

A Reply

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The commentary by Reuben Hedlund and Deborah Paskin¹ on my article, "An Arbitrator Looks at Expediting the Large, Complex Case,"² appears generally positive and approves most of the procedures and approaches employed by the arbitrators in the immense case in question. However, as to the arbitrator's approach to discovery and possible settlement, Mr. Hedlund and Ms. Paskin are somewhat more critical. I feel compelled to give some rejoinder.

On the very important matter of discovery in arbitration, Mr. Hedlund, Ms. Paskin, and I are, it seems, in general agreement on basic principles that I believe can be fairly summarized as follows: a principal virtue of arbitration is its informality, which minimizes costs by avoiding or limiting many of the potentially time-consuming and burdensome procedures that have grown up in and around courtroom litigation. Discovery is one such procedure; it is expensive, time-consuming, divisive and often subject to abuse. In arbitration, discovery should be avoided, where possible, or held to a minimum -- especially in cases in which both sides have access to a great deal of basic information. This appears to be the conventional view with which I am in full agreement.

I nonetheless believe that defense counsel's criticism of the arbitrators' "liberal" discovery approach in this case is misplaced. In determining to take a liberal approach to discovery in a case in which, in the words of Mr. Hedlund and Ms. Paskin, "both parties had tons of information available in their own files, and had equal resources, and sophistication,"³ the arbitrators did not perceive that they had "sent an open invitation to counsel to crank up

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1. Hedlund & Paskin, *Another View of Expediting the Large, Complex Case: A Response to Arbitrator Gorske from Counsel for the Defense*, 6 OHIO ST. J. ON DIS. RES. 61 (1990).

2. Gorske, *An Arbitrator Looks at Expediting the Large, Complex Case*, 5 OHIO ST. J. ON DIS. RES. 381 (1990).

3. Hedlund & Paskin, *supra* note 1, at 61.

the discovery machine."⁴ On the contrary, because of the availability to both sides of great amounts of information, equal resources and equal sophistication, the arbitrators assumed that discovery would be used judiciously and economically by the parties and would be tailored to meet their needs for information. The arbitrators also assumed that if one party desired a more comprehensive approach to discovery to obtain necessary information and was willing to incur the additional expense, its decision deserved at least some deference from the arbitrators -- especially in view of the obvious capacity and resources for retaliation available to each party in the event of perceived abuse or harassment.

The discovery in the case was closely supervised by the arbitrators on those numerous occasions in which that supervision was requested. Decisions on the many discovery issues raised were typically issued by telefax within hours of their submission. The arbitrators were constantly sensitive to the potential for abuse and harassment and were not tolerant of that kind of conduct, when demonstrated, even to the extent of imposing sanctions in the final award. However, the most significant discovery objections raised were those based on privilege, attorney work product, and similar law-oriented objections (as opposed to fact-oriented claims such as burdensomeness). As to these law-related objections, the arbitrators took a liberal approach, favoring discovery while giving due respect to the policies underlying the relevant legal principles. Objections based on alleged burdensomeness or harassment were rare occurrences in the proceeding, and even rarer was such an objection supported by contrasting the estimated cost of compliance with the presumed benefits to the other side of production of the requested information. Indeed, the format of the sometimes broad-scaled discovery approaches taken by both parties appeared to place the greater burden on the party requesting the discovery (who had to go to the considerable expense of digesting and processing the materials produced) and the lesser burden upon the other party (who merely had to assemble and produce the requested materials).

The discovery process produced numerous documents that were presented by the parties as exhibits -- some being of considerable interest to the arbitrators. In fact, the arbitrators are of the view that the exigencies of the case were such that discovery of much of the material in question would inevitably have been required in any event. Even if the arbitrators had expressed the intent at the outset of the case to take a generally restrictive approach to discovery, there is no doubt in my mind that fairness would have required much (though, perhaps not all) of the discovery in the case.

4. *Id.* at 71.

Contrary to the opinion of Mr. Hedlund and Ms. Paskin, my perception is that discovery was not "used to frame the issues"⁵ in the case. The principal *issues* resolved in the award were almost precisely the limited number of issues set out by the parties two and one-half years earlier in their preliminary statements. Discovery appeared to influence the *evidence* presented (which, by itself, suggests the discovery's appropriateness) without significantly prolonging the hearing itself, except insofar as it provided a basis for challenge by one party to the evidentiary representations of the other. In this connection it should be noted that it took seventeen months (seventy-four hearing days) for presentation of the principal claimant's direct case, a large portion of which was taken up by extensive and comprehensive cross-examination. Had it been necessary to conduct discovery in preparation for cross-examination during the hearing itself, and in the course of cross-examination, I have no doubt that the total hearing would have been considerably more protracted. Nor could that protraction have been avoided by the simple expedient of setting rigid time limits. The amounts seriously in controversy were so great, and the factual presentations so complex and compartmentalized, that fairness could not have been accomplished through any process that imposed early time restraints either on the direct presentation or on cross-examination. The arbitrators simply had no reliable way of determining what restraints could reasonably be imposed without improperly impeding the fair presentation of the basic evidence. Time restraints were determined to be appropriate later in the case (when the arbitrators knew enough about the evidence to make a defensible decision), and were, in fact, profitably imposed.

Would this case have taken significantly longer and cost significantly more had it been fully handled in the court system? Based upon their undeniably extensive and very relevant experience, Mr. Hedlund and Ms. Paskin do not think so, and even express surprise that the case did not take longer than they estimate it would have in court. Based on my own experience in protracted cases involving similar issues in administrative tribunals and my own experience in civil litigation, I am still of the opinion that, in the final analysis, the process (expensive and harrowing though it was) did save both parties time and money. We will never definitively know whose impression is more accurate, but I am intrigued by the experience of the parties to the various court and administrative agency disputes involved in the South Texas Project nuclear litigation.⁶ Those disputes were going on at the same time as our arbitration and, in some respects, bore considerable similarity to the

5. *Id.*

6. See generally H. Kelly, *South Texas Project Nuclear Litigation*, paper presented to Edison Electric Institute Legal Committee, at Birmingham, Ala. (Oct. 12-14, 1989).

disputes in our case. According to reports, the cost to the parties involved, in terms of money, time, and other resources, has been nothing short of enormous, and has to date amounted to many times the very large cost burdens sustained by the parties in our case.⁷

As far as the matter of the arbitrators' role in settlement is concerned, I read defense counsel's commentary as suggesting that the arbitrators would have been more helpful in this area if they had given some preliminary indication at the hearing of their views about which side was more likely correct on specific issues of fact and law. I am sure both parties would have found that approach of great interest and, probably, unsettling. But the arbitrators see this somewhat differently: their view is that determinations should not be made until an issue has been fully heard and that an open mind should be retained until it is clear that both sides' positions and arguments have been fully and fairly heard. Indicating at some early or middle stage of the proceeding which way the arbitrators are leaning would, at a minimum, create an impression of prejudgment and, worse yet, might have untoward and unintended results in influencing the future presentation of evidence (to the possible prejudice of a party who may have misread that indication). Furthermore, an indication of even a preliminary determination would tend to fix that determination, since arbitrators do not want to appear mercurial or indecisive. In any case, withholding judgment until an appropriate time is sometimes quite difficult, but is a part of the essence of fairness and equity in any kind of contested proceeding. Additionally, I believe that the position of an arbitrator, in this respect, is different from that of a judge in civil litigation in that the opportunity for appeal is much more limited in arbitration, with perhaps a greater consequent need to avoid premature determinations.

As to the lack of success of the mini-trial suggested by the arbitrators, I do not believe that failure of the parties to settle can be convincingly attributed to the fact that the mini-trial took place after the arbitration hearing had begun and the parties' positions had hardened. After all, many cases -- especially important and complex ones and, particularly, ones of sufficient unpredictability to cause experienced and competent counsel "some sleepless nights right to the end"⁸ -- are settled during the course of trial, before the jury returns its verdict, or even after an appeal is taken. There is, however, at least one other element to be considered. In cases in which the parties have difficulty in getting along with each other and in which there are powerful political considerations, it is extremely desirable to have a mutually

7. *Id.* at 7, 11-12. See also *Houston Lighting & Power Co. seeks \$65 million for legal tab*, Wall St. J., Nov. 8, 1989, at B8, col. 4 (Legal Beat).

8. Hedlund & Paskin, *supra* note 1, at 69.

accepted and respected neutral to facilitate the discussions, to focus the parties on the relevant issues, to keep the parties physically together, to help them to assess their respective positions, and to counteract some of the inevitable extraneous influences that often conspire to prevent compromise by the parties. The parties here did not use a neutral. It may well have made a difference.

While not taking credit as "one of the principal architects"⁹ of the Rules and Commentary issued by the Center for Public Resources (CPR), I nevertheless share the enthusiasm of Mr. Hedlund and Ms. Paskin for the CPR Rules.

Finally, to the credit of the arbitration process itself, it bears repeating that the fact that, through arbitration, this extremely significant, and enormously complex, case could be resolved completely, expeditiously, and to the expressed satisfaction of both parties is, I think, truly remarkable. I and my fellow arbitrators, Jay Halverson and Louis Rubino, are very pleased to have been participants in the process.

9. *Id.* at 63. Mr. Hedlund and Ms. Paskin give me rather too much credit in describing me as "one of the principal architects" of the Rules and Commentary for the Non-Administered Arbitration of Business Disputes issued by the Center for Public Resources following conclusion of the case in question. While I was a member of the CPR committee and did indeed participate in its work on the Rules and Commentary, and while some of the procedural problems encountered during the case did have a considerable influence on the discussions leading to the Rules and Commentary, much more of the credit for the final product belongs to Gerald Aksen of Reid & Priest, chairman of the committee; Peter Kaskell, CPR Senior Vice President; Robert von Mehren of Debevoise & Plimpton; and other members of the committee who made significant contributions.

