Following this inquiry, the union took a caucus. That caucus eventually extended two to three hours, whereupon the union returned with not simply an answer as to the remedy sought but a proposed settlement of the entire case. Once I understood what remedy the union was seeking in the context of a settlement, a serious discussion on resolving the case could ensue. In fact, very shortly after the union made its proposed settlement/remedy, the case was settled. Thus, a full and careful exploration of remedy can provide a basis for settling a case. If, however, the remedy is simply stated as, "If so, what shall be the remedy?" the parties never get to that process. Moreover, if remedy is discussed at the very outset before there is a clear idea of how the case will proceed, the union may seek a very broad remedy that will preclude settlement. However, if a discussion on remedy is delayed until sometime later in the case, that discussion may lead to settlement. For this reason, it seems to me that a separate proceeding or part of a proceeding should be devoted to a review and discussion of alternative remedies. Although I am not suggesting that this be conducted pre-hearing, I am suggesting that it may be better placed later in the hearing, even while its nature is that of a pre-hearing or perhaps a separate hearing.

The above examples are only a few recent examples of situations where a supplemental hearing or other procedure was or could have been useful. In fact, I think that it is the exceptional case where such a procedure would not be beneficial.

For this reason, I concur with Ms. Brown that extra hearing procedures should be adopted, as a matter of course.

III. UNION PERSPECTIVE

SHAWN C. KEENAN*

Susan Brown began her talk by describing for you the "old, converted monastery in Maine," where, for seven years, I did an average of two or three arbitration hearings per month. There was not a great deal of time to prepare for so many hearings, let alone attempt discovery or complex pre-hearing procedures. Most hearings were completed between 10 A.M. and 4 P.M., with no lunch break. Exhibits were generally admitted without objection. All

*General Counsel, Maine Education Association, Augusta, Maine.

witnesses were sworn, and constrained by their own counsel to be brief. Occasionally, we wrote post-hearing memoranda, usually because we were too weary of the proceedings to do oral closings.

Counsel for the State of Maine and I resolved pre-hearing issues great and small during the settlement negotiations preceding the hearing. This was particularly useful for complex seniority or discipline cases that might require a second (but almost never a third) day of hearing.

All we asked of the arbitrator was to interpret the contract language in dispute. We did not require a preliminary determination of what the shape of the conference table should be—although, as Ms. Brown described, a particular arbitrator might offer his own uninvited opinion of the venue.

Most procedural problems would occur when opposing counsel discovered that I had developed a "new and improved" theory of the case part way through my opening statement. The most consistent procedural annoyance for the arbitrator, however, would come at lunch time: we shared the building with other functions and groups on overnight retreats; new arbitrators would be startled by the clanging of the lunch bell. Counsel would instruct the arbitrator not to worry—unless we should hear a solo trumpet, which would signal that the record was now closed for eternity.

Any arbitrator who recognizes this story will remember that both counsel in Maine combined effective advocacy with expedition and simplicity. We had procedural disputes and court appeals, of course, but I am proud to say that we had less than our share. I now do only a few hearings as General Counsel for Maine's educators, but as a legal consultant and occasional arbitrator myself, I recognize that advocates and neutrals alike are under constant pressure to complicate, attenuate, and litigate the arbitration process. Therefore, as one who now represents teachers and other educators, let me borrow something from my clients and offer to this group my own "Pre-Hearing Primer."

"A" is for Arbitrability, "B" is for Bifurcation (or) Bench Ruling, and "C" is for Courthouse (because that is where A and B will lead you)

In one of our northern school districts, a school nurse's contract was not renewed after two years of unblemished performance. We

had evidence that she had suffered reprisals for filing a grievance to gain access to her personnel file. School administrators refused to supply reasons for her nonrenewal, saying that she was probationary. The contract said that "all sections (except salary) that refer to teacher also refer to school nurse" and elsewhere that "nothing in this contract applies to questions pertaining to the nonrenewal or dismissal of probationary teachers."

The contract was silent, however, as to the specific length of the probationary period. There is a teacher employment statute that recites that teachers shall serve no more than two years on probation in a district. There is another statute applicable to other municipal employees that says that no employee shall be probationary for more than six months, unless otherwise provided by charter or ordinance. The grievant had never been issued the standard-form teacher probationary employment contract.

At hearing, the school's attorney demanded bifurcation, stating that we had brought this case to arbitration in bad faith to compel the employer to give testimony as to the reasons for nonrenewal. No reasons are required for probationary teachers.

Over the union's objection, the arbitrator allowed bifurcation and would admit evidence on only the issue of arbitrability, that is, whether the parties had intended to treat nurses in all respects like teachers. Before the union could offer evidence on the merits, the arbitrator made a bench ruling that the grievance was inarbitrable. In a memorandum opinion issued later, the arbitrator declined to address the question of which statute (up to two years for teachers or not more than six months for others), if any, might have been incorporated into the contract.

Feeling we had been deprived of our day in arbitration, we filed a motion to vacate under Maine's Uniform Arbitration Act; a prohibited practice complaint under the bargaining law; and a tort claim for wrongful discharge (none of which would have been done had we lost the arbitration fair and square on the merits).

Counsel for the union argued that the grievance was facially arbitrable and that the grievant was deprived of a fair hearing. The school district argued that the court should defer to the arbitrator's interpretation of the probationary language in the contract, the standard that applies to an award on the merits. The judge responded by holding that the arbitrator had ruled on the merits without hearing evidence on the merits and remanded for further hearing. The union resisted using the same arbitrator.

Neither party wished to proceed, however, because both the arbitration award and the court decision were badly flawed. After winning its procedural motion in arbitration, all the school district had gained was more litigation. The case was resolved by a lump-sum payment to the grievant, probably from the insurance carrier.

Although it is natural for litigators to seize any procedural advantage in a proceeding, doing so can sometimes backfire, especially in arbitration. The employer in this case caused the arbitrator to issue a flawed award on an incomplete record. Had the arbitrator merely heard the entire case, even the arbitrability ruling would have had a better chance of being upheld.

"E" is for Economy, Expertise, and Expedition

These are the standard reasons why arbitration is better than any other procedure for resolving labor disputes. The courts are now encouraging alternative dispute resolution (ADR) to resolve disputes in lieu of formal civil litigation. That is another form of mediation and arbitration, techniques that those of us in the labor business have been using for more than half a century. If the courts are trying to become more like us, why should we try to become more like them?

"P" is for Process

Professional litigators are naturally uncomfortable with grievance arbitration. (Who knows how much "process" is really "due" the parties in arbitration?) Yet it is suggested that arbitrators hold pre-hearing conferences to resolve (usually the employer's) procedural issues. We all know that the purpose of such procedural motions is either to avoid a hearing altogether or to control the issues that are likely to become dispositive. Why should arbitrators hold a hearing to decide whether to have a hearing? How much advantage does a party (usually the employer) really obtain by wrangling over the statement of the issue? Should not every effort be devoted to facilitating, rather than frustrating, arbitration?

Litigators are uncomfortable with arbitration because it is said there are too few ground rules—as if procedural rules have made lawsuits more civilized. I am fond of recalling a scene from the western movie "Butch Cassidy and the Sundance Kid," where Paul Newman and Robert Redford return to their hideout only to find

that the biggest, ugliest, and meanest member of their gang has taken over. The ogre offers to fight five-foot something Paul Newman with a two-foot something Bowie knife. Newman protests, "Wait, first we have to agree on some rules." "Rules?" says the ogre, "In a knife fight?" To which Newman surprises him with a kick in the groin!

Most litigation is like a knife fight, which we think should proceed by certain rules, but which frequently hits below the belt, involving scorched-earth discovery, interlocutory appeals, and years of conflict proceeding toward a wholly uncertain result. Even experienced litigators who are not cynical will tell you that outcomes may depend more on which judge you get and who the jurors are rather than the law supporting your cause or even the expertise of your counsel. Most cases settle because justice is better served by negotiated terms rather than by win or lose adjudications.

Arbitration can be like that too, of course, but at least you can fire—or rather, nonrenew—arbitrators who displease you. Although judges can be reversed for allowing inadvisable evidence to be heard by the jury, arbitrators are vacated only for refusing to hear evidence material to the controversy or refusing to postpone the hearing upon sufficient cause being shown.

Naturally, arbitrators should allow each party its "day in court" without going to court. That means the arbitrator hears nearly everything each party wants to get on the record and then decides the arbitrability issue without necessarily deciding the merits. Employers do not like this because they believe the arbitrator will sympathize with a strong case on the merits and lean toward the union on arbitrability. But if the employer's case appears so weak on the merits, is it really wise to rely so heavily on a procedural defect to ensure that the union will never get to put on its case? Remember your A, B, Cs now. . . .

"T" is for Transcript

Arbitration is supposed to be final and binding. Asking for a verbatim transcript (except to assist the arbitrator) is premeditating some kind of appeal. A litigator who is unsure of the case will direct his or her attention, not to the judge or jury, but to the court reporter in order to preserve issues for appeal. (We have all heard a litigator blurt out, "strike that" when he or she mispeaks in

arbitration—even when there is no stenographer to strike anything!)

This is where people forget the *"E" for Economy* in arbitration: union advocates are paid usually by the year; arbitrators are paid by the day; employer's counsel are paid by the hour; and court reporters are paid by the page! Where would you start if you wanted to save money?

"Ow!" is for Outside Counsel

When I was young and foolish I resisted any attempt by my union members to engage outside counsel on an arbitration. But part of maturing (personally and professionally) is relinquishing control. If an employee feels strongly about using his or her own counsel, then I would suggest that counsel do the arbitration (probably at the employee's own expense, except that the union would still pay the arbitrator) and release the union from any responsibility for the outcome. In any event, it should not be left up to the arbitrator to decide how many lawyers should be in the room when the parties would be better able to work that out.

The most complex seniority case I ever handled was the one I ended up not handling. When a northern Maine community lost 120 of its 180 educators due to layoffs, it seemed at least that the school district was applying the appropriate contract standard on seniority and impact areas. But a dissident faction charged the union president and chief negotiator with "collusion" because they would not support grievances where there was no contract violation. The unfair labor practice charge was settled by an agreement that the issue would be submitted to grievance arbitration. Meanwhile, a new slate of officers was elected by the dissidents, since the majority of teachers was subject to layoff.

The dissidents employed their own counsel. The union paid its share of the arbitrator's fee and allowed the dissidents to proceed in the union's name. I shared a back bench with school board members and neither appeared nor testified for either party. Four grievances on the disputed issues were processed over two hearing days (plus one by an unrepresented individual who agreed with neither the union nor the dissidents). No procedural objections were made by anyone. All the arbitrator was asked to do was interpret the contract's layoff provisions as applied by the school district.

Throughout the hearing, the dissidents' counsel repeated how his clients had been "rifted" by the school district. During the first meal break, the arbitrator (who recognized me even in civilian dress) remarked to me that "the only 'rift' in this case appears to be within your union." Nevertheless, it was (nominally) the union that appeared at arbitration to advance its own interpretation of the contract. Unfortunately, the interpretation changed when the union officers changed. Yet the dissidents were forced to resort to representing the disputed issues presented by the layoffs, instead of their own individual claims.

That is why I have consistently advised my own local unions to decide whose rights are supported by the contract and defend that interpretation. Thus, it is the contract, and not merely individuals, that the union is defending, and it is the union that must find a way to resolve its own internal conflicts. Sometimes, as in this case, it may be inevitable that an arbitrator will have to decide the interpretation issues. But union leadership should be able to explain to the employer the course of action—even on layoffs—that will not necessarily result in a blizzard of grievances.

"R" is for Remedy

The best way to win at arbitration is to control the issues. If the union believes it has a strong case on the merits, or at least a strong due process issue, then it would want to deal with the merits without delay. If the employer believes there is a strong arbitrability claim, then it will do all it can to interpose that issue into the process. But sometimes the employer may try to control the remedy portion of the hearing, and I think we know how those can lead to additional hearing days, or worse, the arbitrator retaining jurisdiction.

It is important for the advocates to argue their positions as to the appropriate remedy in their opening statements. Once each party has revealed what it intends to prove and how it wants the arbitrator to remedy any violation, there can be remarkable accord, or strident discord.

Although every layoff case presents conflicting interests between union members, sometimes an employer will try to exploit the situation. One of my locals supported the right of a nonmember (Maine public sector is generally open shop) to bump the least senior teacher in the bargaining unit whose job he was certified to perform. There had been some internal conflict over whether the union should allow a nonmember to displace a dues-paying

member of the local. At the hearing, the union asked the arbitrator to reinstate the senior teacher with backpay. The employer asked the arbitrator to order the school district to lay off the least senior teacher as a remedy for the violation.

The union perceived this as an attempt to maneuver it into further conflict between its members and nonmembers and resisted it. The union argued that the violation required only a "make whole" remedy for the grievant. Thereafter, if the employer still perceived the need to make a layoff in that subject area, they could do so and the union would evaluate whether that transaction was a violation. But in no way, argued the union, should the arbitrator supplant the school board's statutory duty to eliminate programs and lay off teachers. After the grievant was reinstated, the employer attempted no more layoffs during that year.

In a difficult case, however, there is no substitute for the parties devising a stipulated remedy in advance of the arbitration, and then submitting only the merits to the arbitrator for decision. Sometimes it is impossible to restore the status quo, as it was in the case of an alcoholic law enforcement employee I once represented.

After his employer urged him to submit to a residential treatment program, the employee returned home and, while intoxicated, promptly crashed his state-issued law enforcement vehicle. I knew I could get him off because the grievant had not yet been returned to official duty and was still technically on sick leave when he was fired for being drunk on duty and destroying state property. I convinced opposing counsel to stipulate to a remedy. The arbitrator decided that the employer was at fault for allowing the grievant to retain his state vehicle at home while being treated for alcoholism.

The problem was that, after the grievance was initiated, the employee was arrested again and again for drunk driving, even after his license was under suspension. He had failed at least two additional treatment programs. He was simply unfit to return to duty. We stipulated that if he were fired without just cause, the remedy would be to reinstate him on paid sick leave so he could retain his health insurance, then on an unpaid leave when his sick leave ran out; require him to complete residential and out-patient treatment again; restore him to non-law enforcement duty; and otherwise incrementally bring him back into service, if he totally abstained from alcohol. We were unable to implement this remedy because the grievant died.

Nevertheless, this kind of case illustrates how parties can make the process work best if they retain control by agreement. Too often the advocate will attempt to control the proceedings by injecting procedural issues to which opposing counsel can never agree and that the arbitrator must decide at the risk of denying the parties a fair hearing.

Conclusion

Control is an illusion, of course, because once the responsibility for decisionmaking is given to the arbitrator, the issue is out of the parties' control. The best way to control the issues is to resolve them between the parties themselves. The fundamental issues in any grievance are: "What does the contract mean?" and "What would have happened if there had been no violation?" The rest is smoke and mirrors.