The Successful Post-Hearing Brief in a Labor Arbitration

By Lee Hornberger[1]

This article reviews drafting an effective post-hearing brief in a labor arbitration case.

The post-hearing brief is an important part of the labor arbitration process. The post-hearing brief should clearly tell and remind the arbitrator of the advocate's viewpoint of the case and exactly how the advocate wants the arbitrator to rule. "The use of post-hearing briefs is quite common. Their purpose is to summarize and comment on evidence and present legal argument." [2]

Furthermore,

> As a matter of general practice, parties will file post-hearing briefs to summarize the important facts contained in the record and reiterate the arguments made at the hearing. ... [A] clarifying and persuasive brief can be critical. ... [T]he advocate should write a good brief based on the assumption that it might make a difference.

The Code of Professional Responsibility for Arbitrators of Labor-Management Disputes of the National Academy of Arbitrators, Federal Mediation and Conciliation Service, and American Arbitration Association states:

> 6. POST HEARING CONDUCT
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> A. Post Hearing Briefs and Submissions
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> 1. An arbitrator must comply with mutual agreements in respect to the filing or nonfiling of post hearing briefs or submissions.
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> a. An arbitrator may either suggest the filing of post hearing briefs or other submissions or suggest that none be filed.
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> b. When the parties disagree as to the need for briefs, an arbitrator may permit filing but may determine a reasonable time limitation.
>
> 2. An arbitrator must not consider a post hearing brief or submission that has not been provided to the other party.[4]

Concerning the closing of the record:

> If briefs or other documents are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of briefs.[5]

The post-hearing brief should be carefully prepared. The brief should let the arbitrator know the advocate's arguments in a clear and easy-to-read fashion. It should use subtitles. It is helpful if the subtitles are not all capital letters. Regular type with bolding would do quite nicely.

The effective post-hearing brief is courteous and polite. It does not use any invective. It is not tedious. There is a viewpoint that the brief will tell the arbitrator where the brief is going, where it is, and where it has been.

The beginning of the brief should contain a not more than one page summary of the case from the advocate's position. This summary can have an anchoring effect on the arbitrator. The arbitrator will subconsciously remember this summary

as the arbitrator reads the remainder of the brief and writes the award. In addition, this summary can be adapted by the arbitrator to provide the advocate's position in the award document that the arbitrator will write.

If the advocate in the post-hearing brief is going to ask for a burden of proof other than the preponderance of the evidence, there should be discussion justifying that burden of proof and providing authority for that burden of proof.

The post-hearing brief should clarify the issues for the arbitrator. This will include both the substantive and procedural issues. In addition, the brief must clearly inform the arbitrator of the applicable sections of the collective bargaining agreement (CBA) and the page numbers of the CBA where those sections can be found. It is crucial that the arbitrator know exactly where in the CBA the arbitrator can go in order to better understand the case and the parties' viewpoints. If there is a transcript, point out and quote the most important and powerful portions of the transcript.

The goal of the advocate is to make the arbitrator's job easier.

The post-hearing brief should thoughtfully outline the "who, what, where, how, and when" of the case. The brief should emphasize the important parts of the case. After reading the post-hearing brief, the arbitrator should have a clear understanding of who the main actors are, what happened to give rise to the grievance, where the situation occurred, how the situation unfolded, and the timeline of the situation.

The post-hearing brief should be a concise presentation of the case in a professional and courteous fashion. It will summarize in a convincing way the advocate's main arguments, including what happened and precisely what the advocate believed was proven at the hearing.

There should be consideration of citing authorities such as Elkouri & Elkouri as well as published arbitration awards in the brief. If this is done, it is helpful to cite the most recent edition of Elkouri & Elkouri. In addition, if the advocate wants the arbitrator to read a cited arbitration award, a copy of the award should be provided to the arbitrator and the parties when the brief is filed.

The advocate should read some of the arbitrator's prior awards. This will help the advocate know whether the arbitrator considers or at least cites other awards. The advocate should be careful in citing an arbitrator's other awards back to the arbitrator in cases involving different parties. This is because the prior award arose from a different case and a different work environment than the subsequent case for which the brief is being written.

The post-hearing brief should address the unfavorable aspects of the case. The arbitrator should not read about these unfavorable aspects only in the other side's post-hearing brief. This gives the advocate the opportunity to present adverse facts in the best light.

The brief should try to anticipate and answer the arguments of the other side. For example, the brief could say "The other side says . . .," but "this does not control because . . . ." Again, the goal is to make the arbitrator's job easy.

The brief should not contain new evidence or arguments that were not raised at the hearing. The advocate should think very carefully before raising new arguments or citing CBA provisions for the first time. "No new evidence should be included in post-hearing briefs."[6] And "the arbitrator's decision shall be based upon the evidence and testimony presented at the hearing or otherwise incorporated in the record of the proceeding."[7] However, under appropriate circumstances, the arbitrator has the discretion to amend the record to admit appropriate evidence discovered by a party after the conclusion of the hearing.[8]

The advocate should provide a brief to the arbitrator that is easy for the arbitrator to use. In ad hoc and Federal Mediation and Conciliation Service cases, usually there will be simultaneous fil-

ing of a pdf and Word copy of the briefs with the arbitrator. Once the arbitrator has received the briefs from both parties, the arbitrator will cross-serve the pdf copies. Unless the arbitrator indicates otherwise, size 12 Font, Times New Roman, and non-justified right margins should be used.

It can be counterproductive to put too many arguments in the brief. An excessive number of arguments can have a dilution effect. The dilution effect can result in the weaker arguments diluting the power of the better arguments. "[C]luttering a . . . brief with flimsy or tangential arguments . . . can dilute an argument, making the stronger points less persuasive."[9] It has been said that an advocate submits twenty arguments because the advocate could not think of one good argument. Nevertheless, most arbitrators in their awards will respond to every argument made by the losing party.[10]

The post-hearing brief should also tell the arbitrator the relief that the party is seeking. If the arbitrator knows what remedy the party is seeking, it is easier for the arbitrator to write an award section of the arbitration decision which is consistent with the needs of the parties. Carefully consider the wording of the last page of the brief. The end of the brief should tell the arbitrator exactly what the advocate wants the remedy and relief portion of the award to say. This includes reminding the arbitrator of any split-fee or loser-pays-all-arbitrator-fees provision in the CBA. There should be no doubt in the arbitrator's mind as to exactly what a party is asking for and how the party wants that to be worded. This is crucial.

After the brief is written, it should be carefully edited by an individual other than the author. In addition, the advocate should consider having a Devil's Advocate available for these review purposes.[11]

The advocate should consider filing the brief with the arbitrator a day or two before the due date. With "simultaneous" filing, this can do no harm. And it might be helpful to the arbitrator.

In conclusion, the post-hearing brief should tell the arbitrator in a concise, courteous fashion exactly how the advocate wants the arbitrator to rule on the issues and exactly what relief is being requested.

ENDNOTES

1. Lee Hornberger is a former Chair of the State Bar's Alternative Dispute Resolution Section, former Editor of *The Michigan Dispute Resolution Journal*, former member of the State Bar's Representative Assembly, and former President of the Grand Traverse-Leelanau-Antrim Bar Association. He is a member of the Professional Resolution Experts of Michigan (PREMi) and a Diplomate Member of The National Academy of Distinguished Neutrals. He has received the ADR Section's George N. Bashara, Jr. Award. He received a First Tier ranking in Northern Michigan for Arbitration by *U.S. News – Best Lawyers®* Best Law Firms in 2019 and 2020. He is in *The Best Lawyers of America* 2018 and 2019 for arbitration, and 2020 to 2022 for arbitration and mediation. He is on the 2016 to 2021 Michigan Super Lawyers lists for ADR. He holds his B.A. and J.D. *cum laude* from the University of Michigan and his LL.M. in Labor Law from Wayne State University.
2. ELKOURI & ELKOURI, HOW ARBITRATION WORKS 7-36 (Kenneth May ed., 8th ed. 2016).
3. ROGER I. ABRAMS, INSIDE ARBITRATION: HOW AN ARBITRATOR DECIDES LABOR AND EMPLOYMENT CASES 137-38 (2013).
4. Code of Professional Responsibility for Arbitrators of Labor-Management Disputes of the: National Academy of Arbitrators, Federal Mediation and Conciliation Service, and American Arbitration Association, *available at* https://www.fmcs.gov/services/arbitration/arbitrator-code-professional-responsibility/.
5. American Arbitration Association Labor Arbitration Rules, Rule 30, *available at* https://www.adr.org/sites/default/files/Labor_Arbitration_Rules_3.pdf.
6. Elkouri & Elkouri, *supra* note 1 at 7-36.
7. Federal Mediation and Conciliation Arbitration Policies and Procedures (29 CFR Part 1404), 29 CFR 1404.13, *available at* https://www.fmcs.gov/services/arbitration/arbitration-policies-and-procedures/.
8. American Arbitration Association Labor Arbitration Rules, *supra* note 4, Rule 31.
9. JENNIFER K. ROBBENNOLT AND JEAN R. STERNLIGHT, PSYCHOLOGY FOR LAWYERS 156 (2d ed. American Bar Association, 2021).
10. Abrams, *supra* note 2 at 160.
11. ROBBENNOLT AND STERNLIGHT, *supra* note 8 at 12.