FROM SUPREME COURT TO SHOPFLOOR: MANDATORY ARBITRATION AND THE RECONFIGURATION OF WORKPLACE DISPUTE RESOLUTION

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INTRODUCTION

The United States is exceptional among major industrialized countries in its lack of procedures for resolving typical workplace disputes. Indeed, the workplace dispute resolution procedures that do exist in the United States can better be described as a set of exceptions rather than as a general system for resolving conflict. One set of exceptions is the procedures available in unionized workplaces where well-developed grievance procedures provide employees with an effective means to challenge unfair treatment.[1] At one time, it was hoped that union grievance and arbitration procedures might provide the general foundation for workplace dispute resolution in the United States.[2] However, with union membership having fallen below 13 percent of the workforce, the protec-

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[1] *See generally* DAVID LEWIN & RICHARD B. PETERSON, THE MODERN GRIEVANCE PROCEDURE IN THE UNITED STATES (1988) (discussing grievance procedures in steel manufacturing, retail trade, nonprofit hospitals, and local public schools, and analyzing in particular the "grievance filing, processing, settlement, and post-settlement behavior of the parties to the procedures").

[2] *See generally* Arnold M. Zack, *Agreements to Arbitrate and Waiver of Rights Under Employment Law*, *in* EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS IN THE CHANGING WORKPLACE 67, 69 (Adrienne E. Eaton & Jeffrey H. Keefe, eds., 1999) (providing a

tions afforded unionized workers are now an exception to the general American pattern.[3] Another exception is the extensive legal protections against discrimination in the workplace, enforced through the general court systems. The breadth of legal protections and extent of remedies available in the area of employment discrimination make American employment law far stronger in this respect than in other countries.[4] Yet, these protections are limited to disputes involving discrimination, which make up a relatively small proportion of workplace conflicts[5] and are based around a system of enforcement through litigation in the courts, which can be costly and limit accessibility.[6] The result is that for disputes involving discrimination, employees can rely on litigation through the courts, with its attendant costs and risks, while for the typical workplace conflict involving a nonunion employee and a nondiscrimination dispute, there is no effective workplace dispute resolution procedure available.

Against this backdrop, we have seen some change in recent years in the area of workplace dispute resolution. One of the most important changes has come at the initiative of the courts with the development of new doctrines of judicial deferral to employer-initiated arbitration procedures for resolving legal claims by employees.[7] This type of arbitration, often referred to as "mandatory arbitration" because it is typically mandated by employers as a term and condition of employment, reflects the contradictions of workplace dispute resolution in the United States. Advocates see mandatory arbitration as a relatively low-cost, accessible system for resolving workplace disputes that will avoid the expenses and

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critical analysis of *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 24 (1991), and the decision's impact on the law governing labor arbitration).

3 Union Membership (Annual): Union Members Summary, Bureau of Labor Statistics, *available at* http://www.bls.gov/news.release/union2.nr0.htm (last modified January 21, 2004) [hereinafter "Union Membership"].

4 *See, e.g.*, Laura Beth Nielsen, *Paying Workers or Paying Lawyers: Employee Termination Practices in the United States and Canada*, 21 LAW & POL'Y 247, 248 (1999).

5 David Lewin, *Dispute Resolution in the Nonunion Firm: A Theoretical and Empirical Analysis*, 31 J. CONFLICT RESOL. 465, 479 (1987) (finding that only 7 percent of all appeals of management decisions in a sample of nonunion grievance procedures involved discrimination claims).

6 *See* GENERAL ACCOUNTING OFFICE, GAO/HEHS 95-150, EMPLOYMENT DISCRIMINATION: MOST PRIVATE SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION 5 (1995) (stating that "almost any system is quicker, cheaper, and less harrowing than going to court").

7 *See generally* RICHARD A. BALES, COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT (1997) (providing legal background and comprehensive analysis of compulsory arbitration); Katherine Van Wezel Stone, *Employment Arbitration Under the Federal Arbitration Act*, *in* EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS IN THE CHANGING WORKPLACE 27-65 (Adrienne E. Eaton & Jeffrey H. Keefe, eds., 1999) [hereinafter "Stone, *Employment Arbitration Under the FAA*"] (discussing the United States Supreme Court's interpretation of the Federal Arbitration Act).

uncertainty of litigation in the general court system.[8] Critics see mandatory arbitration as undermining existing protections against employment discrimination provided by the public legal system while offering employees little in the way of fairness and accessibility for resolving disputes.[9] Much of the debate surrounding mandatory arbitration has focused on how well it substitutes for litigation, determined, for example, by examining the outcomes of arbitration cases and by comparing arbitration procedures to those of the courts.[10] In contrast, in this article I will take a different perspective on mandatory arbitration and look at its impact on dispute resolution at the workplace level. In particular, I will look at survey and interview-based evidence on the expansion of mandatory arbitration and how it is being used in the workplace. First, though, I begin by reviewing the legal background giving rise to mandatory arbitration.

I. FROM THE SUPREME COURT: THE LEGAL ORIGINS OF MANDATORY ARBITRATION

The 1991 U.S. Supreme Court decision in *Gilmer v. Interstate/Johnson Lane Corp.*[11] gave rise to what are commonly referred to as mandatory arbitration procedures. In *Gilmer*, the Supreme Court for the first time held that a claim based on a right asserted under an employment statute could be subject to a private arbitration agreement between an employee and his or her employer.[12] The effect of this decision was that employers that required their employees to enter into arbitration agreements as a condition of employment became able to avoid more

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8 *See, e.g.*, Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344 (1997) (discussing the benefits of predispute agreements to arbitrate claims governed by federal and state employment laws); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Pre-Dispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559 (2001) (arguing that arbitration is preferable to a litigation-based system because it will provide more claimants with an adequate remedy).

9 *See, e.g.*, Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996) (discussing how mandatory arbitration arrangements can potentially undermine worker rights and arguing that workers should not be permitted to waive their rights under federal and state employment statutes); *see also* David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. (1997) (discussing how compelled arbitration confers corporate defendants with inordinate leverage against employee-claimants resulting in "despotic decisionmaking").

10 *See, e.g.*, Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RTS. & EMP. POL'Y J. 189 (1997) (discussing how employers, as repeat players in the arbitration process, benefit from their experience and from the structure of the arbitration process); *see also* Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777 (2003).

11 500 U.S. 20 (1991).

12 *Id.* at 36.

types of in-court litigation.[13] If an employee subject to a mandatory arbitration agreement wanted to make a legal claim against his or her employer, for example for discrimination in the workplace or sexual harassment, the claim had to be brought through the arbitration procedure described in the agreement; the employee was barred from appealing directly to the courts.[14] This forced a large number of employees to bring their claims through an arbitration procedure designed by the very same employer against whom they were bringing a claim. Employers soon recognized the potential of using mandatory arbitration to avoid the risks and occasionally massive damage awards of litigation and began adopting these procedures in large numbers.[15]

It is important to note that mandatory arbitration is a development that almost exclusively affected nonunion employees.[16] Although there were some attempts to introduce mandatory arbitration in unionized workplaces, the vast majority of mandatory arbitration procedures were introduced in nonunion workplaces where the employees had no effective say over their adoption.[17] For nonunion employees, mandatory arbitration was a particularly troubling development because it undercut the threat of employment litigation, which provides one of the few institutional checks on employers in the absence of unions.[18]

In a series of court battles during the 1990s, employers successfully defended the use of mandatory employment arbitration against challenges that the procedures inherently undermined the statutory rights of employees.[19] Efforts to introduce legislation in Congress aimed at reversing the *Gilmer* decision were unsuccessful.[20] In 2001, the Supreme Court reaffirmed its acceptance of mandatory arbitration to resolve employment disputes in *Circuit City Stores, Inc. v. Adams.*[21] However, some courts have been willing to strike down arbitration procedures that

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13 *See id.*

14 *See id.*

15 Alexander J. S. Colvin, *Institutional Pressures, Human Resource Strategies, and the Rise of Nonunion Dispute Resolution Procedures*, 56 INDUS. & LAB. REL. REV. 375 (2003).

16 *See* Stone, *supra* note 9, at 1036–38 (arguing that, in the non-union setting, pre-hire arbitral agreements are blatant contracts of adhesion).

17 *See id.*, at 1017, 1036-37.

18 *See Gilmer*, 500 U.S. at 42 (Stevens, J., dissenting) ("Plainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right to enforce civil remedies in the courts.") (quoting Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 750 (1981) (Burger, C.J., dissenting)).

19 Hill, *supra* note 10, at 777.

20 Sherwyn, David S. & Tracey, J. Bruce, *Mandatory Arbitration of Employment Disputes: Implications for Policy and Practice*, CORNELL HOTEL & RESTAURANT ADMIN. Q., Vol. 60, October 1, 2001.

21 532 U.S. 105 (2001).

contain particularly egregious violations of due process.[22] For example, courts have refused to enforce arbitration agreements that restrict employee damage awards, require employees to pay half of the arbitration costs (which may amount to thousands of dollars or that impose one-sided obligations to arbitrate), or that allow the employer access to the courts while the employee is forced to arbitrate.[23] In the vast majority of cases, however, the courts have enforced mandatory arbitration agreements where the procedures do not include any egregiously one-sided provisions.[24]

II. THE EXPANSION OF MANDATORY ARBITRATION IN THE WORKPLACE

In light of the courts' general willingness to enforce mandatory arbitration procedures, the key factor in the expansion of mandatory arbitration is the decision by companies whether or not to adopt this type of procedure. The advantage of adopting mandatory arbitration is that it allows companies to avoid litigation by channeling employee legal claims out of the courts and into an alternative forum. This is sensible for companies if they view arbitration as having lower costs and lower risks than litigation. From a risk perspective, arbitration before a professional arbitrator will appear more attractive to companies to the extent that managers fear exposure to large jury awards in litigation. Arbitration will also seem beneficial where managers fear that litigation will be protracted and involve substantial legal expenses. Yet, on the other hand, there are reasons companies might be wary of mandatory arbitration. First, there is uncertainty about the effectiveness of this relatively new tool for resolving employee claims, as, until recently, arbitration clauses were subject to some legal doubts concerning their enforceability. Second, there are concerns about the costs of arbitration, of which the employer will have to bear at least half.[25] Finally, companies may not view the threat of employment litigation as being sufficiently serious

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22 Michael H. LeRoy & Peter Feuille, *Judicial Enforcement of Predispute Arbitration Agreements: Back to the Future*, 18 OHIO ST. J. ON DISP. RESOL. 249 (2003).

23 *See, e.g.*, Cole v. Burns International Security Services, 105 F.3d 1465 (D.C. Cir. 1997); Armedariz v. Foundation Health Psychcare Services, Inc., 6 P.3d 669 (Cal. 2000); *see generally* Alexander J.S. Colvin, *The Relationship Between Employment Arbitration and Workplace Dispute Resolution Procedures*, 16 OHIO ST. J. ON DISP. RESOL. 643 (2001).

24 *See* LeRoy & Feuille, *supra* note 22.

25 *See Cole*, 105 F.3d at 1481; *see also* Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777 (2003) (reporting statistics showing that employers pay more than half of the costs of employment arbitration); Michael H. LeRoy & Peter Feuille, *When Is Cost an Unlawful Barrier to Alternative Dispute Resolution?: The Ever Green Tree of Mandatory Employment Arbitration,* 50 UCLA L. REV. 143 (2002); Dennis R. Nolan, *Employment Arbitration After* Circuit City, 41 BRANDEIS L.J. 853, 874 (2003).

to bother taking extensive measures to avoid it. On the contrary, a number of managers expressed concern in interview based research that adopting a mandatory arbitration procedure could be interpreted by employees as a signal that they had a new type of workplace dispute resolution mechanism available and hence lead to a surge in the number of complaints lodged by employees.[26]

What does the empirical evidence tell us about the extent of expansion of mandatory arbitration? The results of four surveys that have investigated the extent to which organizations have adopted mandatory arbitration procedures are summarized in Table 1 below. This survey evidence suggests that the expansion of mandatory arbitration since the *Gilmer* decision in 1991 has been substantial, though at present only a minority of companies has adopted these procedures. As a rough starting point, a 1991 survey of human resources managers who were alumni of a master's degree program in industrial relations and human resources indicated that 2.1% of the companies they worked for had adopted mandatory arbitration procedures covering nonunion employees.[27] This is likely a high-end estimate of the extent of mandatory arbitration because the survey population probably over sampled larger organizations with relatively sophisticated human resource management policies.[28] A 1995 survey by the General Accounting Office (GAO) of firms subject to Equal Employment Opportunity Commission (EEOC) reporting requirements indicated that around 7.6% of the firms used mandatory arbitration procedures.[29] Again, this survey population may be skewed towards companies with relatively sophisticated policies since the survey was directed at establishments that were legally required to comply with EEOC reporting requirements.[30] Still, this suggests that by the mid-1990s there was already substantial growth in the adoption of mandatory arbitration. Two subsequent surveys conducted by the author suggest further expansion of mandatory arbitration in the late 1990s. A 1998 survey of establishments in the telecommunications industry indicated that 16.3% of

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26 Alexander J.S. Colvin, Citizens and Citadels: Dispute Resolution and the Governance of Employment Relations (1999) (unpublished Ph.D. dissertation, Cornell University) (on file with author).

27 *See* Peter Feuille & Denise R. Chachere, *Looking Fair and Being Fair: Remedial Voice Procedures in Nonunion Workplaces*, 21 J. MGMT. 27, 31–32, 36 (1995).

28 *Id.* at 30, 32.

29 GENERAL ACCOUNTING OFFICE, GAO/HEHS 95-150, EMPLOYMENT DISCRIMINATION: MOST PRIVATE SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION 12 (1995). In response to an initial question on the GAO survey, 9.9% of employers reported having mandatory arbitration procedures. However, when these companies were subsequently asked by the GAO for further information on their procedures, a number of them indicated that they in fact did not have mandatory arbitration procedures, reducing the effective incidence of procedures to 7.6%. *Id.*

30 *See id.* at 20.

these organizations had adopted mandatory arbitration.[31] A subsequent 2003 survey of establishments in the telecommunications industry indicated that 14.1% had adopted mandatory arbitration.[32] Although some establishments were surveyed in both time periods, the 1998 and 2003 surveys did not involve identical samples. Therefore, the small drop in the incidence of mandatory arbitration cannot be interpreted directly as organizations abandoning such procedures. Major restructuring in the telecommunication industries during this time period meant that many establishments closed and new ones opened, which may account for part of the difference.

TABLE 1: EXTENT OF ADOPTION OF MANDATORY ARBITRATION

Author(s)	Year	Sample	Mandatory Arbitration Incidence
Feuille & Chachere	1992	Alumni of masters in IR/HR program (n=195)	2.1%
GAO	1995	Establishments subject to EEOC reporting requirements (n=1448)	7.6%
Colvin	1998	Telecommunications industry establishments (n=213)	16.3%
Colvin	2003	Telecommunications industry establishments (n=291)	14.1%

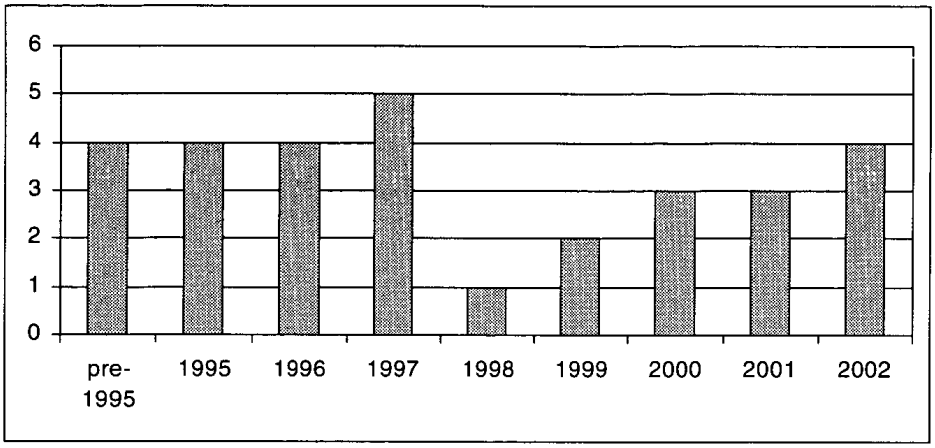
Taken together though, the results suggest that, after rapid expansion in the 1990s, growth of mandatory arbitration may have slowed. This suggestion is supported by the adoption dates of mandatory arbitration procedures found in the 2003 survey from the telecommunications industry. Data on the dates of adoption of human resource practices need to be interpreted with some caution because organizations often do not keep records of and cannot always provide accurate information on adoption dates.[33] However, a number of the establishments were able to provide dates for the adoption of mandatory arbitration and these results are summarized in Table 2.

31 Colvin, *supra* note 15, at 375, 386.

32 Rosemary Batt, Alex Colvin, Harry Katz & Jeffrey Keefe, Telecoms 2004: Strategy, HR Practices & Performance, Final report of the Cornell-Rutgers Telecommunications Project, Cornell University, Ithaca, NY (2004) (unpublished survey) (on file with author).

33 Survey Research Institute at Cornell, Telecom2 Final Code Book, July 29, 2002, at 193 (unpublished survey) (on file with author) (showing forty of eighty respondents surveyed could not estimate year of adoption of mandatory arbitration procedures).

TABLE 2: YEAR OF ADOPTION OF MANDATORY ARBITRATION CLAUSES IN EMPLOYMENT CONTRACTS



The first thing to note about the dates of adoption is that the vast majority of mandatory arbitration procedures were adopted after 1994. This suggests that the shift in the law following the Supreme Court's *Gilmer* decision provided the impetus for the expansion of mandatory arbitration, rather than merely signifying a mere ratification of a practice already in common usage. Adoption was more frequent in the mid-1990s before dropping off in 1998 and 1999 and then picking up again through 2002. The data here is limited, but it suggests a general expansion of mandatory arbitration since the mid-1990s with a possible temporary slowdown in the late 1990s. Possible reasons for a slowdown in the late 1990s could include legal uncertainty over the status of mandatory arbitration during court challenges to procedures during that period and a lack of pressure to avoid litigation during the tight job markets of the late 1990s. However, it appears that employers have continued to adopt mandatory arbitration clauses through 2002, the latest year for which data is available.

The latest estimates from the telecommunications industry surveys suggest an incidence of mandatory arbitration in somewhere in the range of 15% of establishments. If this industry is typical in this respect (there are no obvious reasons to think it is unusual), then mandatory arbitration has become over a period of a little more than a decade since the *Gilmer* decision a workplace dispute resolution procedure that governs a significant portion of the American workforce. Although an estimate in the range of 15% may not seem particularly large, it is worth remembering that unionization in the United States is now under 14% of the workforce.[34] Over a relatively short period of time, mandatory arbitration has become a system for workplace dispute resolution that should be

[34] Union Membership, *supra* note 3.

considered as important as union grievance procedures. This suggests the need to turn to the issue of how these mandatory arbitration procedures are being used.

III. MANDATORY ARBITRATION AND WORKPLACE DISPUTE RESOLUTION ACTIVITY

Most existing attempts to investigate how mandatory arbitration is functioning have involved studies of collections of arbitration decisions; in particular, sets of decisions from the files of the American Arbitration Association or from the securities industry's arbitration procedures.[35] These studies provide useful insight into the arbitration decision-making process and are valuable for comparing the outcomes of litigation and arbitration. An alternative way to look at the impact of mandatory arbitration is to examine its effect on the process of dispute resolution in the workplace. This section will describe the results of an analysis of the impact of mandatory arbitration on workplace dispute resolution activity based on data from the 1998 survey of telecommunications industry firms discussed earlier.

When examining workplace dispute resolution activity, one of the most basic statistical indicators is the grievance rate, which is often measured as the annual number of grievances filed per 100 employees in a given workplace.[36] From the employer's perspective, a high grievance rate can indicate excessive amounts of conflict in the workplace, perhaps reflecting worker discontent with some aspect of workplace management. By contrast, when we are comparing different types of grievance procedures, an especially low grievance rate can be of concern because it indicates a lack of employee trust in the fairness or efficacy of the dispute resolution procedure.

In the first column of Table 3, grievance rates are reported for four different types of grievance procedures based on data from the telecommunications industry survey. The grievance rates are reported for grievances about disciplinary and dismissal decisions only so as to adjust for the fact that procedures may differ in the categories of disputes that they cover, thereby influencing the overall grievance rate. Using annual disciplinary grievance rates as a standard unit of comparison, the highest rate—5.3 per 100 employees—is found in union grievance procedures. It is not surprising to find higher grievance rates for union than nonunion

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35 *See, e.g.*, Bingham, *supra* note 10, at 189–220.

36 *See, e.g.*, DAVID LEWIN & RICHARD B. PETERSON, THE MODERN GRIEVANCE PROCEDURE IN THE UNTIED STATES (Quorum 1988); Peter Cappelli & Keith Chauvin, *A Test of an Efficiency Model of Grievance Activity*, 45 INDUS. & LAB. REL. REV. 3 (Oct. 1991); David Lewin, *Grievance Procedures in Nonunion Workplaces: An Empirical Analysis of Usage, Dynamics, and Outcomes*, 66 CHI.-KENT L. REV. 823 (1990).

procedures.[37] More surprising is the finding that grievance rates were higher for nonunion procedures that included mandatory arbitration—3.2 per 100 employees—than for other nonunion procedures—1.3 per 100 employees. These differences in grievance rates are affected by differences in underlying levels of conflict in the workplace. However, a similar pattern results when we adjust for differences in the number of disciplinary decisions by examining the percentage of disciplinary decisions appealed. The highest disciplinary appeal proportion is for union procedures at 55%, with the lowest appeal proportion for other nonunion procedures at 11%, and with nonunion procedures that include mandatory arbitration occupying a middle position at 34%.

TABLE 3: MEAN DISCIPLINARY GRIEVANCE RATES AND APPEAL PROPORTIONS BY TYPE OF DISPUTE RESOLUTION PROCEDURE[38]

	Disciplinary grievance rate: (Annual grievances per 100 employees)	Appeal proportion: (Percentage of discipline decisions appealed)
Union Procedures	5.3***	55%***
Nonunion procedures:		
Mandatory arbitration	3.2***	34%***
Peer review	2.9**	30%**
Other nonunion procedures	1.3	11%

*p<.10; **p<.05; ***p<.01: rates significantly higher than for "other nonunion procedures" category.

These results are surprising if we view them in light of concerns about the due process protections available in mandatory arbitration. However, we need to consider that most of these comparisons look at mandatory arbitration versus litigation in the court system. When we are looking at workplace dispute resolution procedures, the base comparison category is "other nonunion procedures," which are most commonly grievance procedures in which employees have to lodge a complaint with a higher level manager in the organization, who will in turn render a decision on the employee's grievance. Viewed from the perspective of a grievance procedure based on unilateral management decision-making, mandatory arbitration may appear to be an improvement in due process, even if it falls short of the standards available in the courts or in union grievance procedures.

[37] *See* David Lewin & Richard B. Peterson, *The Nonunion Grievance Procedure: A Viable System of Due Process?*, 3(1) EMPLOYEE RESPONSIBILITIES & RIGHTS J. 1 (1990); Peter Feuille & John T. Delaney, *The Individual Pursuit of Organizational Justice: Grievance Procedures in Nonunion Workplaces*, 10 RES. IN PERSONNEL AND HUM. RESOURCES MGMT. 187 (Gerald R. Ferris & Kendrith M. Rowland eds., 1992); *see also* Alexander J.S. Colvin, *The Dual Transformation of Workplace Dispute Resolution*, 42 INDUS. REL. 712, 725 (2003).

[38] Table based on results reported in Alexander J.S. Colvin, *The Dual Transformation of Workplace Dispute Resolution*, 42 INDUS. REL. 712 (2003).

Some support for this notion is provided when we consider another type of nonunion workplace dispute resolution procedure that involves non-managerial decision-makers—namely, peer review. Under peer review procedures, a panel of "peer" employees decides whether or not an employee's grievance will be successful.[39] Peer review procedures are distinctive in that all, or a majority, of the members of the panel are not managers, but workers at the same level in the organization as the grievant.[40] Table 3 compares the results for both types of procedures. The table shows a high degree of similarity between mandatory arbitration and peer procedures in both disciplinary grievance rates—3.2 and 2.9 per 100 employees respectively—and disciplinary appeal percentages—34% and 30% respectively. The similarity between the procedures suggests a common effect of non-managerial decision-makers boosting employee usage of procedures.

TABLE 4: MEAN EMPLOYEE SUCCESS RATES BY TYPE OF PROCEDURE AS A PERCENTAGE OF GRIEVANCES AND OF DISCIPLINARY DECISIONS[41]

Type of Procedure	Successful Appeals as a Percentage of Disciplinary Grievances	Successful Appeals as a Percentage of Disciplinary Decisions
Union grievance procedures	36.4	17.3***
Nonunion procedures:		
Mandatory arbitration	36.4	11.1**
Peer review	30.0	9.9*
Other nonunion procedures	46.4	2.7

*p<.10; **p<.05; ***p<.01: success rates significantly higher than for "other nonunion procedures" category.

Thus far, this article has examined employee usage of workplace dispute resolution procedures, but it is also worth exploring to what degree employees are actually successful in using the procedures to reverse management decisions. Table 4 reports the success rates for the four different categories of procedures. The results suggest minimal difference between procedures when looking simply at the percentage of disciplinary grievances in which employees are successful in appealing a decision. Peer review procedures have the lowest employee success rate at 30.0%, union grievance procedures and mandatory arbitration are tied in the middle at 36.4%, and, surprisingly, other nonunion procedures

[39] *See generally* Feuille & Delaney, *supra* note 37; Douglas M. McCabe, *Alternative Dispute Resolution and Employee Voice in Nonunion Employment: An Ethical Analysis of Organizational Due Process Procedures and Mechanisms – The Case of the United States*, 16 J. BUS. ETHICS 349; Alexander J.S. Colvin, *Institutional Pressures, Human Resource Strategies, and the Rise of Nonunion Dispute Resolution Procedures*, 56 INDUS. & LAB. REL. REV. 375, 380 (2003).

[40] *See supra* note 39.

[41] *See supra* note 39.

have the highest employee success rate at 46.4%. In comparing success rates, however, it must be acknowledged that employees are intelligent actors in choosing whether or not to file grievances. If an employee believes that a procedure offers little prospect of redress through appealing a disciplinary decision, he or she is less likely to go to the trouble of filing a grievance. In particular, if employees are concerned about due process issues and the danger of retaliation for filing a grievance, they are more likely to only file grievances where they have a particularly strong case. Therefore, the percentage of all disciplinary decisions that are successfully reversed by employee grievances, regardless of whether a grievance is filed, provides a better measure of the impact of the dispute resolution procedure in the workplace. The last column of Table 4 reports the percentage of disciplinary decisions successfully appealed for each procedure category. Union grievance procedures have the highest percentage of decisions successfully appealed at 17.3%, whereas other nonunion procedures have the lowest percentage at 2.7%. In the middle are nonunion procedures involving mandatory arbitration at 11.1% and peer review at 9.9%.

What light do these results for workplace dispute resolution activity shed on mandatory arbitration? One general point is that our perspective on mandatory arbitration may vary depending on the reference point for comparison. The due process protections in mandatory arbitration have been compared unfavorably with those offered by the court system.[42] Similar negative comparisons can be made between union grievance procedures and mandatory arbitration, particularly in regard to the representation role of the union. The results examined in this article support the notion that mandatory arbitration does not provide a level of workplace dispute resolution procedure akin to that of union grievance procedures. On the other hand, mandatory arbitration may appear more favorable if the reference point is typical nonunion dispute resolution procedures that feature management decision-makers. Compared to these other nonunion procedures, mandatory arbitration does appear to be associated with greater employee usage and more success in overturning management decisions.

These results may suggest a potentially positive impact of mandatory arbitration on workplace dispute resolution, but a couple of additional questions need to be considered in this regard. One question is whether any benefits to workplace dispute resolution are outweighed by costs to the enforcement of public employment laws. The answer to this question will depend in part on how one evaluates the effectiveness and appropriateness of mandatory arbitration as a substitute for litigation

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[42] *See* Stone, *supra* note 9, at 1039.

through the court system.[43] Another question, however, is whether mandatory arbitration is a necessary or desirable way to structure workplace dispute resolution procedures. In the next section, I will describe one alternative approach to reforming workplace dispute resolution procedures that organizations have attempted.

IV. ALTERNATIVE TRAJECTORIES FOR WORKPLACE DISPUTE RESOLUTION SYSTEMS

A key characteristic of mandatory arbitration is that the *Gilmer* decision simply allowed companies to introduce arbitration procedures as a substitute for litigation; it did not determine the structure of these procedures.[44] Although subsequent decisions have refused to enforce some egregiously one-sided arbitration provisions, in general, organizations are free to adopt the type of procedure they wish.[45] In particular, organizations can choose to combine mandatory arbitration with other dispute resolution procedures in a multi-stage procedure.[46] Most dispute resolution procedures in nonunion workplaces in fact consist of multi-stage grievance procedures.[47] For example, in the 2003 telecommunications industry survey described earlier, the typical (median) nonunion dispute resolution procedure involved a three-step grievance procedure.[48] Under these multi-step procedures, employees typically begin the process by filing a grievance with a lower level manager.[49] If the grievance is unresolved at the first step, higher levels of management consider the grievance.[50] The procedure may incorporate other features, such as mediation at some step.[51] Mandatory arbitration and peer review procedures are often incorporated into these procedures as the final step in the multi-stage procedure.[52] The result is that there are a variety of options open to companies in designing nonunion workplace dispute resolution procedures, and consequently, there is substantial variation in the nature of these procedures.[53] Although some procedures are characterized by a "race to the bottom" style effort to ensure management retains control of

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43 *See, e.g.*, Theodore O. Rogers Jr., *The Procedural Differences Between Litigating in Court and Arbitration: Who Benefits?*, 16 OHIO ST. J. ON DISP. RESOL. 633 (2001).

44 *Gilmer*, 500 U.S. at 35.

45 *See* Colvin, *supra* note 23, at 645–46.

46 *See id.* at 645-55.

47 *Id.* at 649.

48 *See* Colvin, *supra* note 23.

49 *See* Colvin, *supra* note 23, at 645–50.

50 *See id.*

51 *See id.* at 645–55.

52 *See id.* at 648–50.

53 *See id.* at 645–55.

the process regardless of due process, other procedures include features that enhance their fairness to employees.[54]

One company that adopted a set of procedures that include a number of innovative features is TRW, a diversified aerospace and automotive parts manufacturing company.[55] The development of TRW's workplace dispute resolution procedures provides an intriguing example of a possible alternative trajectory of the development of mandatory arbitration. The initial impetus for development of the procedures at TRW came from a relatively conventional source. In the early 1990s, the company laid off a large number of employees in its aerospace business as a result of the post-Cold War contraction of the military aerospace industry.[56] Many of these employees were long serving professional and managerial employees who were entering the labor market as their entire industry was contracting. This wave of downsizing produced a backlash in the form of an upsurge of employment litigation.[57] Confronted by this sudden rise in litigation costs, the company decided to consider adopting a mandatory arbitration procedure in light of the then recently decided *Gilmer* case.[58]

Rather than simply adopting a standard mandatory arbitration procedure, however, TRW engaged in an extended investigation directed at integrating its dispute resolution procedures with its overall human resources (HR) strategies.[59] A particular concern for the company was that it had for many years emphasized a high commitment-oriented HR strategy with its employees. Management feared that employees might view a mandatory arbitration procedure as designed to undermine their legal rights.[60] As a result, the company decided to restructure the arbitration procedure so that it would provide an alternative mechanism for resolving disputes, but would not be viewed by employees as a "take-away" of their rights.[61] The first important feature of the procedure was that mandatory arbitration would be introduced as a final step on top of, or in addition to, other workplace dispute resolution procedures.[62] In conjunction with the introduction of mandatory arbitration, individual divisions of TRW engaged in a process of reviewing and revising their existing

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54 *See id.*

55 For a more detailed examination of the TRW case study, see Alexander J.S. Colvin, *Adoption and Use of Dispute Resolution Procedures in the Nonunion Workplace*, *in* vol. 13, ADVANCES IN INDUSTRIAL & LABOR RELATIONS 71 (David Lewin & Bruce E. Kaufman, eds., 2004).

56 *See id.* at 19.

57 *Id.*

58 *See id.* at 20–21.

59 *See id.* at 9.

60 *Id.* at 22.

61 Colvin, *supra* note 55.

62 *Id.* at 23–29.

workplace procedures. In many cases, TRW upgraded these procedures through features such as the addition of a mediation step prior to arbitration.[63] The second important feature was that although arbitration would be mandatory, it would be non-binding for the employee, but binding for the employer.[64] This meant that employees would be required to take disputes initially to arbitration, but if not satisfied with the results of arbitration they could proceed to court; the employer would be bound by the results of arbitration whatever the outcome.

How has the procedure worked in practice? When TRW initially introduced the procedure, it attracted a lot of attention due to the unusual feature of having non-binding arbitration.[65] Yet, in practice, very few of the disputes have gone to arbitration.[66] The vast majority of disputes are settled either in the preliminary grievance steps or in mediation prior to arbitration.[67] Indeed, the striking feature when talking to employees of TRW involved in dispute resolution is how much of the attention is focused on the preliminary steps in the procedure before arbitration. During the initial three years that the procedure was in place, of the 72 cases that reached the mediation stage, only three subsequently went to arbitration.[68] Time needed to resolve cases in mediation was relatively low, with cases averaging only three to four months from the initial claim through resolution in mediation.[69] Mediation costs were also relatively low, averaging around $2000 per case.[70] More significantly from an employee perspective, many of the mediation settlements included continued employment. The remedies included reinstatements, adjustments of the application of company policies, and transferal of employees to new jobs within the company.[71] A major weakness of litigation as an employment dispute resolution system is that most cases involve terminated employees, so continued employment is not a plausible outcome. The ability of the TRW workplace dispute resolution procedure to allow continued employment is a major strength of the system.

What does the TRW example tell us about mandatory arbitration? In one sense, it is a positive example of how, with the expansion of mandatory arbitration, some companies are introducing workplace dispute resolution procedures that enhance the resolution of conflict to the benefit of employees as well as the company. In this respect, this exam-

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63 *Id.*

64 *See id.* at 22.

65 *Id.*

66 *Id.* at 27.

67 *Id.*

68 Colvin, *supra* note 55, at 27.

69 *Id.*

70 *Id.*

71 *Id.* at 28.

ple fits with the positive message from the grievance rate statistics described in the previous section.[72] On the other hand, it is not clear that the strengths of the TRW system are a product of mandatory arbitration itself. Arbitration raised possibilities that provided the initial impetus for restructuring TRW's workplace dispute resolution procedures, but the major benefits appear to have come from mediation and the enhanced earlier stages in the procedure rather than from arbitration itself. Furthermore, TRW has had success with a procedure that makes arbitration mandatory but non-binding, whereas a key feature often advocated on behalf of mandatory arbitration is that it could be made binding. This suggests the possibility of a system of nonunion workplace dispute resolution procedures that offers the benefits of expanded access to resolution of conflict in the workplace and an alternative mechanism for resolving claims before they turn into litigation, without the problematic feature of an employer-imposed binding mandatory arbitration barring all access to the courts.

CONCLUSION

The expansion of mandatory arbitration procedures is a striking example of a shift in employment relations practices at the workplace level directly resulting from a change in the interpretation of the law at the Supreme Court level. The expanded deferral to employer-initiated, mandatory arbitration procedures has raised concerns about the undermining of public employment laws by the establishment of private dispute resolution procedures in which employers design the structures within which they are a party. While mandatory arbitration raises obvious concerns about the normal enforcement of employment laws through the public court system, it is also important to understand the impact of mandatory arbitration from the perspective of workplace dispute resolution. The dominant characteristic of workplace dispute resolution in the United States is the absence of effective procedures for most workers to resolve typical employment disputes. The question is what impact mandatory arbitration is having on this landscape. The limited evidence available so far indicates that mandatory arbitration is already having a significant impact on a segment of the workforce because companies are increasingly adopting these procedures. Perhaps more surprisingly, there is substantial usage of workplace dispute resolution procedures that incorporate mandatory arbitration and that allow an increased number of nonunion employees to successfully challenge management decisions. On the other hand, it is not clear that workplace dispute resolution procedures need to be binding in the sense of preventing subsequent appeal to

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72 *See supra* Table 3 and Table 4.

the courts, or even need to involve arbitration to have these effects. Peer review procedures, another type of workplace dispute resolution procedure involving non-managerial decision-makers, result in increased employee usage rates similar to those of mandatory arbitration. Furthermore, where a multi-stage procedure combines arbitration with mediation, it appears that mediation rather arbitration can actually play the dominant role in improving workplace dispute resolution procedures. In general, although mandatory arbitration has its weaknesses in enforcing public law, it is important not to ignore the pressing need in American workplaces to enhance dispute resolution procedures for the majority of employees who lack union representation. To the degree that legal pressures can provide an impetus for organizations to enhance their workplace dispute resolution procedures, they will be a positive development.