SURVIVING YOUR FIRST LABOR ARBITRATION: TIPS FOR THE NEW ADVOCATE

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I. INTRODUCTION

This article, written by two experienced neutrals, is specifically designed to provide some guidance to new advocates who are just beginning to represent employers or unions at the arbitration hearing. The goal of the authors is to orient new advocates to some of the common practices of labor arbitrators in conducting hearings, to prepare new advocates for typical issues that arise at the hearing, and to help new advocates understand the role of the arbitrator in finding the facts and interpreting contract provisions. We begin with the threshold issue facing a new advocate who comes to a hearing with no prior experience as a presenter at arbitration.

II. IT IS NOT NECESSARY TO TELL THE ARBITRATOR THAT THIS IS YOUR FIRST HEARING

Every arbitrator has encountered the new advocate who, before briefcases are unpacked and everyone is seated in their chairs, feels compelled to announce to the arbitrator and anyone within earshot that this is his or her first arbitration hearing. Before calling attention to this lack of experience, consider that arbitrators are independent thinkers who take pride in their professional judgment and decision-making. While arbitrators may be influenced by the well-reasoned arguments of a seasoned advocate, they must still reach conclusions based on their own interpretation of the record and the disputed contract provisions. If the new advocate succeeds in establishing a complete record that tells the story of the grievance, it is unlikely that lack of experience will have any substantial impact on the outcome of the proceeding.

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While arbitrators generally steer clear of assisting a party in the presentation of its case, they are disinclined to allow an experienced advocate to take unfair advantage of a new advocate to the detriment of the other party. If unsure how to react to a new development at the hearing, a new advocate always has the option of requesting a brief recess. Unless obviously calculated to put an end to unfavorable testimony elicited during cross-examination by the opposing advocate, the recess will most likely be granted. Before you tell the arbitrator that this is your first hearing, consider whether such a disclosure serves any useful purpose. If the disclosure does not further the objectives of getting your evidence before the arbitrator and effectively communicating your issues and positions, the disclosure is probably unnecessary.

III. COME TO THE HEARING WITH A SCHEDULING PLAN

Before the hearing gets underway, many arbitrators will quiz the parties as to how they plan to budget their time so as to facilitate the completion of the case in the time allotted. If there are special problems associated with bringing witnesses to the hearing, such as interruption of the employer's business or of scheduled union activities, these problems should be brought to the arbitrator's attention. In an effort to avoid putting the case over for a second session, the arbitrator may suggest an abbreviated luncheon recess, working late, or other scheduling adjustments.

The arbitrator may also recommend that the parties consider a stipulation to allow witnesses, once in the hearing room, to be examined for all purposes. This may avoid the need for witnesses to be called more than once to testify at the same hearing. Parties need not feel pressured to accept an arbitrator's time-saving suggestions if there are strategic reasons for withholding agreement. If it becomes apparent that the hearing is not going to finish in the scheduled time, new advocates should do their part to insure that a mutually agreeable date to resume the hearing is identified without delay and confirmed on the record or in writing.

IV. DECIDE WHETHER OR NOT YOU WANT TO REQUEST WITNESS SEQUESTRATION

The underlying rationale for witness sequestration is that a witness should not be influenced by hearing the testimony of other witnesses. Advocates may also wish to preclude witnesses from hearing the

advocates' opening statements. If witness sequestration is not requested (in many arbitral arenas it is not the norm), the arbitrator may confirm with both advocates that everyone in the hearing room is present without objection from either party.

Even if sequestration is granted at the request of either party, the grievant and the union's representative always have the right to remain in the hearing room throughout the proceeding. Employer advocates also have the right to designate a client representative to advise them during the hearing.

V. BE PREPARED TO JOINTLY SUBMIT THE ISSUES OR TO CONFER ON THE ARBITRATOR THE AUTHORITY TO FRAME THE ISSUES

Even before the hearing formally opens, most arbitrators will ask the parties if they have agreed upon joint submission of the issues. Included in this inquiry will be the question of whether the parties agree that the dispute is properly before the arbitrator for final and binding determination. A thoughtful advocate will seek a stipulation from the opposing party regarding these matters in advance of the hearing. Such stipulations will be reduced to writing for submission to the arbitrator at the commencement of the hearing. In the event that either party declines to stipulate, the arbitrator will ask the parties for the explicit authority to frame the issues as part of the arbitrator's decision-making process.

VI. KNOW THE DIFFERENCE BETWEEN PROCEDURAL AND SUBSTANTIVE ARBITRABILITY

A party (generally the employer) who raises an issue of timeliness or failure to follow all of the steps of the grievance provision of the contract is questioning whether the grievance is *procedurally* arbitrable. If this issue is raised for the first time at the hearing, the arbitrator is unlikely to grant a request that the hearing be limited to the issue of procedural arbitrability. In this situation, the arbitrator will probably hear evidence and arguments on both the procedural issue and the merits of the grievance.

A party may also raise the issue of whether or not the dispute is the type of dispute that the parties intended would be covered by the grievance arbitration procedure. In this case, the party is questioning whether the grievance is *substantively* arbitrable. Unless the parties

confer authority to decide an issue of substantive arbitrability on the arbitrator, a party may resist arbitration and insist that the issue be determined by a court. Alternatively, a party raising a substantive arbitrability issue may decide to proceed to arbitration while reserving the issue.

VII. USE YOUR OPENING STATEMENT TO INTRODUCE THE ARBITRATOR TO YOUR POINT OF VIEW

Opening statements provide a unique opportunity to accomplish a number of important objectives. First, the arbitrator is looking for an overall structure in which to organize the evidence that will be received during the hearing. Parties who decide to reserve opening statements until completion of the opposing party's case are unnecessarily giving the other side free rein to establish a single context in which evidence will be heard. Another important function of an opening statement is to provide an early response to some portion of the evidence that may be damaging if heard in a vacuum.

Opening statements also provide an excellent way to introduce the arbitrator to specialized vocabulary, workplace acronyms, organizational charts, the names of key players, and a general chronology of significant case events. Providing this information at the outset of the hearing makes it easier for the arbitrator to assimilate information once the evidentiary portion of the hearing is in progress. Remember that the arbitrator comes to the hearing with absolutely no information about the case other than the names of the parties and a brief description of the grievance. The opening statement also provides an excellent opportunity to explain what the arbitrator is being asked to do as a means of remedying the violation, thus inviting comment from the opposing party with respect to remedial issues.

Opening statements are not evidence and may not be used to support a finding. However, their importance cannot be over-emphasized. An effective opening statement does not demonize the opposing side or contain statements that will not be supported by the evidence. The authors encourage new advocates to make opening statements without reading from a prepared text. Doing so is less likely to engage the arbitrator than a brief statement describing in the advocate's own words what will be shown by the testimonial and documentary evidence.

VIII. SAVE HEARING TIME BY ORGANIZING THE DOCUMENTS FOR PRESENTATION TO THE ARBITRATOR

One way to impress the arbitrator with your competence and preparation is to organize your documents into a binder with tabs and an index. In order to preserve precious hearing time, some parties exchange documents in advance of the hearing and prepare a joint exhibit binder. Whether a document is marked as a party exhibit or a joint exhibit does not influence the arbitrator in making a determination as to whether the document is relevant and, if so, what weight to give it.

With regard to any document that is not being jointly submitted, be prepared to explain through a witness the identity and purpose of the document, the document's author, the date the document was created, and to whom the document was distributed. Always have in your possession at the hearing a sufficient number of copies of documents, i.e., a copy for the arbitrator, opposing counsel, your file, and the witness.

The authors encourage parties to avoid lengthy discussions regarding hearsay and relevance of documents where these matters can be addressed during final argument or briefing. On the other hand, a party may seek to introduce a document that violates privacy rights or attorney-client privilege. In this case, objections should be raised before the arbitrator has reviewed the document in question.

In the process of introducing evidence, be sure to draw the arbitrator's attention to any contemporaneous documentation that corroborates the testimony of your witnesses and supports your theory of the case. Arbitrators pay special attention to documents that were created before the initiation of the dispute, especially when resolving conflicts in the testimony.

IX. IN MOST LABOR ARBITRATION CASES, YOUR MOST IMPORTANT FUNCTION IS THE DIRECT EXAMINATION OF YOUR WITNESSES

The union bears the burden of proof in a contract interpretation case, while the employer has the burden in a discipline case. In the vast majority of cases, the party with the burden of proof will be able to put forth its best case based on the direct testimony of its own witnesses. Rarely does a party, whether or not it bears the burden of proof, prevail based on an advocate's brilliant cross-examination of a witness called by the opposing party. A key skill to be developed by

the new advocate is learning to tell the story through appropriate questioning of his or her own witnesses.

Questions calling for a "yes" or "no" answer should be avoided during direct examination as they generally require the witness to confirm or deny statements made by an advocate who is not under oath and who is not providing testimony. The direct testimony of a witness, recounted in his or her own words, is far more compelling than "yes" or "no" responses to an advocate's leading questions.

A new advocate must learn to listen to the testimony of the witness to make sure that the answer corresponds to the question. Witnesses frequently deviate from the advocate's plan by volunteering information or providing an answer that is not responsive to the question. If this occurs, the advocate must exercise better control over the witness.

Even after giving an informative opening statement, the new advocate must never lose sight of the fact that the arbitrator is just learning the case. To properly educate the arbitrator, it is important to set the stage before eliciting crucial testimony. If concerned that the arbitrator may not fully understand witness testimony, do not hesitate to ask for a site visit. In presenting testimony about a meeting, the witness should be invited to describe the location, date, time and purpose of the meeting. The witness should be asked how the meeting came about and to provide details as to what occurred at the meeting. This allows the arbitrator to receive information in the appropriate context.

X. SOMETIMES THE BEST CROSS-EXAMINATION IS NO CROSS-EXAMINATION

There is no requirement that every witness be cross-examined by the opposing party's advocate. In some cases, e.g., where the witness has provided no damaging testimony, an advocate may make an informed decision to tell the arbitrator that he or she has no questions. This approach may serve to diminish the significance of the witness. A cross-examination that has no useful purpose may only serve to firm up points made on direct examination. Even worse, the advocate's cross-examination may cure deficiencies in the testimony as originally presented. If the risks involved in cross-examination are not outweighed by some strategic purpose, the better approach may be to waive cross-examination.

Cross-examination is beneficial in appropriate cases. It may serve to bring out facts that were deliberately omitted from direct examination, to confront the witness with a prior inconsistent statement, or to highlight irreconcilable discrepancies in the testimony elicited on direct examination. Appropriate questions on cross-examination may also reveal bias or personal interest in the outcome of the proceeding. For example, cross-examination questions may reveal that the witness called to support the grievant's account of the incident is the grievant's relative or best friend. Or questioning may bring to light the fact that the witness called by the employer is next in line for the vacant position that will be created by the grievant's termination.

XI. REBUTTAL IS NOT REQUIRED

It is not uncommon in labor arbitration for the party with the burden of proof to waive its rebuttal opportunity where the facts have been sufficiently established through both parties' testimonial and documentary evidence. In some cases, when unanticipated evidence is presented by the opposing party, rebuttal witnesses are called to respond to that evidence. In rare circumstances, the opposing party may request an opportunity for surrebuttal (rebuttal to rebuttal). The important point for new advocates to understand is that rebuttal is not a reopening of the entire case.

XII. KNOW HOW AND WHEN TO DECIDE WHETHER TO ORALLY CLOSE OR TO SUBMIT WRITTEN ARGUMENT

Oral closing is the preferred method of final argument in many cases. Many parties reserve written argument for only the most complex cases. Sometimes parties agree as part of their grievance and arbitration provision that certain types of cases will be argued by means of post-hearing briefs and that other types of cases will be submitted orally at the conclusion of the hearing. Where the agreement provides no guidance, advocates should wait until the evidence is in before deciding which method of final argument is more appropriate.

If an advocate chooses to submit written argument to the arbitrator, under no circumstances should the advocate attach new evidence to a brief without the agreement of both parties or a directive from the arbitrator. Attaching a new document to the brief is unfair to the opposing party who had no opportunity to respond to it. If the

opposing party will not agree to allow the new evidence to be considered by the arbitrator, an advocate must make a formal request to the arbitrator to reopen the record.

XIII. IN MAKING A FINAL ARGUMENT, BE COMPREHENSIVE BUT SUCCINCT

Whether making an oral or written argument, be sure to address all of the issues, including the appropriateness (or lack thereof) of the requested remedy. It is not necessary to recapitulate all of the evidence presented by both parties, especially when there is a transcript of the hearing. When identifying conflicts in the testimony, be sure to provide the arbitrator with a rationale as to why your witnesses should be credited. For example, you may point out that your witness is corroborated by contemporaneous documentation. Do not ignore evidence that may be perceived by the arbitrator as damaging. A good oral or written argument should explain to the arbitrator why the testimonial and documentary evidence, as applied to the relevant contract provisions, leads to the result you are seeking.

XIV. KEEP THE AIMS AND OBJECTIVES OF THE ARBITRATOR IN MIND THROUGHOUT THE HEARING

New advocates should always keep in mind that the arbitrator's orientation is different from the advocates. While advocates present their respective cases in the most favorable light emphasizing some facts and de-emphasizing others, the arbitrator is seeking to determine the most plausible interpretation of the entire record. The arbitrator's job is to take into consideration the conflicts in the evidence and the credibility of witnesses. The arbitrator, who comes to the hearing knowing virtually nothing about the case, is primarily focused on gathering the facts necessary to decide the case in a competent and professional manner. To this end, the arbitrator seeks to achieve a full understanding of the nature and scope of the dispute, the positions of the parties, and each party's response to the other party's positions.

Conduct that does not help the arbitrator fully understand the case should be avoided. For example, lengthy exchanges between advocates during the hearing do not help the arbitrator find the facts and are seldom useful in resolving issues of discipline or contract interpretation. For this reason, arbitrators frequently direct the advocates to confine such discussions to private meetings outside the presence of the arbitrator.

Excessive objections by an advocate may also hinder the arbitrator's goal of developing an adequate record. All advocates should refrain from any editorializing about the testimony or documents coming into the record until the time of final argument. If a new advocate truly grasps the arbitrator's role as finder of the facts and interpreter of the contract, the new advocate will be better equipped to assist the arbitrator in performing his or her functions in a manner that also serves the advocate's objectives.

XV. SHOW RESPECT FOR THE ARBITRATOR AND THE PROCESS

Arbitration is an informal process when compared to a formal court proceeding. However, the utmost care should be taken to avoid even the most oblique references to the case while the other party is outside the hearing room. Likewise, witnesses and parties should be instructed by the advocates to refrain from discussing the case in common areas where their remarks may be overheard by the arbitrator. In such cases, the arbitrator may feel compelled to make a disclosure to both parties. Depending on the circumstances, the disclosure may cause a delay in the proceeding, or even the withdrawal of the arbitrator from the case.

Most arbitrators prefer to be addressed formally during the course of the hearing and to observe a certain level of decorum. Too much familiarity or informality during the hearing process may be misunderstood by some of the participants. A grievant may feel that his or her fate is being determined in a clubby atmosphere, or an employer representative may feel that the employer's concerns are not being taken seriously.

XVI. CONCLUSION

New advocates need not be overly concerned that their lack of experience may adversely affect arbitration outcomes. The arbitrator's job is to provide a fair hearing process. Arbitral decision-making is based on a reasoned analysis of the evidence and arguments presented by both parties, and not on the relative skills and abilities of the advocates. As a general rule, new advocates should take advantage of the opportunity to make an opening statement that introduces the arbitrator to their theory of the case. The chief focus of new advocates should be on the direct examination of their own witnesses and the identification of contemporaneous documentation that supports the

credibility of those witnesses. New advocates should never lose sight of the fact that the arbitrator is just learning the case and that the fundamental role of the advocate is to educate the arbitrator. Finally, new advocates should always keep in mind that the arbitrator has an ethical obligation to insure the integrity of the process.