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LABOR ARBITRATION:
Practical Ways to Cut Costs without Sacrificing Quality

By Rick Bales

The main advantages for choosing arbitration over litigation to resolve labor disputes are speed, party control over the process, the possibility of preserving an amicable relationship between the parties, and cost. This essay focuses on cost—what does labor arbitration cost, and what can the parties do to keep costs down while maintaining the integrity of the process and ensuring accurate outcomes?

According to the Federal Mediation and Conciliation Service ("FMCS"), the average labor arbitration case in 2014–15 cost just over $4,800 for the arbitrator's fee and expenses. Arbitrators' fees ranged from $375 to $2,400 per day, averaging about $873. The average case took about four days for the hearing, travel, and the time spent deciding the case and writing the opinion and award (also known as "study"). Expenses averaged about $398, but can be far higher if the parties bring an arbitrator in from out of town. These numbers reflect only FMCS cases, but are likely to be representative of labor arbitrations using other arbitral service providers. These numbers do not reflect the other costs of arbitration to the parties, such as the cost to each party of its own attorneys' fees, or the opportunity cost of the company and union representatives and the witnesses participating in the arbitration (and the entire grievance process) instead of attending to their regular job duties.

These costs pale in comparison to the cost of taking a case to litigation. Nonetheless, for many parties, especially small employers and union locals, the costs are significant. They may mean the difference between resolving a grievance or, on the other hand, letting it fester or settling it on unfavorable terms. Typically, the parties split equally the cost of the arbitrator, but bear their own attorneys' fees and other expenses.

The simplest way to cut arbitration costs is by choosing an arbitrator with a low per-diem or hourly fee. However, this approach can be penny wise and pound foolish. A more experienced arbitrator can move a hearing along and may require less time than an inexperienced arbitrator for research, preparation, and writing the award. The parties are more likely to have confidence in arbitrators they know and trust, and this by itself can help move the process along. For example, parties who trust the arbitrator are less likely to "pile on" redundant evidence in fear the arbitrator will miss an obvious point.

Other suggestions for keeping the cost of labor arbitration reasonable include:

Mediation: Consider attempting to mediate the grievance before taking it to arbitration. Research indicates that mediation is often successful and that it increases party satisfaction.[1] The FMCS does grievance mediation for free, and many labor arbitrators also are experienced in labor mediation. Mediation has the advantage of offering the parties not just a means to resolve the pending grievance faster and with a resolution that's attractive to both sides, but unlike arbitration, it has the capacity to resolve systemic issues that gave rise to the grievance and that will recur if not corrected.

Avoid Administrative Services: If the parties can agree upon an arbitrator they already know and trust, consider contacting the arbitrator directly instead of through

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an arbitral service provider. Arbitral service providers provide valuable services in some cases—particularly by providing rosters of potential arbitrators—but their services are not necessary in every dispute.

Reduce Briefing: Most labor arbitrators find pre-hearing briefs unhelpful, and as such the briefs represent wasted time and expense. If you are confident a pre-hearing brief will be useful in a particular case, coordinate with the other party before writing one. If the arbitrator receives a pre-hearing brief from one party but not the other, chances are the arbitrator will not read it before the hearing because of the possibility of causing real or perceived prejudice.

Stipulations: Before the hearing, consider conferring with the other party about the possibility of offering joint stipulations of facts. Most parties confer before the hearing on joint exhibits; joint stipulations of facts can shorten the hearing, narrow the issues, and reduce the amount of the arbitrator's preparation and writing time. Submit these stipulations to the arbitrator in Microsoft Word so the arbitrator can cut-and-paste it directly into her or his award.

Resolve Objections in Advance: Have each side indicate to the other which exhibits will be objected to, and the basis for the objections. Some of these objections may be resolvable by the parties before the hearing. Even if not, the hearing will go much more smoothly if the parties know in advance what the objections will be, so they can succinctly make their arguments to the arbitrator.

Use Technology: If the arbitrator is bringing a computer to the hearing, consider loading all the exhibits onto a flash drive instead of introducing paper copies. You'll save in copy costs, and a tech-savvy arbitrator will appreciate the portability of your submission. Keep in mind that there often is an inverse relationship between the quantity of paper a party provides in exhibits and the relevance of the exhibits.

Go Local: Choosing a local arbitrator, rather than one from out of town, will save significantly on the arbitrator's fee for travel costs and time.

Coordinate Witnesses: Before the hearing, confer with the other party to coordinate which witnesses will be called when, and by whom. This will accomplish two objectives. First, it will minimize the witness's frustration at having to sit around for hours waiting to be called. Second, it will allow the parties to call witnesses in a logical order that will help the arbitrator understand as early in the hearing as possible what the dispute is about and what the critical testimony will be.

No Transcripts: Consider whether you really need a court reporter. In many disputes, the critical language is in the collective bargaining agreement, not the testimony. A good arbitrator is a good listener and can take good notes. Consider as a compromise conducting a digital audio recording of the hearing that can immediately be shared with all parties and the arbitrator. Court reporters are expensive, and can significantly delay the time between the hearing and the award.

Start Early: Start the hearing early in the morning, especially if there is a chance the hearing will go late. Few things add to delay and expense more than having to unexpectedly extend a hearing to a second day. Seldom are all of the parties and attorneys and witnesses and the arbitrator available the very next day, and resuming the hearing weeks or months later requires everyone to prepare for the second phase of the hearing almost from scratch.

Go Lean: Don't beat dead horses. If your fourth witness is saying exactly the same thing your previous three witnesses just said, you're unnecessarily extending the time and cost of the hearing. Feel free to seek the arbitrator's guidance on whether the point has been made adequately. A good arbitrator will signal this to you without your having to ask. Watch for those cues.

Letter Briefs: Keep post-hearing briefs short. Consider agreeing with the other party to submit "letter briefs—a written version of a good closing argument—instead of traditional briefs.

Use Technology-2: Send post-hearing briefs by email, and send them in both PDF and Microsoft Word form. The PDF format is ideal if the parties have agreed that the arbitrator will exchange post-hearing briefs with the parties upon receipt of each party's brief. The Word document allows the arbitrator to cut-and-paste elements from the briefs—especially the relevant contract language and the parties' arguments—into the arbitration award, thus reducing the amount of time required for drafting the award. Similarly, be sure to send the CBA to the arbitrator electronically in Word to save the cost of the arbitrator having to retype provisions of the CBA. This is better than just putting CBA language in the brief because the arbitrator may need to cite other provisions in the CBA than the ones on which a particular advocate wanted to rely.

Short Opinions: Choose an arbitrator who does not feel obligated to turn the simplest discipline award into a tome worthy of a Dostoevsky novel. Both parties—and especially the losing party—want to know that the arbitrator heard and understood the factual testimony, want a reasoned opinion and award, and want the award to acknowledge each of the parties' arguments and why the arbitrator has accepted or rejected them. But they don't necessarily want to pay for a 30-page award in a straightforward discipline case. ■

Endnotes

1. See, e.g., Stephen B. Goldberg, Grievance Mediation: Why Some Use it and Others Don't, 2009 Proceedings of the National Academy of Arbitrators 275.

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lawyers is determining who will become a client. Some of those lawyers evaluate and screen prospective clients based on whether the client has a viable legal case: if yes, the lawyer may represent the client; if not, the lawyer may send the person away.

That approach misses the opportunity to help people with their very real problems even when they have no meaningful legal claims (or they lack the wherewithal to pursue such claims). The presence or absence of a legal claim is a factor in developing and implementing a plan of action; but the absence of a legal claim does not mean that the client doesn't have a problem or that the lawyer cannot help the client with that problem.

Most lawyers have good analytical skills. Many clients do not; even those who do typically lack the objectivity to analyze their situations effectively. A problem-solving lawyer can provide valuable assistance merely by helping the client think through the problem, identify possible avenues for solution, and decide on a course of action, all without regard to the existence any legal claims.

The employment lawyer with a client-centric approach should approach every representation with a problem-solving mind-set and should look for problem-solving approaches to addressing whatever problems and disputes are presented. The client, whether an employee or an employer, generally will be well served by such an approach. ■