Teamster Guide to Arbitration: Building Skills, Knowledge and Confidence

Training and Development Department
International Brotherhood of Teamsters

PREFACE

Since 1978, the IBT Training and Development Department has conducted hundreds of programs on arbitration techniques for Teamster officers, agents, stewards, members and staff. We have compiled some of our best material in one volume to help guide you in your efforts to secure winning outcomes, either before a panel or an arbitrator.

From the moment a member approaches the steward about a problem, we begin the process of preparing a case for arbitration. While the goal is always to settle a case at the lowest possible step, we must always keep in mind the possibility that a panel or third-party may eventually decide our fate.

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INVESTIGATION

AND

PREPARATION

PREPARATION FOR ARBITRATION

I. What Influences the Arbitrator?

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1. Must be able to “see” the place
2. Must be able to “know” the job
3. Must be able to “feel” the emotions
4. Must understand the sources of authority
5. Must know the past practices
6. Must know the intent of the parties
7. Must know the “expectations” of the parties

B. The Arbitrator may be influenced by secondary considerations or other factors

1. Consciousness of what will help labor relations
2. Consciousness of bargaining strength of parties
3. Consciousness of the quality of labor-management relationship
4. General “market” conditions (e.g. unemployment)

II. What is the Source of Authority?

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3. Application
4. Where the contract is silent or ambiguous

B. Equity

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A. Outline the attack on paper

1. The problem
2. Exactly what happened
3. Evidence and testimony needed for support
4. Past Practice

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1. The problem
2. The issue
3. Facts which are conceded and which the other side is likely to concede
4. What happened?
    a. Cast of Characters
    b. Scene
    c. Props
    d. Description of job or jobs

5. Source of authority (contract, law or past practice)
6. What the other side is likely to argue
    a. Identify, examine, and evaluate opposition's arguments
    b. Establish reasonable answers

7. Preparation of witnesses
    a. Interview witnesses in advance
    b. Inform witnesses in advance what questions will be asked
    c. Tell them to be brief, non-technical, not to argue the case, and to interrupt their answers when there are objections
    d. Plan your questions around what they have to offer
    e. Anticipate possible cross-examination by preparing re-direct questions or anticipating employer's questions
    f. Witness is to admit fact of advance conference if asked

8. Prepare visual material
    a. Charts, graphs, models or large exhibits
    b. Arrange for easel or blackboard for exhibits

9. Develop a "theory of the case"
    a. To do this you answer these questions:
        (1) What do I need to prove to the arbitrator in order to win this case?
        (2) What are the best facts I have to prove?
        (3) How can I best present those facts?

IV. If Time Permits, Conduct Arbitrator Dry Run

A. Purpose of Dry Run

1. Exposes weaknesses in your case.
2. Prepares witnesses, builds comfort level.

V. Prepare for Intra-Group Communications at Hearing

A. Single spokesperson or division of presentation among the team
B. Arrange to sit together for easy communication
C. Use method of passing notes to spokesperson
D. Recess may be requested for consultation
E. Assign one associate to take full notes
F. If hearing lasts more than one day, conduct an evaluation session at the end of each day

VI. General Criteria

A. Avoid the "litigious attitude" (the desire "to win")

1. Show the impact or consequences of the remedies at hand
    a. Precedents for future
    b. Discouragement of unreasonable grievances
    c. Improvement of relationship with employer
    d. Unwillingness to hurt others by helping one
    e. The need to avoid conflicts within the employee organization

ANALYSIS FORM

ARBITRATION ANALYSIS FORM

Summarize issue. If this is a discipline case, include both accusation against employee and disciplinary action by employer.

Remedy sought:

Points on which union and management can probably agree:

1.

2.

3.

4.

5.

6.

7.

8.

Provisions in agmt union will rely upon:

1.

2.

3.

Provisions in agmt management will rely upon:

1.

2.

3.

Management version of facts:

Union version of facts:

Union arguments:	**Management arguments:**
1.	**1.**
2.	**2.**
3.	**3.**
4.	**4.**

Support needed:

Exhibits

Witnesses

One-sided Exhibit

Notes on Presentation of Case

GUIDE FOR PLANNING TO USE WITNESSES

FOR UNION

Name	Expected to establish	Planned or expected cross-exam questions

FOR COMPANY

Name	Expected to establish	Planned or expected cross-exam questions

PROCEDURES AT THE HEARING

PROCEDURES AT THE HEARING

I. Usual Procedure

A. Oath of arbitrator (considered waived if not requested)

B. Definition of the issues (writing of submission agreement)

C. Stipulation of agreed upon facts

D. Agreement on order of presentation, or stipulation by arbitrator of order of presentation. Stenographers will ordinarily be provided only if requested and arrangements are made for paying expenses.

E. Opening Statement

1. This is usually a brief introductory statement by each side including definition of the issues, contract clauses which are pertinent, and a brief listing of the main arguments and evidence.

2. Note on order of presentation – in discharge and discipline cases the arbitrator usually asks management to start off because it has made the change in the status quo by its action against the employee. Otherwise, the union goes first.

F. Presentation of case by initiating party

1. Direct examination of witnesses, subject to cross-examination.

2. Witnesses may be sworn individually, or informed that they are under oath or may testify without oath. It may be to your advantage to request that witnesses be sworn.

3. Presentation of information, exhibits and data. These are usually admissible if they are relevant to the case or help the arbitrator understand it better.

G. Presentation of case by opposing party.

H. Questions by arbitrator, if he/she desires.

I. Summation

1. The spokespersons for both sides may be permitted to sum up. Sometimes the order is reversed from the order applied in the opening statements.

J. Visit to the Workplace

1. The arbitrator may want to inspect the site of the dispute.

K. Subsequent Opportunity for Information

1. At the request of one or both of the parties, or on the instruction of the arbitrator, post-hearing briefs may be submitted, either by simultaneous presentation within a stated number of days, or by exchange and rebuttal.
2. The post-hearing brief can substitute for closing arguments.

II. Some Guides to Techniques

A. The Single Spokesperson

1. Should communicate with the team by passing notes, or may request a caucus or recess.

B. The Introductory (Opening) Statement

1. It is an intention of proof, *not testimony* ("We intend to prove")
2. It is proper to caution the arbitrator against your opponent's improper use of a tone of fact or proof in their statement.
3. It should be brief, concise and to-the-point.
4. It should help to explain facts to which the arbitrator needs introduction, to give the dispute a context.

C. Questioning of Witnesses

1. Establish the witness' identity and, if necessary, his/her competence.
2. Bring the witness to the facts as quickly as possible.
3. Do not testify for the witness.
4. Anticipate by your direct questions some doubts that may be raised in cross-examination.
5. You may re-examine the witness after cross-examination (redirect examination) to clear up or answer questions raised in cross-examination.
6. Ask the witness only what is needed.
7. Ask the witness only what he/she saw, heard, or knows.

Note: Much more leeway is allowed in an arbitration hearing than in a court proceeding in allowing "hearsay" testimony or "irrelevant" material, but the general guides are:

1. Does it make a contribution of an impartial nature to the arbitrator's knowledge?
2. Does it bear on the subject pretty closely?
3. Will the arbitrator be able to assign a weight to it in keeping with its value as something seen, heard, or known?

Oftentimes, the arbitrator will allow testimony or evidence to be entered into the record and will reserve judgment on its relevance or materiality.

D. Cross Examination

1. Most of your questions should be confined to testimony already given in direct examination.
2. The arbitrator will allow you to conduct a rigorous cross-examination or to repeat a question that was already raised in direct.
3. Don’t ask a question on cross-examination unless you know what answer the witness will give, or are prepared to prove that the response is a lie.

E. Decorum

1. Firm conviction, but polite manner.
2. Improper: Coaching, signaling, outbursts, rejoinders, or any interruption of the proceedings.

NOTES ON MANAGEMENT'S CASE

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Until the management presents its case, the union's case, no matter how well prepared, is strictly tentative, having been prepared on a foundation of anticipation. Therefore, while the management's case is in actual progress the union must craft a final defense that will disprove what the opposition has presented.

In order to analyze and digest the management's case, it is most important to take careful notes. It is essential that the next four phases of arbitration be kept in mind. They are:

1. Cross-examination of management witnesses.
2. Presentation of any necessary rebuttal witnesses.
3. Closing arguments.
4. Preparation (if necessary) of post-hearing briefs.

While management witnesses are testifying, you should take notes and look ahead to cross-examination and rebuttal witnesses. Therefore, underline any testimony which in your opinion might be reviewed under cross-examination or during the presentation of rebuttal witnesses. Some of the types of testimony to look for:

1. Testimony that is not clear. On an important aspect of the case a witness may not be clear and could be interpreted several different ways. It may be an important point and one that you wish to clarify in cross-examination. On the other hand, testimony that isn't clear may serve to your advantage and should, therefore, be reserved for your closing argument or brief, if filed.

2. Testimony that is not complete. When a management witness is drawing near the end of his or her direct examination, a quick review of your notes may reveal that the testimony has not been complete. These missing links require quick but careful study. Why was the testimony left out? What does it mean? What should be done about it? You are the only one who can make that decision. There are no guides that are completely reliable. Sometimes you should let the matter rest and be thankful that no more damage to your case was done; and other times you should plunge in on cross-examination and expose the witness.

3. Testimony that is contradictory. There are times when the exposure of contradictory testimony can be used effectively as a means of persuading the arbitrator that the individual giving such testimony was not too sure of the facts or is outright false testimony. Such persuasion, if handled properly, may often prove helpful, particularly when a case revolves around disputed facts. The challenge is to decide when to expose the contradiction— during cross-examination or in the closing statement, when it is too late for the employer to explain away such seeming contradiction. Remember, contradictory testimony is always going to arise. Witnesses, being human, are likely to make minor deviations in their testimony which, although contradictor, are not important. Several people can witness the same incident and remember it differently. You

must make a decision whether the contradiction should be dropped at this point or pursued in cross-examination or in summation.

4. Testimony that is Hearsay or Opinion. Hearsay and opinion arise in arbitration hearings. Usually the arbitrator is quick to distinguish between what is admissible proof and what is not; therefore, you may be insulting his or her intelligence if you point out what is obviously so and accomplish nothing more than place the management on notice that its testimony is of little value. There may be times, however, when the evidence is not so clearly hearsay or opinion. Then it becomes your job to probe the witness in cross-examination until you are satisfied that the witness has been properly exposed.

5. Testimony that brings in new evidence. Ordinarily if you have prepared your case thoroughly, nothing new in the way of evidence will be brought out in the hearing. Sometimes, however, evidence is brought to light of which you have no previous knowledge. Its introduction means you must study it carefully and quickly and decide whether to (1) claim surprise and ask for a continuation of the hearing; (2) claim bad faith on part of management and ask that the arbitrator discount such evidence; (3) refute it through use of rebuttal witnesses; or (4) plunge into the matter through cross-examination.

6. Testimony that is clear, complete and damaging. Painful subjects are a good thing to avoid as long as possible, but sooner or later a case comes along in which employer testimony is without a flaw. If you were properly prepared, you were able to anticipate which evidence the employer was in a position to present. It could be that the case should not have been taken to arbitration or that you will need to deal with the issue in a post-hearing brief, hoping for the best.

REBUTTAL WITNESSES

As soon as management indicates they have presented their last witness, you should glance quickly through your notes to determine the need for rebuttal witnesses. Has management presented any evidence in their case that you have not already covered in the presentation of your own case? Did you succeed in casting doubt over certain testimony through cross-examination? Rebuttal witnesses sometimes are not needed, and it is your job to make the decision.

Rebuttal requires submission of counter-proofs in the area you are seeking to nullify. Unless these can be produced, there is no way rebuttal can be achieved. Effective rebuttal invariably involves the introduction of new witnesses or examination of recalled witnesses on new aspects of the controversy.

If you are assured that no risk is incurred by not rebutting, the safest course is not to. Once you do, the other side has the opportunity to examine your witnesses and, on its own part, to rebut your rebuttal . . . or go even further, perhaps. But, if the other side has placed your cause in jeopardy, every effort should be made to use rebuttal witnesses.

INTERVIEWING WITNESSES

I. INTERVIEWING WITNESSES

Preliminary Interview of Witnesses

Of first importance in any case are **THE FACTS.** As you prepare, let the witness tell his/her own story. If you shut them off and insist on getting only answers to specific questions, you may screen out some important points. You cannot possibly anticipate all the facts in every case.

After getting the story, you will then have to ask questions to sift through the relevant aspects, to emphasize important features, to fill in gaps, and to help the witness see the outline of the total case, as you develop it from the facts before you.

If the witness can understand your theory of the case, he/she may tell you facts which otherwise might be inadvertently overlooked or discarded as immaterial. Remember, winning at arbitration requires a team effort. It is essential to get your witness on the team.

In questioning the witness you must be a friendly, but nonetheless searching, examiner. **It is your task to learn all the bad as well as the good points of the case—**to marshal the evidence intelligently, to prepare arguments properly, and avoid unpleasant surprises at the hearing. Advance knowledge may enable you to weaken the effect of your adversary's cross-examination by explaining or minimizing unfavorable facts or to neutralize some of his/her direct evidence by anticipating it in your direct examination.

Witnesses in arbitration can hardly be objective about their case. Consciously or otherwise, the good points will be exaggerated, the bad minimized. Self-interest or bias may lead to fabrication or omission. **Early investigation will save the advocate a great deal of woe in some cases.**

In any case, you must find a way to make your witnesses realize how important it is that they confide in you so that you will not be faced with any surprise at the hearing. A fact is much more damaging if it catches you by surprise. If you know about a damaging fact in advance, you may be able to explain it and take the sting out of it.

Not only must the witness be frank with you; you must be frank with the witness. Some advocates assume an optimistic attitude, apparently intended to encourage witnesses in the early stages of the case. There is danger, however, in too much optimism. An objective recognition of the problems involved in the case is not only the ethical approach but also, in the long run, the best insurance against disappointments and dissatisfaction for your witnesses.

Any weaknesses in a case should be discussed candidly so that witnesses will understand the difficulties. Sometimes this understanding will increase their helpfulness in the preparation of the case. At other times they may be brought to recognize the advisability of a compromise settlement.

Take Good Notes!! Some advocates fail to take detailed notes. They either make a few cryptic notations that only they can understand, or depend entirely on their memories. No advocate has a memory good enough to guarantee recall of all the necessary details at the right moment. Moreover, it is useful to preserve an accurate record of the facts while they are fresh in the minds of the witnesses. Then, too, the person who confers on the case at the outset may not be available later. The records in the file should, therefore, always be in such condition that any advocate called into the case on short notice can understand the case by studying the file.

<u>All witnesses should be interviewed as early as possible</u>. Begin by asking the witness how he/she happened to know what he/she relates. Find out where the witness came from, where the witness was going, what the witness was doing at the moment of the occurrence and exactly where he/she was with respect to what was seen or heard. It is also important to ascertain whether there were any intervening objects, stationary or moving, so that you may determine if the witness could have actually seen or heard what he/she says they saw or heard.

Sometimes it may be important to obtain a signed statement from a witness. If witnesses prepare a statement in their own handwriting, there is less likelihood that it will be repudiated. If it is not in the witness' handwriting, have the witness sign a statement that the facts reported are true.

The importance of obtaining such statements in certain cases cannot be overemphasized. Employees may leave or be discharged before the hearing. They may lose interest, or become hostile. They may be too concerned about a new job to come to your arbitration hearing willingly. A friend today may become a foe tomorrow.

Final preparation for the hearing should include a review of all documentary evidence in the case, not only those exhibits which you intend to offer in evidence, but you should also review those which the opposing party may offer. The exhibits should be arranged for ready use at the hearing. You will need four copies of each at the hearing: one for the arbitrator, one for the opposing party, one for the witness, and one for yourself.

If there are only a few exhibits, they may be arranged in a folder in the order in which you expect to use them at the hearing. Another folder should hold correspondence and other documents which you do not intend to use, but for which a need may arise at the hearing. If they are not too numerous, the simplest arrangement is to keep these documents in chronological order.

It may sometimes be helpful to prepare special exhibits. It may be desirable, for instance, to enlarge photographs. In a case involves extensive testimony by accountants based on voluminous records, the advocate should prepare visual aids such as balance sheets, operation statements, comparative statements and summaries.

Final Interview of the Witness

No matter how careful the preliminary preparation, the thorough advocate will not go to the hearing without final interviews. The advocate should interview all the witnesses who are available, to preview the facts to which each will testify on direct examination, or about which they may be asked on cross-examination.

The advocate should also prepare to deal with **the weaknesses of the witness** as distinguished from **the weakness of the testimony.** Does the witness have an ulterior motive for testifying? A friendship with another party? A bias? What is the nature of the witness' position? Is there any other factor which may influence the testimony?

If the witness has something in their background which may be subject to problems, the advocate cannot afford to spare the witness' feelings in the interview and then subject the witness, without preparation, to a far less friendly probe at the hearing. The advocate must go over the facts so that witnesses will not suppress the truth to *protect themselves* under the influence of the shock, excitement, or embarrassment during the hearing since this may ruin their credibility and your chances of success.

The advocate must impress upon the witness the importance of telling the truth so that the advocate can make the effect of any attack milder by preparing for it.

INSTRUCTIONS FOR WITNESSES

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Being a witness in an arbitration hearing is not always a comfortable experience. You are probably worried about your testimony. You want to leave a favorable impression. You are naturally concerned that during cross-examination the opposing advocate will attempt to discredit your testimony, to cause you to contradict yourself, and thereby sound inconsistent and untruthful.

It is important to be as comfortable as possible. Your comfort level will improve considerably if you are aware of how arbitration proceedings are conducted. Equally as important, you should be able to give your testimony in a manner that the arbitrator finds understandable and believable. The following should help you.

1. **Sit comfortably erect.** Try not to slouch, change position frequently, fidget, or wave your arms about. Your objective is to appear calm, confident, and self-assured.

2. **Tell the truth on the witness stand.** Remember, you're under oath.

3. **Don't volunteer information.** Answer the opposing advocate's questions honestly and directly, but answer only what is asked. If you can answer with a yes or no, do so—and stop. If there is something you have left untold which could be helpful to your case, it is the responsibility of your advocate to bring it out during re-direct examination. Remember, you are not on the witness stand to try the case. You are there only to answer the questions asked of you.

4. **Answer all questions asked of you, no matter by whom, in a courteous and forthright manner.** You will be asked questions by your advocate, the opposing side, and often by the arbitrator. Answer them all in the same tone, in the same manner, with the same demeanor—honestly, forthrightly and courteously.

5. **Don't argue with the opposing advocate or the arbitrator.** It is the job of the other party's advocate to try to upset you, get you angry or irritated, attempt to discredit you, and cause you to contradict yourself. The opposing advocate may use harsh tactics or an aggressive manner. Don't get angry, sarcastic, snide or emotional.

6. **Be alert and attentive.** If you are in the hearing room during other testimony, pay attention to what's going on. If other evidence reminds you of something relevant you forgot to mention to your advocate, quietly pass a note telling them about it.

7. **<u>Watch the arbitrator</u>.** The arbitrator's body language may communicate an attitude. When do they take notes? Has something significant just happened? Was it something helpful or damaging to your case?

8. **<u>Don't patronize the arbitrator</u>.** If you treat the arbitrator in an exceptionally friendly manner and the other side observes it, the arbitrator may be placed in an awkward position. The arbitrator may feel the need to compensate for your manner by demonstrating to the other side that he/she has not been prejudiced by your actions or words.

9. **<u>Consider each question before answering</u>.** Questions should be answered without hesitation, long pauses or undue reflection. But don't let the cross-examiner set the pace for your answers. **Think before you answer.** If you give an answer which is incorrect or unclear, correct or clarify it promptly.

10. **<u>Don't repeat questions before answering them</u>.** This gives the appearance of stalling or delaying. Try to answer questions with reasonable promptness to avoid casting suspicions on your credibility.

11. **<u>Don't answer a question you don't understand</u>.** If a question is ambiguous or unclear to you, ask the questioner to repeat the question, or rephrase it. Do this as many times as necessary for you to clearly comprehend the question.

12. **<u>Don't deny that you have reviewed your testimony with your advocate.</u>** Occasionally the opposing side may ask you if you've gone over your testimony with your advocate prior to the hearing, implying that this is wrong. **Tell the truth.** If the answer is yes—rarely will it be otherwise—say so. The arbitrator will assume that you have, and it will reflect negatively on your credibility if you deny it.

13. **<u>Don't be afraid to say, "I don't know."</u>** No witness is expected to know all there is to know about any given subject. If you have answered other questions asked of you in a straightforward manner, with specific answers, you will actually enhance your credibility on those matters when you say, "I don't know" to other questions.

14. **<u>Don't mumble; speak clearly</u>.** Your testimony is of value only if it is heard and understood by the arbitrator. Keep your hands away from your face. Hold your hands still or fold them comfortably on your lap.

15. **<u>Don't answer a question if your advocate raises an objection.</u>** The reasons for your advocate's objection may not always be very clear to you, but you can be sure it is intended to be in your best interest. If this happens, take a deep breath and relax. Don't continue testifying until the arbitrator tells you to.

16. **<u>Don’t look to your advocate for answers to questions.</u>** The answers to questions asked of you must come only from you. If the arbitrator sees you getting signs or nods or head shakes from someone else, it may discredit your testimony.

17. **<u>Realize that witnesses may be excluded from the hearing when not testifying.</u>** One of the traditional methods of preserving the “purity of testimony” is the rule that excludes, or sequesters, witnesses from the hearing during the testimony of others. When either party invokes it, it is invariably granted. This is to guard against the possibility that one witness may be influenced by what he/she has heard someone else say.

18. **<u>Realize that the arbitrator may also ask you questions.</u>** The arbitrator has the right to ask questions of witnesses to clarify a point, and to obtain information. Just as in direct and cross-examination, you should be courteous, honest, and forthright in the answers you provide.

19. **<u>Be prepared for the cross-examiner to use harsh or aggressive tactics.</u>** The objectives of cross-examination may be classified as:
    (a) Discrediting the testimony of the witness;
    (b) Testing the validity of another witness’ testimony;
    (c) Using the testimony of this witness to contribute independently to the favorable development of ones’ own case.

20. **<u>Keep yourself under control.</u>** The arbitrator will be evaluating you, your answers and your demeanor. You want the arbitrator to leave the hearing with a positive impression of your testimony.

21. **<u>Study carefully any contract provisions applicable to the case</u>.** You are not expected to be an expert on the contract. But you should have at least a working knowledge of the relevant provision(s) if you were interpreting or applying them in connection with some decisions made or actions taken.

THEORY OF THE CASE

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After a thorough investigation of the facts surrounding the incident and having determined what happened in the process of building the best defense or claim, it is important to develop a theory of the case to which your presentation will conform. In doing so, you must figure out how this theory can best be proven to the arbitrator through the presentation of your case.

The nature of the incident, of course, sharply controls the development of a theory simply because of the two broad divisions into which disputes fall: **Contract Interpretation** and **Discipline and Discharge**. There are common considerations to be taken into account on any issue in contention. These include:

1. Are any fatal procedural defects apparent?
2. What practice, if any, has been applied in past cases?
3. Are there other facts on this matter that apply?

In matters of **interpretation or application,** the issue is essentially one of rights and obligations. The key question therefore has to be -- *Is the language clear or is it ambiguous?* Other issues of importance include:

1. Has the contested language or clause been ruled on before in arbitration?
2. Do previous grievance settlements indicate a mutually accepted process for handling the problem?
3. Is the current dispute consistent with such past history or does this concern an issue not covered by existing rulings and/or practices?
4. Does the issue in contention relate to the exercise of a dormant right or waiver of an implicit obligation?
5. Do the surrounding circumstances of the event demonstrate that the language is being twisted into a new meaning not anticipated by the other side?

In disputes related to **discipline**, the issue centers around equity rather than rights, and is more complex, even though straightforward in almost every case. The key questions in these disputes are:

- Did the grievant commit the infraction?
- Is evidence of this misbehavior available?

Assuming that the facts of the violation can be demonstrated, other issues of vital importance include:

1. Does the contract affect the degree of penalty imposed?
2. Were the surrounding circumstances to the fact mitigating or aggravating?
3. Does the grievant's past disciplinary record weigh for or against corrective action?
4. Does the penalty fit the crime?

Depending on the nature of the dispute and the conclusions you draw after your investigation, the theory of your case can be developed. **In so doing, the theory of the other side's case can usually be figured out and this should be taken into account when your own theory is developed.** It is important to not only convince the arbitrator that you have the merits in the case, but to also convince the arbitrator that the other side is wrong in their presentation of the case.

THE OPENING STATEMENT

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The opening statement is of critical importance because it gives the arbitrator the first impression of the case. It is **not** evidence of any sort, nor should it consist of testimony nor incorporate the offering of any exhibits. It is simply an account of what the case is all about as you see it. The opening statement can be expected to allege that a certain event occurred and, depending upon your position, to provide criteria for supporting, modifying or reversing the outcome and remedy requested. It should be brief and to the point, but not so brief that it does not give the arbitrator a clear picture of the testimony and evidence you will present.

The opening statement should include:

1. What the employer allegedly did to cause the grievance, including enough detail to give the arbitrator a *feel* for the case.
2. The pertinent section(s) of the contract alleged to have been violated.
3. A brief listing of the main arguments.
4. What issue you are asking the arbitrator to decide, and
5. What remedy you want the arbitrator to apply.

Remember that your opening statement is argument, not evidence; what you claim in the statement has to be proved through witnesses and/or evidence. Do not make assertions in your opening statement that you either cannot prove or neglect to prove. **If you can do all this in 300 words, you have done a good job.**

ONE ARBITRATOR OUTLINES AN OPENING STATEMENT:

a. State what action the employer took giving rise to the grievance and arbitration; provide enough information for the arbitrator to understand the circumstances surrounding the grievance. Have you included all the names, places, times and other specifics of the incident that caused the grievance? Do you note which of these facts are in dispute?

b. State the contractual provisions and/or past practices violated by the employer's action. Cite specific contract language and include excerpts of the language in the description of what you believe has been violated and why you believe it has been violated.

c. State what you intend to prove and state what evidence you will use to establish proof.

d. State the issue(s) you believe the arbitrator ought to address.

e. State as fully as possible the remedy sought.

With respect to opening statements, it is a good practice to prepare them in written form. Copies should be provided to the arbitrator and to the opposing side, and read into the record.

The advantages are:

1. By organizing your thought in advance, you can review the opening statement to be sure no crucial points are left out, as might happen when spontaneous oral remarks are relied upon. You can assure that it is concise and that you address the important points without cluttering detail.

2. Since many cases are heard by ad hoc arbitrators, a written opening statement relieves the arbitrator of the need to take copious notes during your statement, and is a source of memory-refreshment ready at hand for the arbitrator's reference.

3. Your written opening statement reminds the arbitrator of your point of view and the theory of your case as well as evidence brought out to support your cause.

PROVING YOUR CASE

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STANDARD OF PROOF

Proof in arbitration cases is generally a matter of common sense. There is no widely accepted standard the "burden of proof" since it may differ depending on the nature of the issue, the contract language, or the habits and customs of the parties. Most arbitrators decide cases without ever stating who has the "burden of proof," just as most arbitrators do. Some exceptions will be discussed below.

Normally, the party initiating the hearing will present evidence (or *go forward*) first. However, this order is sometimes reversed if the other party is in possession of the facts, as in a **discharge case**. This is supported by the usual objection to *proving a negative*. A union can scarcely prove a member did not do something until it is known what he/she is alleged to have done. In this case, the company would be the *moving party*. The order in which evidence is presented is not usually important, since both parties will have the opportunity to present all of their evidence eventually.

Arbitrators normally will a general idea of who must prove what in a case, and as the case progresses will make up their minds about the quantum (amount) of proof needed to satisfy him or her. There are three levels or degrees of proof that a party may be required to sustain.

The loosest standard of proof is called the **preponderance of the evidence.** This gives the decision to the side which, on balance, carries a majority percentage of proofs by weight related to the relevance they bear on crucial aspects of the dispute. The tightest standard of proof is **beyond a reasonable doubt**. In application of this standard, the side carrying the burden must establish proof-positive or fail in its cause. It has been said that *beyond a reasonable doubt* is at least 90%. In other words, the decision does not emerge on weight, but by standing alone. The third standard of proof is **clear and convincing** evidence which lies somewhere between the two.

In **Discipline and Discharge** cases, the burden of proof and the amount of proof an arbitrator will require will depend on the contract language, the seriousness of the offense, and how the parties have treated such offenses in the past. Since discharge is the ultimate penalty management may impose on a worker, most arbitrators will make the employer prove its case clearly, sometimes even "beyond a reasonable doubt" or with "clear and convincing evidence."

There are two points to be decided in discipline and discharge cases: *First*, the proof of wrongdoing; and *secondly*, the degree of penalty to be imposed if proof is established. Sometimes the contract will give the arbitrator no flexibility in assessing the penalty. In such a case, the arbitrator normally decides guilt and the penalty follows automatically. Normally, the arbitrator likes to have the latitude to determine a proper penalty, or remedy.

In **Contract Interpretation** cases, the proof depends largely on the contract language and on the case to which the language is being applied—as, for example, in seniority applications:

- If the contract provides for straight seniority, the standard of proof is obviously on the employer if they wish to by-pass the senior worker.
- If the contract provides for seniority and *sufficient* ability, the employer must show that the senior worker does not have the *sufficient* capabilities for the job.
- If the contract provides for seniority provided ability is "equal", the burden shifts to the union to show that ability actually is equal.

Sometimes, if the contract is silent or vague, an arbitrator will apply a stricter standard if seniority is being applied to promotions, demotions or layoffs.

EVIDENCE

EVIDENCE

Most arbitrators are not bound by legal rules of evidence in arbitration proceedings. The exceptions are when a statute or special arbitration agreement applies. Arbitration cases are conducted more informally than courtroom procedures, and are designed so, inasmuch as the arbitration process assumes a continuing relationship between the parties.

The purpose of arbitration is to seek out the facts in a case and to have a decision rendered. The application of technical rules of evidence makes it appear that all the facts are not being taken into account. For these reasons, arbitrators are permitted (and sometimes required) to accept or listen to all evidence when a party believes it to be pertinent. A refusal to accept all relevant evidence is grounds for vacating an award. On the other hand arbitrators may rule in the hearing, or in the decision, against the propriety of certain evidence.

Arbitrators may not subpoena evidence nor may they compel the testimony of witnesses. (Again, arbitration under a Statute or a special agreement may provide differently). Normally such power is not necessary since the arbitration is voluntary and the parties will provide what the arbitrator wants and needs. A failure to produce relevant evidence would naturally be taken into account by the arbitrator, to the disadvantage of the party failing to respond.

It is up to the arbitrator to decide what weight he/ she will give to a piece of evidence and whether and to what extent he/she believes a particular witness to be credible. In making such a determination, arbitrators take into account the following factors:

- whether or not statements "ring true"
- the conduct of the witness on the stand
- whether the witness speaks from first-hand knowledge or hearsay
- the witness's experience in the matter on which he/she is testifying
- inconsistencies in the witness' testimony
- past record or personality or demeanor

All of these factors together determine how much weight or credibility an arbitrator gives to evidence or witnesses.

Kinds of Evidence

1. **Hearsay Evidence:** Hearsay is permissible in arbitration. But problems can arise. If a witness testified as to what he/she did or saw, that testimony carries more weight than if the witness testified as to what somebody else told him/her. Another problem is that over-reliance is placed on admissibility of hearsay and the parties sometimes think they have made their case through witnesses who offer nothing but

hearsay.

2. **Parol Evidence:** This pertains to word-of-mouth or verbal agreements. It is admissible only "for what it might be worth" which is usually little or nothing. It will not prevail against any written agreement. Sometimes the agreement will state specifically that verbal agreements that conflict with it are invalid.

3. **Circumstantial Evidence:** Though not as strong as direct evidence, circumstantial evidence is acceptable and sometimes decisive in arbitration cases. The test is whether or not such evidence proves "beyond a reasonable doubt" that a worker actually performed an alleged act.

4. **Best Evidence:** A rule that favors the use of primary evidence as distinguished from secondary. This is a protection against mistaken or fraudulent admissions as well as a protection against intentional or unintentional misleading which could occur through the introduction of selected portions of a comprehensive writing to which an opponent has no access.

Affidavits or signed statements will routinely be subjected to objections. The plain fact is that the statements cannot be cross-examined and is susceptible to having been carefully edited to present its subject matter in the most favorable light possible. This is not the best kind of evidence, and the author, if available, should be brought in to testify.

5. **Expert Witnesses:** This is usually a professional person who will provide testimony of a technical nature. Experts may be doctors, engineers, handwriting experts or lie-detector experts. In every case, when the witness is called to the stand, the opposing party can undertake **voir-dire,** which is the qualification of the expert witness by reference to education, training, experience, and professional reputation.

Some Procedural Protections

Though most kinds of evidence are admissible in arbitration proceedings, regardless of the weight that will be attached to them by the arbitrator, other kinds of evidence are not admissible or have protections that accompany their use. In addition, there are certain procedures that by common-law rule must be followed in arbitration proceedings. The most important of these are:

1. **Right to Cross-Examination:** An arbitrator will not accept evidence if it is submitted only on condition that the other party not be allowed to see it. The parties not only have the right to see evidence (exhibits) but also to cross-examination witnesses making allegations. Even new data submitted in post-hearing briefs can be grounds for demanding a further hearing. Certain exceptions are made to this general right, as in admitting hearsay evidence or affidavits from persons not present at the hearing. However, the evidence may be discounted by the arbitrator.

2. **Withholding Evidence Until the Hearing:** In order to prepare a defense or rebuttal, both parties must be given copies of all exhibits. There is also a strong convention against withholding previously-known evidence until the hearing. At the very least the opposing party may claim time to consider such new evidence. In some cases deliberate delay in withholding evidence will seriously damage the case of the party doing so. Sometimes the contract will say that the parties must reveal in grievance negotiations any evidence available to them at that time. The only exception that is generally recognized is where evidence has only recently come to the knowledge of one of the parties

3. **Improperly Obtained Evidence:** Evidence obtained by illegal or unethical means, such as unauthorized locker searches of personal belongings, may be refused by arbitrators. Another example is entrapment, where a plan is pursued solely for the purpose of catching a person in a wrongful act.

4. **Offers of Compromise:** There is general authority among arbitrators that compromise offers, made in grievance negotiations, are not admissible in an arbitration. The public policy behind the grievance procedure is to encourage settlements prior to arbitration. A party might be reluctant to make compromise offers if it was known that any offer made in negotiations could be introduced against that party in an arbitration hearing.

5. **Outside Testimony:** Certain types of cases, such as incentive rate disputes, sometimes are helped by the testimony of outside persons. Generally arbitrators try to restrict testimony of outsiders (especially “character witnesses”) or get the agreement of both parties to their appearance. On the other hand, of course, testimony by doctors or other expert witnesses, who have knowledge of conditions of witnesses or plant operations, may be critical in certain types of cases.

6. **Inspection by Arbitrator:** If both parties consent, the arbitrator may undertake a personal inspection of the workplace or scene of the grievance. Sometimes the arbitrator will press for evidence of this sort.

INTRODUCING DOCUMENTS

INTRODUCING DOCUMENTS

Arbitration advocates routinely introduce documents into evidence as part of their cases. There are standard techniques for doing this.

1. THE DOCUMENT MUST BE *IN THE RECORD* TO BE CONSIDERED

An Arbitrator will consider a document in his/her decision only if it has been placed "in evidence" or "in the record." This means the advocate may not simply give any piece of paper to an arbitrator and ask that it be considered. The advocate must get the document into the record somehow. This is part of the hearing strategy, just as the advocate must decide how to get necessary testimony into the record.

2. TWO WAYS TO GET A DOCUMENT INTO THE RECORD

A. **Stipulation:** Management and the union sometimes stipulate (agree) to jointly enter certain documents into the record. When the parties stipulate to the admission of documents, they agree there is no dispute about their authenticity.

Generally the advocates agree on stipulations before the hearing begins. Then, during the preliminary discussion among advocates and the arbitrator prior to the opening of the hearing, the advocates present to the arbitrator the exhibits to whose admission they have stipulated. Typically the parties stipulate to the admission of at least:

a. The Collective Bargaining Agreement, which is typically Joint Exhibit No., and

b. The documents making up the grievance record (Step 2 Appeal, Step 2 decision, Step 3 Appeal, etc.). Usually the parties call these collected papers the “grievance package” and they stipulate to admit the whole package as Joint Exhibit No. 2. Some arbitrators or advocates may give each separate document its own Exhibit number.

In addition, advocates often stipulate to other routinely used forms or documents into the record.

Stipulation is the easiest way to get documents into the record. It is often the best way when there is no dispute about their authenticity or accuracy. However, even where there is no dispute over the admissibility of a document, advocates should take care to <u>explain fully</u> what it is and what significance it should have for the arbitrator.

B. Authentication: Authentication is necessary where the parties have not stipulated to the admission of a document into the record. To authenticate a document is to show it is valid so the arbitrator will admit it to the hearing record.

Authentication is necessary because a document is different from a witness' live testimony. A document usually reports that certain facts are true or actually happened. So does a witness, but where a witness can be cross-examined to test his/her truthfulness, a document cannot. So a document is usually authenticated through a witness who can testify about it. This is also called "laying a foundation" for the document.

To get a document into evidence by authentication, a witness is called who can give testimony answering such questions as:

- Where he or she obtained the document;
- How the document was created;
- Whether the document was produced in the regular course of business;
- What facts the document shows, and
- Whether the document accurately reports the facts.

After the witness has established the document's authenticity through answers to such questions, the advocate requests that the document be placed in the record:

"Mr. /Madame Arbitrator, the Union offers this document for admission to the record as Union Exhibit 5."

3. OBJECTIONS

Two objections are commonly made to challenge the admission of documents to the record:

A. **Lack of Foundation.** An objection of "*lack of foundation"* usually means, "*The document should not be admitted to the record because it had not been sufficiently authenticated or explained."* Usually this objection is proper when one side has moved to admit a document without any explanation of what it is, where it came from or what it supposedly shows.

When you face such an objection, be prepared either to: (1) offer additional information about the document, usually through your witness; or (2) argue that you have already provided sufficient information about the document for its admission to the record.

B. **Hearsay.** A hearsay objection to a document may be raised where the truth of what the documents reports are at issue. Such an objection is proper where, for example; (1) the Employer moves to admit a security guard's investigative memorandum, but the guard is not present to testify and be cross-examined about the facts reported in the memorandum; or (2) the union offers a written statement of a witness, but the witness is not available to testify and be cross-examined about the facts reported in the statement.

Keep in mind that arbitrators commonly admit evidence -- testimony and documents -- that are technically objectionable, saying, "I'll admit it and give it appropriate weight (or, I'll accept it for what it's worth')." If the material is offered against you and it is damaging, it may be helpful to object strenuously to make the point that the evidence should be considered worthless even though it is placed in the record.

4. **VOIR DIRE**

This French phrase is used to describe the process of testing the authenticity of a document offered into evidence. One side may "voir dire" the opposing side's witness concerning a document offered into evidence, interrupting the other side's direct examination of its own witness.

These are the types of questions that would be used to authenticate any document through a witness, for example:

"Ms. Supervisor, I refer you to the document marked for identification as Management Exhibit 5. Can you tell me what this document is?"

"Who created this document?"

"Please explain each column and row of numbers on the chart."

"What is the source of the date reported in this document? It is available for verification?

CROSS-EXAMINATION TECHNIQUES

CROSS-EXAMINATION TECHNIQUES

There are some basic guidelines that will assist you in handling cross-examination. The following guidelines are not guaranteed to make you a "good" cross-examiner, but they may prevent you from becoming a "bad" cross-examiner.

The best approach to cross-examination is to be prepared. Ideally, you should be able to deliver the closing statement of the case even before the case begins. Nothing should surprise you once the arbitration hearing starts. You should know what points you are going to raise about the credibility of the other side's witnesses even before you ask your first question. To prepare an effective argument on the credibility of the other side's witnesses, you should remember:

1. Be tactful -- Arbitrators are smart. Respect the intelligence of the arbitrator.

2. Use simple language.

There are two basic rules to follow in cross-examination: (1) Never ask a question unless you have definite reason for asking it; and (2) Never ask a question unless you are sure of the answer. There are, of course, exceptions to the above, but it is good to remember that unless you know exactly what to ask and where to begin, the best cross-examination is "No Cross-Examination."

In discussing point number (1) above, please note that little can be gained in cross-examination by asking the same questions as were asked in direct examination. If the witness is telling the truth, he or she will certainly repeat the same answers, and if the witness is lying, it is almost too much to hope that a different answer will be given than before, simply by asking a second time. You should have a reason for asking your questions. Unquestionably there are times when an effort must be made to cross-examine the previous testimony of a management witness because you realize that the testimony standing uncontested and untouched will cause you to lose your case

In discussing point number (2) it must be pointed out that it is not enough just to have a good reason to ask a question; you must also have faith in the integrity of the witness. Once you know who the employer witnesses are likely to be, it is important that you investigate their honesty.

Although it is important not to ask questions in cross-examination unless you already know the answer, there are, of course, exceptions to this rule. If the purpose of the cross-examination is to reveal the character, attitude or mental condition of the witness, it is seldom possible to anticipate the answers to your questions. Another exception is when you have lost your case and you know you have lost. If you are going to lose the case anyway, what is to be lost through reckless questioning?

Cross-examination is not limited to trying to show that a witness is lying, and you should

structure your cross-examination accordingly. You may want to discredit the witness by showing bias, and to elicit testimony favorable to your case.

Another consideration is also one of the most abused: **if the witness hasn't hurt you in direct examination, don't cross-examine.** Knowing this is one thing, practicing it is another. Advocates are too inclined to interpret the testimony of an opposing witness as harmful. There are clearly situations in which staying silent is your best tactic. The occasions will be rare when you will take issue with everything said by an opposing witness. You may only plan to dispute the opposing party on one or two issues. In such a situation, a wide-ranging cross-examination will only weaken the impact on the issues which are most important to you.

The decision whether to cross-examine can be a complex one. The crucial factor is to make these decisions in light of your overall theory of the case, with an eye to the issues you believe are crucial to your case.

Objectives of Cross-Examination

A. **To Discredit the Testimony of the Witness:** It may be impossible to show an arbitrator that a witness produced by management may be mistaken in one or more areas of testimony. This assumes that you do not like what the witness has testified to, and want to discredit the witness. In many circumstances, however, cross-examination is an opportunity not to discredit what has come before, but to build new testimony favorable to your side.

B. **To Challenge "Established" Facts:** A contradiction has more impact when two witnesses called by the same side disagree than when witnesses called by the opposing sides disagree. The possibility of such contradiction is increased by the rule permitting sequestering of witness from the hearing.

C. **To Produce Affirmative Testimony:** Another objective of cross-examination is to contribute favorable testimony. That is, you may elicit testimony which does not contradict the witness or other witnesses, but which provides affirmative testimony to aid your case. The most obvious example of this is when the witness, during direct examination, has testified to certain facts that hurt your case, and also to other facts that are harmful. Your cross-examination could consist simply of getting the witness to repeat the favorable portions of the testimony.

Some Guidelines for Effective Cross-Examination

1. **Prepare for your Cross-Examination.**

2. **Don't cross-examine unnecessarily.** Know when silence is the best strategy.

3. **Don't ask a question unless you know the answer.**

4. **Be brief, concise and to-the-point.** Use plain language. Even simple cases are complex to the arbitrator. Be realistic about the number of points you can prove on cross-examination.

5. **Always ask leading questions.** You are allowed to ask leading questions in cross-examination. You want to put words in the witness's mouth. Ask leading questions with well-chosen language. Word the question so that the answer is limited to the information you seek. Don't give the witness the opportunity to repeat on cross-examination what he or she testified to on direct examination, and never permit the witness to explain anything.

6. **Listen to the answer.**

7. **Avoid offensive questions**. Don't get into an argument with the witness.

8. **Avoid the one question too many.** Realize when you have proven your point.

9. **Save the ultimate point for your closing statement.** This allows you the opportunity to put points before the arbitrator in a way that is strongest for your case.

10. **Asking a few good questions is more important than asking too many questions.**

OBJECTIONS

THE USE OF OBJECTIONS IN ARBITRATION HEARINGS

Arbitration hearings are not conducted under the rigorous rules of evidence or procedure of the court room. Indeed, most arbitrators will generally apply less formal procedures than that used in most administrative hearings, because they are primarily interest in a straightforward presentation of the facts in the case in hand. Moreover, arbitrators will almost universally react negatively to overly technical objections, hostile cross-examination of witnesses or other "Perry Mason" type behavior.

The exclusion of relevant fact from an arbitration hearing is one of the few grounds that courts recognize for overturning arbitration awards. Accordingly, the union representative should not be surprised if the arbitrator admits certain types of evidence which would be excluded in a court or administrative hearing. Through the wise use of objections, however, you may succeed in demonstrating the faulty nature of your adversary's case. In such situations, the arbitrator may signify his or her concurrence with your objection by admitting the testimony or evidence "for whatever it's worth." Your point is nonetheless made.

Union representatives should not allow the management representatives to run away with a hearing. Your adversary should not be allowed, for example, to put words in the mouths of witnesses on important questions of fact during direct examination. That is leading a witness and should be objected to, if not stopped directly by the arbitrator. Similarly, objections should be made to damaging evidence or testimony being introduced in a discipline case unless it is material and / or relevant to the charge with which the member is faced.

Objections in a hearing are intended to test the nature and value of evidence or the procedure by which it is introduced. Given this, perhaps one of the best uses of the following information would be to apply its standards to any case you prepare for arbitration. In doing so you will then be sure of what you are going to present and how you are going to do it. The rest will depend upon the facts and the judgment of the arbitrator.

The questions decided by an arbitrator fall into three broad areas: Questions of contract language, of fact and of evidence. What is the applicable language? What actually happened? What kind of information will tell me what actually happened? Most objections rose during the course of taking testimony or evidence at an arbitration hearing usually relates to this third kind of question.

Objections are not subtle tricks used to deceive an opponent nor are they meaningless rituals. They are concise ways of saying that the information your opponent is offering or the manner of offering it is not likely to give the arbitrator an honest and accurate view of what really happened.

No one can tell you when to make an objection. That depends on your analysis

of the entire situation at the time. Never lose sight of your basic task, to make your witnesses and their version of the facts believable and believed. You should be prepared for objections. If you are objecting to a line of questioning, be prepared to explain to the arbitrator what you are objecting to. Conversely, if your opposing advocate objects to your line of questioning, be prepared to defend your questions and why you asking them to the arbitrator. If the arbitrator sustains the opposing advocate's objection, take a few moments to gather your thoughts, and think of another line of questioning to get at the facts you want from the witness.

Objections are also used as tactical tools. For example, if your witness is being badgered by your opposing advocate on cross-examination, you might object in order to give the witness time to collect his or her thoughts and to slow your opposing advocate down. On the other hand, if your witness is holding up well and keeping composure despite the bullying tactics of your opposing advocate you might just want to let the witness go on to demonstrate to the arbitrator how completely trustworthy and sure of the truth of the matter your witness is. Only experience will teach you this.

What follows is a guide to the technical language used in making these objections. It will not make you an expert in the process—only the experience of trying cases will do that – but at least it will demystify the techniques somewhat and will give you an introduction to some of the tools you may find helpful in the presentation of evidence.

Motions for Dismissal

Motions for dismissal in arbitration cases should be raised for procedural or substantive reasons. A question of procedural arbitrability arises when one of the parties argues that the case is not properly before the arbitrator because one or all of the grievance procedure steps prior to arbitration have not been complied with as outlined in the collective bargaining agreement. A question of substantive arbitrability arises when one of the parties argues that dispute in question is not within the scope of the arbitration agreement and that an arbitrator would not have the power or jurisdiction to render a final and binding award.

Badgering

You should protect your witnesses from tactics designed to bully or intimidate. Although arbitrations are informal hearing, menacing or threatening a witness either physically or by tone of voice, sarcasm, ridicule, or in any other way, is termed badgering the witness and should usually be stopped.

Speculation or Opinion

Only duly qualified experts on some technical subject should be allowed to express their opinions. Other witnesses should tell only what they experienced with one of their senses. An objection that a question calls for speculation or for opinion is proper where the witness is drawing an inference by some extended process or reasoning based on his or her impressions. For example, it is perfectly proper for the witness to say that the green leafy thing he observed was a tree. However, unless he could be qualified as an

expert on trees, he could not say that the leaves he saw were dropping because the tree had elm disease.

OBJECTIONS TO THE CONTENT OF THE QUESTION

Irrelevant and Immaterial

The issues of relevancy and materiality of a question overlap and usually it is enough to simply object that the question is irrelevant. Technically, however, the two words cover different ground. A question is not material if it relates to something that has nothing to do with the issues the arbitrator must decide. A question is not relevant if, even though it does relate to a material issue, it would not help decide that issue one way or another.

Cumulative

A question which simply goes over material that has already been presented once. This is a matter within the arbitrator's discretion. When the arbitrator reaches point where enough has been heard on a particular point, the arbitrator will sustain your objection. The arbitrator may tell the opposing advocate that enough has been heard or may wait for you to make the objection. This is a matter of the personality of the particular arbitrator and you simply have to watch to see how you are to proceed.

Incompetent

A question where the witness has no personal knowledge of a matter he or she is asked about.

Lack of Foundation

Sometimes, certain preliminary questions have to be asked before a witness can competently testify about a particular fact. Before the contents of a conversation can be told, the witness must tell the time, the place and what persons were present. It would be proper to object if the witness is asked what was said before being asked these preliminary questions, based on a lack of foundation.

Best Evidence

In the case of writings of any kind, the foundation requires either the production of the writing itself, or upon proof that the original is unavailable, a properly authenticated copy. If no copy is available, a satisfactory explanation should be given why there is no copy and a foundation must be laid that shows the witness knew what was in the writing and is capable of remembering it. If the writing or a copy is available, the document itself is the best evidence of what is contained and in that case a witness may not testify as to what it says.

OBJECTIONS TO THE FORM OF THE QUESTION

Ambiguous or Unintelligible
Simply means that you cannot understand what the question means.

Argumentative
A question that is not asked to get information but is really a comment on the evidence. For example, "That was pretty foolish of you, wasn't it?" is not designed to give the arbitrator any new information but rather is designed to simply state the questioner's opinion that the witness has acted foolishly. By objecting that such a question is argumentative, you save your witness the possible embarrassment of having to try to answer it. You also say to the arbitrator, in effect "that is just opinion, not evidence." The proper time to state an opinion is at the conclusion of the case, but it is improper during the taking of testimony.

Asked and Answered
The proper objection where the opposing advocate is not satisfied with the answer just received and keeps asking the same thing over and over.

A Fact Not in Evidence
A question assumes a fact not in evidence when it includes a statement by the questioner that assumes a certain factual situation exists before there has been any evidence that such facts actually existed.

Leading Question
You should object to a question in which the questioner suggests the desired answer by the form of the question. It appears the questioner is in fact giving the testimony by the form of the question, leaving the witness merely to say "yes" or "no". Leading questions are permitted in cross examination and when a party calls an "adverse witness," but not in direct examination, except if not objected to.

Hearsay
The general rule is that a witness may tell only what he or she personally observed through one of his or her own senses. A witness cannot tell what was learned second hand. To do so is to present hearsay evidence, which is generally not admissible (but may be allowed) in arbitration hearings. Hearsay may be admitted by an arbitrator but it is generally not a sufficient basis for a decision without some other non-hearsay evidence.

CONTRACT INTERPRETATION

STANDARDS APPLIED BY ARBITRATORS IN CONTRACT INTERPRETATION

The primary goal of the arbitrator is to carry out the intent of the parties. To do this the arbitrator looks to the contract language but not necessarily in a completely literal way. He/she tries to determine what the words of the agreement mean to those who created and used them, while realizing that reducing an agreement to writing sometimes introduces a distortion or change in the original intent of the language.

The tests used by arbitrators in contract interpretation cases will be discussed under three heading: Standards based on the contract language itself, standards going beyond the contract, and some special considerations.

1. STANDARDS BASED ON CONTRACT LANGUAGE

Contract Authority – Does it permit the employer to act and how? Does it permit the union to act and how?

Language Which is "Clear and Unambiguous"—Even when the parties themselves disagree on what the contract language means, the arbitrator may find it to be clear and definite. Interested parties are inclined to make a clause mean what they want it to mean. The arbitrator brings a certain amount of objectivity to the process.

Specific Contract Clause – Does the language clearly cover the situation, or does it have to be "projected"? Is the language general, or is it specific? Where contract language is specific in some respects, it will normally be held to supersede another, more general clause.

> Example: "Management shall continue to make reasonable provisions for the safety and health of its employees. Wearing apparel and other equipment necessary to properly protect employees from injury shall be provided by management in accordance with practices now prevailing … or as such practices may be improved from time to time by management."

How would you expect an arbitrator to rule on a case asking that rain clothes be provided certain employees if this had not been done before?

To Express One Thing is to Exclude Another—To mention one item or a group or class of items, and not to mention others, is construed to mean that the others were meant to be excluded.

> Example: "Shift workers will be given 20 minutes from their regular shift for eating lunch, at the convenience of management."

Could regular workers claim the same privilege?

Words will be Judged by their Context—The meaning of words and phrases will be judged by the context in which they appear.

Example: Section on Holidays Worked. "Holiday rate of 8 hour plus time worked at the applicable rate will be paid for holidays worked."

Section on Holidays Not Worked. "To be eligible for holiday pay, an employee must work the day before and the day after the holiday."

A worker was absent the day before a holiday, but worked 8 hours on the holiday. The employer said he was ineligible for holiday pay.
How would you argue the case?

Agreement to be Construed as a Whole – Arbitrators normally will hold that all parts of the contract have some meaning, or the parties would not have included them in the agreement.

Normal and Technical Usage – Words and phrases will be given their popularly accepted meaning in preference to some special meaning which one of the parties may try to give them. Arbitrators will take the meaning customary in labor relations.

Example: Vacation pay was based on "average earnings." An employee worked on two types of jobs. The employer based vacation pay on the worker's average earnings on the lower-rated job, on which she worked 80% of the time.

How would you rule and why?

2. STANDARDS GOING BEYOND THE CONTRACT

Intent of the parties – Where the contract is not a sufficient guide, the arbitrator will look beyond it to see if he/she can determine the intent of the parties.

Contract Negotiations – The history of negotiations, as evidenced by minutes or records, is important. The arbitrator may rely on oral evidence if convinced of its accuracy.

No Consideration to Compromise Offers – Offers made in negotiations leading up to arbitration will not be considered in arbitration. It is recognized that parties will make offers, looking towards settlement that might be less than they consider to be their strict contractual rights. (Here, however, it must be determined that it is a compromise offer and not an admission that the case is really based on considerations other than those put forward in negotiations.)

Custom and Past Practice – What the parties do under a collective agreement might

be even more important than what they <u>say</u> in it. Past practice is one key to understanding the contract. One definition of past practice is:

> "A practice that is a <u>reasonable,</u> <u>uniform</u> response to a <u>recurring</u> situation over a <u>substantial</u> period of time which has been recognized by the parties <u>implicitly</u> or <u>explicitly,</u> as the proper response."

The general rules on past practice are these:

A. Past practice will normally not be considered if the contract language is clear and unambiguous, although some arbitrators make exceptions to this.

B. The practice must be <u>mutual</u> and be shown that both parties accepted it. Continued failure to object to a practice is sometimes held to make it mutual. Although, it is also sometimes held that the failure to object to a practice is merely ignorance of contractual rights and does not constitute acceptance.

C. It must be of <u>sufficient generality and duration</u> to imply acceptance. This is frequently difficult to prove.

D. In general the burden of persuasion is on the party using the past practice to buttress its case. Usually this is the union.

<u>Industry Practice</u> – When the practice in a particular workplace does not provide a sufficient guide, an arbitrator will sometimes look to practices in other similar workplaces of the same employer, or other workplaces in the same industry. This would be especially true in these cases:

> Where the practice was found under the same clause in other workplaces of the same employer.
>
> Where the same agreement was entered into by one employer with several unions.
>
> Where the same agreement was entered into by several employers with one union.

Rarely is general industry practice taken into account, since a practice in one industry might be meaningless in another.

3. SOME SPECIAL CONSIDERATIONS

<u>Interpretations in the Light of the Law</u> – When two interpretations are possible, one making the agreement unlawful and the other making it lawful, the latter may be used on the presumption that the parties intended to have a valid contract. For instance, if one interpretation of the contract would put the parties in violation of the Fair Labor Standards (Wage and Hour) Act, it is likely to be avoided if another interpretation is possible.

Reason and Equity – Where language is ambiguous, the arbitrator usually will strive to apply it in a manner that is reasonable and equitable to both parties. As one arbitrator put it:

> "The arbitrator should look at the language in light of experience and choose that course which does the least violence to the judgment of a reasonable man."

Avoiding, Harsh, Absurd, or Nonsensical Results – When one interpretation would bring just and reasonable results and another would lead to harsh, absurd, or nonsensical results, the former will be used. For example, an interpretation would probably be rejected that would grant reporting pay under one clause and reject it under another.

Forfeitures or Penalties – Both arbitrators and the courts are reluctant to assess a penalty or forfeiture if another interpretation is reasonably possible. For example, a contract clause requiring back pay for a worker unjustly discharged was interpreted not to require back pay where the employee suffered no loss of earnings while off the payroll of the employer. Outside earnings and unemployment compensation will commonly be deducted from back pay awards.

On the other hand many arbitrators are inclined to rule that some remedy (including back pay, and even interest in some cases) is appropriate in certain types of cases. The question of remedies is one of the most controversial for arbitrators and the parties involved.

Experience and Training of Negotiators – Arbitrators are less inclined to apply a strict construction of contract language where the negotiators are inexperience. The assumption is that the rules and practices were better understood by the parties than the words by which they tried to express such practices. This liberal attitude would not be taken with experienced negotiators who were known to have scrutinized the language closely.

Interpretation Against the Party Selecting the Language – When no other rule or standard applies, arbitrators sometimes will rule against the party which drafted the language. The reason is that the drafting party can more easily prevent doubts as to its meaning.

PAST PRACTICE

PAST PRACTICE

The most basic labor agreement can provide a seemingly endless source of disagreement over its interpretation. In part these results from the complexities of the employment relationship which the contract seeks to govern, and is often complicated by the less-than-mathematical precision of the written word. It can be further complicated by the intentional use of ambiguous language where the negotiators see more precise language as being counter-productive to reaching agreement on an otherwise acceptable contract.

It is a cardinal rule of arbitration that a party cannot gain in arbitration that which they were unable to gain in negotiations. For this reason, where the clear and unambiguous language of an argument is found wanting, the arbitrator will also look to past practices of the parties themselves as the best evidence in determining the meaning of the issue in dispute.

I. The Nature of a Past Practice

One definition of a past practice is: **"A practice that is a reasonable uniform response to a recurring situation over a substantial period of time which has been recognized by the parties implicitly or explicitly as the proper response".** Even though it may ultimately be proven that a particular practice has been consistently followed by the parties, it should be emphasized that not every practice or way of doing things amounts to a binding past practice. A custom or past practice is not something which arises because a given course of conduct has been pursued by the union or management on one or more occasions. Rather, it evolves between the parties as a "normal" reaction to a recurring situation. It must be shown to be the accepted course of conduct characteristically repeated in response to a given set of underlying circumstances.

The arbitrator is obliged to determine whether the alleged practice is merely one of the courses of action followed from time to time by the parties in response to a certain set of circumstances, or whether it is the exclusive and unanimous response. Mutual acceptance or agreement – even though it may be implied – is the foundation for that uniform response.

What standards can be used to determine whether or not a past practice exists? There are no universally accepted standards for this purpose. A past practice is usually the product of a particular history and tradition, or a particular group of employees and employers, and a particular set of circumstances which created it in the first place.

Arbitrators frequently consider factors like the following and may ascribe varying degrees of importance to each or any combination of factors:

1. The express terms of the written contract
2. The prior negotiations of the parties
3. The degree of the mutual "acceptance" of the practice
4. The duration in which the practice has been followed
5. Other relevant facts

Nevertheless, arbitrators have come to rely on certain characteristics which, when applicable would be given great weight in making a determination of past practice. These characteristics are:

1. Clarity and consistency
2. Longevity and repetition
3. Acceptability
4. Mutuality

How does one measure "longevity and repetition"? It's up to you to argue how long a practice has been in place and to what extent it was an ongoing practice. The only "rule of thumb" is that twenty (20) years is better than ten (10) years is better than five (5) years is better than two (2) years.

Since the continued binding effect of a past practice can be based on "acceptability, the question of whether the practice was established by both parties, or established by one of the parties and not contested by the other, is a factor often given importance by the arbitrator. It would seem that the parties might agree that a particular practice is mutually binding regardless of how it was initiated. For example, a group of employees may begin taking a coffee break in violation of an explicit company rule which prohibits such breaks. Or, it may originate upon the suggestion of the employer alone or the employer and the union jointly. The fact remains, if the coffee break is taken over a long period of time and is eventually accepted by both parties as the customary and normal way of doing things, it will be binding on the employer, regardless of how it was initiated. The origin of a practice (whether it was initiated by one or both of the parties) should be one of the relevant facts to consider in determining whether the necessary "mutual agreement" is present.

An express agreement is not necessary to create a binding past practice. Once it can be shown the parties had knowledge of the particular course of conduct, agreement may be implied when there is a continued failure on the part of one party to object to the other's activity.

II. Function of a Past Practice

A. **When Contract Language is Ambiguous** – The most common function of a past practice is to clarify ambiguous contract language. Arbitrators will determine what the parties meant when they caused such language to be incorporated into the agreement by observing how the parties have conducted themselves under that language.

B. **When Contract Language is General** – Arbitrators will use past practice in implementing general contract language. There are subject included in contracts that just cannot be made specific. The parties may be satisfied to express their general standard of agreement knowing that the provision is too general to answer every practical problem that may arise.

Many times the parties are content to permit the general clause to receive its real meaning in the grievance or arbitration procedure. The parties may reinterpret the language in light of grievance decisions or arbitration awards. All of these factors in some way influence the formation of a binding past practice. The role of past practice in giving specific meaning to general contract language is considerable.

C. **When the Contract is Silent** – Even where the collective bargaining agreement may be silent on a particular matter, past practice has been held to constitute a separate, binding obligation. Obviously, since the issue arises over matters which are not covered in agreement, the central question is whether duties and obligations, not specifically bargained for, can be imposed on the parties.

III. The Burden of Proof

There is no question that the burden of proving the existence and mutual acceptance of a past practice is upon the party alleging it. If custom or past practice is invoked to resolve a contract ambiguity and the arbitrator is not persuaded of the correctness of interpretation sought by either party, the moving party may be held to have failed to prove the burden. In many cases, the alleged practice will be seen by the union as an "important condition of work." On the other hand, the employer may feel it is simply an "inherent right of management" which the employer is free to terminate at will. The burden of proving the existence and application of a past practice is no small or easy task.

IV. Termination of a Past Practice

Once the practice has been mutually accepted by the parties as a binding condition of employment, it becomes, in effect, an integral part of the labor contract. As such, it cannot be changed or terminated without the mutual consent of the parties.

An important point to consider is the effect of changing circumstances on the viability of a binding past practice during the term of the collective bargaining agreement. The practice must continue to a change in those conditions, the practice may be changed. But those changes must be accomplished through negotiation rather than through unilateral action.

V. Conclusion

A valid past practice can be as much a part of the labor agreement as any written provision. Useful in defining the intent of ambiguous language, it gives focus to general provisions and may also establish independent conditions or benefits of employment. Where it is clearly established over a lengthy period of time, it may also be considered to amend the apparent language of the contract.

THE
CLOSING
STATEMENT

CLOSING STATEMENTS

After each side has presented its case, the time has come for closing statements. At this juncture, the arbitrator reviews all the facts and may come to a tentative decision.

The closing statement is ordinarily made in two phases. *The first phase is a quick review of the facts as brought out in the testimony and evidence*. *The second consists of the argument and conclusions based upon the facts.* But the closing statement is more than just a summarization of the case. It is your final. Don't attempt to enlarge upon the testimony of witnesses. The arbitrator will quickly discern the difference between what you are now claiming the witness said and what was actually stated. If there has been contradictory evidence, admit it, and explain why the arbitrator should accept the version you have presented through testimony and evidence as being correct.

To make your closing statement most effective, you must continuously be aware of your objective, and you must remind yourself that the arbitrator is beginning to review the case mentally as you summarize your own case. Everything you say and how you say it is, therefore, designed to have an immediate effect upon their line of reasoning. It is also important that you avoid mentioning anything in your closing statement that might open up discussion about any weak points in your case. (If management has not already plugged the loopholes, don't remind them that they remain unplugged.)

You should also present any citations of other awards that are relevant to your case, but recognize that there is no "precedent" in arbitration. When considering making such citations, be sure you carefully read the entire case in advance, not just the part which supports your position. Otherwise, if the arbitrator reviews the case(s) in advance of his/her decision-making, he/she may find grounds for ruling against you.

Outline For Preparing An Oral Closing Statement

A. State your theory of the case and the point(s) you set out to prove.
B. State the facts supporting your case.
C. Respond to the point(s) which may have hurt your case.
D. State the point(s) the Employer set out to prove.
E. State the facts in the record which undermine the point(s) the Employer tried to prove; thus, weakening the Employer's theory of the case beyond...

   a reasonable doubt, or
   the quantum of preponderant evidence, or
   clear and convincing evidence

F. Restate the issue (s) before the Arbitrator.
G. Restate the remedy sought

DISCIPLINE AND DISCHARGE CASES

INVESTIGATION PROCEDURES AND PREPARATION FOR DISCIPLINE AND DISCHARGE CASES

Credibility Tests

Discipline and discharge cases often deal with questions of credibility. The question which faces the arbitrator is whom to believe. In order to make certain your case is well prepared, you should test your grievant and all other witnesses vigorously to make certain of exactly what happened. The grievant sometimes "sees" the situation differently than it actually happened. A grievant is emotionally involved and therefore sometimes misjudges the facts. Occasionally there are lies to cover up mistakes. To avoid embarrassment at the hearing you should take the following steps:

1. Review your story thoroughly. Check every aspect of it. When you don't trust its credibility, challenge it.

2. Double check any part of the story which "stretches" the rational imagination.

3. Try to find other credible witnesses who support the grievant’s story. Different witnesses see the same event differently.

4. Use questions and techniques which you anticipate in cross examination. In other words, play “devil's advocate.”

   Remember, if you set up a more vigorous test of your grievant’s story than the employer and it is passed, there is a better chance being believed by the arbitrator.

5. Check personnel (or medical) records if they are involved. Don't take the grievant’s word.

6. Talk to the foreman or the employer witnesses beforehand. Check out their accounts.

Records Test

Often employers' discipline and discharge actions are based on the records of employees. Make certain that records are accurate. Find out who made the entries and if possible interview those who made the entries.

Consistency Tests

Compare the grievant's action with others. Make certain he/she did not do things any different or worse than others who were not disciplined at all, or were less severely disciplined. In this respect, the employer may have acted in a "discriminatory or inconsistent manner, and thus may stand a good chance of losing the case.

Check the Contract, Rules, etc.

Often the grievant's may have been wrong, but should not be disciplined because there was not violation of the rule or the agreement. In this regard you should make certain that even if there were a rule violation, it must have been a reasonable rule and well promulgated. While ignorance of a rule per se is no excuse, ignorance due to bad or improper communication may be defensible. Also if the rules are unreasonable or not related to the work, safety of others, or employer's image, the grievant may not be held culpable.

Study the Grievance

Sometimes the reason for the disciplinary action or discharge was predicated on a specific act. If the employer later tries to base its action on other more broad charges, they may be prohibited because of the initial charge. Moreover, the rule of reason based on time should be considered. In other words, past charges which are "stale" may not be used against the grievant. (Be careful on this point. For example, if the union wanted to introduce evidence to show the grievant has been a good worker for 5 years, you may open a *Pandora's box* to allow the company to introduce evidence which shows the bad aspects of the grievant' s work history.)

Look for Motive

Where fights or insubordination, profanity, etc., are involved, check to see if the grievant was provoked or trying to defend him/herself. Being an initiator of an action vis-à-vis defending one's self is often viewed quite differently by the arbitrator...

Look also to supervisory motive. If you can show that a supervisor had reason to "do in" the grievant, that should be brought out.

JUST CAUSE CONSIDERATIONS

Most labor-management agreements contain a "just cause" or "proper cause" provision. But very few if any, define what the employer's ability to discipline for "just" or "proper cause" means. One arbitrator defined just cause as:

> "A reasonable person, taking into account all relevant circumstances, would find sufficient justification in the conduct of employee to warrant discharge."

Arbitrators were forced to come up with definitions for just cause - not employers or unions! The Enterprise Wire Company case (46 LA 359), decided by Carroll R. Daugherty, and was the first case to crystallize the Seven Tests of Just Cause. Below is an excerpt from Daugherty's decision:

STANDARDS WHICH MAY BE UTILIZED BY AN ARBITRATOR IN DISCIPLINARY CASES

The issue before the arbitrator frequently requires findings in respect to the existence or non-existence of "just cause" for discipline, including discharge. Few union-management agreements contain a definition of "just cause". Nevertheless, over the years the opinions of arbitrators in discipline cases have developed a sort of "common law" definition. This definition consists of set of guidelines or criteria that are to be applied to the facts of any one case, and said criteria are set forth below in form of questions.

A "no" answer to any one or more of the following questions normally signifies that just and proper cause did not exist. In other words, such "no" means that the employer's disciplinary decision contained one or more elements of arbitrary, capricious, unreasonable, or discriminatory action to such an extent that said decision constituted an abuse of managerial discretion warranting the arbitrator to substitute his/her judgment for that of the employer.

The answers to the questions in any particular case are to be found in the evidence presented to the arbitrator at the hearing. Frequently, of course, the facts are such that the guidelines cannot be applied with precision. Moreover, occasionally, in some particular case an arbitrator may find one or more "no" answers so weak and the other "yes" answers so strong that he/she may properly, without any "political" or spineless intent to "split the difference" between the opposing positions of the parties, find that the correct decision is to "chastise" both the company and the disciplined employee by decreasing or nullifying the degree of discipline imposed by the company. Example: reinstating a discharged employee without back pay.

The Questions

1. **Did the Employer give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?**

    a. Such a forewarning of foreknowledge may properly have been given orally by management or in writing through the medium of typed or printed sheets or books of shop rules and of penalties for violation thereof.

    b. There must be an actual oral or written communication of the rules and penalties for violation thereof.

    c. A finding of such communication does not in all cases require a "no" answer to Question No. 1. This is because certain offenses such as insubordination, coming to work under the influence of alcohol or drugs, drinking intoxicating beverages or taking drugs on the job, or theft of the property of the company or fellow employees are so serious that any employee in the industrial society may properly be expected to know already that such conduct is offensive and heavily punishable.

    d. Absent any contractual prohibition or restriction, the company has the right unilaterally to establish reasonable rules and give reasonable orders; and this need not have been negotiated with the union.

(Management has an inherent obligation to manage. The notice test requires that an employer communicate clearly and unambiguously to employees, first, <u>what kind of conduct will lead to discipline;</u> and second, <u>what the penalty will be for any particular act of misconduct.</u> Warnings must be clear and timely.

Along with this comes the responsibility of the employer to inform employees of the meaning and application of the rules. The employer cannot count on the union as an agent to communicate new rules to employees, nor may the employer use the disciplinary process to introduce new rules.)

2. **Was the employer's rule or managerial order reasonably related to the orderly, efficient, and safe operation of the Company's business?**

    a. If an employee believes that said rule or order is unreasonable, they must nevertheless obey same (in which case they may file a grievance) unless they sincerely feel that to obey the rule or order would seriously and immediately jeopardize their personal safety and/or integrity. Given a firm finding to the later effect, the employee may properly be said to have had justification for their disobedience.

(The employer has the right to establish rules that will maintain a safe and efficient workplace. If the rule is related to the attainment of the goals and objectives of the employer, and it that rule is not arbitrary [without reason or explanation, without exercise of judgment], capricious [erratic, impulsive, on-again/off-again], or discriminatory [unequal treatment of one employee, as compared to others, for a reason that is not directly related to the employee's performance] it is generally considered to be reasonable.)

3. **Did the employer, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management before administering discipline to the employee?**

    a. This is the employee's "day in court" principle. An employee has the right to know with reasonable precision the offense with which he/she is being charged and to defend his/her behavior.

    b. The employer's investigation must normally be made BEFORE making its disciplinary decision. The employer's failure to do this may not normally be excused on the ground that the employee will get their "day in court" through the grievance procedure after the exaction of discipline. By that time there has usually been too much hardening of positions.

    c. There may of course be circumstances under which management must react immediately to the employee's behavior. In such cases the normally proper investigation, with the understanding that (a) the final disciplinary decision will be made after the investigation and (b) if the employee is found innocent after the investigation, they will be restored to their job with full pay for lost time.

    d. The employer's investigation must include an inquiry into possible justification for the alleged rule violation.

(Whenever discipline for any reason is contemplated, a **timely** and **thorough** investigation of the suspected misconduct is critical to management for two obvious reasons: First, if the employer makes an inadequate effort to uncover all of the facts, it may easily end up without enough evidence to prove that misconduct was committed. Second, due process requires that an employee (1) be informed promptly, and with reasonable precision with what offense they are being charged, and (2) be given an opportunity to tell their own side of the story.)

4. **Was the Employer's investigation conducted fairly and objectively?**

    a. At said investigation the management official may be both "prosecutor" and "judge", but may not also be a witness against the employee.

b. It is essential for some higher, detached management official to assume and conscientiously perform the judicial role, giving the commonly accepted meaning to that term in his/her attitude and conduct.

c. In some disputes between an employee and a management person there are no witnesses to an incident other than the two immediate participants. In such cases it is particularly important that the management "judge" question the management participant rigorously and thoroughly, just as an actual third party would.

(In common parlance, a "fair" investigation is one that is one that is **complete, timely,** and **conducted in accordance with an employee's due process rights** [i.e., the right to defend him/herself, the right to union representation, etc.] In arbitration, a fair investigation, may mean something more specific – that at some point in the disciplinary process, in order for there to be a fair investigation, an upper management official, who has no direct interest in the outcome of the situation, assumes a "quasi-judicial" role and evaluates the case for discipline as fairly and objectively as would a neutral outside third party.

Why is this test important? Because the supervisor who is an employee's immediate superior has a natural tendency to believe that his/her view of what took place is correct. Yet a supervisor, like anyone else, may misperceive or misjudge a situation, even with the best of intentions. The independent judgment of some other management official is necessary, if all the evidence, on both sides, is to receive an objective evaluation.)

5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

a. It is not required that the evidence be preponderant, conclusive or "beyond reasonable doubt." But the evidence must be truly substantial and not flimsy.

b. The management judge should actively search out witnesses and evidence, not just passively take what participants or "volunteer" witnesses tell him/her.

(Did the employer improperly gather its evidence after the disciplinary action had already taken place? It goes without saying that in every situation involving discipline and discharge, proof is basic and indispensable and , other things being equal, of all the just cause tests this is the one most frequently in contention. Moreover, if no misconduct is proved, no penalty can be just.

Many arbitrators take the view, following Arbitrator Harry Shulman's approach, that when the testimony of a supervisor and a grievant is in direct conflict, if no other complicating factors are present, the supervisor deserves to be credited on the theory

that

> "… an accused employee is presumed to have an incentive for not telling the truth and that when his testimony is contradicted by one who has nothing to lose or gain, the latter is to be believed."
> [Ford Motor Company, 1 ALAA 67, 244 (1945)]

But there are many arbitrators who are highly critical of the Shulman view. Anti-Shulman arbitrators, and more than a few union advocates, believe that a witness should not be discredited merely because they have a bias or interest in the matter about which they testified. Conversely, a witness should not be considered truthful merely because they have no bias or interest in the matter about which they testified.

In other words, self-interest does not impeach a witness's credibility by and of itself, and an interest in the outcome does not raise any presumption that a disciplined or discharged employee is lying.)

6. **Has the employer applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?**

    a. A "no" answer to this question requires a finding of discrimination and warrants negating or modifying the discipline imposed.

    b. If the employer has been lax in enforcing its rules and order and decides henceforth to apply them rigorously, the employer may avoid a finding of discrimination by telling all employees beforehand its intent to enforce hereafter all rules as written.

(Management has an obligation to make known and to enforce its rules, orders, penalties and other expectations uniformly, consistently and predictably. Failure to do so is a denial of due process. There should be no evidence of arbitrary, capricious, or discriminatory conduct or management's part.

There is also the principle of **SHARED GUILT.** Has management violated its own rules or principles? Have managers engaged in the kind of behavior [gambling, foul language, etc.] they are trying to discipline in the bargaining unit?)

7. **Was the degree of discipline administered by the employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his/her service with the employer?**

    a. A trivial proven offense does not merit harsh discipline unless the employee has properly been found guilty of the same or other offense a number of times in the past. (There is no rule as to what number of previous offenses constitutes a "good", "fair", or a "bad" record.

Reasonable judgment must be used.)

b. An employee's record of previous offenses may never be used to discover whether he/she was guilty immediate or latest one. The only proper use of an employee's past record is to help determine the severity of discipline once he/she has properly been found guilty of the immediate offense.

c. Give the same proven offense for two or more employees, their respective records provide the only proper basis for "discriminating" among them in the administration of discipline for said offense. Thus, if employee A's record is significantly better that those of employees B, C and D, the company may properly give a lighter punishment that it gives the others for the same offense; and this does not constitute true discrimination.

Mitigating circumstances are factors which serve to explain or excuse otherwise prohibited activity. They can range from a defense to the charge of sleeping on the job that the grievant had been heavily medicated by the company doctor, to the fact that the employee failed out of incompetence rather than negligence, to the question of trouble at home. This is the "Human" side of the adversary process.

This test will be affected by a number of other tests such as: if no misconduct has been proved, obviously no penalty can follow; or if prior offenders have received suspensions for similar misconduct under similar circumstances, then, in accordance with the Equal Treatment test, the discharge penalty would not be in order. Other considerations also can be expected to play a part as to whether a penalty is appropriate or not, such as the notion that "the penalty should fit the crime."

A record of long-term and/or otherwise satisfactory performance gives a clear indication of the employee's investment in the company or agency, of the company or agency's investment in the employee, and of the employee's demonstrated ability to be a good employee. Similarly, a generally poor work and disciplinary record leaves great doubt that the employee can ever become a satisfactory performer.

STANDARDS FOR JUDGING WHETHER AN EMPLOYER HAS JUST CAUSE IN DISCIPLINARY CASES

1. The Employer is entitled to prescribe **reasonable rules** of conduct unless his/her discretion is limited by the collective bargaining agreement.

2. The Employer has an obligation to give **adequate notice** of rules to employees. Employees have a right to know what is expected of them.

3. **The Employer must conform to reasonable rules in good faith.**

4. **The Employer must avoid arbitrary, hasty or capricious action in the face of unsatisfactory conduct.** Management must not overreact against what they regard as a challenge to their authority. This is one of the most persistent problems giving rise to discipline cases. Such overreaction arises especially in cases of alleged insubordination.

5. Disciplinary treatment should be consistent and non-discriminatory.

6. **The punishment should fit the crime.**

7. Proper disciplinary action is **corrective, not punitive.** Its purpose is to achieve restraint. Discharge, which involves costs to both sides, should be invoked as a last resort, after it has become clear that corrective measures will not succeed.

8. **The proper penalty depends not only on the immediate offense, but also on the Employee's previous disciplinary record.** Normally, this means a series of penalties (such as interviews, formal reprimands, and disciplinary suspensions) should be applied with gradually increasing severity before "*Capital Punishment*" is invoked. This is called corrective discipline.

9. **Proper procedure or procedural due process must be followed.** This involves written notice to the alleged offender, the right to representation, the right to a hearing and the right to appeal. The charges contained in the notice must be specific. Other acts of misconduct cannot subsequently be made into specific reasons for justifying discipline imposed for the specific misconduct.

WHY ARBITRATORS REINSTATE DISCHARGED EMPLOYEES

WHY ARBITRATORS REINSTATE DISCHARGED EMPLOYEES

(Excerpted from an American Arbitration Association article by Morris Stone)

When a labor arbitrator reverses an employer's decision to discharge or suspend an employee for misconduct, is it because the evidence against the grievant was weak, or because the arbitrator found fault with management's administration of industrial justice?

These were among the questions dealt with in an American Arbitration Association study of 391 discharge and discipline cases in which the employer's decision was reversed or mitigated.

1. Mitigating Circumstances – The most frequent single reason given by arbitrators for reinstating discharged employees of for reducing the duration of disciplinary suspensions was that, in view of the grievant' s generally satisfactory record and the likelihood that he had *learned his lesson*, he was deserving of a second chance. This category covered 107 cases, or 27 percent of the total.

Typical was the case of an employee fired for using offensive language toward a member of supervision and walking away from his place of work in the course of an argument over whether an employee who was not in the bargaining unit could do certain work.

Reducing the discharge to a 10-week suspension, the arbitrator explained that the grievant had been a *fairly competent* worker for 8 workers and had committed no previous offenses that called for punishment, that the incident giving rise to the discharge was *one isolated, emotional outburst* that lasted only five minutes, and that the discharged worker was in a department where *improper language* was not only common, but commonly employed by the supervisor.

2. Inconsistent Enforcement of Rules – The next most frequent reason arbitrators found for not upholding disciplinary actions was that employers themselves were inconsistent in enforcement of rules. In 77 cases (about 19 percent of the total) it was found that companies had frequently overlooked similar violations, encouraging the belief among employees that they could disobey the rules without risking penalties.

Arbitrators voiced strong criticism of personnel practices characterized by laxness over long periods of time until one hapless individual was discharged as an *example* to others.

Grievants and unions often accuse management of showing personal bias against the disciplined employee, but among the 77 cases in this category, there were

only two in which arbitrators found evidence to support this charge. Most often the inconsistent enforcement of rules comes about haphazardly, perhaps out of thoughtless or indiscriminate *leniency* on the part of first-line supervision, rather than as a result of deliberate intention to *get* an individual.

3. Making the Punishment Fit the Crime – How to make the punishment fit the crime is a perennial problem in every system of justice and law enforcement. Industrial discipline is not an exception.

Some employers try to achieve evenhanded administration of discipline by announcing in advance precisely what penalty will follow violation of a particular rule. Others prefer to improvise, assigning whatever penalty seems right in the individual case, after the infraction occurs.

Apparently, neither system is foolproof. Arbitrators found in 56 cases (14 percent of the total) that the punishment was too harsh, either in terms of the employer's own standards or in terms of industrial practice generally.

One difficulty with the schedule of penalties is that employees have a way of committing faults that do not quite fit published schedules. When an employee failed to return from lunch, was she merely an absentee from the half day and therefore deserving of a written warning under the employer's rules, or was she guilty of walking off the job, a more serious offense in the rule book?

When an employee absented himself from work after asking for the day off and being refused, was he merely an absentee or insubordinate?

Twenty times, among the 56 cases in which the penalties imposed by management were deemed excessively harsh, the arbitrators differed with management as to which of the published rules the grievant had violated.

4. Suspicion is Not Evidence – The rules of evidence in arbitration are not as strict as in courts of law, but arbitration awards are nevertheless based upon facts and evidence. Failure to realize that, when a person's job is at stake, a strong suspicion is not a substitute for solid documentation resulted in 52 reversals of discipline (13 percent of the cases in this study).

In one plant, for instance, someone had thrown an explosive device into a group of fellow employees, causing an injury to one of them. It seemed strange to management that all of the workers who might have thrown the missile except one immediately rushed to the scene. The one person who was seemingly lacking in curiosity must have done the mischief, management thought.

Maybe so, and maybe not, ruled the arbitrator. *To uphold the discharge penalty requires clear and substantial evidence that the grievant was the guilty party,* the arbitrator wrote. *Although the circumstances indicate that the explosive device was*

probably thrown near the injured employee by someone who might very well have been the grievant, there is some possibility that the grievant did not commit the act. As long as such a possibility exists, it is difficult to uphold the company's action on the basis of the circumstantial evidence presented.

5. Due Process and Industrial Justice – Prison gates sometimes swing open for guilty persons whose constitutional rights were violated. So too, do occasional employees escape punishment because general standards of due process were not observed. In some instances, particularly where union contracts are very strict in the matter of back pay for improperly discharged employees, guilty employees even enjoy the *unjust enrichment* of wages for their idle time.

In 23 cases, management committed procedural faults serious enough to prejudice the rights of grievant to a defense. In several, contractual requirements that the union be formally notified of the discipline had been overlooked. In others, stewards had not been permitted to attend the meetings where the grievant were questioned about their misbehavior. And in one case, the union persuaded the arbitrator that the grievant had been subjected to *double jeopardy*. He had first been suspended for his offense. Later, upper echelons of management reviewed his history and decided that nothing short of the ultimate penalty of discharge would be appropriate. The arbitrator reduced the dismissal to a suspension again, pointing out that a different result would have followed if the company had suspended the man, *pending further determination*, and had then ordered the dismissal. In that event, it would have remained one penalty for one offense.

It is, of course, true that arbitration is less formal than litigation, and that arbitrators will often accept evidence in a form that would be excluded by judges. But this does not mean that any evidence at all will be admissible. In three cases, employers relied entirely upon a line of argument the arbitrators held irrelevant. For that reason, the employers lost those decisions.

The clearest example involved a discharge that the employer feared would not stand up in arbitration. When the grievance was filed, management tried to bolster its case by investigating the grievant's employment application. There they found many outright misrepresentations on matters which, if the truth had been known at the time, would have barred employment in the first place. All the evidence – the incident giving rise to the discharge and the original falsification – was put before the arbitrator. But the arbitrator refused to accept anything that had to do with the employment application. *A discharge must stand or fall*, the arbitrator said, *on the basis of facts known to the employer at the time the penalty was invoked.*

6. Substantive Errors – Not all managerial errors, of course, were merely procedural. Twenty-seven times among the 391 cases, management's fault lay in contributing to the incident for which the grievant was disciplined.

Thus, although the evidence was clear that an employee had used intolerable

language in addressing his foreman, he was reinstated because the foreman had not been blameless in his own choice of language. In several cases, the fault with managerial personnel lay in not deterring violations when they had opportunity to do so.

The employee in one of these cases had telephoned the personnel office to ask permission to stay out one day so that he might make some repairs to his home. He was reminded that his attendance record was poor, but was not specifically told that his absence for this would not be excused.

In such circumstances, the grievant was justified in assuming that he could stay away from work to take care of his problems at home without fear of discipline, the arbitrator wrote. *It would have been another matter if he had received a direct communication from the company informing him that in view of all the circumstances, he must report to work or take the consequences.*

7. <u>The Limited Reach of Discipline</u> – Years ago, employers would occasionally discharge employees for a variety of moral or other faults that had nothing in particular to do with the employer-employee relationship. Today, in establishments operating under collective bargaining agreements, it is generally understood that the employer's disciplinary reach extends only to activities that affect production.

But there are borderline cases, and in the 391 studies, there were 18 in which management guessed wrong.

An interesting borderline case of this kind was one involving an employee who, preferring "not to get involved," told the police he knew nothing about the intruder in the plant they were looking for, although he had seen the man and could identify him. Later, he admitted to management that he had lied, and for that he was given an official reprimand – a form of punishment that the employer thought was quite mild under the circumstances.

Mild or not, the penalty was reversed by an arbitrator. *Although the grievant's conduct deserves to be condemned*, the arbitrator wrote, *what he did was a matter for 'his conscience,' not for discipline by the employer. The disciplinary action applied by the company was <u>not</u> for telling the truth to an agent of the company in job-related situation, but was for not telling the truth to agents of the civil authorities in a matter not related to the performance of the employee's job. This action cannot be sustained.*

Reasons Given by Arbitrators for Reversing Management
(Out of 391 cases reported)

Number of Cases	Reason
77	The evidence supported the charge, but there were mitigating circumstances.
52	The evidence did not support the charge of wrongdoing.
38	Inconsistent enforcement of rules.
30	The rule itself was reasonable, but its application in this case was not.
28	The grievant did not know he/she was risking a penalty by his/her action.
27	Management was partly at fault in the incident.
25	The penalty was excessive in terms of the employee's disciplinary record.
20	The grievant was punished under the wrong rule or schedule of penalties.
18	Employees involved in the same incident were dealt with differently without a satisfactory explanation of the difference.
14	Punishment was for a reason the arbitrator thought was beyond management's authority to discipline.
13	Management committed procedural errors prejudicing the grievant's rights.
11	The penalty seemed excessive in terms of customary penalties in the industry.
9	Union stewards/officers were disciplined for actions in connection with official union business.
9	Retroactive application of a new rule, or insufficient publicity about a rule.

Number of Cases	Reason
7	General standards of judicial process were violated.
4	The grievant was substantially guilty, but the arbitrator thought he was entitled to another chance because of special circumstances.
4	The rule that the grievant had violated was inherently unreasonable.
3	The evidence of wrongdoing was held inadmissible by the arbitrator.
2	The employer had shown personal bias against the grievant.