

Installment 14

Closing Argument/ Post-Hearing Brief

Hello NWP Reps and Members;

Welcome to LR Chronicles number 15. This is part 6 of the full and complete explanation of "the Arbitration process." The last LR Chronicles explained what occurs at the actual Hearing and how each side presents their respective case. This version will explain what occurs between the time the Hearing is over and the time the Arbitrator renders their decision.

As I stated last time, an advocate has a choice of their "summation." They can choose a closing argument prior to the close of the record, or they can choose to submit a post-hearing brief after the close of the Hearing. I also told you that a post-hearing brief is done about 95% of the time. Whichever method of summation is chosen, it is normally agreed to between the two lead advocates.

If the Parties have chosen to close their case with a closing argument, they do not have the advantage of referring to the transcript of the Hearing to make and support their arguments. The advocate must rely on their memory as well as any notes taken during the course of the proceeding to finalize and present their closing argument which will be read into the record. This makes the notes taken by the Second Seat invaluable when preparing a closing argument. It is important to have supporting law and pertinent case law inserted into the written copy of the closing argument. This will allow the Arbitrator to review references made during the closing argument. The Arbitrator will also have a copy of the transcript, if they wait for it, with which to refer when making their decision.

To the contrary, a post-hearing brief is a much more in-depth and intricate form of summarizing a case. The post-hearing brief is where the advocate combines all facets of the case into a cohesive and persuasive argument for the Arbitrator. The advocate will guide the

Arbitrator through the entire case and “argue” why the Arbitrator should render the decision in their favor. To do so, an advocate must:

- Provide the Arbitrator with a clear statement of facts;
- Provide the Arbitrator with the applicable law or standard; and
- Apply the standard to the facts of the case.

Completely reviewing the transcript is essential to completing the post-hearing brief. While the advocate can begin the post-hearing brief prior to receiving the transcript, they cannot complete it prior to going through the entire transcript. As with anything else, the passage of time causes our memories to not recall certain things as when they are fresh in our mind.

The post-hearing brief is an advocate’s opportunity to apply the facts from the record to the pertinent contract provisions and law. As discussed in previous LR Chronicles, the main objective of conducting the hearing is the creation of a record. Any argument made by an advocate, regardless of its eloquence, will be undermined by a lack of sufficient facts; FACTS, not argument, determine the outcome of a case. The Arbitrator will review the record established at the hearing through testimony and documentary evidence. An effective advocate utilizes his or her post-hearing brief to facilitate the sifting and sorting of facts. Without a proper grasp of the facts, any remedy granted by an arbitrator will be without a strong foundation. As such, the portion of the post-hearing brief dedicated to the statement of facts is just as important as the portion dedicated to the argument. In fact, a good practice is to ensure that each argument made by brief has a corresponding reference point in the facts.

Functionally, as the advocate develops their post-hearing brief, they will incorporate, and highlight for the Arbitrator, a summary of the case as it occurred. The post-hearing brief allows an advocate to document the most accurate statement of facts. To do so, an advocate must convey the facts in favor of its case, distinguish the facts that seem to favor the opponent’s case, and dismiss any erroneous statements made by the Agency. The advocate will refer to the transcript of the Hearing and

emphasize the evidence and testimony that supports their case. The advocate will take excerpts of the actual testimony and/or evidence out of the transcript and incorporate that into the post-hearing brief. The advocate will also point out the weaknesses of the agency's case and, if necessary, refer the Arbitrator to the portions of the transcript that show the weaknesses of the agency's case and that support our case.

Once the factual record has been stated, the advocate must then utilize the post-hearing brief as a vehicle for stating the applicable law, contractual provision, or practice. An effective post-hearing brief outlines the appropriate law and standard for the case. Once the law and standard are established—through an explanation of the law, contract language or past practice—the standard will be applied to the facts. Of course, the facts are highly relevant in discussing contractual issues as well as issues related to the Parties' practices. Additionally, while guiding the Arbitrator through the case and making the points that the advocate needs to make in order to convince the Arbitrator, it is imperative to refer the Arbitrator to the law and established case law. Traditionally, the advocate will provide the Arbitrator with copies of any resources (cases, statutes, etc) cited in its post-hearing brief.

Normally, the time limit to submit the post-hearing brief is set by stipulation by the Parties and the Arbitrator. For example, it could be agreed that post-hearing briefs are due to the Arbitrator not later than 20-30 days after receipt of the transcript from the court reporter. It is also possible for one Party to request an extension of time-limits to submit the post-hearing brief. The Arbitrator's decision on whether or not to grant this extension to a Party is dependent on several factors, including:

- The reason for the request
- The Arbitrator's workload/caseload
- Objections from the other Party

Unless otherwise stipulated, the Parties will simultaneously submit their post-hearing brief to the Arbitrator and the opposing Party.

Once both Parties have submitted their post-hearing brief to the Arbitrator and to the other Party, the waiting game begins. Both Parties will await the Arbitrator to render their decision and to deliver that decision to both Parties. Our collective bargaining agreement (CBA) in Article 9, Section 10 states **“The arbitrator shall submit his/her report to the Air Traffic Manager, the aggrieved employee and/or the Union representative, as soon as possible, but in no event later than thirty (30) calendar days following the close of the record before him/her unless the Parties waive this requirement.”** This “requirement” is almost always waived by both Parties. The main reason being that more important than a **quick** decision is a **correct** decision. For example, I personally have seen decisions take up to 8 months to be rendered and delivered to the Parties.

Additionally, although our CBA states that the Arbitrator’s decision is submitted to the air traffic manager and the employee, this is actually not how it is done. The Arbitrator will only submit their decision to the Union’s lead advocate and the agency’s lead advocate. It is up to each respective lead advocate to make their own appropriate notifications.

In my next LR Chronicles, the last regarding the Arbitration process, I will explain what options are available to each Party depending on whether or not the decision rendered by the Arbitrator is in their favor.

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