**ABA Rail & Airline Committee Mid-Winter Meeting 3/11/16**

**“Complex Arbitration”**

Josh Javits

Arbitrator and Mediator

Complex arbitrations present special problems for parties and neutrals that require extra attention to organization and explanation. They include cases with multiple issues or parties, cases with high stakes or risks and cases that are especially contentious. Examples are cases involving subcontracting, compensation, benefits, flow-throughs, interest arbitration, seniority list integration and Presidential Emergency Boards.

First, it is vital to find the “fulcrum” of such cases, the key facts and arguments around which the decision will turn; second, it is important to facilitate the process by assuring the 3 “E”s: Educate the neutral, make your case Easy to understand, and make the process Efficient.

II. Pre-hearing:

1. Structure of process: 1, 3 or 5 neutrals: more lends “stature” but consider efficiency and cost factors; partisan neutrals useful too
2. Choice of neutral: consider need for mediation skills, “active” v “passive” bench, familiarity with industry and issues
3. Hold early conference calls to hear and address issues such as arbitrability, document exchange, witnesses
4. Logistics: determine duration (be realistic), confidentiality, location, attendees
5. Pre-hearing briefs enable neutrals to absorb more at hearing
6. Sequestration: if no credibility issues, more efficient for all witnesses to be present to hear and respond
7. Set order and type of presentation to best elucidate subject matter, assure due process for parties

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III. Hearing:

1. Standards, decision criteria: establish contract and legal standards, use of “patterns”
2. “Brandeis brief:” address context of dispute: labor relations, market, history, practices
3. Openings: thorough, especially where facts not disputed and arguments are central; but let necessary witnesses speak for themselves
4. Join issues: address opposing side’s central arguments, but don’t let them control your case
5. Arbitrator feedback: encourage interchange to assure neutral understands case and to open door for neutral to offer preliminary case evaluation
6. Demonstrative evidence is helpful: Chronologies/Diagrams/key contract provisions/summaries

IV. Post-Hearing:

1. SBAs/PLBs: useful for technical input and for communications with parties
2. Tentative rulings: helpful where speed is of essence
3. Where multiple issues or provisions raised, e.g. vacation case implicates pay provisions: address all?
4. Briefs: should be focused not “catch-all;” closings, better because details are fresh and speedier resolution

V. Settlement efforts:

1. Worthy of consideration at any time in process: parties control outcome, avoids “win-lose” hostility, more flexible remedies
2. Beginning of hearing: if no prior attempt
3. Middle: if unexpected fact or argument arises
4. End: Once record complete, re-evaluate merits
5. Consider use of neutral for mediation; med-arb; arb-med; arb-med-arb