

What Do the Parties Want from the Neutrals?

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What Do Parties Seek In General

- Fairness, clarity, and enforceability
- A resolution aligned with their underlying issues.
- A binding (usually final) decision based on the facts and applicable law.
- Neutrality (in their favor).

Arbitration is Not One Size Fits All

- Nearly every arbitration has common features and themes.
- However, arbitrations can vary dramatically based on party and arbitrator preference.

Common Issues in Labor Arbitration

Grievances Parties Bring to Arbitration

- **Discipline and Discharge:** Was termination/discipline justified under the CBA and just cause principles (whatever those are)?
- **Contract Interpretation:** What does the agreement say, and what does it *mean*?
- **Wages and Benefits:** Disputes over pay, overtime, or perks
- **Work Conditions:** Safety, hours, or job assignments
- **Discrimination/Harassment/Retaliation:** Fair treatment under law or policy

Diverging Goals May Mean Different Preferences of Arbitrator's Approach

■ Employer's Goals

- Uphold management rights and authority
- Justify disciplinary actions (e.g., “just cause” for termination)
- Minimize financial liability (back pay, reinstatement)
- Consistent interpretation of contract to avoid future disputes

■ Union/Employee's Goals

- Reinstatement or compensation for wrongful discipline
- Protect employee rights and contract benefits
- Set a favorable precedent for future cases
- Ensure fair treatment and due process

Do Goals Align with Arbitrator's Hierarchy of Authority?

- **What the arbitrator finds most important to any particular case may conflict with the Parties' goals in the grievance.**
 - **Contract Language:** Primary source of authority?
 - E.g.: Plain language rule? Or Parties' intent?
 - **Past Practices:** How have similar issues been handled? What past practice is considered?
 - **Evidence:** Strength of documentation and testimony.
 - What evidence comes in and what stays out?
 - **Precedent:** Prior arbitration rulings or legal standards
 - **Fairness:** Balancing equity with contractual obligations

Should the arbitrator be loose or tight on admitting hearsay and other evidence?

- Allowing hearsay or other technically objectionable questions?
- Strict or not on technical objections to testimony and/or documentary evidence?
 - Analysis and explanation when ruling on objections.
- Taking evidence “for what’s it worth” as a shortcut.
- How do the Fed. R. of Evid. apply?

Should the arbitrator be loose or tight on admitting hearsay and other evidence?

■ Pros

- Fair and full presentation of the case without rigid focus on admissibility.
- Greater efficiency—the purpose of arbitration in the first place.
 - Debates over admissibility can become mini-hearings, and increase tension.
 - This is not a jury trial.
- Allows for flexibility, a broader range of evidence allowing the arbitrator a more detailed and holistic view.

■ Cons

- Consistency, or lack thereof, in what comes in and what stays out.
- Irrelevant or unreliable evidence/testimony may undermine the correct decision.
- Opens the floodgates.
- Uncertainty in the weight and value of evidence with questionable admissibility.

Do you expect the arbitrator to tape the hearing if no transcript will be provided?

- What is the purpose of a “record” of the hearing?
- What if one party wants transcript, but the other does not?
- If a Party requests to tape the hearing themselves?

Should pre-hearing conferences be encouraged?

■ Benefits?

- Promotes procedural efficiency and mutual understanding among the parties
 - Agree on undisputed facts, narrow the issues
 - Scheduling or prioritizing key testimony
 - Avoiding unnecessary testimony or evidence
 - Address logistical issues, if any.

■ Drawbacks?

- Extra layer of time, cost, and scheduling challenges to an already resource-intensive process.
- Requires participation and availability of the parties, their counsel, and the arbitrator.
- Possibility of becoming a pre-arbitration fight.
- Not all disputes are complex—simple cases with simple issues should be kept simple.
- CBA does not require it, so parties chose not to add that layer.
 - Could/should Arbitrator suggest or require something parties bargained out of the CBA.

Should pre-hearing briefs be encouraged?

- Why might pre-hearing briefs be helpful?
 - Save time and streamline presentation at arbitration: Parties outline their positions, key arguments, evidence, and contract language, and avoid wasting time on agreed or extraneous issues.
 - Focus the dispute.
- Why to avoid?
 - Increases the time, cost, and complexity of preparation, particularly for parties with limited resources, and not needed in simple cases where the issues can be adequately addressed during the hearing.

Should the arbitrator suggest mediation before the hearing?

- Benefits?
 - Settlement, obviously.
- Why not?
 - If the parties wanted to mediate, they would (and perhaps already have).
 - Signals doubt in the arbitration process and the ability of the arbitrator.
 - Adds additional time, cost, and delay.
 - Many cases are not “split the baby,” and mediation on a “Yes or No” case may signal a lack of impartiality moving forward.

Remote Hearings?

- Should contract interpretation cases be heard remotely?
- Should disciplinary cases be heard remotely?
- What if credibility is not an issue?

Discipline Cases

■ Pros:

- If straightforward evidence, like written records or emails as to the conduct, then can increase efficiency dramatically.
- Benefits outside witnesses and unions by reducing one-sided travel obligation.
- Allows broader availability of witnesses.
- Face-to-face hearings could increase tensions depending on misconduct.

■ Cons:

- Body language and non-verbal cues do not come across.
- Technical issues and presentation of evidence.
- Possibility of subterfuge, witness coaching.

Contract Interpretation

■ Pros:

- Legal arguments on contract language translate seamlessly to remote formats via screen sharing and digital exhibits.
- All eyes on the same exhibits at the same time.
- Save the paper and ink: complex documents presented in full.
- Sophisticated parties can rely on technology to aid in presentation.

■ Cons:

- *Might* be less conducive when nuanced past practice is at issue, or if minute details are contested.
- Live testimony more conducive to open discussion and more detail.

Credibility Issues – Remote or Not

- Pros:

- Multiple witnesses without travel can allow for more testimony on disputed issues.
- Safety and comfort— alleged victims of misconduct might feel more comfortable testifying.

- Cons:

- Credibility is the Achilles' heel of remote hearings.
- Arbitrators (and humanity in general) rely heavily on nonverbal cues (e.g., hesitation, eye contact)
- Cross-examination more limited, and
- Possibility of technical glitches.
- Possible coaching harder to detect.

**Questions? Comments? Praise for the
Presenters?**

Thank You

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