Relations industrielles
Industrial Relations

Time Delays in Grievance Arbitration

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Volume 47, numéro 4, 1992

URI : https://id.erudit.org/iderudit/050811ar
DOI : https://doi.org/10.7202/050811ar

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Éditeur(s)

Département des relations industrielles de l'Université Laval

ISSN

0034-379X (imprimé)
1703-8138 (numérique)

Découvrir la revue

Citer cet article

Ponak, A. & Olson, C. (1992). Time Delays in Grievance Arbitration. *Relations industrielles / Industrial Relations*, *47*(4), 690–708. https://doi.org/10.7202/050811ar

Résumé de l'article

Le but de notre exposé est d'analyser le bien-fondé de l'une des critiques adressées le plus fréquemment au processus d'arbitrage des griefs, soit les délais indus.

La première section constitue un retour sur quelques études portant sur ces délais, dont nous confrontons les résultats à des données nouvelles. La seconde section s'intéresse plus précisément au cas albertain afin de mettre en lumière des variables exerçant une influence significative sur l'étendue des délais, comme par exemple le type de grief. La dernière partie du texte résume les résultats de nos analyses, tente d'expliquer la persistance des délais et sur cette base, suggère des moyens visant à les abréger.

Le lecteur trouvera au tableau 1 des données tirées de dix études portant sur le temps écoulé entre la formulation d'un grief et la sentence arbitrale qui en dispose. Ces études ne tiennent compte que des griefs ayant donné lieu à une sentence arbitrale. Des analyses les plus récentes, il appert qu'approximativement une année s'écoule entre la formulation du grief et la sentence. On constate de plus que ces délais ont tendance à s'allonger: de 256 jours en Ontario, au début des années 70, à 342 jours dans la même province en 1983; de 214 à 345 jours en Alberta entre 1975 et 1988; de 223 jours aux États-Unis en 1975 à 345 au milieu des années 80; et finalement de 283 jours à 428 dans les causes citées par *Labour Arbitration Cases* (L.A.C.) entre 1975 et 1988.

Le tableau 1 indique clairement que la portion la plus importante du délai global se situe entre la formulation du grief et la tenue de l'audition. En effet, une fois que cette dernière a eu lieu, la sentence est rendue assez rapidement. La moyenne arithmétique masque certaines caractéristiques intéressantes des données. Une analyse plus détaillée de celles-ci indique qu'un petit nombre de cas associés à des délais exceptionnellement longs induisent une distorsion dans l'image reflétée par la moyenne. Cet effet de distorsion devient apparent si l'on ventile les données albertaines, ainsi que celles tirées de L.A.C, selon la durée du délai total de traitement. Le tableau 2 indique qu'en Alberta, dans la moitié des cas, une sentence arbitrale fut rendue en dix mois et moins (médiane 308 jours) et que dans les deux tiers des cas, une décision fut rendue en un an ou moins. Dans 4% des cas (25 dossiers sur un total de 600) le délai fut de deux ans et plus. Si nous éliminons ces cas d'exception, le délai moyen passe de 345 à 319 jours, comme le souligne le tableau 3.

Il est possible d'enrichir notre analyse à l'aide du tableau 4 qui reprend les résultats de cinq études qui classifient les données brutes en quatre catégories ou phases: (1) la procédure de grief (de la formulation du grief à la décision de le soumettre à l'arbitrage); (2) le choix de l'arbitre (de la décision de le soumettre à l'arbitrage au choix d'un arbitre); (3) la détermination d'une date d'audition (de la sélection de l'arbitre à la tenue de l'audition); (4) la préparation de la sentence (de la fin de l'audition à la décision de l'arbitre). Quatre de ces études concernent le processus régulier d'arbitrage des griefs, alors que la cinquième nous donne l'occasion d'utiliser des données issues du processus d'arbitrage accéléré, en vigueur en Ontario (Rose 1986).

Dans le système normal d'arbitrage, cinq à sept mois sont consacrés au choix de l'arbitre ainsi qu'à la détermination d'une date d'audition. Le temps requis pour franchir ces deux étapes représente la moitié (en Ontario et aux États-Unis) ou presque les deux tiers (en Alberta) de la durée de l'arbitrage dans son ensemble. Les données concernant le Québec montrent une tendance presqu'identique à celle détectée en Alberta.

Il est évident, à la lecture du tableau 4, que la procédure accélérée ontarienne d'arbitrage des griefs fait réaliser aux parties une économie de temps appréciable au niveau du choix de l'arbitre et de la détermination de la date d'audition. En effet, ces deux étapes sont franchies en deux semaines dans le cadre de l'arbitrage accéléré. On note que ce système exerce cependant peu d'influence sur l'étape au cours de laquelle les parties sont susceptibles de régler elles-mêmes le litige, ainsi que sur la période de réflexion suivant l'audition et aboutissant à la sentence. En somme, le tableau 4 suggère que la durée totale du processus d'arbitrage des griefs pourrait être significativement abrégée si les parties parvenaient à choisir un arbitre plus rapidement et si la détermination d'une date d'audition était facilitée.

La seconde section évalue l'influence de certaines variables indépendantes. L'analyse repose essentiellement sur les données albertaines, colligées entre 1985 et 1988. Les variables retenues sont: le secteur (privé ou public), le type de tribunal (un seul arbitre ou un arbitre et deux assesseurs), le nombre d'avocats impliqués dans la cause, la charge de travail de l'arbitre, le type de la cause et le dispositif de la sentence. L'influence de ces facteurs est analysée au tableau 5.

Le processus d'arbitrage des griefs exige beaucoup de temps et cette tendance à l'extension des délais s'accentue. Dans les années 70, les parties passaient de la formulation du grief à la sentence en moins de sept mois. Vers le milieu des années 80, le processus exigeait une année pour atteindre son terme. Il est raisonnable de croire qu'entre autres choses, la complexité grandissante des cas soumis à l'arbitrage justifie l'extension des délais. Il convient néanmoins de s'interroger sur l'opportunité d'essayer de modifier une tendance qui, si elle est laissée à elle-même, conduira à un délai total anticipé de 18 mois vers le milieu des années 90 et de deux ans vers l'an 2 000. Bien que les spéculations sur l'avenir soient hasardeuses, la régularité de la tendance récente à l'extension des délais d'arbitrage n'en demeure pas moins une source de préoccupations.

Si l'on désirait réduire les délais indus, il faudrait agir sur les portions «compressibles» du cycle dans son ensemble. En effet, le processus d'arbitrage peut être scindé en trois étapes : (1) la procédure de traitement des griefs; (2) le choix d'un arbitre; (3) la détermination d'une date d'audition; (4) le stade final de la décision. Plus de la moitié de la durée totale requise par le processus est accaparée par la seconde et la troisième étape. Cela devrait retenir l'attention des parties intéressées; de fait il ne semble pas approprié de modifier la première ainsi que la dernière étape du processus.

En effet, il est avantageux de laisser aux parties la possibilité de résoudre leur différend entre elles, avant qu'il ne soit déféré à un arbitre. Bien que ces discussions informelles exigent des efforts et du temps, il demeure que la plus grande partie des litiges de ce type trouvent une solution au cours de cette phase initiale du processus. De la même façon, il est souhaitable de laisser à l'arbitre tout le temps requis pour peser le pour et le contre d'une décision. Il paraît plus approprié d'abréger les deux autres phases (le choix de l'arbitre et la fixation d'une date d'audition). Ces deux étapes pourraient être écourtées sans affecter la qualité du processus d'ensemble ou desservir les intérêts des parties.

Time Delays in Grievance Arbitration

Allen Ponak
and
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This paper examines the issue of time delays in grievance arbitration. Previous studies, as well as new data from the Province of Alberta, show that delays are increasing and that the average grievance takes approximately one year from its filing to its resolution by an arbitrator. Factors associated with delay include use of three person boards (versus sole arbitrators), sector, and type of issue. A conclusing section discusses the implications of these findings.

In 1970 the senior author of this paper took his first course in grievance arbitration from Professor Charles Killingsworth, who had recently completed a term as president of the National Academy of Arbitrators. In the introductory lecture, the many virtues of arbitration were extolled along with the criticism that arbitration was becoming too legalistic, too expensive, and too slow. Today, twenty years later, we too stand before our students extolling the many contributions grievance arbitration has made to dispute resolution in labour relations. We tell them it is a wonderful process except that it has become "too legalistic, too expensive, and too slow".

Has so little changed in twenty years? According to Kochan and Katz (1988: 306-307):

The two criteria most commonly employed to evaluate grievance procedures are the time taken and the costs associated with processing them to arbitration. These are reasonable criteria since the original purpose in developing the procedures was to find an expeditious and inexpensive substitute for court procedures. The parties themselves are increasingly concerned, however, over

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** The authors acknowledge the financial support of the Alberta Law Foundation, Alberta Energy Company, and the Alberta Labour Relations Board.

both the delays and the costs involved in following the procedure. Consider, for example, the following critique by John Zalusky, a staff member of the AFL-CIO:

"The traditional labor arbitration procedure has grown in complexity until today it is taking on the appearance of a courtroom procedure. The arbitration process is so large and cumbersome it is beginning to discourage industrial justice for two very basic reasons: cost and delay."

The problem of time delay, costs, and legalism are inter-related and have prompted numerous suggestions for remedies. Expedited arbitration procedures, grievance mediation, prohibition of lawyers, reduction in grievance steps, permanent umpires, and programs to increase the supply of arbitrators are just several ideas from a long list of solutions that have been proposed and utilized in one place or another (Gandz and Whitehead 1989). Many of these solutions, however, have been well known for many years, raising the question as to why the problems associated with arbitration persist (Edwards 1977).

The objective of this paper is to examine one particular criticism of grievance and arbitration procedures - *time delay*. Commenting on some of the consequences of delay, Rose (1986:. 33) stated:

The failure to resolve grievances in an expeditious manner can have significant consequences. For example, a backlog of grievances might result in wildcat strikes as employees try self-help to get their problems settled, without delay and without fees..... Frustrations over delays and the perception that grievance procedures were unfair contributed to wildcat strikes in the U.S. bituminous coal industry. In addition, a large backlog of grievances awaiting arbitration may spill over into formal contract negotiations.

Time delays may also create inequities. For the employee who is unjustly discharged and remains out of work for a substantial period, an award of backpay may not provide an adequate financial remedy.

It is evident to even the most cursory observer that the speedy resolution of disputes is not one of the hallmarks of the North American grievance arbitration system. In fact, as our paper will show, the average grievance that ultimately is resolved through arbitration takes a year to proceed from its origin to the arbitrator's award and the time period required has increased substantially over the past decade.

The majority of new data presented in this study was gathered from the Province of Alberta and from reported cases in Labour Arbitration Cases (L.A.C.), a Canada-wide reporting service. The Alberta data are based on all grievance arbitration cases filed in Alberta with the provincial Department of Labour between 1985 and 1988, inclusive; thus with the exception of cases which arbitrators may have neglected to file (estimated to be a small number) the Alberta sample contains the universe of cases. The Labour Arbitration Cases data, by comparison, represent only a small sub-set of arbitration cases across the country. The

editors of L.A.C. select only those cases worthy of publication. As a result, the L.A.C. sample may contain a higher proportion of novel, more complex, and thus, more time consuming, cases.

This paper is divided into three sections. The first section examines previous studies of time delays, comparing earlier patterns to the new data presented in this study. The second section focuses on time delays within the Alberta sample in order to investigate factors (e.g. type of issue, sector) associated with delay. The final section of the paper summarizes the main findings, tries to explain why delays persist, and, based on the findings, suggests ways in which delays may be reduced.

RESEARCH ON TIME DELAYS

Ten studies of the length of time it takes a grievance to go from the first step of the process to the last are reported in Table 1. It should be clearly noted that these studies only examined grievances that actually reached arbitration and in which an arbitrator rendered a decision. These studies do not include grievances that were resolved during the grievance process or before an arbitrator issued a decision. Of the ten investigations, three were carried out in Ontario, two in Alberta, one in British Columbia, two were Canada-wide (taken from Labour Arbitration Cases reporting service), and two were conducted in the United States. The research covers a period from 1966 to 1988.

Time delay in Table 1 is broken into two parts: (1) the number of days from the filing of a grievance to the holding of an arbitration hearing; and (2) the number of days from the end of the hearing to the issuance of an arbitration award. The total elapsed time from the filing of the grievance to the issuance of the award is also provided. The total number of days from the filing to the award is slightly greater than the sum of its reported parts (items 1 plus 2 above) due to missing data and the holding of multi-day hearings in 28 percent of the cases[1].

From the studies it can be seen that the most recent information indicates that approximately one year elapses from the time a grievance is filed until an arbitration decision is ultimately rendered. Moreover, the time is increasing: from 256 days in Ontario in the early 1970's to 342 days in the same province by 1983; from 214 days to 345 days in Alberta between 1975 and 1988; from 223 days in United States in 1975 to 345 days by the mid-1980's; and from 283 days to 428 days in cases cited in L.A.C. between 1975 and 1988

1 Where multi-day hearings occurred, the average time from the first hearing to the final hearing was 35 days. However, the median time lapse in multi-day hearings was only 5 days.

TABLE 1

Studies of Time Delays in Grievance Arbitration

Cases	*Ontario*[1] *1971-73 N=1661*	*Alberta*[2] *1973-75 N=102*	*U.S.*[3] *1975*	*L.A.C.*[4] *1975 N=215*	*B.C.*[5] *1966-81 N=2830*	*Ontario*[6] *1980 N=426*	*Ontario*[7] *1983 N=685*	*U.S.*[8] *1985-87 N=961*	*Alberta*[9] *1985-88 N=598*	*L.A.C.*[10] *1987-88 N=404*
Days Elapsed From:										
Grievance To Hearing	212	157	—	—	—	258	—	281	268	366
Hearing To Award	37	46	—	—	—	36	48	64	70	101
Total, Grievance To Award	256	214	223	283	240	301	342	345	345	428

(The total time elapsed may not equal the sum of the two parts due to missing information and multi-day hearings.)

1. Goldblatt, 1974
2. Fricke, 1976
3. Kochan and Katz, 1988 (Cited at p. 307)
4. *Labour Arbitration Cases,* Volumes (7(2d)-9(2d)
5. Stanton, 1983
6. Winter, 1983
7. Rose, 1986
8. Records of the Federal Mediation and Conciliation Service, 1988
9. Olson, 1990
10. *Labour Arbitration Cases,* Volumes, 28(3d)-34(3d)

Table 1 also clearly demonstrates that by far the most time is taken between the filing of the grievance and the holding of the hearing. Once the hearing is concluded, a decision is rendered relatively quickly. This time distribution is not surprising because a number of steps must be undertaken once a grievance is filed: the various levels of the grievance procedure must be followed, an arbitration board must be appointed, and a hearing scheduled. During this time, the parties continue to discuss the grievance, both formally and informally, in an attempt to resolve the matter. In Ontario for example, the internal grievance process, the selection of the arbitration board, and the scheduling of the hearing account for well over 250 days. In contrast, once the hearing is concluded, the matter is decided and the award issued in under 50 days (Winter 1983).

The arithmetic average disguises some interesting patterns, however. A more detailed analysis of the data (where available) shows that a small number of grievances takes an inordinate length of time, to some extent distorting the real situation. Goldblatt (1974) reported that a number of cases took more than 1000 days to complete and noted that the *median* elapsed time was almost two months less than the *mean* elapsed time. Winter's research (1983) showed the median time to be 30 days less than the mean time, a finding very similar to that observed in the American data.

TABLE 2

Distribution of Total Elapsed Time From Grievance to Award

	Proportion of All Cases	
Time Taken	*Alberta[1] 1985-88 (N=598)*	*L.A.C.[2] 1987-88 (N=404)*
Less than 3 months	2%	8%
3-6 months	14%	16%
7-9 months	24%	14%
10-12 months	26%	16%
13-15 months	12%	10%
16-18 months	10%	11%
19-21 months	5%	7%
22-24 months	3%	4%
More than 24 months	4%	14%
Mean	345 Days	428 Days
Median	308 Days	336 Days

Source
1. Olson (1990).
2. *Labour Arbitration Cases*, Volumes 28-34

The "distortion effect" of a few really lengthy cases can be observed more readily through a detailed breakdown of the Alberta and Labour Arbitration Cases data. Table 2 shows the proportion of L.A.C. and Alberta cases decided within various time periods. In Alberta, half the

cases were decided within 10 months (median of 308 days) and two-thirds within a year. Four percent of the cases (25 cases out of 600) took more than two years, however. If these cases are eliminated from the sample, the average elapsed time drops from 345 days to 319 days (Table 3).

TABLE 3

Elapsed Time: Effect of Very Lengthy Cases[1]

	Entire Sample		*Sample Without Very Lengthy Cases*	
	Mean	Median	Mean	Median
Alberta[2]	345	308	319	303
L.A.C.[3]	428	336	316	294

1. Very lengthy cases are defined as cases that take more than 2 years to complete.
2. Very lengthy cases account for 4 percent of Alberta sample.
3. Very lengthy cases account for 14 percent of L.A.C. sample.

The effect of the really lengthy cases is even more dramatic in the L.A.C. sample. Slightly more than half of these cases are decided within a year (median of 336 days), but fully fourteen percent take more than two years; thus, the average elapsed time is 428 days (Table 2). Removing the cases that take longer than two years and re-calculating elapsed time reduces the average to 316 days (Table 3), a result much more consistent with results obtained elsewhere.

The foregoing analysis raises the question of whether a relatively small number of very lengthy cases creates a misleading impression of what is really occurring in terms of how expeditiously cases are handled. Do the perceptions of those participating in arbitration become distorted by a few cases that take an inordinate amount of time to resolve?

Related to this question is the issue of *how many* very lengthy cases occur within any given jurisdiction. In Alberta, cases that took longer than two years accounted for only 4 percent of the total cases between 1985 and 1988. Yet, re-analyzing the sample without this small number of cases reduced the average elapsed time by one month. In the L.A.C. sample, by contrast, the very lengthy cases accounted for a much higher proportion of all cases - 14 percent; taking this much larger number of cases out of the sample reduced average elapsed time by almost four months. Fragmentary information (Stanton 1983; Goldblatt 1974; Winter 1983) suggests that the Alberta pattern of very lengthy cases (in which they account for only a small proportion of all cases) is much more typical of other jurisdictions than is the L.A.C. sample. Because of the potential of very lengthy cases to distort the overall picture of time delays in the arbitration process, it would be useful for

each jurisdiction to obtain information on the number of cases which go beyond two years.

In addition to knowing how many cases take an especially long time, it would be even more useful to know *why* certain cases take more than two years to complete. An analysis of Alberta cases showed several factors were responsible including: (1) awaiting the outcome of the grievor's case in another forum (e.g., courts, human rights tribunal); (2) awaiting the disposition of a similar or related grievance before another arbitrator; (3) allowing the grievor to complete a rehabilitation program (e.g. for substance abuse) before proceeding with the arbitration; and (4) the difficulties of one particular arbitrator with a large backlog of cases. Thus, with the exception of the last item, exceptionally long delays may actually advance rather than undermine good labour-management relations and may be mutually acceptable to the union and employers. These reasons do not apply to all cases, however. The long delay in a number of the cases simply reflected an unduly slow process in which the parties had trouble agreeing on an arbitrator, scheduling the hearing took an inordinate amount of time, and/or the arbitrator was extremely tardy with the decision. More detailed analysis of very lengthy cases needs to be undertaken to distinguish justifiable reasons for delay from less justifiable ones.

Additional insight into time delays is provided by Table 4 which uses data from five studies to disaggregate elapsed time into four periods: (1) grievance procedure (i.e. grievance filing to reference to arbitration); (2) arbitrator selection (i.e. reference to arbitration to selection of an arbitrator or arbitration board); (3) scheduling (i.e. selection of arbitrator to holding of hearing); and (4) preparation of decision (i.e., conclusion of hearing to issuance of award). Four of the studies report results from regular arbitration procedures (Federal Mediation and Conciliation Services 1988; Winter 1983; Olson 1990; Foisy 1991) while the fifth study, useful for comparative purposes, provides information on Ontario expedited arbitration (Rose 1986).

The results of Table 4 are instructive. Under normal arbitration systems, five to seven months are spent selecting the arbitrator and scheduling the hearing. The time spent in these two stages accounted for half (Ontario and U.S.) to almost two-thirds (Alberta) of the total elapsed time in the entire process. Quebec data show patterns similar to Alberta. While it may be argued that a certain amount of time is appropriately spent in going through the grievance procedure and in researching and writing the award, it is more difficult to justify the time that elapses squabbling over an arbitrator and scheduling the hearing.

TABLE 4

Elapsed Time in Various Stages of Grievance and Arbitration Process (in Days)

Stage	*Ontario*[1]	*Alberta*[2]	*United States*[3]	*Québec*[4]	*Ontario Expedited*[5]
Grievance Procedure	101	63	102	—	71
Arbitrator Selection	65	81	82	—	11
Scheduling	92	128	97	150	8
Preparation of Decision	36	70	64	70	23
Total	301	345	345	—	119

N.B. The total time elapsed may not equal the sum of the component parts due to missing data and multi-day hearings.

Source

1. Winter (1983)
2. Olson (1990)
3. Records of Federal Conciliation and Mediation Services, 1988
4. Foisy (1991)
5. Rose (1986)

The contrast in this regard between regular and expedited arbitration is striking. It is evident in Table 4 that expedited arbitration's real time savings are in arbitrator selection and scheduling of the hearing. These two stages were accomplished in just two weeks under Ontario's expedited system. On the other hand, even under expedited procedures, considerable time is spent by parties in the actual grievance procedure and arbitrators still need some time to prepare the decision. In short, the data in Table 4 confirm the process could be speeded up considerably if the parties were able to choose arbitrators more quickly and if a way was found for more efficient scheduling of cases.

FACTORS ASSOCIATED WITH DELAY

In this section of the paper, factors that might be systematically related to elapsed time are investigated. This analysis is based mainly on the Alberta data collected between 1985 and 1988. Findings from other studies, as well as information gathered from L.A.C. cases, are cited as appropriate. The factors chosen for analysis are: sector, forum, number of lawyers, arbitrator caseload, issue, and outcome. The results are reported in Table 5.

Sector Grievances filed in the Alberta public sector (health, education, local and provincial government) take two and a half months

longer to reach an arbitration decision than do grievances in the private sector (Table 5). Most of the difference in elapsed time between the two sectors occurs in moving the grievance from filing to a hearing. More time is spent in the public sector in progressing through the grievance procedure and public sector unions and employers take twice as long as their private sector counterparts in agreeing to and notifying the arbitrator. In the L.A.C. sample, public/private sector differences were even more pronounced, with public sector grievances taking more than five months longer to resolve than private sector grievances (508 days versus 345 days).

TABLE 5

Factors Associated with Time Delays: Alberta Cases 1985-1988

Variable	*Mean Elapsed Time (Days)*
Forum	
Sole Arbitrator	284.1***
3-Person-Board	360.9
Sector	
Private	297.1***
Public	373.1
Arbitrator Case Load	
Higher Volume	350.6
Lower Volume	340.0
Issue	
Discharge	289.9***
Non-Discharge	366.1
Outcome	
Grievance Dismissed	353.2
Grievance Upheld	334.5
Lawyers (3 person board)	
Four or more	348.5
Three or less	366.2
Lawyers (single arbitrator)	
Two/Three	282.0
One or none	294.1

*** $p < .001$
** $p < .01$
* $p < .05$
Analysis utilized two-tail T- test for difference-of-means.

There are several possible explanations for arbitration taking so much longer in the public sector than in private sector. First, management decision-making tends to be more centralized and bureaucratic in the public sector; the process is slowed until the ultimate decision-maker can become involved. Second, observers have noted the tendency of large public sector unions to mirror the bureaucratic structures of the employer whose staff they have organized. One union representative stated that "when we get a grievance, it just goes to the bottom of the pile and waits

its turn". Third, because many public sector unions represent employees who cannot legally strike, use of the grievance procedure and arbitration provide alternative ways of expressing militancy. This may produce a greater volume of grievances, leading to bottlenecks and a slower process.

Forum In Alberta more than three-quarters of all arbitrations take place in front of three person boards; less than 25 percent of cases are heard by a sole arbitrator. The use of three persons is much more pronounced in Alberta than elsewhere. In Ontario, prior to establishment of expedited arbitration procedures, about 60 percent of arbitrations went to three person boards (Winter 1983; Rose 1986), in British Columbia until 1981, cases were almost equally divided between sole arbitrator and three member boards (Stanton 1983), and in only 40 percent of the L.A.C. cases were three member boards used.

Consistent with the results of every previous study of arbitration time delays (see, for example, Winter 1983; Ponak 1987; Stanton 1983), Table 5 shows that three person arbitration boards significantly slow the process. In Alberta, the difference amounted to two and a half months in total, with most of the extra time spent moving from the grievance to the hearing. Other studies report time differences between sole and three person arbitrations ranging from 30 days (Goldblatt 1974) to an astounding 240 days in the L.A.C. sample.

Such results are predictable. Scheduling a hearing which will involve two additional busy people (as is the case where a tripartite board is used) will *ceteris paribus* be more time-consuming. As well, after the hearing is completed, the chairman of a tripartite board must circulate a draft decision to the other two board members for review and comment.

The preference for three person boards in Alberta (as well as other jurisdictions) is even more striking considering that there is no significant difference in outcomes between single arbitrators and three person boards. An analysis of the Alberta cases showed that three person boards dismissed 50 percent of the grievances before them; sole arbitrators dismissed 46 percent. The four percent difference was not statistically significant. The lack of outcome differences between tripartite boards and sole arbitrators has also been found in other jurisdictions (Rose 1986).

Lawyers One suggestion that has been made for reducing time delays is removing lawyers from the process. The suggestion is rooted in an assumption that lawyers, as a function of their training, are likely to be more formal and legalistic in their approach to grievance arbitration and that this legalism and formality will lengthen the entire process.

Data from the Alberta sample indicate that the suggestion that lawyers slow the process is unsubstantiated. Elapsed time was examined on the basis of the number of lawyers involved in the case. In situations where a sole arbitrator is used, the number of lawyers involved in the case can vary from zero to three. The analysis shows no systematic relationship between the number of lawyers and the elapsed time. In fact, elapsed time proved greatest when *no* lawyers were involved in the case.

A similar pattern (or absence of pattern) is observable for those cases where an arbitration board is appointed. In this situation the number of lawyers can vary from none to five. Again, there is no systematic relationship between elapsed time and the number of lawyers used and again the greatest time delay occurred when no lawyers were involved.[2]

In short, while lawyers provide ready scapegoats for the ills that beset the arbitration process, the evidence in Alberta is convincing that the use of lawyers does not slow the grievance arbitration process.

Issue Discharge cases comprised slightly more than one-quarter of all the arbitration cases filed in Alberta between 1985 and 1988. Consistent with findings in other jurisdictions (Stanton 1983; Rose 1986), discharge cases were dealt with more swiftly than other types of cases. Not only is the grievance brought to a hearing more quickly (by about a month), but the decision is issued more quickly as well.

In total, discharge cases in Alberta take two and a half months less time than non-discharge cases. This "faster" resolution must be put into perspective, however, as it still takes almost 10 months from the time an employee is terminated until an arbitration award is issued. Analysis of the L.A.C. sample showed a similar, but more pronounced, trend. Discharge cases (329 days) were completed almost five months sooner than non-discharge cases (475 days).

Outcome An Ontario study of discharge cases in the 1970's noted a relationship between elapsed time and grievance outcome. According to George Adams (1978), a grievor's chance of winning reinstatement declined with the passage of time; in other words, arbitration took longer when the grievance was dismissed. Other research, however, has failed to find a similar pattern, either for discharge[3] (Ponak 1987; Barnacle 1991) or grievances in general (Stanton 1983).

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2 For sole arbitrators the breakdown was as follows: no lawyers – 375 days; 1 lawyer – 262 days; 2 lawyers – 309 days; 3 lawyers – 271 days. For arbitration boards: no lawyers – 403 days; 1 lawyer – 312 days; 2 lawyers – 370 days; 3 lawyers – 375 days; 4 lawyers – 335 days; 5 lawyers – 372 days.

3 Barnacle (1991) seems to suggest in his discussion that there is some relationship between time lapse and outcome. However, his own data in Table 26 belie those conclusions.

Findings from the Alberta data also fail to establish a relationship between grievance outcome and elapsed time. Although elapsed time for grievances that were dismissed was slightly greater than the elapsed time for grievances that were upheld (either partially or fully), the difference (approximately two and one half weeks) was too small to be statistically significant. Thus, based on the data in this study, it cannot be said that the arbitration process takes longer for losing grievances than for successful ones. This result is consistent with the preponderance of evidence on this issue; with the exception of the Adams study, no other researchers have been able to find a systematic relationship between time delays and the disposition of the case.

Caseload It is unclear whether an arbitrator's caseload will affect the speed with which cases are handled. On the one hand, it might be suggested that a heavier caseload will lead to more time being taken as the arbitrator becomes swamped by the volume of work. Alternatively, it might be just as plausibly assumed that a significant volume of cases forces administrative efficiencies, thus enhancing the arbitrator's ability to deal with cases in an expeditious manner. If this is true, a heavier caseload would be associated with less delay.

The results of the analysis showed that higher volume arbitrators (50 or more cases in the period under review) were slower by approximately 10 days in terms of overall elapsed time but were a little more expeditious at getting the award out once the hearing was completed (4 day difference). In neither case, however, were the differences statistically significant. Thus, the data do not support conclusively either of the two competing hypothesis regarding the effect of caseload. However, as a practical matter, the results suggest that choosing a busier arbitrator does not have the effect of delaying the process, a potentially important consideration.

To summarize, the analysis of factors that might be associated with time delay showed:

(1) Grievances are resolved much more quickly in the private sector than in the public sector.

(2) Cases with three person boards (versus sole arbitrators) took almost three months longer to complete.

(3) The number of lawyers involved in the process has no effect on elapsed time.

Barnacle also does not provide any statistical tests, a shortcoming of the earlier Adams (1978) work.

(4) Discharge cases are resolved more quickly than non-discharge cases.

(5) Elapsed time and outcome are not related.

(6) Heavy arbitrator caseload does not increase elapsed time.

DISCUSSION

The preceding analysis probably reveals little that was not already suspected. The grievance arbitration process is a lengthy one and it is becoming longer. In the 1970's, labour, management, and arbitrators were capable of moving a grievance from initiation to a decision inside seven months; by the middle 1980's, the process had stretched to a year. There may be valid reasons for the extension of the process, including, perhaps, the increasing complexity of issues, but it is necessary to ask whether the current trend must inevitably lead to 18 month long cases by the mid-1990's and two year cases as the norm by the year 2000. Although it is dangerous to project the future based on the past, the patterns seen to date give cause for concern.

The results of the study suggest some possible solutions, however. It is clear that the major participants are capable of moving cases forward more quickly if they wish to do so. Discharge cases are handled more swiftly than non-discharge cases. Can some of the procedures applied to discharge cases be transferred to other issues? As well, labour and management in the public sector seem to have particular difficulty in moving matters ahead swiftly. But, if the private sector has learned how to be faster, why cannot the public sector?

The most obvious way to save time without a drastic overhaul of the system is to use sole arbitrators much more frequently. The data confirm what almost everyone associated with arbitration knows - use of a three member board delays the process. Scheduling is not an additive process; each additional person who must be scheduled increases the complexity exponentially. Three member boards also are slower at getting the award out once the hearing is completed.

Certainly there is some sentiment in favour of retaining three member boards. Each party to the grievance takes comfort in the fact that it has a representative on the arbitration board, presumably to help the chairperson to reach the "right" decision and to ensure that he or she does not stray too far afield in the written award. The latter justification may be valid in the case of inexperienced arbitrators but is much more difficult to rationalize if the chairperson is experienced. As to the belief that a nominee can influence the outcome, the data from Alberta, as well as work in Ontario, show no difference in outcome attributable to use of a

three person board versus a sole arbitrator. If the parties are truly serious about reducing delay, three person boards should be reserved for only the most exceptional cases requiring technical expertise.

Besides factors capable of reducing delay, this paper also identified factors that, conventional wisdom notwithstanding, do not contribute to delay. The foremost shibboleth is that lawyers are responsible for delay and that reducing the number of lawyers involved in arbitration will expedite the process. The data provide no support for this proposition. Also without support is the notion that the busiest arbitrators become backlogged and are slower than their colleagues who are less in demand. Our data suggest that the parties do not delay the process by limiting their appointments to the relatively small number of highly acceptable arbitrators.

If the length of the overall process is to be reduced, this study pointed to the most promising place for the reduction to occur. It is useful to break the process into four distinct phases: (1) the grievance procedure stage; (2) the arbitrator selection stage; (3) the scheduling stage; and (4) the decision stage. Over half of the elapsed time takes place in the middle two stages and it is here that the parties ought to direct their attention. The other two stages, particularly the grievance procedure phase, probably should be tampered with the least. There is great value in allowing the two parties to attempt to resolve the matter before the arbitration process; even if such discussions are time-consuming, the fact that the vast majority of grievances are resolved at this stage (Gandz and Whitehead, 1989) suggests that the time spent is worthwhile. Similarly, value is also derived by allowing the arbitrator appropriate time to carefully consider the merits of the case and to render a decision. A rushed decision may not necessarily be a good decision.

Less value is derived from the time spent choosing an arbitrator and then scheduling the hearing. These two stages could be shortened considerably without damaging the process or harming the interests of any of the participants. With respect to choosing an arbitrator, collective agreements could list arbitrators, with selection taking place in a set rotation or at random. The list of acceptable arbitrators is not long to begin with; placing half a dozen acceptable names in the agreement may reduce time consuming wrangling and shorten the process by as much as two months. Canadian jurisdictions would also benefit from the development of non-governmental agencies like the National Academy of Arbitrators and the American Arbitration Association to which the parties could turn for the expeditious appointment of an experienced arbitrator.

Scheduling, on the other hand, will always be a problem as long as the parties are reluctant to forego their preferred counsel (who usually are

busy) or place their fate in the hands of the first available arbitrator. It is possible, however, for the parties to have the arbitrator and counsel they want and a more expeditious process if they are willing to have cases heard by sole arbitrators rather than three person boards. The single best way to reduce the time spent getting to the hearing is to eliminate three person boards.

Knowing where possible solutions lie is still a large step away from implementing them. The grievance arbitration process attempts to serve a number of different roles and it is not clear that these roles are always compatible. For the individual employee who has a legitimate belief that his or her rights under the contract have been violated, filing a grievance is a way of seeking justice in the workplace. Such an employee is likely to want a decision next week, not next year. In this case, justice delayed may well appear synonymous with justice denied.

For management and the union, the grievance procedure can often fulfill a problem-solving function. Recurring questions about the meaning or application of particular parts of the collective agreement can be discussed and resolved in the grievance process. Issues that cannot be solved in a mutually satisfactory manner can be taken to arbitration. Problem-solving requires time; rushing the process too much may well interfere with the ability of the parties to use the grievance procedure in a constructive fashion.

But labour-management relationships also contain an adversarial element. It would be surprising if the grievance arbitration process was not used to further the partisan objectives of one side or the other. If, in a given situation, either party can gain a partisan advantage from delay, there will exist little incentive to expedite the process. Substantial delay becomes almost inevitable.

The hard decision for labour and management is to determine which of the multiple functions (justice for the individual; problem-solving; partisan advantage) of the grievance arbitration process is most valuable. Changes designed to enhance the role of individual justice may well differ from changes implemented to foster problem-solving. Further, if the main focus of the parties is the strategic use of the grievance arbitration procedure to advance partisan objectives, then perhaps the current process, time delays and all, may be acceptable. The parties would do well, however, to ask whether the strategic use of arbitration might jeopardize other, potentially more valuable, functions of the grievance process.

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La progression des délais en arbitrage des griefs

Le but de notre exposé est d'analyser le bien-fondé de l'une des critiques adressées le plus fréquemment au processus d'arbitrage des griefs, soit les délais indus.

La première section constitue un retour sur quelques études portant sur ces délais, dont nous confrontons les résultats à des données nouvelles. La seconde section s'intéresse plus précisément au cas albertain afin de mettre en lumière des variables exerçant une influence significative sur l'étendue des délais, comme par exemple le type de grief. La dernière partie du texte résume les résultats de nos analyses, tente d'expliquer la persistance des délais et sur cette base, suggère des moyens visant à les abréger.

Le lecteur trouvera au tableau 1 des données tirées de dix études portant sur le temps écoulé entre la formulation d'un grief et la sentence arbitrale qui en dispose. Ces études ne tiennent compte que des griefs ayant donné lieu à une sentence arbitrale. Des analyses les plus récentes, il appert qu'approximativement une année s'écoule entre la formulation du grief et la sentence. On constate de plus que ces délais ont tendance à s'allonger: de 256 jours en Ontario, au début des années 70, à 342 jours dans la même province en 1983; de 214 à 345 jours en Alberta entre 1975 et 1988; de 223 jours aux États-Unis en 1975 à 345 au milieu des années 80; et finalement de 283 jours à 428 dans les causes citées par *Labour Arbitration Cases* (L.A.C.) entre 1975 et 1988. Le tableau 1 indique clairement que la portion la plus importante du délai global se situe entre la formulation du grief et la tenue de l'audition. En effet, une fois que cette dernière a eu lieu, la sentence est rendue assez rapidement.

La moyenne arithmétique masque certaines caractéristiques intéressantes des données. Une analyse plus détaillée de celles-ci indique qu'un petit nombre de cas associés à des délais exceptionnellement longs induisent une distortion dans l'image reflétée par la moyenne. Cet effet de distortion devient apparent si l'on ventile les données albertaines, ainsi que celles tirées de L.A.C., selon la durée du délai total de traitement. Le tableau 2 indique qu'en Alberta, dans la moitié des cas, une sentence arbitrale fut rendue en dix mois et moins (médiane 308 jours) et que dans les deux tiers des cas, une décision fut rendue en un an ou moins. Dans 4% des cas (25 dossiers sur un total de 600) le délai fut de deux ans et plus. Si nous éliminons ces cas d'exception, le délai moyen passe de 345 à 319 jours, comme le souligne le tableau 3.

Il est possible d'enrichir notre analyse à l'aide du tableau 4 qui reprend les résultats de cinq études qui classifient les données brutes en quatre catégories ou phases: (1) la procédure de grief (de la formulation du grief à la décision de le soumettre à l'arbitrage); (2) le choix de l'arbitre (de la décision de le soumettre à l'arbitrage au choix d'un arbitre); (3) la détermination d'une date d'audition (de la sélection de l'arbitre à la tenue de l'audition); (4) la préparation de la sentence (de la fin de l'audition à la décision de l'arbitre). Quatre de ces études concernent le processus régulier d'arbitrage des griefs, alors que la cinquième nous donne l'occasion d'utiliser des données issues du processus d'arbitrage accéléré, en vigueur en Ontario (Rose 1986).

Dans le système normal d'arbitrage, cinq à sept mois sont consacrés au choix de l'arbitre ainsi qu'à la détermination d'une date d'audition. Le temps requis pour franchir ces deux étapes représente la moitié (en Ontario et aux États-Unis) ou presque les deux tiers (en Alberta) de la durée de l'arbitrage dans son ensemble. Les données concernant le Québec montrent une tendance presqu'identique à celle détectée en Alberta.

Il est évident, à la lecture du tableau 4, que la procédure accélérée ontarienne d'arbitrage des griefs fait réaliser aux parties une économie de temps appréciable au niveau du choix de l'arbitre et de la détermination de la date d'audition. En effet, ces deux étapes sont franchies en deux semaines dans le cadre de l'arbitrage accéléré. On note que ce système exerce cependant peu d'influence sur l'étape au cours de laquelle les parties sont susceptibles de régler elles-mêmes le litige, ainsi que sur la période de réflexion suivant l'audition et aboutissant à la sentence. En somme, le tableau 4 suggère que la durée totale du processus d'arbitrage des griefs pourrait être significativement abrégée si les parties parvenaient à choisir un arbitre plus rapidement et si la détermination d'une date d'audition était facilitée.

La seconde section évalue l'influence de certaines variables indépendantes. L'analyse repose essentiellement sur les données albertaines, colligées entre 1985 et 1988. Les variables retenues sont: le secteur (privé ou public), le type de tribunal (un seul arbitre ou un arbitre et deux assesseurs), le nombre d'avocats impliqués dans la cause, la charge de travail de l'arbitre, le type de la cause et le dispositif de la sentence. L'influence de ces facteurs est analysée au tableau 5.

Le processus d'arbitrage des griefs exige beaucoup de temps et cette tendance à l'extension des délais s'accentue. Dans les années 70, les parties passaient de la formulation du grief à la sentence en moins de sept mois. Vers le milieu des années 80, le processus exigeait une année pour atteindre son terme. Il est raisonnable de croire qu'entre autres choses, la complexité grandissante des cas soumis à l'arbitrage justifie l'extension des délais. Il convient néanmoins de s'interroger sur l'opportunité d'essayer de modifier une tendance qui, si elle est laissée à elle-même, conduira à un délai total anticipé de 18 mois vers le milieu des années 90 et de deux ans vers l'an 2 000. Bien que les spéculations sur l'avenir soient hasardeuses, la régularité de la tendance récente à l'extension des délais d'arbitrage n'en demeure pas moins une source de préoccupations.

Si l'on désirait réduire les délais indus, il faudrait agir sur les portions «compressibles» du cycle dans son ensemble. En effet, le processus d'arbitrage peut être scindé en trois étapes : (1) la procédure de traitement des griefs; (2) le choix d'un arbitre; (3) la détermination d'une date d'audition; (4) le stade final de la décision. Plus de la moitié de la durée totale requise par le processus est accaparée par la seconde et la troisième étape. Cela devrait retenir l'attention des parties intéressées; de fait il ne semble pas approprié de modifier la première ainsi que la dernière étape du processus.

En effet, il est avantageux de laisser aux parties la possibilité de résoudre leur différend entre elles, avant qu'il ne soit déféré à un arbitre. Bien que ces discussions informelles exigent des efforts et du temps, il demeure que la plus

grande partie des litiges de ce type trouvent une solution au cours de cette phase initiale du processus. De la même façon, il est souhaitable de laisser à l'arbitre tout le temps requis pour peser le pour et le contre d'une décision. Il paraît plus approprié d'abréger les deux autres phases (le choix de l'arbitre et la fixation d'une date d'audition). Ces deux étapes pourraient être écourtées sans affecter la qualité du processus d'ensemble ou desservir les intérêts des parties.