A Practical Guide to Arbitration-The Dos and Do Nots

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Introduction

The motives of labor arbitration versus employment arbitration are fundamentally different. Labor arbitration is based upon a series of terms set forth in a Collective Bargaining Agreement "CBA". Those terms were negotiated by the parties to create conditions that form the basis of the employment relationship. Therefore, any arbitration under the CBA is performed under an active, ongoing relationship between the union, acting collectively on behalf of the employees, and the employer. Therefore, regardless of the outcome of the arbitration proceeding, the CBA and the relationships formed thereunder continue. Practitioners must therefore be mindful of the impact any proceeding may have on that relationship.

Employment arbitration is a more transactional adjudication under conditions of employment that the employee is subject to by virtue of accepting employment or through an individually negotiated employment agreement. Normally the attorney is advocating on behalf of the single employee challenging an employer's action that most typically signals the end of that employment relationship.[1] Such controversies are based on the contention that the employer's action either violated statutory law or a term or condition offered via the employee manual or individual contract. Thus, practice in employment arbitration tends to be quite similar to litigation in the courts.

[1] this description purposefully excludes class action litigation which remains a contentious issue in the courts.

The substantive rules that are applied in labor arbitration are based upon the arbitrator's interpretation of the rights set forth in the Collective Bargaining Agreement. In addition to the terms and conditions specifically set forth in the agreement, there are a number of rules that do not appear which are referred to as the "common law of the shop." One example of such a rule concerns the expectation that a worker should grieve an order from his or her boss rather than ignoring it or "work now, grieve later." This concept nevertheless is clearly recognized and accepted in the labor management community. Such interpretations are acceptable as long as they "draw its essence from the collective bargaining agreement."[2]

Procedural Rules and Limitations

Labor contracts rarely contain any detailed procedural or substantive requirements for how to prepare for or conduct an arbitration hearing. A typical arbitration provision – found in the CBA's grievance procedure – will contain deadlines on when to demand arbitration, how to select the Arbitrator, which administrative agency (if any) has jurisdiction over the arbitration, and a prohibition on the Arbitrator's ability to modify contract language. Pre-hearing discovery procedures, or even notice of the other party's witnesses or evidence, are almost never included. Any such disclosures usually occur informally as a matter of past practice.

Employment arbitration is more regimented and detailed. While it is not as regimented or detailed as a court case, the procedures adopted in employment arbitration are more similar to formal litigation than labor arbitration. In employment arbitrations, the parties' arbitration agreement sometimes provides some substantive or procedural details on how to prepare for or present the case, or at the very least will refer to the detailed rules of the arbitration jurisdiction

[2] See Steelworkers v. Enterprise Wheel & Car Corp., 80 S.Ct 1347, 46 LRRM 2416 (1960)

(e.g., AAA, JAMS, etc.). While the intent of such an agreement is to avoid the complexities and burdens of a lawsuit, the intent also is to avoid the largely unregulated nature of labor arbitration.

Arbitrator Selection

Probably one of the most important decisions a practitioner has to make in the preparation of one's case is the selection of the arbitrator. After all, this person is responsible for drafting an award that will have a significant impact your clients' working life. The possibility of appealing an unfavorable award is quite limited.

When one receives a panel of arbitrators, it is important to research his or her background to access the arbitrator's ability to decide the case and to determine any conflicts of interest or indications of bias. Information on the arbitrator is available from the administering agencies. In addition to reviewing the arbitrator's panel bio, one should take time to learn about the arbitrator through Google and social media sites as well as talking with colleagues. Further, if prior awards are available, read them before making a selection.

The practitioner should be aware that the qualifications of an arbitrator in an employment matter are quite different from those for arbitrators in labor matters. Under the rules of the American Arbitration Association, the organization that administer panels in both labor and employment arbitration, an employment arbitrator need only "be experienced in the field of employment law" and "shall have no personal or financial interest in the results of the proceeding in which they are appointed and shall have no relation to the underlying dispute or to the parties or their counsel that may create an appearance of bias."[3]

[3] American Arbitration Association Employment Arbitration Rules, Rule 12

What this means is that even though the employment arbitrator is experienced, he or she may continue to actively represent employers or employees. Labor arbitrators on the other hand must be truly "neutral." He or she does not have to be experienced in the field of employment law. Indeed, the arbitrator need not be an attorney. He or she only has to show experience in labor relations matters.

According to the Code of Professional Responsibility for Arbitrators of Labor Management Disputes, the labor arbitrator must disclose "any current of past managerial, representational, or consultative relationship with any company or union involved in a proceeding in which the arbitrator is being considered for appointment or has been tentatively designated to serve." [4] The Code also states that Labor Arbitrators must disclose not only in each case but also to the administrative agency any concurrent or recently past advocacy, representative or consultative relationship with companies or unions in labor relations matters. [5]

One important distinction in disclosures in employment versus labor arbitration concerns the possibility that counsel in a labor matter may appear before the same arbitrator on a number of occasions in a number of cases over a number of years. This is anticipated. The practice of labor arbitration lends itself to "repeat players." Thus this many not require immediate disclosure. However, the disclosure of such prior encounters must be disclosed in employment arbitration.

Regardless of the forum, the arbitrator is obligated to disclose any relationship that present a conflict of interest before or during the hearing as the potential conflict comes to the arbitrator's attention. Practitioners should also be aware of any disclosure requirements that

[4] Rule 2.B.1 Code of Professional Responsibility for Arbitrators of Labor Management Disputes; *www.naarb.org.*
[5] Rule 2.B.2, Id.

apply in applicable federal or state statute.[6] It should be noted that once an advocate becomes aware of an apparent conflict of interest whether it is disclosed or not, it is counsel's responsibility to raise that apparent conflict. One may not "sit on" such information only to use it as a basis for appeal if one loses the arbitration.

Preparing the Case: Information Gathering

All that being said, when getting ready to present a case for labor arbitration, the first step is to obtain as much information as possible from the client. With limited opportunities for discovery, it is important to have as much information as possible from the party's own side. Such a thorough investigation might uncover information that the other side also has, which allows the advocate to prepare for the evidence and avoid surprises during the hearing.

When getting ready to present a case for employment arbitration, the first step is to obtain as much information as possible from the other party. An advocate should take advantage of every opportunity to learn what evidence that other party possesses. These disclosures allow for timely assessment of the strengths and weaknesses of the party's and the other party's cases. Although obtaining as much information as possible from one's own client is important, that will occur in response to the other party's discovery requests, will usually will be served within the same timeframe as the party's own discovery requests.

The idea of pre-hearing discovery in labor arbitration practically does not exist. Written discovery requests – such as Interrogatories or Requests for Production of Documents – are almost unheard of and usually require permission from the Arbitrator. The exchange of any information, if it occurs at all, is a product of the grievance procedure under the CBA.

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[6] For example see Standard 7, California Rules of Court

Outside of the grievance procedure, any efforts to obtain pertinent information from the other party usually occur outside the arbitration proceeding and are enforced through non-arbitral proceedings. For labor arbitrations involving private or public sector employers, an information request can be submitted as part of each party's duty to bargain in good faith. In that instance, the scope of the disclosure obligation and its enforcement occur under an unfair labor practice proceeding before the National Labor Relations Board or a State/Local labor board. For public sector employers, there is the added feature of receiving and responding to public records requests under State or local law. For those requests, the appropriateness of the scope of the request usually is dictated by statutory definition or case law interpreting those statutes, and the enforcement of a disclosure obligation usually occurs in various court proceedings.

By contrast, employment arbitrations involve many of the discovery methods found in court cases: written discovery, depositions, non-party discovery subpoenas of witnesses and records, and medical examinations. While these methods might be curtailed somewhat from court proceedings, they are still authorized within those limits. Moreover, discovery disputes are resolved by the Arbitrator.

Any efforts to subpoena third-party witnesses or records are permitted but are subject to the rules of the state in which the arbitration is held. However, in labor arbitration, subpoenas are used to produce witnesses or documents at the arbitration hearing. [7]

It is a fact, that both in labor and employment arbitration the bulk of the evidence (documents and witnesses) is typically under the possession and control of the employer which creates a challenge for the union/employee advocate with regards to their discovery efforts.

[7] For example see AAA Labor Arbitration Rule 27; "An arbitrator or other person authorized by law to subpoena witnesses and documents may do so independently or upon the request of any party."

The Case Management Conferences

All of the items mentioned above are important in preparing for the Case Management Conference. The best advice is not to wait until the CMC to discuss these topics. Spend the time beforehand developing a discovery and litigation strategy. In short, "be prepared." This includes:

- knowing from whom discoverable information must be obtained, whether the individuals possessing the information are connected with the other party (written discovery, deposition notices) or outsiders (subpoenas)
- assessing whether expert testimony will be needed and identifying and retaining such an expert;
- assessing whether there are unavoidable factual disputes that preclude any meaningful chance of a favorable ruling on a dispositive motion;
- determining if there is evidence of a trade secret, confidential or proprietary nature that might require that any discovery occur under a protective order; the protective order should already have been drafted and shared with the other party; ideally, the parties should agree on the protective order before the CMC occurs; when that effort fails short, they should be prepared to present the Arbitrator with a partial draft and the remaining unresolved items (which should be limited in number, if an effort is made beforehand to draft the protective order).
- Administrative issues: Length of hearing, location, who is responsible for the court reporter, do you want an award or a full opinion.

An advocate who prepares thoroughly for the CMC, then has the best opportunity to take command during the CMC. The advocate with the suggestions that are the most well thought out usually have the greatest influence on how these topics are resolved.

Another important requirement is to contact the other party's counsel well in advance to begin discussion of all items to be discussed during the CMC. Items that are agreed upon require little discussion before the Arbitrator and save everyone's time. Unresolved items then can be

presented succinctly, which both informs the Arbitrator and saves time. At this stage, whenever possible, the parties should be willing to explore any settlement opportunities.

One important note in labor arbitration; it is not unusual for the union or the employer's case may be presented by a non-attorney. The person may be labor-relations or human resources professional, or a union officer. One should never assume that the individual is not familiar with the collective bargaining process or the substantive provisions of the Collective Bargaining Agreement.

In labor arbitration, as in employment arbitration, the parties have the same mutual interest in having the process operate efficiently; thus, as an advocate, it is in your Client's best interest to show respect for the Arbitrator, your adversary and all the participants involved in the process. Avoid at all cost appearing uncooperative since tactics to delay or obstruct the process are disfavored in arbitration.

Case Presentation

The absence of any formal rules may apply to the presentation of evidence during the labor arbitration hearing. Even some of the most basic tenants of the rules of evidence – such as not asking leading questions during direct/redirect examination, inadmissibility of hearsay evidence without exceptions, or laying a foundation for introducing evidence – do not apply depending on the circumstances of the case. Indeed, many arbitrators take great pride in saying that the rules of evidence are more appropriate "for juries" and that evidence will be introduced "for what it's worth." However, one should understand that in labor arbitration the arbitrator has little if any prior information relating to the case. Therefore, most arbitrators are hesitant to

prematurely exclude evidence when one may not know how such evidence may fit into the theory of the case.[8]

In employment cases, adherence to the rules of evidence is the rule and not the exception. Although the evidentiary rules are somewhat relaxed from jury trials, Arbitrators in employment arbitrations usually assume the same role as a Judge in a bench trial.

Further, it is important to consider that in any resolution process of workplace disputes there is an important therapeutic value, mostly for the employees involved in the dispute. In many occasions, an employee's chance to tell their story may be as important as winning the case. Based on the above, many scholars have argued that strict application of evidence rules can have a chilling effect on lay witnesses. In many circumstances hearsay evidence is the only evidence available since it might be extremely difficult for a party to find first-hand witnesses and/or to get them to attend the arbitration hearing. With that being said, the parties should always strive to present the most reliable evidence possible and should understand that the Arbitrator will probably give said evidence less weight.

Finally, know your party's case, at least from the perspective of your side. Nothing is worse than when an Arbitrator asks either a factual or procedural question, and the answer is "I don't know." The Arbitrator is trying to get to the fundamental aspects of the case, and there are limited opportunities for doing so before the hearing occurs. As advocates, we should never assume that the Arbitrator has intimate knowledge of the case as a whole so how we present the information at the outset of the hearing is crucial to the advocate's effectiveness in framing the

[8] In this regard, one should note that one of the reasons an award may be vacated is because the arbitrator failed to consider critical evidence. In many cases, the arbitrator my not know if certain evidence is critical until the end of the hearing.

issues for resolution. Always take advantage of your opening statement to point the Arbitrator towards the evidence that supports your Client's case or rebuts your adversary's case.

Close of the Hearing and Post-Hearing

After the evidence has been introduced, the Arbitrator usually provides the parties with the option of presenting oral closing arguments or opting to file written briefs. Post-hearing briefs have become the norm. However, notwithstanding which option the parties choose, oral argument or post-hearing brief, they are a party's last opportunity to persuade the Arbitrator that the evidence presented fits your Client's theory, and to rule in favor of your client. In presenting closing arguments or briefs to the arbitrators, parties may submit statutes, case law, or other arbitration awards as authority to support their client's theory of the case. However, it is within an arbitrator's discretion to consider such authority when issuing a decision, and may not always be persuasive.[9]

An Arbitrator's final decision in the form of an "Opinion and Award," is final and binding and can only be challenged under very limited circumstances.[10] Nevertheless, the issuance of the Arbitrator's award is not always the end of the dispute, since a party may file a suit to either set aside/vacate the award or to enforce/confirm the award. However, few arbitration awards are appealed to Court, mostly because there is very little wiggle room for review and because most disputes are not worth the time, money and resources needed.

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[9] "Arbitrators in state-sector cases, like private-sector arbitrators, have disagreed on the question of considering external law where either the collective bargaining statute nor the collective bargaining agreement is definitive or unequivocal with respect to the relationship between contract terms and relevant external law." Snow, Contract Interpretation, in The Common Law of the Workplace: The Views of Arbitrators (St. Antoine ed., BNA Books 2d ed. 2005)

[10] Four narrow grounds under the Federal Arbitration Act (FAA): Corruption, Fraud, or Undue Means; Partiality or Corruption of Arbitrators; Misconduct during Proceedings; and Arbitrator's Decision Exceeded their Authority. In addition to the four statutory grounds under the FAA, some jurisdictions recognize "Manifest Disregard of the Law" under common law.

POST AWARD/REMEDY ISSUES

In labor arbitrations, unless specifically precluded by the CBA, an arbitrator has the authority to choose any remedy he/she deems appropriate, including an injunctive "cease and desist" and reinstatement remedies and monetary back pay remedies, or make whole awards which may include both.[11] Make whole awards, or any monetary awards, are usually issued in cases where an employee was discharged or disciplined with loss of compensation (i.e. suspension without pay). When a remedy is awarded that includes a monetary component, employees, particularly in discipline and discharge cases, are required to mitigate their damages as reasonably as possible.[12] Mitigation can include applying for unemployment or obtaining another job. A back pay and/or make whole remedy may be denied partially, or in its entirety where the employee has failed or refused to take advantage of reasonable employment opportunities.[13] Mitigation, however, does not require an employee to be successful, but only requires that the employee puts forth a good faith effort.[14] Further, arbitrators may deny an award based on the principle of unjust enrichment and to avoid one party receiving an extraordinary remedy such as a windfall.

The most challenging task applicable to any type of monetary remedy is the calculation of a monetary amount. This is specifically applicable to any remedy issued with a back pay component. Usually, specifically asked, the actual calculation of the money to be retroactive paid is done after the arbitrator has issued his award. Depending on the back-pay amount, this task can be very laborious, as it usually involves the understanding and inspection of company payroll records, time sheets and/or logs, and insurance and benefit packages.

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[11] Bakery & Confectionery Workers International Union v. Cotton Baking Co., 514 F.2d 1235, 1237 (5th Cir.1975) See also Gilmore Envelope Corp., 110 LA 1036, 1041 (Ross 1998)
[12] Hill & Sincropi, Remedies in Arbitration 216 (BNA Books 2d ed. 1991)
[13] United Int'l Investigative Serv., 114 LA 620, 626 (Maxwell 2000)
[14] It is the employer's burden to proof that lack of due diligence or good faith regarding an employee's mitigation effort.

Additionally, make whole remedies are even more difficult to calculate because 1. the term "make whole" is vague and is difficult to ascertain and 2. make whole remedies usually includes the awarding of retroactive contributions to retirement funds, payment of medical bills, calculations of missed overtime opportunities, and etc. To help mitigate some of the challenges described of above, parties should anticipate this challenge, and factor it into their preparation for the arbitration hearing. Moreover, parties should also request that an arbitrator retain jurisdiction over the arbitration matter in case a dispute regarding the award or interpretation of the award arises at a later date. Requesting an arbitrator to retain jurisdiction at the outset, unless objected to by the opposing party, can ensure a smooth transition from the issuance of the award to the distribution of a remedy. Also, arbitrators usually include the retention of jurisdiction in their awards in an effort to resolve disputes after an award is issued to the parties.

Even if the arbitrator retains jurisdiction, the extent of that jurisdiction is quite limited. This limitation extends only to the determination of a remedy. As a general proposition, once the arbitrator has rendered his or her decision, the arbitrator's jurisdiction becomes *functus officio*. Under the Code of Professional Responsibility there can be no clarification or reinterpretation of the award without the agreement of both parties.[15]

[15] Code of Professional Responsibility for Arbitrators of Labor Management Disputes, Rule 6(D) and 6(E). Depending on the jurisdiction, state statute may allow a period of time to correct computational errors only. See generally Dusford, John E., *The Case for Retention of Remedial Jurisdiction of Labor Arbitration Awards,* 31 Ga. L. Rev. 201(1996)