

LJAB Training

LJAB OBJECTIVES:

- 1) Conduct a fair LJAB that renders a legally defensible and binding decision.
- 2) Develop a good record if the matter is appealed to an Article X Panel.
- 3) Settle disputes in a way that benefits the industry and leads to labor-management harmony.

SETTING UP AN LJAB

Adopting Procedural Rules

The Union and the association must establish rules regarding time tables, enforcement of awards, and hearing procedures that will advise the parties on how to proceed. Sample procedural rules are available in the [LJAB Guidelines](#).

Who has the power to appoint an LJAB member?

In most cases, the association has the right to appoint the management panelist(s) and the Local Union is charged with appointing the Labor panelist(s). The manner and power of appointment should be spelled out in the local procedural rules adopted by the parties. In rare instances, it may be spelled out in the collective bargaining agreement.

How many members?

The optimum number of LJAB members depends on the size of your local area and the frequency of grievances. Only one management and one labor panelist are necessary to hear a case. However, you may want to have more than one member appointed to serve even if only one of them hears any given matter. We do not recommend having a large roster of panelists present at the hearings, however. This often makes it difficult to reach reasonable settlements with your labor counterpart. One or two members per side is customary.

Who should be appointed to be an LJAB member?

The right temperament is important. We recommend that your management panelist have the following qualities:

- 1) Knowledge of your local collective bargaining agreement. You may wish to look to your negotiating team for panelists.
- 2) Fair minded.
- 3) Willing to make unpopular decisions.
- 4) Level headed.
- 5) Thinks outside the box.
- 6) Respected by other contractors.
- 7) Generally, has a good working relationship with the union.

Keep in mind that a contractor involved in a dispute may not sit as a member of the LJAB. A union representative presenting the grievance or otherwise involved in the dispute may not sit on the LJAB. Likewise, a Chapter Executive presenting the grievance or otherwise involved in the dispute may not sit on the LJAB.

WHO CAN BE GRIEVED

An LJAB hears grievances of either the employer or the union, arising out of interpretation or enforcement of the agreement. The rules provide that if a grievance cannot be resolved in Step 1, a party may request an LJAB either where the work was performed or the jurisdiction of the employer's home local.

In most cases, there is no issue regarding which LJAB has authority to hear the dispute. Under the Standard Form, the LJAB established by the terms of the local contract will have jurisdiction to hear disputes arising under that Agreement. An LJAB could be asked to hear grievances against:

1. A SMACNA contractor signatory to that area's collective bargaining agreement;
2. A local independent signatory contractor provided evidence of the grievance procedure existing in their contract is part of the LJAB submittal;
3. An out-of-town contractor - one who has no permanent shop in the area - who is being grieved related to work performed by that contractor's employees within the Local union's jurisdiction;
4. The local union; or
5. The contractors' association.

Grievances against either the local union or the contractor's association are extremely rare. However, they are permitted and should be handled in the customary fashion should they arise. It is worth noting, that the grievance procedure cannot be used for disputes solely between individual contractors or contractors and the contractors' association.

Some specialty agreements (i.e., the National Maintenance Agreement) have their own grievance procedures, which will govern with respect to questions concerning the applicability of, or the interpretation of that particular agreement. Understand that the grievance procedure under a National agreement may be the sole and exclusive dispute resolution avenue.

LJAB PROCEDURAL RULES

Time limits

1. First step: To be valid, grievances must be raised within 30 calendar days following the occurrence giving rise to the grievance, or first knowledge of facts giving rise to the grievance.
2. Second Step: Must be submitted to the LJAB within 30 days of the termination of Step 1 proceedings.
3. The LJAB is then directed to meet within 14 days, unless the time is extended by mutual agreement.

Timeliness issues are factual questions. Therefore, whether a grievance has been brought to the LJAB in a timely manner is something for the LJAB panelists to determine. Neither the union nor the association

should refuse to convene an LJOB based on timeliness. Convening the LJOB does not waive an objection to timeliness.

Requirements to submit dispute

1. Any dispute submitted to the LJOB shall state:
 - The specific provision violated
 - The facts which give rise to the dispute
 - The position of the grieving party
2. At the time one party submits the dispute to the LJOB, it shall serve a copy on the other party to the dispute.

Pre-Hearing Procedures

In the majority of local areas, it falls to the association to arrange the LJOB. If that is the case in your area, we suggest you take the following steps:

1. When - Determine 2 or 3 dates that will work for the management LJOB members and present them to the union for consideration. We recommend also checking with the contractor being grieved to ascertain their availability. You will want to leave enough time for the hearing that the parties can adequately present their case and the LJOB members to deliberate over the matter.
2. Where - we recommend that the union hall, association office or training facility be used unless a party objects. If a party objects or none of those locations have available space, the hearing should be held in an inexpensive neutral location. If you have a reasonably good bargaining relationship, and are confident of everyone's abilities to function, there is no harm in holding a hearing in a union hall or association setting. Keep in mind that costs for a third-party location are typically split between the union and the association.
3. How - Once these arrangements have been finalized, a confirming letter should be sent to everyone involved: this usually will be the union and the contractor. Make sure you mail the information sufficiently in advance of the meeting so that the parties can arrange to have a representative present and to prepare their case. Usually, at least ten days' notice is appropriate. The best approach is to give the parties notice by phone as soon as the arrangements have been made.

Although it is preferable to select a date, time, and place that is convenient for all parties, the LJOB has the authority to determine when and where the LJOB shall be conducted. Reasonable requests to delay a hearing should be granted. However, neither party should be allowed to unreasonably delay the process.

Procedures during hearing

The LJOB should be conducted in such a way as to permit the following objectives to be met:

1. The grieving party must detail the violation and the surrounding circumstances.
2. The grieving party must submit evidence, which may include witnesses or affidavits.
3. The grieved party must be allowed to present defenses and introduce witnesses or affidavits.
4. The grieving party may rebut.

There is a sample script in the [LJAB Guidelines](#), that should assist you in conducting the LJAB hearings. For the most part it will walk you through the following steps:

1. The LJAB Chair should introduce the LJAB members for the record and emphasize that both Labor and Management co-chairs shall act in that capacity. How the chair is selected and whether management and labor representatives alternate that responsibility should be established in your local procedures.
2. The Secretary should obtain the names, positions and addresses of all parties present for the record. We recommend having a sign in sheet for the hearing.
3. The parties should be informed by the Chair of the rules governing the hearing.
4. If either party raises procedural objections, these objections should be noted in the minutes and the hearing should proceed. Tell the parties that procedural matters will be considered when the LJAB meets in executive session, after the hearing ends, and that the LJAB will hear testimony on the procedural objection raised and then hear the merits of the case.
5. The parties should be advised that it is desirable that only one person presents the case for labor and one for management. Each spokesman may, however, call witnesses to give factual testimony. Sometimes a question arises about whether it is permissible for a lawyer to be at the hearing or to make the party's presentation. Either party may have any chosen representative present its case, including lawyers. It is important that you do not do anything to interfere with either party's right to be represented by an attorney. Also, you should not suggest that a party will receive less favorable treatment if they choose to be represented by an attorney. You will, however, want to advise attorneys, especially, that rules of evidence and procedure are not controlling in LJAB hearings.
6. While either side is presenting its case, interruptions should not be tolerated. Each party should be given ample opportunity for rebuttal.
7. You are now ready for the grieving party to present his/her position. If new evidence is submitted pertinent to the case, the other parties should be given copies and time to review said evidence for the purpose of preparing and presenting an adequate defense. You may consider requiring in your procedural rules that documents and other physical evidence be exchanged at least 24 hours prior to the hearing.
8. The grieved party should now present his/her evidence.
9. LJAB members may request clarification by the parties on their positions and statements at any time. Do not be reluctant to be an active LJAB member. Ask questions to develop a complete record. You are specifically given the authority to call on the representatives of the parties to provide evidence during the hearing if the facts are not sufficiently set forth.
10. Both parties should have the opportunity for rebuttal on facts. When the LJAB feel they have sufficient information on the grievance, the parties should be given an opportunity to make a brief summation of their positions.
11. The parties should be advised that under grievance process, the LJAB will reduce their decision to writing and that it will be mailed to the parties within 14 days from the hearing. The parties should also be informed that, in most cases, the LJAB's decision is final and binding on all parties.
12. After the parties have been dismissed, the LJAB should go into executive session.

POST-HEARING – DECISION

You should always attempt to arrive at a decision immediately after the hearing ends while the testimony and evidence is fresh in your mind. The decision of the hearing LJOB shall be confined to the specific issues presented by the parties and the evidence developed regarding the issues.

Remember to consider any procedural matters raised during the hearing. Your rulings on procedural matters must be included in the decision itself and it is usually appropriate to rule on these items before you decide the substantive issues.

The LJOB does not have the authority to add to or subtract from the labor agreements. The LJOB is empowered to render such decisions and grant such relief to either party as it deems necessary and proper, including awards of damages or other compensation. However, we recommend staying away from “penalties” unless specifically provided for in the collective bargaining agreement. Many courts will not uphold awards for penalties.

A dispute will often include a claim for damages by one of the parties. In some cases, additional information may be necessary to calculate appropriate damages. The LJOB may retain jurisdiction over a matter in order to permit the parties a set amount of time to supplement the record. We suggest contracting the NJAB administrator for guidance on how to draft language retaining jurisdiction where necessary. Be sure to include a clear deadline in your request to the parties for supplemental information and permit the other party an opportunity to comment on the evidence presented if that party desires.

When it can be determined which individual(s) specifically suffered lost wages, and that individual did not participate knowingly in the contractor's violation of the labor agreement, the damages should be paid to the individual(s) and the appropriate corresponding trust funds.

When monetary damages are agreed on and it cannot be determined which individual was specifically damaged, the monies can be paid to a fund which will benefit both sides; for example, the joint apprenticeship and training fund or an employee-assistance program.

The LJOB has the authority to suspend damages. It is not uncommon for an LJOB to hold an award of damages, or a portion thereof, in “abeyance” for a set period such that the grieved party is not required to pay the amounts held in abeyance as long as there are no further similar violations of the collective bargaining agreement during the stated period. Suspended damages should have clear time lines and be specific as to which types of violations will trigger the requirement for payment of damages.

Drafting of the LJOB decision and minutes is extremely important. The LJOB decision should clearly specify the nature of the dispute, i.e. the provisions of the agreement allegedly violated, and the LJOB's determination as to the merits of those claims. Be sure to include mention of any procedural objections that were raised and their disposition as well. The decision also needs to indicate what if any award is being made to the prevailing party. Where damages and penalties are awarded, the decision should include a basis for the award so that they do not appear arbitrary or capricious. Sample decisions are available in the [LJOB Guidelines](#). Parties may also contract the NJAB administrator for guidance in drafting difficult language.

Minutes are likewise important. They form the basis for the record in the event a matter is appealed to an Article X Panel hearing. They also provide the local parties with historical context to past decisions rendered by their LJAB; the parties involved, including the LJAB members, won't always be around.

We recommend that minutes not be verbatim as they can be confusing and difficult to follow. Rather, minutes should capture the key salient points in the grieving parties case as well as the griever's defense. They should be drafted such that a future reader with no knowledge as to the local situation or players could grasp the facts presented and salient arguments on both sides. The original or "verbatim" notes taken during the hearing often need to be condensed when written for submission as "decision" minutes. However, care should be taken not to distort the information and positions of the parties in the process.

We recommend that the association maintain a file that contains both the decision and the minutes, along with any important documents relied upon in the hearing, and that these files are kept as historical records.

Right to Appeal:

Except in cases of a deadlock, a unanimous decision of the LJAB is final and binding upon the parties unless the employer is an out-of-town contractor. An out-of-town contractor may request an appeal of a unanimous LJAB ruling to an Article X Panel.

While out-of-town contractors have the right to appeal, LJAB members should keep in mind that a unanimous decision of the LJAB which is appealed but deadlocks at the Panel and then the full board of the NJAB, is then fully enforceable against the out-of-town contractor. Management panelists should not agree to a LJAB decision they do not believe is supported by the evidence assuming it will be overturned at the Panel or NJAB level.

Noncompliance with decision

If a party does not comply with an LJAB decision within 30 calendar days, the other party may enforce the order in court and receive their costs and attorneys' fees. The LJAB does not typically act to enforce its decisions.

OTHER ISSUES

Immunity from liability

Individuals serving as members of a LJAB are acting as arbitrators. Consequently, they are generally immune from civil liability for their decisions, so long as they are acting without bias and within the scope of their authority.

It is for this reason that individuals who were involved in the underlying dispute or who actively participated in presenting a matter to the LJAB are prohibited from serving on that matter's LJAB. As a matter of best practices, LJAB members should refrain from arguing with parties presenting the case or appearing to offer "testimony" in the matter.

The doctrine of arbitral immunity also protects LJAB members from being required to disclose information relating to how the decision was arrived at. However, the privilege not to disclose such

information may be found to have been waived if not raised in a timely manner. It may also be waived by discussing the LJOB deliberations with the parties. LJOB members are cautioned to keep those deliberations confidential to the extent possible.

If you are served with a subpoena to provide documents, or to testify in some legal proceeding, SMACNA's labor relations department can help you in understanding how to proceed.

Parallel legal proceeding

Occasionally, the parties will claim that there are also unfair labor practice charges, civil litigation, and other matters which should prevent the LJOB from taking jurisdiction over the matter. Our advice is that you should proceed to hear the matter, unless you are specifically enjoined by a court from doing so.

Subpoena power

Because an LJOB is serving as a board of arbitrators, most state statutes give subpoena power to such a body. Thus, an LJOB acting jointly has the power to subpoena documents, or individuals, for appearances before the LJOB.

Conflicts of interest

You cannot serve as a LJOB member if you are also involved in the dispute. Management members should consider whether a business relationship with the involved contractor presents a conflict of interest and if so, decline accepting the case.

Official transcripts, stenographic records and tape recordings

As a general rule, we recommend against allowing recordings of the proceeding as they rarely assist in resolving the dispute. These types of recordings are only allowed at Panel hearings and NJAB with special dispensation and we recommend your LJOB adopt similar rules prohibiting the practice in your local procedures. However, in some jurisdictions, the parties may have a statutory right to have a court reporter present. Before you make any decision that potentially restricts the rights of a party that desires to use a court reporter, you should contact your local labor counsel for guidance.

Rules of order

As a Panelist, you have the authority to make reasonable rules in order to keep the hearing productive and orderly.

Admissible evidence

The LJOB is not bound to follow formal rules of evidence, like those in a court proceeding. Evidence should be permitted as long as it is reasonably related to the matter in dispute. It is probably better to err on the side of allowing a party to present evidence and allow LJOB members to assess the relevance, probative value or credibility of the evidence.

However, the LJOB need not allow a party to present duplicative and unrelated information. It is appropriate in those cases to note for the parties that evidence has already been submitted on that point and unless their current offering adds something new, you would like them to move on. Likewise, the LJOB chairs should feel free to politely stop someone one who has reached a point in their testimony where they are repeating themselves.

DIFFICULT GRIEVANCES

Most grievances ask an LJOB to analyze the facts presented under the applicable collective bargaining agreement. Therefore, an understanding of the relevant collective bargaining agreement and the industry practices for the area are sufficient knowledge for a LJOB member to have to adequately adjudicate the dispute. However, there are few rare instances where legal theories and collective bargaining obligations collide and therefore it is helpful for the LJOB member to understand some legal principles.

Alter Ego – Single/Joint Employers – Double Breasted Operations

Normally, one company is not bound by the contracts of another, and that principle also applies to collective bargaining agreements. However, an exception may exist in some cases, where the two companies are so intertwined that they are no longer truly separate entities. In such a case, the company that is signatory to a collective bargaining agreement, as well as the closely related company [its “alter ego”] will be bound. Through a related legal doctrine, the two companies may be found to constitute a “single employer.”

Such cases may be rather intimidating, because they present a host of legal issues, rather than traditional issues of contract interpretation. Furthermore, the use of legal counsel by the parties is more common in such cases, which tends to complicate the situation.

The National Labor Relations Board and the courts have considered a number of issues as important in deciding these cases under the National Labor Relations Act and ERISA. Unfortunately, the approach taken is far from being a precise mathematical formula, and there is a fair level of inconsistency in NLRB and court decisions. Nonetheless, SMACNA’s Labor Relations Department can provide you with some general principles, which serve as a useful guide for the LJOB in approaching such a case.

The hallmarks of the alter-ego doctrine include whether two companies have substantially identical management, business purpose, operation, equipment, customers, supervision and ownership. Similarly the single employer factors look to common ownership, interrelation of operations, common management and centralized control of labor relations. A joint employer relationship can exist if two or more entities share or codetermine matters governing essential terms and conditions of employment, and one of the entities requires direct and immediate control over the terms and conditions of employment.

Clearly such grievances require a fact-intensive analysis.

It is important to note that an LJOB only has jurisdiction over an entity that has agreed to resolve grievances before the LJOB. Therefore, if an LJOB determines that one of these relationships exists, and the collective bargaining agreement has been violated, damages should only be assessed against the signatory entity.

NLRA violations – Unfair Labor Practices

From time to time, an allegation of a violation of the National Labor Relations Act is part of the basis for a grievance. Luckily, the LJOB member does not generally need to understand these laws because the only way an unfair labor practice is actionable under the grievance procedure is if the same actions also allegedly violate the collective bargaining agreement. Therefore, the best approach for an LJOB member is to require the parties to specify the violation of the agreement and focus his/her analysis there rather

than on the broader labor law the party wishes to introduce. It is also possible that the National Labor Relations Board can defer an unfair labor practice to an LJOB for resolution. Typically the parties will be required to allow the Regional Director of the National Labor Relations Board to review the LJOB's decision to ensure that the LJOB reasonably applied the Act to the unfair labor practice issues. One word of caution, the writing of the LJOB decision may need to be done with extra caution so as not to have an unintended impact on the pending NLRB action, if one exists, or if the case is one which has been deferred, to ensure that the Regional Director finds the LJOB reasonably considered and decided the unfair labor practice claim. If you are unsure about whether an alleged labor law violation is something you need to address at your LJOB or have a case that has been deferred and have questions about it, please contact the LJOB administrator in advance of the hearing.

Jurisdictional Disputes

A contractor signatory to multiple crafts which compete for the assignment of the same work may face a grievance that it has misassigned that work. Such grievances generally seek an award of lost work opportunities and fringe benefit contributions. In considering these claims it is useful for LJOB members to focus on what trade has historically done this work in the geographic area, whether there are letters of assignment, is the disputed work trained by one apprenticeship program and not the other, and can one trade man the work in a timely manner, while the other cannot.

Resolving these grievances can also be challenging for the LJOB and can easily strain the labor-management relationship. There are groups such as the Plan for the Settlement of Jurisdictional Disputes and local jurisdictional dispute resolution bodies, such as the New York Plan, which can resolve these claims. When faced with a misassignment grievance a contractor can stipulate to the Plan and request that it decide which trade should perform the disputed work. Importantly these decisions do not award back pay or damages; they only decide who should perform the work prospectively.

Information on the Plan for the Settlement of Jurisdictional Disputes and the form for stipulation are available on [SMACNA's website](#).





