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Workplace Arbitration in the Current Economic Crisis

David B. Lipsky
Cornell University, dbl4@cornell.edu

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Abstract
[Excerpt] In the midst of our economic crisis, arbitrators are facing unprecedented challenges. As the financial implosion has spread from Wall Street to Main Street, we are hearing cases that require us to decide issues the parties never anticipated when their arbitration programs were established. Take labor-management arbitration as an example. Unlike in the past, when labor arbitrators sometimes had to decide whether a layoff complied with the collective bargaining agreement, today they are addressing the repercussions of mass layoffs resulting from plant shutdowns. Similarly, in previous years, labor arbitrators frequently decided cases dealing with alleged infractions of Title VII and other anti-discrimination statutes. The wave of plant closings over the last year or so has widened the range of statutory claims arbitrators must consider. For example, recently some arbitrators have had to decide cases involving claims by laid-off employees that their employer did not give them sufficient advance notice under the WARN Act.

Keywords
arbitration, economic crisis, employment disputes

Workplace Arbitration in the Current Economic Crisis

BY DAVID B. LIPSKY

Director, Scheinman Institute on Conflict Resolution Anne Evans Estabrook Professor of Dispute Resolution, ILR School, Cornell University.

In the midst of our economic crisis, arbitrators are facing unprecedented challenges. As the financial implosion has spread from Wall Street to Main Street, we are hearing cases that require us to decide issues the parties never anticipated when their arbitration programs were established. Take labor-management arbitration as an example. Unlike in the past, when labor arbitrators sometimes had to decide whether a layoff complied with the collective bargaining agreement, today they are addressing the repercussions of mass layoffs resulting from plant shutdowns. Similarly, in previous years, labor arbitrators frequently decided cases dealing with alleged infractions of Title VII and other anti-discrimination statutes. The wave of plant closings over the last year or so has widened the range of statutory claims arbitrators must consider. For example, recently some arbitrators have had to decide cases involving claims by laid-off employees that their employer did not give them sufficient advance notice under the WARN Act.

It is not only the scope of arbitral labor issues that have widened dramatically in the wake of the economic crisis. The American Arbitration Association reports that the economic crisis has led to a dramatic growth in the inquiries it receives from parties seeking information about alternative cost-saving services, such as expedited arbitration and grievance mediation. Nowadays the parties are clearly eager to find means of cutting the costs of resolving their disputes. To save travel and lodging costs, for example, they are turning to conference calls and video teleconferencing for assistance in handling their disputes. The AAA is working with the parties to devise new methods of minimizing the costs of dispute resolution.

For some providers of neutral services, the recession has led to an increase in their case loads. The Finance Industry Regulatory Authority (FINRA), which administers both investor and employment arbitrations involving firms in the financial services industry (an industry that has seen massive layoffs), reported a 54% increase in case filings between 2007-2008. Securities attorney Jacob Zamansky recently wrote an article on his blog forecasting a tsunami of investor claims as a result of the credit and housing crisis.

Last year many labor relations experts expected the demand for labor arbitrators to increase as a result of the proposed Employee Free Choice Act (EFCA) pending in Congress. Best known for the provision calling for card checks to certify unions for collective bargaining purposes, the EFCA also proposed to require-for the first time in U.S. history-arbitrators to resolve impasses between private employers and newly certified unions during negotiations of their first labor contract. It was this latter provision that was expected to increase the demand for labor arbitrator services. Then-Representative Hilda Solis (D-Calif.), now President Barak Obama's Secretary of Labor, supported the House bill, while then-Senator Obama supported the Senate version. The EFCA passed in the House but did not come to a vote in the Senate. On March 10, the EFCA (H.R. 1409, S. 560) was reintroduced in Congress to quite a bit of fanfare and editorial comment. However, it is not known whether the Obama Administration will expend its political capital on this bill while the financial crisis continues.

Many arbitrators are likely to view any increase in the demand for their services as good news, but most will realize that today's challenges will test their skills and wisdom in ways not experienced since World War II. During that war, arbitrators demonstrated their mettle by helping to shape the institutions and practices that have proved so beneficial to disputants and society at large in the decades that followed.

Will professional neutrals once again help shape solutions to the problems created by the current crisis? Will they have the talent and wisdom needed to find enduring solutions to these difficult and often intractable disputes?

Let's not forget that the neutral profession is graying. Will we be able to educate and train a younger generation of arbitrators and mediators with the abilities to understand and decide disputes based on sound principle?

AAA-Cornell ILR Partnership

At this historic moment in our country, the AAA and the Scheinman Institute on Conflict Resolution at Cornell University's School of Industrial and Labor Relations (ILR), the leading higher education institution dedicated to the study of em-

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ployment and labor relations, have entered into a partnership to implement several initiatives designed to improve the practice of workplace dispute resolution. The Institute, which focuses on the study of workplace conflict, brings to this partnership some of the best researchers in the world as well as scholars and faculty from the ILR School and Cornell Law School.

As the Director of the Scheinman Institute, I am exceptionally pleased that we are partnering with the leading arbitration provider organization in the country, if not the world. I know our colleagues at the AAA share my conviction that the joint enterprise we are launching not only has the potential to significantly improve the practice of dispute resolution but, if our fondest hopes are realized, to transform it. One of the products of this partnership is research conducted by Alex Colvin on the outcomes of AAA employment arbitration cases to determine, among other things, whether arbitrators tend to "split-the-difference" in their awards.

We announce this partnership in this column, the first of many to appear here, to be written by faculty and practitioners affiliated with the Scheinman Institute on topics of current or emerging importance in the field of workplace dispute resolution. In the next issue, Rocco Scanza, the Institute's executive director, and Jay Grenig of Marquette Law School, will examine the possible advantages of using non-attorneys as arbitrators in labor and employment cases—a practice once quite common but not in recent years. Researchers in workplace dispute resolution will write future columns. Colvin will write about the employment arbitration research referred to above. Ariel Avgar will report on his cutting-edge research into dispute resolution in the healthcare sector. And Ron Seeber and I will write about our research into the highly contentious issue of whether employment arbitration does or does not provide a level playing field for the disputants. We will also call on neutrals affiliated with the Institute (most of whom also serve on the AAA panel of neutrals) to report on critical issues they are facing in their practices.

The AAA and the Scheinman Institute are co-sponsoring an educational program called "Labor Arbitration in a Time of Economic Crisis." The program will be given in New York, Washington D.C., and San Francisco. At the risk of being overly boastful, we have assembled some of the very best arbitrators and advocates in the country to speak at these programs. The dates, locations, topics and speakers are listed on the preceding page. To obtain further information about these programs, call Karen Jalkut, AAA senior vice president, at 617-695-6062, or send an e-mail to JalkutK@adr.org.

The AAA and the Scheinman Institute are planning other joint initiatives-so please stay tuned! ■

READER MAIL

Michael Altschuler's article on arbitrating before a non-attorney construction neutral" *(DRJ*, Nov. 2008-Jan. 2009) was outstanding.

His comment about how quickly the industry professional "gets it" was spot on. Sometimes we have to really struggle to not judge the case in the first 10 minutes of the hearing.

Most non-attorney construction arbitrators feel strongly that it's increasingly difficult to get cases. Attorneys are more inclined to select other attorneys even when less qualified than an industry arbitrator. Attorneys also seem fearful of industry arbitrators. This is unfortunate. Attorneys would be doing their clients a big favor by selecting one or two industry arbitrators to sit on a panel or making one a sole arbitrator.

A number of years ago I served on a panel in a case alleging defective concrete. A retired judge chaired the panel. After about 10 days of intense testimony on technical issues, the judge leaned over to me and asked, "Do you have any idea what these guys are talking about?" Doesn't this suggest that some cases should be heard by industry arbitrators?

The bottom line is that industry arbitrators add value to the ADR process. We frequently charge less than attorney arbitrators and we understand the construction process and the dynamics and power struggles on a modern construction project. We quickly understand the facts. And we provide what most construction parties want—a hearing by construction experts.

Richard P. Grigsby, P.E.
Hillsboro, Oregon
rick@grigsbyusa.com

AAA Consumer Arbs Are Fair, Study Says

A study of 301 consumer arbitrations administered by the American Arbitration Association (AAA) in 2007 concludes that these proceedings are not biased in favor of businesses that arbitrate on a repeat basis, and are relatively economical and expeditious.

The study, prepared by the Consumer Arbitration Task Force at the Searle Civil Justice Center (SCJC) at Northwestern University School of Law, reported that consumers won some relief in 53.3% of cases involving non-repeat businesses and in 51.8% of cases involving repeat businesses. In addition, it found that the average time from filing to final award was 6.9 months and that the average award was 52.1%of the amount claimed for consumers and 93% for businesses. This difference, the study

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