Labor Arbitration Hearing Procedure

Arbitrator Michael G. Whelan

The labor arbitration hearing is similar to courtroom bench trials in some ways, but it is less formal, and the rules of trial procedure and evidence do not strictly apply. That stated, the orderliness of trial procedure is preserved.

Advocates for parties in labor arbitration should keep in mind that arbitrators often do not have much information about the nature of the case they will be deciding prior to the hearing. The paperwork they receive appointing them may only advise whether the case is a discipline or discharge case, or a contract interpretation case. Therefore, a prehearing conference is a necessary first step to identify the issues in the case and provide advocates and grievants with a "road map" for the hearing. I also believe the prehearing conference is important for grievants who often have a great deal at stake and are unfamiliar with the arbitration process.

Typically, the prehearing conference is held the same day of the hearing immediately prior to the parties' presentations, unless the parties request to hold it earlier. Contact between arbitrators and the parties before the hearing has traditionally been limited to scheduling matters and the issuance of witness subpoenas. However, in recent times, "virtual" hearings conducted on Zoom or other video conferencing platforms have become more common, and a preliminary conference via telephone or video conference may be held prior to the date of the hearing so that the arbitrator and the parties can address issues unique to virtual hearings.

I always conduct a prehearing conference on the day of the hearing regardless of whether there has been a preliminary conference or conferences. I prefer to conduct the prehearing conference "on the record" so that rulings and any stipulations are preserved. The matters that are often addressed during the prehearing conference include:

- If there any hearing procedures unique to the parties' collective bargaining agreement or their agreed-upon practices, the prehearing conference provides an opportunity to inform me of those procedures. Because the arbitration process is a contractual process of the parties, I will typically accommodate such procedures.

- If the parties desire a record of the hearing for any purpose, they may make an audio recording or retain a court reporter at their expense. I take notes during the hearing, which are my confidential record of the proceedings. I may also make an audio recording as a supplement to my notes, but I do not provide a copy of my notes or the audio recording to the parties.

- We will identify the issue or issues to be decided.

- There may be a discussion of the allocation of the "burden of proof," which involves the burden of production and persuasion. The party carrying the burden of production will be the first to present its evidence, and I usually adhere to the traditional assignment of that burden to the employer in a discipline or discharge case and to the union (or the grievant) in a contract interpretation case. If either party believes that the burden should be allocated differently in a particular case, the prehearing conference is the time to address that issue. The burden of persuasion will depend on the type of case and the quantum of proof (e.g., preponderance of the evidence or clear and convincing evidence). In a discipline or discharge case decided under a clear and convincing evidence standard, the burden of persuasion is on the employer. In a contract interpretation case decided under a preponderance of the evidence standard, the burden of persuasion in ultimately on the party bringing the grievance—usually a union—but as a practical matter, the party that persuades me that its interpretation of the agreement captures the intent of the parties will prevail, so it is fair to conclude that both parties have a burden of persuasion.

- We will discuss whether there are any factual stipulations.

- It is also my preference to mark and decide the admissibility of exhibits—except impeachment and rebuttal exhibits. If there are genuine issues regarding the foundation of any particular exhibit, I will require the party seeking to introduce the exhibit to establish a foundation during the evidentiary part of the hearing. Although the rules of evidence do not apply, these rules go to the reliability and trustworthiness of the evidence, and advocates may raise objections to the admissibility of exhibits during this procedure, just as they may during witness testimony during the hearing.

- We will address any other prehearing motions or housekeeping issues raised by me or the parties.

After the prehearing conference, the parties will have an opportunity to make opening statements to familiarize me with the evidence and their respective theories of the case. The party with the burden of production will have the opportunity to provide its opening statement first, and then the opposing party may open or preserve its opportunity to open when it presents its evidence. Some advocates prefer to read their opening statements from a prepared writing and, when this happens, I find it helpful to provide me and the opposing advocate with a copy. My practice is to take extensive notes during the hearing—even if it is recorded in some fashion—so I like being able to follow along with an opening while it is being read without taking notes.

After opening, the party with the burden of production will have the opportunity to call its witnesses. Witnesses will be questioned by the party calling them on direct examination and, after the direct examination has concluded, witnesses will be subject to cross-examination by the other party. Redirect and—because the rules of evidence do not apply (e.g. FRE 611(b))—recross and perhaps and additional rounds of examination will be permitted as is reasonable and consistent with the goal of providing both parties with a full opportunity to present their evidence.

When the party with the burden of production has presented all its evidence and "rests" its case-in-chief, the opposing party will have an opportunity to call witnesses, who will also be subject to examination in the manner previously described. After this party rests, the parties will be presented with an opportunity to present rebuttal and surrebuttal. Again, in the interest of providing a full and fair opportunity to present their cases, additional "rounds" of rebuttal and surrebuttal may be permitted. When all the evidence has been received, the evidentiary part of the case will be closed.

After the close of the evidentiary part of the hearing, the parties will have the opportunity to present closing arguments. Typically this is done in post-hearing briefs, but again, any agreed-upon procedure of the parties is usually permitted. For example, occasionally, the parties prefer to give oral closings. If the parties cannot agree on how they will close and want to close in different ways (e.g., one party wants to submit a brief and one party wants to present an oral closing argument), I will permit each party to close in the manner it chooses.

When briefs are to be submitted, I will work with the parties to establish a due date. Unless the parties have another agreed-upon procedure or the case is being administered by an organization that acts as a clearinghouse for communications with the arbitrator, I prefer that briefs be emailed to me by 11:59 p.m. on the date they are due. I also prefer that the parties submit one PDF version and one Word version of their briefs. After I receive both briefs, I will email both briefs to both parties. Once closing arguments—whether through briefs or oral argument—have been submitted, the hearing record is closed.