

If an Eyebrow is Raised on the Internet, Will the Arbitrator See it?

By Daniel Rainey

Approximately a decade ago, before information and communication technology was a proven channel for handling arbitration hearings under the Railway Labor Act, an arbitrator and two parties agreed to conduct a hearing live, on web video, with attendees at a railroad union conference as an audience. The arbitrator was in one state, the parties were in two other states, and the union audience was in yet another. As the dialogue progressed, the arbitrator addressed one of the parties' counsel.

"Are you skeptical?" he asked.

"Why do you ask?" counsel replied.

"Because I saw you raise your eyebrow at that last comment," the arbitrator answered.

Even back then, the audience learned, web video was good enough to allow for recognition of most of the nonverbal cues that many people had assumed would be lost in the use of technology.

Documents and exhibits fared even better in the web video hearing. One of the parties had a hand-drawn map of the area in which an accident had taken place, a map the party wanted to use to explain the movements of a train in a rail yard. In a face-to-face hearing the party would have held up the drawing and used a pen or pencil to trace the movement of the train. Online, the map was scanned and presented on-screen for all to see, and the party used an electronic "pointer" to show the movement. Arguably, the party's case was visually clearer and better demonstrated than it would have been in person.

In the intervening years, the use of technology in the arbitration program of the National Mediation Board (NMB) has become commonplace. Hearings are held online, often just as described above, and when a panel of arbitrators is involved, the panel members routinely use an online platform with document sharing and single-text editing software to finalize awards. Parties also have access to a "submissions-only" secure asynchronous platform where they can drop submissions that an arbitrator can then pick up and read. The arbitrator can then render an award by posting back onto the platform – without a synchronous hearing at all.

When this technology was first introduced to the board's parties in the mid-2000s, both parties and



arbitrators evidenced a great deal of skepticism. Accustomed to looking for opponents' nonverbal signals, wanting to "look 'em in the eye," and fearing the loss of other elements of face-to-face hearings, parties often were slow to adopt online tools. Generally, the first cautious uses of technology were for cases perceived to be low risk: low-dollar-figure claims and "minor" grievances. More than one party said he or she would be willing to use

online tools for these minor matters, but discipline and discharge cases would never be appropriate for anything other than face-to-face sessions. Since then, almost all the parties have accepted online arbitration as potentially appropriate for all types of grievances, including discipline and discharge cases.

Two basic modes of information and communication technology are used in the NMB arbitration program. In the first, the parties use a synchronous web video and document-sharing platform to hold hearings that are an analogue of face-to-face hearings. The hearings are in real time, with everyone able to see and hear everyone else. Generally, the sessions are set up with audio through a telephone landline, with video and graphics handled by the web video application. This offers some redundancy: if the audio goes out, the participants can communicate through the application's chat room. If the video goes down, they can communicate through the phone line.

Before the parties are given access to the application, they are asked to participate in an informal training process that takes less than an hour. In one of the first hearings using web video and document sharing, the parties went through training on one day and then went online with one of the NMB's staff at 8 a.m. the following day to start their session. The NMB staff member got them going, told them to call him if they had any trouble, and then dropped off the platform. The parties indicated that the hearing would probably last through the lunch hour. At about 11 a.m., the staff member checked back in and found the platform closed down. He thought they must have had problems, so he called the arbitrator, who told him there had been no technology glitches: they just got it all done early. This has been a typical experience. Web video has posed very few technical challenges for the NMB arbitration program, and both parties and

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arbitrators have reported being generally satisfied with the process.

In the second mode, the parties have access to an asynchronous platform to deal with submissions-only cases that, in the past, might have been handled using e-mail (which is the least secure and least desirable way to handle online case communication). In this mode, for the appellate hearings that make up the vast majority of the arbitration cases in the NMB system, the record created as a case proceeds to the hearing stage is posted to a secure online document-sharing platform that requires a private log-in and password. The arbitrator, using her or his private log-in information, can see the documents related to the case, download and read them, write a decision, and post the decision to the same secure site. All the work can be done asynchronously, at the arbitrator's convenience.

E-mail exchanges with the NMB's Director of Arbitration Services, union and carrier parties active in the NMB's arbitration program, and arbitrators who hear cases for the NMB, elicited explanations of why, from all points of view, online arbitration platforms have value.

The big advantage inherent to the NMB in the use of online technology is obvious: it allows the NMB to process more cases while staying within a strained federal ADR budget. Roland Watkins, the NMB's Director of Arbitration Services, is more specific. "As a result of the reduction in travel costs," he notes, "more funds are available to pay the arbitrators and write decisions."

The parties realize their own advantages, even as they maintain some reservations. The National Railroad Adjustment Board (NRAB) is one of the venues with responsibility for handling grievances under the Railway Labor Act. Marcus Ruef, Chairman of the NRAB, relayed his conclusions about the online technology. "I believe that it has a place in the Section 3 [grievance arbitration] process; however, there are practical, ethical, and legal limits to its utility. Properly deployed, it can eliminate a lot of needless travel and bring a wide range of benefits to all stakeholders. It is worth considering where appropriate."

One of the measures of "appropriateness" may be the degree to which a grievant feels that her or his case – or voice – can be heard. Most of the arbitration cases heard by NMB arbitrators are appellate in nature, and because the unions have the responsibility of representing the grievant, in many cases the grievant is not even present at the hearing. The NMB has not done any formal surveys of parties who use the NMB systems to determine the level of satisfaction with the various modes. However, some research regarding levels of satisfaction in

online dispute resolution processes generally, in conjunction with a research project funded by National Science Foundation research grants, suggests that participants in online proceedings record positive perceptions of communicating creative ideas and effectively reaching solutions.¹

Finally, arbitrators have their own reasons for embracing online platforms. Arbitrator Lynette Ross e-mailed a summary of her experience: "The video conference hearings were very useful in situations where all three board members were at different locations, travel was not feasible for the parties, and the parties wanted the board to go forward. In those video conferencing situations, a claimant who desired to attend the hearing but was unable to travel to the location could participate in his or her hearing. So, my experience has been that the video conference is an option that should be promoted given the flexibility it offers."

A decade ago, the fact that you could see facial expressions via web video was a bit like discussing a talking dog. You didn't comment on the dog's grammar; that he talked at all was amazing enough. Since then, cameras have been built into most laptops, desktops, tablets, and smartphones, and most of us have tried Skype, FaceTime, or some other web video application to "visit" with friends, relatives, and colleagues around the globe. And for many, interacting through social media and other text-based communication channels has become more the norm than a curiosity. We may be down to criticizing the dog's grammar, but one thing is sure: these days, if an eyebrow is raised on the Internet, everybody sees it. ♦

Endnotes

1 See Ethan Katsh, Leon Osterweil, Daniel Rainey, and Norman Sondheimer, *Early Lessons from the Application of Process Technology to Online Grievance Mediation*, National Conference on Digital Government Research, Conference Series Proceedings of The Digital Government Society (2005). See also Ethan Katsh, Leon Osterweil, Daniel Rainey, & Norman Sondheimer, *Experimental Application of Process Technology to the Creation and Adoption of Online Dispute Resolution*, National Conference on Digital Government Research, Conference Series Proceedings of The Digital Government Society (2006).



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