III. Necessity Is the Mother of Invention: Reducing the Costs of Disputing—Successes and Failures

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Introduction

One of the hallmarks of collective bargaining agreements is that they contain procedures for the peaceful resolution of disputes. Traditionally, these procedures involve the union or employee filing a grievance, which is then considered by management at some level, or perhaps considered by a committee composed of both union and management members. The grievance might be further considered at different levels of the management organizational structure. Ultimately, absent resolution, the union will have the opportunity to take the dispute to arbitration.

The grievance-arbitration procedure has been embedded in law as a central feature of the unionized work place. The courts have recognized the primacy and pivotal role of such grievance-arbitration procedures in two distinct ways. First, as a matter of process, where a grievance-arbitration procedure exists, it is the employee's exclusive means to resolve a contractual dispute, at least absent a union's breach of the duty of fair representation.[1] Second, as a matter of substance, the courts are extremely deferential to the merits of arbitrators' "final and binding" awards.[2] The grievance-arbitration procedure has become so engrained as part of the fabric of collective bargaining that we sometimes forget that this process itself is a form of alternate dispute resolution (ADR) designed to provide a mechanism to avoid the need for judicial litigation and to promote the timely resolution of workplace disputes.

Today, I would like to review the scope and the development of the grievance-arbitration procedure in the Postal Service with the particular purpose of identifying changes, differences, and various techniques that have been used by the Postal Service and the

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[1] *Vaca v. Sipes,* 386 U.S. 903 (1967).

[2] *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

unions representing postal employees to achieve a more effective and functioning conflict resolution procedure.

The Grievance-Arbitration Procedure in the United States Postal Service: Scope

The United States Postal Service is, as far as I can tell, the largest unionized employer in the world. According to *Fortune* magazine, the Postal Service is the fourth largest employer in the world[3]. The world's largest employer—Wal-Mart—is not heavily unionized. I also assume that the labor laws and human resources policies of the world's second and third largest employers—the Chinese state-owned petroleum company and the Chinese state-owned utility company—do not incorporate arm's length collective bargaining as we have come to know it.

The Postal Service employs 700,000 career employees, and 625,000 of them are represented in bargaining units. There are another 100,000 non-career employees, and about 65,000 of those are included in union-represented units. Given that the total number of unionized workers in this country is about 8 million in the private sector and 15.4 million overall, the 690,000 postal bargaining unit employees constitute a significant portion of America's unionized workforce. The sheer size of the Postal Service makes it an employer with a major stake both in the topic, and in the reality, of conflict resolution in the workplace.

Certainly, the grievance-arbitration procedure has been and remains a critical part of the union-management relationship in the Postal Service. The Postal Service has nine bargaining units represented by seven unions, but 99 percent of its bargaining unit employees are in one of four major national unions: the American Postal Workers Union, AFL-CIO (APWU); the National Association of Letter Carriers, AFL-CIO (NALC); the National Rural Letter Carriers' Association (NRLCA); and the National Postal Mail Handlers Union, AFL-CIO (Mail Handlers Union). We have various arbitration panels with all of our unions. We have arbitration panels for disciplinary cases, for contract cases, for expedited cases, for jurisdictional cases, and for national cases. We not only have these categories of panels with each union, we have them

[3] *See* http://www.usps.com/strategicdirection/_txt/FiveYearPlan2004-2008.txt.

separately in each geographic area of the country. We literally have hundreds of arbitration panels, and we currently have 635 arbitrators serving on them.

In Fiscal Year 2006, postal arbitrators decided 3,021 cases, presided over 5,019 hearing days, and received from the Postal Service and postal unions about $6.7 million in fees and expenses. Since 2000, postal arbitrators have decided 35,013 cases, while the Postal Service and the unions have resolved 258,651 cases without the need of arbitration.

As large as these numbers are, however, the real story is in the fact that the number of disputes in the Postal Service's grievance-arbitration procedure has gone down dramatically in recent years. While I mentioned that postal arbitrators decided more than 3,000 cases in 2006, they decided closer to 7,000 in 2001. That number has been steadily declining ever since.

A statistic that we closely monitor as an indication of progress in this area is the number of grievances pending arbitration. This statistic tells us a lot both about the number of disputes being filed and how efficiently those disputes are flowing through the system. This number, as recently as the end of fiscal year 2002, was an overwhelming 111,796. Between 2002 and 2006, this number was reduced by an impressive 82 percent, to 19,152.

Although this is still a large number in absolute terms, the fact that the parties have managed to reduce so dramatically the number of disputes in the system portends well for their ability to address these issues, as well as disputes that arise in the future. This is a huge change from the 1990s. Fueled, perhaps, by incidents of tragic shootings, more frequent resort to interest arbitration, and heightened public rhetoric, the state of labor relations in the Postal Service was considered bad enough in the mid-1990s that the General Accounting Office (GAO) investigated and issued reports on the issue not once, but twice. The reports, especially the first one, were not particularly positive. The Director of the Federal Mediation and Conciliation Service (FMCS) convened "labor summits" between postal management and union leaders. Now, however, we are able to talk about dramatically reduced levels of disputes throughout the system. It is a much more pleasant topic to discuss.

The Grievance-Arbitration Procedure in the United States Postal Service: History

Let's review for a few minutes how some of the main features of the grievance-arbitration procedure developed.

After the Post Office Department was transformed into the United States Postal Service in 1971, the first collective bargaining agreement contained substantial grievance-arbitration procedures. This first agreement covered 99 percent of bargaining unit employees, as the four major national postal unions bargained together at that time. The grievance procedure included a four-step process. The first step involved the employee (who might or might not be represented by a steward) discussing the grievance with his or her immediate supervisor. The second step required an appeal in writing at the installation head level. The third step permitted an appeal to management at the regional level. The fourth step was an appeal at the national level. "Final and binding" arbitration might be taken after either Steps 2, 3, or 4.

A significant development related to the effort to enhance the effectiveness, efficiency, and cost of dispute resolution occurred in the collective bargaining negotiations in 1973 when the parties agreed, on an experimental basis, to establish "Expedited Arbitration." This process was originally designed for routine disciplinary grievances and featured requirements that the hearing be informal, that no briefs be filed, that the hearing normally be concluded in one day, and that the arbitrator's decision be issued either as a bench ruling or at least within 48 hours. As many of you know, expedited arbitration remains a significant feature of postal grievance-arbitration procedures and has been expanded to include nondisciplinary disputes of a more routine nature.

Subsequent rounds of bargaining resulted in other changes designed to enhance the effectiveness and efficiency of the grievance-arbitration procedure. Class grievances were authorized in 1975. A substantial rewrite of the procedure in 1978 emphasized the preference for settling grievances at the lowest possible level, the requirement of full disclosure of the parties' contentions and arguments, the joint responsibility of the parties for the "efficient functioning" of the process, and the identification of

"representative" cases to resolve groups of grievances with the same or similar issues. More procedural detail on the functioning of the case assignment process was included to address issues such as scheduling and back-up cases. In addition, national level grievances and arbitration were reserved only for "interpretive issues . . . of general application." In this way, national cases would serve as binding precedent throughout the country.

With this procedure now more substantially fleshed out, the breadth of changes to the grievance-arbitration procedure in subsequent rounds of bargaining generally lessened. Moreover, the four unions that initially bargained together began one-by-one to bargain separately, with some differentiations inevitably emerging.

Also, the parties began to experiment with alternative procedures in selected locations. A "mod-15" process was tried with both the APWU and Mail Handlers Union. This modification of Article 15, the article in the contract that contains the grievance-arbitration process, generally involved allowing grievances to go to arbitration at the local level rather than first being appealed regionally. The idea was to require the parties at the local level to take more responsibility for cases that they were unable to settle. The arbitration procedures were something of a hybrid between regular and expedited arbitration.

In addition, the Postal Service and the NALC experimented with a process of jointly considering disputes, called "union-management pairs," or "UMPS." In 1992, the Postal Service tried transferring the responsibility for Step 2 decisions from Labor Relations to the Operations managers impacted by those decisions, but that decision was ultimately reversed. Mediation provisions were added to the APWU collective bargaining agreement in 1994. No time-off suspensions were adopted, in part, because of considerations related to the impact on the grievance-arbitration procedure.

A more fundamental change in the grievance-arbitration process was incorporated into the collective bargaining agreement with the NALC in 2002, although the parties had been experimenting with the new process for several years. The new process provided for jointly trained management and union individuals to be specially designated as a team that would review grievances, develop the facts and contentions as necessary to determine the contractual outcome, and issue a team decision. This new process

did more than just change Steps 2 and 3 to Steps A and B. It represents a genuine attempt by the parties to address the disputes, and the process for resolving them, in a more mutual way. In addition, the Postal Service and the APWU in 2003 developed more effective procedures to minimize lost hearing dates, conduct pre-arbitration case reviews, and achieve timelier Step 3 meetings.

One of the most significant developments this decade in terms of seeking to prevent disputes or, at least, to resolve them promptly, has been the development of contract administration manuals. First, with the NALC, next with the Mail Handlers Union, and then with the APWU, these contract administration manuals represent an enormous amount of work by the parties. They provide an article-by-article joint interpretation of contract provisions and a repository of the substance of previously resolved issues. They were accompanied by joint training to further emphasize their purpose as a joint document intended to lay to rest issues that might otherwise generate disputes.

There are other, less fundamental steps that have been taken to increase the effectiveness and reduce the costs of workplace disputes. Some are relatively simple and straightforward—like paying more attention to geography in arbitrator selection to reduce travel costs or, as we do with one union, limit arbitrator study days absent mutual agreement. Other steps have been taken unilaterally to demonstrate a commitment to the process of resolving disputes rather than using disputes as a means to achieve other purposes. For example, in the Postal Service's pay-for-performance program, one of the metrics for the labor relations function is the achievement of target reductions in the number of pending disputes.

Conclusion

Harking back to the title of this session, "Necessity is the Mother of Invention: Reducing the Costs of Disputing—Successes and Failures," the most significant way to reduce the cost of disputing is to reduce the number of disputes. Although process and procedure can help do that, the parties must jointly see dispute resolution as a high-priority goal to make it really happen. Hopefully, the parties at the Postal Service will be successful at continuing their efforts to further reduce the level of disputes in the postal workplace.