilitates adjustment of schedules to seasonal variations in sunlight (by shifting from daylight time to standard and back) illustrates the value of central authority in such matters.⁶ Individual businesses acting alone would have great difficulty making time adjustments, unless they knew that all other business would make them simultaneously. This need for interfirm coordination helps explain why it is difficult for employers to adjust to the hours scheduling preferences of workers whose needs do not match normal business schedules.

There are also internal coordination problems, i.e., problem within the workplace, which make it difficult for employers to adapt to the hours needs of individual workers. Many tasks in workplaces require teamwork. Such tasks inherently require most or all of the team members to be present at the same time. Even where formal teamwork is not involved, individuals at the workplace often must interact on a regular basis with other

employees. Thus, even if they were freed from the constraints of external coordination of hours with other firms, employers might find it extremely costly to permit individual workers to schedule their own hours. Hours scheduling is therefore more likely to reflect the preferences of the average employee, rather than those of the individual.

External and internal coordination difficulties explain why so-called "flexitime" or "flextime" schedules, under which individuals (usually within some constraints) determine their hours, are comparatively rare. About 12% of full-time wage and salary workers in 1985 reported themselves to be on flexible work schedules. Not surprisingly, the proportions were lowest among blue-collar workers, where production technology (such as assembly lines) would make individual scheduling very difficult. Managers and professionals tended to have higher incidences of flexible working schedules.⁷ A relatively small number of wage and salary workers (as opposed to the self employed) have arrangements permitting them to provides services at home.⁸

iii. Work Hours and Leisure Hours.

The fact that many individuals would prefer longer work weeks does not mean that they place little value on leisure. An important issue regarding leisure is how it is taken: in short, regular doses or -- alternatively -- in periodic large blocks.

Having an extra half hour at home per day might not be of great value to many individuals. But having an occasional long weekend or a paid absence of a week or more might be much desired.

In the U.S., the accommodation toward leisure preferences since World War II has tended to be in "time off," especially in the form of paid vacations and holidays.⁷ The existence of paid vacations and holidays (especially the former) is yet another symptom of the ongoing employer-employee relationships; it is hard to imagine what such benefits would mean in the context of a daily labor auction market. (In an auction market, a worker who wanted a day's leisure would simply not auction himself/herself off that day).

Holidays, because they involve closing down of the business, raise the external coordination problems cited earlier. Not surprisingly, therefore, government often is involved in "declaring" national or state holidays. Private employers are not legally required to close on such holidays (nor to pay workers for those days if they do close). Yet many do close down their operations, knowing that other firms which they rely on will also be closed.

Vacations, on the other hand, involve the absences of particular individuals, not complete business closings. External coordination issues do not arise for vacations. By controlling

the number of workers on vacation at any point in time (or attempting to match that number with seasonal production swings), employers can reduce the problems vacation-related absences pose for internal coordination and teamwork.

Thus, if 5% of the workforce were typically on vacation on any day, the firm could simply adjust by having a 5% larger workforce than it would if there were no vacationers. Generally, however, employee preferences for vacations will not be spread evenly over the year. For this reason, employers often do not permit employees to have complete discretion over when they take their vacations.

Supervisory approval is often required for the scheduling of a vacation. As a result, vacation scheduling can sometimes be a source of employer/employee friction, and HRM guidelines for supervisors may be helpful in reducing conflict. In some situations, it may be possible to permit employees to work out their vacation schedules as a group, subject to constraining rules, e.g., a given number of workers must always be present on a workday.

iv. Hours and Employer/Employee Frictions.

The issues surrounding the scheduling of work and the hours of work have been presented as examples of potential sources of

employee complaints. Unless management violates a specified policy in assigning hours, holidays, and vacations, such complaints cannot be formally classified as grievances. Nor will standard grievance mechanisms resolve the resulting frictions. Yet employees may nonetheless be dissatisfied with management's hours decisions, and these dissatisfactions may vary with business cycle pressures.

Human resource managers will want to be aware of such dissatisfactions, even if they have difficulty (because of external and internal coordination needs) in alleviating them. Employees may at least be mollified if explanations of these coordination problems are offered. Indeed, employees may have suggestions for accommodating alternative schedules. Although flexible scheduling is often difficult to accommodate -- and still comparatively rare -- it is a growing phenomenon of the workplace, indicating that an employer response to worker preferences is taking place slowly.

II. Formal Grievance and Arbitration Procedures.

Grievance mechanisms can be found in both union and nonunion settings in the private sector. In the public sector, civil service procedures provide similar arrangements -- even in the absence of a union. As already noted, private, nonunion grievance processes are less formal than those found in unionized

firms, and -- except in a few notable cases -- nonunion grievances are not subject to final resolution by an outside arbitrator.

The mere fact that an outside arbitrator can be called in to settle an unresolved rights dispute partially accounts for the greater formality of grievance handling in the union sector. More often than not, arbitrators today come from a legal background. While arbitrators typically do not insist on strict courtroom procedures and rules of evidence, such judicial concepts have had an influence on the way in which contemporary arbitration hearings are conducted. Moreover, at a hearing, the representatives of the parties may also be attorneys. Thus, the legalistic approach is reinforced. As will be noted below, legalism is sometimes viewed as a detriment to the ultimate goal of resolving workplace problems.

It is important to stress, however, that every grievance filed in the union sector does not necessarily require arbitration for its resolution. Arbitration is almost always specified as the final step -- if all else fails -- in the union-management contract. But disputes can be settled at lower levels of the grievance machinery. Although there is no national census on the subject, it can be assumed that the vast majority of grievances are settled before reaching the arbitration stage. In fact, many potential grievances may effectively be resolved

before they are formally filed, or may simply be withdrawn or resolved very early in the process.

Generally, a grievance mechanism involves a series of hierarchical steps, any one of which can be the resolution point.¹⁰ Almost half of all union contracts surveyed in the mid 1980s had a three-step process, and almost all had between two and four steps. In some instances, the initial step may entail oral (rather than written) statements of the grievance and responses from management. Time limits, both for filing and management's response are often specified, and they are typically short. Under the Taft-Hartley Act of 1947, even when a union has representation rights, individual workers can present their own grievances to management if they so choose (Sec. 9(a)). But as a practical matter, most unionized grievants will want a union representative to make the presentation, or at least to be present.

If not resolved at the first step, grievances typically proceed to mid level steps where higher level management and union officials are involved. A union/management grievance committee may be designated to meet regularly and consider pending cases. At the final step, management might be represented by the director of industrial relations or, in a few instances, by still higher company officials.

Although grievances are often thought to be synonymous with disputes over employee discipline, many other issues can be grieved. Again, no national census of grievance issues exists. But a partial source of information can be found in reports of the Federal Mediation and Conciliation Service (FMCS). Apart from its duty of supplying parties to interest disputes with federal mediators, the FMCS also provides lists ("panels") of private arbitrators to parties in need of such services for rights disputes.¹¹ FMCS data indicate that discipline is the most common source of grievances; in fiscal year 1984, for example, about 40% of the issues settled by those arbitrators who were obtained from FMCS lists involved discipline or discharge of employees.¹²

Despite this disciplinary concentration, many grievances relate to the application of seniority (in layoffs, promotions, transfers, etc.), to the use of pay schedules and benefit programs in particular situations, to assignment of work duties, and to management decisions involving the subcontracting of work previously performed in the bargaining unit. Questions of management rights (or management's reserved rights) sometimes are raised in the context of grievances and arbitrations. Union-management contracts frequently have language reserving to management unilateral authority in areas not specifically constrained by the contract or itemized for joint resolution. Such clauses may contain general statements about management's

right to direct the workforce, to manage the business, to control production, and to make company rules.¹³

In response to a particular grievance by the union over a management decision affecting an individual or group in the workforce, management may reply that it was acting within its area of reserved rights. Also, in some disputes, management may take the position that the grievance is not "arbitrable," i.e., that it covers a topic or circumstance which is not within the jurisdiction of arbitrator decision making as specified in the contract. In such cases, part of the arbitrator's task is to determine if the dispute is arbitrable under the terms of the agreement.¹⁴

So far, grievances and arbitration have been discussed only in formal and abstract terms. In order to illustrate the process more concretely, some examples of issues which might be raised in grievances -- and possibly end in arbitration -- are listed below.

*Job classification. A union-management contract may provide for a variety of wage rates, depending on job classification. An individual employee, whose job duties in his/her opinion had been enlarged over a period of time, might claim that he/she should be placed in a higher-paying classification. The employer, however, might contend that the

job duties had not changed appreciably, or that the changes did not merit a higher classification.

*Use of supervisors. Contracts often limit the right of management to use supervisors to perform nonsupervisory tasks except in cases of emergency. These clauses protect the jobs of nonsupervisory, union-represented workers. The union might grieve what it thought to be use of supervisors in such tasks during non-emergency situations. It might contend that the emergency exception applied only to very unusual situations in which a threat to safety or equipment was involved, e.g., a supervisor shutting down a malfunctioning machine which might otherwise be damaged. But the company might argue that the definition of emergency should be understood to include situations in which production deadlines had to be met and insufficient nonsupervisory workers were on hand.

*Promotions. Language in the contract may indicate that seniority would be the determining factor in allocating a promotion, if applicants were otherwise qualified. A senior applicant might file a grievance if passed up for promotion, claiming that he/she met the qualifications standard. Management may dispute the grievant's credentials.

*Night shift differential. A contract might provide for a lump-sum bonus proportional to wages in lieu of a wage increase

for workers with at least one year of seniority. It might also provide that night-shift workers receive a 20% wage premium. The union might grieve if the company failed to reflect the bonus in the premium. Management might respond that other bonuses it had paid in the past -- such as perfect attendance awards -- had not been factored into the premium during previous contracts, i.e., that bonuses had always been based on the straight-time hourly wage on the day shift.

*Suspension without pay. A worker might grieve a one week suspension without pay for smoking in an area containing barrels of inflammable chemicals. The worker might contend that he/she had no way of knowing about the fire danger, since the barrels were not labeled. But a supervisor might respond that the worker had been told of the danger and ordered to stop smoking a week earlier when the same barrels were present in another area.

*Plant closing. A union might have negotiated language in a contract indicating that before a particular plant could be shut down, management would undertake good faith negotiations with the union to see if the plant could be saved. A grievance might be filed if -- without such negotiations -- plant operations ceased with no announced date for restarting because of what management described as a temporary drop in demand. Management might argue that its obligations involved only permanent shutdowns, not temporary, and that it intended to reopen the plant at some point

in the future when demand for its products picked up. The union might argue that it was doubtful that management intended to reopen the plant and that the cessation of production amounted to more than a normal temporary layoff.

i. Considerations for the Arbitrator.

New contracts and contractual provisions are supposed to be negotiated by the parties. Thus, arbitrators in rights disputes see their task as interpreting the existing union-management contract, not creating a new agreement. However, just as in the legal setting, where judges see their task as interpreting the law -- not making it, the line between interpreting and creating may not always be sharply defined. If contract provisions were always clear, precise, and unambiguous, it is difficult to imagine what the role of the arbitrator would be. The very fact there is a dispute suggests that some lack of clarity is involved.¹⁸ Resolving that ambiguity inevitably shapes the future meaning of the agreement.

Contracts may be ambiguous because -- during intense negotiations -- the parties could not reach an agreement on precise language, and felt a need to bring their bargaining to a successful conclusion. Some economists who have analyzed contracting in the labor market have emphasized that it is not possible to write a complete agreement, i.e., one that covers

every possible contingency.¹⁶ Indeed, it is a problem that extends to commercial contracting outside of the employment setting and is viewed as an important explanatory factor in corporate organization and practice.¹⁷ But in the labor market, when the inherent difficulty of incomplete contracting is compounded by the need to wrap up an agreement and avoid or terminate a strike, it is not surprising that contractual language is not always crystal clear.

Implicitly, in such cases of contract ambiguity, the union and management expect that an arbitrator will resolve the uncertainties for them at some future date, if they cannot resolve the issue for themselves when it actually arises. Again, there are parallels to commercial contracting here. It is often the case -- to the chagrin of lawyers -- that business arrangements leave some matters unresolved, often in the expectation that the parties will handle them later, or that good faith on both sides will take care of future disputes.¹⁸

Perhaps the most important ambiguity in a typical union-management contract is the provision involving disciplinary actions initiated by the employer. It is common to find provisions which state that discipline and discharge will be undertaken only for "cause" or for "just cause." The language need not always be so vague; in the case of certain employee actions, it may state the cause and effect exactly, e.g.,

employees not following a specified safety rule on the job will be dismissed.

Where such precise contractual language exists, the arbitrator may be largely confined to determining whether the facts occurred as management asserted (whether the employee was, in fact, violating the safety rule). But even in such cases, questions may arise as to whether management actually has enforced the rule consistently in the past. In more general cases of discipline for "cause" (with no further definition), the arbitrator has the task of determining whether cause existed for managerial action.

It would be inappropriate here to attempt to present a treatise on standards applied in arbitration.¹⁹ However, some of the kinds of issues facing arbitrators are listed below:

*Credibility. Arbitration hearings usually involve testimony from witnesses. Such testimony may conflict. For example, a supervisor's recollection of what was said to an employee in the course of an oral warning may vary from that of the employee. Two co-workers involved in an altercation may recall the circumstances quite differently. Sometimes conflicting testimony may result from faulty memories, sometimes from the natural tendency for individuals to color their memories in ways which favor their position, and sometimes due to simple

lying. Arbitrators have to make judgments on what the truth is, when reported recollections differ.

*Past practice. Management may have made a decision regarding an item not specifically included in the contract. For example, a Christmas bonus, which was not referenced in the contract, might be terminated by management due to poor business conditions. Whether an arbitrator might deem such a bonus to be an implicit part of the agreement, and therefore not subject to change without negotiation, might depend on the consistency of awarding the bonus in the past. An occasional bonus might be viewed as less of an obligation than one which had been given without fail -- even in bad times -- for many years.

*Rules and Reasonableness. Because not every circumstance can be spelled out in the contract, management has the right to make reasonable rules. Such a right will be deemed to exist even if it is not spelled out in a contractual management's rights clause. When management's rule-making is challenged in a grievance "the arbitrator's function is to (determine) whether the employer in administering the rules governing the employee-employer relationship violated the limitations embodied in the collective agreement."²⁰

Management-made rules might involve safety standards (requiring the wearing of protective clothing), dress codes (so

that customers receive a positive impression of the establishment), record keeping (so that money or inventory is not lost or misplaced), or courtesy (to avoid frictions between employees, or between employees and customers, or between employees and supervisors). All of these areas of regulation will be seen as appropriate subjects of rule-making by arbitrators in principle. However, in some cases, a rule involving an appropriate subject -- or its application in a particular situation -- might be seen as unreasonable.

For example, a rule requiring the wearing of a company uniform is normal and reasonable in many circumstances. But the imposition of a penalty, pursuant to that rule, for being out of uniform might be deemed unreasonable if the employee could show that his/her uniform had been damaged and rendered unsuitable for wearing. Relevant might be the source of the damage; was it caused by negligence of the employee? Or was it caused by circumstances beyond the employee's control? Suppose the uniform was damaged moments before his/her shift was to begin by flooding due to a burst water pipe in the employee locker room. In that situation, enforcement of an otherwise reasonable rule might well be found to be unreasonable.

Apart from considerations of reasonableness, rules need to be communicated to employees effectively, in order to be applied. And rules should not be applied in an arbitrary, capricious, or

discriminatory manner, e.g., to certain employees, but not to others, in similar situations.

*History of negotiations. The parties may have discussed the interpretation of a now-disputed contract clause during negotiations. What they said or did not say while negotiating might help the arbitrator determine what was meant when the language was first inserted into the contract. If the union (or management) asserted an interpretation during a negotiation-- but backed off or let the matter drop rather than forcing the issue -- the union's reassertion of that interpretation during a subsequent arbitration hearing may not carry much weight. Arbitrators will be loathe to grant one side or the other something it could not win on its own at the bargaining table.

*Making the punishment fit the crime. In discipline cases, even where an employee has clearly committed an infraction, management's response can be subject to a test of appropriateness. Commonly used -- and viewed as good practice by arbitrators -- is the application of "progressive discipline." For example, an employee exhibiting inappropriate behavior on the job might initially be given an oral warning by a supervisor. If behavioral improvements did not ensue, this initial step might be followed with a written warning, then a suspension of several days, and finally -- if satisfactory improvement had not occurred -- dismissal.

Progressive discipline need not be applied in all cases. Table 2 illustrates reported employer policies for six specific examples of employee misconduct or inadequate performance. Generally, the more serious the offense, the more compressed the disciplinary steps involved. Thus, most employers used a four-step process for excessive tardiness. And, at the other end of the spectrum, most discharged immediately in cases of employee theft of company property. Arbitrators look for progressive discipline to be followed, except in extreme cases such as theft. A failure to follow progressive discipline might indicate to the arbitrator that a miscarriage of justice had occurred.

But the issue is not simply one of following a series of steps. The seriousness of the offense and the circumstances under which it occurred will be important considerations in judging the appropriateness of the penalty inflicted. Discharge of workers is sometimes said by arbitrators to be the workplace equivalent of capital punishment. In taking that view, arbitrators are recognizing the difference between the real world labor market and the spot auction market of the simple economic model.

A discharged worker suffers three types of losses. First, there is a direct loss of income while he/she is without work and must seek other employment. Often, state unemployment insurance

Table 2

Disciplinary Approaches Reported by Employers

Percentage of Employers With Policy

| Problem | 1 Step: | 2 Steps: | 3 Steps: | 4 Steps: |
|---|-----------|--------------------------|---|---|
| | Discharge | Suspension, Discharge | Written Warning, Suspension, Discharge | Oral Warning, Written Warning, Suspension, Discharge |
| Unexcused/ excessive tardiness | * | 0% | 14% | 82% |
| Failure to maintain quality/ quantity standards | 1% | 5% | 25% | 64% |
| Refusal to obey order or accept assignment | 29% | 29% | 27% | 10% |
| Possession of illegal drugs | 65% | 23% | 6% | 2% |
| Willful damage to employer property | 76% | 17% | 3% | * |
| Theft of employer property | 84% | 11% | 3% | 0% |

*Figure is less than 0.5%.

Note: Percentages add up to less than 100% because some employers report no policy or failed to report their policies.

Source: Bureau of National Affairs, Inc., Employee Discipline and Discharge, PPF survey no. 139 (Washington: BNA, 1985), pp. 17-18.

laws deny or limit payments to workers discharged for cause. Employers pay company-based "experience-rated" premiums for unemployment insurance; their payments will rise if more workers make claims. Hence, the employer has an economic incentive to protest unemployment benefit claims of former workers discharged for misconduct.²¹ If the employer's position is upheld, the discharged worker may not receive any compensation.

Second, particularly in the union sector, where many workplace benefits are hinged to seniority, loss of a job means loss of many seniority-related advantages, even if another job is quickly found. A discharged senior worker becomes the most junior employee at the new workplace. Thus, he/she may be the first laid off in an economic downturn, he/she may be assigned to the least desirable shifts, and he/she may have to work for several years to acquire a vested right to a pension.

Third, a discharged employee carries a stigma. Potential new employers may be reluctant to hire some other firm's problem worker. The discharge has what economists call a "signaling" effect; it signals to other employers that the job applicant may be of low quality or low productivity, or may disrupt the workplace if hired. Even if these impressions are incorrect--if the employee's discharge was actually not merited--in a world of imperfect information about worker quality, a discharged employee is someone to avoid. Hence, loss of a job at one

employer may make it difficult for the worker to find a "good" job elsewhere in the future.

For minor infractions, therefore, and especially for first-time offenses, arbitrators are likely to see discharge as an inappropriate remedy. Employers have other options in discipline such as warning letters, temporary suspensions without pay, and demotions. Indeed, the progressive discipline approach is meant to ensure that discharge is the last resort, not the first, except in cases of the most serious workplace misconduct.

ii. Arbitration Remedies.

Arbitrators have discretion in fashioning their decisions. One possibility is that one side or the other is found to be wholly in the right. If management has properly exercised its authority, the arbitrator simply endorses management's decision. If the union's case is completely upheld, the arbitrator so indicates and fashions a remedy which "makes whole" employees who might have been injured by management's improper action.

For example, if a group of employees should have been paid a premium for certain work (say, hazardous duty) but did not receive it, the remedy would be to give them the extra payment retroactively. If an employee was discharged without just cause, he/she can be reinstated with full back pay, seniority and

pension rights, etc. However, arbitrators do not award punitive damages; they simply attempt to put matters back to where they should have been, absent the improper management action.

In discipline cases, an arbitrator will not impose a stricter penalty than management invoked; a 10-day suspension imposed by management will not be changed by the arbitrator to a 30-day suspension. Nor will the arbitrator instruct management on how to handle its internal affairs, e.g., an arbitrator would typically not advise management to discipline a supervisor who has been shown to have acted improperly relative to the grievant. It is management's job -- not the arbitrator's -- to see that supervisors appropriately implement their responsibilities.

Where arbitrators find that management has acted improperly, they are not bound to grant complete relief to the grievant, and often do not. For example, an arbitrator may believe that, while the grievant did commit an infraction worthy of some discipline, management's chosen discipline was excessively harsh. A common remedy in cases of improper discharge, for example, is to reinstate the grievant without back pay. Because of the delays in the arbitration process (see below), such a remedy can be expensive to the grieving employee, even if less severe than complete job loss.

iii. Managerial Authority.

The grievance and arbitration mechanism takes as a given management's authority over the workplace. Such authority can be limited by the union-management agreement, but ultimately management is deemed to be in control in the context of a hierarchical, superior-subordinate relationship. Except in very unusual circumstances, for example, an employee who is given an order by a supervisor is supposed to follow that order, whether or not he/she believes it order to be proper.²²

For example, suppose an employee is ordered by a supervisor to continue working during a lunch break. The employee may believe that the union-management contract gives him/her an absolute right to take a break. However, simply walking out at lunch time, despite the supervisor's order, would be "insubordination" -- even if the employee's interpretation of the contract was later found to be correct. Since insubordination is considered a serious employee offense, the insubordinate act could itself lead to discipline.

Appropriate action for the aggrieved worker, in the case of the disputed lunch break, would have been to file a grievance, but follow the order. Attempts by the employee to remedy the situation (sometimes known as engaging in "self help") through means other than the grievance process are viewed as improper. In particular, employee actions which undermine supervisorial

authority, such-as assaulting a supervisor, are likely to be seen as serious infractions by arbitrators. Even in the absence of a specific rule or contract provision dealing with insubordination, these norms of behavior are part of the unofficial "law of the shop."

iv. The Legal Status of Arbitration.

The strike wave after World War II that played an important part of passage of the Taft-Hartley Act of 1947 (see the previous chapter) also focused attention on peaceful means of resolving all forms of labor-management disputes. Most serious strikes, however, stemmed from interest disputes, not rights disputes. Nevertheless, the fact that arbitration had been adopted as a successful method of handling rights disputes in most contracts was naturally appealing to lawmakers. The Taft-Hartley Act did not require the use of rights arbitration. But it did speak favorably of "voluntary arbitration" (Sec. 201) and supported "final adjustment by a method agreed upon by the parties (as) ... the desirable method for settlement of grievance disputes..." (Sec. 203).

More concretely, the Act created the Federal Mediation and Conciliation Service which, as already noted, helps the parties find private arbitrators. And it gave legal status to union-

management contracts, which by that time (as now) usually contained no-strike/no-lockout clauses. If those clauses had to be heeded for legal reasons, a need was created for a peaceful dispute-settling mechanism during the life of the agreement. Violation of the no-strike/no-lockout clause could give rise to suits for damages under Taft-Hartley; arbitration was therefore the appropriate remedy for contract interpretation disputes.

Over the years, legal support for arbitration grew. The arbitration language in a union-management contract is seen as a legally binding obligation; management is not free unilaterally to refuse to take cases to arbitration once it has agreed to the standard arbitration clause. Under some circumstances, employers may obtain injunctions against unions who strike, rather than use arbitration, in rights disputes. Federal courts, following the lead of the U.S. Supreme Court, generally "defer" to arbitrators' decisions; they are reluctant to second-guess such judgments, in part fearing that the judiciary might become a national grievance system.²³

Under certain circumstances, the National Labor Relations Board will also defer to arbitration in cases raising questions of violations of the laws the NLRB enforces. In some instances, the NLRB will insist on the use of the contract's arbitration procedure before hearing an unfair labor practice charge arising out of the circumstances. Courts will not necessarily defer to

arbitration in cases where equal employment opportunity (EEO) issues, e.g., race and sex discrimination, are involved, nor will they require plaintiffs in such cases to use the available arbitration machinery. However, when they are submitted to that machinery, EEO-related cases will be heard by arbitrators, since discrimination in employment decisions typically would also involve violation of the union-management contract.²⁴ And, even if arbitration decisions in EEO cases are appealed to the courts, the arbitrator's opinion might well influence the eventual judicial resolution.

v. The Duty of Fair Representation.

The legal system may (inadvertently) actually raise the arbitration caseload. Under the Wagner/Taft-Hartley framework, unions can be sued by workers they represent for failure to provide "fair" representation. In effect, unions acquire the "privilege" of exclusive representation of workers in the bargaining unit in exchange for an affirmative responsibility towards those workers. For example, if a grievance must be appealed from one step of the grievance mechanism to the next within a designated time period, and if union officials negligently fail to file a timely appeal, the union can be sued for damages by the frustrated grievant.

However, a union decision not to process a grievance, or not to appeal it to a higher step or to arbitration need not indicate either negligence or bad faith. The union officials involved may honestly believe that the grievance is frivolous and that pursuing it may be both expensive (with no payoff) and harmful to the climate of labor-management relations. Where the labor relations climate is amicable, unions may screen out frivolous grievances, or at least seek to settle them informally. The threat of lawsuits by disgruntled employees tends to make unions leery of performing this important screening role, a result of concern to both unions (who fear expensive suits) and managements (whose task is complicated by overloaded grievance machinery).

In effect, the "duty of fair representation" issue is yet another manifestation of the principal/agent problem in the employment area. Unions are -- by law -- the agents of the employees (the principals). The law seeks to ensure that the agents act for the principals through judicial mechanisms.

But there is a special problem that unions have as agents; the principals they represent may have conflicting interests. For example, if the union decides not to push a questionable grievance through to arbitration in the interests of better relations with management (or simply to save the union's limited financial resources), it has basically determined that the interests of the employee group as a whole are in conflict with

(and outweigh) those of the grievant. In representing a group of diverse principals, the union needs latitude to make such judgments.

Conflicts between principals are prone to arise in matters relating to seniority rights. Suppose in a layoff situation, a worker claims that management ignored his/her right to "bump" into another job, thereby displacing a less senior worker. Both workers are represented by the union. If it pushes the grievance (or if it does not), the union is favoring one principal over the other. Expensive litigation may not be the best way to resolve such questions; as in other aspects of life, perfection may not be attainable.

vi. Criticisms of the Arbitration Process.

The widespread use of private arbitration in union-management agreements to settle rights disputes is found in few countries other than the U.S. American industrial relations specialists often point with great pride to this innovation. However, over the years two criticisms have been leveled at arbitration. First, as already noted, there have been complaints over increasing legalism and formality in the process. Related to this complaint is the second issue of delay and cost.

During fiscal years 1980-84, the FMCS reported that cases which went all the way through to arbitration took an annual average of 230 to 335 days from the filing of the grievance to the final decision by the arbitrator. Roughly three months of this time was spent within the parties' own internal grievance machinery. Nevertheless, it is not unusual -- once the grievance process has been exhausted -- for 3-4 months to elapse before an arbitrator can be picked and a hearing can be scheduled. Another month or month and a half may be spent awaiting the arbitrator's decision after the hearing is held.²⁵

The direct costs of arbitration, i.e., the fee of the arbitrator and his/her travel expenses, averaged about \$1,400 in fiscal 1984, according to FMCS.²⁶ These expenses are almost always split 50-50 between the employer and the union. However, much larger expenses may accrue indirectly due to payment of advocates, pay for time spent off the job by employee witnesses, stenographic services for transcripts (when used), and the intangible -- but definite -- disruption of the workplace which can result when a grievance festers unresolved for months.

Various solutions have been put forward and tried in response to the criticisms of arbitration. These include a step between the end of the grievance procedure and the invocation of arbitration in which informal mediation of the grievance is tried. Under such an arrangement, the parties -- with the help

of a third party facilitator -- attempt to reach a satisfactory solution in a setting without legal trappings. Nothing said or proposed at the mediation session is admissible as evidence at the subsequent arbitration hearing -- if one is necessary. Hence, the parties may be freer in exploring avenues of resolution. Despite its seeming advantages, however, grievance mediation is quite rare.²⁷

Forms of expedited arbitration have also been tried. Under these arrangements quick decisions are rendered -- perhaps right at the hearing -- with agreement that these decisions apply only to the cases at hand and do not set precedents. Thus, the chance that a quick-but-erroneous verdict will create future complications is reduced.

Difficulties in training arbitrators also contribute to delays in decision processing. The first cohort of arbitrators received their training during the World War II era as a byproduct of government intervention and wage controls. Individuals who were employed by the War Labor Board to settle labor-management disputes picked up their trade through that experience, and went on to practice it in the postwar era.

But as arbitration became standardized, both labor and management came to recognize that arbitration decisions could have important implications for their relationship. From the

management viewpoint, a "poor" arbitration decision might lead to a permanent constraint on managerial flexibility and control or to a substantial outlay of money. And from the union viewpoint, an "erroneous" arbitration award could eliminate hard-won bargaining gains and upset the relation between the union and its members.

Thus, both parties searched for arbitrators with proven track records and experience.²⁸ Through past use, word of mouth, and available reporting services, the parties could determine what kinds of issues the arbitrator had decided in the past, and how he/she had ruled. Selection could be made on that basis. Whatever slight financial advantage there might be in hiring an inexperienced arbitrator might easily be swamped by the potential costs of a sloppy decision. It is a system which tends to create backlogs of cases for experience arbitrators (with resulting delays), although inexperienced new entrants may have light caseloads.

Labor markets where applicants are told "come back when you have experience" pose problems for long term recruitment, since experience can be acquired only by hiring. Formal training in school-type settings does not solve the problem. What is needed is a form of "apprenticeship" whereby the "masters" in the field provide tutelage to, and oversight of, new entrants. The fact that a new entrant is blessed and supervised by someone in whom

the parties have confidence should make that new entrant more acceptable to them.

In spite of complaints about its features, there is a distinct possibility that arbitration of grievances -- which has been largely confined to the union sector -- may be found increasingly in nonunion settings in the future. As will be noted below, courts have begun to consider complaints about discharge from nonunion employers. It has been argued that use of arbitration by nonunion employers would help shield them from costly court awards in wrongful discharge litigation. In addition, there have been proposals to require by law submission of discharge disputes to some form of arbitration. These issues will be discussed more fully below.

vii. An Economic Interpretation.

Wherever contracting occurs, some means of resolving disputes over contract interpretation must be created, and a mechanism for contract enforcement is needed. Otherwise, one party or the other to the contract is free to violate its provisions, negating the contracting process itself. The importance of contracting is reflected in reinforcing social norms concerning honesty, fairness, and keeping one's word. In addition, there may be costs in acquiring a poor reputation of being a person (or organization) prone to acting in bad faith.

In the nonunion setting, there typically is no written employer-employee contract. Whatever relationship exists is either implicit or expressed in documents which ordinarily are not viewed as contracts, i.e., company handbooks outlining HRM rules and procedures. While nonunion employers -- especially those with progressive HRM policies and strong HRM departments-- are likely to have grievance mechanisms, it is not surprising that these are often the informal "open door" programs mentioned earlier.

There are difficulties in creating a formal procedure to enforce implicit obligations. And there are advantages to management in having more discretion in interpreting its obligations to employees than would occur in a formal processed capped with judgment from an outside arbitrator. Not surprisingly, usage of nonunion grievance systems tends to be lower than that of union systems.

In union settings, there is more codification of the rights of management and the rights of employees than is found among nonunion employers, even though there remain many areas of ambiguity in the most formal situations. However, the potential costs of disagreement over employee rights are much higher in the union sector than in the nonunion sector. Where unions are involved, if there were no grievance and arbitration mechanism,

contract interpretation disputes might be resolved by strikes. And if strikes could occur in mid course, i.e., during the life of a contract, it is unclear what meaning the contract's agreed-upon duration would have.²⁹ Effectively, as occurs in some countries, the contract would be operative only until someone became tired of it.

American management, after World War II, was both threatened by the surge in unionization that had so recently occurred, and anxious to regain workplace stability. It wanted contracts of fixed duration which would guarantee labor peace and which would be renegotiated only at specified intervals. The unions of that era, many of which were new institutions and which were looking for recognition and legitimacy, also wanted stable relations with employers. Although the two sides may have agreed on little else after the War, both saw virtue in the grievance and arbitration system which survives to this day.

Unions had still another interest in arbitration, one which remains important today. A successful union raises the costs of wages and benefits to the employer, as discussed in the previous chapter. But this advantage could be eroded away if employers had full discretion about other aspects of workplace conditions. Employers, faced with higher direct costs of labor, would have an incentive to recoup as much as they could of their higher

compensation costs by economizing on (degrading) other aspects of the quality of working life.

To prevent such an erosion of conditions, union contracts must be detailed concerning the non-wage component of jobs. For example, jobs and tasks must be carefully described to prevent the employer from using lower paid workers to do the work of higher paid employees. Elaborate contracts require the formal means of interpretation and enforcement which ultimate recourse to binding arbitration provides. In short, the traditional mode of adversarial union-management contracting, when combined with U.S. management's desire for labor peace during the contract's life, requires a grievance and arbitration system, something very much like it.

viii. Exit and Voice.

In a buyer/seller context, if one of the parties becomes unhappy with the relationship, there are two basic options. The unhappy party can break off the relationship (exit). Alternatively, he/she can attempt to modify the behavior of the other party by expressing the dissatisfaction and seeking a resolution (voice). Thus, for example, a shopper unhappy with the absence of a particular brand in a supermarket can either shop elsewhere, or, alternatively, complain to the store manager.

Which option is chosen -- exit or voice -- will depend on the relative costs of each. If there are many supermarkets within a short distance, shopping elsewhere -- rather than complaining -- may be the easiest solution for the unhappy customer. But in an isolated area with no other nearby markets, trying to effect a change in the local market's policy on what brands are carried may be the best strategy.

The exit/voice model has been applied to the workplace as well as the product market.³⁰ In the workplace, the exit option for the employee (seller) is quitting. And the voice option is trying to alter the policies of management (the buyer) which are causing dissatisfaction. A grievance mechanism is one way for employees to exercise voice. And use of voice rather than exit can be expected in situations where the latter is perceived as costly.

Quitting a job may be costly for an employee. A quit may not carry the stigma of a discharge. But in some cases, it may have a negative signaling effect nonetheless. For example, because turnover can be costly for firms, someone who changes employers often may be perceived as unstable, i.e., as a person who "can't hold a job." More importantly, in the real world labor market, quitting a job may entail a long search for a satisfactory new one, unless the new job is already lined up at the time of the quit. Also quitting a job -- even if a new one

can quickly be found -- entails giving up whatever benefits and privileges past seniority has bestowed.

For union workers, the existence of a union pay premium-- combined with the strong weight placed on seniority in union jobs -- can make quitting a very unattractive option. Alternative nonunion jobs may not pay union wages and benefits. And, because union jobs pay above the market, alternative union jobs may be hard to find; they may already have queues of applicants awaiting any vacancies.

These considerations suggest that the voice option will be important to workers who have "non-salvageable" investments in their jobs, especially relatively immobile union workers who enjoy "quasi-rents" which might otherwise be expropriated by their employers.³¹ Union workers tend to express more job dissatisfaction in attitude surveys than nonunion workers, even though they are less likely to leave their employers voluntarily.³² It may be that unionized employers -- seeking to recoup some of the higher costs they carry in wages and benefits -- invoke harsher standards of discipline than comparable nonunion firms. In any case, these considerations place added stress on the grievance and arbitration mechanism as an important voice option.

Obviously, having a voice option can be valuable for nonunion employees, too, since the exit option may also be costly for them. There is a value to the employer in providing both options; valued employees may be lost if no channels for expressing dissatisfaction exist. However, the more formal the grievance process is made, the less discretion the employer may have concerning the outcome of dissatisfaction of a particular worker. In some cases, the employer may feel it would be better from the firm's perspective if the employee did exercise the exit option.

Were the decision to be placed in the hands of an outside arbitrator, or even decided internally in strict accordance with stated company policy, there is no guarantee that the outcome in these cases -- would be exit. In effect, nonunion employers may well want the information that the voice option provides, but may not want their managerial discretion limited as a result. For that reasons, their internally-designed grievance systems are less likely to be so formal that they would restrict managerial flexibility.

III. Complaint Resolution in the Future.

Employees and employers have both mutual interests and conflicting interests. In the past, coping with these conflicts has been primarily a private matter. Bargaining and formal

grievance and arbitration mechanisms were the standard approaches in the union sector. In the nonunion sector, less formal grievance mechanism also were created. And progressive nonunion employers, through surveys and other monitoring mechanisms, attempted to diffuse problems before they became serious sources of friction in the workplace.

i. Public Intervention.

At the outset of this chapter, it was noted that not all employee complaints could be classed as disputes over rights. Many are akin to interest disputes. Employees would like the terms and conditions they are offered to be different (better) than they actually are. One option they have -- involving neither exit from, nor voice within their firms -- is to push for legislation mandating resolution of their complaints. However, public policy has been less active in both these interest and rights disputes in the U.S. than in many other countries.

In the interest area, policy as established in the 1930s was largely confined to minimum conditions. Federal and state minimum wage laws are the prime examples. Beyond minimums, policy was largely restricted to establishing a framework for collective bargaining -- a private system which, it was assumed, would take care of other conflicts.

However, regulation in the U.S. has never followed the minimum intervention approach completely. Requirements for payment of overtime when hours exceed 40 hours per week, reached beyond the bottom tier of the workforce, as did the mandating of employer participation in unemployment insurance, Social Security, and workers' compensation. Regulatory pressures on the employment relationship began to rise in the 1970s. Perhaps the main example was the federal Occupational Safety and Health Act of 1970 (OSHA) which put into force an elaborate system of mandatory workplace standards for reducing industrial accidents and diseases.

Regulatory pressures in the 1970s also spread into the area of employee benefits. A peculiar mix of mandatory/non-mandatory regulations arose. In the pension area, for example, there is no federal requirement that an employer provide a pension plan for workers (although there are tax incentives to do so). However, if employers did opt to have pension plans, elaborate regulations were enacted setting out how such plans had to be funded, what their vesting and eligibility rules had to be, and establishing mandatory federal insurance of retirement benefits.

Similarly, in the area of health care, no federal law requires employers to offer health insurance to workers. But, again, if they do chose to provide such insurance, employers are required to offer employees the option of joining a local health

maintenance organization (HMO), as well as the traditional fee for service plans.³³ It was hoped that offering the HMO option would provide greater incentives for containment of rapidly inflating health care benefit costs.

In some countries, employers are simply required to offer particular benefits. For example, minimum lengths of paid vacations may be specified by law. In the U.S., there has been a preferences for incentives -- but not outright requirements-- chiefly through the tax code. And there has been a preference for regulating the outcome of a choice, e.g., the choice of whether or not to offer a pension, rather than remove the choice and make the benefit mandatory.

However, as noted above, the American system has never been pure -- some conditions are mandated in the U.S. -- and regulation could tilt in the future toward still more mandatory specifications of exactly what the employment relationship will provide for workers. The decline of collective bargaining has made it more difficult to argue that regulation is not necessary because whatever workplace remedies may be needed can be "negotiated." Absent a union representative, negotiations will not take place.

ii. Alternative Forums.

A similar evolution with regard to rights disputes may be in the making. There is a tendency for nonunion employees to seek to exercise voice in workplace decisions through external legal channels. In the American context there are a variety of potential channels open for expressing employee voice, even if they were not deliberately created or planned for that purpose.

Wrongful Discharge Litigation.

The rise of wrongful discharge litigation represents a new forum for employee complaints to be heard. In states where courts have permitted substantial scope to such litigation, employers have grown cautious about firing workers. The courts have recognized -- even if they do not express it in these terms -- a stakeholder interest of workers in their employment relationship.

All states in the U.S. recognize the employment "at will" doctrine. Under this doctrine, employees can quit and employers can discharge for any reason, or no reason, unless some legislative prohibition exists, e.g., by law, employers cannot discharge an employee on the basis of race. However, state courts are finding a growing list of exceptions to the at-will concept.

For example, courts in 31 states were found in a survey in the mid 1980s to construe an exception to at-will employment based on "public policy."³⁴ Thus, employees terminated for, say, refusing to give false testimony at a legislative hearing to cover up employer wrongdoing, may have a cause of action against their former employer. In eight states, courts have found that a "covenant of good faith and fair dealing" applies to the employment relationship. Thus, an employee fired just before he/she would have become vested in a pension program might successfully sue, if it could be shown that the employer was simply motivated to save pension resources.

Courts in many states will consider statements in employee handbooks as contractual obligations of the employer to the employee. If the handbook promises due process before termination, and none was provided, a wrongful discharge may have occurred. Promises made during job interviews or in oral statements to employees at the time of hiring may also bind the employer.

Because of the various opportunities for litigation in the wrongful discharge area, the management community has pondered a legislative response. Specifically, some employers have toyed with the idea of supporting a limited-liability wrongful discharge arbitration program. Under such a program, complaints

over discharges would be channeled to a publicly-run complaint system. Jury trials, and thus very expensive potential verdicts, would be avoided. Management might eventually support this proposal if it feels that the existing system of court adjudication is becoming too costly. A similar development in connection with worker's compensation (see below) occurred in the early part of this century.

EEO as a Forum.

Employees are finding forums other than wrongful discharge suits for exercising voice. Equal employment opportunity (EEO) laws provide forums for allegations of discrimination with regard to race, sex, age (40 years and over), religion, national origin, and handicap. Most complaints are filed in the race, sex, and age categories. There is reason to believe that many cases are filed which are really general complaints over workplace decisions. The EEO laws thus provide a limited vehicle for those in the protected groups to exercise some voice, absent other channels.

Age discrimination cases became especially visible in the late 1970s as Congress extended the age of mandatory retirement (to 70 years) and then eliminated it altogether. Although they are not the same thing, age and seniority tend to be positively correlated. Thus, claims of age discrimination are likely to be

filed by relatively high seniority workers who feel wronged by their employer. Not infrequently, the claimants are executives and managers who think they have been passed over for promotions, or discharged, because the company wants "new blood."

Since public sector workers have civil service procedures, unionized workers have formalized grievance and arbitration mechanisms, and protected groups have EEO laws, most workers have someplace to register a complaint. In 1986, only about one fifth of wage and salary earners were private sector, nonunion white males under 40 years old.³⁵ And, of course, even these relatively unprotected workers have the possibility of wrongful discharge litigation in many states.³⁶ Or they might file workers' compensation claims.

Workers' Compensation as a Forum.

Workers' compensation laws provide yet another avenue of employee redress.³⁷ These laws were created at the state level in the early twentieth century to provide financial compensation for employees injured on the job. Employers initially had various legal defenses if they were sued by injured workers. They could claim, for example, that the worker was injured through his/her own negligence, due to the negligence of some other employee, or simply that the job was inherently risky and the worker assumed the risks entailed by accepting employment.

HEALTH
Medical Services 1355



Stress At Work



Burned Out? ...
Harassed?

Sick? Overworked?
CALL NOW!

for an immediate appointment at NO COST TO YOU.

(213) 879-6227

(818) 242-6900

Free appointments, services, monetary benefits & treatment may be available thru Workers' Comp WHETHER FIRED or WORKING.

Professional Consultation
Certified Licensed Physicians
HABLAMOS ESPANOL

HEART ATTACK/BYPASS SURGERY

Past and future medical bills paid, plus money paid directly to you if we can prove your heart problems were partly caused by stress at work. No fee or costs unless you collect.

FOR FREE INFORMATION CALL:

(213) 387-2266 (818) 984-2266

JOB PROBLEMS

If You Suffer From
NERVOUSNESS, LOW ENERGY
IRRITABILITY, INSOMNIA
DEPRESSION OR OTHER
DISABLING PSYCHOLOGICAL
SYMPTOMS-resulting from:

- EMOTIONAL STRESS
- HARASSMENT
- PHYSICAL INJURY
- OVERWORK, etc.,

while on the job,
CALL ANYTIME
NO COST TO YOU
FREE APPOINTMENT

(213) 655-8777

(818) 789-0788

(SE HABLE ESPANOL)
PSYCH SERVICES CENTER
M.D.'s & Ph.D.'s

WORK STRESS?

WORK INJURY?

If you are unable to continue to work because of job stress or injury you may be eligible to receive Disability Benefits thru WORKERS COMP including COMPENSATION, PAYMENT & TREATMENT.

AT NO COST!
Call O.P.P. Services
213/933-0133

All Appointments Free
Licensed Psychologists & M.D.

WORK TRAUMA

★ Hotline ★

Tape Recorded Information
★ 213/470-3378 ★

or Call Direct
★ 213/470-4220 ★

Regarding Money & Benefits You May Be Entitled To Receive From Staff Dr's Through Worker's Comp. At No Cost to You. Standing by to Advise You Are Attorneys & Doctors Who Can Provide Medical, Psych & Legal Services in Connection with Work Injury & Job Stress.

Available 24hrs-7 days a week
P.A.S. Inc. Law Offices of
Brush, Brush & Brush
HABLAMOS ESPANOL

JOB PROBLEMS? Suffer from Nervousness, Low Energy? Call 213/655-8777 or 818/789-0788

Mental Health 1390

HAVE YOU BEEN INJURED AT WORK?

EITHER
EMOTIONALLY
or
PHYSICALLY?

You May be Entitled to Substantial Monetary Benefits, as well as Medical Treatment at No Cost To You through Worker's Compensation.

UNJUSTLY FIRED?

Call the Law Offices of
Brush, Brush & Brush at

213-738-0122

For A
FREE CONSULTATION
CALL A LAWYER FIRST
HABLAMOS ESPANOL

JOB PROBLEMS

If You Suffer From
NERVOUSNESS, LOW ENERGY
IRRITABILITY, INSOMNIA
DEPRESSION OR OTHER
DISABLING PSYCHOLOGICAL
SYMPTOMS-resulting from:

- EMOTIONAL STRESS
- HARASSMENT
- PHYSICAL INJURY
- OVERWORK, etc.,

while on the job,
CALL ANYTIME
NO COST TO YOU
FREE APPOINTMENT

(213) 655-8777

(818) 789-0788

(SE HABLE ESPANOL)
PSYCH SERVICES CENTER
M.D.'s & Ph.D.'s

However, these defenses began to give way to sympathetic juries and the organized management community opted to support no-fault insurance for employees.

In principle, without having to demonstrate that their employers were at fault, employees can collect specified damages for work-engendered injuries and illnesses (but no pain and suffering awards) under state workers' compensation systems. However, the circumstances of eligibility for recovery have widened substantially. In recent years, in particular, claims have been filed for cases of "occupational stress" which go well beyond the kinds of injuries and diseases which were originally compensable.³⁸

One form of occupational stress claim alleges that such physical health problems as heart attacks or strokes were brought on by stressful working conditions, usually over an extended period. Undoubtedly, stress at work can contribute to such conditions. But non-work stresses, genetic predisposition, dietary habits, etc. may also be contributory factors. Claims for this type of stress compensation -- and the willingness of workers' compensation authorities to entertain them -- can be viewed as the expression of a desire that employers should provide for the expenses connected with health problems, even if their connection with the job is uncertain. The claims amount to a public rewriting of the modern employment contract, just as,

say, the requirement for overtime pay after 40 hours rewrote the contract when it was first enacted.

Stress claims in the psychological area entail compensation for exit from work. In these cases, the employee may allege that conditions at the workplace, e.g., an overbearing supervisor, created such tension that he/she was unable to work due to anxiety, depression, etc. Past practice, before stress claims became feasible, was for employees simply to leave (quit) if workplace conditions became extremely unpleasant. Of course, the worker might lose the stake he/she had in the job under such circumstances, especially if long seniority was involved. Thus, a stress claim may sometimes be an attempt to recoup some of this investment in the job from the employer.

The ability to file claims for stress (or for discrimination under EEO laws, or for wrongful discharge) creates a degree of voice for employees. Employers are aware that such suits are possible and may therefore be more responsive than they otherwise would be to employee complaints. Litigation for the employer can be expensive, even if its defense is ultimately successful. Legal forums, in short, give nonunion employees the ability to inflict costs on their employers, just as unions can inflict strike costs. This ability provides limited leverage to them for resolving workplace complaints.

Limitations on Layoffs.

Most job loss in the U.S. labor market stems from layoffs, not discharges. If special machinery were created to deal with wrongful discharge, it would not limit such layoffs. In the next chapter, layoffs and job security issues will be discussed more fully. However, it should be noted at this point that pressure has mounted in the 1980s for legal restraints on "plant closings." Some states have adopted relatively weak legislation in this area.

Various proposals have been made at the federal level regarding regulation of plant closings. And in at least one case, laid off workers were successful in achieving an out-of-court settlement against an employer who allegedly concealed plans to close down an operation.³⁷ An aging electorate during the next 10-20 years could prove receptive to a regulatory approach toward job security. Such an approach would likely go beyond limited scope of wrongful discharge and discipline remedies, and would seek to restrict employer freedom to lay off workers during business downturns.

iii. Private HRM Responses.

Despite the encroachment -- current and future -- of external forces, HRM specialists have options for dealing with

employee complaints and grievances. First, where there are union-management contracts specifying a grievance mechanism, or where formal complaint systems exist for nonunion employees, these arrangements need to be monitored. How many grievances are being filed? Do they vary from worksite to worksite, and -- if so -- why? Are there patterns in the kinds of problems being adjudicated? What kinds of problems seem to be causing the most workplace frictions?

Second, where systems -- either union or nonunion -- have been in place for long periods, it is important to evaluate their outcomes. Are they, in fact, resolving problems or aggravating them? Clearly unproductive are long delays or tensions arising over the use of the systems themselves. Grievance machinery is supposed to reduce the friction which is inevitably found in any workplace. If it is not performing that function, changes are needed.

Alternatives to existing practice are available. In the union setting, where arbitration is typically the final step in the process, the mediation option has already been noted. If arbitration has been characterized by high cost and long delays, mediation prior to the arbitration step certainly should be considered. But as with any HRM system, mediation needs evaluation. If mediation is installed, it is essential to track the results. Are a substantial fraction of the problems referred

to mediation being resolved, thus averting the need for arbitration? If not, mediation simply becomes an additional source of delay. If expedited arbitration is tried, are the decisions simply fast? Or are they also perceived as reasonable when compared with the outcomes of standard rights arbitration?

Third, alternative remedies need to be considered. In the case of discharges found to be unjustified, the standard remedy imposed by arbitrators has been reinstatement, perhaps with all or some back pay. Yet the wrongful discharge suits that have been filed by employees often seek monetary damages, not necessarily reinstatement. Especially for upper level employees, reinstatement may not be a viable option. A high level of trust is needed between executives; a forced reinstatement is not likely to be a good remedy for either party. Indeed, even at lower levels of the organization, a forced reinstatement may add to workplace frictions.

Monetary awards and buyouts of problem employees may be an appropriate outcome in disputed discharge cases. In fact, employers contemplating discharge should consider the alternative of a more amicable voluntary departure, lubricated by a monetary settlement. If the employment relationship is viewed as an implicit contract, then an earlier-than-planned termination of that contract can be negotiated in monetary terms, just as occurs

in the case of premature termination of other buyer/seller agreements.

Apart from strictly cash payments, employers can ease transitions from their workforces through provision of placement assistance, through flexible policies with regard for absences needed for job search, and through tailored early retirement. But as with other HRM approaches, there are both costs and benefits. For example, an employer would not want to create the impression among its workforce that buyouts are an entitlement for departing employees. And it is not desirable for remaining workers to feel that rewards for problem employees exceed those for those who are loyal and productive.

So far, the discussion has assumed that a grievance mechanism of some type is in place. However, this assumption is not always valid for nonunion workers. Studies have indicated that nonunion workers in firms which have some unionization are less likely to have complaint systems than those in totally nonunion firms. Indeed, the higher the proportion of union-represented workers, the greater the probability that the nonrepresented workers have available no formal grievance handling system.⁴⁰ A survey in the late 1970s found that only 44% of employers had "formal grievance procedures" for their nonunion employees.⁴¹

In the future, however, it is probable that the proportion of private nonunion workers with formal grievance arrangements will rise. Contemporary employees are looking for a way to voice their problems; if they do not find such channels within the firm, they will increasingly turn to external remedies. The costs of such external routes can be high for employers. But if internal channels are available, employees who failure to use them -- or who summarily reject their outcomes, will find they have lesser credibility within the outside channels.

To have a formal grievance system, however, requires guidelines for HRM decisions. Formal grievance systems need formal statements of the mutual obligations of employer and employee. A purely implicit contract, with no documentation, is difficult to adjudicate. The implicit contract must be made more explicit.

Some attorneys are advising employers to state clearly to workers that the firm has no obligations to employees, that employment is at will in the strict classic sense, and that employees can be dismissed at any time and for any reason or no reason. Most employers, however, will be reluctant to take such a stance relative to current or future employees. (Would you-- as a job applicant -- be attracted to an employer who openly reserved the right to behave capriciously with regard to your future?) For most employers, the increasing demand for employee

voice is likely to be reflected in more carefully crafted -- and monitored -- HRM policies and complaint systems.⁴²

FOOTNOTES

1. Susan E. Shank, "Preferred Hours of Work and Corresponding Earnings," Monthly Labor Review, vol. 109 (November 1986), pp. 40-44.
2. Herbert Simon, Administrative Behavior, third edition (New York: The Free Press, 1976), pp. 130-134.
3. Other reasons, accounting for only a small portion of the total, include "job terminated during week," "new job started during week," and "material shortages or repairs to plant and equipment."
4. Normally, unemployment compensation systems require that the employee be totally laid off before benefits will be paid. A symposium on the work sharing topic can be found in Barbara D. Dennis, ed., Proceedings of the Thirty-Eighth Annual Meeting, December 28-30, 1985, Industrial Relations Research Association (Madison, Wisc.: IRRR, 1986), pp. 424-456.
5. Earl F. Mellor, "Shift Work and Flextime: How Prevalent Are They?," Monthly Labor Review, vol. 109 (November 1986), pp. 14-21.
6. Similar issues arise in connection with adoption of standardized weights and measures, definition of currency units, etc. The central authority need not always be government; national time zones in the U.S. were first created by private railroad companies in the 19th century which found it difficult to produce train schedules when each town had its own time system. They simply announced there would be a clock at the railroad station and the railroad schedule would refer to that clock only. Localities eventually adopted railroad time as their own. However, when there is no central authority, costs may arise, e.g., incompatible systems of home video taping (Beta vs. VHS).
7. Mellor, "Shift Work," op. cit., pp. 18-20.
8. Some workers engage in manufacturing at home (industrial homework). There are legal restrictions on such work because it is difficult to enforce minimum wage and other such laws in a home setting. Under the Reagan administration, some of these restrictions were lifted. See Francis W. Horvath, "Work at Home: New Findings from the Current Population Survey," Monthly Labor Review, vol. 109 (November 1986), pp. 31-35.
9. Theresa Diss Greis, The Decline of Annual Hours Worked in the United States Since 1947 (Philadelphia: Industrial Research Unit, The Wharton School, University of Pennsylvania, 1984).

10. Information on the structure of grievance machinery in this section is taken from Bureau of National Affairs, Inc., Basic Patterns in Union Contracts, eleventh edition (Washington: BNA, 1986), pp. 33-40.

11. The FMCS will supply lists of arbitrators for both types of labor-management disputes: rights and interests. However, almost all the disputes reported are disputes over rights.

12. U.S. Federal Mediation and Conciliation Service, Thirty-Seventh Annual Report -- Fiscal Year 1984 (Washington: FMCS, no date), Table 8. It should be noted that an "issue" is not the same thing as a "case"; a case may involve more than one issue. In addition, FMCS reports reflect only the cases that involved arbitrators whose names were supplied on FMCS lists to the parties. Many arbitrations take place without FMCS involvement. Finally, it is possible that there are differences in the mix of issues between grievances filed, and that subset of grievances which end up resolved by arbitration.

13. Bureau of National Affairs, Inc., Basic Patterns, op. cit., pp. 80-81.

14. Generally, the arbitrator would hear the dispute over arbitrability and then the facts of the case. In his/her decision, the arbitrator would first rule on the arbitrability issue. If the case was deemed not arbitrable, the decision would end with a statement so indicating. But if it was viewed as arbitrable, the decision would then proceed to analyze the facts of the underlying dispute and render a decision. Sometimes, management may refuse to participate in the arbitration process if it feels the issue is not arbitrable. Such situations may end up in court, with the union arguing that by refusing to allow an arbitrator to consider the arbitrability issue, management is violating its contractual obligation. Courts are likely to be sympathetic with the union position, absent unusual circumstances.

15. There are sometimes cases in which the union will pursue a "frivolous grievance," knowing it will lose its case, fearing that a failure to do so would be unpopular or (as will be discussed below) subject it to litigation. Similarly, management may feel a need to show support for a supervisor, even if it believes the supervisor's action in a given case will not be sustained by an arbitrator.

16. Oliver E. Williamson, Markets and Hierarchies: Analysis and Antitrust Implications (New York: The Free Press, 1975), pp. 75-77; Michael L. Wachter and Oliver E. Williamson, "Obligational Markets and the Mechanisms of Inflation," Bell Journal of Economics, vol. 9 (Autumn 1978), pp. 549-571.

17. Arbitration of commercial disputes (not related to the employment relationship) is a common practice. On contracting and corporate organization, see Oliver E. Williamson, "The Modern Corporation: Origins, Evolution, Attributes," Journal of Economic Literature, vol. 19 (December 1981), pp. 1537-1568, especially 1545.

18. Steward Macaulay, "Non-Contractual Relations in Business: A Preliminary Study," American Sociological Review, vol. 28 (February 1963), pp. 55-67.

19. A widely used, and readable text on the subject, is Paul Prasow and Edward Peters, Arbitration and Collective Bargaining: Conflict Resolution in Labor Relations, second edition (New York: McGraw-Hill, 1983).

20. David E. Feller, "A General Theory of the Collective Bargaining Agreement," California Law Review, vol. 61 (May 1973), pp. 663-856. (The quote is from p. 748).

21. State laws provide ceilings on unemployment insurance premiums. Hence, those employers who have experienced many layoffs may be at the ceiling rates, and may have little incentive to protest claims.

22. An exception might be an order to undertake a life-threatening action, e.g., an order to drive a truck with defective brakes, or an illegal action, e.g., an order to commit perjury at a trial or legislative hearing to protect the firm.

23. The courts do not automatically defer to arbitration decisions. But they are reluctant to reverse those decisions, especially if the arbitrator has acted in a professional fashion. The vast majority of arbitration decisions are accepted as binding by the parties and are not taken to court. But when they are not, federal courts are bound by three Supreme Court decisions issued in 1960, and popularly known as the "Arbitration Trilogy," which call for a general policy of judicial deferral. For more information, see Walter A. Fogel, "Court Review of Discharge Arbitration Awards," The Arbitration Journal, vol. 37 (June 1982), pp. 22-34.

24. For example, a person who was disciplined for reasons of racial animosity rather than for some workplace infraction was clearly not disciplined for just cause. Moreover, many union-management agreements contain non-discrimination clauses.

25. U.S. Federal Mediation and Conciliation Service, Annual Report, op. cit., p. 20.

26. U.S. Federal Mediation and Conciliation Service, Annual Report, op. cit., p. 20.

27. Only 3% of contracts surveyed in the mid-1980s had grievance mediation. - See Bureau of National Affairs, Inc., Basic Patterns, op. cit., p. 37.

28. The preference for experienced arbitrators has been demonstrated in the case of interest arbitration. Presumably, similar preferences should be exhibited for rights arbitration. See David E. Bloom and Christopher L. Cavanagh, "An Analysis of the Selection of Arbitrators," American Economic Review, vol. 76 (June 1986). pp. 408-422.

29. Some contracts permit strikes in mid course, but typically only over certain specified issues. From time to time, unofficial or "wildcat" strikes occur over matters which should be resolved by the grievance machinery. Union officials are supposed to make an effort to bring about a quick return to work in such cases, and may face legal action by the employer if they do not, and especially if it appears that the union played a role in fomenting the strike. As in other facets of life, there are episodes in union-management relations when gaps appear between what is supposed to occur, and what actually does.

30. Richard B. Freeman and James L. Medoff, What Do Unions Do? (New York: Basic Books, 1984), chapter 6; Oliver E. Williamson, "The Economics of Internal Organization: Exit and Voice in Relation to Markets and Hierarchies," American Economic Review, vol. 66 (May 1976), pp. 369-377; Albert O. Hirschman, Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States (Cambridge, Mass.: Harvard University Press, 1970).

31. Armen A. Alchian, "Property Rights, Specialization and the Firm," working paper no. 225, UCLA Department of Economics, November 1981.

32. Freeman and Medoff, op. cit., chapter 9.

33. Health maintenance organizations are health care providers who offer comprehensive care for a flat monthly fee through their own facilities. Fee for service plans reimburse patients for their medical expenses according to a specified schedule.

34. National Association of Manufacturers, Employment Law in the 50 States (Washington: CUE/NAM, 1987), p. vi.

35. This estimate was made using data from Employment and Earnings, vol. 34 (January 1987), p. 219.

36. White males can also file claims that they have been subject to "reverse discrimination," i.e., illegal preferences for minorities or women.

These laws were once known as Workmen's Compensation. The law was made sexually neutral in the 1970s.

In most states, the insurance to cover these claims is provided by private carriers even though the adjudication system is government-run. One of the benefits of having a no-fault system was originally thought to be a reduction in the need for court involvement. In fact, there is substantial lawyer involvement in the processing of workers' compensation claims. Hence, there is a constant search by attorneys who handle these cases to find new avenues of recovery for clients.

The case involved the Atari Corporation, a maker of video games which closed down manufacturing operations in California and moved them to Hong Kong in 1983. See Henry Weinstein, "Atari Settles Landmark Lawsuit," Los Angeles Times, June 4, 1986, Part 4, 2.

40. Donald Berenbeim, Nonunion Complaint Systems: A Corporate Appraisal, report no. 770 (New York: The Conference Board, 1980), pp. 5.

41. Bureau of National Affairs, Inc., Policies for Unorganized Employees, PPF survey no. 125 (Washington: BNA, 1979).

42. It is surprisingly, in response to growing employer interest in creating complaint systems for nonunion workers, that management groups began to advise their members on good practice in this area. See, for example, National Association of Manufacturers, Setting Complaints in the Union-Free Operation (Washington: NAM, 1982).