TAB 15

The Six-Minute Labour Lawyer 2020

Canada's Best Expedited Labour Arbitration Regime

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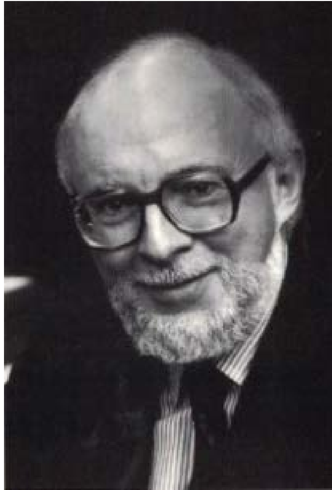
IN MEMORIAM



J. F. W. (Ted) Weatherill
1932-2020

INTRODUCTION[1]

How would employer and trade union arbitration budgets look if they could use a single hearing day to plead multiple grievances and then receive all the resulting arbitral awards within 30 days? Perhaps that single day might include, but not be limited to, hearing an employee's five separate and distinct grievances[2]?

Or an arbitrator might hear four distinct duty to accommodate cases during a single day's sitting[3].

These results do not arise from some new regime recently created after decades of deep academic thought. Instead, they reflect how parties in the railway industry have handled their grievance arbitration for over 55 years[4]. But for many labour lawyers, the "railway model", inspired by the Canadian Railway Office of Arbitration and Dispute Resolution (CROA), remains either a vaguely familiar or completely unknown regime[5].

CROA holds hearings for its members every month except August. Rather than joining CROA, some railway industry employers and trade unions instead collectively bargain a CROA-inspired regime directly into their collective agreement[6].

This paper will examine how employers and trade unions in the railway industry have created Canada's most efficient and cost-effective expedited labour arbitration system. It will also note some of the challenges any expedited arbitration system faces.

CONCERNS ABOUT "REGULAR" LABOUR ARBITRATION

Concerns about the state of labour arbitration are not new. Former Ontario Chief Justice Warren Winkler, a long-time labour lawyer, commented on what he considered the "golden age" of labour arbitration. While not mentioning it specifically, his remarks about

[1] Due to the pandemic, this conference proceeded via recorded audio.
[2] CROA&DR 4524
[3] CROA&DR 4503 to CROA&DR 4506.
[4] The Canadian "railway model" for labour disputes actually started in 1918.
[5] For an invaluable historical review of CROA, see Michel G. Picher's article: *The Canadian Railway Office of Arbitration: Keeping Grievance Hearings on the Rails*, Lancaster House, Labour Arbitration yearbook, 1991 Volume 1 Pages 37-54.
[6] For ease of reference, this paper will often use CROA generically to refer to "railway model" regimes.

a golden age highlighted some of the characteristics, especially the importance of the parties' relationship, which have ensured CROA's success since the 1960's[7]:

> There was a tripartite board consisting of two persons from each side— one labour, one management—and a neutral chairperson. **The parties would appear and present their cases, and this was a non-adversarial, non-acrimonious type of proceeding**. The usual process was that the parties would print up their submissions in a brief; it would be short, and it would contain evidence. This evidence would often conflict, but nobody worried about that. There were frequently no witnesses called, there were no cross-examinations. There was no acrimony because it was non-adversarial. People showed up and presented these cases, which were short and over with quickly.
>
> Each side would be somewhat loath to bring forward arguments at hearing that would inflame the other side—whether or not it was viewed as a "winning argument." On the management side, almost all employers belonged to the Central Ontario Industrial Relations Institute; it provided surveys on salaries, and wages and benefits, as well as other relevant statistics. While managers represented the interests of employers at collective bargaining, in arbitration they were principally motivated by sound labour relations and a non-adversarial approach. **This non-adversarial and non-acrimonious perspective permeated everything and made the system work as successfully as it did. There was simply none of the litigiousness that followed in later decades; it was most common to have no lawyers involved so that neither the nominee nor the presenter would be a lawyer. I characterize it as something of a "golden age" of labour arbitration, because it was**.
>
> (Emphasis added)

The railway industry traditionally had healthy relationships which buttressed their expedited arbitration regime. Many railway managers had started their careers in a bargaining unit. In addition, a surprising number of "railroaders" spent their entire career with the same railway and sometimes continued working despite being eligible for an unreduced pension.

These characteristics helped establish long term professional, if not collegial, relationships. It also ensured a deep understanding throughout the supervisory and management ranks of employees' daily activities.

[7] Labour Arbitration and Conflict Resolution: Back to Our Roots, Presented at Queen's University, 30 November 2010, Queen's School of Policy Studies.

Chief Justice Winkler felt the "golden age" ended when labour arbitration moved more towards a civil litigation model. He also commented on the role of lawyers[8]:

> **Originally, the parties worried about whether or not the labour arbitration process would enhance, foster, and benefit industrial relations in the plant. This changed so that now you had the emergence of a group of people who were not worried about that at all; instead, they were worried about winning the case. They did not care whether one party or the other was upset in the workplace. If they were upset, the attitude was "Well, let them be upset." The arbitration process changed from one that was industrial relations based to one that was litigation based**. This change drove a wedge between the arbitration process and the labour relations in the plant, and it drove a wedge between the parties in such a way that they did not relate any more. This disconnect proved to be immensely harmful.
>
> **The industrial relations practitioners on both sides, who had been such an important part of this community, were displaced by this litigation mentality as the arbitration process was inundated with lawyers.** It became a litigation-based arbitration hearing in which the discourse changed from one that was based in industrial relations to one based on law. As a litigation-based process, it was about winning cases, often at any cost. It was also about making technical arguments, taking a different approach to a case, adhering strictly to the rules of evidence, and insisting on the production of documents and on particulars.
>
> (Emphasis added)

In contrast to Chief Justice Winkler, Professor Donald Carter questioned the extent of any "golden age" of arbitration[9] and added:

> Frankly, I don't think we can draw much from that earlier Golden Age of Arbitration. I think it was a different time, it was actually a private sector collective bargaining relationship. People knew each other well. I think the world is changed. We have a new reality. We have much broader jurisdiction.

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[8] As a career labour lawyer who now decides cases, the author does not share the simplistic view that, as Shakespeare suggested in *Henry VI*, things would be better by getting rid of all the lawyers, *infra*. That is not what the former Chief Justice was suggesting either.

[9] Ontario's chief justice warns arbitrators to pick up pace of cases, National Post, May 2, 2011.

Labour lawyers Ronald A. Pink, Q.C. and David C. Wallbridge identified various contemporary challenges, and candidly addressed the impact of lawyers and arbitrators on the arbitration system[10]:

> **Unavailability is becoming a huge problem. We continue to struggle to have our hearings set down by an arbitrator in a timely manner**. For the most part, the juggling of the schedules of both counsel and the arbitrators is the biggest problem. On occasion, but not as frequently, it is also the schedule of the union or employer clients and witnesses.
>
> …
>
> **In almost all circumstances, when a case gets unduly delayed it is the fault of the lawyers.**
>
> **We are too busy and our schedules are jammed. As a result, the scheduling of hearings becomes difficult and cases are put off and delayed**.
>
> Too often, instead of focusing on the real issues between the parties and working on solutions, lawyers make cases overly complex. **We are guilty of pursuing too many legal issues in cases that could be very simple (death by a thousand preliminary arguments)**. We are all guilty of calling too many witnesses. We are all guilty of spending too much time in direct examination. We are all guilty of spending too much time in cross examination.
>
> (Emphasis added)

One can debate the extent of any “golden age”. But beyond debate is the railway industry’s success, albeit with some challenges, in running extremely efficient and cost-effective labour arbitrations. The parties’ relationship remains essential for this success, just as Chief Justice Winkler noted for his “golden age”.

[10] Ronald A. Pink, Q.C. and David C. Wallbridge, The Future of Labour Arbitration, CBA Conference, November 26-27, 2010.

EXPEDITED ARBITRATION REGIMES

Non-railway examples

Various parties to collective agreements have negotiated expedited arbitration regimes. For example, in *Kasim*[11], the CIRB described Air Canada's and the former CAW's expedited process:

> 8 On January 16, 2008, as part of Air Canada's expedited arbitration procedure, the CAW filed a mediation brief setting out its position on behalf of Mr. Kasim.
>
> 9 On February 22, 2008, again as part of the expedited arbitration process, Mr. Kasim's grievance was sent for a fact-finding facilitation resolution.
>
> 10 From April 9 to 11, 2008, an investigator conducted interviews with various individuals about the August, 2007 incident.
>
> 11 On April 15, 2008, the investigator produced a Fact-Finding Report containing these three recommendations:
>
> > a) In addition to having employees sign Management's Policy that includes acceptable internal email practices, it is advisable that this policy be reinforced through other means of communications.
> >
> > b) Management advises employees of when they plan to hold informal meetings including who will be present.
> >
> > c) Although the meeting was not disciplinary in nature, management should consider union involvement when the issues are of the kind raised in this matter.
>
> 12 On July 25, 2008, during a monthly review under the expedited arbitration process, Arbitrator Martin Teplitsky, Q.C., issued the following decision with regard to Mr. Kasim's grievance:
>
> Decision: A fact finding report was presented to the parties. I agree with its conclusion. The grievance is resolved accordingly.
>
> 13 The CAW advised Mr. Kasim that his grievance had been resolved.

The AC-CAW model contemplated written briefs and an investigator producing a "Fact Finding Report" for the arbitrator hearing the case.

[11] 2008 CIRB 432

The Toronto District School Board and CUPE have established a pilot project for their own expedited arbitration regime[12]:

> 3. These grievances were heard as part of the “Expedited Arbitration Pilot Project” agreed upon by the parties. The process for hearing grievances under the expedited arbitration pilot project is referred to in a Memorandum of Agreement between the parties dated February 1, 2018. The expedited process generally involves the parties filing extensive written briefs, which includes all documents, will-say statements for each witness and submissions. The parties have specifically agreed that the arbitrator is to provide brief written reasons for every award. In accordance with the parties’ agreement this award is binding on the parties but will not have any precedential effect on other grievances. It should also be noted that the parties have agreed, on a without prejudice basis, to the appropriate remedy should I find a breach of the Collective Agreement.

The TDSB/CUPE regime relies on written briefs. The parties further agreed to full document production and “will-say” statements[13]. Either party could cross-examine on a “will-say”[14].

Sophisticated parties have adopted labour arbitration regimes which differ significantly from those mimicking a civil litigation model. Labour boards, which deal with a significant volume of duty of fair representation complaints, have so far had the wisdom to respect parties’ expedited arbitration regimes[15].

[12] Toronto District School Board v Canadian Union of Public Employees, Local 4400, 2019 CanLII 2343
[13] Toronto District School Board v Canadian Union of Public Employees, Local 4400, 2018 CanLII 67327
[14] Toronto District School Board v Canadian Union of Public Employees, Local 4400, 2018 CanLII 55899
[15] *Kasim*, *supra*, at paragraphs 23-27.

KEY ELEMENTS FOR A SUCCESSFUL EXPEDITED ARBITRATION REGIME

Overview

There is no single blueprint for expedited arbitration. However, CROA's success does suggest some key elements. Successive generations of "railroaders" have ensured that CROA kept "grievance hearings on the rails"[16].

Two labour arbitration giants, J.F.W. (Ted) Weatherill and Michel G. Picher, helped develop CROA's culture and jurisprudence for 15 (1968-1983)[17] and 28 (1986-2014) consecutive years, respectively. Parties now benefit from online access to over 6000 railway awards. CROA's website provides access to all CROA awards.

In addition, Abe Rosner, retired CP Rail shopcraft worker and long time CAW National Representative assigned to the federal transportation sector (rail, air traffic control, marine), has maintained both CROA's database as well as, at his own expense, a database for both railway Ad Hoc and Shopcraft arbitration awards[18].

Only the parties know how many railway disputes never reach arbitration because they have access to a massive precedent database of arbitral awards specific to their industry.

Parties have traditionally used the Brown System of demerit points which avoids the financial penalties of suspensions in favour of imposing points. However, suspensions are sometimes used as a last chance warning. Termination occurs when an employee reaches 60 points. The Brown System helps fine tune progressive discipline in the railway industry[19]:

> 15. The Brown System's use of demerit points provides progressive discipline guidance to employees, their trade unions, employers, as well as to CROA

[16] To paraphrase the title of Arbitrator Picher's 1991 CROA article, *supra*.

[17] Arbitrator Weatherill continued to hear "informal expedited" railway cases for decades, which were not reported under the terms of the specific collective agreements. He heard further CROA cases in 2019.

[18] An Ad Hoc arbitration, which the parties pay for themselves, could take one or even several days, unlike the matters heard during monthly CROA sessions. Occasionally, a CROA case may morph into an Ad Hoc. See, for example, Teamsters Canada Rail Conference v Canadian Pacific Railway, 2018 CanLII 27194 at paragraph 18. Shopcraft cases involve the maintenance and repair side of the railway business. Shopcraft cases have always been heard outside CROA proper but follow a CROA-inspired arbitration regime.

[19] CROA 4600. Some railway employers may choose not to use the Brown System: CROA 4630 at para 4.

arbitrators. The latter group, of course, as in any progressive discipline system, retains the discretion to substitute a different penalty.

The CROA regime places key obligations on its members to ensure that 21 cases will be scheduled and resolved every month. CROA's Memorandum of Agreement Establishing the CROA&DR (*MOA*) establishes the regime and describes the parties' obligations.

For those scheduled cases which do not settle in the weeks leading up to a CROA monthly session, the parties plead them over a three-day period and receive all their arbitration awards within 30 days.

Some parties to railway collective agreements do not join CROA but instead negotiate a CROA-inspired regime directly into their collective agreement. Some may even add an additional "informal expedited model" which excludes lawyers, limits the length of written briefs, sets pleading time limits and makes all awards "without prejudice". An arbitrator will draft only short awards to reflect the parties' negotiated regime[20].

A CROA hearing involves each party reading its written brief. The active listening this requires from the arbitrator is invaluable. While an arbitrator could just read the parties' materials in isolation, he/she would miss many of the benefits which come from this type of oral advocacy.

For example, a party's aside to describe something technical helps an arbitrator who is not a railroader. An arbitrator can also ask a question at the very moment when a particular point may not be clear. Arbitrators engaged in active listening[21] constantly write down their ideas and questions for use during later deliberations.

Experience shows the fallacy of an outsider's initial perception that a party provides little value to an arbitrator when reading its written brief[22].

Expedited arbitration, regardless of the model, differs fundamentally from regular arbitration, which is closer to a civil litigation model of dispute resolution.

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[20] Appendix D to the CROA *MOA*, *supra,* contains some of these elements in its informal expedited regime.
[21] A similar difference exists between passive and active reading.
[22] Michel G. Picher: *The Canadian Railway Office of Arbitration: Keeping Grievance Hearings on the Rails, supra, at page 47*

By analogy to a lawyer's labour law practice, expedited arbitration is like a client phoning his/her labour lawyer for an opinion. In a sophisticated solicitor-client relationship, a client may ask a lawyer for an instinctive reaction to an issue. Such clients know that the opinion comes from experience and instinct rather than from in depth research.

Those clients generally do not hold their lawyer to the standard applicable to a full-fledged legal opinion. If they did, instinctive phone opinions would disappear. Savvy clients identify the specific cases for which they require a fully researched legal opinion despite the increased costs.

Parties who receive multiple expedited awards from a labour arbitrator based on his/her decades of pleading and/or decision-making experience, generally accept them for what they are. They represent a cost-effective way to deal with the merits of a multitude of grievances. Perhaps most importantly from an access to justice perspective, expedited matters are not settled solely because of cost concerns. That differs significantly from what often happens with regular labour arbitrations.

What elements help perpetuate CROA's success?

CROA is a more consensual than adversarial arbitration process

One of the secrets of CROA's success, when it works, is that the parties, rather than lawyers and arbitrators, work together to identify an arbitration case's facts and legal issues. Rather than holding multi-day and expensive fact-finding arbitration hearings which take place sometimes years after the actual events, the parties have agreed to focus on the facts long before arbitration.

For non-disciplinary matters, successful parties provide detailed positions in writing to each other during the grievance process. They may also meet face to face to ensure each side fully understands the other's position on the dispute. Ideally, at the start of arbitration, there is no dispute about the facts or issue(s). The parties simply need a quick award from their chosen arbitrator.

For disciplinary matters, the parties have agreed that an investigation interview and written transcript works best, *infra*. This consensual process loosely resembles the results

achieved from examinations for discovery in civil litigation cases. This early fact-finding process leads to more settlements since it forces the parties to focus immediately on the disputed matters. The do not wait for an upcoming arbitration date before turning their minds to events from months or years before.

CROA's consensual approach means that both parties have the legitimate expectation that each will put its cards on the table early in the process. The better the trust between the parties, the better CROA works.

While a party could try to win a CROA case by pulling an ace out of its sleeve, the consequences to the process cannot be overstated. Sharp practice, if not fixed immediately, could lead both parties to resort to "trial by ambush" techniques or limit ongoing communication other than in a perfunctory way. Such conduct hinders the effectiveness of CROA's consensual model of expedited dispute resolution.

Certain CROA arbitral principles have developed over the decades which discourage such behaviour, including those requiring fair investigations and the identification of all issues long before the day of the hearing, *infra*.

Ultimately, the parties realize that CROA's success is a labour relations issue rather than a legal one. The parties determine its long-term success rather than arbitrators. Proper relationships and consensual fact-finding allow an arbitrator to hear one or more cases in a single day. And grievors receive their awards shortly thereafter.

Even in the best expedited system, however, fact-specific harassment and accommodation cases can still present certain challenges[23].

Immediate investigations identify the facts in discipline cases

Perhaps the most important procedural element in the CROA regime comes from the parties' negotiated language regarding the holding of an immediate investigation for disciplinary matters. The integrity of the investigation, and the resulting written record, are

[23] See, for example, the harassment case examined in Fraternité internationale des ouvriers en électricité (conseil no. 11, réseau) c Compagnie des chemins de fer nationaux du Canada, 2020 CanLII 19578

a CROA lynchpin. Indeed, a failure to conduct a fair and impartial investigation generally renders any discipline void *ab initio*[24].

In the recent case of *Canadian National Railway Company v Sims*[25], the Court found an arbitrator's decision unreasonable when it declared discipline void *ab initio* without a consideration of other possible remedies short of reinstatement. The parties are awaiting the Saskatchewan Court of Appeal's decision on this case.

Despite the requirement for fair and impartial investigations, the process must nonetheless remain informal and expeditious[26]. The investigation interview ensures that the arbitrator has a proper written record[27]:

> 26. An investigation under the parties' expedited arbitration regime is intended to be more informal than the process which might take place before an administrative tribunal. It is neither a criminal investigation nor a process conducted by experienced legal counsel.
>
> 27. It is rather an opportunity for both parties to ensure this Office's record contains the material facts should a later hearing be necessary. As a process designed to eliminate to a large extent the need for this Office to hear oral evidence, it allows each party to ask questions and to have the employee answer those questions. The TCRC posed questions to Mr. Madubeko near the end of the interview to ensure the record contained other facts it considered essential.

Arbitrators focus on the integrity of the written record when deciding procedural objections[28]:

> As noted in prior awards of this Office, in discipline cases the form of expedited arbitration which has been used with success for decades within the railway industry in Canada depends, to a substantial degree, on the reliability of the record of proceedings taken prior to the arbitration hearing at the stage of the Company's disciplinary investigation. **As a result, any significant flaw in the procedures which substantially compromise the integrity of the record**

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[24] Teamsters Canada Rail Conference v Canadian Pacific Railway, 2019 CanLII 89682 at paragraphs 35-39.
[25] 2019 SKQB 245
[26] CROA&DR 2073.
[27] CROA&DR 4608
[28] CROA&DR 3061

> **which emerges from that process goes to the integrity of the grievance and arbitration process itself. Consequently, in keeping with general jurisprudence in this area, it is well established that a failure to respect the mandatory procedures of disciplinary investigations results in any ensuing discipline being ruled void *ab initio*.**
>
> (Emphasis added)

Employees also have obligations under the CROA system. An attempt to “sabotage” the investigation will undermine an argument suggesting that the employer failed to conduct a fair and impartial investigation[29]:

> Moreover, it cannot be said that the grievor was denied his rights under article 86 of the collective agreement. He was duly presented with all of the statements and documentation in the possession of the Company, and upon which the Company intended to rely, absent any satisfactory explanation or rebuttal on his part. **A central purpose of the investigation process is to give the employee the opportunity to know and respond to the evidence in the possession of the Company. For reasons which the grievor and his representative best appreciate, they chose to squander that opportunity. The manner in which the grievor and his representative responded to the Company’s attempt to conduct an orderly investigation, which in my view bordered on abusive, was tantamount to a waiver of the grievor’s rights to pursue the matter any further**.
>
> …
>
> In the result, I am compelled to conclude that the case presented by the Council, both as to the preliminary objection and the alleged misconduct itself, is entirely without merit. **While the assessment of thirty demerits against an employee of twenty-nine years’ service is a serious matter, so too is the deliberate sabotage of a work assignment, aggravated by an equal willingness to sabotage the ensuing disciplinary investigation**. The grievance must therefore be dismissed.
>
> (Emphasis added)

Some initial interviews may also result in supplementary investigations as part of the fact-finding exercise[30].

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[29] CROA&DR 3157
[30] SHP563

Arbitrators have issued numerous awards finding discipline void *ab initio* due to an unfair investigation. The consequences are roughly analogous, in the civil litigation context, to refusing to hear a new issue at trial which falls outside the four corners of the pleadings or trying to introduce a document at trial which a party had failed to produce in its affidavit of documents. Arbitral policing of these types of principles remain essential to CROA's success.

Joint Statements of Issue

Given the consensual nature of the fact-finding exercise, the *MOA,* and CROA-inspired processes negotiated into collective agreements, insist on the creation of a key document for every arbitration: The Joint Statement of Issue (JSI). As described at Article 10 of the *MOA*, the JSI contains the facts and issues for the upcoming arbitration:

> 10. **The joint statement of issue referred to in clause 7 hereof shall contain the facts of the dispute and reference to the specific provision or provisions of the collective agreement where it is alleged that the collective agreement had been misinterpreted or violated**. In the event that the parties cannot agree upon such joint statement either or each upon forty-eight (48) hours notice in writing to the other may apply to the Office of Arbitration for permission to submit a separate statement and proceed to a hearing. The scheduled arbitrator shall have the sole authority to grant or refuse such application.
>
> (emphasis added)

Article 10 of the *MOA* notes that, exceptionally, the parties may proceed by way of ex parte statement.

The JSI resembles the canary in the coal mine. The healthier the labour relations climate, the less often the parties will resort to ex parte statements. However, the *MOA* nonetheless ensures that one party's inability to agree on a JSI does not prevent the other from accessing CROA's expedited arbitration system.

The drafting of a JSI is not a summary inconsequential procedural step. The JSI limits the issues the arbitrator may decide[31]:

> With respect to the second objection, however, the Arbitrator is satisfied that the Company is correct. The jurisdiction of the Arbitrator under of the memorandum of agreement establishing the Canadian Railway Office of Arbitration & Dispute Resolution expressly limits the Arbitrator's jurisdiction to those matters contained within a joint statement of issue. As is clear from the text of that document in the case at hand, the alleged acts of harassment contained within the letter of April 26, 2005 prepared by the grievor fall entirely outside the issues identified within the joint statement of issue and cannot be properly said to fall within the jurisdiction of this Office in respect of the grievance at hand.

Where an issue has not been raised during the grievance procedure, it may be too late to do so in an ex parte statement[32]:

> 27. In order to protect the integrity of the parties' expedited arbitration regime, railway industry arbitrators have refused to hear new issues which were not raised during the grievance procedure. As this case illustrates, railway arbitrations take just a matter of hours. That expedited system cannot accommodate the raising of new issues on the eve of arbitration, no matter how innocently, without potential prejudice arising.

The same result may arise where a party introduces a novel issue in its written brief[33] or when one party files an ex parte statement very late in the process[34].

The *MOA* allows parties to call witnesses to give evidence, though it is rare[35]. The right to call evidence, however, differs from that which exists in regular labour arbitrations given the system's expedited nature[36]:

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[31] CROA&DR 3488
[32] Canadian National Railway Company v International Brotherhood of Electrical Workers System Council No. 11, 2019 CanLII 123925 at paras 17-34.
[33] CROA&DR 4666
[34] CROA&DR 4548
[35] Article 13, *MOA*.
[36] Canadian National Railway Company v International Brotherhood of Electrical Workers System Council No. 11, 2018 CanLII 52755

> 26. As the arbitrator mentioned in passing during the hearing about various recent cases, it is challenging when new facts first come to light at an expedited arbitration. Article 13.19 of the parties' collective agreement seems to assume that the parties have fully discussed all relevant facts, especially if a Joint Conference (Article 13.8) has been held.
>
> 27. Article 13.21 regarding the parties' right to present evidence seems to assume that any oral evidence will focus mainly on key contradictions. Otherwise, if the evidence presented raises new facts, then the parties might as well hold a traditional multi-day arbitration. Similarly, raising potentially new grounds for discipline can be problematic in any expedited arbitration process: CROA&DR 4628.

Arbitrators have commented about the challenges when the parties add new facts only at the hearing[37]. But arbitrators also realize that no expedited system will be perfect. The parties have designed a low cost expedited system. Arbitrators must work within that system. Contradictory facts are not necessarily the problem; rather, the challenge often comes from the parties' failure to identify and discuss them in advance.

CP and the TCRC recently demonstrated how a jointly negotiated JSI, in addition to the exchange of written briefs in advance, can facilitate an expedited Ad Hoc arbitration[38]:

> 19. The parties made significant efforts to expedite this matter. They negotiated a 5-page Joint Statement of Issue (JSI) identifying 10 Items for which they sought determinations. They further agreed to exchange their numerous written briefs, in advance, with both each other and the arbitrator.

The parties' choice of an expedited arbitration system may also impact an arbitrator's decision when faced with different schools of thought on a legal issue. For example, for the debate surrounding how to calculate damages in lieu of reinstatement, an arbitrator may consider the parties' expedited system when deciding to apply the notice-based model to that specific case rather than the "economic loss model"[39]:

> 38. This analysis may be appropriate for regular arbitrations. But the parties using this railway expedited arbitration regime consciously chose not to adopt

[37] International Brotherhood Of Electrical Workers Council No. v Toronto Terminals Railway Company, 2019 CanLII 29083 at paragraphs 26-31.
[38] Teamsters Canada Rail Conference v Canadian Pacific Railway, 2018 CanLII 27194
[39] Central Main and Quebec Railway Canada Inc. v United Steelworkers – Local 1976, 2019 CanLII 39200

> a model that followed too closely one inspired by civil litigation. The civil litigation model has its own well-known issues, including with access to justice. Instead, the railway industry chose a streamlined arbitration model, one which has far lower costs for both trade unions and employers and which frequently has non-lawyers pleading arbitrations.
>
> 39. Given this reality in the railway industry, the arbitrator prefers an analytical model which fits comfortably within an expedited arbitration regime, already has deep roots in labour and employment law, does not exclude laypeople from pleading labour arbitration cases and which limits, if not eliminates, the need for clairvoyant arbitrators.

Parties also must be realistic about the number of issues set out in a JSI if they have only a one-hour time slot at CROA for their case[40]. As Arbitrator Sims noted by analogy to sausages[41]:

> Second, this is in fact five distinct grievances combined into one joint statement. The result is that, within the time allotted for one CROA appeal, the parties argued five cases, with a predictable shortage of time forcing the hearings into the evenings. It also requires what are in essence five sets of reasons rather than one. **It is quite appropriate that such cases be heard consecutively, but you can't squeeze five pounds of sausage meat into a one pound sausage skin**.
>
> (Emphasis added)

The art underlying expedited arbitration encourages the parties to choose the appropriate process for each case.

Does a case fit within a traditional CROA hearing which will hear up to 7 cases a day? Should a case be heard on an Ad Hoc basis as certain non-CROA members regularly do under their collective agreements? Could the informal expedited hearing process at Appendix D[42] of the *MOA*, and as found in modified form in various railway collective agreements, more efficiently resolve a multitude of grievances on a without prejudice basis?

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[40] Some railway industry parties who are not CROA members schedule and complete one case per hearing day.
[41] CROA&DR 4621
[42] Appendix D to the *MOA* creates a separate "Informal Expedited Hearing Process" which some parties to railway collective agreements have used as a starting point to develop a summary informal expedited arbitration model.

If a matter may create an important precedent, or involves cutting edge legal issues, then the parties may benefit from a more detailed Ad Hoc process or even a formal regular arbitration[43]. This triage available to the parties represents an important strategic consideration which, if ignored, could lead to precedent setting awards which might have been decided differently had a more detailed hearing taken place[44].

It is analogous to a client wanting a labour lawyer's quick instinctive comments on an issue compared with a request for a fully researched opinion on a cutting-edge question. The parties' choice of process can impact the result.

The parties, not lawyers or arbitrators, make these crucial triage choices which directly impact the efficiency of their expedited arbitration regime. Choosing the right method results in an appropriate hearing for the specific issue at stake.

Since most CROA cases have no witnesses, many are tailor-made for videoconference hearings which can significantly reduce the travel expenses for parties in a Canada-wide industry[45].

What does "expedited" mean?

The word "expedited" can have different meanings depending on the arbitration system.

For example, under s. 49 of Ontario's *Labour Relations Act, 1995*[46], an arbitrator appointed by the Minister of Labour must "commence to hear the matter referred to him or her within 21 days after the receipt of the request by the Minister". In this sense, "expedited" means the hearing will start quickly. But, in the absence of a settlement, it may still take months or even years to complete the arbitration.

The railway model has a different meaning for "expedited". A CROA grievance will not be heard immediately after its filing, but once it is scheduled for a specific month then the

[43] SHP530 is one example where a fuller hearing took place into an employer's drug and alcohol testing policy. An intervenor also participated.
[44] Teamsters Canada Rail Conference v Canadian Pacific Railway, 2019 CanLII 89682 at paras 92-97
[45] The Ontario Labour-Management Arbitrators' Association has produced Guidelines for videoconference mediations and arbitrations.
[46] S.O. 1995, c 1, Sch A

parties, if they do not settle, know precisely when they will have the matter heard and decided. A fixed date for a case, as with regular arbitrations, often results in the parties settling a good number of the cases scheduled for each month.

CROA benefits from having a significant membership[47] which produces enough grievances to allow for a full-time office and administration. The benefits of fixed hearing dates for future months and years allows all participants to plan properly.

For example, the parties agree on and schedule a revolving roster of arbitrators. They avoid the common problem in regular arbitration where parties cannot book their preferred arbitrators on a timely basis, especially for continuations. The parties reserve the same three days in every month[48] for CROA matters. Lawyers' busy schedules are not an issue since they book their time years in advance.

This contrasts with a common challenge in some parties' expedited arbitration regimes where they agree on a list of arbitrators but then impose time limits for the arbitration. Unless the parties have booked their preferred arbitrators well in advance, those with busy practices may have difficulty meeting the parties' desired deadlines.

To lawyer or not to lawyer?

The simple answer to this question is that CROA members have agreed at article 12 of the *MOA* that they may elect to use legal counsel:

> The parties to a dispute submitted to the Office of Arbitration may at any hearing be represented by Counsel or otherwise as they may respectively elect.

Many CROA cases have non-lawyers on one or both sides. In some cases which take barely an hour, laypeople pleading a case demonstrate they have fully communicated their positions to one another. They agreed on the facts and issues in the JSI, as required under CROA's *MOA*. They simply needed an arbitrator to determine whose position should prevail.

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[47] CROA's website lists its current members.

[48] Hearings commence the second Tuesday of every month. CROA does not sit in August.

The system is designed to allow employer and union representatives, who may deal with each other daily in the field, to plead their difference of opinion directly with a CROA arbitrator. The process should not discourage their participation. It reflects perhaps the "golden age" to which Chief Justice Winkler referred. Having a database of 6000+ cases no doubt helps all parties consider how arbitrators might have handled similar situations in the past.

But this is not to suggest the system would be better without lawyers. The parties decide who will represent them. Not everyone likes to plead. That is why the Almighty created corporate lawyers.

It is also one thing to read a written brief. It is quite another to respond to the opposite party's legal arguments immediately following their presentation.

Given arbitrators' expanded jurisdiction, cases can raise cutting edge legal issues. Arbitrators, who have no legal department, benefit from the expertise provided by experienced legal counsel[49].

The duty to accommodate is just one of those challenging areas. The principles may be generally understood, but even the SCC often cannot agree on how to apply them[50]. It is not enough in these areas simply to rely on past awards decided under different legal landscapes. Parties who plead cutting edge legal cases without a firm grasp of the current legal principles do so at their peril.

All arbitrators know and appreciate how labour lawyers at the top of their craft frequently work together to ensure an efficient arbitration. Their ability to talk candidly with each other, put their cards on the table in settlement discussions and often negotiate win-win resolutions never cease to impress. It is just one example of excellent advocacy for clients.

Judicial review and expedited arbitration

There will always be an uneasy tension between expedited arbitration and judicial review. Parties understandably want numerous relatively summary arbitral awards rendered in a

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[49] Teamsters Canada Rail Conference v Canadian Pacific Railway, 2019 CanLII 89682 at paragraph 94.
[50] Stewart v. Elk Valley Coal Corp., 2017 SCC 30

short time frame following the hearing. But occasionally they may want to judicially review, *inter alia*, an award's completeness[51].

Parties have an absolute right to proceed to judicial review. That is how the system works. No competent decision maker would ever take offence from parties pursuing their available legal remedies.

But the greater the frequency of judicial review in an expedited system, the more the arbitral awards will start resembling those coming from regular arbitrations. This reality impacts an expedited regime which succeeds in part due to summary hearings and awards. It also adds significant time and cost to an arbitrator's drafting process.

For example, a CROA arbitrator, in accordance with the *MOA,* may issue 12 awards within at most 30 days[52]. A judicial review may not occur for months or even years after the award. Even after the JR hearing, a court may take 21 days[53] or over three months[54] to issue its decision reviewing just one of the 12 awards.

In another example, a court took 3.5 months following argument to issue a decision about a CROA award which had been issued within 7 days of the hearing as just one of that monthly session's decisions[55].

This is not a criticism of the courts which must contend with their own heavy workload. But it raises a catch-22 situation for expedited hearings/awards and the full-blown judicial review remedies to which all the parties have access. This is especially the case since extensive affidavit evidence cannot be added to the record on judicial review, except in limited circumstances[56].

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[51] Compagnie des chemins de fer nationaux du Canada c. Conférence ferroviaire de teamsters Canada, 2019 QCCA 2180

[52] Teamsters Canada Rail Conference v Canadian Pacific Railway, 2019 CanLII 89682 at paragraphs 92-97.

[53] Canadian Pacific Railway Company v. Picher, 2015 QCCS 2319.

[54] Teamsters Canada Rail Conference c. Canadian Pacific Railway Company, 2017 QCCA 479.

[55] Canadian National Railway Company c. Clarke, 2020 QCCS 1442

[56] Canadian National Railway Company v. Teamsters Canada Rail Conference, 2019 ONSC 3644

Reviewing courts play an essential role in administrative law. Arbitrators owe it to parties to explain why they reached a conclusion. A bald conclusion, absent an explanation, may not be saved by the tribunal's written record[57].

Similar concerns apply to the suspect practice of giving bottom line decisions, with "reasons to follow". As Arbitrator Weatherill commented about this folly[58]:

> Some years ago, we would have discussion in the Academy about saving money and saving time and getting decisions right away. "I heard the case; let's have the decision right away, especially on a discharge case because those are so important to people's lives." I know some of these judges who hear discharge cases, they send a telegram saying, "Reinstate. Reasons to follow." **Well, folks, "reasons to follow," once you have given that kind of decision, are not reasons. They are justifications. Unless, of course, you have the courage to write out the real reasons and then change your decision, which is very difficult, even if you're courageous. It proves you're a fool. Because a bench decision is a gut decision. And why should people have gone through the grievance procedure, had a hearing, and paid you all this money for a gut decision? You should not take long to write decisions. People who delay writing decisions should be ashamed of themselves**. You should get at it and get the decision settled. Fine. They should be reasoned. They don't have to be long. They should be logical and they should persuade you. **And you shouldn't issue a decision until you've written it out or typed it out. I'm a believer in tactility. Anyhow, you'll be writing it up. And you sign it. You send it. That's a real decision. These other things are gut reactions, and, you shouldn't get paid for them.**
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> (Emphasis added)

Expedited decisions in the CROA system are not issued once parties conclude their oral argument. Arbitrators review the parties' often substantial Briefs after the hearing. The drafting process itself is the only way for a decision maker to ensure he/she has properly understood the parties' positions. As Arbitrator Weatherill noted above, that is the reason why the parties pay the arbitrator.

In addition, the Supreme Court of Canada in *Vavilov*[59] eliminated previous ambiguity and reemphasized the importance of a decision maker's reasons for judicial reviews.

[57] Delta Air Lines Inc. v. Lukács, [2018] 1 SCR 6, 2018 SCC 2, at paragraphs 22-31.
[58] Fireside Chat with J.F.W. (Ted) Weatherill, Arbitration 2009, National Academy of Arbitrators, at page 426.
[59] Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 at paras 91-98 and 136-138.

Conclusory, boiler-plate statements without analysis will invite reviewing courts' contempt[60]. Similarly, decisions from administrative tribunals must come from the appointed decision maker and not from some shadowy bureaucratic process[61].

Arbitrators cannot guess in advance which expedited awards might be the subject of judicial review. The essence of CROA has always been the parties' acceptance of summary hearings and brief arbitration awards. The more the parties decide to exercise their unquestioned right to judicially review those awards, the more time arbitrators will have to spend drafting them.

Similarly, the higher the number of judicial reviews then the greater the chance of the courts undermining, however innocently and well intentioned, Canada's most effective expedited dispute resolution system. Most judges' point of reference will be the civil litigation system, despite its massive access to justice issues[62]. They probably never experienced anything resembling the railways' successful expedited arbitration system which disposes, on the merits, of up to 21 collective agreement grievances each month.

CONCLUSION

Sceptics might question whether employers and trade unions could ever agree to establish written records, via investigation transcripts and/or JSIs, and ask an arbitrator to hear the merits of multiple arbitration cases in a single day. The best response to that scepticism is that the railway industry via CROA, albeit with occasional blips, has been doing it successfully now for over 55 years.

The parties ultimately determine the success of their expedited arbitration system. Their professional relationship determines the system's success far more than the relative talents of arbitrators and lawyers. Lawyers, if used, and arbitrators nonetheless play an important role.

Lawyers can assist the parties' efforts to promote a healthy and productive relationship. And arbitrators, who will have both laypeople and lawyers appear before them, need to

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[60] Langevin v. Air Canada, 2020 FCA 48 at paragraph 18.
[61] Shuttleworth v. Ontario (Safety, Licensing Appeals and Standards Tribunals), 2019 ONCA 518. See also "*Procedural Fairness and the Drafting of Reasons*", 17th Advanced Administrative Law & Practice, The Canadian Institute, October 24 - 25, 2017.
[62] Access to Justice: A Societal Imperative, Remarks of the Right Honourable Richard Wagner, P.C. Chief Justice of Canada, October 4, 2018

ensure the hearing procedure respects the parties' agreement as found in the *MOA* or in individual collective agreements. The insistence upon a fair and impartial investigation, as well as the disclosure of all issues during the grievance process, are just two long-time principles by which arbitrators promote the joint disclosure necessary for CROA to work.

From an access to justice perspective, the CROA system provides a key benefit. The arbitral awards focus on the merits of the parties' dispute. Due to CROA's efficiency, settlements are not negotiated merely because arbitrator and legal costs dwarf the value of the case. Those costs have been controlled by the parties' consensual system which requires them to identify the facts and to prepare legal briefs supporting their respective positions[63]. Absent a settlement, every grievor will get his/her "day in court" to argue the merits of the grievance[64].

The parties also receive their awards quickly, without the need to schedule multiple hearing dates, sometimes over several years, just to contest the facts.

Expedited arbitration is not a system for everyone. If parties have trouble agreeing on a mutually acceptable arbitration date, then a consensual arbitration regime may not work for them. And for those who want all the bells and whistles (and related costs) of a full hearing, then only regular arbitration will suffice. Clearly, some cases will benefit from a traditional arbitration hearing.

But for those parties contemplating a more consensual approach for pleading multiple grievances in a cost-effective way, the CROA model remains the gold standard for expedited arbitration.

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[63] There is evidently an administrative cost to the parties doing more work themselves, especially when preparing Briefs in complicated legal cases.
[64] Some cases could still be decided on procedural grounds rather than on the merits. Trade unions also decide which grievances go to arbitration.