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What's So Interesting About Interest-Based Arbitration?

The Process and Substantive Considerations

Alan A. Symonette, NAA, Arbitrator  
Philadelphia, Pennsylvania

## Introduction

A little less than two years ago, when there was much anticipation in the legislative agenda to be developed by the then new Obama Administration, labor practitioners were especially interested in what was believed to be the most significant overhaul of the labor laws in at least a quarter century. Part of that anticipation included what could possibly have been the increased use of binding interest arbitration for first contacts in the private sector. As a result, interest arbitration, once an area of alternative dispute resolution limited to the public sector and a limited number of private industries pursuant to voluntary agreements of the parties, became the subject of increased interest across the labor bar.

Now, there is significant doubt that there will be any debate on the Employee Free Choice Act during this administration's first term. Yet, there remains significant interest in the area as a method of reaching agreements without the disruptive impact of strikes or other labor action. Much of this interest can be viewed through the prism of the current economic conditions facing state and local governments. Indeed despite the long term decline in private sector collective bargaining with reduced expectations for any considerable improvement in wages and benefits, the public sector has experienced rather brisk collective bargaining activity especially in interest arbitration. Municipal workers, especially those in public safety have realized comparatively significant gains in wages and benefits. It has been my experience that in recent years wage increases have exceeded the annual cost of living index. It can also be argued that these workers have traditionally enjoyed fully paid health benefits and generous pensions.

Of course public safety workers would argue that these gains were well deserved. First, their jobs are seen as inherently dangerous. They provide an essential service to the taxpayer at the risk of injury or death. No one would argue that those public safety workers who ran into the World Trade Center did not deserve the health care, pensions and survivor's benefits received through collective bargaining. At the same time many of these benefits were agreed to for political expediency. It was not considered to be a good political strategy to be viewed as endangering the health and safety of public safety workers thus impacting the quality of services taxpayers – and voters – have come to expect.

However, I submit that this economic downturn has created a new reality. State and local government has been particularly hard hit by current conditions. Many government budgets are now carrying large underfunded pension liabilities. The increasing cost of health care compounded in some instances with the dramatic cost of retiree health insurance has been a significant burden. Municipalities are running out of funding sources and are particularly hesitant to raise taxes to pay for the shortfall. While government is looking for more creative ways to raise revenue, they are also becoming more aggressive in controlling cost. This means that the interest arbitration process will play a critical role in collective bargaining between state and local government on one side, and their workers, especially those in education and public safety, on the other. This paper is intended to discuss the substantive evidence arbitrators consider in arriving at an interest arbitration award. It will begin by discussing the overall mission of the interest arbitration process followed by the types of evidence presented and the weight accorded that evidence.

### **The Mission of Interest Arbitration**

The simple mission of any interest arbitration process is to fashion an agreement that the parties would have likely reached if they had successfully bargained to a resolution. As a result interest arbitrators exercise significant restraint in setting the terms of an agreement. Contract language, once awarded though the process tends to have a significantly long shelf life. Therefore arbitrators are very hesitant to break new ground and impose terms that the parties strongly object to or that will significantly change the status quo in the collective bargaining relationship.

In the public sector, the scope of what may be considered by the arbitration panel is determined by statute and as discussed by Attorney Weisman, may involve a range of procedures. Depending on the state, the arbitrator may have to either select from one or the other final offer as in Oregon or as the case in Pennsylvania, the panel has full discretion to develop an agreement from issues in dispute. These procedures do have a direct impact on the flexibility of the arbitration panel or single arbitrator in imposing and agreement. For example, the panel will have more flexibility in formulating a contract in “conventional” interest arbitration versus the “final offer” arbitration. Yet the factors that one must consider remain the same. The panel must ultimately balance the interests of the parties as articulated by the issues.

## **The Interest Arbitration Process**

### **Issues in Dispute**

Procedurally, and regardless of the type of statute, the process begins with the submission of issue in dispute. This may appear as a laundry list of proposals or as a last best package offer. The statute usually provides that the issues must be submitted by a certain deadline before the selection of the arbitrator or arbitration panel and the commencement of hearing. Once those issues are submitted they may be rejected if they are contrary to law. Indeed many statutes specifically delegate the responsibility of certain matters to the legislative or executive powers of elected officials. In addition, once submitted the issues presented may not be added to or amended without the consent of both parties. This is especially true with respect to the presentation of new or additional contract language. Hopefully, this will give the parties a final opportunity to reach agreement prior to hearing once the prevailing issues are articulated and prioritized.

### **The Presentation of Evidence**

The interest arbitration hearing in many instances is conducted in a presentation form with a “presenter” arguing the merit of each issue. From time to time witnesses may be sworn in to provide testimony through direct and cross examination. The Socratic method of eliciting evidence is used but may not be necessary. Presenters may also respond to questions from the panel.

The evidence that is presented would fall into two general categories. Members of the bargaining unit and representatives of the government usually present evidence to introduce the neutral to the entity and the bargaining unit. Public Safety officers normally provide descriptions of their working conditions and issues that they face in their day to day work. This may include crime statistics, the number of responses to emergencies or fires, etc. Government managers provide evidence describing the economic and population demographics of the entity and explanations describing the budgetary process. The second category would involve statistical evidence presented to support economic proposals. In some cases depending on the complexity of the analysis involved, parties may employ experts to conduct and describe their analysis of the reasons for requested raises or, on the other hand address arguments concerning the entity's ability to pay. Parties tend to use experts, when necessary, to explain proposals related to health benefits and pensions.

One should note that, for the most part, the presentations made by the parties in interest arbitration are document driven. It is not unusual for parties to present thick binders containing a number of supportive documents. Most of the documents are self explanatory and depending on the complexity do not need extensive oral explanation.

## Economic Proposals

### The most critical consideration: Prevailing Practice

As indicated above, the mission of the arbitration panel is to determine what parties as reasonable persons should have agreed upon through negotiations. Most negotiated agreements reflect to a substantial degree the prevailing practice (comparables) within a given area. It is therefore reasonable to assume that the terms of any agreement would not substantially deviate from that practice. This would apply to holidays, vacations, sick leave, meal periods, rest periods, union security provisions, length of work-day or workweek, shift differentials, schedules and shifts, overtime, and premium pay. Thus the arbitrator(s) must determine what the prevailing practice is and what weight that such practices should have in the agreement. Elkouri & Elkouri in its treatise How Arbitration Works describes the process as follows:

“If the terms of employment of a given employer are below the standard set by the prevailing practice of comparable employers and if no basis exists for a differential, an arbitrator may conclude that an inequality exists. Many arbitration awards have undertaken to reduce or eliminate inequalities, such as inequalities between related industries, inequalities within an industry, inequalities between comparable firms or work within a specific area and inequalities within the plant itself.”<sup>1</sup>

As a practical consideration, the process of analyzing appropriate comparables is an exercise in not only looking for similarities with other agreements but also giving weight to those distinctions that would support the differences between those same agreements. This requires the consideration of a number of factors including but not limited to the bargaining history, the size of the bargaining unit, the cost of living within the area, the age of the bargaining unit, the cost of the agreement and the ability of the governmental entity to pay.

There is no specific formula which prescribes the weight to given to each factor. Rather the panel is expected to consider all the factors presented in order to balance the interests of the parties in order to reach a fair agreement. Panels are loath to impose substantial changes to a collective bargaining agreement. Not only will this cause possible upheaval in the relationship for years to come but it may also have an impact on the prevailing practice within comparable entities.

#### 1. Quantitative Analysis or Lies, Big Lies and Statistics

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<sup>1</sup> Elkouri & Elkouri, How Arbitration Works, Fifth Edition, Page 1107

It is not unusual for parties to use quantitative analyses to support their position in determining the appropriate level of cost or compensation to be inserted in the collective bargaining agreement. However, it must be noted that the value of such data clearly depends on the perspective of the party submitting the information. For example unions typically quantify the differences in net pay in comparing compensation with other employee groups. Employers on the other hand tend to rely on the total cost of the compensation package since this determines the entire cost of the contract. These amounts may also be influenced by accounting and other disclosure rules even though the employee may not realize any immediate difference in his or her take home pay.

Parties may also retain expert economists to help the arbitrator(s) parse the numbers. However, it must be remembered that these same numbers may be used to prove a point for the opposing side. Nevertheless it is critical for the advocate to employ statistics that are based on accurate data that is researchable and that the statistics are as recent as possible and as specifically related to the job or jobs that are in issue. It is the arbitrator(s) role to analyze the information to determine which analysis best supports the positions of the parties. As such do not be surprised if the arbitrator(s) ask to look at the underlying data in order to reach their own statistical conclusions.

## **2. Health Care and Retirement**

Unlike the other so called “fringe benefits” that find their way into a collective bargaining agreement, the cost of health care and retirement will have a dramatic impact. Assuming that these benefits are offered, the cost of maintaining these benefits can vary significantly from year to year.

Everyone is aware of the inflationary trends in the cost of health care. Accordingly, the issues of cost shifting and co pays will be a significant consideration. In addition, the employer may seek the flexibility to change and modify plans during the term of the agreement in order to contain costs. The union on the other hand may request that regardless of the use of copays or plan modification, that a certain level of coverage be maintained.

Many employers have recently, when possible, modified their pension plans from a defined benefit formula to defined contribution. Nevertheless the value of these plans depends on the volatility of the markets which have been significant from year to year. Again, as with any volatile benefit, the arbitrator(s) may be forced to balance the need of the employer to retain flexibility to control cost with the union's desire to maintain a basic, reliable benefit. In many cases, pension benefits are controlled by state or local law and to extent that one party or another may propose changes one should anticipate the use of actuarial analysis to show the cost of such changes.

### 3. Ability to Pay

The employer's ability to pay the cost of the collective bargaining agreement is a significant element that must be taken into account in determining the weight to be attached to other the criteria. The employer carries a significant burden in demonstrating its ability to meet this cost. In describing the weight to be given this evidence Elkouri and Elkouri quoted from a panel chaired by John T. Dunlop:

“(1) In the case of properties which have been highly profitable over a period of years, the wage rate would normally be increased slightly over the levels indicated by other standards (2) in the case of persistently unprofitable firms, the wage rate would normally be reduced slightly from the levels indicated by other standards, and (3) in the case of the companies whose financial record over a period of years falls between these extremes, the wage rate level would be determined largely by other standards.”<sup>2</sup>

However, in the public sector, “profitability” means the ability of the government to meet the costs of a new collective bargaining agreement without imposing any additional tax burden on the populace. This involves both economic and political considerations. In many cases, the union will present evidence to show that the government does not have to raise taxes to meet its demands. Rather the ability to meet the obligation may only depend on the willingness of the government to shift its budgetary priorities. For example, is it appropriate for the government to allocate money to the improvement of the local public golf course rather than to the health care benefit for public safety officers? However, these choices may be more critical. Should money be allocated to schools rather than to police benefits? The arbitrators do not have to face the electorate to explain the consequences of these choices.

### Non-economic proposals

As in any collective bargaining negotiations, any consideration of non-economic issues involve making inroads into management's right to run the business in order to protect the employees' right to job security, fairness and due process. However, unlike the private sector, the “rights” may be directly related to the privileges and obligations that are inherent in government. Thus government officials strongly argue for the retention of these rights including but not limited to the right determine the size of the bargaining unit or the allocation of services.

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<sup>2</sup> Elkouri & Elkouri, *supra*, Page 1125

In many instances, these rights raise specific health and safety concerns for bargaining unit members responsible for protecting the public.

In many respects non-economic proposals submitted by the union are in reaction to what they perceive as the abuse of authority of management. This may include issues as the assignment of overtime, shift designation, and approval of leave. The evidence presented in support of usually involves the presentation of testimony by members of the bargaining unit describing what they believe to be instances of abuse by management. The arbitrator must consider whether it is appropriate to insert language to address the single complaint where the impact of that language will have far reaching results. On the other hand Government may make proposals in order to realize cost savings through the reallocation of services or staffing. This may have a direct impact on the safety of the members of the bargaining unit.

## **Conclusion**

The interest arbitration process cannot be described as formulaic application of statistical analyses. Rather, as briefly described above, it involves the balancing of a number of factors within the collective bargaining relationship. Again, the role of the arbitrator or arbitration panel is to fashion an agreement that the parties would have likely reached if they had successfully bargained to a resolution. As such, arbitrators tend to be quite conservative; seldom imposing significant changes to the wages, terms and conditions of employment. Parties should not anticipate reaching a better resolution than if they worked to negotiate an agreement.

One could argue that given the current economic environment, parties are less able to reach agreement to meet everyone's needs. Thus it is easier to have a third party to make the hard but necessary decisions. Parties must recognize however that these decisions do have a lasting impact on the relationship for years to come. Even though the parties may have relinquished ownership of these decisions, they must take ownership of the consequences.