Writing Effective Labor Arbitration Briefs

RICHARD BALES*

ABSTRACT

Post-hearing briefs play a critical role in labor arbitration by providing arbitrators with a structured and persuasive presentation of facts, contract language, and arguments. A well-crafted brief can clarify the key issues in dispute, assist the arbitrator in drafting the award, and ultimately influence the outcome of the case. Unlike oral presentations, which are transient and may not be fully recalled, a written brief remains a lasting document that serves as the foundation for an arbitrator's analysis. This article examines the structure of an effective post-hearing brief, identifies best practices, and discusses common pitfalls that advocates should avoid. By following these principles, advocates can maximize the persuasive impact of their written submissions.

I. INTRODUCTION

Labor arbitration is an integral part of dispute resolution in collective bargaining relationships.[1] Unlike litigation, arbitration procedures are often less formal, and the arbitrator's role is more flexible. However, one constant remains: the importance of effective advocacy, particularly in post-hearing briefs. Unlike oral arguments, which can be fleeting or subject to interpretation, a well-organized and persuasive brief provides a lasting record of the advocate's best arguments.[2]

*Richard Bales, J.D., is faculty member at Ohio Northern University Law School specializing in Alternative Dispute Resolution, Torts, and Civil Procedure. Bales has published more than 100 articles on topics related to labor & employment and alternative dispute resolution. Bales also serves as a panelist for the Federal Mediation and Conciliation Service and the American Arbitration Association, among others.

1. *See, e.g.,* United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960).

2. *See generally* Chris S. Edwards, *The Importance of Oral Arguments in Appellate Courts: Insights for Trial and Appellate Practitioners*, WARD & SMITH, P.A., (June 24, 2024), https://www.wardandsmith.com/articles/the-importance-of-oral-arguments-in-

A compelling brief does more than summarize testimony and contractual provisions; it frames the dispute in a way that logically leads the arbitrator to the desired outcome.[3] Well-structured briefs help arbitrators recall key facts, synthesize complex issues, and apply the relevant contract language and arbitral precedent effectively. Given the volume of information an arbitrator must process, a brief that is clear, concise, and well-organized can have a meaningful impact on the outcome of the arbitration proceeding.

A poorly written brief, by contrast, can frustrate the arbitrator and make it more difficult to find a clear basis for a ruling. For example, an arbitrator faced with a brief that is overly lengthy and repetitive may struggle to distill the core arguments and factual assertions, leading to a decision that does not fully address the advocate's intended points. Likewise, briefs that fail to organize their arguments logically can cause confusion, forcing the arbitrator to parse through scattered claims in search of a coherent position.

This article discusses the essential elements of a strong post-hearing brief and provides practical guidance for advocates seeking to present their cases effectively.

II. THE STRUCTURE OF AN EFFECTIVE POST-HEARING BRIEF

A persuasive post-hearing brief should adhere to a clear and logical structure.[4] Using traditional I/A/1/a/(1)/(a) outline structure in the brief's headers helps the arbitrator understand how the various parts of the brief—and the advocate's arguments—fit together. Though arbitrators may have individual preferences, most effective briefs contain the key sections discussed below.

A. Introduction

The introduction sets the stage for the arbitrator. It should concisely summarize the dispute, the key issues at stake, and the specific relief sought. The introduction is an opportunity to provide a roadmap for the arbitrator and to establish the key themes that will be developed

appellate-courts-insights-for-trial-and-appellate-practitioners (describing the importance of briefs in the context of federal appellate courts).

3. Richard A. Bales, *Telling a Story*, BENCH & BAR (Ky. Bar Ass'n), July 2002, at 25.

4. Richard A. Bales, *Headings*, BENCH & BAR (Ky. Bar Ass'n), July 2003, at 41 (describing the importance of formal structure in legal writing).

in the argument section. A strong introduction lays out the essential context without becoming too argumentative.

The introduction can also be an effective place to introduce the key individuals involved in the grievance, along with their roles and relationships within the workplace. In a discipline case, for example, it may be important for the arbitrator to understand the grievant's job role, who the immediate supervisor was, and how those individuals fit within the employer's chain of command. Providing this information early—either in the introduction or at the beginning of the statement of facts—can help the arbitrator visualize the workplace structure and clarify decision-making processes. Including formal titles and describing each person's function within the organization makes it easier for the arbitrator to track who was involved in key events leading to the dispute.

B. Statement of Facts

1. Organizing the Facts

The Statement of Facts section should present a chronological and relatively neutral recounting of the relevant facts. Unlike an opening statement at a hearing, which may be framed in an advocacy-driven manner, the fact section in a brief should be objective and well-supported by citations to the record. Remember that this is not a closing oral argument at a jury trial.

The most effective Facts section presents all relevant events in strict chronological order, starting with background facts and progressing through the grievance trail. Organizing facts in this manner makes it easier for the arbitrator to reconstruct the sequence of events, identify key turning points, and understand how the dispute unfolded. Arbitrators often spend a significant portion of their time writing an award by constructing a neutral timeline of events, and a well-organized Facts section can facilitate that process.

2. Telling a Story [5]

The human brain is hard-wired to respond to stories.[6] This explains why Aesop's Fables, parables from the New Testament, African folk

5. This section is adapted from Bales, *supra* note 3.

6. *See* Jonathan H. Westover, *The Power of Storytelling: How Our Brains Are Wired for Narratives*, HUM. CAP. INNOVATIONS, (Jan. 11, 2024), https:/

tales, and numerous television commercials resonate so strongly.[7] Arbitrators, like all human beings, are drawn to narratives that make sense of complex situations. The way a grievance is framed in the hearing and in the briefs—whether as an unfair punishment, a necessary disciplinary action, or a simple misunderstanding—can significantly influence how the arbitrator perceives the case.

As mentioned in *Telling a Story*, a compelling narrative requires four essential elements: character, conflict, resolution, and organization.[8] In both a grievance and a Dostoevsky novel, character development can be the most crucial element.[9] Especially in a grievance involving discipline, the union advocate's goal—and often biggest hurdle—is to present the grievant sympathetically, because readers naturally support characters they can relate to and understand.[10] The same is true for the employer's advocate, who needs to frame the grievant in a way that justifies the employer's actions, whether by emphasizing policy violations, prior warnings, or broader workplace concerns. At the same time, the employer's advocate should also personalize the employer, who might otherwise be perceived as a faceless, uncaring entity. Just as the union seeks to humanize the grievant, the employer's advocate should highlight the individuals behind the decision—managers, supervisors, or Human Resource professionals who grappled with a difficult choice and acted not out of malice, but out of a legitimate need to maintain workplace standards. Arbitrators are not juries or judges bound by strict legal precedent; they often base decisions on equity and fairness.[11] This means that a well-developed, credible character can tip the balance in a close case.

Conflict is the second element of a compelling narrative.[12] Most grievances contain plenty of this.[13] The key is to frame the conflict in a way that highlights the client's positive qualities and character.[14] For a union advocate, the conflict might be framed as an employee struggling

/www.innovativehumancapital.com/article/the-power-of-storytelling-how-our-brains-are-wired-for-narratives.

7. Bales, *supra* note 3, at 25.
8. *Id.*
9. *Id.*
10. *Id.*
11. Thomas A. Telesca et al., *Must Arbitrators Follow the Law?*, 41 FRANCHISE L.J. 347, 349-50 (2022).
12. Bales, *supra* note 3.
13. *Id.*
14. *Id.*

to maintain a livelihood despite an unfair application of company rules. For an employer advocate, the conflict might center on the company's need to enforce standards to ensure a safe and productive workplace. Unlike in civil litigation, where the conflict is often about liability and damages, labor arbitration disputes are often about whether discipline was justified, whether management had just cause, and whether contractual obligations were met. An arbitrator is not deciding abstract legal principles but resolving a workplace dispute with real consequences. A compelling conflict—one that highlights why the client's position is the fair and reasonable one—can make all the difference.

The third element of a compelling story is resolution.[15] "In a well-crafted story, the resolution aligns with the character and the conflict: Odysseus returns home to reclaim his home; Lear succumbs to grief over Cordelia, and Raskolnikov seeks redemption."[16] Advocates cannot script the resolution; arbitrators do this. Doing so, however, is difficult for many lawyers; law school does a much better job of teaching students how to make effective technical arguments than it does of teaching students to make effective emotional arguments. Arbitrators, however, are often less focused on the finer points of legal precedent and more concerned with workplace justice and labor relations. An arbitrator's decision is not just about settling a legal dispute—it is about restoring order to the workplace in a way that aligns with the collective bargaining agreement and the principles of industrial fairness. Framing the resolution in terms of workplace equity and long-term labor stability can make it more persuasive.

The last essential element of a compelling story is structure and organization. Stories typically follow a three-part organization: order, disorder, and re-order.[17]

> In developing character, the story starts at status quo: Maria Smith, an accountant and a mother of three young children, was driving home from work on the afternoon of April 22, 20[25]. Then, something disruptive happens: James Jones, who had been drinking all afternoon at a local bar, ran a red light and collided with Smith, injuring her so severely that she required three days of hospitalization and ongoing physical therapy. Finally, there is a re-

15. *Id.*
16. *Id.*
17. *Id.* at 31.

> order (or often, in a legal case, a proposed re-order): Maria Smith sues Jones to recover for the medical expenses, lost wages, and suffering she incurred as she attempted to cope with the effects of the accident on her job and family life.[18]

In labor arbitration, the structure is much the same: the status quo is the grievant's employment, the disorder is the alleged contract violation or disciplinary action, and the proposed re-order is the remedy. A well-organized narrative not only helps the arbitrator understand the case but also guides the arbitrator toward a ruling that restores balance in a way that favors the client.

3. Writing Objectively and Acknowledging Unfavorable Facts

While it is appropriate to emphasize facts favorable to one's case, it is crucial to maintain a neutral tone. Arbitrators are more likely to incorporate fact statements directly into their awards when the facts are stated in objective terms rather than in overtly argumentative language. A persuasive brief demonstrates why certain facts matter rather than asserting conclusions about their significance.

Ignoring unfavorable facts is a common but serious mistake. An arbitrator will expect to see all relevant facts, including those that may appear harmful to a party's position.[19] If an advocate omits critical details, the opposing side's version of events may become the default. The most effective approach is to acknowledge and contextualize problematic facts, explaining why they are not dispositive.

Citing testimony from opposing witnesses whenever possible makes it much more likely the arbitrator will accept those facts as true. Arbitrators expect a party's witnesses to testify favorably for that party,[20] but when a fact is presented or corroborated by testimony from the other side, it becomes significantly more persuasive. The best briefs rely heavily on contemporaneous documents and the statements of neutral or opposing witnesses, rather than exclusively on self-serving testimony.

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18. *Id.*

19. *The Role of Evidence in Arbitration: Key Considerations*, RAPID RULING (Feb. 21, 2025), https://rapidruling.com/blog/alternative-dispute-resolution-blog/arbitration-alternative-dispute-resolution-blog/the-role-of-evidence-in-arbitration-key-considerations/.

20. *See Representing Yourself in Employment Arbitration: An Employee's Guide*, AM. ARB. ASS'N, https://www.adr.org/self-represented (last visited Mar. 22, 2025).

C. Applicable Contract Language

The collective bargaining agreement (CBA) is the central legal document in any labor arbitration.[21] The brief should reproduce the relevant provisions. Reproducing all pertinent CBA provisions into the brief ensures that the arbitrator has easy access to the necessary contractual language without needing to sift through the full agreement.[22] Advocates should not assume that the arbitrator is intimately familiar with every provision of the CBA. Instead of requiring the arbitrator to search for key language, it is better to provide the relevant sections directly within the brief.

Different arbitrators have different preferences on how contractual provisions should be presented. Some prefer to see the unedited text of the relevant provisions in their entirety, while others favor an edited version that removes material that is obviously extraneous.[23] If you are unsure about your arbitrator's preference, it is safest to include the full provision while using formatting techniques—such as italics, bolding, or different colored fonts—to highlight the most relevant portions.

For most arbitrators, using ellipses to omit verbiage irrelevant to the grievance can help streamline the arbitrator's review while maintaining accuracy. For instance, if a section of the contract contains multiple subsections, but only one is directly applicable, it is advisable to include only that portion and indicate any omissions with ellipses. This approach helps the arbitrator focus on the critical language without distraction.

In more complex cases involving nuanced contract interpretation, emphasizing critical words or phrases can help guide the arbitrator's analysis. Italicizing key terms or using boldface type for operative phrases can direct attention to the most significant parts of the contract. Similarly, for cases requiring a comparative contract analysis, using different colored fonts for distinct sets of contractual language can

21. Howard Parish, *How Arbitrators Decide*, 0 J. COLLECTIVE BARGAINING ACAD. 12, 10 (Apr. 2010).

22. Lee Hornberger, *How to Write a Persuasive Post-Hearing Labor Arbitration Brief*, LAB. & EMP. LAWNOTES 20 (2022).

23. *See generally Labor Arbitration Law*, BLOOMBERG LAW, https://pro.bloomberglaw.com/insights/labor-employment/labor-arbitration-law/#what-is-labor-arbitration (last visited Mar. 27, 2025).

visually distinguish between various provisions and make their relationships clearer.

Ultimately, the goal of this section of the brief is to ensure that the arbitrator has immediate access to the contract language necessary for resolving the grievance. By thoughtfully presenting and formatting these provisions, advocates can facilitate a more efficient review process and draw attention to the provisions in the CBA that help the advocate's case but that might otherwise be overlooked.

D. Analysis

1. Organization

The Analysis section forms the heart of the brief. A well-structured argument should logically apply the CBA to the facts. Advocates should clearly enumerate their arguments using structured sub-headings (e.g., if Part IV of the brief is "Analysis", Part IV.A would be the advocate's first argument, Part IV.B would be the second argument, etc.). Within these sub-headings, use clear signals (e.g., "First, . . ., Second, . . ., Third, . . .") to ensure clarity and logical progression.[24]

2. Citations to Authority

The CBA is by far the most persuasive authority. Whenever possible, tie each argument to specific CBA language. In a discipline case, this may be as simple as demonstrating whether the employer met the just cause standard, while in a contract-interpretation case, it may require detailed grammatical analysis of the contract language.

Most lawyers are conditioned to cite legal authority for everything. However, arbitration does not rely on legal precedent in the same way courts do,[25] and over-citing authority can distract the arbitrator from core arguments. For example, extensive discussion of arbitral precedent on the meaning of "just cause" or the burden of proof might impress an unsophisticated client, but will not be useful to an experienced arbitrator. Arbitral precedent is most effective when used judiciously. It is likely to be most useful when the cited awards involve the same

24. *See* Brandon Vogel, *Strong Headings*, *No Cliches, Precise Verbs*, N.Y. ST. BAR ASS'N (Dec. 21, 2020), https://nysba.org/strong-headings-no-cliches-precise-verbs-how-to-craft-a-winning-arbitration-brief/; *See also* Richard A. Bales, *Transitions*, 66 BENCH & BAR 35 (2002) (discussing signals and internal previews).

25. *See generally* KENNETH MAY, ELKOURI & ELKOURI: HOW ARBITRATION WORKS (Patrick M. Sanders & Wesley G. Kennedy eds., 8th ed. 2016).

parties as the present case, or the present case raises an extraordinarily unique fact situation and the advocate wants to show the arbitrator that there is arbitral precedent for something that may not be intuitively obvious.

When citing to Elkouri & Elkouri's *How Arbitration Works*,[26] be sure to include the edition number, the chapter, section, subsection numbers, and the page number. Consider including with the brief a PDF of the relevant pages. Different editions are not always consistent, and the arbitrator's version may be very different from the advocate's. Likewise, always provide a PDF of arbitration awards cited in the brief.[27] In the United States, different labor arbitration awards are available in different firewalled for-profit databases (unlike in Canada, where awards are publicly available and easily searchable).[28] The arbitrator likely does not have access to the database the advocate used to find a cited award. The arbitrator will not rely on, much less cite, an award unless the arbitrator can review the award and ensure it stands for the proposition the advocate is citing it for.

There is one notable exception to the general advice against over-relying on external authority: when past practice is at issue. The critical authority on this topic is Richard Mittenthal's *Past Practice and the Administration of Collective Bargaining Agreements*.[29] Though written more than 60 years ago—and arguably, more complex than necessary—Mittenthal's framework remains the leading standard for distinguishing an enforceable past practice from a mere pattern of behavior. If past practice is central to the dispute, an advocate's post-hearing brief should not only cite Mittenthal's article, but also apply his framework to the facts of the case, demonstrating how it leads to the desired outcome. Failing to do so risks leaving the arbitrator without a structured method for evaluating the claim, thereby weakening the argument's persuasiveness.

26. *Id.*

27. Hornberger, *supra* note 22.

28. *See Arbitration Awards Online*, FINRA https://www.finra.org/arbitration-mediation/arbitration-awards (last visited Mar. 20, 2025); *See also The Grievance Arbitration Awards Portal*, GOVT. OF ONT., https://www.lr.labour.gov.on.ca/en-CA/ (last visited Mar. 20, 2025).

29. *See* Richard Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, 59 MICH. L. REV. 1017 (1961).

3. Citations to the Record

Advocates should use the record efficiently by providing pinpoint transcript citations rather than vague references such as "the testimony showed."[30] If citing an exhibit, including specific page numbers allows the arbitrator to verify claims quickly.

Additionally, it is important to avoid over-reliance on self-serving testimony from one's own witnesses. Instead, the strongest briefs incorporate corroborating testimony from opposing witnesses or documentary evidence to bolster key assertions.

Finally, advocates should avoid stretching, misrepresenting, or ignoring facts or contract language.[31] Doing so creates an immediate loss of credibility. It also forgoes an opportunity to argue why the advocate's side should win notwithstanding the unfavorable testimony or contract language. A brief that fairly presents the evidence, acknowledges weaknesses, and explains why the advocate's position remains the most reasonable will be far more persuasive than one that ignores unfavorable evidence or overstates claims.

E. Conclusion and Remedy

The conclusion can be brief. Unless the requested remedy is obvious (e.g., denial of the grievance), the conclusion should state the requested remedy. If the advocate is requesting a remedy beyond typical reinstatement and back pay, the brief should describe in detail what the advocate is requesting, and, if appropriate, the authority in the CBA for issuing it. A more extensive discussion of the remedy might be appropriate in the analysis section of the brief. For example, if the advocate is requesting that the arbitrator order a written apology, the brief should discuss to whom the apology should be sent, and why the requested apology is appropriate under the circumstances of the case.

30. Susan W. Fox & Wendy S. Loquasto, *The Art of Persuasion Through Legal Citations*, 84 FLA. BAR J. 49 (2010) ("The primary purposes of citation are support and attribution for the propositions advanced by the author. . ..In short, persuading a court to follow precedent, distinguish it, or overrule it — as the case requires to advance your client's position — is in large part dependent upon credible citations and sound reasoning based upon the citations.").

31. Hornberger, *supra* note 22.

III. COMMON MISTAKES IN POST-HEARING BRIEFS

Even experienced advocates make errors that can undermine an otherwise strong case. Some of the most frequent mistakes are failing to follow arbitrator guidelines and excessive length and repetition.

A. Failing to Follow Arbitrator Guidelines

Arbitrators' idiosyncratic preferences differ, so the recommendations discussed above are not hard-and-fast rules. Advocates should carefully follow any specific guidelines provided by a particular arbitrator. If the arbitrator does not provide guidelines, and the advocate has access to one or more of the arbitrator's prior awards, those awards may provide guidance.[32] How is the award structured? Does the arbitrator summarize each witness's testimony or synthesize the facts? Even just using the same font and other similar formatting conventions may maximize the possibility of the arbitrator cutting-and-pasting material from the advocate's brief into the award.

B. Excessive Length and Repetition

There is no correlation between brief length and success on the merits. An excessively long brief risks overwhelming the arbitrator and making it difficult to find specific arguments within the brief. The brief should be long enough to comprehensively make the advocate's arguments and no longer.

IV. CONCLUSION

An effective post-hearing brief is a crucial tool in labor arbitration, serving to advocate for a party's position and to assist the arbitrator in rendering a decision. By adhering to best practices—such as structuring arguments logically, presenting facts neutrally, and making efficient use of the record—advocates can maximize the persuasive impact of their briefs. Avoiding common pitfalls further enhances the credibility and effectiveness of written submissions. As labor arbitration continues to evolve, mastering the art of brief-writing remains an essential skill for practitioners.

32. *Id.*