Chapter 3

HOW MUCH PROCESS ARE YOU DUE? BALANCING DUE PROCESS AND ACCESS TO JUSTICE

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Background

Arbitration is an "integral part of the system of (labor-management) self-government,"[1] but at the same time, arbitrators have always been active enforcers of individual employee rights under collective bargaining agreements. As Willard Wirtz pointed out in 1958, in writing their early awards arbitrators devised and set forth procedural due process rules not expressly included by employers and unions in their agreements,[2] despite the "suspect nature in this shirt-sleeves, seat-of-the-pants, look-no-hands business of arbitration."[3] As well-catalogued by our colleagues,[4] due process concepts "migrated" into "the law of the shop" as the concept of a grievance procedure developed, viewed as a means of "provid(ing)

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[1]Shulman, *Reason, Contract and Law in Labor Relations*, 68 Harv. L. Rev. 999 (1955). Background materials were first developed in a paper presented by Ms. Mackenzie at a March 2003 meeting of the ABA Committee on Labor and Employment Law, *Arbitrators as Enforcers of Due Process and Statutory Rights Under Collective Bargaining Agreements: Is There an Appropriate Standard of Review?*

[2]*Due Process of Arbitration*, in The Arbitrator and the Parties, Proceedings of the Eleventh Annual Meeting, National Academy of Arbitrators, ed. McKelvey (BNA Books 1958), at 12.

[3]Cited in Oldham, *Due Process in Discipline and Discharge*, in Common Law of the Workplace, ed. St. Antoine (BNA 1998), at 186.

[4]*See, e.g.*, Brand, *Due Process in Arbitration*, §15.05, Labor and Employment Arbitration, 2d ed., eds. Bornstein, Gosline, & Greenbaum (Matthew Bender & Co. 1999).

stability in the parties' relationship,"[5] and "necessary to ensure a fair hearing for both parties in any adversary proceeding."[6]

The question the Panel addressed was whether certain "procedural protections" are effectively overwhelming arbitration's goals of speed and economy and even the goal of fundamental fairness that due process is supposed to ensure, and what procedures can be used to promote a speedy, economical, and fundamentally fair proceeding?

The Panel explored some of these challenges by reviewing the procedural problems presented during the arbitration process at three key stages: (1) the pre-arbitration hearing stage; (2) the arbitration hearing stage; and (3) the post-arbitration hearing stage.

The Panel discussed various techniques currently used by advocates and arbitrators to address the "whats and hows" of moving the process forward, with a special emphasis upon the pre-hearing and hearing stages where the potential of exercising control by arbitrators and advocates to "jump start" the proceeding and possibly move toward the goal of a single-day hearing may be more readily apparent.

The Panel presented both "practice tips" and ideas that might be considered by the parties and arbitrators to meet the goals of streamlining the process.

Opening Comments by the Arbitrators/Advocates

Arbitrator Susan Mackenzie noted that when she first began working as an arbitrator in the mid-1970s, relationships between the parties were often less formalized and adversarial than those found in today's proceedings. She explained that when she arrived at the hearing site, she would sit with the parties. The union representative would begin by "telling the story" and describing the problem: "Here's what's going on. . . ." Then the employer representative would tell its side of the story: "Well that's true as far as it goes. But here's the real problem. . . ." She commented that few questions were asked and, generally, no one who was talking or testifying was interrupted. The whole process, from the time the

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[5] Zack, *Just Cause and Progressive Discipline*, §14.03(1), Labor and Employment Arbitration, 2d ed., eds. Bornstein, Gosline, & Greenbaum (Matthew Bender & Co. 1999).

[6] Beck, in Arbitration 2002: Workplace Arbitration: A Process in Evolution, Proceedings of the 55th Annual Meeting, National Academy of Arbitrators, ed. Coleman (BNA Books 2003), at 63.

problem arose to the time the award was issued, was completed in a couple of months. Today, she noted, it is not unusual for the process to take a couple of years. Meanwhile, the grievant or grievants may be out of work, and management or supervisory employees retired or laid off. She questioned whether in the current economic climate, a six-month, year, or two-year delay between the time a grievance arises and the time an award is rendered might be tantamount to a de facto denial of justice?

Arbitrator Rosemary Townley questioned the inherent due process problems that arise when grievance arbitration panels administered by the parties schedule hearings years from the day the arbitrator is asked to hear the case. The ability of the parties to find witnesses, or for those witnesses to recall important facts of the grievance or to locate relevant evidence, among other problems, are serious due process deficiencies when a lengthy amount of time is allowed to run from the filing of a grievance to its actual hearing by an arbitrator.

Arbitrator Margo Newman emphasized that arbitrators often can be more effective in the pre-hearing and hearing stages where there is the greatest potential to make the process fairer and less lengthy. She stressed, and all agreed, that justice delayed can be justice denied, and that a major issue facing those involved in the process is the time delay that has become incorporated into the procedure.

Management Advocate Violet Clark emphasized that procedural due process protections are a "two-way street" and that the process should provide protections for both parties. She noted that some arbitrators have lost sight of the fact that the union "is actually the other party and not the individual employee." When an arbitrator attempts to ensure that the individual grievant has been afforded due process, it often appears as if the union and the individual grievant are afforded more due process than the employer is granted.

Union Advocate Alexia Kulwiec pointed out that an arbitrator must ensure that the procedural due process rights are afforded to the union and the grievant, such as requiring an employer to provide appropriate notice of all allegations against the grievant; sharing names of witnesses or information learned from them; avoiding unnecessary litigation tactics, such as the filing of motions; and requiring the conduct of a fair investigation.

The Pre-Arbitration Hearing Stage

All Panel members agreed that the pre-hearing stage could be critical in terms of establishing the foundation for controlling delay, excessive costs, and the over-formalization of process. They also concurred that negotiated language on grievance procedures in collective bargaining agreements can provide direction to the parties and the arbitrator with respect to "due process" in the arbitration process.

Negotiate Limited Discovery Provisions and/or Special Classes of Cases in Future Contracts to Expedite the Process

Arbitrator Mackenzie reviewed experiences where the parties negotiated provisions in their contracts for expedited procedures for specific classes of cases, such as time and attendance and low-level disciplinary actions. Under certain contract provisions, the parties expressly limited the evidence that could be considered by the arbitrator, established time limits on the length of presentations at the hearing, and limited the length of the award. These procedures foster a more expeditious and less expensive process. She suggested that parties consider negotiating such provisions in future contracts, thereby setting the stage for an expedited procedure.

She also suggested that parties consider the negotiation of provisions in their future contracts so as to limit the practice of waiting until the hearing to exchange documents. Otherwise, the arbitrator must allow time for the receiving party to review the documents, which often delays the hearing until early afternoon. Then, if a party or witness must leave by 3:00 or 4:00 p.m., another hearing day must be scheduled, often months away.

Pre-Hearing Conferences Between the Advocates and/or With the Arbitrator

The Panel concurred that pre-hearing conferences would be extremely useful to the process in terms of narrowing or resolving the issues, improving hearing preparation matters, and expediting the overall procedure. Union Advocate Kulwiec stressed that such conferences need not necessarily be with the arbitrators, as the advocates could meet within 30 days of the hearing date to address the issues. The Panel Arbitrators agreed that both forms of conferences would be useful and, when effective, could provide

an opportunity for the parties to hone in on the real issues in the dispute and, perhaps, as noted by Arbitrator Mackenzie, "foster a new era of 1-day hearings." She also noted that an in-person meeting or teleconference could help the parties generate stipulations of fact and reduce the number of witnesses or length of witness testimony.

Arbitrator Newman commented that she utilizes such conferences with advocates to address evidentiary or preliminary issues that can be argued and ruled upon prior to the hearing. She suggested the use of a "confirming letter," which sets forth a date and time one week prior to the scheduled hearing for a conference call to discuss the issues as a matter of course and requires the advocates to explore the possibility of settlement or stipulations of documentary evidence and undisputed facts to "flesh out any preliminary issues." Arbitrator Newman further noted that the use of "med-arb" to either resolve the dispute or narrow the issues of the dispute prior to the hearing, or after the opening statements, might be useful in certain situations.

Union Advocate Kulwiec noted that she has found that arbitrators believe they must entertain any motion raised by a party. She suggested that, as a practical matter, such a practice allows either party to unnecessarily increase costs and delay in a case. She acknowledged the Panel's discussion of imposing costs upon a party found to be acting in an obstructionist manner. The Panel's consensus, however, was that arbitrators are bound to assess fees and costs pursuant to the express requirements of the collective bargaining agreement.

With respect to the exchange of documents and information before an arbitration hearing outside any contractual requirement to do so, Union Advocate Kulwiec noted that one of the problems she has encountered regards the amount of time spent obtaining the cooperation of certain employers, who are usually not large "players" or are not familiar with the arbitration process.

Management Advocate Clark commented that the issue of the exchange of documents and information often turns on the "lack of trust on both sides" as to how and when that information will be used in the process. She questioned whether such information would be used by a union to put "pressure on its members" or if an employer might use it "to retaliate against employees and a union". She emphasized that these issues usually are not problematic when attorneys represent the parties.

Pre-Hearing Briefs/Bifurcated Hearings

The Panel agreed that pre-hearing briefs and memoranda would be unduly burdensome, add to the cost and delay of the process, and over-formalize the process. In addition, Management Advocate Clark stressed that both sides look forward to the opportunity to be heard, a very important part of the process that should not be taken away by an arbitrator.

The only exception might be for those cases where the parties consent to a bifurcation of the hearing, with stipulated facts and exhibits, and very short briefs either to address a threshold matter or to resolve the dispute that might have run into multiple days of hearing (e.g., a timeliness matter).

The Arbitration Hearing Stage

How Active Should the Arbitrator Be During Hearing/Offers of Proof/Stipulations?

There was clear consensus among the Panel arbitrators that they should take a more active role in precluding duplicative or irrelevant testimony. They also agreed that they should encourage the use of stipulations and offers of proof in the absence of any challenge regarding credibility. This action would move the process along in situations where most of the case has been presented and additional witnesses would serve only to delay the close of the record. The use of telephonic testimony might be suggested in those situations where the witness is not a primary one and/or is unavailable for testimony.

Should an arbitrator attempt to actively rein in the scope of redirect and re-cross examination, or foreclose a party from calling a rebuttal witness if the party could have addressed the issue on cross-examination? Management Advocate Clark suggested that an arbitrator's role is that of a fact finder and decision maker. If an arbitrator essentially were to begin to direct an advocate's case, then such action might give rise to questions of arbitral bias and/or direct the case in a manner not intended by the advocate.

On the issue of an arbitrator's actively reining-in the scope of redirect and re-cross, Arbitrator Newman noted the rule in Canada, set forth in *Browne v. Dunn*.[7] This ruling provides in part that "If you intend to impeach a witness you are bound, whilst he is still

[7] 6 R. 67 (1893, House of Lords).

in the box, to give him an opportunity of making any explanation which is open to him." She noted that the rule is used in Canadian arbitration and effectively limits the need for rebuttal evidence because if during cross-examination counsel fails to give a witness warning of his or her intention to elicit contrary evidence on a matter of substance, then such evidence later may be held to be inadmissible.

Objections

The consensus was that advocates should not accept the response from arbitrators when taking evidence that he/she is doing so "for what it is worth." Rather, the advocates should ask the arbitrator to explain why (or why not) the proffered evidence is (or is not) relevant or persuasive. The Panel arbitrators agreed that once a ruling is made regarding a certain line of questioning, a "continuing objection" should be noted for the record by an advocate, who should avoid repetitive objections that serve only to prolong the hearing.

Oral Closings v. Written Briefs

The Panel arbitrators agreed that although oral closings would be sufficient in many disputes, to force the parties to focus on the core issues in dispute rather than a lengthy explication of alternative arguments or theories, they would not preclude a party from submitting a written brief, perhaps with time and page limitations. Some cases are best served by written briefs. In the alternative, as suggested by Arbitrator Townley, if one party wished to provide an oral closing, then that party could be allowed to do so, and the other party would submit a brief within the usual time limit, with an opportunity for the party providing the oral closing to respond, and vice versa.

Management Advocate Clark noted that written briefs should always be allowed, as it is as much of an attorney–client relationship issue as a due process one. A written brief provides the opportunity for the employer to review all of the facts presented and argue in support of its position. She stresses that true due process allows a party to decide the manner in which to submit its closing argument and that both parties need not do so in the same manner and format.

On the other hand, Union Advocate Kulwiec prefers oral closings and suggests that arbitrators encourage the use of them. She

believes that the submission of a written brief should not be based upon client demands and expectations, as written briefs add more time to the overall process.

Post-Arbitration Hearing Stage

Retention of Jurisdiction Over Remedy/Enforcement Issues

The Panel generally agreed that an arbitrator should retain jurisdiction in the award for the limited purpose of resolving those issues that arise out of the implementation or enforcement of the remedy in order to avoid the re-litigation of the same issue. Arbitrators Mackenzie and Newman pointed out that retention of jurisdiction avoids the necessity or ability of one party to approach a second arbitrator to determine what was decided by the first arbitrator, especially when used as a means of delaying or grabbing "another bite of the apple."

Arbitrator Newman emphasized that she discourages the use of "string citations" for those propositions that are not necessary for the resolution of the issue, or citing cases that have not been read in their entirety, as such tactics serve to delay the process because they lengthen the award writing time, as the arbitrator must address the arguments raised. In addition, she pointed out that at times the cited cases support the opposing party's argument, which she will note in the award.

Should an arbitrator encourage a page limit on post-hearing briefs, as well as specify areas to be addressed in the brief? Arbitrator Mackenzie noted that "a review of 20 arbitration or court cases is not necessarily enlightening" and that the point often can be presented more concisely. She also posited that an arbitrator should consider informing the parties that a page limitation will be imposed upon the decision, but such a suggestion could be problematic where parties insist on raising multiple issues and arguments.

Also discussed was an arbitrator's awarding of penalty interest for delay in implementing an award or for built-in delay in the procedure. This would discourage a party from prolonging the proceeding or from re-litigating the same issue.

With respect to the notion of "split-decisions" whereby an arbitrator finds a grievant guilty as charged but considers mitigating circumstances in developing a penalty, the advocates had opposing views. Management Advocate Clark noted, "split decisions

hurt the process and often serve to deny due process, as due process most often means someone will lose but they will feel as if the process of getting to the loss was fair." She also notes that when arbitrators allow a grievant "a second chance" due to mitigating circumstances by reducing an employer's penalty, despite the finding of the grievant's guilt, such a result provides "too much due process." On the other hand, Union Advocate Kulwiec commented that a split decision "helps the process, as it allows the arbitrator to look fairly at the grievant's conduct while also considering fair discipline and rendering a fair award."

Conclusion

The Panel's comments are but a brief overview of how parties and arbitrators might work together to balance procedural protections and speed the arbitration process in an economical and efficient manner, while continuing to promote the principles of due process. The Panel encourages parties and arbitrators to continue the dialogue in order to achieve the goal of the "single-day hearing" of years ago.