

Hello NWP Reps and Members,

Welcome to LR Chronicles number 14. This is part 5 of the full and complete explanation of the "Arbitration Process." The last version of the LR Chronicles explained the time it takes for our case advocates to prepare for the Hearing. I also explained from where that time and other various amounts of time come. We are finally at the Hearing itself. In this version, I will explain to you the process that takes place at the actual Hearing in front of the 3rd Party neutral, called an Arbitrator.

There are several steps to an actual Arbitration proceeding. It is similar to a court proceeding, although the rules of evidence and the process are much more relaxed at Arbitration than in a court of law. I will take you through each step of the Hearing from start to finish. One thing to keep in mind as you read is that this step-by-step process applies regardless of how long the actual Hearing takes. Whether the Hearing is one day or one week (extremely rare), this process applies.

At the start of the Hearing on day one, the first order of business is the introductions. The Arbitrator introduces him or herself to all of those present. The Union's case advocate introduces the Union's team, including the grievant, as well as any Union observers. The agency's case advocate introduces the agency's team as well as any agency observers. Once all of the "pleasantries" are out of the way, the Arbitrator will call the Hearing to order and go "on the record." The record is defined in Black's Law Dictionary as **"The official report of the proceedings in a case, including the filed papers, a verbatim transcript of the trial or hearing (if any) and tangible exhibits."** Once the Arbitrator goes "on the record", everything is recorded by the Court Reporter and will become part of the written and recorded transcript of the Hearing. Sometimes during a Hearing, it is necessary for the Arbitrator or either of the Parties to go "off the record". Only the Arbitrator makes the decision to go off the record; if one of the Parties wishes to go off the record, the advocate must make a request to the Arbitrator. When the Arbitrator indicates that the hearing is, in fact, off the record, none of what is said or done will be recorded, nor will any portion of it become part of the transcript or the record. There are times when the hearing is suspended to provide a break. At other times the Parties and/or the Arbitrator may wish to have

an off-the-record conversation to resolve either a substantive or procedural issue. Should any stipulations or understandings be reached during such a conversation, the information must be read into the record. A great deal of progress can be made off the record but it must become part of the record to have impact.

Before the hearing can begin, there are several "preliminary matters" that must be addressed. As defined in Black's Law Dictionary, the term "preliminary" means **"Coming before and usually leading up to the main part of something."** While the Arbitrator will provide the Parties with an opportunity to address any preliminary matters prior to hearing opening statements and receiving evidence, the general practice is to reach at least a general agreement off the record. Some preliminary matters that may be raised at this point include:

- Threshold issues
- Stipulations
- Sequestering of witnesses
- Additions to witness lists
- Continuances
- Requests for Verbal Close or Formal Brief's

While off the record, the Parties can have a frank discussion regarding each of these matters and may even receive assistance from the Arbitrator. Once agreement is reached (or it becomes obvious that the Arbitrator is going to have to formally weigh in on a matter), the Arbitrator will go on the record to outline any preliminary matters. It is at this point where each Party is responsible for declaring any preliminary matters that they may have and that need to be adjudicated. In the event that an agreement was reached, this process should be fairly uneventful. Should the Parties fail to reach an accord; the Parties will present their divergent views to the Arbitrator for resolution. The Arbitrator will either make an immediate decision or provide the Parties with an answer in the award. For example, an Arbitrator faced with a decision regarding the sequestration of witnesses will make a decision at the moment he or she is presented with the question, while an Arbitrator faced with competing issues can either frame the issue at the time of the hearing or do so after the evidence has been presented.

Once the preliminary matters are completed, the Arbitrator will call for the Moving Party to begin their case. The Moving Party, for purposes of Arbitration, is the Party that has the "burden of proof." There are two types of cases that are brought to Arbitration between NATCA and the FAA. Those are "disciplinary/adverse actions" and "contract interpretation." In disciplinary/adverse action cases, the agency has the burden of proof, and as such, will be the first to proceed with their case. The reason the agency has the burden of proof in this type of case is because the agency must substantiate their disciplinary/adverse action. In contract interpretation cases, NATCA has the burden of proof and therefore will be the first to present our case. The reason why NATCA has the burden of proof in contract interpretation cases is because we need to substantiate that our reading of the contractual language is correct due to the fact that we initiated the action that brought about the Arbitration. The Party that does not have the burden of proof is called the "Responding Party" or "Respondent."

There are basically three or four parts to an Arbitration Hearing (depending on whether a closing argument or Post-Hearing brief is chosen) for each Party. I will explain each one below. They are:

- Opening Statement
- Case-in-Chief
- Rebuttal
- Closing Argument (if chosen)

Opening Statement: The Moving Party begins their case by giving their opening statement. Opening Statement is defined in Black's Law Dictionary as "**At the outset of a trial, an advocate's statement giving the fact-finder a preview of the case and of the evidence to be presented, but not containing argument.**" The function of the opening statement is to focus the Arbitrator on the key issues of the case, to show the Arbitrator the evidence that will be forthcoming and to notify the Arbitrator of the significance of that evidence.

As I stated in a previous version of the LR Chronicles, the Responding Party may elect to defer giving their opening statement until after the Moving Party completes their Case-in-Chief. Because the opening statement is our first opportunity to frame the issue, it is best to present the opening statement prior to any testimony.

Case-in-Chief: After the recitation of the opening statement(s), the Moving Party begins their Case-in-Chief, which is defined by Black's Law Dictionary as **"The Part of a trial in which a Party presents evidence to support its claim or defense."** This is where a Party puts on their evidence and testimony. Each Party will call its own witnesses and question them in what is called "Direct Examination" which is defined in Black's Law Dictionary as **"The first questioning of a witness in trial or other proceeding, conducted by the party who called the witness to testify."** The case advocate will present evidence and testimony through the Direct Examination of their witnesses. Evidence can be oral (testimony), documents and/or tangible objects that tend to prove or disprove an alleged fact.

Every witness that is called to the witness stand and is questioned under Direct Examination must also be subject to cross-examination by the opposing Party. "Cross-Examination" is defined in Black's Law Dictionary as **"The questioning of a witness at a trial or hearing by the party opposed to the party who called the witness. The purpose of cross-examination is to discredit a witness before the fact-finder..."** The opposing Party is not required to engage a witness in cross-examination; the decision to cross-examine a witness is largely based upon the scope of the testimony provided under direct examination. Prior to contemplating the cross-exam of any witness, an advocate must have full understanding of the theory of the case and the potential positives and negatives of providing an adverse witness with the opportunity to further elaborate upon statements already placed in the record.

Once a witness is direct-examined and cross-examined, the Party who called the witness may "Re-Direct" and then if this occurs, the opposing Party may "Re-cross." This can go on for several times before a witness is excused by the Arbitrator. The purpose of this additional direct and cross examination is often to clarify any statements made by a witness and to

provide the most coherent record possible. Additionally, the Arbitrator may ask any witness any question they deem necessary to ensure they properly understand the testimony. There is no set time for questioning from an Arbitrator. The Arbitrator may wait until the advocates have completed questioning or may interject during a direct or cross examination. During this phase of the arbitration the "Second Seat" to the arbitration team plays a vital role. They track and deliver information to the lead advocate that can/may be useful during "Cross" or "Re-Direct". This helps the lead advocate to maintain focus when addressing these issues as they arise.

When a Party is done with their Case-in-Chief they "rest" their case. Rest is defined in Black's Law Dictionary as **"To voluntarily conclude presenting evidence in a trial."** While it is unlikely that an Arbitrator would prohibit the presentation of rebuttal witnesses because a Party failed to reserve its right to do so, the best practice is to rest the case in chief pending rebuttal.

Rebuttal: Black's Law Dictionary defines rebuttal as **"In-court contradiction of an adverse party's evidence."** Just as the definition states, a Party's rebuttal case is when that Party has facts (evidence/testimony) that will rebut or refute evidence presented in the other Party's case-in-chief.

Closing Argument: As I explained in a previous LR Chronicles, a Party may choose one of two ways to close their case. They may choose a closing argument which is done at the actual Hearing and prior to the close of the record in the case, or they may choose to submit a Post-Hearing Brief, which is completed and submitted after the close of the record. The Post-Hearing Brief is chosen about 95% of the time. Whichever way is chosen, it is normally agreed upon by both Parties prior to the Hearing. It is very rare for one Party to give a closing argument and the other Party to submit a Post-Hearing Brief.

Chronologically, an Arbitration Hearing consists of the following, in the following order:

- Preliminary Matters (informal)
- On the Record
- Preliminary Matters (formal)
- Moving Party opening statement
- Responding Party opening statement (unless deferred)
- Moving Party Case-in Chief
 - Direct Examination
 - Cross Examination
- Moving Party Rests their Case-in-Chief
- Responding Party opening statement (if deferred)
- Responding Party Case-in-Chief
 - Direct Examination
 - Cross Examination
- Responding Party rests their Case-in-Chief
- Moving Party Rebuttal Case (if any)
- Responding Party Rebuttal Case (if any)
- Moving Party closing argument (if chosen)
- Responding Party closing argument (if chosen)
- Close of Record

In the next LR Chronicles I will explain what occurs after the close of the record. I will include information about the transcript, Post Hearing Brief and when a decision from the Arbitrator may be expected.

If there are any questions, please don't hesitate to ask.

Mike Hull
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