

## CHAPTER 6

### NEW PERSPECTIVES ON OLD PROBLEMS

#### I. ELAPSED TIME IN GRIEVANCE ARBITRATION

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A unique contribution of the American system of industrial relations has been the voluntary grievance arbitration procedure. Despite the fact that unions and employers are not required by law to include grievance arbitration in their agreements, over 97 percent of all negotiated contracts have these provisions.<sup>1</sup> The widespread acceptance of grievance arbitration by both unions and management is evidenced by the fact that, once negotiated in a contract, such provisions are seldom excluded from subsequent agreements. Eloquent testimony to the durability of grievance arbitration was provided during the early 1980s when management succeeded in wringing concessions from unions in many areas of the agreement. Yet, the record is devoid of a single major agreement in which grievance arbitration was eliminated. Indeed, there is no evidence that management demanded deletion of these provisions in negotiations.

Among the many values of grievance arbitration, one of the most important is that the process decides unresolved grievances expeditiously. Speed in resolving workplace disputes is particularly important in discharge cases because, under nearly all contracts, the grievant is removed from the job pending resolution of the grievance.

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<sup>1</sup>Stieber, *The Future of Grievance Arbitration*, in *Arbitration 1986: Current and Expanding Roles*, Proceedings of the 39th Annual Meeting, National Academy of Arbitrators, ed. Walter J. Gershenfeld (Washington: BNA Books 1987), 205.

Given the importance of speed in grievance arbitration, it is relevant to examine the trend in elapsed time from the filing of a grievance to the issuance of the arbitrator's award, starting in the 1940s, when grievance arbitration provisions were included in many collective bargaining agreements, to the 1980s, when virtually all contracts include such provisions. It is also desirable to ascertain the time consumed by the intervening steps in the grievance process from the date the grievance is filed to the date of the arbitrator's award.

Unfortunately, because of the voluntary and private nature of grievance arbitration, only a small percentage of all decisions are published. Furthermore, even published decisions vary widely in the kind of information needed to determine the elapsed time between various steps in the process. Many decisions omit one or more of the following: when the incident giving rise to the grievance occurred; the date the grievance was filed; when the grievance was appealed to arbitration; the date of the arbitration hearing; whether or not there was a transcript; and date of posthearing briefs, if any. For most published cases, it is possible to determine only the date of the grievance, the hearing date or dates, and the date of the award. Some published decisions even omit one or more of these dates.

The availability of information improved in the 1960s when the Federal Mediation and Conciliation Service (FMCS) started publishing elapsed time data for cases processed through its office. In the 1980s the American Arbitration Association (AAA) started requiring arbitrators to fill out a form for each case, which included the kind of information necessary to determine elapsed time in the grievance arbitration process. Unlike the FMCS, the AAA has not published elapsed time information on a regular basis.

Despite these shortcomings it is possible to determine a definite trend in elapsed time in grievance arbitration cases from articles in professional journals, FMCS and AAA reports, and from a study of arbitration decisions in 1986 in one region of the AAA. This paper will present and analyze the available information on elapsed time in arbitration cases and will suggest some of the reasons for the indicated trend.

#### **Trend: 1940s to 1980s**

The earliest published analysis of elapsed time in grievance cases was an article by Arthur Ross in 1957 entitled "The Well-

Aged Arbitration Case.”<sup>2</sup> Using Bureau of National Affairs, Inc. (BNA) *Labor Arbitration Reports*, Ross compared arbitration decisions completed in 1945 and 1946 and in 1955 and 1956. He found that “over the past decade the time span between the first and last steps of the arbitration process has tended to lengthen significantly.” The average elapsed time from the grievance date to the decision increased by 52 percent, from 133 days in the 1940s to 202 days in the 1950s. The period from the grievance to the hearing accounted for most of the elapsed time: 100 days in 1945–1946 and 112 days in 1955–1956, an increase of 12 percent. The time from hearing to decision went from 28 days in the earlier decade to 46 days in the 1950s, an increase of 65 percent. (Ross notes that the average elapsed days for the intervening periods cannot be added to obtain the total elapsed time from grievance to decision because each average refers to a different group of cases for which the particular information was available.)

Ross also presented elapsed time data for four different types of cases: (1) wage rate, job classification, and fringe benefits; (2) employment security; (3) discharge and discipline; and (4) procedural and miscellaneous. He noted that the data for discharge and discipline cases are of special interest because potential retroactive pay is accruing, and discharged employees are unemployed and need to know if they should be seeking other permanent employment. Elapsed time from grievance to decision in discharge and discipline cases rose from 121 days in 1945–1946 to 151 days in 1955–1956, an increase of 25 percent. The time from grievance to hearing increased by 34 percent, from 82 days to 110 days, and from hearing to decision by 15 percent, from 34 to 39 days.

We have carried the Ross analysis forward from the 1950s to the 1980s for discharge cases in which the grievant was dismissed for insubordination. Because of limited resources we examined only this one category of cases published in BNA's *Labor Arbitration Reports*, starting with the decade of the 1950s to the decade of the 1980s. We included only ad hoc decisions because they are more comparable than decisions in cases decided by permanent arbitrators. For each decade we examined insubordination discharge cases for a 3½ year period: September 1955–February 1959, September 1965–February 1969, September 1975–Feb-

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<sup>2</sup>Ross, *The Well-Aged Arbitration Case*, 11 *Indus. & Lab. Rel. Review* 262 (1958).

ruary 1979, September 1985–February 1989. Because hearing dates were available for only a small number of cases, we present in Table 1 only the elapsed time from grievance to decision.

Table 1 data indicate that the average elapsed time between grievance and decision in discharge-for-insubordination cases increased by 60 percent from the 1950s to the 1960s, by 42 percent from the 1960s to the 1970s, but decreased by 11 percent in the 1980s. Overall, the average elapsed time rose from 124 days in the 1950s to 251 days in the 1980s, an increase of 102 percent. The increase in median elapsed days was smaller, 71 percent. These figures are not directly comparable to the Ross data because they cover only discharge cases for insubordination decided by ad hoc arbitrators, while Ross included all discharge and discipline cases regardless of the source of arbitrator designation. Nonetheless, the trend noted by Ross for a single decade is shown to have continued in the ensuing three decades.

### FMCS Cases

The FMCS has been publishing data on elapsed time in processing grievances through arbitration since 1963. Table 2 presents elapsed time data in 5-year averages for the 25-year period 1963–1987.<sup>3</sup>

Total time for processing a grievance from the date the grievance was filed to the date of award rose from an average of 214 days in 1963–1967 to 364 days in 1983–1987, an increase of 70 percent. Average elapsed time increased by 13 percent

*Table 1. Elapsed Days, Grievance Filing to Decision, Discharge for Insubordination Cases*

Period	N	Mean (% Change)	Median (% Change)
9-55 to 2-59	28	124	133
9-65 to 2-69	53	198 (60%)	153 (15%)
9-75 to 2-79	54	282 (42%)	233 (52%)
9-85 to 2-89	28	251 (-11%)	227 (-3%)

<sup>3</sup>FMCS figures are from Annual Reports, supplemented by unpublished data and corrections for the years 1978–1987, provided by Jewell L. Myers, Director of Arbitration Services.

Table 2. FMCS Cases. Five-Year Average Elapsed Time (in days) From Grievance Filing to Arbitration Award by Fiscal Year

	1963- 1967 <sup>a</sup>	1968- 1972	(% Change)	1973- 1977	(% Change)	1978- 1982 <sup>b</sup>	(% Change)	1983- 1987 <sup>b</sup>	(% Change)	(% Change) 1963-1967 1983-1987
Total:										
Grievance—award	<u>214.2</u>	<u>242.9</u>	<u>+ 13.2</u>	<u>246.8</u>	<u>+ 1.6</u>	<u>259.4</u>	<u>+ 5.2</u>	<u>364.1</u>	<u>+40.4</u>	<u>+ 69.7</u>
Grievance—request for panel	83.3	79.0	- 5.2	77.8	- 1.5	84.7	+ 8.9	101.7	+ 20.1	+ 22.1
Panel request—panel sent	4.9	10.3	+ 10.2	9.6	- 6.8	3.9	- 59.4	7.4	+ 89.7	+ 51.0
Panel sent—Arbitrator appointed	28.6	42.9	+ 50.0	44.6	+ 4.0	44.5	0.0	77.4	+ 73.9	+ 170.6
Arbitrator appointment— Hearing	54.0	62.5	+ 15.7	66.5	+ 6.4	72.6	+ 9.2	106.0	+ 46.0	+ 96.3
Hearing—Award	43.7	48.2	+ 10.3	48.3	+ 0.2	53.5	+ 10.8**	71.5	+ 33.6**	+ 63.6

<sup>a</sup>Does not include figures for 1964 which were not available.

<sup>b</sup>Figures include corrections provided by FMCS Arbitration Services Director, Jewell L. Myers.

between 1963–1967 and 1968–1972, then remained fairly stable until 1983–1987 when elapsed days increased by 40 percent over the previous five-year period.

Accounting for most of the elapsed time in 1983–1987 was the number of days from the date the arbitrator was appointed by FMCS to the date of hearing: 106 days, an increase of 96 percent over 1963–1967. Next in order of magnitude was the grievance filing date to the date of request for a panel of arbitrators from FMCS: 102 days in 1983–1987 compared to 83 days in 1963–1967, an increase of 22 percent. Since much of this time may have been used in trying to reach a settlement without going to arbitration, this 3½ month time lapse is to some extent understandable. Less justifiable are the 77 days it took the parties to select an arbitrator in 1983–1987, a whopping 171 percent more time than the 29 days required to agree on an arbitrator in 1963–1967. This presumably reflects the time taken to check the track record of arbitrators from the greater variety of sources available in 1983–1987 as compared with 1963–1967.

The average time from hearing to award increased by 64 percent, from 44 days to 72 days over the 25-year period. This increase was probably caused in varying degrees by the more frequent use of briefs and transcripts and to FMCS allowing arbitrators 60 days to submit awards, starting in 1979, as compared with 30 days in previous years. The time taken by FMCS to respond to the parties' request for a panel of arbitrators varied from year to year, from a low of 4 days in 1978–1982 to a high of 10 days in 1968–1972.

### AAA Cases

In a letter to members of the AAA Labor Panel, dated January 29, 1987, President Robert Coulson noted that "the average labor arbitration takes 200 days from filing to award. Some continue more than a year and, of course, the preliminary grievance procedure may take even more time." Although AAA does not publish elapsed-time data on a regular basis, in response to our request, it provided figures on the average number of days required to process cases from filing to award by AAA region for 1987 and 1988.

In 1987 it took an average of 253 days to process 5,884 cases from filing to award in the 26 AAA regions. The range in elapsed time was from 185 days in the region with the shortest

elapsed time to 331 days in the region with the longest elapsed time. The nine regions that averaged less than 200 days per case processed 1,062 cases, or 18 percent of total AAA cases, while the seven regions averaging more than 250 days processed 2,013, or 34 percent of all cases. This suggests that the busier regions took longer to process cases than the regions handling relatively fewer cases. The median time required from filing to award was 206 days for all cases. The median in 25 of the 26 regions was less than the average, indicating that the average was affected by a small number of cases which required an unduly long time to process.

In 1988 the average elapsed time for 5,740 awarded cases was 270 days, and the median 211 days, increases of 6.7 percent and 2.4 percent, respectively, over 1987. Again, cases in the regions with fewer cases showed much lower averages and medians than the busier regions.

### **1986 Cases in One AAA Region**

In 1988, with the cooperation of the national office and the one region of AAA, we were given access to the files and all awards rendered during calendar year 1986 in that region. Using a 20 percent sample of the 650 decisions (130 cases), we collected data on elapsed time from the date of the grievance to the award as well as the intervening steps in the grievance process. This information is shown in Table 3.

The average elapsed time in 1986 from grievance date to decision was 398 days; the median was 360 days. In other words, it took more than a year for a grievant to have a case resolved. Ninety-eight or 75 percent of the cases had posthearing briefs; only eight, or 6 percent, had a transcript taken of the hearing. Elapsed time for intervening steps are shown in Table 3.

Table 4 shows elapsed time for the 83 cases with posthearing briefs, a single hearing day, and no transcript. These cases represent 64 percent of the total. Table 5 presents information for the 30 cases with only one hearing day, no briefs, and no transcripts. The remaining 17 cases took more than one hearing day or used transcripts.

Cases with briefs took an average of 410 days from grievance date to award compared with 368 days for cases without briefs. The median elapsed times were 369 and 315 days, respectively. The average time from hearing to brief was 46 days. There were

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*Table 3. Elapsed Time for Arbitration Cases in One AAA Region\* (Calendar Year 1986)*

	N	Mean	Median
Grievance date to AAA filing date	126	110	78
Filing date to date panel submitted to parties	123	7	6
Panel submission to arbitrator appointment	122	35	28
Arbitrator appointment to hearing	128	167	127
Initial hearing to transcript	8	25	14
Transcript to brief	8	41	39
Initial hearing to brief	98	50	44
Brief to award	98	35	33
Initial hearing to award	129	74	70
Filing to award	129	284	254
Grievance to award	126	398	360

\*A 20% sample (130 cases) of 650 decisions.

only minor differences in elapsed time for intervening steps in the arbitration process as between cases with and without briefs.

Separating the total elapsed time into prehearing and post-hearing periods, we find that the number of days from grievance

*Table 4. Elapsed Time for Arbitration Cases\* in One AAA Region (Calendar Year 1986)*

	N	Mean	Median
Grievance to AAA filing	81	113	79
Filing to panel submission	79	7	6
Panel submission to arbitrator appointment	78	36	31
Arbitrator appointment to hearing	82	167	126
Hearing to brief	83	46	42
Brief to award	83	35	32
Hearing to award	83	81	73
Filing to award	83	294	274
Grievance to award	81	410	369

\*Cases *with* briefs, single hearing date, no transcript (N = 83).



Table 5. *Elapsed Time for Arbitration Cases\* in One AAA Region (Calendar Year 1986)*

	N	Mean	Median
Grievance to AAA filing	29	116	74
Filing to panel submission	29	8	6
Panel submission to arbitrator appointment	29	28	22
Arbitrator appointment to hearing	30	174	118
Hearing to award	30	40	28
Filing to award	30	249	185
Grievance to award	29	368	315

\*Cases *without* briefs, single hearing date, no transcript (N = 30).

to hearing was far greater than the elapsed days from hearing to award. This was true for cases with and without briefs. But the major sources of delay in the resolution of grievances were the number of days from the date the grievance was filed to the date it was submitted to AAA for arbitration, and the period from the date the arbitrator was appointed to the date of hearing. For both periods the median was significantly less than the average, indicating that the average was increased substantially by a few cases that took an unusually long time to be appealed to arbitration and for a hearing date acceptable to both parties and the arbitrator to be established.

The parties should not be faulted for taking a relatively long time to submit grievances to arbitration, because this allows more time for them to arrive at a settlement without resorting to arbitration. While negotiations may continue prior to the scheduled hearing date, we suspect that difficulty in accommodating to schedules of the parties as well as the arbitrator was responsible for most of the elapsed time between appointment of an arbitrator and arranging an agreed upon hearing date. None of the other steps in the grievance process appear to have taken an unreasonably long time.

### Impact of Attorneys

The increasing use of attorneys in arbitration has often been considered as contributing to stretching out the elapsed time for

processing grievances through arbitration. The rationale for this assumption is that involving advocates who have other commitments, such as appearing in court and handling other business, makes it more difficult to process cases through the various steps of the grievance arbitration process. Table 6 shows elapsed time by attorney representation for the 81 cases in which briefs were filed, only one hearing day was utilized, and there were no transcripts.

It is clear that filing posthearing briefs is closely associated with attorney representation. Approximately three fourths of all cases with briefs involved the use of attorneys by one or both parties. However, other more time-consuming aspects of the grievance arbitration process were not affected by the use of attorneys. Thus, the time involved in choosing an arbitrator and submission of briefs was no longer when one or both sides used attorneys than when neither side employed an attorney. The elapsed time from appointment of an arbitrator to hearing date was substantially greater when no attorneys were used (average = 213, median = 185) than when both parties were represented by attorneys (average = 146, median = 110) or when only the employer was represented by an attorney (average = 150, median = 126). In terms of overall elapsed time from grievance to award, the average number of days when neither side employed an attorney was 446 days as compared with 365 days when both parties were represented by attorneys, and 396 days when the employer had attorney representation and the union did not.

Based on data in Table 6, attorneys cannot be held responsible for the fact that it took over a year from the date a grievance was filed until the arbitrator's decision was rendered in this AAA region. Excluding the elapsed time from the grievance date to filing with AAA for arbitration, it took almost 11 months to resolve grievances when attorneys were not involved and only 9 months when one or both parties were represented by an attorney.

### **Conclusions**

In his 1987 letter to arbitrators, AAA President Coulson concludes: "Whatever the cause, delays from the date of the incident until the parties either settle or comply with an award, reflect upon labor arbitration and upon everyone involved." This judg-

Table 6. Elapsed Time for Arbitration Cases\* in One AAA Region by Attorney Representation (Calendar Year 1986)

	All cases (N = 81)		Both sides with attorney (N = 23)		Employer with attorney Union without attorney (N = 35)		No attorneys (N = 20)	
	Mean	Median	Mean	Median	Mean	Median	Mean	Median
Grievance to AAA filing	113	79	91	81	117	64	121	117
Filing to panel submission	7	6	6	6	7	6	7	7
Panel submission to arbitrator appointment	36	31	33	26	42	35	31	31
Arbitrator appointment to hearing	167	126	146	110	150	126	213	185
Hearing to brief	46	42	52	46	45	37	44	42
Brief to award	35	32	39	38	33	32	30	29
Hearing to award	81	83	91	85	78	70	74	71
Filing to award	294	274	288	254	276	257	325	325
Grievance to award	410	369	385	365	396	352	446	445

\*Cases with brief, single hearing, no transcript.

ment was based on 1986 statistics. Since then delays in grievance arbitration have increased. What, if anything, can or should be done to reduce the time it takes to process grievances through arbitration? Let us examine each step in the grievance arbitration procedure.

1. *Grievance Date to Filing for Arbitration.* This step takes between three and four months, which is probably at least twice as long as the contractually stipulated period in most contracts. To the extent that extensions are used by the parties to settle grievances without resorting to arbitration, they serve a useful purpose. However, if extensions reflect the failure of unions to decide whether or not to appeal to arbitration, they are more questionable. This is especially true in discharge cases where grievants are off the job without a source of income.

2. *Panel Request to Panel Sent to Parties.* The one week reported by both FMCS and the AAA region for which data are available does not appear to be excessive.

3. *Panel Submitted to Arbitrator Appointment.* FMCS cases show about 2½ months as compared with approximately one month for the AAA region. More significantly, the FMCS time for this step increased by more than a month in the 1983–1987 period. This may reflect delays in FMCS sending out appointment letters after receiving the parties' selection or difficulty experienced by the parties in agreeing upon an arbitrator and possibly requesting an additional panel from FMCS. Whatever the reason, this would appear to be a step where elapsed time could be reduced.

4. *Arbitrator Appointment to Hearing.* For both FMCS and AAA cases, this is the most time-consuming step in the grievance arbitration process. The average FMCS case took 106 days during the 1983–1987 period, an increase of 46 percent over the 1978–1982 years, and close to an increase of 100 percent compared to the 1963–1967 period. The AAA region took even longer: an average of 167 days or 5½ months, and a median of 4 months. In earlier years a shortage of arbitrators was often blamed for the delays in securing acceptable hearing days from overcommitted arbitrators.<sup>4</sup> Occasionally the parties' insistence

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<sup>4</sup>Usery, *Some Attempts to Reduce Arbitration Costs and Delays*, 94 Mo. L. Rev. 3 (1972); Kilberg, *The FMCS and Arbitration: Problems and Prospects*, 94 Mo. L. Rev. 40 (1971).

on waiting for their chosen arbitrators, who may not be available for six months or longer, may still be the cause of long delays. More likely, however, it is the parties who request a hearing date months beyond the time that the arbitrator is available to hear the case.

The two-month difference between FMCS and AAA may also indicate that involvement of an intervening agent (AAA) between the arbitrator and the parties results in some delay in securing an acceptable hearing date. Whatever the reason, this step appears to be susceptible to reduction in elapsed time. To the extent that arbitrator availability is the problem, the parties could require that the chosen arbitrator propose hearing dates within a given time period. If that arbitrator is not available within the prescribed time, an alternate arbitrator could be designated to hear the case. One contract names a six-arbitrator panel and requires hearing dates within 30 days in discharge and discipline cases and 90 days in contract interpretation cases. In a 1987 article in *Arbitration Journal*,<sup>5</sup> Arbitrator Garth Mangum notes that in coal mining cases in which he serves as arbitrator, the average elapsed time between grievance and hearing has been 62 days. He states that in one district there is a 30-day maximum between filing the grievance and holding the hearing, and discharge cases are usually held within one week. These and other examples that could be cited by arbitrators suggest that the time between arbitrator appointment and hearing could be pared substantially if the parties and the arbitrator had the will to do so.

One element causing delay in holding hearings is requests for postponement by one or both parties or the arbitrator. In the AAA cases we examined, we found that employers, unions, or both requested postponement after a hearing date had been scheduled four times more often than postponement requests from arbitrators. As previously noted, the use of attorneys by one or both parties does not appear to have been the cause for delays in scheduling hearings. However, in view of the small number of cases involved in our study, this finding is questionable.

5. *Hearing to Award.* Once the hearing has been held, the parties are impatient to receive the arbitrator's decision. While

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<sup>5</sup>Mangum, *Delay in Arbitration Decisions*, 42 Arb. J. 58 (1987).

understandable, the time between hearing and award has not been a major contributor to total elapsed time between filing of the grievance and issuance of the award. In cases that do not involve transcripts and briefs, the average time from hearing to award in the AAA cases was 40 days; the median was 28 days. In cases with briefs but without transcripts, the average was 81 days, and the median 73 days, with briefs accounting for 30–35 days. There were only eight cases with transcripts in our sample, which is too small to generate any useful conclusions.

During the 1983–1987 period it took over 70 days for all FMCS cases to go from hearing to award, including about 75 percent in which briefs were submitted and 30 percent with transcripts. Of this total 40 days were required for briefs and 32 days for the arbitrator to render a decision.

One thing that stands out from this study is the need for more and better statistics on elapsed time in grievance arbitration cases. Both AAA and FMCS require arbitrators to complete case reports after every award. It should be relatively simple and inexpensive to collate these data on an annual basis and make them available to the parties, arbitrators, and other interested individuals. FMCS has provided this information more often than AAA, although FMCS has cut back on reports in recent years. These data are essential to an understanding and improvement of the grievance arbitration process. It is hoped that this paper will result in the two major appointing agencies devoting the necessary time and resources to make data on elapsed time in grievance arbitration available on a regular basis.

## II. SENIORITY AND POSTREINSTATEMENT PERFORMANCE

### I.B. HELBURN\*

Since 1957 there have been at least seven studies of the relationship between seniority and postreinstatement performance in the private sector. Most of the authors have been members of this Academy. The studies, taken individually, show conflicting and indeterminate conclusions. This paper presents a reanalysis

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