

Hello NWP Reps and Members;

Welcome to LR Chronicles number 13. This is part 4 of the full and complete explanation of "The Arbitration Process." The last LR Chronicles explained the final coordination that takes place between the Union's case advocate and the agency's case advocate PRIOR to the actual hearing. In this version, I will explain the time the Union's advocates expend in preparation for the hearing, to conduct the hearing as well as post hearing. I will explain from where this time comes, i.e., whether it is annual leave, credit hours, comp time, official time, etc. I will also explain how the witnesses are granted time to testify and from where that time comes.

Regarding the Union's case advocate(s), if you remember in LR Chronicles number 11, there are two (2) case advocates for the Union, the First Seat and the Second Seat. Unfortunately, due to our contractual language, the Second Seat in an arbitration hearing does not receive any time at all in order to prepare for, conduct, or do anything post hearing. The applicable contractual language appears in Article 9, Section 10 of the CBA, which states **"The Union advocate, if an employee of the FAA shall be granted eight (8) hours of official time for preparation for the hearing."** Since this language appears in the singular, the second seat must be on their own time, annual leave, credit hours used, or comp time used. The First Seat however, receives eight hours of official time for preparation if they are an employee of the FAA. Often times, our NATCA National employees are the first seat at a hearing. Since they are employees of NATCA and not employees of the FAA, no official time from the agency is necessary. Of course, NATCA National sends our employees to the hearing in order to prepare and conduct the hearing.

Continuing reading Article 9, Section 10 of the CBA, it states **"Additional release time may be granted unless prohibited by operational requirements. Such time may be annual leave, earned compensatory time, leave without pay or a combination thereof."** Therefore, the Union's case advocate, if an FAA employee, receives a guaranteed eight hours of official time and they also receive as much of their own time that the FAA can get them off the schedule. This latter time is not guaranteed, but is subject to the caveat of operational requirements, which is defined in Article 99 of the CBA. Please keep in mind that this

time is just for the preparation for the hearing and does not include any time for conducting the hearing or anything post hearing. The CBA does not carve out specific allotments of official time, or any other release time, for a grievant or a witness to prepare for the hearing. However, the Union's advocates are generally able to coordinate an arrangement with management. The time associated with preparation will be discussed shortly.

Depending on the type of case, it typically takes one to two weeks to properly prepare for a case. Some of the items that a case advocate does to prepare for one case include:

- Determining who our witnesses are and to what they will testify
- Developing questions for each of the Union's witnesses (Direct examination)
- Developing questions for the agency's witnesses (Cross examination)
- Conducting all appropriate research regarding the case; i.e., case law, FLRA and/or MSPB decisions
- Developing opening statement and/or closing argument
- Making copies of all appropriate and/or relevant documentation
- Developing the issue or issues
- Developing the stipulations, if any

As you can see, eight hours of official time, plus any additional release time is just not enough time to properly prepare for an arbitration hearing. Our arbitration advocates are dedicated activists and use much of their own time, including RDOs, in order to be advocates for arbitration.

Article 9, Section 10 also states **"The grievant and/or the Union advocate shall be given a reasonable amount of official time to present the grievance."** This is the time that the grievant and the Union advocate receive in order to conduct the actual hearing. As I stated in my last LR Chronicles, the grievant has a right to face his/her accuser. Therefore, the agency is required to get them both off of the schedule for however long it takes to conduct the hearing. All of this time is official and/or duty time. Neither of them is required to expend their own time in order to be present at and to conduct the hearing.

After the preparation for the hearing and after the actual hearing takes place, there is one more issue that the Union's case advocate must complete in order for the Arbitrator to render their decision. A summation of the hearing is typically handled in one of two ways:

- Conduct a closing argument at the very end of the hearing; or
- Submit a Post Hearing Brief to the Arbitrator after the close of the record

This decision is done in coordination and agreement with the agency's advocate. If the advocate's elect to conduct a closing argument, this is done on official time because it is done at the actual hearing, after all testimony and evidence is presented, and prior to the close of the record. However, if the advocate's elect to submit a Post Hearing Brief, there is actual contractual language in Article 9, Section 10 that states **"If the Union advocate elects to submit a Post Hearing Brief, the Union's case advocate, if an employee of the FAA, will be granted sixteen (16) hours of release time to prepare the Post Hearing Brief unless prohibited by operational requirements. Such time will be annual leave, earned compensatory time, leave without pay or any combination thereof. Additional release time may be granted unless prohibited by operational requirements."** Therefore, if the Union advocate elects to submit a Post Hearing Brief, which is done about 95% of the time, once again, they do this on their own time. If the agency cannot get the advocate off of the schedule due to operational requirements, they are left to develop the Post Hearing Brief on their RDOs or otherwise on their own time.

I would now like to talk about the witnesses at an arbitration hearing. Since the vast majority of you are arbitration advocates, but any one of you, at any time can be called as a witness at a hearing, I feel it is very important to discuss how this time is captured by our CBA as well as from where it is derived. In accordance with Article 9, Section 10 of our CBA, **"FAA employees who are called as witnesses shall be in a duty status, if otherwise in a duty status. The agency agrees to adjust the schedule of witnesses, to allow them to appear in a duty status."** What this means is that if you will be called as a witness by either party at a hearing, you do not need to do this on your own time.

You WILL be in a duty status, which means that you will be paid by the agency in order to testify, and if necessary, the agency is required to change and/or alter your schedule in order to accommodate however long it takes for you to testify.

Article 9, Section 10 also states **"Each party shall bear the expense of its own witnesses who are not employed by the FAA, or who are not located at that duty location where the grievance arose."**

What this means is that if we have "experts" testify at a hearing and they are NOT FAA employees, we are solely responsible for the expenses of these witnesses as well as their "fee", if any, to testify. If you remember, in a previous LR Chronicle, I told you that "normally" the hearing will take place at the location where the grievance arose. If we choose to have an FAA employee testify as an "expert" and that FAA employee is at a different duty location from where the hearing is taking place, the Union is solely responsible for their expenses as well.

Finally, regarding witnesses, Article 9, Section 10 states **"The agency agrees to make every reasonable effort to provide witnesses requested by the Union."** In other words, the agency is required, by all reasonable means to provide the witnesses we are requesting in order for them to testify. If the agency fails to do so, we can ask the Arbitrator to force the agency to do so, or barring that, we would ask the arbitrator for a continuance until such time as the agency produces the witnesses that we are requesting.

Sometimes, the agency will call NATCA bargaining unit employees (BUEs) to serve as witnesses for THEIR case. This is a VERY important issue and an issue that EVERYONE MUST know about, as well as each employee's rights. In accordance with an FLRA case called the "Brookhaven" Decision, there are three very important requirements for the agency to be able to do this:

- It is the employee's decision to participate in any preparation. The decision must be made voluntarily. If the employee agrees to participate, the employee must be in a duty status when the FAA preps them.
- The agency MUST notify the Union that they want to prep a BUE for possible testimony, and the Union has a right to designate a representative to be present during the witness preparation.
- The employee has a right to refuse to participate in the preparation without fear of reprisal. However, if the employee is called as a witness, he or she must be ready to testify.

NATCA very strongly recommends that if you are ever called by the agency to possibly testify for them, please contact your RVP immediately.

As usual, if there are any questions, please feel free to contact me.

Mike Hull  
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