Grievances & Arbitration – Arbitration Practices

Arbitration Policies

POLICY GUIDE

Few responsible and mature representatives of labor or management would dispute that a grievance that is thoroughly aired and discussed and settled by the parties themselves is far preferable to an imposed decision by an outsider. Yet, even with the best of intentions, situations may arise where the parties' positions become more calcified as the matter goes through the grievance procedure or where the parties simply do not know how to settle the grievance without "losing face."

Before deciding to take a case to arbitration, you might want to ask yourself the following questions:

Are we right? You should have a good-faith belief that your position is right in law and in justice. The question of being right probably is more important to management than it is to the union. Employees are more likely to forgive a union for asking too much of the company than they are to forgive the company for an act or decision that appears unfair, petty, or stupid.

Is it worthwhile? This may be relative; something of minor importance to management may be of great importance to a union, especially if it involves internal political considerations. Most things that infringe on management rights probably are worth going to the mat for. Arbitration also is worthwhile if it can settle a nagging dispute or provide a guideline for future conduct. For minor discipline cases or other one-shot issues, you might be better off putting a CB8h price on settling the dispute and be done with it.

Can it be won? You should consider what evidence is available; how effective your witnesses are likely to be vis-a-vis your opponent's witnesses; and, most importantly, where the equities seem to lie. You should ask: Is this the right case to try this particular issue? You should be convinced that there is a substantially better than 50-percent chance of winning. If there is a fair chance that the underlying complaint has merit, the company's decision might better be reversed or modified by management itself.

What will be the effect of winning or losing? You should ask: (1) Is there anything to lose by winning? and (2) How much is to be lost by losing? Winning a compulsory overtime case isn't much of a victory if most of the work force quits as a result.

What settlement is possible? Unless the situation is one of no-compromise, a bargained settlement may be better and less costly than an imposed settlement.

Nevertheless, there may be cases where management rightly decides to go to arbitration while recognizing that it stands a good chance of losing. A possible example of this type of case is one involving serious off-duty misconduct. Arbitrators generally hold that employers cannot penalize an employee for off-duty conduct unrelated to the job. Yet, where the off-duty conduct is so bad in the eyes of the employees and the community, management may have to demonstrate that it will not voluntarily tolerate such conduct or have such employees on its payroll.
Types of Arbitration

POLICY GUIDE

Arbitration is the process by which an impartial third party is called in to settle a dispute which the parties in conflict have been unable to resolve.

In labor-management disputes, the third-party neutral - the arbitrator - holds a formal hearing, takes testimony from both sides, and then renders a decision by which the parties have agreed to be bound. In most cases, labor and management voluntarily agree - either as part of the collective bargaining agreement or at the time of impasse - to take their disputes to arbitration, and they work together to select a mutually acceptable arbitrator or board of arbitrators.

There are two basic kinds of labor-management disputes for which arbitration is commonly used: Irreconcilable interests that prevent settlement on new contract terms and disagreements over the rights of individuals or groups under an existing agreement.

APPLICATION OF POLICY

Grievance Arbitration v. Interest Arbitration

The two main types of arbitration can be distinguished by where they occur in the scheme of the labor-management relationship.

"Grievance" or "rights" arbitration involves the interpretation, application, and/or enforcement of established contract terms and conditions of employment. The arbitrator's job is to determine the meaning or proper application of a contract's provisions with regard to a specific situation, often involving a disagreement about individual or group rights. The vast majority of labor contracts provide for arbitration as the final step in the grievance procedure and usually prohibit strikes and lockouts over arbitrable issues.

"Interest" arbitration, rather than dealing with rights accrued under an existing contract, involves the acquisition of rights for the future. When negotiations over new contract terms are stymied because of conflicting interests, management and union may agree to put the matter before an arbitrator rather than allow their disagreement to disrupt operations. Interest arbitration may be chosen voluntarily by the parties when they find themselves at an impasse in negotiations; it may be provided for in the preceding contract; or it might be made compulsory in certain situations.

Because it is an outside interference with the bargaining relationship, the use of interest arbitration has not spread much beyond a few industries and certain public sector job groups, particularly in the "essential" safety and health services, where strikes can be particularly disruptive. While arbitrators warn against its overuse, voluntary interest arbitration can at time be a useful collective bargaining tool.

Arbitration v. Mediation, Conciliation, and Fact-Finding

The process of arbitration differs from conciliation or mediation and from fact-finding because it provides a definite means of settling a dispute. Resort to arbitration may occur after the techniques of
conciliation or mediation, and possibly after fact-finding, have failed to produce agreement.

In conciliation or mediation, labor and management call in a third party to help them continue to negotiate. In current usage, the terms conciliation and mediation are used interchangeably, although traditionally a "conciliator" played a less active role than a "mediator" in a labor dispute. Whether the third party works behind the scenes or actually takes part in the negotiations, the goal is compromise. The mediator attempts to persuade the negotiators, by proposals or arguments, to come to voluntary agreement, but the parties are in no way bound to do so.

In fact-finding, a labor-management dispute is called to a halt until an official agency, usually a fact-finding board, investigates and assembles all the facts surrounding the dispute. Fact-finders hold formal or informal hearings, may subpoena documents or individuals, and submit a report to the administrative agency, which in turn submits it to the parties and sometimes makes it public. Although in some cases the fact-finders' recommendation or decision may be binding, the final report usually is advisory and may be accepted or rejected by the disputants.

In arbitration, however, the parties do not have the choice of accepting or rejecting the third-party decision. When they resort to arbitration, the parties no longer are concerned with compromise, but are compelled by their own agreement to accept the decision of an arbitrator as final and binding.

MED-ARB

In a procedure that combines the techniques of mediation and arbitration, a neutral may be brought in to act as a mediator on as many issues as possible, but given the authority to act as an arbitrator on issues left unsettled. Whatever is settled by mediation becomes part of the arbitrator's decision and is written up as his decision.

Expedited Arbitration

The conventional arbitration procedure can be too time-consuming and costly to use for all grievance disputes that arise. For this reason, an increasing number of contracts provide for some type of short-form arbitration, either in addition to or in the place of the traditional procedure. The term "expedited arbitration" is used to describe a variety of types of grievance resolution. It may simply provide for ways to speed up the conventional procedure, or it may mean deleting some of the traditional steps, setting strict time limits, or cutting down on the use of lawyers and top-flight arbitrators for routine issues.

For example, in one expedited system, brief decisions are handed down within 48 hours of the hearing. Legal briefs, transcripts, and formal rules of evidence are banned. Local plant officials and union grievance committee-men present their respective cases with lawyers rarely heard or seen at the hearings, and a special panel of arbitrators, many with little arbitral experience, presides over the system. Nearly all unresolved grievances over written reprimands or disciplinary suspensions of five days or less are referred to the expedited process. The national-level system is reserved for grievances on other issues.

Permanent Arbitrators

Under some contracts, particularly those covering large units, a permanent arbitrator is appointed. He may be an "umpire" sitting alone; or he may be an "impartial chairman," who is joined by
one or more arbitrators appointed by each of the parties. In a few instances, a permanent umpire "panel" is named, and umpires are called in turn from the panel.

Advantages of the permanent arbitrator arrangement include: (1) The arbitrator eventually becomes an expert on the contract and on industry practices; (2) decisions will be more consistent with one another; (3) no time is lost in choosing an arbitrator; (4) the arbitrator becomes familiar with the personalities on both sides of the table; (5) time-savings result from (1) and (4) in presenting cases; (6) cost-savings result from the time-savings, the lessened need for a verbatim transcript, etc.; (7) the parties are less likely to take weak cases to arbitration; (8) the arbitrator knows that he must continue to live with the parties and with his decisions.

Disadvantages include: (1) Unless they use the screening services of a reputable arbitration association, the parties risk the danger of picking and being saddled with a "lemon"; (2) although total arbitration costs may end up being less, the parties usually must commit themselves to a minimum predetermined fee for the permanent umpire's services; (3) the ready availability of the permanent arbitrator may lessen the incentive to settle prior to arbitration; and (4) it may be difficult to find an arbitrator experienced in all types of potential grievances.

Temporary or Ad Hoc Arbitrators

Under the majority of contracts, a temporary or ad hoc arbitrator or arbitration board is selected for each dispute referred to arbitration.

Some of the advantages and disadvantages of this type of arbitration are obvious from the preceding discussion. Here are some additional considerations:

Advantages include: (1) The parties can change arbitrators easily and aren't stuck with an incompetent; (2) an arbitrator may be selected who possesses particular qualifications or expertise for the particular type of grievance; (3) the temporary system permits the continued selection of a good arbitrator, thereby securing many of the benefits of a permanent system without some of the liabilities.

Disadvantages include: (1) Extra time and effort are required to select an arbitrator for each case; (2) the use of a string of temporary arbitrators hinders the establishment of precedents and of consistency in decisions; (3) each new arbitrator must be educated in the contract and local practices and conditions.

Tripartite Arbitration Boards

A tripartite arbitration board, which may be either permanent or temporary, is made up of one or more members appointed by the union, an equal number appointed by the employer, and one neutral member, who acts as chairperson.

Advantages of the tripartite board include: (1) It gives the parties a better opportunity to keep the third member fully informed on the parties' real positions and on technical phases of the case and particular industry practices; (2) unanimous decisions and even majority decisions may carry more weight than a decision of a single arbitrator.

Disadvantages include: (1) The costs usually are appreciably greater; (2) the neutral or third member may feel forced to compromise his own best judgment in order to secure a majority vote.
Patterns in Union Contracts

Arbitration procedures are included in 96 percent of the contracts surveyed by BNA - 98 percent of manufacturing and 94 percent of non-manufacturing agreements. The scope of the arbitration procedure is specified in 90 percent of these contracts, with 78 percent calling for arbitration of any matter not settled under the grievance procedure.

Initiation procedures are specified in 95 percent of the contracts studied. Of these, 89 percent call for arbitration at the request of either party. Only 1 percent of the contracts require mutual agreement to process a dispute to arbitration.

Time limits on appealing a grievance to arbitration are included in 64 percent of the sample contracts. The most frequent time limits specified are 30 days (24 percent), 10 days (20 percent), 15 days (16 percent), and five days (9 percent).

The arbitrator is selected on a case-by-case (ad hoc) basis in 68 percent of the contracts. In another 12 percent, a single arbitrator, an arbitration board, or a rotating list of arbitrators is specified to serve for the duration of the contract. Whether on an ad hoc or permanent basis, 75 percent of the contracts specify use of a single arbitrator, while 19 percent provide for arbitration boards comprising equal numbers of union and management representatives plus an impartial chairperson.

Nonunion Arbitration Procedures

A few companies provide for arbitration as the terminal step in a formal grievance procedure for unorganized employees.

EXAMPLE: Under the procedure for nonunion employees of the Northrop Corp., Beverly Hills, Calif., employees first take up a complaint with their supervisors. If not satisfied with the supervisor's response, they may file a written complaint with the employee relations department, which investigates the matter by consulting with the complaining employee, the department head, and the department head's superior. An administrative ruling is made by the senior management member. If the employee still isn't satisfied, the decision may be appealed to a "management appeals committee," made up of the company president, the department head, and the director of industrial relations. If the decision of this committee doesn't satisfy the employee, arbitration is provided at the company's expense. The arbiter's decision is binding on all parties.

EXAMPLE: At Trans World Airlines, based in New York City, discharged employees may request arbitration. Under the normal grievance procedure, the third and final stage is a hearing by a "System Board of Adjudication," which is composed of the "vice president of personnel, an executive from a department other than the grievant's, and an employee named by the grievant. In contested terminations, however, the board is replaced by an arbitration panel, with an arbiter, who is selected by the grievant, assuming the position of the departmental head.

The American Arbitration Association has developed two model programs for third-party resolution of nonunion grievances. "Expedited Labor Arbitration" is an informal system for resolving "typical" workplace complaints, such as those concerning the fairness of a management action that affects an individual employee. "Employment Dispute Resolution" is a formal program that deals with
"statutory" claims involving, for example, job-discrimination charges. This system, which was designed using criteria announced in a U.S. Supreme Court decision, is a less expensive, alternative to costly litigation, the association says. Detailed descriptions of the programs and suggested procedures and forms are provided in the booklet "Employment Arbitration: Plain and Fancy," available from any AAA regional director. The association also offers technical assistance to employers interested in setting up the programs.

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**Selecting Your Arbitrator**

**POLICY GUIDE**

No part of the arbitration process is more important than that of selecting the person who is to render the decision. Finding an arbitrator who is acceptable to both parties, however, often entails difficulties and a variety of selection methods may need to be considered.

Mutual agreement on an individual known to both parties may be possible and desirable in some cases. This arbitrator may be a lawyer, an expert in industrial relations, a university professor, a judge, or any other knowledgeable person in whose judgment both you and the union have confidence. It is better, if possible, to select a local individual with a reputation for fairness and impartiality, and generally know to the community and to the employees.

It may be wise, too, to select someone with experience as an arbitrator, and particularly with experience in handling cases in your industry. Arbitrators themselves, however, criticize employers and unions for their tendency to look for older, established arbitrators for all cases. In the routine case, they say, there is a high degree of predictability no matter who hears it, and new arbitrators, because they are less in demand, charge smaller fees. While cost and availability of a proposed arbitrator's services should be considered along with other factors, a low fee or a fast settlement should not be given greater weight than qualifications for arbitrating the case.

Assuming you and the union cannot agree on an arbitrator, there are several things you can do. You can agree on someone to select an arbitrator - a local court judge, for example. You can each select an outside partisan advocate and let these two agree on a third, impartial member of your temporary board. Or, you can ask one of the several agencies - governmental and private - in the field to help you.

Choosing a permanent umpire is essentially no different from choosing an arbitrator for a single case, except that it is usually done with a little more care. Since permanent arbitrators ordinarily have some tenure of office, it may be advisable to strive for selection by mutual agreement.

**Selecting Professional Arbitrators**

Although the Federal Mediation and Conciliation Service (FMCS) and the American Arbitration Association (AAA) - the primary agencies that assist in selecting arbitrators - can directly appoint an arbitrator from their rosters, both agencies prefer selection by the parties to the case. Since they do, however, help to narrow the field by providing a brief list of candidates, you can improve your chances of choosing a qualified arbitrator by indicating to the agency the nature of your dispute and requesting a list of arbitrators who are knowledgeable in the area of dispute and have served on similar cases. You should also request background information and case histories of all the individuals suggested.

Once you have the names of arbitrators with the appropriate experience, you should do some
research into their previous decisions and evaluate them in terms of the case at hand. Texts of their decisions may be found in BNA's Labor Arbitration Reports - the LA cases summarized throughout this volume. Other sources of information include the AAA Award Bank, which makes available to interested parties both published and unpublished awards of over 500 arbitrators; professional management associations to which you may belong; and personnel/industrial relations officials at companies whose disputes were decided by the proposed arbitrators.

While you are evaluating the candidates' backgrounds and prior decisions, consider their qualifications in light of considerations such as whether the case is a highly technical or an emotional issue, whether an arbitrator seems to stick closely to contract language or to expand the interpretation beyond the intent of the contract, and whether the arbitrator tends to restrict the parties to the specifics of the issue or allows a great deal of latitude during the hearing.

Federal Mediation & Conciliation Service

On request, FMCS will submit names of arbitrators to the parties. A brief statement of the nature of the dispute should accompany the request to enable the Service to submit the names of arbitrators qualified for the issues involved. The request also should include a copy of the collective bargaining agreement or stipulation. If the full contract isn't available, a copy of the provisions involved should accompany the request.

Unless the parties specify a different approach, FMCS will submit the names of seven arbitrators, together with a short statement of the background, qualifications, experience, and per diem fee of each. If both the company and union indicate that they don't want a particular individual, that name will be omitted from the list. If only one side makes such a suggestion, that name generally will be omitted unless the suggested omissions are excessive or otherwise indicate lack of careful consideration.

FMCS will not put a name on the panel list at the suggestion of one side unless the other party knows of the suggestion and indicates no objection.

The two methods of selection from a panel are (1) at a joint meeting, the parties alternately strike names from the submitted panel until one remains, or (2) each side separately advises the Service of its order of preference by numbering each name on the panel. If needed and if permitted by the parties' agreement, FMCS will comply with a request for another panel.

Submission of a panel or appointment of an arbitrator does not preclude a subsequent voluntary adjustment of the dispute by the parties. A charge may be made, however, if the arbitrator doesn't receive enough notice of the adjustment to permit him to rearrange his schedule.

American Arbitration Association

Under AAA rules, single arbitrators, tripartite board, or other boards may be used, depending upon the wishes of the parties.

AAA's standard procedures for selecting an arbitrator involves sending a list of names to each of the parties. Each party may cross off the names it objects to and indicate an order of preference for the others. When the two lists are returned to the AAA and compared, a mutual choice usually becomes apparent.
The parties are not obliged to use this procedure, although they usually do. They are free to name an arbitrator directly from the AAA list.

Survey of Arbitrator Selectors

The experience of the arbitrator is the "foremost" factor on selectors' minds when reviewing a list of potential arbitrators, according to a study based on in-depth interviews with 26 labor relations representatives, half each from union and management, conducted by professors at Loyola University of Chicago. Although previous studies have found "little difference" between the awards of experienced and inexperienced arbiters, the study noted, "the 'craving' of the parties for 'name' arbitrators is a fact of industrial life." Other findings of the study were:

- Of the four major professions producing arbitrators - law, labor economics, industrial engineering, and the clergy - the representatives indicated they generally prefer lawyers for cases involving arbitrability, economists for interest disputes, and industrial engineers for wage incentive and job evaluation issues.

- A majority of the representatives cited the “type of issue” and the “liability involved” as “compelling” considerations in determining how long they are willing to wait for an arbitrator. Generally, cases involving discharges or monetary liability are ones in which an early hearing date would be sought.

- Seventy-five percent of the representatives said that the size of an arbitrator's fee would have no effect on the selection process, while 10 percent admitted that it would.

- The arbitrator's award would have a definite bearing on future selection processes, according to 24 of the 26 representatives. A majority, however, insisted that “they would consider the quality of the award rather than its direction alone when deciding to retain an arbitrator again.” Of primary importance to these representatives is how well the arbitrator explains the "conceptual and factual foundations for the award."

- The arbitrator's “personality and attitude” also are considered by the parties in reselecting a particular umpire. Generally, they prefer an arbitrator who: is “neither domineering nor lax during the hearing”; “perceives and can place himself in the environment of industrial relations”; and possesses a range of “ideal” personal characteristics, including “judicial temperament, fairness, impartiality, compassion, and honesty.”

- Representatives of both sides clearly “want decision-makers in arbitration and not award-splitters or mediators.”

Preparing Your Case

POLICY GUIDE

The die is cast. You are taking a dispute to arbitration. The arbitrator has been selected. How do you prepare for the hearing before the arbitrator?

The preparation of your case should begin at the first step of the grievance procedure. In fact, a careful handling of grievances may result in the long run in avoiding arbitration altogether. See to it that
the grievance is clearly stated, preferably in writing. It is very important that the grievance be reduced to writing if it goes beyond the first informal step.

During all steps of the grievance, keep written records, particularly if the grievance is a complicated one. If partial agreement is reached on any phase of the issue, the arbitrator will take account of this in deciding the entire problem. But the evidence that agreement was reached must be convincing.

But this is preliminary. You are committed to arbitrate - at least you have agreed to permit an arbitrator to determine whether the issue is arbitrable. If you don't agree that the question is subject to arbitration under the contract, that is the first question you raise. And if you are the one who insists on arbitration, be sure that the question actually is arbitrable. Otherwise you have the expense of arbitration without accomplishing anything.

APPLICATIONS OF POLICY

Steps In Preparation

Assuming that the issue is arbitrable, the "musts" in preparing your case are these:

1. Know all the facts. Collect all the hearsay, opinions, and individual feelings of those acquainted with the dispute in order properly to evaluate the case and to choose witnesses. Know whether potential; witnesses agree with the grievant or with each other.

2. Put down your facts in writing, even though you plan to present your case orally. By preparing a written record, you can more easily spot inconsistencies and weak points.

3. Go over the facts with foremen and supervisors who were on the spot when the grievance arose.

4. Know your contract and relate the facts to it. If you are preparing a written brief for the arbitrator, show exactly what contract clauses apply to the dispute at hand; how the clause may be affected by other parts of the contract, and so forth. Questions to ask include: What changes have been made in the clause over the years? What were the reasons for the changes? Has one side tried to obtain a change in negotiations but failed?

5. Make a careful study of all grievance papers and other relevant documents, custom, and practice as to the matter in issue, and applicable arbitration precedents (see below).

6. Develop a theory of the case. It is essential to develop a theory of the case and to stay with it. Introduction of extraneous issues might explode and destroy what otherwise might have been a good case. Plan a method of presenting the facts in a logical manner in order to obtain the desired ruling. Anticipate that your opponent has engaged in the same preparation, and try to figure out what justification he will give.

7. Outline your case. It is important to have an outline of your planned presentation of the case - the opening statement, the documents to be introduced, questions to be asked the witnesses, cross examination of the opponent's witnesses.

8. Prepare your witnesses. It is important to explain the case to the witnesses, tell them what
arbitration is and how it is conducted, and what is expected of them.

9. Make sure that all the people in your group understand who will be the principal spokesman for your side, who the witnesses will be, and what will be the main substance of their testimony.

Use of Other Decisions

One means of anticipating union arguments on a particular question is to look at what other unions have argued in other arbitration cases. Warnings are issued periodically by lawyers and arbitrators about the dangers of considering arbitration awards as precedents. But that does not mean that you cannot strengthen a case by judicious use of other decisions on the point raised by your own dispute. And a study of published decisions often results in avoiding arbitration through the settlement of grievances on the basis of a number of arbitrators' rulings on the same or a similar question.

Many employers look up all available decisions on issues similar to that which they are submitting to arbitration before completing their preparation of arguments. A large number of these decisions have been summarized throughout this volume under appropriate subject headings.

Necessarily, however, only a small percentage of all reported arbitration cases can be reproduced in this way. For the complete listing of published awards and text of arbitrators' opinions, it is necessary to use Labor Arbitration Reports, published by The Bureau of National Affairs, Inc.

Presenting Your Case

POLICY GUIDE

Arbitration proceedings generally are conducted in an informal atmosphere. Over-technicality should be avoided, as also should familiarity with the arbitrator, even if you know him. He should be treated with respect and dignity.

Within reasonable limits, the other side should be permitted to have its day in court, even if the evidence strikes you as being technically inadmissible.

It should not be forgotten that after the arbitration hearing, witnesses for management and for the union must continue working together.

APPLICATION OF POLICY

Preliminary Steps

More immediate steps to be taken on the eve of the arbitration hearing include:

1. Prepare a brief written summary of your contentions and deliver one copy to the arbitrator and one copy to your opponent at the start of the hearing.

2. Have copies of all documents that you desire to present as evidence ready for delivery at the hearing. Also have at least one copy for your opponents unless you know they have copies of their own.

3. If it would be helpful for the arbitrator to view a machine or operation, have a picture, drawing,
or blueprint of it ready for introduction at the hearing, or make arrangements for it to be available for the arbitrator to make an on-the-spot investigation during the hearing.

Conduct at Hearing

During the course of the hearing, the following guides should be followed:

1. Be on time or early if possible. Tardiness creates a generally bad impression.
2. Do not shout or speak more loudly than necessary at the hearing. Avoid provocative words or epithets.
3. Do not mention old and long-settled frictions or acts or misconduct by your opponent unless clearly relevant to the issue in the present dispute.
4. Strive for clearness and coherence in your oral presentation; avoid repetition.
5. Do not interrupt statements of the opposing party or the presentation of its evidence. Remember that an arbitration hearing, while informal, is not the same as a grievance committee or bargaining meeting.
6. If you intend to call witnesses, have them present in the room or nearby ready for call. If they are employed near the hearing room, they may remain at work, but they should be notified in advance that they may be called and should be asked not to leave, even though their work shift may end before they are needed as witnesses.

Training of Witnesses

A tool to assist in training witnesses who testify at arbitration hearings is the film, *Arbitration: The Truth of the Matter*. It presents guidelines for the proper conduct of a witness at a hearing. For information about the film, contact BNA Communications Inc., 9401 Decoverly Hall Road, Rockville, Maryland 20850. Telephone: (301) 948-0540.

Proving Your Case

Here are some suggested pointers on proving your case at the arbitration hearing:

1. Prove your case by your own witnesses. Don't try to establish it by the testimony of people put on the stand by your opponent.
2. If you cross-examine your opponent's witnesses, keep it short. The more questions you ask on cross-examination, the more chance you give a hostile witness to repeat his adverse testimony.
3. You have the right to ask leading questions when cross-examining hostile witnesses. You also should save time by asking your witnesses leading questions, except at points where disputed facts are involved. On disputed matters, testimony should be brought out, if possible, by questions that do not suggest the answer.
4. Do not make captious, whimsical, or unnecessary objections to testimony or arguments of the
other party. The arbitrator will realize, without repeated mentions on your part, when he is hearing weak testimony such as hearsay and immaterial statements.

5. A court reporter and a transcript may be desirable where extraordinarily long or highly technical matters are being presented. In such cases, the transcript will help the arbitrator in reviewing the testimony when preparing his award.

Post-Hearing Conduct

If a party requests the privilege of filing a post-hearing brief, it must be granted, as part of a "fair hearing." Both parties should be given an equal time to submit briefs, which should be limited to a comparatively short period of a week or two after the hearing.

If reply briefs are agreed upon, they should follow within three or four days after the delivery of the post-hearing briefs. It is customary for the parties to mail briefs to the arbitrator and to opponents at the same time.

Many arbitrations are closed without post-hearing briefs. They may be desirable, however, if the statement given to the arbitrator at the outset of the hearings wasn't complete or, in the light of subsequent developments, should be supplemented.

Arbitration Problems

POLICY GUIDE

Since 1945, BNA has published thousands of arbitration awards and court decisions dealing with the arbitration process. From these decisions, some frequently recurring issues emerge. Some of the major ones include:

- How does a company challenge the arbitrability of a particular dispute?
- Who passes upon the issue of arbitrability, the arbitrator or the courts?
- Does the obligation to arbitrate survive the expiration of the contract?
- Can one party compel the other to arbitrate several grievances before the same arbitrator in a single proceeding?
- Can management and/or the union get an advisory opinion in a dispute over contract interpretation before a violation actually occurs?
- How much authority does the arbitrator have in drafting remedies for contract violations?
- What happens where an alleged contract violation also provides the basis for a charge of violating the Taft Act?

The rulings of arbitrators and the courts on these and other issues are taken up in this section.
APPLICATION OF POLICY

Use of Submissions

A submission (sometimes called a "stipulation" or an "agreement to arbitrate"), which must be signed by both parties, describes an existing dispute; it also may name the arbitrator and spell out in detail his authority.

A submission is necessary where there is no existing agreement to arbitrate, and it may be useful even where there is an agreement to arbitrate. However, use of a demand for arbitration only, with no joint submission, is a common practice where the collective bargaining agreement contains an arbitration clause.

Some reasons for executing a joint submission, even where there is an arbitration agreement, are:

- To expand or diminish the authority of the arbitrator more than is provided by the collective agreement.
- To state precisely the issue to be decided by the arbitrator, and thus indicate the scope of his jurisdiction more precisely.
- To state procedural details that the parties desire to control.
- To meet any applicable statutory requirements not met by the arbitration clause of the collective bargaining agreement.
- To confirm the arbitrability of the particular dispute.

Use of a submission depends upon the particular case, and the actual contents and form of the submission will vary greatly from case to case.

Is the Issue Arbitrable?

Under a contract providing for arbitration only of dispute's involving the interpretation or application of contract terms, you may question the arbitrability of a particular issue. If you believe that any issue is not arbitrable, raise the question at the first step in the contractual procedure where it is appropriate. Often this means at the very first step.

Failure to raise the question and continuation of negotiations with the union through the grievance procedure may be interpreted by the arbitrator to mean that you have given up your right to question the arbitrability of the issue. Since most contracts provide that disputes unsettled by the grievance procedure may go to arbitration, the very fact that you have processed a dispute through the grievance procedure means you consider it one in which the union has a right to voice its opinion and have it considered.

Who Determines Arbitrability?

The determination of arbitrability is most often left to the arbitrator. This avoids the delay and expense of a court determination. Moreover, the arbitrator has the industrial relations expertise that the...
parties contemplated when they provided for arbitration.

The bargaining agreement itself may specifically provide that the arbitrator is to rule on questions of arbitrability as well as the merits of the dispute. This provides the surest method for the parties to minimize court participation or "interference" in the arbitration process.

Even if the contract does not state specifically who is to determine arbitrability, the arbitrator generally is regarded as having the authority to rule on arbitrability, particularly if the arbitration clause broadly covers all disputes, differences, and grievances of the parties.

As indicated above, the parties also may use a special submission or stipulation to authorize the arbitrator to rule both on questions of arbitrability and on the merits.

Even where the parties have not clearly authorized the arbitrator to determine arbitrability, he often does so as an inherent part of his duties. The parties generally accept his conclusions without resort to litigation.

Where a party insists that a dispute is not arbitrable to the point of refusing to participate in any arbitration proceedings, the other party may go to court seeking an order to compel arbitration. Under these circumstances, the U.S. Supreme Court has said, the courts must determine the threshold issue of whether the underlying dispute is arbitrable; the courts should not simply go ahead and direct arbitration and leave the issue of arbitrability for the arbitrator. But, the Court also emphasized that any doubts should be resolved in favor of arbitration and that the courts should steer clear of passing upon the merits of the dispute. The role of the court is limited to deciding whether the party seeking arbitration is making a claim that on its face is governed by the agreement. (Steelworkers v. Warrior Navigation Co. - US SupCt (1960), 46 LRRM 2416)

**Between-Contract Grievances**

Grievances that arise in the hiatus between the expiration of one contract and the negotiation of the next are not arbitrable in the absence of an express agreement to extend the expiring contract, a federal appeals court has ruled. But grievances arising prior to the expiration of the contract may be arbitrable even after the contract expires, the court said. (Independent Union v. Procter & Gamble - CA 2 (1962), 51 LRRM 2752; review denied - US SupCt No. 1076 (1963), 53 LRRM 2544)

**Arbitration of Multiple Grievances**

Can one party be compelled by the other to arbitrate several grievances before the same arbitrator in one proceeding. The answer may vary depending upon the stage of the proceeding at which the issue is raised.

Where several grievances reach the arbitration stage at the same time, it generally is held that simultaneous arbitration may be compelled by either party unless the arbitration agreement clearly provides otherwise. (50 LA 1070, 47 LA 330, 46 LA 210, 45 LA 571) Simultaneous arbitration of grievances, one arbitrator said, reflects "the best ideals of the whole arbitration process, which are devoted to efficiency, expeditious disposition, and economy." (12 LA 305)

But once an arbitrator has been selected, a party has very little basis for submitting additional grievances to the arbitrator without the arbitrator's consent and agreement by the other party. In this
regard, Rule 7 of the American Arbitration Association states: After the Arbitrator is appointed, no new or different claim may be submitted to him except with the consent of the Arbitrator and all other parties.

Hypothetical Questions

Arbitrators generally are reluctant to issue advisory opinions or "declaratory judgments" in cases where there is a dispute over contract interpretation but no claim that a violation has occurred as yet. One arbitrator explained this reluctance:

"There are many vague clauses in any collective bargaining agreement; clauses which may lead to arbitrable disputes. However, it is not contemplated that one party to the agreement can insist upon arbitration to settle hypothetical questions which are based on such clauses. Until an actual dispute arises together with the related, specific facts, neither party has a right to demand arbitration." (29 LA 495)

Under certain circumstances, however, an arbitrator might issue an advisory opinion. This might happen where the requesting party shows that it is necessary to protect his interest under the contract (25 LA 756) or the arbitrator is convinced that both parties desire one (25 LA 830).

Where both parties desire an advisory opinion, the dispute could be sent to arbitration by preparation of a submission agreement. (See above.)

Remedy for Contract Violation

Arbitrators generally have fairly broad discretion in drafting a remedy for a contract violation. The U.S. Supreme Court has said:

"When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency."

The Court added, however, that the arbitrator may not dispense his own brand of justice without regard to the contract. If it is apparent that he went beyond the submission or the contract, his award will not be enforced by the courts. (Steelworkers v. Enterprise Wheel & Car Corp. - US SupCt (1960), 46 LRRM 2423)

Reducing the Penalty Arbitrators sometimes find that a discharged employee was guilty of misconduct warranting some form of discipline, but that discharge was too severe a penalty. In such a case, the arbitrator may order the employee reinstated, but without back pay or with only partial back pay.

Some contracts specify, however, that the arbitrator may not substitute his judgment for that of management on the proper penalty where misconduct is shown. In such a case, an appeals court found that an arbitrator went too far by substituting a lesser penalty for the discharge decided upon by management. (Teamsters, Local 784 v. Ulry-Talbert Co. - CA 8 (1964), 55 LRRM 2979)
Computing Back Pay

Some arbitrators, after ordering reinstatement of employees found to have been improperly discharged, will leave it up to the parties to compute the amount of back pay. Most arbitrators, however, feel that they should render final and complete awards on all issues, including the remedy.

Arbitrators also are divided on whether the award should be for straight back pay or for back pay less other monies received from earnings elsewhere or from unemployment compensation. The majority view is that the back pay should be limited to the amount needed to make the injured party "whole." (45 LA 336, 45 LA 751, 49 LA 728) It is not customary in labor arbitration to grant interest on the award of back pay or other monetary damages. (See 26 LA 149, 41 LA 1310) One arbitrator, however, awarded interest on a back-pay bill, commenting that while interest is seldom awarded in arbitration cases, this may be because it is seldom requested. (47 LA 686)

NLRB and Arbitration

Contracts providing for arbitration frequently forbid conduct that also is an unfair labor practice under the Taft Act, such as unilaterally changing existing wages, hours, and working conditions. May arbitration be compelled in a dispute where the complaining party also could go to the NLRB?

The U.S. Supreme Court has said there is a division of jurisdiction - the courts may order arbitration to remedy the contract breach and NLRB may remedy the unfair labor practice. If this creates serious problems they will be faced on a case-by-case basis, the Court said. (Smith v. Evening News Assn. - US SupCt (1962), 51 LRRM 2646)

Even though the Court has upheld this concurrent jurisdiction, NLRB as a matter of policy may decline to exercise its jurisdiction if it determines that the basic dispute, while raising Taft Act issues, mainly involves a good-faith difference as to the administration and interpretation of the contract. The Board's theory is that the parties should be encouraged to dispose of such disputes through collective bargaining or the grievance-arbitration machinery. Thus, NLRB generally will defer to arbitration if these conditions are met:

- The contract clearly provides for grievance-arbitration machinery.
- The employer's action is not patently erroneous or designed to undermine the union, but rather is based on a substantial claim of contract privilege.
- It appears that the arbitrator's ruling will resolve both the unfair labor-practice issue and the contract-interpretation issue in a manner compatible with the purposes of the Taft Act. (Jos. Schlitz Brewing Co., 175 NLRB No. 23 (1968), 70 LRRM 1472)

Honoring awards - In addition to declining to take cases that should go to arbitration, NLRB also has a policy of honoring arbitration awards that settle issues also involved in disputes before the Board. NLRB has said that it will give full weight to arbitration awards that dispose of unfair practice issues where (1) the arbitration proceedings had been "fair and regular"; (2) all parties had agreed to be bound; and (3) the arbitration decision was not "clearly repugnant to the purpose of the Act." (Spielberg Mfg. Co., 112 NLRB 1080 (1955), 36 LRRM 1152)
Reliance on Past Practice

Arbitrators may use evidence of past practice or custom (1) to establish the existence of rules governing matters not included in the written contract: (2) to indicate the proper interpretation of ambiguous contract language; or (3) to support allegations that clear language of the written contract has been amended by mutual action or agreement.

Many agreements specify that existing practices will remain in effect for the duration of the agreement. Even in the absence of such a provision, many arbitrators hold that unless the agreement specifies to the contrary, existing practices regarding major conditions of employment are to be regarded as included within any contract negotiated after the practice has become established and not repudiated or limited by it. (24 LA 191, 20 LA 372, 48 LA 1275)

As a general rule, a past practice to become binding must (1) be well established, and (2) the result of mutual understanding or agreement. Unilateral choices made by management in the exercise of managerial discretion "are merely present ways, not prescribed ways, of doing things" and, "being the product of managerial determination," such practices, in the absence of a contractual provision to the contrary, are "subject to change in the same discretion." (19 LA 237)

Arbitrators are more likely to find a custom to be binding where it involves a benefit of peculiar personal value to the employees and does not directly involve methods of operation or control of the work force. A distinction often seems to be made between "employee benefits" and "basic management rights." Thus, management was not permitted to change or discontinue the following "benefits": the furnishing and laundering of uniforms (41 LA 1115); giving demoted supervisors the right to return to their last bargaining-unit job (42 LA 1172); permitting strikers to maintain their insurance benefits (44 LA 740); permitting employees to wear beards (48 LA 120); permitting employees to play radios at isolated work station (48 LA 1275).

Violation of No-Strike Contract

A union doesn't waive its right to invoke the arbitration provisions of a contract if it calls a strike in violation of the agreement, the U.S. Supreme Court has indicated.

A union filed a grievance protesting the discharge of employees who were charged with violating the contract's no-strike clause. Rejecting a contention that the union had waived its right to arbitration by violating the no-strike pledge, the Court said that the union's conduct might entitle the employer to bring a court action for damages, but it did not dispense with the requirement of arbitration. (Packinghouse Workers, Local 721 v. Needham Packing Co. - US SupCt (1964), 55 LRRM 2580)

Pay for Arbitration Time

It a contract requires pay for time spent in meetings with management or in discussing grievances, it generally is held that this pay requirement doesn't extend to time spent in arbitration hearings.

EXAMPLE: A contract stating only that union representatives were to be paid for time spent in negotiations and meetings with management was held not to require pay for time spent at arbitration hearings. The union's argument was that whenever company and union officials gather to further collective bargaining, there is a "meeting." The arbiter, however, decided that the "meetings" referred to
in the contract were routine and frequent gatherings at which the par- ties sought by discussion and agreement to dispose of differences. An arbitration hearing doesn't fit this definition, he added, since there the parties do not dispose of disputes themselves but submit them to a third party. He found support for his decision in another section of the contract, which said arbitration costs were to be shared equally. (Reeves Pulley Co., 36 LA 1044)

Arbitration Cost Control

POLICY GUIDE

When you take a grievance to arbitration, you may be setting the stage for a costly proceeding. If you "go for broke" and take the deluxe arbitration model, you will be faced with per diem charges from the arbitrator, your lawyer, and a court reporter. In addition, you may be billed for travel expenses for the arbitrator, the lawyer, or the court reporter. You also will have to pay for time lost by company representatives in preparing for the hearing and by employees who appear at the hearings.

The first step management and union can take to reduce costs of an arbitration proceeding is to agree, prior to the hearing, on the precise issue to be resolved by the arbitrator. Stating the issue as specifically as possible eliminates unnecessary study and discussion in the hearing and opinion, provides a basis for disallowing testimony and evidence that are not relevant to the precise issue; and substantially reduces the risks of an appeal to the courts based on objections that the arbitrator exceeded his authority. Additional ways to reduce arbitration expenses are listed below.

APPLICATION OF POLICY

Cost-Saving Tips

In view of the potential for sizeable charges, you might want to consider ways of holding down expenses. Some cost-saving suggestions include:

- Don't rent a hotel room for the hearing if it is possible to hold the hearing in the company conference room.

- Don't use a court reporter unless you really need one. Usually a transcript isn't essential unless the case is extremely complicated or technical.

- In the old stand-by type of case, involving discipline, seniority, job classifications, and like issues, consider whether you wouldn't be just as well off training your own representatives to present the case rather than hire a lawyer.

- Consider using a relatively new arbitrator. New arbitrators are in less demand than the old pros and therefore charge smaller fees. At least in the routine cases, there is a high degree of predictability no matter who hears the case.

- In any event, find out the arbitrator's fee in advance. Also find out his policy on billing for travel time.

- Settle as many facts as possible with your opponent before the hearing starts. This will cut both hearing time and the arbitrator's study time.
• Consider dispensing with a written opinion if the case turns mainly on matters of fact. (But many employers still feel that a written opinion in the long run saves time and money, particularly where basic issues are at stake, by making it easier to understand and explain the decision.)

• Avoid indiscriminate citations of other awards. You don't help yourself by citing cases that are easily distinguishable, and you only add to the arbitrator's study time.

• Avoid futile fights about arbitrability if all you really mean is that the grievance lacks merit.

• Be considerate of the arbitrator's time. If you fail to keep hearing dates or ask for postponements on short notice, you will be charged for it one way or another.

• Find out what you can about the arbitrator before you select him - otherwise you may have to pay to educate him on your time.

**Expedited Procedures**

High costs and case backlogs have led companies and unions to experiment with more efficient methods of settling grievances than the traditional arbitration route. Various forms of expedited arbitration, in which routine types of grievances are processed under strict time limits, usually eliminating one or more traditional procedures, can result in great savings of time and money for both parties.

One of the most ambitious and widespread expedited arbitration systems was adopted in 1971 by the steel industry. Serving as a backup program for the regular grievance and arbitration system of the major steel companies and the United Steelworkers, the expedited program requires brief decisions within 48 hours of the arbitration hearing. The vast majority of disciplinary grievances are handled through this method.

The American Arbitration Association has set up its own system for expedited arbitration in which the parties do not file briefs, no stenographic records are made, and the arbitrator's opinion, if required, is an abbreviated one. Awards are rendered within five days of the hearing.

One example of an expanded use of the expedited arbitration concept is contained in an agreement between Anheuser-Busch Corp. and the Teamsters, which calls for a speed-up of the entire grievance procedure - from the filing of a grievance to its disposition. Whereas expedited arbitration normally is used for certain classes of disputes, such as discharge and discipline cases or productivity and work assignment grievances, the Anheuser-Busch Teamsters' shortened procedure is used for all grievances and all stages of the grievance process. Strict time limits are fixed for each stage of the procedure, and the grievance automatically is decided against the party that fails to comply with those limits.

_A grievance-mediation option_ is another cost-cutting and expeditious means of settling labor relations disputes. Mediation occurs between the completion of internal grievance procedures and initiation of arbitration. In the bituminous coal industry, the procedure resulted in compromise settlements in 51 percent of 153 mediation conferences; the average grievance was resolved in 15 days, and total savings for the parties amounted to more than $100,000.
Who Pays Arbitration Costs?

BASIC PATTERNS SURVEY

Arbitration expense provisions are included in 87 percent of arbitration clauses in 400 union contracts surveyed by BNA's COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS. All but two of these provisions specify the method for compensating the arbitrator. Under 93 percent of these provisions, the fee is shared equally by the parties; where a multiple-member arbitration board is used, the parties generally assume the costs of their own representatives on the board, and share the fee of the impartial chairman. In 4 percent, the fee is paid by the losing party.

Collateral expenses (for example, copies of transcripts of the arbitration hearing) are discussed in 19 percent of contracts containing arbitration expense provisions. In 66 percent of these agreements, the cost of a transcript is paid by the party requesting it, and in 31 percent the cost of the transcript is shared equally.

Of the 18 percent of agreements that refer to pay for time lost by witnesses at an arbitration hearing, a majority (70 percent) provide for reimbursement by the calling party.