Sometimes, More is Just More—Make Your Next Labor Arbitration More Efficient With These Insider Insights

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1. INTRODUCTION

The notion that labor arbitrations are lasting longer is not an illusion born from the frustration of your most-recent three-day slugfest. Empirical evidence compiled annually by the Federal Mediation and Conciliation Service shows that hearings in cases involving disputes under collective bargaining agreements have become longer, on average. The difference is not huge on a percentage basis, but, considering that thousands of labor arbitration cases are measured by the agency, the difference assumes greater significance.

In 1987, for reported cases, the average hearing length was 1.04 days. In 2003, the average length was 1.15 days. Since the minimum reporting figure is one day for a hearing, the 10 percent statistical increase probably signifies a greater length, too, in cases below the one-day line.

Why has this happened? Some of the additional time might be attributable to increasing formality in many arbitration settings: Attorneys, motions, transcripts, briefs, and the like being the prime culprits. Many of these trappings are triggered by concerns about the proof demands of cases that involve individual statutory employment claims pending in another forum, or because a duty of fair representation issue has been raised by a grievant's private counsel.

However, other factors also may be at work, accentuating formalities. One possibility is that declining union density, especially in the private sector, prompts unions to screen cases more carefully, with decisions made to go forward, where possible, only with more difficult disputes or cases of greater significance.

And declining union density in some industries, coupled at times with concession demands, has sharpened the adversarial relationship between labor and management. In some instances, an employer may feel emboldened to fight harder to break union resistance, if not a union's treasury, or a powerful union may press an advantage against a weakened employer in a troubled business. Whatever the reason or reasons, longer hearings can be a problem, and not just financially, ultimately having a potentially corrosive affect on collective bargaining relationships. What can be done to reverse this trend?

2. BEFORE THE HEARING

In the pre-hearing phase, several actions can help head off the prospect of a hearing going longer than it should:

A. **Pick the right kind of arbitrator.** Why select the proverbial bump-on-a-log, when you can choose an arbitrator who will move the case along, without fear of making rulings when needed? A good arbitrator will let you present the case the way you wish, and will help you do so by keeping a close eye on what the case is about, all without letting things get out of hand. There is nothing wrong in asking the arbitrator for this type of help, before or at the hearing.

B. **Explore settlement possibilities once you have knowledge about the case.** If you wait until the morning of the hearing to seriously consider settlement, a few hours can easily be lost to last-minute negotiations, leading to an extra day of hearing for that reason alone. On the other hand, if you have not had the opportunity to pursue settlement prior to hearing, and believe that settlement, rather than an arbitrator's award, would be the better result, don't be afraid to use the arbitrator as the ersatz "courthouse steps."

Don't be reluctant to use the services of the arbitrator as settlement judge or mediator; indeed, it can be helpful to select an arbitrator skilled at assisting in settlement talks. Sometimes, doing opening statements first, and allowing the other side to hear what they might face, can encourage a settlement. As to the end result of these talks, if you have some political problems in being the author of the settlement document, consider using the arbitrator for a consent award, or even a solo award by the arbitrator, so long as the situation presented is within ethical boundaries.

C. **Subpoena necessary documents.** If disputes arise, alert the arbitrator in advance so that the hearing can go forward as scheduled. If you subpoena voluminous records, check beforehand to make sure they will be produced. Nothing can kill a day of hearing quicker than a document fight first thing in the morning. While technically there is no right to pre-hearing discovery in labor arbitration, you might be successful in requesting and obtaining the documents in advance from a cooperative opposing advocate.

D. **Assemble exhibits and bring sufficient copies to the hearing.** This avoids copying-related delays that might extend completion of the hearing.

E. **If counsel has a box of documents that has been summarized in a demonstrative chart, offer the other side an opportunity before the hearing to review the chart and the underlying data.** It's true that you might be showing your hand and losing a tactical advantage. Still, the other side will have a right to inspect the material in any event, and might

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persuasively argue that a continuance is needed to confront the new evidence

F. **Work with opposing counsel to ascertain facts that are amenable to stipulation.** This will cut down on the time needed for preliminary factual foundations and witness presentations. Although trying to develop or negotiate stipulations can be time-consuming, if the other side is open to the idea, you can streamline your case by plowing the ground in advance. Similarly, see what joint exhibits are agreeable.

G. **Do you really need a court reporter?** While their services can be very useful, especially in a highly technical case or one which is heavily fact-laden, the reporter can make a hearing longer because the reporter's presence creates a more formal environment.

3. AT THE HEARING

You can move the case along without sacrificing evidence you need to introduce, using these techniques:

A. **Make an opening statement, rather than reserve.** Granted, this takes time, but you will save time by educating the arbitrator. If you reserve your opening, imagine how hard it is to explain why an area of witness examination is relevant to your theory of the case.

B. **Structure your opening remarks in two parts.** The first part describes the facts of the case in a straightforward, objective fashion. The second offers your position on the merits, for example, why the facts show a contract violation or a failure of cause for discipline. Before providing your factual summary, mention this two-part plan to the arbitrator and the opposing advocate, and invite the latter to stipulate to your summary of the key facts, or, at least, to identify where the parties differ.

C. **In a contract interpretation case, use your opening to walk the arbitrator through the relevant contract provisions.** Give your theory about the appropriate interpretation and note for the arbitrator the places where bargaining history or past practice evidence will be adduced to explain the context of the language. Don't waste the arbitrator's time later in the proceeding by putting on a witness to give a "theory" about how the language should be interpreted. If such testimony is not supported by bargaining history or past practice evidence, it is merely argument, and will only invite similar time-consuming argument by the other side. The arbitrator is hired to interpret the contract language.

D. **Don't waste time on the statement of the issue.** Come prepared with your framing of the issue, especially in contract interpretation cases. Talk to your opponent to seek a stipulation. Sometimes a stipulation is easier if you wait until after opening statements. However, if agreement is not possible, grant the arbitrator the authority to frame the issue on the basis of the evidence and the argument presented, and move on.

E. **Seek permission from the arbitrator to ask leading questions to set the stage at the outset of witness examination.** Invite your opponent to do the same. Save proper direct examination for facts likely to be disputed at the core of the case.

F. **As opposing counsel raises issues during the hearing, advise the arbitrator if an issue is not disputed.** For example, if an employee has been fired for poor record keeping, admit that the records were poorly kept when the real issues affecting the outcome of the case are whether the grievant was adequately trained, and whether the discipline is excessive. Similarly, as a tactical matter apart from saving time, why spend hours seeking to justify a faulty investigation by management, when the real point is that there was no harmful prejudice to the other party.

G. **Use business records to demonstrate established past practice.** This is preferable to relying on the piecemeal recollections of individual witnesses whose anecdotal accounts are spotty and uncertain. The quality of your proof will be better and the hearing will be shorter. In the same vein, when the issue is the appropriateness of the employer's action in a contract case, the parties can consider allowing the employer to go first, with full acknowledgment that the union has the burden.

H. **Offer for identification all of your case-in-chief documents at the outset of the hearing.** Do not reserve this for choreographed moments during the testimony. Invite your opponent to stipulate that the marked documents can be admitted, or, at least, that they are authentic. You can offer to do the same for those marked by your opponent. In using this approach, you possibly lose a slight measure of surprise, but your efficiency will avoid disruptive interruptions in the evidentiary presentations and the time needed to lay foundations. Present argument later on the appropriate weight to be given to the documents.

I. **Structure your case efficiently.** You are telling a story, so start with the strongest, most organized witness, whose testimony sets the stage or explains the process.

J. **If past discipline is not in dispute, and it has been finalized, urge that it be received as an established, settled record without need for re-litigation of the facts.** This acknowledges that the previous dispute is over, and avoids the possibility of time-consuming, multiple, mini-trials.

K. **Formal offers of proof are helpful in lieu of and to boil down testimony.** This is useful when the testimony (yours or your opponent's) will be cumulative, or when it is undisputed that the witness will testify to the facts described. When using offers of proof, leave to later argument how you believe the arbitrator should resolve any conflicts.

L. **Request judicial notice of articles from learned, scholarly journals.** This can be an efficient alternative to expert testimony on scientific or technical matters.

M. **If disparate treatment is at issue in a disciplinary case, propose that the arbitrator examine an existing documentary record from earlier personnel actions, perhaps assembled in individual case packets.** By doing so, you can foreclose witness testimony that seeks to elaborate on facts already established by the prior record.

N. **Remind witnesses to leave all files, notes, letters, and so on out of sight.** Opposing counsel will be permitted to inspect them if witnesses take them to the witness box.

O. **Witnesses should not argue with opposing advocates or second-guess the meaning of a question on cross-examination before offering an answer.** This only hurts a witness' credibility and lengthens the hearing.

P. **On cross-examination, stick to points that help you.** Don't make the mistake of getting the witness to simply repeat direct testimony. This leads to longer hearings, bored arbitrators, and allows the witness to repeat and reinforce damaging testimony.

Q. **Avoid lengthy breaks during witness testimony after direct or cross-examination.** Do you, or does the other side, really need a caucus to advise on what needs to be asked? A whisper or a post-it at the table should be sufficient to keep everyone involved or pick up on a missing point.

R. **When organizational structure or lines of authority within an employer's operation are important, use a diagram or chart.** This can be either an existing document or one prepared for the hearing. A diagram illustrating areas of responsibility can not only clarify structural details, but save time otherwise spent on hard-to-follow oral testimony.

S. **If a witness will be identifying spatial relationships at the scene of an incident important to the case, bring multiple copies of the chart or diagram.** One chart or diagram can be marked as a blank original. The rest of the copies can be used, and marked, separately for each witness who will be describing, with reference to the document, what took place and where. No longer will you need to worry about having pens in multiple colors, or who made which dotted line on the page.

T. **Rather than reconvene a hearing for a portion of an additional day, final points can be effectively presented through an augmented record.** This can be either declarations or additional exhibits. An arbitrator may provide an opportunity for responsive submissions.

U. **If you are close to the end of the day, consider post-hearing briefs, instead of closing arguments, so the hearing can conclude that day.** Although advocates dislike post-hearing briefs, as they add to their workload and the expense of the case, a tired arbitrator is not going to digest all of your magnificent closing anyway.

V. **Object when necessary, but pick your battles when dealing with an obstreperous opponent.** Let the arbitrator know you are not going to put up with ridiculous behavior. But it doesn't help your client to egg on the other side for unimportant reasons. Avoid the tantalizing impulse to attack the other side to show your stuff to your client. This gambit only lengthens the case, encourages similar bad behavior from the other side, and does not respect the process.

A difficult advocate requires a strong arbitrator to control the hearing (yet another reason to select your arbitrator with care). If opposing counsel is being extremely difficult, and the arbitrator is not controlling the situation, ask for a side-bar conference outside the hearing room to request the arbitrator's intervention. Remind the arbitrator that he or she has the ability to rein in an advocate by cutting off a line of irrelevant inquiry, and even by drawing an adverse inference when warranted.

4. CONCLUSION

No single method insures that a hearing can be conducted in an efficient manner and finished in a single day when that is all the case truly needs. However, these suggestions may assist an advocate who wants to present a case without delay or confusion. Arbitrators are generally receptive to case presentations that demonstrate organization and forethought. This is particularly the case for arbitrators who have busy calendars and little room to accommodate additional days of hearing arising from unnecessary delay.

From the Editors

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