Chapter 5

HOW TO HAVE AN ARBITRATION HEARING IN ONE DAY OR LESS

I. Whatever Happened to the One-Day Arbitration? Expedited Arbitration Procedures as an Effective Method for Combating Delay, Increased Cost, and Formality in labor Arbitration

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Introduction

The labor movement is in a period of self-evaluation. The workforce, the economy, the legal landscape, and the collective bargaining relationship have changed significantly over the last 50 years.[1] In order to successfully adapt to these changes, unions are taking stock of their own identity and organizational forms.[2] This

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[1]Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 Harv. C.R.-C.L. L. Rev. 345, 398–99 (2001); Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 Comp. Lab. L. & Pol'y J. 221, 259 (2005).

[2]*See generally* Gross, *Separate to Unite: Will Change to Win Strengthen Organized Labor in America?*, 24 Buf. Pub. Interest L.J. 75 (2006); Pope, *Next Wave Organizing and the Shift to a New Paradigm of Labor Law*, 50 N.Y.L. Sch. L. Rev. 515 (2005–2006).

Labor is currently seeking to amend the National Labor Relations Act through the Employee Free Choice Act bill (H.R. 800), passed by the U.S. House of Representatives on March 1, 2007. The Act has three components. First, the National Labor Relations Board (NLRB) would be required to certify a union as the bargaining representative where it finds that a majority of employees in an appropriate unit has signed valid authorizations. Second, the bill provides that if an employer and a union are engaged in bargaining for their first contract and are unable to reach agreement within 90 days, either party may refer the dispute to the FMCS for mediation. If the FMCS is unable to bring the parties to agreement after 30 days of mediation, the dispute will be referred to arbitration. The results of the arbitration shall be binding on the parties for two years. Time limits may be extended by mutual agreement of the parties. Third, the bill would create stronger penalties for violations that occur while employees are attempting to form a union or attain their first contract. Those penalties include civil fines of up to $20,000 per violation against employers found to have willfully or repeatedly violated employees' rights during an organizing campaign or first contract drive. The bill also provides for treble back pay as damages when an employee is discharged or discriminated against during an organizing drive or first contract campaign. Lastly, the bill provides for mandatory applications for injunctions (akin to present 10(l) injunction provisions) when there is reasonable cause to believe that the employer has discharged or discriminated against employees,

self-reflection includes the question of whether labor arbitration, now largely *ad hoc*,[3] meets the needs of workers and their unions. Today, labor arbitration is an "adversarial" rather than an "adjudicatory" procedure.[4] Unions and their advocates query whether it is possible for a grievance arbitration procedure that increasingly resembles litigation to serve labor's interests or enhance the collective bargaining relationship.[5]

Unions and union advocates are not alone in their concern that labor arbitration has strayed far from its original purpose. The "plaintive cry" that arbitration has become "too legalistic"[6] and that the process must somehow "be simplified"[7] has resounded from the pages of the *Proceedings* and other legal publications for half a century.[8] Union advocates, management advocates, and arbitrators alike have joined in this refrain.

This paper revisits the writings of the Academy and re-argues the reality that labor arbitration can and must be "part and parcel of the ongoing process of collective bargaining."[9] The second section of this paper explains how the *Steelworkers Trilogy* and its progeny recognize that arbitration is an extension of collective bargaining, transcending the outcome of a particular case. The third section explores the obstacles that delay and complicate arbitration hearings and cause arbitration to depart from the ideals elucidated in the *Trilogy*. The fourth section describes the characteristics of an efficient expedited arbitration process that addresses those

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has threatened to do so, or has otherwise interfered significantly with employee rights during an organizing or first contract drive. *See* http://www.EmployeeFreeChoiceAct.org and http://www.govtrack.us/congress/billtext.xpd?bill=h110-800.

[3]Jordan, *Comment: Can the Labor Arbitration Process Be Simplified? If So, in What Manner and at What Expense*, in Arbitration 1986: Current and Expanding Roles, Proceedings of the 39th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1987), at 93.

[4]Nicolau, *Can the Labor Arbitration Process Be Simplified? If So, in What Manner and at What Expense*, in Arbitration 1986: Current and Expanding Roles, Proceedings of the 39th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1987), at 81.

[5]*See generally* Newman & Wilson, *Arbitration—As the Parties See it: A Union Point of View*, in Arbitration—Promise and Performance, Proceedings of the 36th Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1984), at 37; and Fischer, *Updating Arbitration*, in Arbitration of Interest Disputes, Proceedings of the 26th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1974), at 62.

[6]*Quoting* Mittenthal, *Whither Arbitration?*, in Arbitration 1991: The Changing Face of Arbitration in Theory and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1992), at 46.

[7]Nicolau, s*upra* note 4 (referring to the title of the paper).

[8]I acknowledge that this is not a new topic. Nonetheless, I write this paper because legalism is an unremedied problem that is growing worse.

[9]*United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987).

obstacles, together with recommendations for how to implement such procedures. This paper proposes that through the use of expedited arbitration procedures, the parties can process cases speedily and economically without diminishing either the quality or the integrity of the results. Informality (i.e., reduced legalism) does not mean lack of rigor in the quality of proof.[10] Expedited arbitration procedures can return arbitration to what it once was. This paper particularly emphasizes the virtues of implementing a permanent tripartite panel.

Steelworkers' Trilogy Articulates the Essence of Labor Arbitration

One of the strengths of the Academy at its best is its deep understanding of labor arbitration's history and purpose. The rationales underlying the *Steelworkers' Trilogy* analysis and holdings were not judicially fabricated. The understanding of labor arbitration in the *Trilogy* was drawn largely from the writings of highly respected practicing arbitrators, especially Dean Schulman and Archibald Cox.

In the *Trilogy*, Justice Douglas recognized the important function of the grievance machinery in the system of industrial self-government.[11] He acknowledged the need for expediency and flexibility in the arbitration procedure as "the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs."[12] Furthermore, he accepted the view that under the collective bargaining agreement, the grievance machinery functions as a "safety valve for troublesome complaints."[13] According to Justice Douglas' characterization of grievance arbitration, a well-operating procedure holds the promise of providing the parties an informal method for quick

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[10]I am not endorsing expedited arbitration procedures that are "time-dominated" in the sense that the hearings are confined to a limited amount of time, say an hour for each case, 30 minutes, no more, for each side. Nicolau, *Can the Labor Arbitration Process Be Simplified? If So, in What Manner and at What Expense*, in Arbitration 1986: Current and Expanding Roles, Proceedings of the 39th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1987), at 71 (citing an example of a time-dominated expedited arbitration program that he believes compromises the integrity of arbitration overall).

[11]*Warrior & Gulf Navigation Company*, 363 U.S. 574, 581 (1960).

[12]*Id.* at 582.

[13]*American Manufacturing Co.*, 363 U.S. 564, 568 n.6 (1960), *citing to* Cox, Current Problems in the Law of Grievance Arbitration, 30 Rocky Mtn. L. Rev. 247, 261 (1958).

and fair resolution of disputes. Indeed, grievance arbitration, as Justice Douglas envisioned in the *Trilogy*, holds many ambitious promises. As eloquently described by former NAA President, Byron A. Abernethy:

> ....arbitration "promised" a peaceful and civilized alternative to industrial warfare, a rational substitute for strikes, lockouts, and tests of economic strength as a means of resolving disputes over the interpretation and application of existing collective bargaining agreements. It promised, as a substitute for strikes and lockouts, a relatively prompt, inexpensive, informal, equitable, and effective resolution of such disputes. It promised to substitute the justice of rational adjudication for the justice of trial by economic combat.
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> The promise to society as well as to the parties was for greater industrial stability, for enhanced productivity as production continued uninterrupted while disputes were being resolved. It held out the promise of improved employee morale, of greater industrial democracy, of a rule of law in the work place. It promised a growing human dignity, an enlarged sense of employee independence and freedom, an end to employee servility, and a growing sense of human worth. It promised the employee who felt aggrieved the opportunity to be heard, the freedom to stand upright, unafraid, with full human dignity, and to say to his employer, "I feel that I have been wronged and I want the wrong remedied." It promised that he or she would have that complaint impartially adjudicated.
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> And finally, it promised the parties the freedom in each instance to devise that particular grievance and arbitration procedure that best served the unique needs of the particular parties involved without imposition by government of some standard pattern of grievance procedure.[14]

Arbitration Too Frequently Fails the Collective Bargaining Process

Is labor arbitration as presently practiced fulfilling its promise? Plainly, on too many occasions it is not.[15] Although not a new development, arbitration has become increasingly legalistic, cumbersome, costly, and slow. [16] An arbitration procedure that

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[14]Abernethy, *The Presidential Address: The Promise and the Performance of Arbitration: A Personal Perspective*, in Arbitration—Promise and Performance, Proceedings of the 36th Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1984), at 9–10.

[15]Newman & Wilson, *Arbitration—As the Parties See it: A Union Point of View*, in Arbitration—Promise and Performance, Proceedings of the 36th Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1984), at 38.

[16]Mittenthal, *The Impact of Lawyers on Labor-Management Arbitration*, 60-OCT Disp. Resol. J. 42, 43 (2005); Newman & Wilson, *Id.*.

is "adversarial," rather than "adjudicatory," is undoubtedly far removed from its original purpose—to reach a quick and fair resolution to a dispute at a reasonable cost. However, it is not too late to return to what arbitration once was.[17]

Whether the parties are starting an expedited procedure from scratch or envisioning how to refine or improve existing procedures, a first step is to identify the underlying causes of delay and excessive cost. I will begin by describing the transformation arbitration has undergone over time, moving away from an informal method of dispute resolution to something akin to a court proceeding.

History of Commentary Regarding the Increase in Legalism in Labor Arbitration

A survey of the *Proceedings of the National Academy of Arbitrators* and other publications reveals that as early as the 1950s, arbitration advocates have debated about what labor arbitration should look like.[18] With each year that labor arbitration grew older, experiencing growing pains and maturation, scores of articles were

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[17]Murphy, *Presidential Address: The Academy at Forty*, in Arbitration 1987: The Academy at Forty, Proceedings of the 40th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1988), at 9 ("One response to legalism has been what is called expedited arbitration. This is really ironic, since originally *all* arbitration was considered to be an expedited process."); Hoellering, *Expedited Arbitration*, Proceedings of the New York University 28th Annual Conference on Labor, ed. Adelman (New York: Matthew Bender 1976), at 325 (quoting Arbitrator Walter Gellhorn as saying, "What is called 'expedited arbitration'…should instead be identified as 'normal arbitration,'…The cumbersome kind, with transcripts, briefs, and all the trimmings, should be denominated 'protracted arbitration' or, even more cuttingly, simply as 'the lawyer's friend.'")

[18]Bartlett, *Labor Arbitration: The Problem of Legalism*, 62 Or. L. Rev. 195, 203 (1983) ("Almost from the inception of the modern labor arbitration system, commentators warned against legalism in the process, most believing that legalism was the opposite of arbitration."); Murphy, *supra* note 18, at 9 ("Of…ancient vintage is the complaint that arbitration is becoming too lengthy, too costly, and too technical and legalistic. This mournful dirge was chanted at least as far back as the early 1950s."); Murphy, *The Ten Commandments for Advocates: How Advocates Can Improve the Labor Arbitration Process*, in Arbitration 1992: Improving Arbitral and Advocacy Skills, Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1993), at 262 ("As early as the 1950s, speakers at these meetings were warning about the perils of 'creeping' legalism. As time went on, the creep became a gallop…"); Alexander & Widenor, *Labor Perspective: The Ten Commandments for Advocates: How Advocates Can Improve the Labor Arbitration Process*, in Arbitration 1992: Improving Arbitral and Advocacy Skills, Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1993) at 281 n.14 ("The debate on legalism in grievance arbitration is as old as the institution itself."); Zirkel, *Creeping Legalism in Grievance Arbitration: Fact or Fiction?*, 16 Ohio St. J. on Disp. Resol. 243 (2001) ("The problem of 'creeping legalism,' or incremental formalism, in grievance arbitration cases has been a continuing refrain in legal literature…").

written about the incidence of increased legalism.[19] Many of the authors argued that greater formality was desirable, while others claimed that legalism and arbitration were antithetical. An excellent summary of the "Two Theories of Arbitration" is found in *Just Cause the Seven Tests*, by Adolph M. Koven and Susan L. Smith.[20]

In the early years of labor arbitration, two men, J. Noble Braden and George Taylor, came to embody two competing models for arbitration. To state it simply, Braden viewed arbitration as quasi-judicial or a private-judge mechanism, whereas Taylor saw it as an extension of collective bargaining.[21] According to observers on the scene, by the 1960s arbitration had developed along the lines of the Braden model[22] rather than the Taylor model.[23] As noted by former NAA President, Richard Mittenthal:

> Slowly, almost imperceptibly, arbitration in most relationships became more formal, more wedded to case precedent, more legalistic. Those characteristics were to some extent always present. But the degree to which they came to dominate the process is, in my opinion, quite remarkable.[24]

The complaint that arbitration has become more legalistic with time is not a hollow one. A 2001 study by Perry A. Zirkel supports

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[19]Levitt, *Presenting an Arbitration Case*, Proceedings of the New York University 8th Annual Conference on Labor, ed. Stein (New York: Matthew Bender 1955), at 271; Sembower, *Halting the Trend Toward Technicalities in Arbitrations*, in Critical Issues in Labor Arbitration, Proceedings of the 10th Annual Meeting, National Academy of Arbitrators, ed. McKelvey (BNA Books 1957), at 98; Platt, *Current Criticisms of Labor Arbitration: Introduction*, in Arbitration and the Law, Proceedings of the 12th Annual Meeting, National Academy of Arbitrators, ed. McKelvey (BNA Books 1959), at *viii*; Simkin, *Danger Signs in Labor Arbitration*, in Labor Arbitration: Perspectives and Problems, Proceedings of the 17th Annual Meeting, National Academy of Arbitrators, ed. Kahn (BNA Books 1964), at 212; Andrews, *Legalism in Arbitration: A Management Attorney's View*, in Arbitration 1985: Law and Practice, Proceedings of the 38th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1986), at 193; Mittenthal, *Whither Arbitration?*, in Arbitration 1991: The Changing Face of Arbitration in Theort and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1992), at 35; R. Abrams, F. Abrams & Nolan, *Arbitral Therapy*, 46 Rutgers L. Rev., 1751, 1784–85 (1994); Editorial, *Creeping Legalism in Labor Arbitration*, 13 Arb. J. 129 (1958).

[20]Koven & Smith, *Two Theories of Arbitration*, in Just Cause: The Seven Tests, 3d ed., ed. May (BNA Books 2006), at 20–23.

[21]Zirkel, *supra* note 19, at 243; Taylor, *The Arbitration of Labor Disputes*, 1 Arb. J. (n.s.) 409 (1946); Taylor, *Further Remarks on Grievance Arbitration*, 4 Arb. J. (n.s.) 92 (1949); Taylor, *Effectuating the Labor Contract Through Arbitration*, in The Profession of Labor Arbitration, Selected Papers From the First Seven Annual Meetings of the National Academy of Arbitrators, 1948–1954, ed. McKelvey (BNA Books 1957), at 151.

[22]Today, it seems the Braden model is referred to as a synonym for legalism. However, this is arguably an unfair characterization of Braden's model because even Braden urged restraint in the use of transcripts and written decisions. *See* Braden, *Current Problems in Labor-Management Arbitration*, 6 Arb. J. 91, 98 (1951).

[23]Zirkel, *supra* note 19, at 243; Mittenthal, *supra* note 20, at 36; Gershenfeld, 53-WTR DRJ 53, 55 (1998).

[24]Mittenthal, *supra* note 20, at 35.

the conclusion that legalization in labor arbitration has continued to creep upward from the early 1970s to the late 1990s.[25] The study showed that there has been a statistically significant upward trend, with two exceptions, for various factors, including elapsed time, charged days, and post-hearing briefs.[26] This study disproved the 1986 prediction of Dennis Nolan and Roger I. Abrams "that labor and management have just about reached the limits of legalism in the arbitration process."[27]

Specific Ways in Which Labor Arbitration Has Become More Legalistic

The most obvious sign of the increasing tendency toward legalistic arbitration proceedings is the frequent use by the parties of attorneys.[28] Initially, there was a widespread belief that lawyers had no place in collective bargaining or arbitration.[29] As Sylvester Garrett, a former permanent umpire in the steel industry for many decades, noted:

> By training and experience, it was felt, [lawyers] were stuffily conservative, enamored by formalism, wordy, devious, overly technical, and utterly unable to comprehend, let alone conform to, the overriding necessities of the collective bargaining relationship.[30]

However, over time, as the incidence of collective bargaining increased and most of the attorneys involved seemed to adapt to the new medium, the prejudice against attorneys diminished.[31] As early as 1961, Sylvester Garrett commented that lawyers are here to stay in grievance arbitration.[32] He believed this was so, "not just

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[25]Zirkel, *Creeping Legalism in Grievance Arbitration: Fact or Fiction?*, 16 Ohio St. J. on Disp. Resol. 243 (2001) (study based on data collected by the Federal Mediation and Conciliation Service (FMCS), from 1970 through 1998).

[26]*Id.* at 243 ("The two exceptions are the use of transcripts, which remained constant until considerable up-and-down variation began in 1990, and elapsed time during the hearing/post-hearing phase, which maintained a constant trend line for the entire twenty six year period.").

[27]Nolan & Abrams, *The Future of Labor Arbitration*, 37 Lab. L.J. 437, 439–40 (1986).

[28]Zack, *New Alternatives to the Grievance Procedure: Suggested New Approaches to Grievance Arbitration*, in Arbitration—1977, Proceedings of the 30th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1978), at 108; Alleyne, *Delawyerizing Labor Arbitration*, 50 Ohio St. L.J. 93, 94–96 (1989).

[29]Garrett, *The Role of Lawyers in Arbitration*, in Arbitration and Public Policy, Proceedings of the 14th Annual Meeting, National Academy of Arbitrators, ed. Pollard (BNA Books 1961), at 102; Mittenthal, *The Impact of Lawyers on Labor-Management Arbitration*, 60-OCT Disp. Resol. J. 42, 44 (2005) ("The parties, more often than not, used to represent themselves in labor-management arbitration. The director of labor relations spoke for management; a union staff representative or business agent spoke for the union.")

[30]Garrett, *supra* note 30, at 102.

[31]*Id.*

[32]*Id.* at 113.

because they are camels who have gotten their heads in the tent, but because the parties want them there to meet a felt need."[33]

Indeed, over time, collective bargaining has become increasingly complex, as evidenced by the "enormous expansion in the number of words per contract."[34] In 1952, Isadore Katz commented that lawyers were necessary due to the escalating detail of collective bargaining agreements:

> Even the locker-room lawyer has been put out of business by the very complexity of the document. The shop steward and the foreman can no longer discuss the collective bargaining agreement with any assurance that they know what they are talking about. The business agent and the plant manager are in no much better position. Lawyers . . . are indispensable in the day to day settlement of grievances . . .[35]

Another relevant factor leading to the increase of legalism in the labor arbitration context is the reality that the interrelationship of labor arbitration with certain "external law" issues has increased in the past 30 years.[36] The subject of directly arbitrating issues of "external law" in labor arbitration has frequently been

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[33] *Id.*

[34] Katz, *Challengeable Trends in Labor Arbitration*, 7 Arb. J. 12, 14 (1952) (statement of Isadore Katz); Mittenthal, *Whither Arbitration?*, in Arbitration 1991: The Changing Face of Arbitration in Theory and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1992), at 39.

[35] Katz, *supra* note 35, at 15.

[36] First, a series of U.S. Supreme Court cases strengthening union members' duty of fair representation cause of action led unions to be more cautious about the handling of grievances and the processing of arbitration claims. *See* Jennings, *Comment: Can the Labor Arbitration Process Be Simplified? If So, in What Manner and at What Expense*, in Arbitration 1986: Current and Expanding Roles, Proceedings of the 39th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1987), at 88–89; Andrews, *Legalism in Arbitration: A Management Attorney's View*, in Arbitration 1985: Law and Practice, Proceedings of the 38th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1986), at195; Bartlett, *Labor Arbitration: The Problem of Legalism*, 62 Or. L. Rev. 195, 212–19 (1983); Murray & Griffin, *Expedited Arbitration of Discharge Cases*, 31 Arb. J. 263, 265–66 (1976).

Second, when a union arbitrates a member's discrimination claim that involves both a statutory right and a right under the collective bargaining agreement, the court will defer to the arbitrator's award only if there has been a minimum degree of procedural fairness in the arbitral forum. *See* Berghel, *The Ten Commandments for Advocates: How Advocates Can Improve the Labor Arbitration Process: Management Perspective*, in Arbitration 1992: Improving Arbitral and Advocacy Skills, Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1993), at 271; Bartlett, *supra* at 218–25; Murray & Griffin, *supra* at 267–68.

Third, under what is known as the *Spielberg/Collyer* doctrine, the National Labor Relations Board has made clear that deferral is contingent upon the award having met certain standards. Proceedings before the arbitrator must have been fair and regular. *See* Andrews, *supra* at 194–95; Bartlett, *supra* at 210–12; Murray & Griffin, *supra* at 266–67.

visited in the *Proceedings*.[37] By definition, presenting and resolving these issues made the process more "legalistic."

"External law" also has indirect influences on labor arbitration.[38] For example, increasingly, on the employer side, attorneys presenting cases have been educated and trained as "employment" lawyers, therefore lacking an understanding of the nature of labor arbitration. Such lawyers have a tendency to present the grievance based on the litigation model. Candidly, union attorney advocates also want to "litigate" a case equal to that presented by employer-counsel, or satisfy the client's desires to feel it had its day in court.[39]

It is also worth noting that increasingly, many arbitrators have a law degree,[40] but have little or no real collective bargaining background.[41] Additionally, some commentators believe that even lay people who represent the parties have begun to use the same formal and technical devices that lawyers do.[42] It seems fair to say that today, labor arbitration is saturated with lawyers, or at least lawyer-like thinking.[43]

As could be predicted, with the arrival of attorneys came many undesirable aspects of litigation and the trappings of the courtroom.[44] In the early years, arbitration resembled what it was meant

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[37]Mittenthal, *Whither Arbitration?*, in Arbitration 1991: The Changing Face of Arbitration in Theory and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1992), at 44–45; Oldham, *Arbitration and Relentless Legalization in the Workplace*, in Arbitration 1990: New Perspectives on Old Issues, Proceedings of the 43rd Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1991), at 23; Feller, *The Coming End of Arbitration's Golden Age*, in Arbitration—1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1976), at 111.

[38]Nolan & Abrams, *Trends in Private Sector Grievance Arbitration*, in Labor Arbitration Under Fire, eds. Stern & Najita (Ithaca: Cornell University Press 1997), at 59–60. In addition, I firmly believe that an arbitrator's combined practice in the employment as well as the labor arena drives up the price of labor arbitration. By this I mean that in employment arbitration, the neutral charges $250 to $400 per hour, as opposed to the "per day" rate for labor arbitration. The $1,000 per day rate feels woefully inadequate; labor arbitration is devalued.

[39]Mittenthal, *The Impact of Lawyers on Labor-Management Arbitration*, 60-OCT Disp. Resol. J. 42, 44 (2005).

[40]Gershenfeld, 53-WTR DRJ 53, 56 (1998); Mittenthal, *supra* note 38, at 43.

[41]Mittenthal, *Id.* at 43.

[42]*Id.* at 41 n.7; Zack, *New Alternatives to the Grievance Procedure: Suggested New Approaches to Grievance Arbitration*, in Arbitration—1977, Proceedings of the 30th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1978), at 108; Bartlett, *Labor Arbitration: The Problem of Legalism*, 62 Or. L. Rev. 195, 209–10 (1983).

[43]Mittenthal, *The Impact of Lawyers on Labor-Management Arbitration*, 60-OCT Disp. Resol. J. 42, 41 n.7 (2005).

[44]*Id.* at 40.

to be—the final step of the grievance procedure.[45] Today, the process is more like what one might encounter before an administrative judge[46] or even a district court judge.

The ways in which "legalism" is manifested are multi-fold. First, the advocates increasingly resort to the exclusionary rules of evidence borrowed from the judicial process.[47] Second, there is widespread use of transcripts, even in cases that are factually straight-forward.[48] Third, post-hearing briefs have become the default method of closing argument.[49] Fourth, the arbitrator is far more likely to issue a written decision rather than deliver one from the bench.[50] Occasionally, when an arbitrator's decision is written, too many pages are filled with exhaustive "summary of the positions of the parties," which results in increased time and cost. Furthermore, there is a tendency for the decision to be unnecessarily academic[51] and directed more at publication in one of the unofficial labor arbitration reporters than at the immediate parties.[52] Fifth, the principle of *stare decisis* has worked its way into labor arbitration.[53] A voluminous body of "precedent" has been made available to the labor-management community and arbitrators, seemingly grounded in the assumption that there is a "common law" of arbitration.[54] Arbitrators, as well as representatives for labor and management, often rely on awards published in the

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[45]Mittenthal, *The Impact of Lawyers on Labor-Management Arbitration*, 60-OCT Disp. Resol. J. 42, 44 (2005).

[46]*Id.*

[47]Murphy, *The Ten Commandments for Advocates: How Advocates Can Improve the Labor Arbitration Process*, in Arbitration 1992: Improving Arbitral and Advocacy Skills, Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1993), at 263–64 (referring to the use of rules of exclusionary evidence in labor arbitration as "a deplorable development.")

[48]Nicolau, *Can the Labor Arbitration Process Be Simplified? If So, in What Manner and at What Expense*, in Arbitration 1986: Current and Expanding Roles, Proceedings of the 39th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1987), at 72 (referring to the use of transcripts and briefs when neither is necessary as an "accepted ingrained procedure").

[49]Franckiewicz, *An Arbitrator's View of Writing Briefs*, 54 Disp. Resol. J. (Feb. 1999) at 60–61.

[50]Mittenthal, *Whither Arbitration?*, in Arbitration 1991: The Changing Face of Arbitration in Theory and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1992), at 42.

[51]Sanderson, McLaren, & Moreau, *Expediting The Arbitration*, in Arbitration 1999: Quo Vadis? The Future of Arbitration and Collective Bargaining, Proceedings of the 52nd Annual Meeting, National Academy of Arbitrators, eds. Briggs & Grenig (BNA Books 2000), at 80, *citing to* Picher & Mole, *The Problem of Delay at Arbitration: Myth and Reality*, Lab. Arb. Y.B. 3 (1993).

[52]Katz, *Challengeable Trends in Labor Arbitration*, 7 Arb. J. 12, 17 (1952).

[53]*Id.* at 17–18.

[54]Mittenthal, *supra* note 51, at 41–42 (There is no such thing as a common law of arbitration. There is, of course, common law within a given bargaining relationship.).

reporters to support their arguments, even when the reported awards involve different industries, different parties, and different collective bargaining agreements.[55] The list of ways in which arbitration has become hyperlegal could go on, but I need not belabor the point.

How Legalism Undermines the Goals of the Trilogy

Is the greater incidence of legalism desirable? No, it is not. The above-mentioned practices are corruptions of the ideal process. Legalism threatens the availability of arbitration as a quick, efficient, and cost-effective dispute resolution mechanism.

Arbitration has become more expensive for both parties. This is due to greater involvement of attorneys, frequent use of transcripts, lengthier hearings, and more common submission of post-hearing briefs.[56] The inflated arbitration bill is probably equal for both the union and management in terms of dollars and cents, but the consequences are usually greater for the union.[57] Arbitrator Mittenthal commented that he had "no doubt that [the increased cost of processing grievances through arbitration] has caused unions to take fewer cases to arbitration."[58] On the surface, this phenomenon would seem desirable to management, but an accumulation of unresolved grievances can lead to employee discontent and a corresponding drop in productivity.[59]

Greater formalism in labor arbitration also leads to delay in the processing of grievances at the arbitration stage. In 1971, Alex Elson commented:

> . . . . delay presents one of the most serious problems in the arbitration process. Delay is behind a good deal of the discontent that exists with the process and forms the basis for the bulk of complaints.[60]

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[55]Platt, *Current Criticisms of Labor Arbitration: Introduction*, in Arbitration and the Law, Proceedings of the 12th Annual Meeting, National Academy of Arbitrators, ed. McKelvey (BNA Books 1959), at *xiii;* Editorial, *Creeping Legalism in Labor Arbitration*, 13 Arb. J. 129, 103–32 (1958).

[56]Mittenthal, *The Impact of Lawyers on Labor-Management Arbitration*, 60-OCT Disp. Resol. J. 42, 43 (2005).

[57]Mittenthal, *Id.* at 43.

[58]*Id.*

[59]Nicolau, *Can the Labor Arbitration Process Be Simplified? If So, in What Manner and at What Expense*, in Arbitration 1986: Current and Expanding Roles, Proceedings of the 39th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1987), at 79–80.

[60]Elson, *Ethical Responsibilities of the Arbitrator: The Case for a Code of Professional Responsibility for Labor Arbitrators*, in Arbitration and the Public Interest, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators, ed. Rehmus (BNA Books 1971), at 200.

Much of the delay in processing grievances at the arbitration stage is attributable to the increased use of attorneys by the parties.[61] It takes more time to establish a date for a hearing that will accommodate the attorneys' busy schedules.[62] Furthermore, introduction of attorneys requires, at a minimum, the coordination of schedules of the management representative, the management attorney, the union representative, the union attorney, and the arbitrator.

Hearings also take longer, as the attorneys are prone to insist upon compliance with formal rules of evidence.[63] An inordinate amount of time is spent by lawyers examining and cross-examining witnesses on a question and answer basis (with objections), founded on the so-called adversarial process and the assumption that truth comes from this confrontation.[64] Additionally, because the process is so adversarial, the morning of the arbitration is often the first time the parties share with each other the documentary evidence they intend to submit to the arbitrator. As a result, too much hearing time is consumed with arguing about the introduction of documentary evidence, arguing lack of foundation, authentication, and relevance.

Another consequence of attorney participation with respect to delay is the greater use of transcripts and post-hearing briefs. Arbitrator Mittenthal spelled out how the use of transcripts and prehearing briefs contributes to delay:

> [A] week or two passes before the court reporter delivers the transcript; then another month passes before the lawyers file their briefs, sometimes even longer because of requests for extending the original filing date.[65]

To anyone experienced in labor arbitration, this routine is familiar.

The consequences of the overly legalistic model impact not only cost and efficiency. The nature of the process and the particular

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[61]Alleyne, *Delawyerizing Labor Arbitration*, 50 Ohio St. L.J. 93, 94–96 (1989). *But see* Ponak, Zerbe, Rose, & Olson, *Using Event History Analysis to Model Delay in Grievance Arbitration*, 50 Indus. & Lab. Rel. Rev. 105, 118 (Oct. 1996); and Braden, *Current Problems in Labor-Management Arbitration*, 6 Arb. J. 91, 99 (1951) (arguing that, overall, involvement of lawyers may reduce delay because lawyers can help sharpen the matters to be decided).

[62]Ponak, Zerbe, Rose, & Olson, *id.* at 61, at 118; *See* Mittenthal, *The Impact of Lawyers on Labor-Management Arbitration*, 60-OCT Disp. Resol. J. 42, 43 (2005).

[63]Alleyne, *supra* note 62, at 107 n.13.

[64]Nicolau, *supra* note 63, at 83; Smith, *The Search for Truth*, in Truth, Lie Detectors, and other Problems in Labor Arbitration, Proceedings of the 31st Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1979), at 48.

[65]Mittenthal, *supra* note 63, at 43.

characteristics of the preparation and hearing are affected, as well as the result. As a matter of day-to-day reality, a "legal proceeding" is under the direction and control of attorneys, consistent with an elitist, technical, "only the lawyer knows" model.[66] By contrast, if the arbitration is conceived of as an extension of collective bargaining, it is a participatory activity, empowering to all parties involved, including the worker, the union's business representative, and the representative for management.[67]

Consequences of Delay and Backlog for the Collective Bargaining Relationship

If the legalistic nature of labor arbitration persists unchecked, and the grievance procedure becomes slow and back-logged, there may be serious consequences for the parties and for the economy. As early as 1958, an American Arbitration Association (AAA) editorial warned that the trend toward legalism had gone so far that unless it was reversed there would be serious dangers that arbitration would lose the very characteristics of speed, economy, and informality that cause companies and unions to prefer it as a method of grievance settlement above all others.[68] Just a year prior, G. Allan Dash, Jr., expressed similar concerns, portending that once parties become disenchanted with the process they might return to economic warfare:

> When the local union representative and company personnel manager, who initially handled arbitrations directly with the arbitrator, find themselves shunted down the arbitration table several seats, with skilled counsel, advocates and consultants sitting between them and the arbitrator. . . . When the simple, inexpensive and expeditious procedures they previously followed in securing their arbitration decisions have substituted for them the complex, expensive and time-consuming procedures. . . . When, in addition, the actual arbitration hearing is conducted in a pseudo-court atmosphere . . . , the growing lack of

[66]Fischer, *Updating Arbitration*, in Arbitration of Interest Disputes, Proceedings of the 26th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1974), at 66 ("Unions have just about reached the point where they will not tolerate arbitration proceedings and discussions which reflect aloofness, hyperlegalism, and an essentially upper-class bias which is still all too common in current arbitration."); McDermott, *Presidential Address—An Exercise in Dialectic: Should Arbitration Behave as Does Litigation?*, Decisional Thinking of Arbitrators and Judges, Proceedings of the 33rd Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1981), at 11.

[67]Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1024 (1955).

[68]Editorial, *Creeping Legalism in Labor Arbitration*, 13 Arb. J. 129, 130 (1958).

> confidence in the arbitration process by the union and the company personnel may well reach the breaking point.
>
> [This] may eventually destroy that process and force labor and management to resort to some other process in culminating their collective bargaining on unresolved grievances. No-strike, no-lockout provisions of labor agreements can be expected to exist only as long as the orderly steps of a grievance procedure continue to serve the function of resolving day-to-day disputes in an expeditious and equitable manner.[69]

The list of harms caused by delay recognized by commentators includes:[70]

- Harm to formal contract negotiations
- Inequities created for the grievant in terms of financial remedies available
- A possible inverse relationship between elapsed time and likelihood of reinstatement
- Financial loss to the employer, especially in discharge cases, if the grievance is sustained
- A strong correlation between the length of a reinstated employee's suspension in discharge cases and elapsed time
- Harm to the arbitration hearing itself as memories of the material events dim with the passage of time
- Employees' and supervisors' uncertainty, frustration, and anger about unresolved disputes
- Greater incidence of wildcat strikes

One purpose of this paper is to review the writings of labor arbitrators who have called for a return to collective bargaining arbitration as intended, and described in the *Trilogy*.[71] I echo Former NAA President George Nicolau in his plea:

> . . . to those who had abandoned "formal informality" to return to it, and . . . to those who had never experienced that method to try it:

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[69]Dash, *Halting the Trend Toward Technicalities in Arbitrations*, in Critical Issues in Labor Arbitration, Proceedings of the 10th Annual Meeting, National Academy of Arbitrators, ed. McKelvey (BNA Books 1957), at 109–10.

[70]Ponak, Zerbe, Rose, & Olson, *Using Event History Analysis to Model Delay in Grievance Arbitration*, 50 Indus. & Lab. Rel. Rev. 105, 107 (Oct. 1996) (surveying multiple theories pertaining to harm caused by delay in the grievance arbitration procedure); *see also* Fischer, *supra* note 67, at 63.

[71]Nicolau, *Can the Labor Arbitration Process Be Simplified? If So, in What Manner and at What Expense*, in Arbitration 1986: Current and Expanding Roles, Proceedings of the 39th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1987), at 70, *citing to* Nicolau, Proceedings of New York University 38th Annual Conference on Labor, ed. Adelman (1985), at 12-1; Dash, *supra* note 70, at 111.

So that the hearing room is a place where the emphasis is on the merits of the claim, rather than technical objections to its consideration. A place that recognizes that the story should be told. A place where motions are minimized; one where advocates understand, as they think of making objections, that they are before an arbitrator, not a jury; a place where argument does not overreach, where briefs are concise and reflective of the record or, in those cases where it's apparent the arbitrator doesn't need them, non-existent. A place, in short, where grievance arbitration can perform the function for which it was designed—that of a fair forum worthy of respect from which just results emerge.[72]

A Return to Arbitration As It Should Be—Expeditious, Informal, and Low-Cost

There are many ways to address (and argue about) "legalism" in ad hoc labor arbitration, such as who or what is the primary cause; whether the parties alone can bring about change; what concretely an able arbitrator can and should do to counteract the worst tendencies of party advocates, etc.[73] However, this paper has two different purposes: (1) to describe models of "expedited" arbitration as alternatives to selecting a neutral to hear and decide each separate grievance; and (2) to attempt a description of how this can be accomplished. Again, these are not new ideas or goals,

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[72]Nicolau, *id*. at 69.

[73]There is disagreement among the arbitration advocates and arbitrators as to what role the arbitrator should play in shaping and influencing arbitration hearings. Some commentators believe that an arbitrator should not intervene, even if the parties are engaged in legalistic excesses. Mittenthal, *The Impact of Lawyers on Labor-Management Arbitration*, 60-OCT Disp. Resol. J. 42, 44 (2005); Mittenthal, *Whither Arbitration?*, in Arbitration 1991: The Changing Face of Arbitration in Theory and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1992), at 41–44; Platt, *Current Criticisms of Labor Arbitration: Introduction*, in Arbitration and the Law, Proceedings of the 12th Annual Meeting, National Academy of Arbitrators, ed. McKelvey (BNA Books 1959), at *xvii– xviii*. Other arbitrators believe that the arbitrator must not be entirely passive to the process. *See* Jennings, *Comment: Can the Labor Arbitration Process Be Simplified? If So, in What Manner and at What Expense*, in Arbitration 1986: Current and Expanding Roles, Proceedings of the 39th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1987), at 91–92; Jordan, *Comment: Can the Labor Arbitration Process Be Simplified? If So, in What Manner and at What Expense*, in Arbitration 1986: Current and Expanding Roles, Proceedings of the 39th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1987), at 97; Bartlett, *Labor Arbitration: The Problem of Legalism*, 62 Or. L. Rev. 195, 228–30 (1983) (the arbitrator has responsibility to "control" the proceedings, and to curb employer abuses, which result in delay an obstruction); Miller, *Presidential Reflections* in Arbitration—1975, Proceedings of the 28th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1976), at 3–4 (writing that "…. [w]e [the arbitrators] are bound by our responsibility to the institution of arbitration to cooperate in the development of these new [expedited] systems and make available to parties whatever constructive aid our experience can provide … we cannot conscientiously remain unresponsive to conditions which command remedy.").

but this paper is an effort to capture the best thinking of Academy writings combined with concrete systems that work.

Expedited arbitration as a generic term is a response to the concerns of the parties over rising costs and delays in grievance arbitration.[74] As a general proposition expedited arbitration is a system mutually agreed upon by the parties whereby arbitrator appointments, hearings, and awards are acted upon quickly by the parties and the arbitrators.[75] There are myriad structures and mechanisms, such as elimination of or transcripts, briefs, and lengthy opinions,[76] and/or selecting a single permanent arbitrator or panel of arbitrators to hear grievances on a rotating basis. This paper will advocate a particular form, that being a tripartite panel with a single permanent neutral.

It should be noted that some arbitrators have expressed concerns that expedited procedures *might* have a tendency to "gut" arbitration[77] by reducing quality and integrity of the system in exchange for claimed increases in speed and economy.[78] The worry is that hastily reached decisions[79] may lower professional standards of arbitration[80] and deprive the grievant of due process.[81]

However, results from a 1985 survey of Academy members on the subject of expedited arbitration suggested that an overwhelming proportion of the members who had engaged in expedited arbi-

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[74]48 Am. Jur. 2d Lab. & Lab. Rel. §420: Expedited labor arbitration rules (2006). Expedited arbitration was used in past on an *ad hoc* basis as the only means to resolve a dispute that might otherwise have resulted in a strike or other concerted activity. *See* Murray & Griffin, *Expedited Arbitration of Discharge Cases*, 31 Arb. J. 263 (1976).

[75]48 Am. Jur. 2d Labor and Labor Relations § 420: Expedited labor arbitration rules (2006).

[76]*Id.*

[77]S. Kagel, *Legalism in Arbitration: Legalism—and Some Comments on Illegalisms—in Arbitration*, in Arbitration 1985: Law and Practice, Proceedings of the 38th Annual Meeting, Academy of Arbitrators, ed. Gershenfeld (BNA Books 1986), at 190.

[78]Kagel, Kelly, & Szymanski, *Labor Arbitration: Cutting Cost and Time Without Cutting Quality*, 39 Arb. J. 34 (1984), at 34; S. Kagel, *id.* at 190.

[79]Miller, *Presidential Reflections* in Arbitration—1975, Proceedings of the 28th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1976), at 2 (surveying criticisms of expedited systems).

[80]*Id.*

[81]Sanderson, McLaren, & Moreau, *Expediting The Arbitration*, in Arbitration 1999: Quo Vadis? The Future of Arbitration and Collective Bargaining, Proceedings of the 52nd Annual Meeting, National Academy of Arbitrators, eds. Briggs & Grenig (BNA Books 2000), at 101 (speaking of expedited arbitration of disputes arising under the Ontario Council of Regents for Colleges of Applied Arts and Technology classification system, "[o]ne of the inherent risks of expedited arbitration is that issues of importance will not be given their due process in a forum designed to reach a resolution quickly." The solution is tightly confined by the scope of the arbitrator's jurisdiction. "Given the confined scope of the hearings and specially trained arbitrators, the parties can be confident that the outcome will be fair and not inappropriately spill over into more complicated matters.").

tration believed that their decisions and awards were as sound and just as their decisions and awards in non-expedited arbitration.[82]

Parties That Have Implemented Expedited Arbitration Systems

Although there may be widespread interest in time-saving (and cost-saving) devices like expedited arbitration and other alternatives to "traditional" arbitration,[83] a limited number of expedited arbitration systems have been adopted to date.[84] The parties that have adopted expedited models are generally found within mass production industries and process a high volume of grievances.[85]

The following is a partial list of parties who have experimented with an expedited procedure, as described in the literature:

- Basic Steel[86]

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[82]Peck, *Report on a Survey of Academic Members on Expedited Arbitration: Appendix B*, in Arbitration 1985: Law and Practice, Proceedings of the 38th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1986), at 268. Nicolau, *Can the Labor Arbitration Process Be Simplified? If So, in What Manner and at What Expense*, in Arbitration 1986: Current and Expanding Roles, Proceedings of the 39th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1987), at 72, *citing to* Hoellering, *Expedited Arbitration*, in Proceedings of the New York University 28th Annual Conference on Labor, ed. Adelman (New York: Matthew Bender 1976), at 319 (commenting on a expedited arbitration procedure in which there were no transcripts or briefs, it took place within three weeks of the discharge, and the award was rendered within three days of the hearing).

[83]Ponak, Zerbe, Rose, & Olson, *Using Event History Analysis to Model Delay in Grievance Arbitration*, 50 Indus. & Lab. Rel. Rev. 105, 107 (Oct. 1996). *But see* McDermott, *Evaluation of Programs Seeking to Develop Arbitrator Acceptability: Appendix D*, in Arbitration—1974, Proceedings of the 27th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1975), at 329, 336–37 (challenging the notion that there is "any strong desire on the part of the parties to arbitration for an expedited procedure.")

[84]Alexander & Widenor, *Labor Perspective: The Ten Commandments for Advocates: How Advocates Can Improve the Labor Arbitration Process*, in Arbitration 1992: Improving Arbitral and Advocacy Skills, Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1993) at 283; Mittenthal, *The Impact of Lawyers on Labor-Management Arbitration*, 60-OCT Disp. Resol. J. 42, 44 (2005); Newman & Wilson, *Arbitration—As the Parties See it: A Union Point of View*, in Arbitration—Promise and Performance, Proceedings of the 36th Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1984), at 56.

[85]Mittenthal, *id*. at 44; Weatherhill, *Expedited Arbitration: A Canadian "Expediter's" View*, Arbitration—Promise and Performance, Proceedings of the 36th Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1984), at 240.

[86]The Steelworkers' program, established in 1971, is one of the first expedited arbitration systems to be adopted and is one of the best known. It is also probably one of the most discussed programs in literature. *See, e.g.,* Williston on Contracts §56:80 Expedited arbitration (2006); Dybeck, *Arbitration in Specific Environments: The Steel Industry*, in Arbitration 1989: The Arbitrator's Discretion During and After the Hearing, Proceedings of the 42nd Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1990), at 236; Kovacevic, *Arbitration in Specific Environments: The Steel Industry: Labor Perspective*, in Arbitration 1989: The Arbitrator's Discretion During and After the Hearing, Proceedings of the 42nd Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1990), at 248; Stark, *The Presidential Address: Theme and Adaptations*, in Truth, Lie Detectors, and Other Problems, Proceedings of the 31st Annual Meeting, National

- Aluminum and Can[87]
- Fabricating[88]
- Machinists[89]
- United States Postal Service[90]
- New York State[91]
- Canadian Railroad[92]
- Ontario and British Columbia public sectors[93]
- Textile Workers Union[94]
- Social Security Administration and American Federation of Government Employees[95]
- International Paper Company and United Paperworkers[96]
- United Transportation Union and Long Island Railroad[97]
- Breweries[98]
- Broadcasting[99]

Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1979), at 1, 9; Gilliam, *Should Arbitrators Be Certified?: Dead Horse Rides Again: Comment*, Arbitration—1977, Proceedings of the 30th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1978), at 199, 201–02; Hoellering, *Expedited Arbitration*, Proceedings of the New York University 28th Annual Conference on Labor, ed. Adelman (New York: Matthew Bender 1976), at 321–22; McDermott, *supra* note 84, at 341; Fischer, *The Fine Art of Engineering an Arbitration System: The Steelworkers Union and the Steel Companies*, in Arbitration of Subcontracting and Wage Incentive Disputes, Proceedings of the 32nd Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1979), at 198; Newman & Wilson, *supra* note 85, at 46–49.

[87]Murray & Griffin, *Expedited Arbitration of Discharge Cases*, 31 Arb. J. 264–65 (1976).

[88]Stark, *supra* note 87, at 9–10.

[89]McDermott, *Evaluation of Programs Seeking to Develop Arbitrator Acceptability: Appendix D*, in Arbitration—1974, Proceedings of the 27th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1975), at 340–41.

[90]Hoellering, *supra* note 87, at 332–34.

[91]*Id.* at 329–32.

[92]Coughlin, *By Land and By Air: Two Models of Expedited Grievance Resolution*, in Arbitration 1997: The Next Fifty Years, Proceedings of the 50th Annual Meeting, National Academy of Arbitrators, ed. Najita (BNA Books 1998), at 110–14; Rosner, *By Land and By Air: Two Models of Expedited Grievance Resolution: Ad Hoc Arbitrations on Canadian Railways*, in Arbitration 1997: The Next Fifty Years, Proceedings of the 50th Annual Meeting, National Academy of Arbitrators, ed. Najita (BNA Books 1998), at 115–22.

[93]Sanderson, McLaren, & Moreau, *Expediting The Arbitration*, in Arbitration 1999: Quo Vadis? The Future of Arbitration and Collective Bargaining, Proceedings of the 52nd Annual Meeting, National Academy of Arbitrators, eds. Briggs & Grenig (BNA Books 2000), at 80–102; Block, Beck, & Olson, *Low Profile/High Potential: A Look At Grievance Mediation*, 51-OCT Disp. Resol. J. 55, 56 (1996).

[94]McDermott, *Evaluation of Programs Seeking to Develop Arbitrator Acceptability: Appendix D*, in Arbitration—1974, Proceedings of the 27th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1975), at341–42.

[95]Hoellering, *Expedited Arbitration*, Proceedings of the New York University 28th Annual Conference on Labor, ed. Adelman (New York: Matthew Bender 1976), at 326.

[96]*Id.*

[97]*Id.* at 327.

[98]Stark, *The Presidential Address: Theme and Adaptations*, in Truth, Lie Detectors, and Other Problems, Proceedings of the 31st Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1979), at at 9.

[99]Also one of the earliest expedited procedures. Stark, *id.*at 11–12.

- Airlines[100]
- General Electric and International Union of Electrical, Radio and Machine Workers (IUE)[101]
- United Mine Workers of American (UMW) and Bituminous Coal Operators Association (BCOA)[102]
- Auto Industry—IUE and General Motors[103]
- Kaiser and United Health Care West (SEIU)
- City and County of San Francisco
- Southeastern Pennsylvania Transportation Authority and Transport Workers Union of Philadelphia, Local 234 CTD
- City of Philadelphia and District Council 47, Local 2187 AFSCME

Additionally, both the Federal Mediation and Conciliation Service (FMCS)[104] and AAA[105] have adopted expedited procedures that the parties can opt to use.

The fact that expedited procedures have not gained widespread acceptability is not because the parties are satisfied with the present system. Rather, there is an absence of necessary coordination between labor and management to implement such a system. There is a lack of will, opposing economic interests, and failure of creativity to make the most of the enormous vitality and inherent

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[100]Ladislaw, *By Land and By Air: Two Models of Expedited Grievance Resolution: Moving from the Old to the New American Airlines Expedited Grievance Resolution Process*, in Arbitration 1997: The Next Fifty Years, Proceedings of the 50th Annual Meeting, National Academy of Arbitrators, ed. Najita (BNA Books 1998), at 122–24 and Addendum, 129–49; Upchurch, *By Land and By Air: Two Models of Expedited Grievance Resolution: The New American Airlines Expedited Grievance Resolution Process*, in Arbitration 1997: The Next Fifty Years, Proceedings of the 50th Annual Meeting, National Academy of Arbitrators, ed. Najita (BNA Books 1998), 124–28 and Addendum, 129–49; Stark, *supra* note 99, at 10.

[101]Hoellering, *Expedited Arbitration*, Proceedings of the New York University 28th Annual Conference on Labor, ed. Adelman (New York: Matthew Bender 1976), at 321; Newman & Wilson, *Arbitration—As the Parties See it: A Union Point of View*, in Arbitration—Promise and Performance, Proceedings of the 36th Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1984), at 44–46.

[102]Newman & Wilson, *id.* at 49–51; Brennan, *Labor Relations in the Coal Industry*, in Arbitration—1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1976), at 220.

[103]Miller, *Presidential Reflections* in Arbitration—1975, Proceedings of the 28th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1976), at 1–2.

[104]48 Am. Jur. 2d Lab. & Lab. Rel. §420: Expedited labor arbitration rules (2006).

[105]*AFL-CIO and Management Support 'Excelleration' Program to Expedite Grievance Arbitration*, 51-SEP Disp. Resol. J. 9 (1996); Coulson, *Certification and Training of Labor Arbitrators: Should Arbitrators Be Certified?: Dead Horse Rides Again*, Arbitration—1977, Proceedings of the 30th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1978), at 178; Hart & Wolf, *Grievance Arbitration— Some Hints on Arbitrator Selection, Preparation, and Trial*, American Law Institute—American Bar Association Continuing Legal Education (1995), 1651–59.

flexibility in the arbitration process.[106] As stated by three Canadian arbitrators, John Sanderson, Richard H. McLaren, and John Moreau:

> Parties who want a model responsive to their own sense of arbitral priorities and rhythms have a choice. They can maintain a classic arbitration process, fine tune their presentation skills, and make it work better for them. On the other hand, they can negotiate alternative processes and procedures, quite distinct from the traditional arbitration norm. They can sculpt existing procedures to reflect their specific concerns. In a real sense, parties are limited only by their lack of creativity, and perhaps as well by a reluctance to exercise their joint authority to design dispute resolution systems specific to their unique needs.[107]

The expedited procedures summarized in this paper are merely suggestions that the parties can take or leave in determining what system would best work for them.

Abolition of the Ad Hoc System

Establishment of a Permanent Neutral. The most significant change to a typical grievance arbitration procedure is to eliminate *ad hoc* arbitrator selection. As James H. Jordan noted, "ad hoc arbitration has an outlook that by nature is more short run and adversarial."[108] In *ad hoc* arbitration, even if an established panel of arbitrators is named in the collective bargaining agreement, delay is likely to occur.[109]

In place of *ad hoc* arbitration, the parties should mutually appoint a permanent arbitrator (umpire). The key to this form of expedited arbitration is a permanent arbitrator who is trusted by the parties and their representatives, and who establishes a continuity of "practice" expectations, a consistent body of knowledge, and a predictable pattern of decision making.[110] George Taylor

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[106]Sanderson, McLaren, & Moreau, *Expediting The Arbitration*, in Arbitration 1999: Quo Vadis? The Future of Arbitration and Collective Bargaining, Proceedings of the 52nd Annual Meeting, National Academy of Arbitrators, eds. Briggs & Grenig (BNA Books 2000), at 94.

[107]*Id.*

[108]Jordan, *Comment: Can the Labor Arbitration Process Be Simplified? If So, in What Manner and at What Expense*, in Arbitration 1986: Current and Expanding Roles, Proceedings of the 39th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1987), at 95.

[109]Weatherhill, *Expedited Arbitration: A Canadian "Expediter's" View,* Arbitration—Promise and Performance, Proceedings of the 36th Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1984), at 237.

[110]Dybeck, *Arbitration in Specific Environments: The Steel Industry*, in Arbitration 1989: The Arbitrator's Discretion During and After the Hearing, Proceedings of the 42nd Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1990), at

explained that when the parties rely on a permanent arbitrator, "[o]ut of the continuing relationship consistent policy and mutually acceptable procedures can evolve."[111] Other commentators echo this view.[112]

An obvious attribute of a permanent neutral system is that time is not wasted getting the arbitrator up to speed.[113] Furthermore, *ad hoc* arbitration proceedings tend to be more formal than permanent arbitration proceedings. This is due to a lack of history and rapport shared by the parties, so attorneys for each side are likely to fall back on the tried and true legal techniques with which they are most at ease.[114] The administrative convenience of using a permanent neutral also far surpasses the *ad hoc* system. Dates for the permanent neutral (e.g., one day per month) may be reserved far in advance. More frequent dates can be set immediately following implementation of the expedited system in order to clean up any backlog, and less frequently when disputes are resolved before reaching the (more) predictable award of the permanent neutral.

Establishment of a Permanent Tripartite Arbitration Panel. Arguably, from the parties' perspectives, one of the biggest obstacles is agreeing to a permanent arbitrator to whom both sides are willing to give such power—the authority to issue "totally unacceptable" decisions to one or both sides. Therefore, to minimize the parties' concern, and of at least equal importance as picking a permanent neutral, is establishing a tripartite panel—one member of the panel designated by the company, one by the union, and a third member (the "chairman" or "neutral") selected by the parties. The union and employer are afforded a mechanism to com-

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240–41; Kovacevic, *Arbitration in Specific Environments: The Steel Industry: Labor Perspective*, in Arbitration 1989: The Arbitrator's Discretion During and After the Hearing, Proceedings of the 42nd Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1990), at 250; Jordan, *supra* note 109, at 94–95 *citing to* Shils, et al., Industrial Peacemaker (Philadelphia: University of Pa. Press, 1979), at 47; Bartlett, *Labor Arbitration: The Problem of Legalism*, 62 Or. L. Rev. 195, 209 (1983).

[111]Jordan, *supra* note 109, at 94–95 *citing to* Shils, et al., Industrial Peacemaker (Philadelphia: University of Pa. Press 1979), at 47; Bartlett, *id.*

[112]Dybeck, *supra* note 111, at 240–41; St. Antoine, *Comment: Whither Arbitration?*, in Arbitration 1991: The Changing Face of Arbitration in Theory and Practice: Proceedings of the 44th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1992), at 55, 57.

[113]Nicolau, *Can the Labor Arbitration Process Be Simplified? If So, in What Manner and at What Expense*, in Arbitration 1986: Current and Expanding Roles, Proceedings of the 39th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1987), at 80 (noting that one factor contributing to the length of hearings is the need to educate the arbitrator).

[114]Bartlett, *supra* note 111, at 209.

municate with the arbitrator and each other in additional ways. The permanent party representatives should be experienced, knowledgeable, and respected by their own constituency as well as the other party to the bargaining agreement. The three panelists must also be committed for the long haul to making the system work.[115]

Continuity of the panelists is what makes this system successful. Party representatives become familiar with the thinking of the neutral arbitrator. With that familiarity, and with the leadership of the panel representatives, many, if not most, cases can be settled without the need for arbitration. This is possible because both parties can predict the likely outcome if the grievance is actually arbitrated. This does not preclude arbitration for those cases that should be heard, but it helps to avoid arbitration of certain cases where the parties do not know the likely outcome from an unknown or untested arbitrator. Should a grievance proceed to arbitration, settlement remains a likely possibility due to the procedure's allowance for caucuses and interim deliberations by the panel, interspersed with communications between panel members and advocates for each side. This may lead to settlements during the hearing, or after submission and before decision.[116]

Such a system works if, especially in the early years, there is a continuity of one or a few advocates from each side presenting cases to the tripartite panel. In an oft-cited law review article, Anthony F. Bartlett described the ideal scenario in which attorneys who are regularly used by the parties appear before a permanent arbitrator:

> An attorney appearing on several occasions before [a permanent arbitrator] under the same contract will become familiar with much of the background of the collective agreement and will be in a position to form a good working relationship with both his adversary and the arbitrator. Consequently, there usually will be less inclination to rely on

[115]The system described in this section is practiced (with slight variations) as the grievance procedure of the Carpenters Master Agreement for Northern California and the Arbitration procedure for all grievances involving United Healthcare Workers West and Kaiser Permanente. Gerald McKay serves as the primary neutral.

[116]In 1951, the Steelworkers eliminated the Tripartite panel, leaving only one neutral arbitrator remaining. It was determined that no need existed to continue the tripartite arrangement because the partisan representatives always cancelled one another out and all decisions were made by the neutral chairman. *See* Dybeck, *Arbitration in Specific Environments: The Steel Industry*, in Arbitration 1989: The Arbitrator's Discretion During and After the Hearing, Proceedings of the 42nd Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1990), at 237. I believe this was an unfortunate decision because it eliminated the possibility of caucusing between the partisan panel members and the advocates for their corresponding side.

> legal technicality, because while familiarity popularly may be thought to breed contempt—a doubtful proposition in labor relations—it undoubtedly breeds security.[117]

With the leadership and direction of the tripartite arbitration panel, party representatives (not their lawyers) are required to devote substantial time and energy to gathering and sharing documents and information before the grievance reaches arbitration. These party representatives review factual disputes, narrow the scope of issues as much as possible, and isolate the areas of disagreement that require arbitrable attention. Ideally, with the prehearing assistance of attorneys, the parties develop a single packet of documents, which both sides agree should be presented to the arbitration panel at the outset of the case.

Before the day of arbitration, the attorneys or advocates for both sides are required to discuss the witnesses in light of the previously identified areas of agreement and disagreement, with the purpose of minimizing the presentation of witnesses to those that both sides agree will be necessary to advance each side's theory of the case.

There are many ways to conduct the hearing under the direction of the panel. One variation that has worked very well with Kaiser and United Healthcare Workers-West is, following introduction of exhibits and framing the issues, the advocates for employer and union each make comprehensive opening statements. These statements make clear the respective positions and theories of the case, and as well clarify what factual matters can be stipulated and what remains in dispute. After opening statements the panel goes into executive session for a preliminary discussion, after which the panel informs the parties of what witnesses should testify about which subjects. As an example, the percipient witnesses may be called upon to describe the critical event(s) giving rise to discipline. The panel decides what it needs to hear to decide the case. Depending on the circumstances, written statements may be admitted as direct testimony, subject to cross-examination. Witnesses may be encouraged to testify in narrative form, with opportunity for follow-up questioning and cross-examination. If they want, the grievants in discipline and discharge cases are always given an opportunity to "have their say" about the critical facts.

No briefs are allowed. Immediately following close of the record, all matters are argued orally to the panel.

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[117]Bartlett, *Labor Arbitration: The Problem of Legalism*, 62 Or. L. Rev. 195, 209 (1983).

After oral argument is concluded, the panel then deliberates in executive session. The panel members reach decision only after full discussion. The decision may or may not be announced on the day of the arbitration, depending on the complexity of the case.

The panel can often hear multiple cases in one day because the parties have narrowed the issues to factual disputes it determines must be resolved. The "compression of the hearing" is the "real secret of success of an expedited arbitration system."[118]

When designing an expedited arbitration system, the parties may decide that written decisions should be issued only when requested by either of the parties.[119] In some instances, bench awards may be sufficient.[120] Alternatively, the parties may prefer that whether or not the decision is announced the day of the hearing, it ought to be reduced to writing and sent to the parties within two weeks, or a comparably short amount of time. Those who have participated in tripartite panels strongly recommend written decisions. Many commentators agree that when decisions are written, they need not be detailed.[121] A short-form or memorandum decision is sufficient in many cases. The most important principle with respect to decisions is that direct participants want, and are entitled to, a prompt decision that they can understand. It is especially important that the losing side be told how the panel reached its decision.[122]

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[118]Weatherhill, *Expedited Arbitration: A Canadian "Expediter's" View*, Arbitration—Promise and Performance, Proceedings of the 36th Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1984), at 238–39.

[119]Braden, *Current Problems in Labor-Management Arbitration*, 6 Arb. J. 91, 97 (1951). Even Braden was concerned with the effect that written decisions have on the overall cost of arbitration. He believed that when decisions were written, they need not be detailed in most cases.

[120]*But see* Weatherhill, *supra* note 119, at 238.

[121]S. Kagel, *Legalism in Arbitration: Legalism—and Some Comments on Illegalisms—in Arbitration*, in Arbitration 1985: Law and Practice, Proceedings of the 38th Annual Meeting, Academy of Arbitrators, ed. Gershenfeld (BNA Books 1986), at 183–84 (". . . when opinions are written they should be concise, they should deal with the issues, they should not refer to the personal beliefs of the arbitrator, and they need not be law review articles with extensive footnotes. They should be concise and instructive . . ."); Fischer, *Discussion: 25 Years of Labor Arbitration— and the Future*, in Labor Arbitration at the Quarter-Century Mark, Proceedings of the 25th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1973), at 41 (Ben Fischer said jokingly that the designers of the Steelworkers expedited arbitration model found a way to curtail long-winded arbitration awards: "We have devised one very simple method of assuring brief decisions: We aren't paying for the decision; we are paying only for the hearing time."); Braden, *supra* note 120, at 97.

[122]Fischer, *Updating Arbitration*, in Arbitration of Interest Disputes, Proceedings of the 26th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1974), at 66.

The deliberations of the panel should be completely confidential. Written decisions are issued as panel decisions and not as decisions supported by named panel members. Both labor and management panel members are encouraged to be frank and honest in their deliberations with the neutral arbitrator. Confidentiality is central to "protecting" the party panelists.

How to Implement a Permanent Tripartite Panel Procedure

Identify and Communicate With Decisionmakers Who Have the Willingness and Authority to Achieve Change. A key to implementing an expedited arbitration procedure is that there is a person or group of people from both the union and the employer who have the willingness and authority, as well as the trust in each other and faith in the collective bargaining process, to achieve change. There will always be others who are opposed or resistant to any change in the status quo of arbitration. Some individuals or groups benefit from prolonged arbitration. For example, Human Resources Directors may spend considerable salaried time prepping for arbitrations. Often they gain kudos for making the arbitrations thorough and exhausting. Similarly, management representatives may prefer that the arbitration process remain painfully slow, as additional punishment for a grievant and/or union. There are other parties, namely advocates, who may wish to retain the current arbitration structure because their focus is solely on winning arbitrations. Even the best-intentioned advocates may be consumed with tracing box scores and may not consider that both labor and management have a stake in arbitration that goes far beyond winning or losing any particular case.[123] The obvious financial incentives for attorneys paid by the hour to prepare, advocate, and brief individual cases must be addressed and overcome. Ben Fisher, in describing how the Steelworkers successfully revamped their arbitration system, noted that the real interests of the parties may be better

[123]Fischer, *The Fine Art of Engineering an Arbitration System: The Steelworkers Union and the Steel Companies*, in Arbitration of Subcontracting and Wage Incentive Disputes, Proceedings of the 32nd Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1979), at 207; *see also* McCracken, Lipkin, & Ritter, *Panel Discussion: Innovations in Dispute Resolution: The Las Vegas Hotel Industry*, Arbitration 2004: New Issues and Innovations in Workplace Dispute Resolution, Proceedings of the 57th Annual Meeting, National Academy of Arbitrators, ed. Coleman (BNA Books 2005), at 118, 129–30 (describing how if parties involved in the Las Vegas hotel industry's Initial Resolution/First Step program begin to count wins and losses, the cooperative spirit of the alternative dispute resolution process will be lost).

represented by policymakers within the company and within the union than by advocates.[124]

Therefore, the first step towards an expedited arbitration system is seeking out and identifying policymakers—company owners, executives, or public officials—who are sufficiently high up in the corporate or public sector entity structure so as to be removed from the daily arbitration process. The identified decisionmakers of the parties should, of course, have an interest in economic savings for the company or public sector entity. Such individuals have the power and the resources to best solve the problems that beset arbitration. Ben Fischer believed that "[o]nly [the policy makers] can take the steps necessary to assure the future health of the process."[125]

The policymakers either have to be sufficiently "enlightened" or must be "educated" to accept the advantages of implementing an expedited arbitration system. The task is to convince them in confidential, totally frank discussions that expedited arbitration is a win-win for the union and the company.

Union advocates for change have been able to accomplish this in various industries by first fully disclosing the union's honest interests:

- Saving money[126]
- Conserving valuable and scarce union reps' time and energy
- Providing the grievant a quick resolution and a "day in court," which is often as important as the outcome[127]
- Making sure that problems do not fester in the workplace

Many of the advantages to the employer overlap with the advantages to the union:

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[124] *Id.*

[125] *Id.*

[126] Williston on Contracts §56:80 Expedited arbitration (2006); Jennings, *Comment: Can the Labor Arbitration Process Be Simplified? If So, in What Manner and at What Expense*, in Arbitration 1986: Current and Expanding Roles, Proceedings of the 39th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1987), at 90.

[127] *American Manufacturing Co.,* 363 U.S. 564, 568 n.6 (1960), *citing to* Cox, Current Problems in the Law of Grievance Arbitration, 30 Rocky Mtn. L. Rev. 247, 261 (1958); Peck, *Report on a Survey of Academic Members on Expedited Arbitration: Appendix B*, in Arbitration 1985: Law and Practice, Proceedings of the 38th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1986), at 265, 269.

- Eliminating exorbitant legal fees (usually the easiest point of agreement for employers)[128]
- Reducing the need for a huge time commitment from Human Resources managers, supervisors, and witnesses so that their time can instead be spent on productive work
- Keeping these matters from riling up the workplace for long periods of time[129]

This discussion also provides the opportunity to raise additional benefits from the process:

- Creating a spirit of cooperation and improved work relations resulting from everyone on both sides knowing that issues will be quickly resolved (both fairly and fully)
- Restoring some measure of faith in the claimed speed and efficiency of the arbitral process[130]

The above-mentioned "philosophical" advantages of expedited arbitration are not particularly convincing to a hard-nosed dollars-and-cents executive unless they are translated into a rational cost-saving equation.

Before speaking with the decisionmaker in the company or agency, it is necessary to consider all the possible concerns about expedited arbitration. Only by becoming aware of and evaluating such criticisms will it be possible to address and respond to them when the decisionmakers raise them in these initial conversations.

Management may be reluctant to implement an expedited system because it may find some benefit of forcing the union to make an economic calculus regarding taking cases to arbitration.[131] Presently, unions may have to decline to arbitrate grievances because the cost of arbitration is prohibitive.[132] Management may fear that if a procedure makes it too "easy" and cost-effective, unions will

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[128]Williston on Contracts §56:80 Expedited arbitration (2006).

[129]Fischer, *The Fine Art of Engineering an Arbitration System: The Steelworkers Union and the Steel Companies*, in Arbitration of Subcontracting and Wage Incentive Disputes, Proceedings of the 32nd Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1979), at 203–04.

[130]Zack, *New Alternatives to the Grievance Procedure: Suggested New Approaches to Grievance Arbitration*, in Arbitration—1977, Proceedings of the 30th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1978), at 113.

[131]Block, Beck, & Olson, *Low Profile/High Potential: A Look At Grievance Mediation*, 51-OCT Disp. Resol. J. 55, 60–61 (1996).

[132]Newman & Wilson, *Arbitration—As the Parties See it: A Union Point of View*, in Arbitration—Promise and Performance, Proceedings of the 36th Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1984), at 40.

bring more non-meritorious claims to arbitration.[133] With good reason, some unionists suspect that management would prefer arbitration to be a long and tiring process as "prolonging the grievance-resolution process through arbitration is merely one battle in the war of attrition against the union."[134] So, why would management ever want to expedite the process?

Ben Fischer explained why management benefits from the implementation of an expedited arbitration even if unions were to fare better under such a procedure. An enterprise is designed to make a product, provide a service, and net a profit.[135] The enterprise is not, however, designed to reinforce the judgments of supervisors on grievances, right or wrong.[136] Quite simply, employee hostility is bad for the company. If supervisors are offended because they perceive that unions are favored, or supervisors' authority is undermined, this may be a worthwhile tradeoff in terms of overall productivity of the enterprise.[137] A simplistic view of winning and losing arbitrations obscures consideration of the basic interests of the enterprise and the parties.[138]

Arbitrator Nicolau made an argument similar to Ben Fischer's in a 1986 Academy paper. He encouraged management to see the value in a smoothly functioning grievance procedure. "The goal of management is efficient production."[139] Efficient production relies on the maintenance of high morale.[140]

> It appears self-evident that those who never have the opportunity to be heard or those who lose because they are "outspent or outlasted" will not be joyful, productive workers, but will turn hostile, a condition management can ill afford. So it seems to be in management's inter-

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[133]Kagel, Kelly, & Szymanski, *Labor Arbitration: Cutting Cost and Time Without Cutting Quality*, 39 Arb. J. 34, 39 (1984).

[134]Alexander & Widenor, *Labor Perspective: The Ten Commandments for Advocates: How Advocates Can Improve the Labor Arbitration Process*, in Arbitration 1992: Improving Arbitral and Advocacy Skills, Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1993) at 279; Newman & Wilson, *supra* note 133, at 39 ("Unfortunately, too many employers see the grievance procedure as a necessary evil, a means of delaying resolution of problems, or a method of wearing out the union or bleeding it dry financially.").

[135]Fischer, *The Fine Art of Engineering an Arbitration System: The Steelworkers Union and the Steel Companies*, in Arbitration of Subcontracting and Wage Incentive Disputes, Proceedings of the 32nd Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1979), at 203–04.

[136]*Id.*

[137]*Id.*

[138]*Id.*

[139]Nicolau, *Can the Labor Arbitration Process Be Simplified? If So, in What Manner and at What Expense*, in Arbitration 1986: Current and Expanding Roles, Proceedings of the 39th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1987), at 79.

[140]*Id.*

est, both in the short and long run, to see that its contractual grievance procedure is working smoothly and effectively.[141]

Resolution and subsequent elimination of disputes will not be possible if unions are deterred from bringing grievances to arbitration or if the grievance process is prolonged interminably. John Kagel and his colleagues noted that when employees are convinced that the action taken on their case is correct, the underlying dispute is not only resolved, but also completely eliminated.[142] Hopefully, the decisionmaker for the company or public entity will see the value in these arguments.

Respected arbitrators with a depth of experience can (and have) been instrumental in advising and assisting parties to fashion a procedure.[143]

An executive or public official may also be persuaded by a point that must be made quietly, but over and over again—a tripartite panel comprised of well-chosen members guarantees the employer and the union that no matter how quickly a case is put on, no matter what witnesses may forget or inaccurately remember, no matter how wanting the lawyer's presentation, each side will have a well-prepared, well-prepped party arbitrator meeting "behind closed doors" with the arbitrator to reach a decision. This ensures that nothing is left out or kept from the arbitrator that is important to rendering a fair and mutually acceptable decision.[144]

Identify, Select, and Educate a Qualified Arbitrator to Serve as the Permanent Neutral. The second key is to identify, select, and to a degree "educate" a permanent arbitrator who has earned the trust and confidence of the key party representatives. Plainly stated,

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[141] *Id.*, at 79–80.

[142] Kagel, Kelly, & Szymanski, *Labor Arbitration: Cutting Cost and Time Without Cutting Quality*, 39 Arb. J. 34, 39 (1984), at 40.

[143] Miller, *Presidential Reflections* in Arbitration—1975, Proceedings of the 28th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1976), at at 3–4 (writing that "… [w]e [the arbitrators] are bound by our responsibility to the institution of arbitration to cooperate in the development of these new [expedited] systems and make available to parties whatever constructive aid our experience can provide…we cannot conscientiously remain unresponsive to conditions which command remedy.").

[144] Arbitrator Mittenthal has argued that the Braden model (formality and legalism) has prevailed because it better serves the parties needs and desires for certainty, predictability, and results they themselves can control. He believes that, from the perspective of the parties, the litigation model limits the arbitrator's discretion and minimizes the possibility of unwelcome surprises. Mittenthal, *Whither Arbitration?*, in Arbitration 1991: The Changing Face of Arbitration in Theory and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1992), at 39. This paper demonstrates that legalism is not necessary to ensure consistency or predictability. Under a permanent arbitrator system that includes party participation in the deliberation process, the parties maintain a degree of "control" together with "predictability."

that arbitrator must have a deep understanding of the collective bargaining agreement and the relationship, as well as the principles of "just cause." The arbitrator must understand how to read the contract in a way that is consistent with the expectation of the parties. Especially immediately following implementation of the expedited system, if the arbitrator issues a "bad decision" going against one or the other party, this can set the process back for years—or forever.

The ideal is to know an arbitrator who already understands this process and can meet with the key party representatives to discuss the process from both the parties' and arbitrator's points of view. Although Academy members may disagree, most arbitrators are not born this way, but, as with the parties, are educated to this point of view. It must be clear that the arbitrator has thought long and hard about this kind of process and is committed to the proposition that arbitration is not only an *extension* of collective bargaining, but also a *reflection* of the particular bargaining relationship.[145] The particular character of a tripartite panel must be adapted to the industry and the expectations of the parties with respect to what they think is just.

An arbitrator who participates in an expedited system must have a special kind of perspective—he or she must be someone who recognizes that the best solution to a dispute is not one that he or she deems best, but rather is one that the parties may agree upon, or at least can live with. A suitable arbitrator recognizes that the key to this process is helping the two panel members, during deliberations, reach their own resolution of any dispute, and then step out and take responsibility for the decision by writing the opinion. Yet, the arbitrator must be willing to never reveal how the panel members have voted behind closed doors.

Transform the Relationship Between Labor and Management. The third key ingredient for success is to transform the relationship between the union and management. The labor relations managers, department heads, union staff representatives, and rank and file leaders who fight out their grievances in an adversarial, hide-the-ball, ambush, and intimidation mode must change their

[145]Koven & Smith, *Two Theories of Arbitration*, in Just Cause: The Seven Tests, 3d ed., ed. May (BNA Books 2006), at 16.

ways.[146] This may require several adverse decisions from the panel. It can take years to break down long-standing patterns, and that is why the stature of both party arbitration panelists is essential for success. Collectively, the tripartite panel can and must exercise its authority to require the parties to interact with each other consistent with the expectations of cooperation, narrowing of the issues, and agreement where appropriate.

Train Union Stewards and Representatives and Company Management and Labor Relations About the New System. Fourth, detailed training of union stewards and representatives, as well as their counterparts on the employer side, is necessary to make the system work, and to change the collective bargaining culture. Practical education about how to read the contract, how to jointly identify and investigate grievances, how to jointly gather documents, and how to jointly narrow disputed issues enable the participants to effectively do the groundwork for the tripartite panel. The Las Vegas hotel industry's Initial Resolution/First Step Process is a remarkably successful example of such a program. Labor and management sponsor joint education and brainstorming workshops attended by front-line supervisors, managers and shop stewards.[147] The workshops are designed to give the participants "a skills toolbox for problem solving."[148] An arbitrator from the FMCS who participates in the program reported that this process has "forced the parties to engage in behavior modification and [has] brought about a dramatic cultural and administrative change for both the union and management."[149] A participating management representative made strong comments in favor of the program:

> . . . . the companies have concluded that that investment of time, money and effort is well worth it. Everything from grievances that would have gone further in the grievance process or to arbitration are either

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[146]Alexander & Widenor, *Labor Perspective: The Ten Commandments for Advocates: How Advocates Can Improve the Labor Arbitration Process*, in Arbitration 1992: Improving Arbitral and Advocacy Skills, Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1993) at 287 ("Too often the only way a union assesses whether the system works is by counting up the win/loss record in the grievance procedure without looking at the structure and mechanics of the process itself. 'It if ain't broke, don't fix it' becomes a rationalization for never revisiting the dynamics of dispute resolution in a changing workplace. [Parties should take a] more pro-active approach to modify the system . . . to try to understand their role in the broader context of industrial relations as a whole.").

[147]McCracken, Lipkin, & Ritter, *Panel Discussion: Innovations in Dispute Resolution: The Las Vegas Hotel Industry*, Arbitration 2004: New Issues and Innovations in Workplace Dispute Resolution, Proceedings of the 57th Annual Meeting, National Academy of Arbitrators, ed. Coleman (BNA Books 2005), at 125.

[148]*Id.*

[149]*Id.*

> resolved or are resolved earlier. But I think it's bigger than that. I think that the result has been to open up channels of communication between nonsupervisory union-represented hourly employees and their first- and second-level supervisors or managers helping them work better together. Employees are more productive because managers treat them better, because employees believe they have more of a stake in the operation, and customer service is enhanced. What my perspective indicates and what I can only assume the casinos have concluded is that this is worth the time, trouble, and investment because the pay back is substantial.[150]

Include Expedited Arbitration Provision in Collective Bargaining Agreement or Adopt Informal Procedures. The parties may wish to include in the collective bargaining agreement language that memorializes and sets out the new expedited arbitration procedure.[151] The advantage of reducing the procedure to writing is that participants in the procedure better know what to expect and what is expected of them. On the other hand, some parties prefer an expedited arbitration system that is not incorporated into the collective bargaining agreement. This allows for greater flexibility as the parties may mutually agree that the process should be revised to better fit their needs.[152] In any case, the agreement to use expedited arbitration must be made before actual cases arise.

Characteristics of Effective Expedited Arbitration Systems

Short of establishing a full-blown permanent neutral system, there are many specific ways to counter delay and high costs, singly or in combination.

Reform of Pre-arbitration Steps. *First-Line Resolution of Grievances.* Expedited arbitration proposals often include methods for reforming the way that grievances are handled before the dispute proceeds to arbitration. In this sense, the proposals seek to holistically reform the problems plaguing arbitration by getting to the root of the problem. As Arbitrator George Nicolau put it, "The best way to simplify the arbitration process is to avoid it—by set-

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[150] *Id.* at 127.

[151] Bartlett, *Labor Arbitration: The Problem of Legalism*, 62 Or. L. Rev. 195, 339–40 (1983).

[152] As an example, the expedited tripartite panel established by Kaiser and United Healthcare Workers West, SEIU in Northern California began as a pilot program. Appended to this paper is the Grievance Procedure of the Carpenters Master Agreement for Northern California, with several multi-employer associations (see Appendix 5-1). This procedure memorializes the basic structure of the tripartite panel, but not the day-to-day practices. Fifteen years later, the parties have still not "written up" the rules of their procedure as both parties respect and follow the unwritten rules.

tling grievances before they reach that stage."[153] As one example, he described how a major network and the broadcast union representing its technicians implemented a first-line grievance resolution system.[154] This structure gave first-line supervisors and union stewards authority to settle grievances on a "no precedent/without prejudice" basis, on terms mutually acceptable to them.[155] The purpose of this system was to allow the parties to reach a decision that was fair and to "get on with the job," while insulating their resolution to that situation alone.[156] Built-in safeguards and an escape hatch allowed either side to undo a settlement if necessary.[157] This system empowered first-line supervisors and allowed for early resolution of the dispute, before each side had dug in its heels.

Joint Fact-finding of Grievances. John Kagel, Kathy Kelly, and Patrick J. Szymanski believe that any true effort at reform must involve the inclusion of a mandatory joint fact-finding provision in the collective bargaining agreement that forces the parties to make constructive use of the early steps in the grievance procedures by fully investigating the relevant facts.[158] They believe joint fact-finding defuses adversarial combat because the parties must work together to investigate their disputes jointly when they arise, not months later in front of an arbitrator.[159] The procedure also makes settlements more likely because both sides have a common understanding of the facts.[160] If settlement cannot be reached, joint fact-finding contributes to a more efficient presentation of cases that are arbitrated because the issues in dispute have been narrowed.[161]

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[153]Nicolau, *Can the Labor Arbitration Process Be Simplified? If So, in What Manner and at What Expense,* in Arbitration 1986: Current and Expanding Roles, Proceedings of the 39th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1987), at 75.

[154]*Id.*

[155]*Id.*

[156]*Id.*; *See also* Newman & Wilson, *Arbitration—As the Parties See it: A Union Point of View,* in Arbitration—Promise and Performance, Proceedings of the 36th Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1984), at 42.

[157]Nicolau, *supra* note 154, at 75.

[158]*See generally* Kagel, Kelly, & Szymanski, *Labor Arbitration: Cutting Cost and Time Without Cutting Quality,* 39 Arb. J. 34 (1984).

[159]*Id.* at 34.

[160]*Id.*; *see also* Newman & Wilson, *supra* note 157, at 42.

[161]Kagel, Kelly, & Szymanski, *supra* note 159, at 34–35.

According to John Kagel and his colleagues, joint fact-finding procedures have eight essential characteristics. There are variants in the process,[162] but it more or less works like this:

1. Grievances that are not resolved in a short, defined period of time by the employee and his or her supervisor are immediately referred to joint fact-finding.
2. Within a specified, often very short, time frame, the union and the company each select a first-level representative of each party to serve as a fact-finder. Together, the union fact-finder and the company fact-finder interview all witnesses who possess pertinent information, review all relevant documents, and fully investigate the grievance.
3. The fact-finders prepare a written report on a simple form. This report lists all the facts that are stipulated and those that are still in dispute.
4. The union and company representatives are supplied with this report. Using this report, the representatives meet in an effort to resolve the grievance.
5. If the case must proceed to further steps in the grievance procedure, culminating in arbitration, the stipulated facts in the report are binding on the parties.
6. If the case is not settled before arbitration, the fact-finders' report becomes a joint exhibit. No other evidence needs to be introduced regarding stipulated facts.
7. The parties are precluded from introducing evidence in arbitration that was withheld during the fact-finding phase.
8. The fact-finding system is coupled with an arbitration procedure calling for joint labor-management meetings, and, if necessary, arbitration, on a periodic, specified schedule before a permanent arbitrator.[163]

After examining the outcome of Safeway and the Teamsters' use of a joint fact-finding procedure over a three-year period, John Kagel and his colleagues concluded that total arbitrators' fees and court reporters' fees per case averaged one-fifth of the typical costs under the prior, traditional system used in that rela-

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[162]Nicolau, *Can the Labor Arbitration Process Be Simplified? If So, in What Manner and at What Expense*, in Arbitration 1986: Current and Expanding Roles, Proceedings of the 39th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1987), at 78.

[163]Kagel, Kelly, & Szymanski, *supra* note 159, at 35.

tionship.[164] The procedure also assisted in reducing counter-productive formalism.[165]

Mediation Prior to Arbitration. Some arbitration clauses include a step following the internal grievance procedure whereby unresolved disputes are submitted to mediation, rather than directly to arbitration.[166] Arbitration is reserved for those grievances that cannot be resolved through mediation.[167] Mediation as a vehicle for resolving disputes arising under a collective bargaining agreement has been advocated for five decades.[168] FMCS provides free mediation services and many states provide free mediators for rights grievances. The advantage of mediation is that it is an informal process in which participants are encouraged to expand their thinking to explore options together.[169] This increases their capacity to resolve future conflicts on their own.[170] As a variation, the mediator is asked to make a recommended decision. If not followed, and the case is arbitrated, then the "loser pays," if the award is consistent with the mediator's recommended resolution.

Post-mediation/Pre-hearing Step Akin to "Early Neutral Evaluation." After mediation, and before arbitration, some parties might opt to take part in a procedure akin to Early Neutral Evaluation.[171] This procedure enables the parties to make an informed decision whether or not to settle a grievance because prior to arbitration,

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[164] *Id.* at 38.

[165] *Id.*

[166] Goldberg, *The Mediation of Grievances Under a Collective Bargaining Contract: An Alternative to Arbitration*, 77 N.W. U. L. Rev 270 (1982).

[167] *Id.*

[168] Block, Beck, & Olson, *Low Profile/High Potential: A Look At Grievance Mediation*, 51-OCT Disp. Resol. J. 55, 60–61 (1996); Alexander & Widenor, *Labor Perspective: The Ten Commandments for Advocates: How Advocates Can Improve the Labor Arbitration Process*, in Arbitration 1992: Improving Arbitral and Advocacy Skills, Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1993) at 286 (noting an increase in requests for training in the area of grievance mediation or med/arb); Newman & Wilson, *Arbitration—As the Parties See it: A Union Point of View*, in Arbitration—Promise and Performance, Proceedings of the 36th Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1984), at 41.

[169] Goldberg, *supra* note 167, at 271.

[170] Nicolau, *Can the Labor Arbitration Process Be Simplified? If So, in What Manner and at What Expense*, in Arbitration 1986: Current and Expanding Roles, Proceedings of the 39th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1987), at 77.

[171] *See* http://www.adr.cand.uscourts.gov/adr/adrdocs.nsf/354c0e78f4dde1a6882564e1000be228/c721a136da682c8c882564e600603882?OpenDocument; Bloch, *Presidential Address: Arbitration in a Litigious Society: Arbitration, Innovation, and Imagination—Escaping the Missionary Position*, in Arbitration 2003: Arbitral Decision-Making: Confronting Current and Recurrent Issues, Proceedings of the 56th Annual Meeting, National Academy of Arbitrators, ed. Coleman (BNA Books 2004), at 11 (explaining how during his 10 years as a permanent arbitrator, he created a system of "What If" sessions. The parties would present evidence to him in an informal setting asking, "What if I was to present this type of evidence to you . . . how might you decide the case?").

they learn how an arbitrator might decide the case. In this procedure, parties will usually make informal presentations to the arbitrator to highlight their respective positions.[172] Then, if the arbitrator feels such a determination is possible after the short presentation, he or she will offer an opinion as to the arbitral outcome.[173] The parties typically agree beforehand that the arbitrator's opinion is not binding; however, they may use it as guidance in their deliberations.[174] If the dispute proceeds to arbitration, then the arbitrator's recommendations may not be referred to in a subsequent hearing and the arbitrator who has participated in this procedure is usually not assigned to hear the case.[175]

Categories of Grievances That Are Processed Under Expedited Systems. For the most part, parties that have adopted expedited arbitration choose to confine the procedure to issues that do not involve novel problems and that have limited contractual significance or complexity.[176] Expedited arbitration is rarely a substitute for regular arbitration.[177] Rather, generally, dual grievance procedures are in place—one for the day-to-day, "run-of-the-mill" type of complaint and another for the more far-reaching or complicated contract disputes.[178] Under a dual grievance procedure, grievances that involve novel problems and are of extensive contractual significance or complexity still follow the "traditional" route.[179] In this sense, expedited arbitration is an adjunct to the "traditional" arbitration process.[180] Expedited arbitration is supportive of regular arbitration because an advantage of the procedure is that it permits quick resolution of a large body of relatively simple claims.[181] This in turn allows the parties and the arbitrators the freedom

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[172]Gershenfeld, *supra* note 171, at 54.

[173]*Id.*

[174]*Id.*

[175]*Id.*

[176]Williston on Contracts §56:80 Expedited arbitration (2006) (citing to the expedited arbitration agreement between Bethlehem Steel Corporation and the United Steelworkers of America). *See also* Sanderson, McLaren, & Moreau, *Expediting The Arbitration*, in Arbitration 1999: Quo Vadis? The Future of Arbitration and Collective Bargaining, Proceedings of the 52nd Annual Meeting, National Academy of Arbitrators, eds. Briggs & Grenig (BNA Books 2000), at 93–94; Fischer, *Updating Arbitration*, in Arbitration of Interest Disputes, Proceedings of the 26th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1974), at 66.

[177]Fischer, *id.* at 67–68.

[178]*Id.* at 67.

[179]St. John, *Comment: Updating Arbitration*, in Arbitration of Interest Disputes, Proceedings of the 26th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1974), 73, 76.

[180]*Id.*

[181]Fischer, *supra* note 177, at 68.

to devote special care and attention to disputes of complexity, import, or precedent value.[182]

With these and other practices in place, many cases can be calendared for each "permanent panel" date.[183] Almost always they will be settled before or on the set date.

Hearing Required Within a Certain Amount of Time Following Appointment of the Arbitrator. Many agreements contain a provision mandating that the arbitration convene within 30 days after notice to the arbitrator, or requiring that the first available arbitrator hear the case. Such *ad hoc* systems don't work. The more acceptable arbitrators have very few, if any, available dates within three months. Union advocates Winn Newman and Carole W. Wilson wrote:

> . . . the number of "acceptable" arbitrators has not kept pace with the increased demand for arbitrations, so that a small percentage of experienced arbitrators are responsible for the overwhelming percentage of cases assigned.[184]

The time between selection and the first confirmed date of arbitration hearing is the single biggest cause of delay, followed closely by the time required to find a second (or third) mutually agreeable date to reconvene if the matter is not completed in one day. The best way to address this issue is with a permanent neutral, reserving regularly scheduled dates (for which the parties are committed) far in advance.

Time and Cost Savings Mechanisms Related To Arbitration Hearings. There are myriad practice techniques employed by arbitrators and advocates to get cases heard and submitted both effectively and efficiently. These strategies are not addressed in this paper.[185] Rather, several recognized (and disputed) mechanisms are summarized.

Discouragement or Prohibition Against Use of Attorneys. This is an effective place to start. Collective bargaining parties can create an expedited arbitration system under which advocacy by attor-

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[182]Miller, *Presidential Reflections* in Arbitration—1975, Proceedings of the 28th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1976), at 3.

[183]Although these pre-hearing requirements can be bargained into an agreement with ad hoc arbitration, they do not work without the consistent enforcement of an established neutral or tripartite panel.

[184]Newman & Wilson, *Arbitration—As the Parties See it: A Union Point of View*, in Arbitration—Promise and Performance, Proceedings of the 36th Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1984), at 44.

[185]A recent article is an excellent review of practice tips. Brogan & Winograd, *Sometimes More Is Just More—Make Your Next Labor Arbitration More Efficient With These Insider Insights*, Cal. Lab. & Employment L. Rev., Vol. 21, No. 1, p. 6 (Jan. 2007).

neys can be the exception, with the understanding that neither side has a lawyer unless specifically requested.[186] In such a case, if one side has an attorney, the other has one too. The process is best served when the participants in an arbitration hearing are helpful and knowledgeable about the plant, the job, what goes on, and what makes sense.[187] Of course, this is not meant to absolutely exclude attorneys who are willing and able to work within an "expedited process."

Preclude Written Briefs Except Where Issue Is Particularly Complex or Novel. Plainly stated, lawyers are trained to "write briefs" to argue their client's case. As well, lawyers, especially management lawyers, must meet "billable hours" requirements. Their remuneration and status are dictated by their "billable hours." As the "expert," lawyers persuade their clients that a thorough hearing of the dispute is necessary, frequently requiring more than one day. The brief is necessary to most effectively persuade the arbitrator. The transcript is necessary to write a quality brief. Two (or more) days of "study and writing" time are required by the arbitrator to read the transcript and briefs and prepare the award. The cost of arbitrator and court reporter is quadrupled.

Oral summary of the case should be the rule rather than the exception. Anyone, even an attorney, can be trained to summarize and argue a case at the end of a day of arbitration. No written briefs should be required unless the matters being disputed are particularly complex or novel.[188] In the typical arbitration proceeding, there is no need for post-hearing briefs.[189] As an alternative to no briefs, the arbitrator can request that specific issues or evidentiary disputes be briefed. This is one area where the arbitrator can take the lead.

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[186]Newman & Wilson, *supra* note 185, at 49 (The United Mine Workers of America and the Bituminous Coal Operators Association Program contractually prohibits the use of lawyers by either side at any step of the grievance procedure, unless mutually agreed upon.).

[187]Fischer, *Updating Arbitration*, in Arbitration of Interest Disputes, Proceedings of the 26th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1974), at 66.

[188]Murphy, *The Ten Commandments for Advocates: How Advocates Can Improve the Labor Arbitration Process*, in Arbitration 1992: Improving Arbitral and Advocacy Skills, Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1993), at 261; Nicolau, *Can the Labor Arbitration Process Be Simplified? If So, in What Manner and at What Expense*, in Arbitration 1986: Current and Expanding Roles, Proceedings of the 39th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1987), at 72–73; Bartlett, *Labor Arbitration: The Problem of Legalism*, 62 Or. L. Rev. 195, 209 (1983).

[189]Bartlett, *id.*; Fischer, *supra* note 188, at 65.

Preclude Use of Transcripts Except Where Issue Is Particularly Complex or Novel. Court reporters and transcription of hearings make the arbitrator's job easier, resolving credibility disputes, unraveling complicated fact patterns, and better capturing the exact meaning of testimony. A written transcript is undoubtedly beneficial and relied upon for multiple-day hearings. However, reliance upon a transcript record is a manifestation of a failed system.

Transcripts are not necessary in the majority of one-day cases.[190] In almost all cases the arbitrator will not *need* a transcript of the hearing for the disposition of the award.[191] Advocates will need a transcript only if they intend to file a post-hearing brief, but in the majority of cases the arbitrator does not need post-hearing briefs either. Elimination of transcripts is a good starting point if the parties wish to reduce cost.[192] Shawn C. Keenan shared his no-nonsense perspective on the cost-saving benefit of prohibiting transcripts:

> [P]eople 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?[193]

Relax Rules of Evidence, Including Encouragement of Narrative Form of Witness Testimony. Rules of evidence should be relaxed in all arbitration hearings, but this is particularly so in expedited arbitrations. Those witnesses whom the panel decides should be heard are encouraged to testify in a narrative form rather than in question-answer method. Harry Shulman made the astute observation in 1955 that free-form testimony by the witnesses may bring issues to the surface that might not have been unearthed through direct or cross-examination:

The more serious danger is not that the arbitrator will hear too much irrelevancy, but rather that he will not hear enough of the

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[190]Nicolau, s*upra* note 189, at 72–73; Bartlett, *supra* note 189, at 209 (commenting that transcripts ought to be used when a very technical or lengthy hearing is involved, otherwise they should be avoided); Braden, *Current Problems in Labor-Management Arbitration*, 6 Arb. J. 91, 98 (1951).

[191]Murphy, *supra* note 189, at 261.

[192]*But see* S. Kagel, *Legalism in Arbitration: Legalism—and Some Comments on Illegalisms—in Arbitration*, in Arbitration 1985: Law and Practice, Proceedings of the 38th Annual Meeting, Academy of Arbitrators, ed. Gershenfeld (BNA Books 1986), at 180 (strongly advocating for the use of transcripts in the interest of due process and encouraging that cost-cutting efforts be made elsewhere in the arbitration process).

[193]Keenan, *Pre-Hearing Process—Old and New: Union Perspective*, Arbitration 1996: At the Crossroads, Proceedings of the 49th Annual Meeting, National Academy of Arbitrators, ed. Najita (BNA Books 1997), at 119.

relevant. Indeed, one advantage, frequently reaped from wide latitude to the parties to talk about their case is that the apparent rambling frequently discloses very helpful information which would otherwise not be brought out.[194]

So-called "rambling" serves an alternate purpose that Justice Douglas recognized in the *Trilogy*—the processing of grievances through arbitration has cathartic value.[195] Many years earlier, the Honorable William Simkin also recognized the therapeutic value of grievance arbitration. He suggested that the hearing is a special time set aside for participants to tell their stories:

> One of the fundamental purposes of an arbitration hearing is to let people get things off their chest, regardless of the decision.... Because I believe so strongly that that is one of the fundamental purposes..., I don't think you ought to use any rules of evidence. You have to make up your own mind as to what is pertinent or not in the case. Lots of times I have let people talk for five minutes, when I know all the time that they were talking it had absolutely nothing to do with the case—just completely foreign to it. But there was a fellow testifying, either as a worker or a company representative, who had something that was important for him to get rid of. It was a good time for him to get rid of it.[196]

Another variation of an expedited procedure may provide for the admission of a witness' written statement into evidence. The witness is then subject to cross-examination by the panel (not by opposing counsel). The panel may direct the witness and the parties as to particular subjects to address.

Decisions Are Not Precedential. A common characteristic of expedited arbitration procedures is that awards are not precedential.[197] For example, under the Steelworker model, under no circum-

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[194]Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1005 (1955).

[195]*American Manufacturing Co.*, 363 U.S. 564, 568 n.6 (1960), *citing to* Cox, Current Problems in the Law of Grievance Arbitration, 30 Rocky Mtn. L. Rev. 247, 261 (1958). *See also* Simkin, Conference on Training of Law Students in Labor Relations, Vol. III, Transcript of Proceedings 636–37 (1947).

[196]R. Abrams, F. Abrams & Nolan, *Arbitral Therapy*, 46 Rutgers L. Rev., 1751, 1784–85 (1994), *citing to* Transcript of Proceedings, 3 Conference on Training of Law Students in Labor Relations 636–37 (1947), *quoted in* Elkouri & Elkouri, How Arbitration Works 298 (4th ed. 1985).

[197]Fischer, *Updating Arbitration*, in Arbitration of Interest Disputes, Proceedings of the 26th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1974), at 68 (critics of expedited arbitration can find some small comfort in the fact that all of the expedited arbitration decisions are without precedent and cannot be cited).

stances did the parties distribute the awards beyond the plant.[198] The parties cannot cite the awards in any further proceedings.[199] A variation of this rule is found in the agreement of British Columbia health care sector collective bargaining agreement.[200] On a case-by-case basis, the parties may specify that the decision is a final determination of only the specified grievance and cannot be used as precedent in any other arbitration or in any other dealings between them.[201]

Conclusion

Objectively, the excessive costs and unacceptable delays that now characterize labor arbitration are a betrayal of the promises of collective bargaining. Expedited arbitration procedures will be agreed to and implemented when both employers and unions come to understand that there are better ways to resolve disputes that do work. The purpose of this paper has been to advocate for workable alternatives.

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[198] Fischer, *The Fine Art of Engineering an Arbitration System: The Steelworkers Union and the Steel Companies*, in Arbitration of Subcontracting and Wage Incentive Disputes, Proceedings of the 32nd Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1979), at 201.

[199] *Id.*

[200] Sanderson, McLaren, & Moreau, *Expediting The Arbitration*, in Arbitration 1999: Quo Vadis? The Future of Arbitration and Collective Bargaining, Proceedings of the 52nd Annual Meeting, National Academy of Arbitrators, eds. Briggs & Grenig (BNA Books 2000), at 92.

[201] *Id.*

Appendix 1 to Chapter 5

Carpenters Master Agreement for Northern California Between the Construction Employers Association of California (CEA), Home Builders Association of Northern California (HBA), Concrete Contractors Association (CCA), NC Contractors Association (NCCA), Millwright Employers Association (MEA), Associated Cabinet Manufacturers (ACM), and Carpenters 46 Northern California Counties Conference Board of the United Brotherhood of Carpenters and Joiners of America

SECTION 51

GRIEVANCE PROCEDURE

Any dispute concerning any application or interpretations of this Agreement shall be subject to the following procedure.

1. In the event that a dispute arises on a job, it shall be first reported to the individual employer and/or the Field Representative of the appropriate Local Union or the NCCRC who shall then attempt to adjust said grievance or dispute at the jobsite level.
2. The grieving parties shall specify the date(s) of the alleged violation(s) and the provision(s) of the Agreement applicable to the dispute.
3. If said grievance or dispute is not satisfactorily adjusted by the appropriate Local Union or the NCCRC or otherwise authorized Union Representative and the individual employer or his representative within three (3) days after submission to the individual employer, the matter may be submitted by either party to a permanent Board of Adjustment created for the settlement of such disputes.
4. The Board of Adjustment shall be composed of one (1) member named by the Union, one (1) member named by the Association and an Impartial Arbitrator. The parties shall select an alternate to the permanent neutral Arbitrator who shall serve only in the event the permanent neutral Arbitrator is unable to serve. At any point in the proceedings should the panel be unable to reach a majority vote the Arbitrator shall participate and his decision shall be final and binding.

5. In addition to any rule or procedure which the panel may adopt, the Board of Adjustment shall be governed by the following provisions:
   (a) No briefs shall be submitted nor a transcript made of the hearing except by mutual agreement of the parties or by direction of the Arbitrator. Any transcript ordered by any party shall be at the expense of the party ordering the transcript.
   (b) In the case of deadlock, the Arbitrator shall render his decision upon the conclusion of the case at the Board of Adjustment hearing, unless the time is extended by mutual agreement of the parties or at the request of the Arbitrator. The Arbitrator shall not render an expanded opinion in any case unless requested by the parties.
   (c) The parties shall select and utilize a permanent Impartial Arbitrator who is willing to abide by the procedures set forth herein. By agreement of both parties, the Impartial Arbitrator may be changed or replaced.
   (d) The Board of Adjustment or the Arbitrator may fashion an appropriate remedy to resolve the issue including, but not limited to, back pay, money damages, injunctive relief, audit, payment of wages and fringe benefits to persons damaged by the contract violations, interest or attorneys' fees.
   (e) Any grievance involving an individual employer not a member of any of the signatory associations shall be submitted directly to the Arbitrator unless the individual employer agrees to submit the matter to the Board of Adjustment.
6. Disputes arising out of work assignment, which is governed by Section 16 (Jurisdictional Disputes), will not be heard at these panels.
7. The Board of Adjustment shall meet within forty-five (45) days on any item properly before the Board. Failure of either party to meet or to participate shall cause the Board or Arbitrator to hear and decide the matter on a default basis.
8. Decisions of the Board of Adjustment or an Impartial Arbitrator shall be within the scope and terms of this Agreement and shall be final and binding upon all parties hereto.

9. In the event an individual employer fails to comply with any such decisions, the Union may withdraw employees or strike the individual employer, and such action shall not be a violation of this Agreement so long as such noncompliance continues, provided, however, that the Union may not enforce the provisions of Section 50 (Subcontracting) by economic action or picketing.
10. The expenses of the Joint Adjustment Board and the Impartial Arbitrator, including the cost of a court reporter, shall be borne equally by the parties hereto.
11. No proceeding hereunder based on any dispute, complaint or grievance herein provided for, shall be recognized unless the grievance procedure steps outlined above have been followed. The Arbitrator or Board may for good cause, accept a late submission, which shall then be decided by the Board of Adjustment.
12. The Board of Adjustment shall establish regular meeting dates and administer grievances filed in conjunction with this section as set forth in the rules and procedures, which may be amended from time to time by the parties.
13. A decision of the Board of Adjustment by majority vote, or the decision of a permanent Arbitrator shall be enforceable by a petition to confirm an arbitration award filed in the Superior Court of the City and County of San Francisco, State of California, or the United States District Court for the Northern District of California. Any party who fails or refuses to comply with a decision of a Board of Adjustment or an award of the Arbitrator, as the case may be, shall be responsible for reasonable attorneys' fees for the filing and trial of any petition to confirm and enforce said decision or award in addition to all other remedies available through law, unless the petition is denied.
14. All hearings of the Board of Adjustment shall be in the City and County of San Francisco, and/or County of Alameda, unless mutually agreed to move to another location.
15. Other than matters concerning discharge, no proceedings mentioned hereinabove on any dispute, complaint or grievance shall be recognized unless called to the attention of the Employer and the Union within thirty (30) days after the last date the alleged violation was committed.

16. On all cases relating to discharge or discipline, employees must file their grievances with the Local Union or the NCCRC within three (3) working days after the imposition of the discharge or discipline. Thereafter, the Local Union or the NCCRC must file its grievance with the Board of Adjustment within four (4) working days after the employee files his grievance. The Board shall meet within seven (7) working days following submission of the grievance. The Board of Adjustment or Arbitrator shall be free to sustain the discharge or to find discipline other than discharge to be appropriate and may order reinstatement with full or partial back pay as he or it deems appropriate provided there shall be no discrimination on the part of the individual employer against any employee for activities in behalf of, or representation of the Union not interfering with the proper performance of his duties.
17. If failure of a Board of Adjustment to meet within one week (7 working days) is due to the unavailability of the Union, the wage payment and Trust Fund contribution liability shall be limited to the above seven (7) working days. If the Employer or individual employer, or arbitrator is unavailable to meet, the wage payment and Trust Fund contribution liability shall be continuing.