UE STEWARD
FIRST LINE OF DEFENSE
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Whether or Not to Arbitrate

Arbitrate? Sometimes we're forced to. But taking grievances to arbitration can be expensive and dangerous. Why? Because arbitration is a third-party process that does little or nothing to build union strength and, at worst, can set a bad precedent that will haunt workers even beyond their own union for many years.

UNDERMINING STRENGTH

Given UE's belief in rank-and-file unity, eagerness to arbitrate grievances can be a danger signal that a local's organizational strength is suffering. The best place to settle a grievance has always been right where it began — on the job. The boss should know that UE grievances will be backed by a unified and, if necessary, angry membership.

If very few grievances are settled on the job or in the early stages of the grievance procedure, then it may be time to take a good look at your local's ability to send a unified message to the boss. Instead of building unity, arbitration can actually undermine organizational strength.

Think about it. Arbitration removes an issue from the workplace and it takes time. Instead of reinforcing the idea that "we — all of us — are the union," arbitration encourages members to think of the union as some type of insurance agency: "file a claim and see what happens."

POTENTIAL DISASTER

An ill-considered decision to arbitrate can also turn into a disaster. With the stroke of a pen, an arbitrator can undo hard-won contract language — and, as many trade unionists have found out, what we lose in arbitration we rarely recover in negotiations.

Arbitrators have considerable freedom to frame their decisions and the outcome may be completely unexpected or irrational. In one case involving a UE local, an arbitrator ruled the company was wrong — but he had developed such a dislike for the grievant that he refused to provide a remedy.

Fighting mandatory overtime through arbitration, a local in another union was shocked when the arbitrator decided the company and the union "wouldn't have negotiated overtime pay provisions if 'reasonable' mandatory overtime wasn't expected." The decision was bad enough, but it also set a precedent that has been used repeatedly in other cases involving similar contract language in other unions.

ARBITRATE 'TIL YOU DROP!

Finally, arbitration is expensive and there are plenty of bosses who would love to bankrupt a local union by pushing every grievance to arbitration. The best rule of thumb: always try to win organizationally; consider arbitration only if there's no other course. And, always consider what will happen if the case is lost.

Remember, the arbitrator's decision may be binding until your contract language is changed. The common experience: unions seem to run about a 50-50 chance of winning discharge and discipline cases, but a much lower percentage of cases involving contract language. Arbitrators seem much more likely to defer to the "management rights clause" than support the union's interpretation of the contract.

IF YOU HAVE TO...

We know it's sometimes necessary to arbitrate. Pick your cases carefully and make sure they're strong. Be very careful where contract language is concerned. And try to take the long view: is it likely that a particular principle can be won through a stronger case in the future? Or should the issue be saved for the bargaining table?

HOLDING DOWN THE COSTS

- Try to negotiate an expedited or slimmed-down procedure that avoids the need for transcripts or briefs. This saves time as well as money.
- Arrange for the hearing at the employer's offices or union hall rather than some fancy hotel.
- Don't use outside lawyers. Local officers and the UE organizer who works with the local know more about the contract, the practices, and the facts of working life than any lawyer. In those rare cases where complex legal issues arise, the UE legal department may be consulted.

AND BEWARE EVEN WHEN WE WIN!

- Some members may decide that this is the way to settle grievances and want more of the same even when the case is weak. ("We won Jane's case, why not take Joe's?")
- Justice delayed is often justice denied. Getting an arbitration decision usually takes many months. Members forget the issue and the union may gain little organizationally.
- The employer may get a roadmap to make matters worse. For example, if discipline is rescinded because a conduct rule is too vague or calls for a lesser penalty, it's an invitation to the boss to write a clearer and harsher rule.

For additional information on preparing and winning an arbitration case, see the UE Leadership Guide, Chapter 9.

ISSUES

Using organization instead of arbitration is often the best way to resolve grievances.

Why? Arbitration can:

- undermine organization...
- be dangerous in ways you never expected...
- and be very expensive.

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What it Takes to Win a Case

✓ **It's a Clear Violation.** The contract language or practice involved must be clear and a violation must have clearly occurred. In other words, the case must be a good one.

✓ **The Union has Real Proof.** Hard evidence, reliable union witnesses, previous written grievances, copies of good notes taken during negotiations, and employer memos are some examples of what you'll need to make a strong case.

✓ **Facts to Back Up the Case.** If it is a firing or discipline case, we must be able to show that the firing or discipline was "unjust" or that the penalty was too severe. Good factual evidence of how other similar cases were treated in the past is needed. In most cases the employee's overall past record will be used against them (even if it is unrelated to the current issue.)

✓ **We Must Have a Credible Theory.** The union needs to give the arbitrator clear reason to rule in our favor. In other words, precisely *how* the contract was violated or precisely how the discipline lacks just cause.

✓ **The Union is Prepared for Arbitration**. Don't wait until the last minute to gather evidence (scan QR code below for examples of documents needed) or talk to witnesses. It's best to get the details and take written statements while the incident is still fresh in the mind of each witness. Know whether a solid case can be prepared and presented before making the decision to arbitrate.

✓ **The Case is Based on Fact, Not Fiction.** The witnesses must be telling the truth. Arbitrators will know when someone is lying or stretching the truth. Arbitrators come down much heavier on union witnesses for lying than they do on management.

✓ **Know the Employer's Case.** This is something essential to pay attention to — thinking through the employer's case and how we'll respond. Most, if not all, of the employer's arguments should have been heard by now in the grievance process. The union ought to be able to disprove or counter all of these arguments, if possible.

✓ **The Issue and Remedy are Clear.** Neither party will be permitted to raise new issues and evidence during the arbitration (especially for discipline and discharge cases). *The union's position must have been made clear during the earlier stages of the grievance process.* Be sure that the union has included the remedy that is wanted in the grievance. An arbitrator can rule *for the union* but, at the same time, *prescribe no remedy* if none was requested.

✓ **Our Case is Not Based on "Fairness."** Finally, remember that arbitration is not the arena to decide what is fair and what is not. An arbitration decides whether the contract has been violated. If the contract allows an unfair act by management, then there is no reason to arbitrate it. If justice (even revenge) is what we are after, there are other, more effective ways to get it.

More Information Online

Scan this QR code with your phone, or go to **ueunion.org/stwd_arb.html** in your browser, to access the online version of this *UE Steward*, which also includes a helpful checklist, "Preparing for an Arbitration Case."

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