Be Fair

- Parties so frequently can be heard to say: “All we ask is for our arbitrator to be fair” or “to give us a fair shake”
- Arbitrators brag that they are “always fair”
- Being “fair” is required by the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes:
  Code: 5. HEARING CONDUCT
  A. General Principles
  1. An arbitrator must provide a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence and arguments.
     a. An arbitrator should not intrude into a party’s presentation so as to prevent that party from putting forward its case fairly and adequately.
  2. Research shows arbitrators tend to apply a basic notion of “fundamental fairness” as the underlying criterion for evaluating just cause in discipline/discharge cases.
But That Leaves Questions:

1. What do we mean by “fairness?”
2. Is that what parties are really looking for in an arbitrator and, if so, do they all mean it the same way?

What is Fairness?: Part I

The Code seems to be talking about fairness when it addresses the “personal qualifications” of an arbitrator:

- Essential personal qualifications of an arbitrator include honesty, integrity, impartiality and general competence in labor relations matters.
- An arbitrator must demonstrate ability to exercise these personal qualities faithfully and with good judgment, both in procedural matters and in substantive decisions.

But that only gets us so far...

What is Fairness?: Part II

- Clearly tied to our sense of what is just
- There has been considerable research and discussion about the meaning of fairness/justice in the arbitration setting
- It turns out fairness comes in several varieties
Organizational Justice Theory

- **Distributive Justice**: Outcomes-based—closely related to a "equity theory" which concentrates on subjective perceived fairness of outcomes individuals receive.

- **Procedural Justice**: Process-based, with focus on how people evaluate the procedures used to determine outcomes.

- **Interactional Justice**: Relations-based, with focus on how people evaluate fairness based on interpersonal treatment during the process (some say this is part of procedural justice).

---

**Distributive Justice**

- **Awards**: Were the outcomes fair?

- **Neutrality**: Was there a demonstrated lack of bias in previous decisions?

- **Measuring**: Does it simply involve gathering information about how frequently an arbitrator has ruled in the past for one side or another, or is there something more?

---

**Procedural Justice**

- **Hearing**: Did the arbitrator control the hearing and keep it moving forward?

- **Standards**: Were basic principles of procedure and professional responsibility upheld?

- **Responsiveness**: Was the award timely and did it cogently & reasonably explain the reasons behind it?

- **Balance**: Were both parties afforded the same opportunities to present their cases?
Interactional Justice

- **Respect** Did the arbitrator treat participants with appreciation for their dignity and pride?
- **Interpersonal** Were kindness, compassion, and understanding appropriately demonstrated, and in a balanced way?
- **Explanations** Did the arbitrator provide information clearly and thoughtfully throughout the hearing?

How Do We Know What Kind(s) of Fairness Matters?

**Sources of Information**

- **Research** Several studies have produced data:
  - **Anecdotal Evidence** (from parties)
  - **Anecdotal Evidence** (from arbitrators)

So What Kind of Fairness Matters Most?

**Distributional, Procedural, or Interactional?**

And the winner is:

**Procedural**
Why Procedural?

- **Voice** With the perception of procedural fairness, participants get the sense of having had their “day in court”
- **Shortcut** Procedural fairness can be a stand-in for assumptions about fairness of outcome, and overall fairness
- **Appreciation** Perception of procedural fairness increases positive reactions to the arbitrator

Distributive Fairness Still Important

- Parties say it matters, even if not as much as procedural fairness
- Arbitrators perceive that it matters
- Advocates go to great lengths to gather information about outcomes
- Sophisticated parties focus, when possible, on reasonableness of decisions under the circumstances of each case rather than raw numbers
- Win-Loss record matters absent any other info
- What about “split decisions?”

And Don’t Forget Interactional Fairness

- Research results mixed, but it is clearly not unimportant
- Not just a nice smile and a pat on the back
- More personal—includes the “human touch”
- Even if reaction to it is partly unconscious, tends to improve evaluation of arbitrator
- And, btw, shouldn’t arbitrators (like all of us) strive to be kind, considerate, patient, and understanding?
Fairness and Experience

• Some data show many advocates perceive a connection between an arbitrator’s level of experience and fairness
• But some research indicates:
  • Little, if any, effect of experience on arbitrator decisions and approaches
  • Parties cannot distinguish between the awards of experienced arbitrators and those of inexperienced arbitrators
  • Perhaps it is that experienced arbitrators have track records parties can look to in determining “fairness”

Conclusions and Questions:

It Has Been My Pleasure

Arthur Pearlstein
apearlstein@fmcs.gov