

HEARINGS

By

Gordon L. Jaynes

Introduction:

I have always felt it unfortunate that the word "hearings" crept into the Dispute Board process, because the word is so closely associated with Court proceedings and other governmental administrative proceedings.. The word "discussions" would have been more appropriate to the original spirit of Dispute Boards.

However, especially under FIDIC provisions, or those provisions modeled on them, perhaps the use of "hearing" was inevitable because the determination of the DAB is a decision which must be complied with by the Parties immediately. Subject only to possible change in a subsequent arbitration, the DAB decision is final and binding.

Nevertheless, a successful DAB will establish a much more relaxed atmosphere for its hearings than does a Court or an arbitral tribunal.

Organisation

The aim of the DAB documents is that hearings will be held at a time and place agreed by the Parties and the DAB. Typically, and understandably, the place is at the Site of the Works, as this is both convenient and economical. Generally, one does not encounter problems over the place of the hearing. However, agreeing a time sometimes is difficult. For example, just last week a Board on which I serve received a request from the Parties to postpone a hearing for which the dates had been tentatively agreed some time ago. The postponement was due to unforeseen construction problems which were demanding much of the Parties' time, and the Parties were convinced that they would have insufficient time to prepare for the hearing at the previously scheduled time.

A hearing at a time not agreeable to the Parties risks being a hearing which turns out to be unsatisfactory, either because it cannot be completed to the satisfaction of the DAB, or because one

Party -- or even both Parties -- may feel that they have not been provided the opportunity for a full and fair hearing of their position. A wise DAB defers to the joint wishes of the Parties, even if inconvenient to the DAB.

Occasionally, one Party will seek to delay a hearing even though the other Party does not want to delay. Again, search for a compromise is preferable to an imposed date and a disgruntled participant, so the art of persuasion can be a necessary agreement. However, if a DAB is convinced that the Party seeking the delay is simply being obstructionist, the DAB should not exercise its power to convene the hearing, and if necessary proceed in the absence of the Party who does not want to attend. This however, is an extreme measure, and clearly may lead to a decision which will be the subject of a notice of intention to refer the dispute to arbitration. Nevertheless, the DAB must not permit itself to be deprived of the power given by the contract to have ultimate control over the holding of hearings.

Generally it is helpful and appreciated by the Parties if the DAB establishes by correspondence with the Parties, the agenda for the hearing, complete with an indication of the amount of time which the DAB foresees allowing each Party. The time allowance should include an indication of the number of times the Parties will be allowed to address the dispute. A general guideline for a straight forward claim which is in dispute is to have the Claimant open, the other Party reply, and the Claimant respond to any matters raised in the reply which were not covered in the opening statement. Only rarely will a prolonged back-and-forth series of oral arguments be of real help to the DAB.

Who should be there:

One of the secrets to the past success of Dispute Boards is that the Board deals with the people who are operating the Contract. Sometimes they are described in tunneling terminology -- "the people at the face". Typically the person addressing the Board will be the Contractor's project manager. He

may call upon one of his staff responsible for execution of a particular portion of the Works for discussion of that portion. For the Employer, the person who leads should be the person responsible for the day-to-day relationships with the Contractor's project manager. If the Engineer is addressing the Board, the person speaking should be the person in charge of the Site on a daily basis.

Although outside experts may be produced as witnesses in some hearings, generally expert witnesses are not required. A lot of expertise will be represented in the experience of the Contractor's project manager, the Engineer's resident representative, and in many cases, the manager in charge for the Employer, plus of course the expertise of the Board Members themselves.

A topic of much discussion is the participation of lawyers. As much as it irritates some lawyers, the consensus is that they usually are not, and should not be, the "presenter" of a Party to the DAB. This is not some form of prejudice against the legal profession, but rather a reflection of the fact that the DAB wants, and needs, to deal with the persons who are executing the Works. Also, as the majority of issues that arise on a construction contract involve technical engineering matters, lawyers seldom have the engineering qualifications required to deal with all aspects of such technical matters. Of course, if there is an issue of law, it is appropriate for a lawyer to speak to that issue; the DAB seeks to give a fair hearing to each Party on each issue.

One minor point should be mentioned and that is the presence of persons who are only "auditors". Many times a Party (or even the Engineer) may wish to have some staff attend hearings for educational purposes. Provided both Parties are agreed in having such attendees, and the "auditors" are silent and do not inconvenience the DAB, Boards usually allow such attendees.

Procedural problems:

It is important for a DAB to keep an eye on the clock. The aim should be allow the Parties equal time. Some Boards have even used "chess clock" procedure for this purpose. While this may seem intimidating, it can be useful if there are significant interventions by the Board during Parties' presentations.

Before the hearing, the Parties should be cautioned that the DAB is not interested in listening to an oral repetition of what has been said already in the written submissions of the Parties. The Parties' written submissions are "to be taken as read."

In no circumstances should one Party be permitted to interrupt the presentation of the other Party. Indeed, the DAB should seek to limit its own interventions during a presentation by a Party to interventions to clarify something not understood. Generally, DAB questions regarding Party presentations should await the conclusion of the presentations of both Parties.

While one intention of the hearing is to give each Party the sense that it has said all that it wishes to say, obviously the DAB Chair must maintain sufficient control to avoid repetitions, "side agreements" in which the Parties start battling each other instead of addressing the DAB, and generally assure that the atmosphere is professional, not brawling.

On complex matters, it may be necessary to adjourn a hearing in order to allow the Parties the time necessary to obtain further documents, or perform various calculations. While a DAB should attempt to avoid adjournments which require subsequent dates of hearing, occasionally such adjournments are required. In such cases, it is important to seek an extension to the time for completion of the DAB's decision. Indeed, there is much to be said for a DAB discussing with the Parties at the time of the DAB's appointment and before disputes have arisen, the possibility of amending the DAB arrangements to have the time limit for the DAB's decision to run from the conclusion of the hearing(s), instead of from the submission of the dispute to the DAB.

The DAB should be sensitive to the likely wish of the Parties to hold hearings during regular Site visits in order to minimise the expense of air travel which arises from special trips solely for the purpose of hearings.

Conduct:

As has been noted elsewhere, the DAB is not a Court, nor is it an arbitral panel, and informality is a characteristic of DAB conduct -- informality without familiarity could serve as a guideline for the DAB. Similarly, the DAB should avoid conduct which may be felt to be intimidating. Typically those present for the Parties will not have a lot of experience in arbitration or Court hearings, and

may anyway be somewhat hesitant in the face of the DAB and its combined experience, so anything amounting to overbearing conduct by a DAB Member may be counterproductive to eliciting a full and accurate picture of the dispute.

No opinions or attitudes of the DAB on the issues in dispute should be expressed during the hearing (or at any time other than in the written decision). Refraining from expressions of opinion or attitude includes facial expressions. Neither jokes nor efforts to make humorous remarks should be proffered by DAB Members. Laughter may occur during a hearing, but it is imperative that the DAB avoid any perception of laughing at any person.

While it is to be expected that the DAB Chair will consult with fellow Members before moving from one presentation to the next in the hearing, DAB Members should avoid excessive interchanges among themselves during the hearing, and should give full attention to persons speaking on behalf of the Parties or the Engineer.

As there seldom is any verbatim record of hearings, DAB Members should take careful notes of what is said, and compare those notes among themselves after the close of the hearings. Occasionally, one or both Parties will request permission to record what is said in the hearing. Experience suggests that such recordings seldom are of good quality, typically DABs do not object to recording, but do ask for a copy for the DAB.

Management:

The DAB has the ultimate authority for the management of the hearing, and therefore the ultimate responsibility for its quality as a hearing, whatever the quality of the content of the Parties' presentations. The aim of the Board should be to proceed expeditiously but fairly, with the result that each Party considers that it has been heard to its satisfactions. Often a DAB Chair will solicit oral confirmation from each Party at the close of the hearing that the Party is satisfied that it has presented all that it wishes to say on the issues covered in the hearing. This is good psychology.

Finally, it is appropriate to mention before closing the hearing that should the DAB, during its private deliberations, have further questions it wishes to put to the Parties, the DAB asks that the Parties remain available for such purpose.

Perhaps a suitable management "Rule" would be modeled on "The Golden Rule", and roughly transposed into "Manage the hearing as you would wish the hearing to be managed if you were one of the Parties."