What do I wish you to take away from my remarks this afternoon? I would like you, particularly advocates, but neutrals as well, to think about your upcoming cases and ask yourselves whether there are things that could be done in advance of the hearing that would make the process more aptly suited to your particular circumstances. Might pre-hearing discovery smooth out and shorten the hearing? Can the arbitrator assist you with devising a plan? Do your witnesses need special attention or special procedures? Are there jurisdictional questions that could be discussed in a pre-hearing conference so that precious hearing time is not squandered? Advocates: do not assume that because the arbitrator you have already selected for a case is not open to creative suggestions just because he or she has never before deviated from a standard procedure. Arbitrators: do not assume in turn that you have been selected for your known habits and therefore cannot alter your longstanding practices when you see that innovation might be needed. Both of these assumptions are foolish. The process is ours—that is what makes it wonderful—and we should continue to adapt it to our needs. Take a page from our comparatively fledgling ADR colleagues and begin to think of labor arbitration more as a framework for resolving disputes than a rigid, unchanging, and unchangeable routine for processing grievances.

II. MANAGEMENT PERSPECTIVE

DAVID GRUNEBAUM*

Introduction

After listening to Susan Brown discuss her proposal for pre-hearing procedures, I find it difficult to argue against the concept. Because I find myself in the unusual position of actually agreeing with an arbitrator, I am compelled to take a second look at the proposal. Consequently, I will focus on some slightly different situations where pre-hearing procedures might be appropriate. Although arbitration is clearly understood to be an inherent part of the collective bargaining process, it is nonetheless an example of the breakdown in the consensual aspect of collective bargaining.

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As a management advocate, you might expect me to oppose further nonconsensual procedures. However, as I stated, I favor these procedures not, as some might cynically suggest, because they will attenuate the process or make it more costly but rather for the opposite reason. It has been my experience that most arbitrators believe that they are responsible for ensuring a fair process, and often their own integrity is intertwined with that of the process. They believe that they must do what is necessary to equalize the playing field. Perhaps, they view themselves as guardians of the process, on occasion battling with Darth Vader. I will not debate that issue today. I accept it, but only for purposes of this discussion. Because arbitrators assume this role, they will usually grant, if not require, an exchange of information, which is a form of discovery. This primarily favors the union.

A second related problem is that as an employer, I periodically find myself approaching an arbitration with very little idea of the concerns of the claim. This is because the grievance procedure does not always work to clarify and define the claim. In effect, both sides need help to prepare their cases.

Pre-Hearing Conference and Pre-Hearing Order

In my portion of this panel I would like to examine two principal concepts and give three examples of cases where these concepts were or could have been used. Simply stated, the concepts are:

1. an automatic pre-hearing conference
2. a pre-hearing order

I would amend the panel topic somewhat to include not only pre-hearing procedures but also what might better be described as "extra-hearing" procedures, procedures to examine and resolve issues or claims that are separate from an examination of the merits of the grievance.

Although the arbitration process was intended to be an informal one leading to an expedited resolution, that beneficial intent has long since been modified by reality and practice. Today, it is certainly not unusual for a case to be in process for well over a year. In my experience, due to scheduling conflicts between the parties and the arbitrator, it is the unusual case that gets to a first day of hearing in fewer than three months. Because of the difficulty of coordinating the arbitrator's schedule with that of counsel, witnesses, etc., most cases do not get started for at least three to four

months after an arbitrator is selected and probably closer to six months after the last grievance step.

A second major change, or so I am told, from the original arbitration concept is the introduction of attorneys on both sides. Of the arbitrations in which I am involved, at least 95 percent involve counsel representing both sides. Originally, arbitration cases were simple matters. Today, cases may involve millions of dollars, many witnesses, and very complex claims. Attorneys by their very nature and training put a significant focus on process. Thus, most pre-hearing procedures will enhance the process but will also result in a somewhat increased cost as well as some initial time delay.

Four Areas for Pre-Hearing Examination

The question that must be answered is whether or not a pre-hearing procedure can, on balance, result in a fairer hearing and an eventually more expeditious processing of the case. I would like to review and discuss four areas that might be handled better in a separate pre-hearing procedure:

1. discovery
2. issue framing, including discussion of the remedy portion of the issue
3. joinder or exclusion of issues pending before other agencies or forums
4. problems similar to, but not necessarily involving, arbitrability

Discovery

Traditionally, there has been no pre-hearing discovery in arbitration. However, the practical reality is that through the use of subpoenas, as well as requests for information required by the National Labor Relations Board (NLRB) or similar state labor agencies, parties are able to obtain documents although often only at the time of hearing. Because these documents are so late in being presented and because the parties certainly have a right to review the relevant documents, the consequences of an absence of pre-hearing discovery may actually be to prolong the hearing.

In my experience, a pre-hearing procedure relating to discovery would probably expedite the processing of all but the simplest cases. Certainly it would expedite the processing of those cases that involve an analysis and review of a substantial number of

documents. I am not suggesting the automatic allowance of such pre-hearing discovery concepts as interrogatories or depositions. In fact, I think any discovery should be very limited to the essential documents necessary to present the case. The arbitration process should not be a fishing expedition where the grievant is permitted to invent or conjure up a case. However, I reluctantly recognize that arbitrators are always seeking that elusive objective of fairness, which is often confused with requiring the employer to make out the grievant's case.

Pre-Hearing Conference

As such, in a large number of cases, the process would be expedited if some pre-hearing conference either by telephone or in person were automatically initiated or initiated at the request of either party.

Under this scenario, either party could request that the arbitrator and counsel meet for a pre-hearing conference. This is analogous to the conferences that routinely occur in most trial courts and certainly in the federal district court. In such a conference, the scope and need for discovery is reviewed, and a timetable is set for any procedural or pre-hearing motions.

I would propose that once the arbitrator is selected, a telephone conference call be automatically scheduled for a date approximately 30 to 45 days prior to the actual first arbitration hearing date. While the parties are going through a process of selecting the actual date for hearing, they could at the same time set the time and date for the telephone conference call. Conference calls are generally more easily arranged than an actual hearing date, since only three persons are necessary—the two counsel and the arbitrator—thus avoiding any scheduling conflicts with witnesses or principals. At this conference, each of the parties could initially put forth those issues of a procedural nature, including discovery issues, that might arise.

It is likely that some of these issues may not be resolved through a telephone conference, but would require an actual hearing. On the other hand, many of these issues might be resolved through the telephone conference. Since often much of the first day of hearing is consumed with getting these matters out of the way, and the hearing is not infrequently postponed thereafter or a second date set following the resolution of procedural issues, the telephone conference would actually reduce cost and increase efficiency.

In the event that the issues are sufficiently complex as to require a hearing, then either an extra day of hearing can be immediately scheduled or the parties can use the scheduled first date of hearing to resolve these procedural issues. In the event that the procedural issues are going to take up a lot of time or require such a hearing date, then everybody will be on notice that witnesses need not appear at the first scheduled day of hearing—again a savings.

One pre-hearing procedure not suggested by Ms. Brown is a procedural order. I am distressed by the length of time it takes to finish a case. I want to suggest that arbitrators begin any complex case by issuing an interlocutory procedural order. Such an order would cover discovery, "the issue," arbitrability, and other pre-hearing matters. Such an order would focus the parties on the real claims, allow an appropriate exchange of relevant information, and dispose of some "loose ends." Once the case was set for hearing on the merits, these issues would have been settled. The historical practice of going forward on the merits without giving serious attention to procedural or pre-hearing issues is simply no longer justified. One problem today is that there are too few ground rules; informality, speed, and so forth, are elevated above due process and occasionally above careful consideration of the claim.

In preparing for this presentation, I reviewed my recent cases to determine those situations in which pre-hearing procedures either were used or could have been used to beneficial effect. These cases serve to illustrate other situations where an "extra-hearing" procedure was or should have been used. The first case illustrates where an issue akin to arbitrability should have resulted in a separate evidentiary hearing.

Excessive Absence Arbitration

I recently had a case involving the termination of an employee for excessive absenteeism. The issue was framed, and the case went forward on the first day of hearing. Subsequently, on the second day of hearing, the grievant failed to appear, allegedly having called the union to explain that she was ill and could not attend the hearing. Although suspicious, I was unable to show that the request for a continuance by the union was a sham. A third day of hearing was then scheduled. Not surprisingly, the grievant again failed to appear. On this occasion I moved to have the case dismissed. Shortly thereafter, the union wrote to say that upon review of the case, they wanted to withdraw.

The arbitrator ruled that the union and grievant would have until a specified date to show cause as to why the case should not be withdrawn and thereafter dismissed. She actually entered a written order to this effect. The specified date came and went, and I, quite naturally, assumed that the case was dismissed based upon the arbitrator's clear written order. Approximately three weeks later, the union came forward stating that they now had in their possession a letter from the grievant's doctor asserting that the grievant was again ill on the specified hearing date. Thereafter ensued a great deal of paper passing on the issue of whether or not the case should go forward. Ultimately, the arbitrator rescinded her earlier ruling and found that the grievant's having contacted the union allegedly on the "drop-dead" date should not have her case dismissed. The union asserted that it received the doctor's letter on that date.

The arbitrator then set a date for a resumed hearing on the merits of the matter. On the final day of hearing, I requested a copy of the doctor's letter and learned that the letter had not been sent until six days after the date claimed.

It seems to me that this case should more appropriately have been set down for a hearing on the procedural issue of whether or not to go forward. On the date of hearing and throughout all the paper passing, the union never once presented the alleged doctor's note. Nor did the grievant have to take the witness stand with respect to the alleged documents. Thus, I was prevented from examining and cross-examining the grievant on an important procedural issue. It is, of course, an irony of the case that the employer's precise reason for terminating the employee was her constant illness. In this case, the arbitrator might have scheduled a prompt hearing date to determine the sole issue of whether or not the grievant was in fact excused from her order. An excuse from that order might have been that the grievant was unaware of the order or that the grievant actually complied with the order. Here, however, the arbitrator made the following error in my judgment.

The arbitrator entered an order without any testimony. The original written order did not contain an exception. Rather, it clearly stated that if on a specified date the arbitrator had not heard from the union and grievant, the case would thereupon be dismissed. The condition not having occurred (i.e., hearing from the grievant), under the arbitrator's order the case should have been dismissed. Rather than permit the exchange of material, the

arbitrator should have ordered the grievant to appear herself and testify as to (1) why she was absent and (2) what steps she took to contact the arbitrator. Although this is not a pre-hearing procedure, one can well imagine this same scenario applying in a pre-hearing context. Thus, the question becomes whether there should be a hearing on the merits of a case when the grievant fails to comply with established arbitrator's orders.

Joinder With Other Claims

Another interesting case involving pre-hearing procedures arose in the following circumstances. This case illustrates problems that arise where there is a parallel case in another agency but the parties are not identical. In this case, the employer hired a number of employees into a newly established job classification. The union asserted that these were promotional positions and grieved the employer's hiring practices. Subsequently, the newly hired employees filed a petition for representation with the state labor relations commission (it could as well have been the NLRB), seeking a separate bargaining unit to represent this classification of employees. The commission, finding that a genuine question of representation (QCR) had arisen, scheduled the matter for hearing. Of course, if the union petitioners were successful in the representation case, the incumbent union would no longer represent the employees nor have the position in their bargaining unit. On the other hand, if the arbitration proceeded and the union was successful in pressing its claim, the current employees stood a real chance of being terminated. That termination would then provide a basis for the union to assert before the labor relations commission that there was no showing of interest. The employees would no longer be employees.

As the employer's representative, I then requested that the arbitrator conduct a hearing on the single issue of whether or not this matter should be arbitrated. In other words, should an arbitration proceed where there is a pending question of representation and the arbitration may undermine or determine the representation case? The contrary was also true (i.e., determination of the representation case could be determinative of the arbitration case). The union moved to stay the representation case, arguing deferral to arbitration. The commission declined to defer, finding that the deferral doctrine did not apply to a representation case.

At the same time, the commission indicated during the last day of hearing that in all probability the representation case would not be decided for at least four to six months, thus leaving the entire issue unresolved. Of course, among the problems with allowing the case to be resolved in arbitration is that only the union and the employer are involved in the arbitration case, whereas in the representation case all three parties are afforded an opportunity to be heard. In this case, the pre-hearing issue was heard separately, the case was bifurcated, and the pre-hearing issues are likely to be determinative of the ultimate outcome, on a practical level, for all parties concerned. Another option would have been to have all parties, including the challenging union, join the arbitration and then have the arbitrator decide all issues.

A third, and perhaps most significant, area where I have had numerous spats with both arbitrators and union advocates is over the issue of remedy. The question of remedy, it seems to me, may have significance on two fronts: (1) ultimate outcome and (2) settlement.

Separate Remedy Discussion

A third case illustrates the idea of setting aside the remedy portion of the issue for separate review after the hearing has commenced. The common practice in arbitration seems to be to frame an issue with some degree of care and then, with significantly less care, to simply say to the arbitrator, "If so, what shall be the remedy?" Of course, the remedy is often what the case is all about. On the other hand, the remedy may not be the significant issue; instead, the parties may be seeking an answer to a question in order to guide their future conduct. For this reason, I am exceedingly careful in dealing with the remedy issue. From my point of view, as the employer's representative, I am reluctant to confer full and untrammeled jurisdiction to the arbitrator. As a practical matter, I may want the arbitrator to answer a question dealing with such issues as the circumstances under which overtime is due, the standards for promotion, categories of employees who are due premium payments, and so forth. If I get that answer, I will, no doubt, reform my conduct as required by the arbitrator's ruling. However, I may not be as willing to agree to make substantial retroactive payments to employees whom I either did not understand to be entitled to the compensation or may not actually have

worked the specified hours or under the specified circumstances. By declining to stipulate to untrammeled remedy jurisdiction, I am, first of all, putting the arbitrator on notice as to the great significance of this issue, and, second, preserving my right of appeal. Of course in Massachusetts arbitrators may not arbitrate on a matter not submitted to them. If I decline to give jurisdiction to the arbitrator on a particular matter, I am at the very least not waiving my right to defend later on in an appeal of the award that the arbitrator ruled on a matter not submitted to arbitration. Of course, the arbitrator may, on the other hand, assert jurisdiction and allow the case to go forward to arbitration, and if I wish to contest it, I would be required to go to the Superior Court. From my point of view, the main purpose is, however, established once I decline to give this jurisdiction to the arbitrator. This may give rise to pre-hearing procedures to determine what the issue is and how to resolve questions where one or another of the parties will not consent to unlimited jurisdiction in the arbitrator.

An advocate is a fool who, after arguing over the issue, proceeds to let the arbitrator frame the issue. In my view, it is better for the advocate either to frame the issue or to decline to give the arbitrator the jurisdiction to frame the issue. As a practical matter, arbitrators are always going to frame the issue in a manner consistent with their award. Giving the arbitrator jurisdiction to frame the issue is simply absurd so long as there is any question in one or the other parties' minds as to what matter should properly be resolved by the arbitrator. Of course, in many cases, the parties are not worried about how the issue is framed, and, in that case, wrangling over the precise wording is equally as foolish.

In another recent case that I was involved in, a second purpose was served by looking at the issues separately from the remedy. Initially, the union presented a series of questions that it wanted answered in arbitration. All of these questions and the entire arbitration arose out of the layoff of a number of employees at a hospital. The parties had agreed to arbitration, but there had been no agreement on the issue, and, in fact, no grievance had proceeded it. Thus, when the matter reached arbitration, the question of what was before the arbitrator was fairly unclear. The parties had a full day of hearing in which the union's business agent began his testimony and at least one grievant testified. At the start of the second day of hearing, I asked the union what remedy it was seeking. Up to that time no discussion on remedy had occurred.

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

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