Chapter 7

EXPEDITED ARBITRATION: IS IT EXPEDITIOUS AND IS IT FAIR?

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The term "expedited arbitration" almost seems a contradiction in terms. Arbitration itself was intended to be an efficient way to resolve disputes without the time-consuming and procedurally complex processes found in the judicial system. Arbitration was supposed to enable labor parties to resolve their disputes quickly and fairly.

But, somewhere along the line, arbitration acquired procedural trappings of its own and became encumbered with delays, costs, and procedures associated with litigation that were never initially anticipated. Rather than having the parties present and argue their own grievances, most cases are now advocated by attorneys. The introduction of attorneys into labor arbitration has resulted in several problems. First, the cost of the process has risen considerably because it now includes attorney compensation. Second, attorneys further complicate arbitrator selection and calendaring. Third, the process has been drawn out by legalistic expectations of what the arbitrator should do. It is not uncommon for a termination grievance to take in excess of two years from the date of filing before the arbitrator issues a decision. Some grievances take as much as five years to be resolved in arbitration. There is very little that is expeditious about a grievance that takes three to five years to resolve.

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To address the issues of time and costs, parties have tried many different adjustments to their grievance and arbitration systems. Mechanisms such as grievance committees, hearings with no transcripts, hearings concluding with oral argument, hearings using non-attorney advocates, time limits for holding hearings, the use of a permanent arbitrator or a panel including two or more advocates, and other variations have been tried. It is the purpose of this paper to discuss a particular model of expedited arbitration that has proved to be useful in addressing some of the complaints parties make against the typical arbitration procedure. The process described here has been employed effectively for many years and through several successive collective bargaining agreements by parties to Kaiser Permanente contracts in California and contracts governing work on the Las Vegas Strip. This paper does not purport to suggest that the process described here is the one and only process that works, or is the process that all parties should adopt. The paper attempts to open a discussion of expedited arbitration by describing a model that has been used successfully in a number of settings and has been effective in reducing the time and costs it takes to resolve a dispute. A constant underlying consideration in this discussion is whether this model results in fair and equitable decisions that are comparable to arbitral decisions resulting from more formalistic proceedings.

If the function of a collective bargaining agreement is to establish a working relationship between the union, the employer, and the employees being represented, then the dispute resolution process inherent in that relationship must reflect the same desire. The dispute process should be designed and operated in a manner that improves the relationship between the parties and does not exacerbate or frustrate the relationship. The parties should feel comfortable using the dispute process and should not avoid it or thwart it. It should not be used as a threat for the union or management to get their way. Instead of a hammer, a grievance should be a vehicle to resolve a conflict in the relationship.

In designing an expedited arbitration procedure, it is necessary to analyze each step to determine where efficiencies can be most effective. It is also necessary to discuss the conceptual framework in which the arbitration system exists. Discussions of expedited arbitration invariably focus on the arbitration hearing and the length of time it takes to get a decision from the arbitrator. When the focus is narrowed in this way, often the only thing that is expedited is the time the arbitrator is given to issue an award while

other unwieldy elements of the process remain the same. This usually results in little expedition because arbitral decision-making is only a small part of the process and is not the step that consumes the greatest amount of time. Everyone is aware of stories about an arbitrator who has taken a year or more to issue a decision. But, in most cases, arbitrators finalize their awards within 30 to 60 days after the close of a hearing. The filing of briefs can sometimes add four or five months to the time it takes to get an award after a hearing.

Ideas for expediting labor arbitration must originate from the conceptual purpose for which it was designed. Arbitration is a process for resolving disputes arising from the terms of a collective bargaining agreement. As the Supreme Court stated initially in the *Steelworkers Trilogy* cases, a collective bargaining agreement is a living document that is not intended to cover every tiny detail of employment life between the company, the employees, and the union. It is a document that needs interpretation and appropriate application. In this way, arbitration is an extension of the collective bargaining process and a continuation of the negotiations between the parties. That is why the courts have, in many respects, treated collective bargaining agreements differently from commercial agreements. Arguments about what constitutes a past practice or what the parties intended a particular provision to do relative to pay and benefits requires an arbitrator to look into the negotiating process itself to understand where the remedy lies. One cannot separate the negotiations for a collective bargaining agreement from the process that resolves disputes arising from that agreement. As a living document, for example, the parties may by their own conduct change the understanding of specific words in a contract to mean something other than what the plain language suggests. These are the factors that make arbitration an integral part of collective bargaining and require the arbitrator to understand collective bargaining to effectively resolve a dispute.

Placing labor arbitration within the conceptual framework of collective bargaining helps determine what parts of the dispute resolution process can be expedited. It also highlights why a dispute resolved by the parties themselves on a direct negotiation basis is almost always superior to a decision imposed on them by an outside arbitrator. Because an effective collective bargaining relationship is one where the parties settle their own disputes, parties should strive to create a system that encourages resolution of all or most all disputes without the need for external intervention.

Any process that encourages the parties to push a dispute forward and, ultimately, give up responsibility for resolving it to an outside arbitrator is not a process that is going to be expeditious and should not be encouraged.

The question then is how best to establish a process for resolving collective bargaining disputes that is expeditious and fair and results in the parties resolving most of their disputes without outside intervention. Those are the challenges that gave rise to the expedited arbitration process currently being used at Kaiser Permanente in California and in the Las Vegas hotel industry. Unions and employers involved in these two expedited arbitration processes sought a way to have grievances either settled or adjudicated within one year from the date the initial grievance arose while reducing the costs of the process. These parties also sought to establish a way to have a relationship with each other that encouraged grievances to be resolved without referral to an outside party.

One of the important elements of an expedited arbitration process is who the parties are going to use to resolve a dispute if they ultimately cannot resolve it themselves. Starting with this piece of the process—which occurs at the end—creates the first building block of an expedited procedure and sets the stage for working from this point to the beginning. It may seem unusual to start at the end of the process to build the beginning, but in many ways, it is the end that controls the beginning. Considering the way disputes will be resolved in the end makes it obvious that an expedited process should not require the advocates to educate an arbitrator in every case about the employer's operations and the nature and politics of the particular employment relationship. When ad hoc arbitrators hear a dispute, the parties invariably feel compelled to educate that arbitrator about their own interpretation of the culture surrounding the dispute. In some settings, this education can consume as much as a day of hearing time and serves no real function except to educate the arbitrator. To avoid this, the expedited process discussed here uses a permanent, neutral arbitrator to hear all the parties' disputes. This ensures that the arbitrator will become familiar with the parties' operation, structure, and politics without the need for an education every time a case is heard.

Another advantage of a permanent arbitrator is predictability. After a period of time, the parties can predict how the permanent arbitrator is likely to respond to particular sets of facts. By way of

example, the parties may discover that the arbitrator is not likely to show much consideration to employees who violate privacy rights of fellow workers or patients by going into their medical files and snooping. The union can take action and warn its members to avoid this offense. The parties can also settle cases where the facts demonstrate a clear violation without hoping the arbitrator will do something different. Since there is no other arbitrator, the parties have to deal with the likely results from the permanent neutral arbitrator. The element of predictability is an important part of reaching settlements without having to take the matter all the way to arbitration.

The second element of the endpoint of an expedited system is the inclusion of an advocate arbitrator from the union and an advocate arbitrator from the employer. The employer should appoint someone who is respected by management peers and has authority above the level of a line supervisor. The union needs to do the same, making sure the individual appointed is someone with peer respect and authority above that of a shop steward.

The function for the party arbitrators is not to provide additional argument for their respective sides to the neutral arbitrator during the deliberation process. Instead, their function is to provide education and insight on the parties' needs, restrictions, organizational structure, and politics so that, in fashioning remedies, the panel can craft a real resolution of the dispute, in contrast to a strictly legal resolution. The resolution of a grievance is of little value to either the employer or the union if it fails to consider the working relationship between those organizations and their needs and conditions. Intelligent and well-respected party arbitrators who bring this information to the arbitration process achieve this end best.

To be most effective, panel deliberations must be confidential. Having a process where labor and management vote and then the neutral arbitrator breaks the tie undermines the panel's ability to work together. Collaborative decision-making, on the other hand, achieves outcomes that enhance the parties' relationship. To work effectively, the individual positions taken by panel members must remain confidential and not be revealed. Insulating the party arbitrators by eliminating concerns about the appearance of their votes permits them to function more ably and, ultimately, promotes their respective interests. In the model discussed here, the panel resolves more than 90 percent of its cases by unanimous consent. As the panel members obtain more experience in

hearing disputes, they become familiar with the appropriate outcome of a dispute and understand that the outcome is necessary to maintain the integrity of the agreement. What the panel members can do in some circumstances is modify or adjust a remedy to make it more palatable for one side or the other. For this reason, it is critical for the panel members to remain constant for the duration of a contract. Consistency and trust is not possible if panel members change from hearing to hearing.

In this model, the neutral arbitrator prepares the award and shares it with the other panel members, who then suggest changes they believe to be important. After incorporating this input, the arbitrator finalizes the decision and is the only one to sign it. Decisions are relatively short in contrast to standard arbitration decisions, and are issued within a week or two of the close of the hearing. While the parties may use a court reporter, the panel relies on the personal notes taken during the hearing to make a decision. The advocates may make oral closing arguments, but are not permitted to file briefs.

The panel process described here also gives the parties a sounding board with respect to the likely outcome of a dispute, long before a case goes to arbitration. It is expected that the parties will use their panel arbitrator to get a reaction about the likely outcome of a case if it were to be arbitrated. Panel arbitrators can educate the individuals involved from their side about how they have contributed to the problem or acted irresponsibly. In this way, the panel influences the earlier steps of the grievance arbitration process, and helps the parties focus on resolving disputes and address their causes earlier and on their own.

Some arbitration systems use multiple party arbitrators, usually two for the union and two for management. Generally, having two advocate arbitrators is unnecessary and counterproductive to the concept of expedition. The use of single advocate arbitrators for each side as described above helps the panel focus on the culture and politics of the parties' relationship, which in turn enables them to fashion remedies that are functional, creative, and acceptable to the parties' needs. Having multiple arbitrators frequently causes unproductive dynamics. Instead of focusing on the problem, panel members reargue the case to the neutral arbitrator, and vote uniformly for their side's view without regard to the evidence or the parties' practices.

Having discussed the panel, it is necessary now to turn to the presentation of evidence. In the model described here, the parties

use attorneys. When attorneys become familiar with the process and its goals, they are very effective. Initially, it took time for some attorneys to accept the expedited process. But once they saw that it worked and was fair, they became enthusiastic supporters. Attorneys bring to the process a sophisticated understanding of the rights of the parties and a clear focus on the issue in dispute. When they are willing to accept the nature of the process and their role in it, they can be skillful at protecting the interests of their side and helpful to the expedition of the arbitration process.

This model relies on elaborate and detailed opening statements presented by both the employer and the union at the outset of the hearing. The parties are not permitted to defer opening statements to the portion of the hearing for which they must move forward. These extensive opening statements ensure that all the facts the parties anticipate presenting are placed on the table at the very beginning. This enables the panel to determine what is disputed and consider how to limit the scope of the hearing. Opening statements should identify the witnesses the parties intend to call and their anticipated testimony. They should also identify and explain any other type of evidence that will be relied upon, such as paper documents, videotapes, recordings, or other forms of data.

After opening statements, the panel excuses the parties and meets in caucus to discuss the opening statements and documentary evidence. During this discussion, the panel members agree among themselves what facts are relevant, and what appears to be in dispute and what is undisputed. Based on the issue presented by the case, the panel then directs the parties to call witnesses on a limited basis to address critical disputed facts or to present other material relevant to the disputed facts. The panel informs the parties that the other, undisputed facts will be assumed to be accurate.

This system is the same system used in many civil law countries in Europe and in South America. There, judges control the collection of evidence, instead of having to rely on selective evidentiary presentations that serve only individual interests and may not provide a complete picture of the dispute. The intent of this model is to present sufficient evidence to get at the reality of the dispute and the cause of the problem. This may or may not be helpful to the individual grievant, but it does result in a finding that is fair to both the union and to the employer, and to the integrity of the collective bargaining agreement. Collective bargaining, by its nature, places the collective interest ahead of the

personal interest of any particular individual. In this respect, if an individual employee is creating significant problems, this model does not permit that individual to hide and obfuscate evidence that would make it possible to have his or her conduct excused. The process is intended to demonstrate the truth of a situation so the problem can be resolved.

Having the panel control the presentation of evidence saves enormous amounts of time and makes it possible in some instances to hear four disciplinary cases, including discharge cases, in a day. Before the introduction of this model, grievances took an average of three hearing days to arbitrate. Some grievances took up to five years to reach a hearing. Now, the parties have reduced the delay time to approximately a year or less from the date a grievance is filed until it is resolved, with most of the processing time devoted to corrective action steps and not the arbitration process. Hearings now take less than a day, allowing the parties to schedule multiple cases on an arbitration day. Hearing dates are scheduled a year in advance and rarely cancel. If a case settles, the next case on the parties' agenda can be heard.

In the parties' opinion, the outcome of disputes heard through the expedited system has remained relatively constant. The union prevails approximately as often now as it did before the adoption of this model. Critical to this is the way evidence is presented at the hearing, and the control the panel has over the evidence it needs to hear. The process is panel-driven, and not advocate-driven. The advocates can express their opinion about evidence the panel has deemed unnecessary should they believe that something else must be heard in order to fully understand the dispute. The panel, however, maintains control over what evidence will be introduced.

For this system to work, all evidence must be shared between the parties in advance of the arbitration hearing. If either the union or the employer is aware of relevant information that has significance to the outcome of the dispute and fails to share that information with the other side, the panel will refuse to hear the evidence. This forces the parties to address the reality of the circumstances surrounding the dispute and not to focus on winning or losing a particular grievance. The goal of this expedited process is not to establish a track record of wins or losses. It is, instead, to create a system that will effectively enhance the relationship between the employer and the union so they can solve problems more efficiently and productively. The union, the employees, and

the employer gain when their relationship is better and disputes are resolved based on their fundamental merits, not on the particular advocacy skills of one side or the other. Winning or losing is totally irrelevant to this particular principle. An employer may be willing to hire very skillful lawyers and win every case and, yet, in the end the employer's productivity and relationship with its employees may suffer significantly as a result of that success. This is not a healthy or productive outcome to a dispute resolution process established under a collective bargaining agreement.

A joint fact-finding committee, while not necessary to an expedited system, can be an effective vehicle for sharing facts with the other side prior to the arbitration. Joint committees sometimes are more effective, and sometimes less effective. The concept, however, in its purest form, is to select uninvolved individuals from the labor side and the employer side, and assign them to investigate, gather, and organize the information regarding a dispute. Witnesses can be interviewed jointly and all information from the beginning to the end is shared uniformly. In theory, fact-finders should be able to agree on the facts. If a joint conclusion can be reached about what occurred, then the issue becomes whether the action taken by the employer—in a disciplinary case, for example—is appropriate.

A party's panel member can be very useful at this stage. Even if some facts are disputed, a panel member can assess the nature of those facts and determine which facts are more likely to be credited by the panel. It does not serve the interest of either labor or management to defend employees or supervisors without regard to their credibility or how poorly they performed their responsibilities. The union or the company are better advised to tell their constituents that it is unlikely that the panel will accept their account. Instead of backing and protecting individual supervisors or employees simply because they are represented, the parties can establish on a factual basis what caused the dispute and resolve it at the earliest stage possible.

This brings the system design process back to the very first step, the filing of a grievance. When a grievance is filed, the union and the company now need to look at the process and see where that grievance is likely to go. If, based on the experience of the panel members, it is apparent the grievance is not likely to be successful, the time and energy of that party is better spent resolving the dispute instead of pressing it forward. It is helpful, in this respect, for the parties to agree on mutual extensions of time limits so

the resolution process can work its way through to a conclusion without the need for a grievance to be filed. This obligates the union steward and manager to take a responsible look at the problem in the first level of the grievance procedure to determine the nature of the problem and its cause. This can resolve problems and enhance the parties' relationship at the level where an issue arises.

As stated at the outset, arbitration was intended to be an efficient process, but, through the years, it has acquired many of the trappings of the litigation process and become cumbersome and counterproductive to the parties' needs. In designing an expedited arbitration process, it is imperative that the parties focus on what it is that they wish to expedite. Expedition does not mean doing something faster to get it done sooner. Expedition means the elimination of unnecessary steps, unnecessary evidence, and unnecessary polarization.

In conclusion, if the parties are willing to look at the resolution of disputes as part of the collective bargaining process, then finding a system that could help resolve those conflicts in an expedited manner is not that difficult. It requires cooperation and creativity. It requires that each element of the process be reviewed and that decisions concerning each step of the grievance machinery be addressed so that an integrated whole can be created. If the parties are willing to do this, they can create a grievance resolution process that is helpful and productive in improving the relationship between labor and management. They can create a system that operates more efficiently than the standard arbitration process and at a significantly reduced cost.

Ultimately, it is up to the parties to develop a dispute resolution process tailored to their collective bargaining relationship and effective for their needs. There is no standard process the parties are obliged to follow to resolve a dispute. What works best will vary depending on the size and nature of the disputes. If the arbitration process promotes collective bargaining, it can be both expeditious and fair to everyone's interest.