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LEGAL REPRESENTATION AND CASE OUTCOME IN NONDISCIPLINE/DISCHARGE CASES: EVIDENCE FROM NOVA SCOTIA*

TERRY H. WAGAR
Saint Mary's University, Nova Scotia

ABSTRACT

This study examined the relationship between legal representation and case outcome in nondiscipline/discharge arbitration cases. Logit estimation of 864 nondiscipline/discharge cases suggested the probability of receiving a favorable award was significantly greater if one party was represented by a lawyer at the arbitration hearing and the other side did not rely on legal counsel.

Does having a lawyer present your party's case enhance the likelihood of winning at arbitration? In recent years, researchers have investigated a number of factors hypothesized to be related to case outcome in arbitration decisions. For example, studies have examined the effect of characteristics of the grievant and the arbitrator on arbitration decisions [1]. However, there is very limited empirical work that examines the impact of legal representation on arbitration awards.

As noted by Block and Stieber, the willingness of employers and unions to opt for legal representation in arbitration cases indicates the parties believe they can enhance the probability of receiving a favorable decision by having lawyers represent them at arbitration hearings [2]. Although the use of legal counsel increases the cost of arbitration, may result in greater time delays, and tends to "legalize" the arbitration process, the parties frequently opt to be represented by lawyers. Moreover, the quality of representation provided an individual grievant at the hearing may play an important role in that individual's perceptions of procedural and distributive justice.

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The purpose of the present study was twofold. First, it provided evidence regarding the reliance on legal representation by employers and unions in Nova Scotia. Second, it examined, based on data from 864 nondiscipline/discharge cases in Nova Scotia, whether the use of legal representation is related to case outcome. Although the bulk of arbitration studies have relied on published decisions, this study uses largely unpublished cases. In addition, while a small number of studies has examined the effect of legal representation in discharge cases [3], a review of the literature revealed only one study that utilized non-discipline and discharge decisions [4].

LAWYERS AND THE ARBITRATION PROCESS

Raffaele noted the increasing use of lawyers at arbitration hearings in the United States [5]. He argued that greater reliance on lawyers results in the use of more legalistic procedures and a greater reliance on the application of rules rather than problem solving as a means of resolving labor-management conflict. Moreover, increasing legalism adds to the complexity of the arbitration process, leads to further confusion for the grievant, and fosters delay. According to Raffaele:

> There are no clear winners and losers in a labor-management relationship. It is not a zero-sum contest. The survival of the other party does indeed matter. Legalistic overkill, especially in establishing proof and credibility, is destructive of cooperative labor-management relations [5, p. 21].

In short, Raffaele believes the increasing use of lawyers in arbitration has negative implications for labor-management relations.

In addition, Deitsch and Dilts found that legal representation was the major factor in determining pre-arbitral settlement of arbitration disputes [6]. Cases in which neither party was represented by a lawyer were more likely to be settled prior to arbitration, while cases where both parties employed legal counsel tended to go to arbitration.

Despite a strong preference by employers (and several unions) to use legal counsel at arbitration hearings, a review of the literature revealed few studies that specifically examined the effect of legal representation on arbitration decision outcomes. A 1983-84 survey by the American Arbitration Association indicated that management relied on legal representation almost 75 percent of the time, while unions used lawyers in about half of the cases [7]. These results are relatively consistent with those obtained by other researchers. Block and Stieber, in their analysis of published and unpublished U.S. discharge cases, found employers used lawyers in approximately 70 percent of the cases, while unions were represented by lawyers in slightly more than 40 percent of the decisions [3]. Ponak, in a study of discharge cases in Alberta, determined that employers used

lawyers 68 percent of the time, while unions relied on legal representation in 52 percent of the cases [8]. Barnacle, who examined the use of legal counsel in 348 Ontario discharge cases, concluded employers were represented by lawyers in 79 percent of the hearings, while unions used legal counsel in 51 percent of the cases [9], and Wagar, in an analysis of 1,284 published nondiscipline and discharge cases in Canada, found employers used counsel in 77 percent, while unions relied on legal representation in 57 percent of the decisions [4].

The limited empirical evidence from the United States and Canada indicates the use of lawyers in arbitration hearings may have an effect on case outcome. Block and Stieber found that, as compared to cases in which neither party was represented by legal counsel, both employers and unions had higher win rates when they used lawyers and their counterpart did not [2]. However, when both parties opted to use a lawyer, the outcomes did not differ from those in which neither party secured legal representation [2]. Like Block and Stieber, Wagar used multivariate analysis in his study of nondiscipline and discharge cases and found the probability of a party winning an arbitration case was significantly higher if the party used legal counsel at arbitration and the other side was not represented by a lawyer [4].

Ponak also investigated whether the use of lawyers provided an advantage to employers and unions. Although the results were not statistically significant, Ponak found the employer win rate in discharge cases was 54 percent if the employer relied on legal representation and the union did not. However, in the situation where the union had legal representation and the employer did not, the employer rate of success dropped to 42 percent. Analysis of the cases also suggested that unions had a decided advantage if neither party relied on legal counsel, while the probability of an employer victory was greater when both parties were represented by lawyers [8].

In an analysis of Ontario discharge cases, Barnacle concluded the greater relative use of legal counsel was associated with higher win rates for both parties. He found that employers used lawyers in 85 percent of the cases in which the dismissal was upheld, compared with a 75 percent utilization rate for cases in which the grievant was reinstated. Similarly, unions relied on legal representation in 45 percent of the cases in which dismissal of the grievant was upheld, while they employed lawyers in 57 percent of the decisions involving reinstatement of the grievant [9]. While these results suggest the use of legal counsel may be related to arbitration outcome, no attempt was made to examine whether the findings were statistically significant.

On the basis of the existing research and personal discussions with labor and management officials and practicing arbitrators, the following hypotheses are advanced:

> H1: The probability of a union victory is greater when the union has legal representation and the employer does not, and

H2: The probability of an employer victory is greater when the employer has legal representation and the union does not.

METHOD

The data for this study were obtained by content analyzing 864 nondiscipline and discharge cases in Nova Scotia over a ten-year period (1980 to 1989). While a handful of the cases have been published in the *Labour Arbitration Cases Reporter*, most are unpublished decisions (since 1980, all arbitration decisions in the province had to be filed with the Nova Scotia Department of Labour). Cases decided on jurisdictional grounds or involving discipline or discharge issues were omitted from the study.

The dependent variable was case outcome. Cases were dummy coded on the basis of whether the grievant/union was successful (that is, the initial employer action or decision was altered in favor of the grievant or union) or whether the employer won (that is, the employer's decision or action was upheld by the arbitrator). This approach has been employed by several researchers [10].

The primary independent variable was representation by a lawyer. Representation by a lawyer was investigated at four levels: 1) the union was represented by a lawyer while the employer was not; 2) the employer was represented by a lawyer while the union was not; 3) neither the union nor the employer was represented by a lawyer; and 4) both parties were represented by a lawyer. The Nova Scotia Barrister's Society provided directory information of lawyers in the province. By matching the names in the directories with the names of the representatives in each case, it was possible to determine whether a party opted for legal representation in the case.

A number of other independent variables were included as control variables. To control for the potential effect of time on grievance outcomes, a dummy variable indicating whether the case was decided between 1980 to 1984 or 1985 to 1989 was included in the analysis. This approach is similar to the method used by Bemmels [11]. The arbitration forum (single arbitrator or arbitration board) was included because the decision-making process and case outcome may be affected depending on whether a single arbitrator or panel was charged with deciding the case. Although there is some evidence that the gender of the arbitrator may be related to case outcome [12], all of the Nova Scotia cases were decided by male arbitrators and thus it was not necessary to control for the arbitrator's gender [13].

Employer sector (manufacturing, service, or not-for-profit) was controlled for because of a possibility that the awards in the private and not-for-profit sectors might vary [2]. As well, there is evidence that decision making in the public sector is more diffuse than in the private sector, indicating it may be more difficult for public employees to settle grievances early in the process. Consequently, it has been argued that a greater percentage of public sector grievances might be classified as "less winnable" [8].

Arbitrator decision-making may also be influenced by the grievance issue; previous research has indicated that union win rates in arbitration cases varied depending on the nature of the issue before the arbitrator [10]. To control for this factor, cases were coded on the basis of whether the issue of the grievance involved compensation (such as wages and benefits), job security, seniority/job posting, or other issues.

RESULTS

Descriptive Statistics

Descriptive statistics relating to the 864 Nova Scotia nondiscipline/discharge cases are reported in Table 1. The data reveal that the union/grievant was the winner in 445 cases for a win rate of 51.5 percent, while the employer was successful in 419 (48.5%) of the decisions.

There was a strong preference on the part of Nova Scotia employers in favor of being represented by lawyers in arbitration cases. In slightly more than 80 percent of the decisions, employers obtained legal counsel, while unions relied on legal representation in 59 percent of the cases. The most common pairing, which occurred in just over half of the cases, involved both parties being represented by lawyers. In a further 28.4 percent of the cases, the employer had legal representation while the union did not. Neither party relied on lawyers in almost 13 percent of the cases, while only 7.3 percent of the decisions involved a union lawyer and no employer lawyer. These findings are relatively consistent with the previous research on legal representation in arbitration cases in which there was a noticeably higher preference on the part of employers to use legal counsel.

The use of legal counsel by employers increased slightly (from 78.9% to 81.2%) between the 1980 to 1984 and 1985 to 1989 time periods. When considering union reliance on legal counsel, the results indicate an increase from 55.6 percent for 1980 to 1984 to 62.4 percent for the 1985 to 1989 period.

With reference to the other independent variables, the number of cases was fairly evenly distributed over the periods 1980 to 1984 and 1985 to 1989. When considering the arbitration forum, the parties displayed a distinct preference for having a single arbitrator hear the case, as 72 percent of the decisions were rendered by a single arbitrator. Whether there is a relationship between the preference for a single arbitrator and the legalization of the arbitration process is deserving of additional attention. Over 48 percent of the cases involved a not-for-profit employer, close to 33 percent of the employers were in manufacturing, and 19 percent were in the service sector. Compensation (38.7%) and seniority/job posting (26.9%) cases occurred most frequently, with an additional 20.6 percent of the decisions involving job security concerns.

Table 1. Descriptive Statistics for Nova Scotia Arbitration Cases

Variable	Number	Percentage
Case Outcome		
Grievant/Union Victory	445	51.5
Employer Victory	419	48.5
Legal Representation		
Union Lawyer/No Employer Lawyer	63	7.3
Employer Lawyer/No Union Lawyer	245	28.4
No Union Lawyer/No Employer Lawyer	109	12.6
Union Lawyer/Employer Lawyer	447	51.7
Time (Date of Decision)		
1980-1984	428	49.5
1985-1989	436	50.5
Arbitration Forum		
Single Arbitrator	622	72.0
Arbitration Board	242	28.0
Sector of Employer		
Manufacturing	281	32.5
Service	164	19.0
Not-for-Profit	419	48.5
Grievance Issue		
Compensation (Wages/Benefits)	334	38.7
Job Security	178	20.6
Seniority/Job Posting	232	26.9
Other	120	13.9

Logit Estimation Results

Logit estimation was used to analyze the effects of legal representation on the probability that the grievance was resolved in favor of the union/grievant. The results of the logit analysis are outlined in Table 2. For both models, the omitted category was both parties being represented by a lawyer. The logit estimates indicate the odds ratio on the dependent variable case outcome for each category relative to the union lawyer/employer lawyer category.

Model 1 analyzed the effect of legal representation on case outcome with the control variables excluded. The logit estimates revealed that the likelihood of a union win was significantly greater ($p < .01$) when the union was represented by a

Table 2. Logit Analysis for Nova Scotia Arbitration Cases: Probability of a Union Victory (standard errors in parentheses)

Variable	Model 1 (*S.D.*)	Model 2 (*S.D.*)
Constant	.151***	.065
	(.050)	(.059)
Legal Representation		
Union Lawyer/No Employer Lawyer	.620***	.545***
	(.163)	(.166)
Employer Lawyer/No Union Lawyer	−.207***	−.220***
	(.080)	(.083)
No Union Lawyer/No Employer Lawyer	−.026	−.077
	(.107)	(.112)
Time (Date of Decision)		
1985-1989		−.103
		(.071)
Arbitration Forum		
Single Arbitrator		.262***
		(.082)
Sector of Employer		
Service		−.022
		(.102)
Not-for-Profit		−.027
		(.089)
Grievance Issue		
Compensation (Wages/Benefits)		.115
		(.109)
Job Security		.105
		(.124)
Seniority/Job Posting		−.038
		(.116)

*$p < .10$,
**$p < .05$
***$p < .01$ (one or two tailed test as appropriate)

lawyer and the employer was not. With reference to the employer lawyer/no union lawyer situation, the logit coefficient was also highly significant ($p < .01$) and in the expected direction, indicating that the probability of an employer victory is greater when the employer secures legal counsel and the union does not. There was no significant difference in win rates when both parties were or were not represented by lawyers in the arbitration hearing.

To control for other variables that may be related to case outcome, a second model was estimated. Even with all of the control variables included (Model 2 in Table 2) in the estimation, the coefficients relating to legal representation are relatively stable and highly significant. The coefficient on union lawyer/no employer lawyer was .545 and still statistically significant at the $p < .01$ level. To interpret the logit coefficient, it is necessary to multiply the coefficient by two and take the antilog of this parameter. Completing this calculation indicates that the odds of a union victory were 2.98 times greater when the union employed a lawyer and the employer did not (compared to the situation in which both parties were represented by counsel). Similarly, the probability of an employer win was significant ($p < .01$) when the employer had legal representation and the union did not; the odds of an employer victory were 1.55 times greater in the employer lawyer/no union lawyer situation.

Although not the primary independent variable in this study, arbitration forum was significantly related ($p < .01$) with case outcome. As indicated in Table 2, the probability of a union victory was greater if the case was heard by a single arbitrator.

DISCUSSION

The major objective of this article was to examine the effect of legal representation on case outcome in nondiscipline/discharge arbitration decisions from the province of Nova Scotia. The results indicated that, as compared to the situation where both parties were represented by a lawyer, the probability of a union or employer victory was highly related to the use of legal counsel; if one party was represented by a lawyer and the other was not, the party with legal representation was significantly more likely to receive a favorable award in the case. However, there was no significant difference in case outcome when comparing decisions in which neither party relied on legal counsel and cases in which both sides employed lawyers.

A number of potential explanations for the results of this study exist. For instance, it is frequently assumed that the use of a lawyer in the arbitration process enhances the party's presentation of the case before the arbitrator. In addition, labor arbitrators in Nova Scotia are almost exclusively trained in law and thus a more legalistic presentation may be preferred. While several arbitrators criticize the legalization of the arbitration process, additional research is needed to investigate whether the relationship between case outcome and the use of legal counsel is affected by the background of the arbitrator.

Lawyers may assist in screening cases prior to arbitration [2]. If the relationship between the lawyer and client is ongoing and characterized by the participation of legal counsel well before a case proceeds to arbitration, the lawyer may advise the client concerning the probability of victory and encourage settlement prior to

arbitration of less winnable cases. However, as noted previously, the involvement of outside legal counsel tends to reduce the likelihood that an arbitration case will be settled prior to arbitration [6]. This apparent contradiction is deserving of more attention. For example, does experience and specialization in labor law increase a lawyer's ability to assess the probability of winning a case? Is a lawyer in an ongoing relationship with an employer more likely to recommend settlement of a case prior to arbitration than counsel who is representing an organization on an ad hoc basis?

To date, little is known about the decision-making process used by unions and employers in determining whether to use lawyers at arbitration. Consequently, I conducted informal interviews with a handful of human resource management (HRM) professionals and union officials about the use of legal counsel at arbitration. In general, the employer participants expressed considerable confidence in their legal representatives, believed that a human resource generalist was at a disadvantage at a hearing in which the union had legal representation, and noted that the opportunity to appear at hearings was somewhat limited because of the relatively few grievances proceeding to arbitration [14]. Still, the HRM manager of one large organization informed me that his firm recently had moved away from using lawyers at arbitration hearings, opting instead to place responsibility for grievance administration and arbitration in the hands of an internal labor relations professional.

Discussions with labor representatives indicated that unions with experienced grievance officers or business agents frequently had such individuals present cases at arbitration hearings; however, unions without such resources typically relied on outside legal counsel to represent the union at arbitration.

Some caution should be taken in interpreting the results of the study. The findings are based on nondiscipline and discharge cases in one jurisdiction and may not be generalizable to other types of cases or jurisdictions other than Nova Scotia. In addition, while a number of control variables are included in the analysis, there may be other factors (such as characteristics of the arbitrator or grievant) affecting case outcome.

Among the several opportunities for future research, an assessment of the role of lawyers in the arbitration process would be fruitful. For instance, what decision criteria do the parties employ in deciding whether to use legal representation? What is the relationship between grievance settlement and the involvement of the lawyer apart from presentation of the case at an arbitration hearing? Is the benefit of legal representation related to the background of the arbitrator? To what extent are grievant perceptions of distributive and procedural justice affected by type of representation at arbitration? While this study suggests that legal representation is related to case outcome, further exploration of the impact of lawyers on the resolution of workplace conflict is needed.

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Terry H. Wagar, LL.B., Ph.D. is an Associate Professor in the Department of Management at Saint Mary's University. He has published several papers on various aspects of employment and labor law and his research has been presented at conferences in North America, Europe, and Australia. He is currently working on a number of research projects addressing workforce reduction and restructuring, grievance arbitration, employee involvement programs, and the law of wrongful dismissal.

ENDNOTES

1. See, for instance, B. Bemmels, Gender Effects in Arbitration, in *Labour Arbitration Yearbook*, Vol. 2, W. Kaplan, J. Sacks, and M. Gunderson (eds.), Butterworths-Lancaster House, Toronto, pp. 167-180, 1991); D. Bloom and C. Cavanaugh, An Analysis of the Selection of Arbitrators, *The American Economic Review, 76*, pp. 408-422, 1986; B. Bemmels, Arbitrator Characteristics and Arbitrator Decisions, *Journal of Labor Research, 11*, pp. 181-192, 1990; R. Thornton and P. Zirkel, The Consistency and Predictability of Arbitration Awards, *Industrial and Labor Relations Review, 43*, pp. 294-307, 1990; S. Oswald and S. Caudill, Experimental Evidence of Gender Effects in Arbitration Decisions, *Employee Responsibilities and Rights Journal, 4*, pp. 271-281, 1991.
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7. American Arbitration Association, *Study Time: A Quarterly Letter of News and Comments for the AAA Arbitrator*, American Arbitration Association, New York, 1984.
8. A. Ponak, Discharge Arbitration and Reinstatement in the Province of Alberta, *Arbitration Journal, 42*, pp. 39-46, 1987.
9. P. Barnacle, *Arbitration of Discharge Grievances in Ontario: Outcomes and Reinstatement Experience*, Industrial Relations Centre, Queen's University, Kingston, Ontario, 1991.
10. See, for example, C. Gilson and L. Gillis, Grievance Arbitration in Nova Scotia, *Relations Industrielles, 42*, pp. 256-269, 1987 or B. Klaas, Managerial Decision Making about Employee Grievances: The Impact of the Grievant's Work History, *Personnel Psychology, 42*, pp. 53-68, 1989.
11. B. Bemmels, Grievance Effects in Discharge Arbitration, *Industrial and Labor Relation Review, 42*, pp. 63-76, 1988.

12. See B. Bemmels [1] for a review of the gender effects arbitration literature.
13. In all of the cases decided by a single arbitrator, the arbitrator was male. Similarly, in all decisions rendered by an arbitration board, the chair of the board was a man. However, in a handful of cases, the union or employer board nominee was a woman.
14. It should be underscored that many unionized organizations in Nova Scotia are relatively small. As one respondent commented, "in a busy year, we have one or two arbitration cases; I wouldn't get enough experience arguing cases even if I wanted to represent our company at arbitration."

Direct reprint requests to:

Dr. Terry H. Wagar
Department of Management
Saint Mary's University
Halifax, Nova Scotia
Canada, B3H 3C3