

Handling A Grievance Filed Under Your Labor Agreement

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Most if not all of Chicagoland's construction labor agreements permit employees as well as the signatory union to file grievances over disputes they have with the contractor. Most of these labor agreements contain a familiar procedure leading to a joint labor management hearing and eventually, under certain circumstances, to neutral arbitration of the dispute.

But any contractor who has been around long enough realizes that even the smallest complaint from an employee represented by a union can result in a grievance being filed. More importantly, most contractors also realize that what may seem to be a small matter at first can develop into something much larger — particularly if back pay or work assignments are at issue. That's why understanding the rights and obligations of both the contractor and the union when a grievance is filed is vitally important.

KNOWLEDGE IS YOUR BEST FRIEND

Perhaps the most important advice is also the most obvious: know your contract. These three simple words of advice necessitate (among other things) knowing the exact steps of the grievance procedure. Most of the area's labor agreements contain detailed steps for how a grievance must be filed, including who the employer has to meet with and when, as well as the time limits within which a grievance must be filed. Contractors should familiarize themselves with those details because that knowledge will help inform how to tailor the employer's response to the grievance at each step of the process.

Unlike a formal lawsuit in court, grievances and arbitrations typically do not allow for discovery (the process of learning all the facts supporting the other side's case). Unsurprisingly, labor arbitration is often called "trial by surprise" or the final frontier of "Perry Mason." The only real opportunity to find out the nature of the

claim along with the supporting facts and the arguments being advanced by the union is in the grievance procedure itself. The steps of that procedure, therefore, take on added importance. Use them wisely — discover exactly what evidence the employee or the union is relying on to support the claim, as well as the theory of the alleged contract violation.

Probing during the grievance procedure assists the contractor in several ways: First, it enables the contractor to determine if it actually did something wrong. If the contractor did make a mistake, the best time to find out is the initial stage of the grievance procedure, rather than waiting for the hearing before a joint labor management committee or an arbitrator. Second, the procedure allows the union to determine whether the grievance truly has merit.

If the contractor has a good case, it should use the grievance procedure to try to convince the union to drop the grievance. At the very least, the union will know what it may be up against when it evaluates whether to pursue the case further. Lastly, full and frank discussion of the grievance helps to "put all the cards" on the table so the contractor can fully evaluate the strengths and weaknesses of its case and help it prepare for arbitration if the case goes that far.

GETTING THE INFORMATION YOU NEED

Using the grievance procedure to its full advantage also means considering whether to make information requests of the union. In a bargaining relationship, the law requires the parties to produce information that will enable the other side to evaluate their position in a grievance.

Information requests must be responded to within a reasonable time period after they are made (unlike a subpoena, which is used for an actual arbitration hearing and need only be complied with at the hearing itself). Determining what a "reasonable period" is varies with the circumstances, but if requests are made promptly, parties



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can obtain information while the grievance is making its way through the procedure.

Although the union is most often the one making such requests, an information request made by the contractor to the union in the right case and under the right circumstances can help the contractor evaluate the grievance — and hopefully point out to the union where its case is weak.

TIME LIMITS HAVE MEANING

As the case winds its way through the grievance procedure, the contractor also must pay attention to the time limits that the contract sets out for several things: when grievance meetings must be held, when the employer's response is due, and most importantly how much time the union has to advance the grievance to the next step if the employer denies the grievance.

If the contractor has any procedural objections to the grievance (for example, that the grievance was not initially filed within the time limits for filing a claim) the answer to the grievance at all steps of the procedure needs to include those objections. Many arbitrators often rule that if such objections were not raised in the grievance procedure they are waived by the time the contractor gets to arbitration. Following that same line of thought, and

to be on the safe side, any substantive objections to arbitration — that the matter is not grievable, for example — should also be noted in the answer in each response.

Strict adherence to the time limits set in the contract for filing grievances and for the pursuit of grievances through the steps of the proper procedure is also important. If a contractor has a history of being lax in this regard, an arbitrator also may find that it has lost its right to apply the time limits in later cases when it tries to do so. Some agreements to mutually extend the time limits may be prudent and inevitable, but they should be the exception rather than the rule, and the reasons for them should be appropriately documented.

Adhering to the strict time limits of the grievance procedure also forces the union to be timely with its cases so that the contractor is not dealing with old disputes that have been “hanging around.” Old grievances have a habit of creating numerous problems for employers not only because back pay may be involved, but also because witnesses may become unavailable, memories may fade or important documents may get lost.

SHOULD WE SETTLE

Parties often settle grievances before they reach the later stages of the procedure. Many times the decision to settle has nothing to do with the merits of the case. Even with a good case, contractors simply realize that the risks of proceeding forward with the grievance do not justify the costs if they can resolve the matter through a reasonable solution or at a reasonable price.

But if the contractor is considering settlement, it should pay careful attention to the prepared settlement documents. Particularly in cases where the dispute could arise again, the contractor must ensure that the settlement agreement recites several stipulations — that the contractor is not admitting to a violation of the contract, that it is preserving all of its rights and defenses, and that the settlement is not precedential and cannot be used in any future proceedings.

TAKE THE JOINT HEARING SERIOUSLY

If the grievance cannot be resolved in

the early stages of the grievance procedure, most area construction agreements require that it be advanced to a hearing before a joint labor and management grievance panel. Although these are sometimes also known as Joint Grievance Committees, Labor Management Committees or Joint Arbitration Boards, they all have a number of important things in common. They must be comprised of an equal number of members from management and labor, and, more importantly, the findings of the joint panel are final and binding on the parties unless the contract specifies otherwise. If the contractor loses before the joint panel, there is no recourse to arbitration. Significantly, the courts have treated the decisions of joint panels with the same deference given to arbitration awards, meaning that a joint panel decision is as difficult to overturn on an appeal to the courts as an arbitration award is.

The consequence of that latter point is critical and requires that an employer confronted with a joint panel hearing treat it seriously. The employer must be prepared to go in front of the panel on the day of the hearing with all its witnesses and documents substantiating its position on the grievance. Contractors are advised to get a copy of the rules that apply to the joint panel’s hearing and review them. If you need an extension of time or postponement,

ask for one in writing BEFORE the actual hearing date (and in the time required by the panel’s rules). Document everything and don’t be reluctant to ask the identity of the management representatives on the panel, and to talk to them before the hearing date about your case. You can be sure that the union is doing the same with its representatives.

Ultimately, if a contractor doesn’t present its case correctly or fully to the joint panel, it can easily lose the grievance no matter how good the case may be. And, if the case involves a significant amount of back pay and/or the reinstatement of a discharged employee, or a reassignment of work from one union to another, the harm can be substantial. Therefore, if the case warrants it, contractors should consider consulting with an attorney to assist in the preparation of the case. Attorneys are generally not permitted to present the case before the joint panel, but are permitted in the hearing room to offer guidance and suggestions to the contractor.

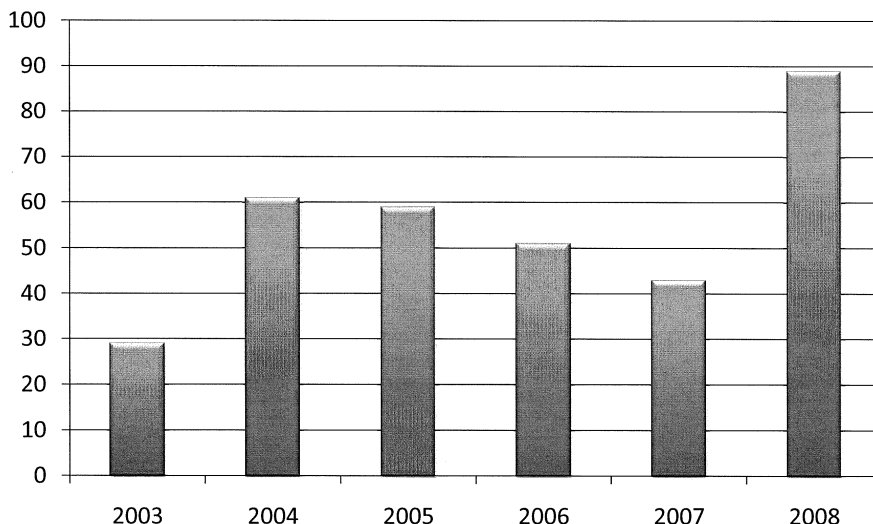
ARBITRATION OF THE GRIEVANCE

Many times, even though the employer has a good case, it’s unlikely that the union will vote in favor of denying the grievance. In that event, the contractor should at least

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MARBA Joint Grievance Committee Activity

A summary of grievances heard by Mid-America Regional Bargaining Association (MARBA) Joint Grievance Committees. Numbers reflect combined grievances heard from Laborers, Operating Engineers, Automobile Mechanics and Teamsters. Of the 332 grievances heard by these committees since 2003, 247 of them (74 percent) have been brought by the Operating Engineers.



Keeping Track Of The Paper Trail

Proper Documentation Key When Trade Union Brings Grievance

BY DENISE HERDRICH

Most unresolved labor disputes do not result in strikes. Instead, the union files a grievance against the employer. In most cases, a strike over a grievable issue would be illegal.

Grievances are filed for a variety of reasons, most of which are valid concerns for at least one of the parties involved (the employer, the union, individual employees). Be aware that the grievance you are handling for your company could have serious ramifications to other parties, including other contractors. What may not seem all that serious to your company could have a serious impact on an industry wide basis and have much greater significance.

The grievance board consists of an equal number of management and labor representatives.

Grievance proceedings are very much like court cases. Each party has a point of view to prove in front of the grievance board and the winning party is usually the one who has done the most extensive and thorough preparation.

If the board deadlocks, the matter can be taken to arbitration and tried again. The arbitrator's decision is final and binding.

PROCEDURES FOR PROTECTION

Throughout the entire process, but particularly at the joint committee hearing and/or arbitration levels, the union is represented by highly skilled and experienced representatives. It typically documents all cases and prepares a strong case in favor of finding a violation. The single most important factor in winning a grievance is keeping consistent, accurate records on each employee.

As big an inconvenience as a grievance may be for contractors, especially during busy summer months, attendance at the pre-grievance meeting and the hearing itself is an absolute necessity if the contractor expects to prevail. The joint grievance committee can make a determination only on the facts presented to it, and if the contractor is absent, the "facts" will be one-sided.

PRE-GRIEVANCE MEETING

Grievance procedures normally require that a meeting be held between union officials and company representatives, and both parties be represented by individuals who are authorized to settle the grievance. At this meeting you will be made aware of the facts that the union contends constitute a violation of the agreement.

ATTENDING THE GRIEVANCE HEARING

If the pre-grievance meeting does not resolve the grievance, a hearing will be scheduled before the joint grievance committee. Again, under committee rules, a case may be decided even if one party fails to attend. Without the employer being present

Answers To Your Labor Questions

This is the fourth in a series of best practices articles written by the Builders Association's Director of Labor, Denise Herdrich. The Builders Association is one of the few in Chicagoland with a full-time Director of Labor.

Questions about labor should be directed to Denise at 847.318.8585.

and prepared, the committee cannot consider the employer's set of facts. Failing to attend the hearing, therefore, is the first step toward disaster.

The contractor members of the committee are understanding of contractors interests and will interpret the contract from a management perspective. A different approach can be expected of the union members of the committee. However, the committee as a whole has no power to change the meaning of intent of the contract and will vote according to the facts.

Attendance at the hearing without proper advance preparation is the second step to disaster. Following the checklist below may be of some assistance in the preparation of a case before the committee:

- Describe what was unique about the project that caused the incident.
- Define efforts that were made to resolve the situation
- Was the labor contract or area practice on this matter reviewed?
- What relevant documents or witnesses exist that may be important for the joint committee to consider?

If there is any ambiguous portion to your presentation or factors that are not understood, it is recommended that you get in contact with people knowledgeable about the contract and area practice. The contractor must be prepared to present his arguments, witnesses and supporting documents.

AFTER THE COMMITTEE HEARING

After hearing all of the evidence, the committee retires to executive session and decides the case. When the committee is unable to reach a majority decision and a deadlock occurs, the union and the employer each have the option of pursuing the matter to binding arbitration. In some important cases that impact the entire industry, both parties will want an arbitration decision. Arbitration hearings are more formal than proceedings before the joint grievance committee. Contractors who are parties to cases which advance to the arbitration level should retain an attorney who is experienced in such matters.

SUMMARY POINTS

- A grievance is only a claim that the company has violated a provision of the labor agreement. Investigate each grievance to determine the actual facts. If the contract provision is not clear, contact the Builders Association for an interpretation.
- If there has been a violation committed by the company, try to reach a settlement with the Union.
- Advise the Association of the grievance to obtain help and advice in presenting your case.
- The Grievance Committee is willing to advise contractors regarding the grievance, but you must attend the grievance hearing to keep a decision from being reached without your input.
- Keep good records regarding discharges, suspensions and layoffs including payments. Keep good records of warnings for violations and send copies of letters to the Union.
- Keep the business agent informed on warnings, employee qualifications and any personality conflicts between employees and company management.
- Each company should issue rules which specify company policies on the job site. All employees should get a copy of the rules and sign an acknowledgment that they have read and understand them.
- Be sure to attend pre-grievance meetings and make sure you understand exactly the basis and facts of the claimed violation.
- Be sure to use the Builders Association as a resource.

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hope that the management members of the panel vote in favor of the contractor, resulting in a deadlock which triggers the union's right to seek neutral arbitration.

Most contracts also set forth the time limit for when the union must seek arbitration after a joint panel deadlock. The contractor again should hold the union to those time limits. Failure to do so could mean that the defense is waived and could spell trouble for trying to enforce them in future cases. While the timeliness issue will have to be resolved by the arbitrator, the contractor should nonetheless raise its objections in its correspondence with the union on the issue.

Once the matter is moved to arbitration, having the advice of legal counsel is always recommended. Arbitration is a formal hearing akin to a trial. While the rules of evidence applicable to the courts do not automatically apply to arbitration (unless the labor agreement says otherwise) most arbitrators apply some level of evidentiary requirements, particularly in discharge cases. The union is likely to use an attorney to handle the case. Even if it doesn't, the odds are that the business representative who handles the case for the union will almost certainly have more experience handling arbitrations than a company representative.

Arbitration can be a unique experience for a contractor who has never been through one. As with any trial, preparation is key. A thorough, working knowledge of the facts and legal theories of the case are crucial to the defense of any grievance. In light of the fact that most labor agreements explicitly state that the arbitrator's award is final and binding, this preparation becomes even more important. Options are extremely limited if the arbitration is lost. Like joint panel decisions, arbitration awards are extremely difficult to overturn on appeal, so in many respects the arbitration is truly a "one shot deal."

CONCLUSION

Of course, the best situation for a contractor is to not have any grievances filed in the first place. However, knowing the terms of the contract, paying careful attention to the details of the grievance, fully exploring the nature of the case in the grievance procedure, understanding the union's theory, and sticking with the contract's time limits all will help in the defense of the grievance if it has to move forward.

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