CHAPTER 9

EXPEDITED ARBITRATION

I. A CANADIAN "EXPEDITER'S" VIEW

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The promise and the performance of expedited arbitration: What happened when all the frantic activity of expediting the hearing of arbitration cases, which so many people were hyping a few years ago, died down? Many of you remember some of the systems of expedited arbitration that were put in place. Where are they now?

I'm not really one to talk about the performance of expedited or any other sort of arbitration. I'm one of the perform*ers* and can't claim to be an objective critic. Of course the parties can't be expected to be objective either, but they don't have to be: it's not an objective evaluation we should hope for, but some assessment of the parties' degree of real satisfaction with—I certainly don't say "enjoyment of"—the system.

I am also one of the promis*ers,* having been involved in various systems of expedited arbitration, some of which are still functioning. In that capacity, my plea is that I kept my part of the bargain. I was there on the dates arranged, and I issued the awards within the time limits specified. Well, bravo! I'm all right, Jack. And with that I should simply thank Frances for putting me on this distinguished panel and retire gracefully, leaving the floor to Bob Colosimo who is, so to speak, a victim of the systems in which I participated and, therefore, able to speak with more authority about its performance.

On the other hand, Frances expects me to stay, and besides it's only fair to give Bob Colosimo something a little more substantial to deal with.

Pressure grew to expedite the hearing and the decision of ar-

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bitration cases because delays in arranging hearings and in issuing awards were causing unrest among grievors and general unease among the parties with regard to the arbitration process as a whole. That situation was in large part simply a function of a growing number of grievances (due in substantial measure to the organization of groups of employees previously unorganized, or at least not fully participating in the collective bargaining, grievance, and arbitration processes—I think especially of public servants and teachers), relative to a fairly stable number of arbitrators and—don't forget—parties' representatives. Full schedules result in delay.

It does not follow, of course, that the remedy for delay is fewer full schedules. I urge both full employment of arbitrators and more of them—and there are more of them, as a result of training and recruitment programs of all sorts. These programs tend to have a relatively low "success" ratio, but perhaps that should be taken as showing that they have been good ones. The point is to develop acceptable arbitrators, and even a modest increase in the number of arbitrators who are both acceptable and busy would do much, and has done much, to alleviate the problem.

That increase must be matched, however, by an increase in the number of persons ready and able to present cases to arbitrators. And that means increased costs for the system as a whole. Those who want the comfort and convenience of speed must recognize that it does have a price. Since delay, too, is costly, the price—provision of sufficient human resources to deal efficiently with the adjudications called for in modern industrial society with a collective bargaining regime—is surely not excessive.

The parties to expedited arbitration sought to find their own way out. Ad hoc arbitration, even with an established panel of arbitrators named in a collective agreement, is subject to delay. Why not arrange with the arbitrator to be present on a particular day—*and* to reserve time for preparing awards? The arbitrator will be happy to sell his time to the parties, and to accept this sort of retainer. The parties, if they really want to, can easily solve their delay problems (for cases going to arbitration; I say nothing about the delays that may occur in the course of the grievance procedure). The judicious use of a form of mediation proceeding may help in that regard, but that is another story.

That's the easy part of expedited arbitration. Finding an arbitrator and signing him up might best be described in medical

language—a procedure providing "regular recurring part-time relief."

Let me just insert a brief parenthetical note here: The arbitrator has made a time commitment, not just for the hearing, but for the preparation of the awards. He must respect that deal, and he must get the awards out within the time limits. What may be an appropriate time limit will vary with the type of case the system is designed to handle. In a very few quite special situations—perhaps construction or longshoring would be examples—"on the spot rulings" given without written reasons may be appropriate. Apart from such situations, however, it is my view that an arbitrator should never give a decision for which he has not prepared written reasons, however brief. Nothing in a system of expedited arbitration (with the possible exceptions just referred to) requires the substitution of a "gut reaction" or "feeling" for a decision. And if one cannot set down, however briefly, the reasons which lead one to a decision, it is not worthy of the name. It is the writing out of those reasons which leads one to the decision, and which often enough corrects one's "feeling" as to what the decision was to be. To announce a decision and later to prepare the reasons is simply to set out justifications for the announced feelings.

Since, in the system of expedited arbitration, it is not necessary to issue an elaborate award in which the circumstances are described at length, the issues are analyzed with subtlety, and the jurisprudence is canvassed for the arbitrator's solitary pleasure, the setting-down on paper of the reasoning that leads to a decision can be done quickly and the reasons expressed tersely. It can, if necessary, be read to the parties at the hearing itself, after a brief adjournment, although in all but emergency cases I should think it a better practice not to do that. Even in expedited cases, time for consideration is needed, and I doubt if the parties really appreciate having their arguments disposed of with what might appear to be unseemly haste. The "bench award," which, you will have gathered, I oppose, is not at all a necessary incident of an expedited arbitration system. The prompt award is.

Now let me return to the arbitration itself. Systems of expedited arbitration usually attack the delay problem on two fronts: the scheduling of arbitrators' time, and the multiplication of the number of cases heard. It is this compression of the hearing, so that several cases can be heard in one day, which is the real se-

cret of success of an expedited arbitration system. That compression, of course, is the hard part. When it works, it solves the delay problem, and it makes a huge dent in the cost problem, although it may involve a certain increase in preparation costs—in staffing—since the work is intensified, not spread out.

I am involved in two systems of expedited arbitration which I think are successful. The representatives of the parties tell me that they are—but, again, that is scarcely an objective assessment. One of these is at the Sudbury operation of the International Nickle Company. Academy member Earl Palmer and I go to Sudbury once a month on a rotating basis to hear the cases scheduled to be heard by what the parties call a "grievance commissioner." In the Sudbury agreement, Inco and Local 6500 of the Steelworkers have provided for an alternative arbitration procedure. Their arbitration clause is similar to one they have had for years and calls for arbitration by a board composed of company and union nominees and a chairman selected in rotation (although this may really mean according to availability) from a list of nine arbitrators (including the two who are grievance commissioners).

The parties try to do a certain amount of advance planning in order to have arbitrators available; it is not done on a strictly ad hoc basis, but there is no retainer system (except for the two grievance commissioners). Unless the parties agree to present a case to the grievance commissioner, it will proceed to the board of arbitration. There, the parties present their cases in a relatively formal way. Most hearings take a full day; some take several days. When the parties do agree to proceed before the grievance commissioner, however, they present their case by way of brief. There are rarely any witnesses. The briefs are exchanged before the hearing and are sent to the arbitrator. He reads them before the hearing and may—and sometimes does—indicate to the parties that evidence should be called on a certain point. The hearings serve mainly the purpose of clarification of the parties' positions. A number of cases—I think as many as 14, more often half a dozen or so, and sometimes none at all—are heard each month. The decisions are to be given within seven days, and they are. It may be noted that the agreement calls for a written decision without reasons, but adds that the parties may request reasons—and from the very start there has been a standing request for them.

This system has indeed expedited the hearing of arbitration

cases and has allowed the parties to deal, apparently satisfactorily, with what had been a large backlog of cases, some of which had not been reaching arbitration for years. It is an optional system, and given that fact and the nature of the operations—a large mining and smelting complex—it is not surprising that most of the cases going to the grievance commissioner involve matters of minor discipline, temporary promotions, or overtime. On rare occasions, the grievance commissioner may hear a discharge case.

I think the factors that allow this system to work are these: (1) There is a relatively large volume of grievances. (2) There is a relatively large bargaining unit (about 15,000 when the system was introduced), concentrated in a relatively small geographical area. (3) The parties are sophisticated with respect to collective bargaining and contract administration.

The other system with which I am involved, the Canadian Railway Office of Arbitration, provides ad hoc resort to an impartial umpire. The office was established in its present form some 20 years ago, following a "Board of Adjustment." The two national railroads and five major railway unions are signatory to the agreement establishing the office, which has a headquarters and a hearing room in Montreal. The bargaining units covered are essentially the operating trades and maintenance of way and clerical workers. The largest group of employees not covered would appear to be the shopcrafts. A number of other railroads and unions have "attorned," as it were, to the jurisdiction of the office. The arbitrator is retained on an annual basis and, so far at least, the turnover of arbitrators has been low. Hearings are held starting on the second Tuesday of every month, in Montreal, and are attended by whatever parties may be involved. They come from regions coast to coast.

Under the various collective agreements (and there are a number), this is the method of arbitration for all cases. It is not strictly speaking a system of expedited arbitration. However, cases are expeditable and may be brought on for hearing with as little as one month's delay. The delays that do occur are in the grievance procedure itself, not in the arbitration process. Again, many cases are heard in a single day, or series of days. Awards are issued within 30 days—all in writing together with written reasons therefor, as the agreement requires.

Here, too, cases are presented by way of brief, although they are not exchanged prior to the hearing. Again, witnesses are

rarely called. The whole range of subjects for arbitration would seem to have been covered in the roughly 1100 decisions which have now been issued. Those of you who have calculated quickly will have seen that, over the years, about five cases have been heard per sitting. In fact, for many years the average was less than that, and there have been a few months with no cases. Quite recently, however, the caseload has increased dramatically. I think this is due in part to a fear on the union's part (not entirely justified, in my opinion) of the "fair representation" provisions of the Canada Labour Code and of how the Canada Labour Relations Board will apply them. It is due in part as well, I think, to a change in railway tradition and to increased militancy in one form or another among some groups of union members. Whatever the reasons, the system is, for the moment, bringing forward to arbitration a volume of cases which strains the proper functioning of the Office of Arbitration. We are at a stage which calls for patience and a steady eye on the long view on the part of the employers, the trade unions—and the arbitrator.

Up to now at least, the system has been thought of as functioning very well. It is flexible, it has developed what I hope is a useful jurisprudence, and it is surely cost-efficient. The reasons for its success, I think, are that (1) there is a relatively large volume of grievances; (2) the parties are sophisticated with respect to collective bargaining and contract administration; and (3) the representatives on both sides of the table, those responsible for the administration of the grievance and arbitration procedure, have in almost all cases been brought up—often like their fathers before them—as railroaders. They share the same tradition. Thus, while the bargaining unit or units are geographically immense, this system functions with a sense of community. I doubt if it would function effectively without that. I should add that the arbitrator himself has come to participate in that sense of community. I think that that is advantageous.

These two systems of expedited arbitration were carefully worked out to suit the needs of the parties, and they have worked. What they have in common is that they handle arbitration cases resulting from large numbers of grievances. For these parties, going to arbitration is not an unusual event. They can afford, psychologically speaking, to waive the formalities and run the risks—for there are risks—that are implicit in abandoning the trial-like procedure followed in the formal arbitration case. It is for this reason, of course, that to be successful, a sys-

tem of expedited arbitration must rely on experienced arbitrators. Another common feature of these two systems is that the men and women representing the parties are sophisticated in the use of expedited arbitration. That, I might add, does not necessarily follow from the mere fact of being involved with a large bargaining unit and a lot of grievances. Third, they have, whether by reason of geographical compression or by the force of tradition, a sense of community, as well as a sense of practical economics, which supports their acceptance of the system.

In the province of Ontario, an amendment to the Labour Relations Act was passed a few years ago as a response to the sort of complaints I referred to earlier with respect to delay in the arbitration process. That amendment provides that, notwithstanding the arbitration provision in a collective bargaining agreement, a party to that agreement may request the Minister of Labour to refer a difference arising under the agreement to a single arbitrator appointed by the Minister. The arbitrator is to begin a hearing on the matter within 21 days after receipt of the Minister's request. There are provisions protecting the time limits that the parties may have negotiated, but it is clear that this legislation permits either party to a collective agreement to bypass, unilaterally, the arbitration provision it negotiated. That this legislation is now widely used demonstrates Gresham's law, but also demonstrates (let arbitrators beware!) that "acceptability" may not be all that important. The Ministry has a long list of arbitrators. Some are experienced, some are not. We may think that the parties take a big risk in giving up their control of who shall decide their case, but some parties seem not to mind. This method serves to expedite hearings, although it relates only to the provision of an arbitrator and not to the compression of hearings. There is some irony to be noted in the fact that many of these cases are adjourned—even at the request of the party that invoked the legislation in the first place.

Apart from the fact that, in my opinion, an arbitrator appointed by the state is not, strictly speaking, an arbitrator at all because he or she is not appointed by the parties, this legislation, in giving them an apparently easy solution to one problem, has placed a new weapon in their hands—one which may be used to the detriment of harmonious labor relations and which will create new problems.

These are some of my reflections on various efforts to expedite the hearing of arbitration cases. The development of a system of expedited arbitration that works is a matter of accommo-

dating a number of conflicting interests and calls for thoughtful negotiation. It can be done, and has been done in the two instances I have described. Not all of the governing factors, however, are in the parties'—or indeed anyone's—control.

II. THE CANADIAN RAILWAY EXPERIENCE

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Several weeks ago, while I was making a purchase at a local delicatessen, I saw a sign posted over the cash register. It said: "Rule 1—The boss is always right. Rule 2—If the boss is wrong, see rule 1."

I should imagine there are many of us who wish the arbitration process were that simple. But it isn't. Indeed, it has become such a time-consuming and troublesome process, for those on both sides of the dispute, that labor specialists are looking for ways to streamline it. Today, the magic phrase is expedited arbitration. It is seen as the simple solution to a complex problem, and therein lies its deficiency. There are *no* simple solutions to complex problems. *That's rule 1.*

I have been asked today to discuss the promise and performance of expedited arbitration. However, I would also like to go a step beyond. Drawing on Canadian railway experience, I would like to offer you a workable and *working* alternative. More on this later.

To begin, let's take a look at everyday reality for a number of industries across the continent. Schizophrenia and marriage aside, it takes no fewer than two to make a dispute. In our context, it is the employee and the boss, and the scenario often goes like this.

Fred works in a heavy industrial environment where heat, noise, and some highly expressive language are the order of the day. His supervisor, Jo-Anne, is pretty much one of the boys—up to a point. One day Fred returns from his morning break five minutes late. Jo-Anne tells him it's the third time this month and enough is enough. Fred makes a fist, extends his middle finger, and walks away. He is suspended without pay for insubordination.

He goes to his union and argues that he meant nothing per-

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