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# EGAPs—Arbitration Plans for Nonunion Employees\*

Charles J. Morris\*\*

The program topic labels my address: "Mediation and Arbitration of Termination-at-Will Lawsuits." Although I shall be faithful to that topic, at least the arbitration part, I shall do so in a roundabout way because I want to tell you something about the arbitration of discharges pursuant to a "just cause" standard—a topic with which you are probably familiar in a different context. Since this conference concerns alternatives to litigation, I want to examine one alternative that seems to have been overlooked, but hopefully not for long. I am going to talk about Employee Grievance and Arbitration Plans (EGAPs). Therefore, I will touch only indirectly on the use of arbitration in the settlement of lawsuits. But I will cover quite directly a new approach to arbitration itself. I am going to explore the perennial problem of finding a way to resolve the issue of employee terminations without lawsuits. In other words, I shall try to find an answer to the basic question of how to bring the due process of arbitration to employee terminations where there is no collective bargaining agreement. But I promise you I won't waste your time with a discussion of pie-in-the-sky legislation.

Everyone in this room is familiar with arbitration. That's why you are here. And many of you are actively involved in arbitrating grievances under collective bargaining agreements. Therefore, you have firsthand knowledge of how well the system works. It works particularly well in discipline and discharge cases—in fact, so well, that the collective bargaining model of a grievance procedure which includes arbitration for such cases has become the proud hallmark of the American industrial relations system. It is the only part of our sys-

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tem which anyone abroad seems interested in emulating. Indeed, American grievance arbitration was the model for the Industrial Relations Tribunals which were introduced by statute in the United Kingdom in 1971. However, the U.K. plan is not tied to collective bargaining, nor does it provide for compulsory reinstatement of unfairly dismissed employees. Yet, the U.K. system seems to work well. Indeed, in turn it has become a model for some aspects of the legislative plans which had been debated and introduced, so far unsuccessfully, in several state legislatures. You Californians are quite familiar with such a plan.

But the most convincing tribute to the American model of collective bargaining arbitration is found here in the United States among those companies which have sought to imitate it in a nonunion setting. After all, imitation is the highest form of flattery. Still, the nonunion imitations are flawed. Even those that might be legal are flawed, for they lack the two most important ingredients which distinguish the union plans. They lack genuine employee participation, and they lack genuine neutrality in the arbitration process. It is a fact that the only benefits that unionized establishments have which nonunion companies cannot offer their employees is a grievance and arbitration plan that is both truly neutral and employee participatory.

Indeed, it is the employee grievance and arbitration plan—which I refer to as “EGAP”—which is the most unique component of American collective bargaining. Wages, pensions, vacation and holiday plans, and other fringe benefits, even seniority, can be made available to employees by nonunion companies. They have done so with great success, whether such success is measured on a scale of employee satisfaction or on a scale of union avoidance. But they have not been able to duplicate what has become the most important feature of union organization at the workplace, the collectively bargained grievance and arbitration plan.

It is too late to turn back the calendar to the days when “master” and “servant” meant just that. For a while it seemed that the national commitment to collective bargaining would be sufficient to ameliorate the harshness of at-will employment. But that didn’t happen. The law, like nature, abhors a vacuum. Federal law now protects against employment discrimination based on race, sex, religion, national origin, age, and handicapped status. Further, state common law has been bursting with the development of new theories, generally based on contract, tort, or public policy, which establish a variety of actions for wrongful discharge. As might be expected, this judicial approach has been spotty and sporadic. It is not my purpose here to outline these legal theories or to discuss the developing common law

of wrongful discharge. But, I will note that the courts have not been able, and should not be able, to provide a complete system of wrongful discharge protection. That is either a proper legislative task or a task to be achieved by private ordering.

As for the legislative approach, I can only say that I generally applaud what my academic colleagues, such as Ted St. Antoine of the University of Michigan, Bill Gould of Stanford, and Clyde Summers of the University of Pennsylvania, have been doing to arouse interest in legislative solutions—solutions which are designed to bring the United States, or at least some of the states—into the mainstream of employee job protection. Although I applaud such efforts, I have certain reservations about the legislative approach. Not one of the foreign statutory systems with which I am acquainted, and I am acquainted with most of the systems in the industrial democracies, can compare with the nonbureaucratic efficiency of employee grievances and arbitration plans, in other words EGAPs, which are operated jointly by management and unions under American collective bargaining contracts.

But, you say, that's all well and good for the unionized establishments, but what about the eighty percent or more of the employees in this country who do not work under union contracts? That's exactly what I want to talk about. I want to explore whether and how employee grievance and arbitration plans—EGAPs—can be legally established in nonunion companies. There are a number of nonunion companies which already claim to have such plans, but these are not true EGAPs because they are established unilaterally. Before examining some of those *unilateral* plans, I want to give you an idea of where I am going. I am going to explore several methods by which legal EGAPs can be established. I want to find a way to fill at least some of the vacuum, a way to provide presently unrepresented employees with the protection of a fair and impartial grievance and arbitration plan—an EGAP they can call their own.

What's wrong with a "unilateral" grievance and/or arbitration plan? The short answer is that it is unilateral. More specifically, it is extremely difficult, if not impossible, to construct and operate such a plan without violating section 8(a)(2) of the National Labor Relations Act (Act).<sup>1</sup> But, aside from the issue of legality, there are other shortcomings. I am well aware that many such plans exist, though

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1. Labor Management Relations (Taft-Hartley) Act § 8(a)(2), 29 U.S.C. § 158(a)(2) (1982).

most do not include arbitration. I am also aware that almost nobody ever bothers to challenge these plans before the National Labor Relations Board (NLRB). There are several reasons for this. First, challenges rarely occur unless they are filed by an outside union seeking to organize the employees: unions which would hesitate to be accused of removing a plan with which employees are satisfied. Second, the employees do not know that the plans are illegal because the Board makes virtually no effort to advise unrepresented employees of what their rights are under the National Labor Relations Act. For example, the Board does not even require the posting of a notice listing basic rights under the statute or even the telephone number and address of the nearest Regional office. Furthermore, it never issues substantive rules, only adjudicative orders which must be translated by lawyers. Nonunion employees simply do not know what rights they have under the law.

Many of the nonunion grievance plans would be declared illegal if they were ever tested. This is so not because of any special propensity of the NLRB to enforce section 8(a)(2)<sup>2</sup> but because of specific language in the statute and an important Supreme Court decision.<sup>3</sup> Understanding the law in this area will not only help to pinpoint the legal deficiencies which are characteristic of many of the present plans, it will also help to explain just what is required in order to create a *legal* EGAP.

The place to begin is with the language of the Act. Section 2(5) provides a very broad definition of the term "labor organization."<sup>4</sup> It defines the term as any "organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which . . . deal[s] with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or condition of work."<sup>5</sup> In other words, any representational plan in which em-

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2. See generally, Morris, *The NLRB in the Doghouse—Can an Old Board Learn New Tricks*, 24 SAN DIEGO L. REV. 9 (1987).

3. Nat'l Labor Relations Bd. v. Cabot Carbon Co., 360 U.S. 203 (1959).

4. § 2(5), 29 U.S.C. § 152(5).

5. *Id.* See also Comparison of S. 2926 and S. 1958, 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR RELATIONS ACT, 1935, at 1319, 1320 (1949) [hereinafter LEGISLATIVE HISTORY] which states:

Last year the term "labor organization" was strictly limited to an organization which existed for the purpose of dealing with employers concerning hours, wages, or working conditions. This year the term "labor organization" has been broadened in the bill to include an organization that deals with employers concerning grievances as well as wages, rates of pay or hours of employment. The importance of this is that an employer is now not permitted to organize a shop committee to present grievances on questions of safety and other minor matters even though he does not use such shop committees as a subterfuge for collective bargaining on the essential points of wages and hours. In other words, the present draft is intended to outlaw certain types of personal administration commonly used by employers and not hitherto felt to be obnoxious.

employees participate for the limited purpose of dealing with the employer concerning grievances is a "labor organization." Accordingly, if such a plan is established by an employer unilaterally, it violates section 8(a)(2) because it is an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."<sup>6</sup> The legislative history is clear and unambiguous that Congress intended to cover such employee plans and/or committees.<sup>7</sup> The Supreme Court confirmed that construction in the *Cabot Carbon*<sup>8</sup> case. Significantly, the original Wagner bill did not include the phrase "any agency or employee representation committee or plan."<sup>9</sup> Those words were added after the Senate Committee had been advised that such plans were the most common form of company unionism.<sup>10</sup> It is also significant that the Senate Committee pointedly rejected Secretary of Labor Perkins' proposal to change the phrase "dealing with employers" to the phrase "bargaining collectively with employers,"<sup>11</sup> thereby indicating that collective bargaining was not essential to the definition of a labor organization.

How do the various nonunion grievance plans fare under this broad definition? Fred Foulkes, in his excellent book on *Personnel Policies in Large Nonunion Companies*,<sup>12</sup> reveals that a number of well known companies maintain employee committees, plans, and/or grievance procedures<sup>13</sup> where the structures certainly appear to be

6. § 8(a)(2), 29 U.S.C. § 158(a)(2).

7. 2 LEGISLATIVE HISTORY, *supra* note 5, at 2306.

The term "labor organization" is phrased very broadly in order that the independence of action guaranteed by section 7 of the bill and protected by section 8 shall extend to all organizations of employees that deal with employers in regard to "grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work." This definition includes employee-representation committees and plans in order that the employers' activities in connection therewith shall be equally subject to the application of section 8.

8. *Nat'l Labor Relations Bd. v. Cabot Carbon Co.*, 360 U.S. 203 (1959). Mr. Justice Whitaker, in delivering the opinion of the Court, noted that:

[t]he Court of Appeals was . . . in error in holding that company-dominated Employee Committees, which exist for the purpose, in part at least, "of dealing with employers concerning grievances . . . or conditions of work," are not "labor organizations," within the meaning of § 2(5), simply because they do not "bargain with" employers in "the usual concept of collective bargaining." (emphasis in original). *Id.* at 212-13.

9. See 1 LEGISLATIVE HISTORY, *supra* note 5, at 32, § 3(5).

10. See *id.* at 1296, 1320, 1322, 1317; 2 LEGISLATIVE HISTORY at 2306.

11. 1 LEGISLATIVE HISTORY, *supra* note 5, at 66-67; 2 LEGISLATIVE HISTORY at 2287.

12. F. FOULKES, *PERSONNEL POLICIES IN LARGE NONUNION COMPANIES* (1980).

13. *Id.* at 283 (discussing successful implementation by large organizations of employee representation systems).

labor organizations within the meaning of section 2(5).

The scope of this presentation does not permit an evaluation of the handful of NLRB cases which have been decided in recent years which might provide some minimal guidance on the unfair labor practice questions. I say minimal guidance because we are dealing with an area in which Congress chose not to give the Board wide discretion, as it did under many other provisions of the Act. In this area, the statutory language alone provides most of the information. Furthermore, the *Cabot Carbon*<sup>14</sup> decision remains a formidable barrier against erosion of the broad statutory definition of a labor organization.

I also do not intend to review in detail the different kinds of unilateral plans to be found in nonunion companies. But their general nature will be noted. Very few offer arbitration as a terminal step. Some provide ombudsman-type representation by a managerial employee; some provide for employee committees; some plans are detailed and multi-tiered; some are not; and some are so-called "open-door" policy plans.

Occasionally, nonunion plans will feature a limited form of arbitration, and to the extent that such plans provide for representation of the grievant, or for employee participation as representatives, committees, or in the arbitration selection process, and perhaps even as witnesses, such plans, in my opinion, qualify as labor organizations. But, even as to the rare, and possibly legal, plan in which the grievant is represented by no one and where the selection of the arbitrator is left entirely to an outside agency, such as the American Arbitration Association, serious problems remain, including an ethical problem confronting the arbitrator. This is a problem which the National Academy of Arbitrators may eventually have to resolve, for the Academy's constitution prohibits members, except for those admitted prior to invocation of the rule in 1976, from "serving partisan interests as advocate or consultant for Labor or Management in labor management relations."<sup>15</sup> Since most of these nonunion arbitration plans are intended, at least in some measure, to be part of a union avoidance plan, an arbitrator who decides a case under a unilateral plan may very well be not only an agent of the employer who pays him, but also an advocate or consultant within the meaning of the Academy membership prohibition. The fact that the arbitrator exercises absolute independence of judgment does not alter his status as the employer's agent.

I am sure that there are some nonunion plans which work reason-

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14. Nat'l Labor Relations Bd. v. Cabot Carbon Co., 360 U.S. 203 (1959).

15. CONST. OF THE NATIONAL ACADEMY OF ARBITRATORS § 6 (added by amendment April 21, 1974).

ably well. Some, however, may be no more than window dressing designed to give employees an impression of due process or fairness, without providing the reality of a truly fair and neutral system. Certainly none of the unilateral plans have yet discovered a legal way to provide expert independent judgment to assist the grievant in the selection of the arbitrator, nor have they provided the employee with truly independent representation in the preparation and presentation of his case. The subtle effect which the unilateral process has on the neutrality and professionalism of the arbitrator is particularly troublesome. Notwithstanding the best of intentions, an arbitrator in such a case has little incentive to bite the hand that feeds him when only one party is doing the feeding. Of course arbitrators are not dogs, they are human, but because they are human they ought to avoid situations, or even the appearance of situations, where they are beholden to one party rather than to the other. Voluntary arbitration, to be true to its historical objectives, must be the result of a bilateral agreement process.

For these, and many other reasons, unilateral EGAPs are not a viable answer to the need for employee due process in the workplace. An employer, no matter how enlightened, cannot provide strong and independent representation for an employee whom it has just fired. As Senator Wagner stated at the hearings on this provision of the statute: "I cannot comprehend how people can rise to the defense of a practice so contrary to American principles as one which permits the advocates of one party to be paid by the other."<sup>16</sup>

So where does that leave nonunion employees? Is there no way that they can obtain the benefits of an effective and unbiased EGAP? There are several different ways in which a legal EGAP can be initiated.<sup>17</sup>

Exactly what is a legal EGAP? First of all, it is not something that is brand new, although it is something that needs to be repackaged. The concept is already contained in virtually every collective bargaining agreement. Yet, even for unionized establishments, I would recommend that the employee grievance and arbitration plan—the EGAP—in the contract be treated separately, perhaps even put into a separate document, as is frequently the practice with airline system

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16. 1 LEGISLATIVE HISTORY, *supra* note 5, at 1416.

17. I use the acronym "EGAP" because I hope the shorthand expression will become familiar and be used widely, just as the shorthand expression "ESOP" is used widely for Employee Stock Ownership Plans. EGAPs should be discussed, debated, and thereby become well-known.

boards of adjustment.<sup>18</sup> But the EGAP to which I refer is the kind which can be adopted in establishments where there is presently no union. It will mean establishing a discreet employee grievance and arbitration plan without a collective bargaining contract. A full collective bargaining contract would not be essential for an EGAP.

The EGAP concept takes advantage of the broad statutory definition of a labor organization in section 2(5), which we have examined.<sup>19</sup> Thus, to use the language of the statute, an EGAP is a "*representation . . . plan . . . in which employees participate and which exists for the purpose . . . of dealing with [an] employer[] concerning grievances.*"<sup>20</sup> Typically, it will provide for various steps in a grievance procedure which will culminate in an impartial arbitration complete with a bipartite method for selecting the arbitrator. The EGAP would, of course, also provide for discipline and discharge for "just cause" only. In addition, depending on the desires of the parties, it might also incorporate a progressive discipline plan and optionally a list of work rules and schedule of penalties. These terms relating to the processing of grievances are obviously the usual provisions in the grievance procedure part of a collective bargaining contract. They are, however, unusual in nonunion establishments.

The difference between these plans and existing nonunion grievance plans is that a genuine EGAP can never be a unilateral plan. It is conceivable, however, that in some instances the terms of the EGAP might primarily reflect the desires of the employer, but that will be true only if the employees or their representative agree to such terms. Perhaps the most visible difference in an EGAP is that the parties must establish the plan in accordance with NLRB requirements. That means that an employer, particularly if the employer is the initiator, should never grant recognition to the plan without first having an NLRB election. This is because the only way the employer can safely deal with an EGAP without risk of being guilty of unlawful support under section 8(a)(2) is to have the employees express their selection of representation by NLRB secret ballot.<sup>21</sup> If an outside party, such as an established labor union or an independent EGAP specialist,<sup>22</sup> initiates the plan, then the employer may be safe in extending recognition on the basis of a card check or some other reliable proof of majority support by the employees.

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18. See *e.g.*, the Railway Labor Act § 204, 45 U.S.C. § 184 (1982).

19. See *supra* note 4 and accompanying text.

20. Labor Management Relations (Taft-Hartley) Act § 2(5), 29 U.S.C. § 152(5) (1982) (emphasis added).

21. See *generally id.* § 9, 29 U.S.C. § 159 (provisions regarding representation and elections).

22. See *infra* note 29 and accompanying text.

The Supreme Court's Bernhard-Altmann<sup>23</sup> decision established that an employer violates section 8(a)(2) if it extends exclusive recognition to a labor organization which does not have the uncoerced support of a majority of the employees in an appropriate bargaining unit<sup>24</sup>—and don't forget that an EGAP is a labor organization. This is why practically every existing unilateral nonunion grievance plan which meets the definition of a labor organization is illegal, for almost none were established by unhindered voluntary action of the majority of the employees in an appropriate bargaining unit.

Once the employers have voted in favor of a named EGAP, and the name could be anything, the NLRB will issue its certification, and the employer and the representative of the employees, *bilaterally*, will negotiate the terms of the plan. The employees of course would have to join the organization in sufficient numbers and also pay dues to cover organizational expenses. How much the dues need be might depend on how cooperative the relationship is between the organization and the employer. Assuming that the employer does not exercise control or unlawful support—in other words, the employees would have to administer their own organization, independently provide representation for the grievants, and independently participate in the selection of arbitrators as a co-equal with the employer—then, the employer should be able legally to agree to pay for more than half the cost, and perhaps even the entire cost of arbitration. This would be a negotiable item and dependent on many factors, both legal and practical.

Anyone familiar with bargaining requirements under the National Labor Relations Act might wonder how an employer could confine an EGAP organization to the limited subject matter of grievances and arbitration. An employer cannot insist on such a limitation, but it can bargain for it. And if the EGAP representative of the employees agrees to grant to the employer unilateral control of all other mandatory subjects of bargaining, including wages, hours, and other terms and conditions of employment *except* for the employee grievance and arbitration plan, then so be it. That would not be unlawful.

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23. See *infra*, note 24, at 732 n.1 (Bernhard-Altmann is the name of the company involved, not the case).

24. *Int'l Ladies' Garment Workers' Union v. Nat'l Labor Relations Bd.*, 366 U.S. 731 (1961).

Justice Clark, writing for the majority, stated, "Bernard-Altmann granted exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority. There could be no clearer abridgment of § 7 of the Act . . ." *Id.* at 737.

The Supreme Court made that clear many years ago in the *American National Insurance*<sup>25</sup> case.

Of course, an employer will have no guarantee that its employees will not eventually want their EGAP to act more like a traditional union—no guarantee other than a carefully drafted management rights clause, an adequate zipper clause, and a contract bar doctrine which would insulate the plan for a three year period. Nevertheless, if this otherwise nonunion employer can manage to keep its employees satisfied without a traditional collective bargaining contract, and if it can lawfully and convincingly communicate management's desires by exercising its free speech rights under section 8(c),<sup>26</sup> then the lamb-like EGAP is not likely to turn into a lion-like labor union.

On the other hand, the employer might discover that employee participation which began merely as a grievance and arbitration procedure could ripen into a healthy cooperative relationship in which the employees could assume more of an active role in decision-making that affects them in the work place. Should the docile EGAP turn into an active labor union, the employees would simply be exercising their rights under the law. Hopefully, the employer and the newly active union would adjust to each other as sensible collective bargaining partners, recognizing that labor relations today and in the future ought to be more cooperative and less adversarial than it has traditionally been in this country.

I have described an EGAP initiated by the employer. I anticipate, however, that the impetus for the creation of an EGAP could come from any of four different sources. Thus, the prospect of some healthy competition might serve to stimulate their creation.

It is true that nonunion employers are a possible source of EGAP initiation. I do not, however, expect that employers with unilateral plans will rush to abandon those plans and replace them with legal EGAPs. Most employers would be happy to have their cake and eat it too. They would naturally prefer a plan that is employer controlled, and it is likely that they will continue to maintain such plans unless and until the National Labor Relations Board bars them from doing so. Accordingly, I recognize that employer support of the legal EGAPs which I have described will not soon be forthcoming, certainly not until and unless the restraints of section 8(a)(2)<sup>27</sup> are adequately enforced by the National Labor Relations Board.

But employers are not the only parties who might initiate EGAPs.

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25. Nat'l Labor Relations Bd. v. American National Ins. Co., 343 U.S. 395 (1952).

26. § 8(c), 29 U.S.C. § 158(c). Subsection (c) provides, in pertinent part: "[t]he expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." *Id.*

27. See *supra* notes 4 and 6.

A second source would be nonunion employees themselves. Upon learning that such a plan is available, they might generate the necessary action which could produce an EGAP. If the idea catches on and how-to-do-it literature becomes available, some employees might seize the initiative and organize an EGAP<sup>28</sup> or they might do this by utilizing the services of an EGAP specialist or consultant,<sup>29</sup> which would be the third source from which the impetus might come.

That third source, an EGAP specialist or consultant, will probably be an attorney, although he or she could be anyone with sufficient expertise and other suitable qualities who has access to good legal assistance. These persons could prove to be the most aggressive and ultimately the most successful movers and shakers in the establishment of EGAPs and in spreading the EGAP idea. They would certainly have something worthwhile to sell—either to employers or to employees, and sometimes even to both. There are pitfalls, however, and a legally unskilled person in this field could do more harm than good. Employees might be intimidated or fired, and employers could find themselves guilty of unfair labor practices as a result of poor advice or lack of legal knowledge on the part of non-lawyer consultants. But if the specialist or consultant is truly professional, well meaning, knowledgeable, and careful, then the role could be a very positive one in the establishment of legal EGAPs.

The fourth source of EGAP impetus will be traditional labor unions. Unions might see in an EGAP the opportunity to represent employees on a limited basis: employees they might otherwise not be able to organize. By confining its organizational campaign to the establishment of an EGAP, however, the union would effectively limit the scope of the employer's objections and defuse much of the usual antiunion rhetoric. Of course, representation which begins only with an EGAP might in time expand to full collective bargaining representation. But that would depend on many different factors not pertinent to this presentation.

Remember, EGAP stands for "Employee Grievance and Arbitration Plan." I hope EGAPs have aroused your interest. If not, then perhaps your curiosity.

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28. Although this might be with the employer's approval, it hopefully would not be with his unlawful support.

29. Usually an attorney or consultant with sufficient expertise in the area.

