

BURDEN OF PROOF IN LABOR ARBITRATIONS

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The concept of burden of proof is well established in our common law system of jurisprudence. The purpose of this paper is to consider the extent to which that concept has been introduced into labor arbitration proceedings, and the propriety and manner of its use in such proceedings.

There are many valid objections to the use of technical rules of evidence and other legal formalisms in arbitration hearings.¹ Burden of proof has never been specifically objected to, however, and the writers generally seem to have accepted the concept's usefulness in arbitrations.² A typical rationale seems to be that "since arbitrations are adversary proceedings, one party or the other must 'prove his case,' which requires consideration of the burden of proof."³

But have the arbitrators accepted burden of proof as a useful tool to be used in hearings before them? It is true that the greater number of arbitration opinions do not even mention burden of proof.⁴ This may largely be explained by the fact that burden of proof has no effect on the final outcome of a large majority of cases, whether at law or in arbitration.⁵ And in arbitrations there is the additional factor that many arbitrators wish to make it perfectly clear that the case was decided on its merits rather than on any legal technicalities in order to avoid arousing the natural suspicion of parties involved who have no legal training. These two factors may go a long way toward explaining why burden of proof is not more frequently spoken of in the reported arbitration decisions.

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¹ See, for example, Singer, *Labor Arbitration: Should It Be Formal or Informal*, 2 L. L. J. 89 (1951); Mayer, *Judicial "Bulls" in the Delicate China Shop of Labor Arbitration*, 2 L. L. J. 502 (1951).

² ELKOURI, *HOW ARBITRATION WORKS* (1952), pp. 164-168; GOLLUB, *DISCHARGE FOR CAUSE* (1946), p. 14; UPDEGRAFF AND MCCOY, *ARBITRATION OF LABOR DISPUTES* (1946), p. 96; Beck, *Evidence, Burden and Quantum of Proof*, 1949 WASH. U. L. Q. 89.

³ Beck, *op. cit.*, p. 89.

⁴ Of approximately 300 arbitration opinions reported in volume 19 of the Labor Arbitration Reports and the first 350 pages of volume 20 of those Reports, only some 30 cases speak of burden of proof.

⁵ UPDEGRAFF AND MCCOY *op. cit. supra* note 2 at p. 96.

Taking these factors into consideration, a sufficient number of arbitration reports speak of burden of proof to indicate that it is a matter at least worthy of consideration. Before reaching any true estimate of the value of burden of proof in this field, however, we must examine some of the particular situations in which it has been applied. This paper will not attempt to investigate all the possible situations where questions of burden of proof arises. Instead, we will look at the instances where the question has arisen with sufficient frequency to present a fair number of decisions on which to base our discussion.

During our examination it will be well to keep in mind the generally accepted maxim that the party asserting the affirmative of an issue has the burden of proof.⁶ The principle sounds disarmingly simple. Its application is alarmingly difficult. As Wigmore says:

“The truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations.”⁷

Arbitrability

In investigating a few of the “different situations” which may arise in labor arbitrations, it seems appropriate to begin with the issue of arbitrability. Before any dispute may be settled by arbitration it must be demonstrated that the question is one which the parties have contracted to submit to arbitration. In determining whether an issue has properly been submitted to their jurisdiction, arbitrators have generally said that unless the issue is one specifically submitted to arbitration by the terms of the contract, the party asserting the authority of the arbitrator has the burden of proof.⁸ Where the matter is specifically made arbitrable by the contract, any party asserting oral modification of the written contract or waiver of its provisions has the burden of proof.⁹

These rules are in accordance with the accepted legal rules governing interpretation of written contracts. In opposition to the

⁶ WIGMORE, EVIDENCE (3rd ed.), § 2486.

⁷ *Ibid.*

⁸ Jack & Heintz Precision Industries, Inc., 20 LA 289, 293 (1952); Waterfront Employers Ass'n of the Pacific Coast, 2 ALAA par. 67, 779 (1953); The Flintkote Co., 3 LA 723 (1946).

⁹ S. Karpen & Bros., 12 LA 276 (1949), involving oral modification of a written contract; Super-Cold Corp., 8 LA 187 (1947), waiver.

application of ordinary rules in this field, it could be argued that the general policy favoring industrial peace warrants placing the burden on the party denying arbitrability in all cases. This argument has met with no success. Its failure may be explicable on the basis of a general feeling that, where the matter is not clearly assigned to arbitration under the terms of the contract, collective bargaining by the parties is preferable to the decision of a third party.¹⁰

Promotion and Lay-off

The decisions as to who has the burden of proof in cases involving challenged promotions or lay-offs are by no means uniform.¹¹ The different results as to who should bear the burden may largely be explained in terms of the contract clause involved in each case. The great majority of contract clauses limiting management's rights to promote, demote or lay-off emphasize either seniority or ability, or both. For our purposes, these clauses may be divided into two general groups, those which emphasize seniority as at least a factor equal to ability, and those which make ability the primary consideration with seniority only a matter of secondary import. To the writer it appears that where the burden of proof is placed has been made to turn on which of these groups the contract clause involved falls within. Where the contract clause makes seniority the dominant factor and provides that only something near equal ability is required, the burden of proof is generally said to be on the company to prove that its failure to act strictly on the basis of seniority was justified.¹² On the other hand, where the contract provides that promotions or lay-offs shall be according to skill, ability and seniority, with the latter being decisive only if the first two are equal, the union has the burden to show that the allegedly aggrieved individuals were of equal ability.¹³ Similarly, where the only duty on the management is to make promotions in good faith, the union has the burden of proving lack of good faith.¹⁴

¹⁰ Jack & Heintz Precision Industries, Inc., *supra* at note 8.

¹¹ ELKOURI, *op. cit. supra* at note 2, p. 164.

¹² Quaker Shipyard and Machine Co., 19 LA 883, 887, 888 (1952); Campbell Soup Co., 19 LA 1 (1952); Seeger Refrigerator Co., 16 LA 525, 529 (1951); Darin & Armstrong, 13 LA 843, 846 (1950); Columbia Steel Co., 13 LA 666, 668 (1949); Chrysler Corp., 5 LA 333 (1946); Ford Motor Co., 2 LA 374 (1945).

¹³ International Paper Co., 19 LA 403 (1952); Merrill Stevens Dry Dock & Repair Co., 17 LA 516 (1951); Republic Steel Corp., 17 LA 105, 109 (1951); Combustion Engineering Co., 9 LA 515 (1948).

¹⁴ Durham Hosiery Mills, 12 LA 311, 315 (1949).

This distinction based upon the type of contract clause involved appears to be a step consonant with the probable intent of the parties. Where the collective bargaining agreement provides that seniority is to be the decisive factor unless a difference in ability is present, the general indication is that in the ordinary situation promotions or lay-offs are to follow seniority, unless a special reason for another result is shown. Placing the burden of showing the special reason on the company is an aid to maintaining seniority as the general determinant. Conversely, placing the burden of showing equal ability on the union seems to effectuate the intent of the parties where they provide that ability is the factor to which foremost consideration is to be given.

Placing the burden on the union under contract clauses emphasizing ability can only be justified, however, if we realize that the concept of burden of proof is properly composed of two separate factors, burden of persuasion and burden of going forward with the evidence.¹⁵ Insofar as the discussion above indicates that in some situations the burden of proof in promotions or lay-offs is on the union, the burden is limited to burden of persuasion. To impose also the burden of going forward with the evidence on the union would require it to attempt to rebut the company reasons for finding a difference in ability while the company's basis for its decision was still unknown. That is to say, the union's evidence in these cases is chiefly rebuttal, and it would be unfair to require the union to rebut the company's position without knowledge of the reasons therefor.¹⁶ Logically, the burden of going forward with the evidence should always be imposed on the company in the usual promotion or lay-off case. Whether this rule would be accepted is not clear from the arbitrators' reported opinions, since they speak generally in terms of burden of proof and it is impossible to tell from the opinions which party made the first presentation of evidence.

It has been suggested that a management clause in the collective bargaining agreement is sufficient to place the burden of proof in promotion cases on the union or employee.¹⁷ Two arbitrators have mentioned these clauses in placing the burden of proof on the union,¹⁸ but in both cases the contract clause specifically referring

¹⁵ WIGMORE, *op. cit. supra* at note 6, §§ 2497-2498.

¹⁶ ELKOURI, *op. cit. supra* at note 2, p. 165.

¹⁷ GOLLUB, *op. cit. supra* at note 2, p. 14.

¹⁸ Merrill Stevens Dry Dock & Repair Co., 17 LA 516 (1951); Combustion Engineering Co., 9 LA 515 (1948).

to promotion placed ability first and made seniority only a secondary consideration. It is not clear that either decision would have been different if the management clause had not been present. There is no good reason why a general management clause should affect the burden of proof question if there is a specific contract clause dealing with promotions or lay-off. It is highly improbable that the management clause was intended by either party to the contract to affect the burden of proof or provides reliable indicia of the attitude of the parties toward the right to promote or lay-off.

The quantum of proof necessary in promotion or lay-off cases is often not discussed, the arbitrators merely assigning a general burden of proof. Several formulae have been suggested: "clear and convincing proof,"¹⁹ "an unmistakable, readily demonstrable, major degree of proof,"²⁰ "the greater weight of the evidence,"²¹ and "reasonable and substantial proof."²² It is extremely doubtful that it would be helpful or possible to establish one talismanic formula to cover all the possible situations.

Discharge

The great majority of arbitration opinions involving discharge for cause place the burden of sustaining the discharge on the management.²³ It could be argued that on theory a different result should have been obtained in these cases. If the arbitration proceeding is viewed as an attempt to reinstate a discharged employee the union is affirmatively asserting that the employee should be returned to his job. Under this analysis the union should bear the burden of proof since it is making the affirmative assertion. The argument was properly rejected, however, since the true view is that the discharge itself is the affirmative action involved, and since

¹⁹ Campbell Soup Co., 19 LA 1 (1952); Darin & Armstrong, 13 LA 843, 846 (1950); Durham Hosiery Mills, 12 LA 311, 315 (1949).

²⁰ Quaker Shipyard & Machine Co., 19 LA 883, 888 (1952).

²¹ Combustion Engineering Co., 9 LA 515 (1948).

²² Seeger Refrigerator Co., 16 LA 525, 529 (1951).

²³ For example, Wm. H. Walsh Co., Inc., 20 LA 174 (1953); Fairbanks Co., 20 LA 36 (1951); Ford Motor Co., 20 LA 13 (1952); Crawford Clothes, 19 LA 475, 479 (1952); Panhandle Eastern Pipe Line Co., 19 LA 413, 415 (1952); Century Foundry, 19 LA 380, 384 (1952); Aviation Maintenance Corp., 8 LA 261, 268 (1947); American Smelting and Refining Co., 7 LA 147, 150 (1947); American Liberty Oil Co., 5 LA 399 (1946); A. S. Beck Shoe Corp., 2 LA 212 (1944); Campbell, Wyant & Cannon Foundry Co., 1 LA 254, 262, 263 (1945).

the company has made the discharge it must affirmatively support that action.²⁴

Other reasons militate toward placing the burden of proof in the usual discharge case on the management. The management alone knows the reasons for the discharge and the evidence warranting the action, or at least has better knowledge of these facts. To require the union to present its evidence first would here, as in the promotion cases, call upon the union to attempt to rebut all possible bases for the action. Since it naturally follows that rebuttal evidence should be the last received, burden of going forward with the evidence should be on the company. Burden of persuasion is usually placed on the company in these cases partly as a matter of construing contract clauses referring to "just cause," and partly because of the severity of the economic penalty of discharge.

Notwithstanding the general imposition of the burden of proof on the company in the cases involving discharge, several arbitrators have reached a contrary decision. A few of these cases may be explained by the peculiar contract terms involved.²⁵ Others are not so easily explained.

In *United Air Lines, Inc.*,²⁶ the arbitration involved the propriety of a discharge of an airline pilot for incompetency. The question of burden of proof was strongly contested by the parties. The arbitrator held that in view of the company's duty to the public to provide safe travel facilities, the burden lay on the pilot to show that he had been wrongly discharged. In so holding the arbitrator realized that he was departing from the general rules:

"Whatever may be the true rules as to these matters [burden of proof and degree] in ordinary cases, the paramount interest of the public in safety would justify departure from those rules in a case of the sort now before us."²⁷

Under the circumstances, the departure from the ordinary rules regarding burden of proof certainly appears proper.²⁸ But what

²⁴ For a specific example of a rejection of the notion that the union is the party desiring the affirmative action see *Swift & Co.*, 12 LA 108 (1948).

²⁵ In *Carbon Fuel Co.*, 1 ALAA par. 67, 327 (1946), the employee had the burden of proof where the contract required him to show that he had been "unjustly dealt with." Where the contract provides for probationary employees, these employees have the burden of showing arbitrary action by the company if they are discharged during the probationary period. *North American Aviation, Inc.*, 19 LA 565, 569 (1952).

²⁶ 19 LA 585, 587 (1952). ²⁷ *Ibid.*

²⁸ Here, as in the promotion cases, we must assume that burden of proof is used to mean only risk of persuasion, since the union's evidence is chiefly rebuttal.

degree of public interest must be involved before the burden changes hands? Does the public have a sufficient interest in the competency of a bus driver? A munitions plant worker? The *United Air Lines* opinion is the first to suggest that a paramount public interest may shift the burden, and since the case is of recent vintage there is no certainty how far the doctrine will be carried.

In another recent case it seems to have been suggested that the discharged employee should bear the burden of proof under some circumstances because of the necessity of maintaining plant discipline.²⁹ In that case two employees were discharged for smoking. At the hearing the only evidence was the testimony of a supervisor who said he saw the violation and the testimony of the employees, who denied that they had been smoking. Had the arbitrator chosen simply to believe the supervisor instead of the discharged employees, his decision would have presented no problem for us. The decision rests on a different basis:

“The union was unable to present positive proof to buttress its case. . . . To rule against management in a case based solely on the personal testimony of a member of the supervisory staff as against the personal testimony of two employees could very well . . . jeopardize the responsibility vested in those who direct and supervise. . . .”³⁰

This may be unfortunate language expressing a just result. Taken at its face value, it indicates that where a supervisor accuses an employee of a wrong which is cause for discharge, and the employee denied the accusation, the union has the burden of presenting evidence other than the testimony of the employee in order to prevent discharge. This result may be explained by saying either that the supervisory employee's testimony is always entitled to the greater weight or that the testimony of the two men cancels out and the union is left with the burden of presenting other evidence. From either viewpoint the position is untenable. There is no reason why an arbitrator should blind himself to the testimony in individual cases by adhering to a strict rule that a supervisor's testimony is always entitled to preference. Nor is there sufficient reason to justify a departure from the general rule that burden of proof in discharge cases should be placed on the company.

*Grayson Heat Control Ltd.*³¹ represents another situation where

²⁹ Standard Oil Co. (Indiana), 19 LA 795 (1952).

³⁰ *Id.*, p. 796.

³¹ 2 LA 335 (1945).

it is sometimes said that the union must bear the burden of showing a discharge to be improper:

“Where there is substantial evidence justifying a conclusion that the employer is opposed to organization of his employees or has shown a previous hostile attitude to a labor organization representing his employees, then it would appear that the major burden of proof would be upon the employer. . . . But where, as in this case, there is substantial evidence justifying a conclusion that the employer is not opposed to organization of his employees . . . then it would appear that the practical application . . . is to hold the discharge proper unless the evidence is very convincing that a finding of discharge for just cause is arbitrary.”³²

This logic has been accepted by other opinions and writers.³³ On analysis, however, this does not mean that in any discharge case the union has the *initial* burden of proof. What we are here concerned with is the situation where the company has already shown a sufficient reason to discharge and the union contends that the discharge would still be unwarranted because discriminatory toward union members or officials. The burden on the union is to show discrimination sufficient to prevent an otherwise valid discharge. The union does not have the burden of proving the discharge improper from its inception. On the primary question, the existence of a sufficient reason to discharge, the burden will remain with the company.

As was true with regard to promotion and lay-off proceedings, the cases involving discharge have failed to establish any certain pattern regarding the degree of proof to be required. The decisions have spoken of “a fair preponderance of the evidence,”³⁴ “clear and convincing proof,”³⁵ “proof beyond a reasonable doubt,”³⁶ “the weight of the evidence,”³⁷ and evidence “sufficient to convince a reasonable mind of guilt.”³⁸ The cases appear hopelessly irrecon-

³² *Id.*, p. 338.

³³ Carnegie-Illinois Steel Corp., 1 ALAA par. 67, 332 (1946); Bendix Aviation Corp., 1 ALAA par. 67, 082 (1946); GOLLUB, *op. cit. supra* at note 2, p. 15.

³⁴ American Smelting & Refining Co., 7 LA 147, 150 (1947).

³⁵ Fairbanks Co., 20 LA 36 (1951); Aviation Maintenance Corp., 8 LA 261, 268 (1947).

³⁶ American Smelting & Refining Co., 16 LA 416 (1950); Bethlehem Steel Co., 2 LA 194, 196 (1945).

³⁷ Deere Manufacturing Co., 19 LA 203 (1952).

³⁸ Stockham Pipe Fittings Co., 1 ALAA par. 67, 460 (1946).

cilable, and it again must be questioned whether these verbal formulations of the requisite burden of proof are helpful in proceedings before arbitrators.

There is one line of decision in regard to quantum of proof which merits consideration, however. Where discharge is based upon an alleged criminal act, some arbitrators have analogized to the criminal law and required proof beyond a reasonable doubt.³⁹ Such a heavy burden on the company is justified on the grounds that discharge is the strongest economic penalty available, and where a discharge is upheld on criminal grounds the worker's reputation also suffers greatly. On the other hand, the analogy to criminal law is not applied to civil cases based on criminal acts.⁴⁰ Arbitrations of labor disputes are more closely related to civil actions than criminal proceedings in the type of sanctions imposed, so why borrow quantum of proof requirements from criminal actions? Still, the writers seem to have accepted "beyond a reasonable doubt" as the proper quantum where criminal actions are the basis for the discharge.⁴¹

Regardless of the particular word formulae used to express the degree of proof necessary to sustain or overrule a discharge, it is clear that burden of proof has been used in such a way as to show that arbitrators are loath to impose a discharge, the ultimate penalty available. Frequently the arbitrators have been willing to impose a lesser penalty where they felt that the evidence was insufficient to warrant discharge.⁴² And an examination of the cases certainly indicates that the degree of proof required to sustain a discharge is greater than the degree of proof necessary to sustain actions involving promotion and lay-off.

Conclusion

As has been noted, burden of proof will not be an important factor in most arbitrations, affecting usually only the order of the presentation of the evidence. Though it is impossible to tell, it seems probable that in many cases burden of proof is merely used as "icing on the cake" to buttress a decision reached without it.

³⁹ A. S. Beck Shoe Corp., 2 LA 212 (1944); Continental Paper Co., 16 LA 727, 729 (1951).

⁴⁰ WIGMORE, *op. cit. supra* at note 6, §§ 2497-2498.

⁴¹ GOLLUB, *op. cit. supra* at note 2, p. 16. Beck, *op. cit. supra* at note 2, p. 90.

⁴² Brinks Inc., 19 LA 724 (1953); Armen Berry Casing Co., 17 LA 179 (1950); Bethlehem Steel Co., 2 LA 194, 196 (1945).

Certainly erroneous use of burden of proof by an arbitrator is not grounds for judicial attack on his decision.⁴³

Yet, there apparently are instances where burden of proof has been, and will be, helpful. It would be too much to presume that the concept is of no aid, in the face of the many cases in which it has been argued and imposed. Moreover, the decisions regarding burden of proof show a certain consistency, as this paper has attempted to demonstrate. That consistency is in part due to the fact that use of burdens has been controlled, to a large extent, by analogy to the principles used at law. At the same time, it shows that the arbitrators have generally taken into account the factors peculiar to labor disputes and arbitrations. For example, discharge cases may be explained on the ground that the company has the affirmative of the issue and should bear the burden of proving its case. But that statement would mean little without the considerations that discharge is the strongest economic punishment available under a collective bargaining contract, and the reasons therefor are best known to the company.

By attempting to set out the general lines along which decisions regarding burdens have fallen, this paper does not intend to suggest that there has been, or should be, any rigidification of the use of burden of proof by arbitrators. One of the greatest values of arbitration, admittedly, is flexibility. The decisions have value only insofar as they show the reasons underlying the application of burden of proof to different situations arising in arbitration hearings.

That the decisions collected herein fall generally into certain patterns should not be taken to indicate a rigidity in the approach of arbitrators to the question of who should bear the burden in a particular case. Rather, the great majority of opinions seem properly to have considered each case on the merits involved in the situation. Such uniformity as has been reached appears to be more the result of a like reasoning on similar situations than any adherence to a fixed rule. Assuming that this flexibility in its application will continue, our conclusion must be that burden of proof is a proper and useful weapon in the armament of arbitrators.

⁴³ ELKOURI, *op. cit. supra* at note 2, pp. 148-149.