CHAPTER VIII

PROBLEMS OF PROOF IN THE ARBITRATION PROCESS:

REPORT OF THE PITTSBURGH TRIPARTITE COMMITTEE*

Introduction

Having been selected to hear and decide an important dispute, not uncommonly an arbitrator spends substantial time at the arbitration hearing considering arguments directed to the basic rules governing the admissibility or exclusion of evidence. "Motions to strike," "demands for proof," and the familiar "incompetent, irrelevant and immaterial," and similar objections are heard from the participants. At times, the only missing ingredient seems to be the TV camera. How can justice be done under such circumstances?

Experienced arbitrators respectfully remind counsel for the parties that an arbitration hearing is not a court of law, and that rigid adherence to rules of evidence is neither necessary nor desirable. Tactfully, he communicates the thought that the ancient, sometimes unrealistic, often legalistic, exclusionary rules of evidence are seldom followed in arbitration practice. Competent trial counsel are sometimes shocked to learn that irrelevant and legally incompetent evidence is admitted under arbitrable standards for the admission of evidence with the brief statement of the arbitrator, "I will accept it for what it is worth."

Many serious students of the labor arbitration process, mindful that one widely recognized function of arbitration is to "let off steam" (the so-called "therapeutic" approach), believe that the

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arbitration hearing should serve as a "safety valve," and conclude that anything should be admitted that either party desires to present. Others believe that no arbitrator worthy of the title will sit idly by and permit the total inundation of a hearing by a flood of irrelevant evidence. They hold that the frequent practice of admitting all evidence "for what it is worth" may need re-evaluation as arbitration continues to evolve and mature.

In courts of law, all facts having rational, probative value are admissible unless excluded by some specific rule. A witness may be questioned as to any fact or information within his knowledge which may be relevant to the disputed issue being tried. However, whether in a court of law or an arbitration, accepting evidence "for what it is worth" generates at least two problems. *First,* advocates must know "what it is worth" so they can decide what evidence they must rebut. *Second,* and perhaps most important, while evaluating the testimony, the arbitrator needs standards to guide him in determining what weight is to be given to evidence.

Parties have a right to know what general standards an arbitrator uses in this critical determination of what evidence is worth. It has been suggested that properly understood legal rules of evidence have their foundation in reason, common sense, and necessity, and that perhaps the rules for the admissibility of evidence in court trials may be re-molded into rules for weighing evidence by arbitrators, even if no evidence is absolutely excluded as inadmissible. A thoughtful exploration of the underlying reasons why certain principles of admissibility and exclusion are used in law courts may illuminate the problem and be useful in evaluating evidence in arbitration cases. It is difficult to imagine that the legal rules of evidence which have evolved over centuries could not yield helpful suggestions for use by arbitrators and participants in arbitration cases.

The context in which evidence is presented in an arbitration hearing is unique. There are no pleadings to limit issues or evidence save, possibly, where a formal submission agreement has been signed. Even when a hearing is almost concluded, the parties may not be in agreement as to the exact questions at issue. Thus, strict rulings on relevancy and materiality of evidence are virtually impossible. If on the one hand, evidence is admitted which later

is found to lack relevancy or materiality, the opposing party is in the unhappy position of feeling obligated to rebut that irrelevant and immaterial evidence or assume the risk that it will persuade the arbitrator to an incorrect decision. This dilemma is the chief reason why the concept of "admissibility" evolved in the law courts. If on the other hand, an arbitrator incorrectly excludes evidence and, after the hearing is closed, he becomes aware that it was improperly excluded, there is no machinery for rectifying the injustice because no appellate procedures are available to the party injured by an arbitrator's incorrect ruling.

Perhaps the principal difficulty in the sorting of evidence is occasioned by the inherent nature of the arbitration process. Because arbitration is the instrument of the parties, to some it represents merely a type of adjudication where each adversary presents proof and arguments in an endeavor to obtain a decision in his favor. To others, the arbitration hearing represents the place for the relief of tensions, "letting off steam," or bringing to the surface latent dissatisfactions or frustrations, so that the over-all labor-management climate may be improved. In these latter cases the specific dispute being decided is often subordinated to these other considerations, and the parties uninhibitably express their feelings. If the parties grudgingly accept arbitration as a substitute for a strike or lockout, and zealously attempt to win a case without any balancing of a victory against continuing relationships at the plant level, then they probably will desire a rather formalistic hearing. To the extent that parties approach arbitration as a therapeutic process representing but one small facet of the labor-management relations, they will probably desire a broad policy of admitting all kinds and types of evidence.

The problem is not simplified by stating that common sense shall be the rule, because then this basic question persists: what are the common sense rules that are to apply to the parties and to the arbitrator during the arbitration hearing? There is always a possibility, in arriving at his decision, that an arbitrator will rely upon evidence that is not substantially and logically probative. If the test is that arbitrators are to determine what is pertinent or not pertinent in a case, then there still remains this problem: by what standard shall we judge what is pertinent?

In the search to discover guidelines that will be useful in the arbitration process, it is probably best to begin with the Code of Ethics and Procedural Standard for Labor-Management Arbitration (the Code), prepared jointly by the American Arbitration Association and the National Academy of Arbitrators, and approved by the Federal Mediation and Conciliation Service. Section 4 (e) of the Code states:

> "The arbitrator should allow a fair hearing, with full opportunity to the parties to offer all evidence which they deem reasonably material. He may, however, exclude evidence which is clearly immaterial. He may receive and consider affidavits, giving them such weight as the circumstances warrant, but in so doing, he should afford the other side an opportunity to cross-examine the persons making the affidavits or to take their depositions or otherwise interrogate them".

Although the Code cautions the arbitrator to allow full opportunity for the parties to offer all evidence which *they* deem "reasonably material," he may exclude evidence which he deems "immaterial." The problem of direct confrontation of witnesses is obliquely attacked, but no other exclusionary rule, other than materiality, is specifically mentioned.

The Voluntary Labor Arbitration Rules of the American Arbitration Association yield the following apposite rules:

> "28. Evidence—The parties may offer such evidence as they desire and shall produce such additional evidence as the Arbitrator may deem necessary to an understanding and determination of the dispute. When the Arbitrator is authorized by law to subpoena witnesses and documents, he may do so upon his own initiative or upon the request of any party. The Arbitrator shall be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the Arbitrators and all of the parties except where any of the parties is absent in default or has waived his right to be present".
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> "29. Evidence by Affidavit and Filing of Documents—The Arbitrator may receive and consider the evidence of witnesses by affidavit, but shall give it only such weight as he deems proper after consideration of any objection made to its admission . . ."

These existing guidelines are obviously incomplete and inadequate. If any generally accepted rules are to govern evidentiary problems encountered in arbitration hearings, they remain to be formulated.

This report is based upon the assumption that certain general "common sense" evidentiary rules may be drafted. We have attempted to formulate tentatively some basic principles in the limited area we have considered.

Our second thesis is that knowledge and application of these rules would contribute affirmatively to the functioning of labor arbitration. The understanding of these fundamentals and their application does not require a legal education, but rather only a willingness to consider certain basic principles and to apply them during arbitration hearings.

This report will attempt: (1) to define certain evidentiary principles; (2) to illustrate the problem areas by means of examples; and (3) to comment on the possible rulings and their implications. In order to coordinate the work of the four committees covering the same problem, the Program Committee has suggested certain areas to be considered.

We shall follow the Committee's suggested agenda.

1. The Rules of Evidence in Arbitration Proceedings: *Which Are Applicable? Shall They Be Applied as They Are Used in Courts or With Modifications?*

a. *Exclusionary Rules (hearsay, res gestae, etc.).* The first and most general principle is that all facts having probative value are competent unless some sound rule excludes their reception. In general, the purpose of exclusionary rules is to limit the evidence submitted to that which has some inherent probability of truth, and contributes to the correct resolution of the issue in dispute.

Hearsay consists of testimony given by a person who states, not what he knows of his own knowledge, but what he has heard from others. Such evidence derives its value not solely from the credibility of the witness who is testifying, but, in part, from the credibility to be given to some other person who is not present in the hearing room and who cannot be examined. Law courts exclude such testimony because: (1) there is no opportunity to cross-examine the person making the original statement; (2) there is a great risk of inaccuracy in the repetition of the story; (3) experience demonstrates the general unreliability of such evidence;

and (4) it does not permit a person to face his accusers, as for instance:

> Example #1—"Witness: Joe Smith told me that he knew the real reason I was fired was because I told the boss that No. 2 Press was a menace to life and limb and no one should be asked to operate it before signing up for more life insurance."

Ruling: An arbitrator should reject this offer of proof of improper motivation unless the person alleged to have this knowledge is available for examination and cross-examination.

> Example #2—"Witness: I heard the grievant tell Joe Smith that if the Company wanted that machine run, it could damn well run it with someone else because he sure wasn't going to."

Ruling: This type of testimony, reflecting matters or statement allegedly made by the grievant, is usually admitted since the witness can be cross-examined and the grievant always can deny making the statement.

The majority of our Committee believe that arbitrators could lend a greater service to the parties if, when they receive hearsay evidence, they indicate to the parties that they recognize it as hearsay, and that direct evidence would be given more weight. Although it is customary to admit hearsay evidence in arbitration cases, only seldom should a decision be based exclusively upon it, even though in normal affairs of life we base many of our judgments on hearsay. The testimony of a witness concerning his own age is based upon hearsay, and this circumstance does not render such testimony inadmissible even in a court of law.

Certain exceptions to the hearsay rule are also observed by courts, e.g., the *res gestae* rule. *Res gestae* is the verbal part of an act. Literally, it means that the words expressed are born of a sudden event, not of conscious reflection. For illustration: if a fight between two employees occurs, the words spoken in the heat of anger may be testified to by an observer who saw the fight. This constitutes one of many valid exceptions to the hearsay rule. An understanding of the rule and its exceptions on the part of arbitrators could provide helpful guidance in determining what weight to be given to hearsay evidence.

b. *Relevance and Materiality.* Evidence is relevant if it reasonably tends to prove or disprove the fact at issue or facts closely

related to the point at issue. Justice Holmes stated that the rule of relevancy is a concession to the shortness of life. If parties may introduce evidence of facts not logically connected with the matter in dispute, the point in issue may be totally submersed in a flood of irrelevancies. Although an orderly presentation of the matter in dispute may be altered to provide a forum for "letting off steam," the arbitrator should be careful not to use such evidence as a foundation for his decision on the point at issue.

The objection that evidence is immaterial is an attempt to exclude matters that are too remote to be worthy of consideration. Materiality means substantial importance or influence. Unless evidence is material, it lacks the capacity to influence the result of the hearing. Evidence which is otherwise competent may relate to facts that are too remote in point of time or to matters too far removed from the scene of the transaction to have any practical effect. The concept of materiality tightens up the requirement of relevancy. Unless identity is an issue, a pedestrian struck by an automobile is not interested in the color of the paint on the car. Clearly, therefore, the color of the paint is immaterial.

The same considerations concerning the exclusion of evidence that is too remote are applicable to evidence that is irrelevant. Immaterial evidence should be admitted only where it is necessary to permit the parties to vent their underlying dissatisfactions. A suggestion to the parties that more immediate evidence will be more cogent may be sufficient to alert participants.

> Example #3—"Union: I move that this unemployment compensation decision be admitted to show that the grievant was not guilty of wilful misconduct under law."

Ruling: If we assume that the issue before the Arbitrator is whether "just cause" existed for discharge within the meaning of the labor agreement, the Unemployment Compensation Referee's application of the state Unemployment Compensation Law is not relevant, and the evidence should *not* be admitted.

In this type of situation, the Arbitrator can clarify matters by requesting the submitting party to explain the purpose for which the evidence is being offered. This is illustrated more concretely in the following example:

Example #4—"Union Attorney: I move that this time card, with the timekeeper's notation 'home—personal' be admitted as showing by its early ring out that the grievant went home, with Company permission, on Thursday morning."

Ruling: If this card is being offered to prove the circumstances and time at which the grievant departed from the plant, it should be admitted. If offered as a defense in connection with subsequent discipline for failing to notify the foreman of intent not to report to work on Friday morning, the card should be rejected, since it is of no probative value as to this issue.

In general, where the issue of relevancy or materiality is "doubtful" in the arbitrator's mind, the evidence should be admitted for the purpose stated by counsel. It should not then be used by the arbitrator for other than counsel's stated purpose.

An obvious, but often overlooked, reason for excluding irrelevant and immaterial evidence is that much time is wasted. Lengthy hearings cause unnecessary expense to the parties involved. The arbitrator should use his best judgment and shut off irrelevant and immaterial evidence when it goes far afield from the issue.

c. *Best Evidence.* This rule, invented to prevent error, requires submission of the most authoritative source for the information sought to be introduced. Two phases are illustrated below:

Example #5—"Witness: The written agreement reached by the parties provides that double time is to be paid for all hours over eight (8) in a work day."

Ruling: Since the testimony concerns a written instrument and its contents, the evidence should not be admitted by oral testimony unless the written instrument cannot be obtained because of its destruction, etc.

Example #6—"Attorney: I offer into evidence this carbon copy of the agreement reached by the parties in connection with overtime rate."

Ruling: All carbon copies are really "duplicate originals." The mere fact that the original document is not introduced should not bar admission of the copy unless one of the parties expressly challenges the accuracy or correctness of the copy.

d. *Offers of Compromise.* To encourage settlements out of

court and for other reasons, such offers are normally inadmissible to prove liability of the offeror in court actions. However, admissions against interest made in the course of offers of compromise are not excluded generally.

> Example #7—"Attorney: We are prepared to show that in the 3d Step Grievance Meeting, the Company admitted that it was wrong because it offered to reinstate the grievant without back pay."

Ruling: This testimony should be excluded. Most arbitrators and advocates agree that the exclusion rule should be absolute in arbitration cases. Successful solution of grievances short of arbitration is vital to the process. Anything which imperils this philosophy must be avoided. Additionally, parties normally have neither inclination nor skill sufficient to cloak their settlement offers protectively. There are many reasons why offers of settlement are made, and they do not necessarily imply that the offering party admits it was wrong.

e. *Opinion Testimony (Expert Witnesses).* The function of a witness is to relate what he has seen and heard, not to draw inferences from these observations or from other facts. This rule does not apply to the "expert." The "expert" is allowed to draw inferences and conclusions because, in theory, his knowledge is superior to that of the person having to resolve the issue, be it judge, jury, or arbitrator.

> Example #8—"Company Attorney: We will present Mr. Jones, a qualified Industrial Engineer, to testify as to the proper classification and rate for this job."

Ruling: Clearly admissible evidence. One cornerstone of labor arbitration is the supposed expert knowledge of the arbitrator himself concerning the issues in dispute. Hence, the value of expert witnesses correspondingly diminishes, and the probability of substantial error involving misplaced reliance on expert testimony is minimized. This logic does not apply where the expert is discussing medical or other non-industrial specialties.

Experts frequently are presented in cases involving job evaluation, incentive, and medical matters. Once the competence of the witness is established, there remain few valid objections to his testimony. If an arbitrator is not strong in this area of knowledge, he should question the witness for his own benefit.

2. Parol Evidence

When Is Parol Evidence Admissible?

a. *Reformation.* The general rule is that a written instrument speaks for itself and its terms cannot be altered by oral testimony alleging prior or contemporaneous oral agreements which attempt to vary or contradict the terms of the instrument itself.

> Example #9—"Attorney: We are prepared to prove by oral testimony that at the time this language was negotiated, requiring payment of four hours reporting pay, it was orally agreed that this Section would not apply unless it was a regularly scheduled work day for the employee."

Ruling: The Management Committee Members insist that this evidence should be rejected by the arbitrator. Although it is the theory of many writers and judges that a labor agreement is a mere "skeleton," the sanctity of even a skeleton should not be violated unless it can be shown by competent testimony that the "bones" sought to be added were omitted through mutual mistake or by fraud.

The Labor Committee Members believe that if the evidence is forceful enough, even an express contract provision may be altered or amended by a verbal side agreement or a well established past practice.

This is an entirely different question than the one raised by contract silence. In the latter case, the relevant testimony only establishes that the contract is silent on the issue involved. Thereafter, the question is one of justifiable inferences to be drawn by the arbitrator from the silence. For example, where the contract is silent on the precise question of "contracting-out" work, arbitrators usually consider the negotiations of the parties, established past practices, and other matters outside the contract instrument itself to resolve the dispute.

b. *Ambiguity.* Generally, oral evidence is competent to explain ambiguous terms in a written agreement.

> Example #10—"Attorney: We are prepared to prove by competent oral testimony that the term 'two weeks' pay' for vacation

purposes was intended by the parties to mean eighty (80) hours pay at straight time."

Ruling: This evidence should be admitted for the purpose of resolving the ambiguity.

This is perhaps too simple an example, but if the underlying assertion is that parties omit basic definitions and concepts from their contract at their own peril, then the issue is quite often resolved on the theory of Example #9, *supra.*

Example #11—"Attorney: We are prepared to prove by competent oral testimony that the language 'promotion based on seniority' was intended by the parties to include the right to a shift preference based on seniority."

Ruling: The Management Committee Members are of the opinion that this evidence should be rejected because no patent ambiguity exists, and the offer is really an attempt to reform the contract. Union Committee Members insist that many verbal understandings are made during negotiations, and that testimony concerning these should be considered by the arbitrator.

To a very great extent, lawyers and arbitrators differ strongly in respect to this area. Frequently, arbitrators assume that they can separate the wheat from the chaff; hence, they allow either party to attempt to prove anything regarding the meaning of terms. The degree of proof required should be increased as the practice impinges upon the apparent meaning of the contract language.

c. *Collateral Agreements.*

Example #12—"Attorney: We offer to prove by competent testimony that since execution of the agreement, the parties have mutually agreed to modify the contract language so that holiday pay is due whether or not it falls on the employee's regularly scheduled work day."

Ruling: This evidence should be accepted, since such modification is both possible and proper. Of course, the agreement may require that modifications or amendments be signed, sealed and delivered. But that is another question, as is the weight or amount of proof required in face of a denial by the other party.

3. Circumstantial Evidence

Circumstantial evidence involves testimony or proof which by its own validity supports an inference or deduction concerning the main issue in dispute.

> Example #13—"Company Attorney: We intend to prove, as evidence of lack of due care in the performance of grievant's work duties, that shortly after brushes were replaced in the main electrical motor, which drives the mill, a flash of fire surrounded the commutator, and substantial damage occurred. Immediately afterwards, several broken, burned brushes were found in the area below the motor, and the wire of one worn brush was found welded to the commutator."

Objection was made by union counsel on the ground that this evidence is purely circumstantial and that no eye witnesses testified that the replaced brushes were not removed from the area.

Ruling: Although this proof is entirely circumstantial, it is entitled to be admitted, because a deduction from these facts as to the cause of the occurrence is justified. Frequently, circumstantial evidence is the only evidence available, and it may be of great probative value. The admissibility of evidence is not governed by the fact that it is circumstantial. However, unless the circumstances relied upon are sufficiently strong to raise a material presumption of the fact sought to be proved, the circumstantial evidence may not be entitled to much weight.

4. Past Practice

Does Proof of Past Practice Require Satisfying Special Standards?

The term "past practice" may be defined as a repeated course of conduct uniformly or systematically engaged in over an appreciable period of time by parties who can reasonably be presumed to be aware of such conduct.

> Example #14—"Union Attorney: We are prepared to prove that even though the contract says that the employee vacation selection will be subject to the company's need for efficient operation of the plant, the company has never exercised this right."

Ruling: If this offer of past practice is intended to rebut clear contract language, it should be rejected. Contract rights should

not be eroded by mere failure to exercise them. The impact of past practice and/or failure to exercise any contract right can and should be set forth in writing.

> Example #15—"Attorney: We intend to prove that for ten (10) years the Company has always allowed a five minute wash-up time at shift ending and hence it is an established working condition within the meaning of Section 2-B of our Contract."

Ruling: This proof of a pattern of conduct which has existed over an extended period of time should be admitted. It justifies a finding that a local working condition or practice existed which cannot be changed without mutual consent. Clear and definite proof of past practice is essential because arbitrators tend to enforce past practices as vigorously as specific contract language.

5. What Considerations Should Govern Admission of Evidence from an Adversary or Third Person?

(a) *Duty to Produce Evidence or to Testify*

Burden of proof is a judicial device intended to regulate the order of trial and to specify the evidentiary hurdles faced by each party. The most notable usage of this device in arbitration is the requirement in disciplinary cases that the "burden" is on management, not only to proceed first with the introduction of evidence at the hearing, but also to produce sufficient evidence to meet either the "preponderance of the evidence" or "proof beyond a reasonable doubt" test. In other disputes the most widely used practice requires the aggrieved party to proceed first in the introduction of evidence. This rule probably is founded on the principle that the one who asserts a proposition has the duty to prove it.

On the matter of producing evidence, we find no valid reason why a company should not make all of its non-confidential records available to the union. It would seem that under the decisions of the National Labor Relations Board a union has the legal right to examine such records. We do not believe, however, that either party should be required to prepare summaries for the opponent.

The Committee believes there is no duty on an adversary party to produce evidence or to testify unless the opposite party either makes a specific request to produce such evidence or serves a

subpoena on the desired witness. However, an arbitrator should be free to draw conclusions from an individual's failure to testify. After request, an employer should make records available to the union concerning any matter relevant to the dispute. Today, even in law courts, broad compulsory discovery procedures are the general rule.

(b) *"Calling" Witnesses from the "Other" Side*

Arbitrators have quite correctly practiced the right to draw adverse inferences from a party's failure to produce evidence that is clearly within their control. We see no reason why an adverse witness or party cannot be called, subject, however, to the right of the opposite side to examine the witness on *voir dire* before the witness testifies. We believe that the party calling the witness should be bound by the testimony of that witness.

An arbitrator is called upon to make findings of fact and in order to perform his tasks properly all known facts should be presented to him. Hence, there should be no objection to calling witnesses from "the other side."

An exception to this general rule, in the opinion of the Labor Members of our Committee, should exist in discipline cases. They insist that the burden should be on the employer to prove his case without having the right to call the grievant as a witness. Based on facts known to the employer, the decision to discipline was made. Hence, the grievant should be allowed to decide whether he desires to testify at a hearing involving discipline meted out to him. Management members argue that the general rule should prevail.

(c) *Subpoena*

The subpoena power of an arbitrator is necessarily dependent upon the respective state laws. However, the classical and compelling language of such documents frequently satisfy the layman as to its legality, and it proves effective. Even assuming its legality, the use of the subpoena is not to be encouraged. Demands for relevant information by either party should be honored without the formality of a subpoena.

(d) *Decisions, Records of other Court or Agency Proceedings*

In arbitration cases the decisions of other tribunals are generally held irrelevant and are not admitted. However, the testimony recorded at such hearings may be used to impeach a witness if he has attempted to "alter" his testimony.

A witness should not be permitted to testify one way under oath before a commission and then appear in an arbitration proceeding and give evidence contrary to his earlier testimony.

6. Standard for Direct and Cross-Examination

(a) *Direct Examination: "Leading" the Witness*

One of the most frequently encountered problems in direct examination is the use of leading questions. A leading question is one which "suggests" the answer desired. One should not be permitted to use such questions when directly examining his own witnesses. However, leading questions are proper on cross-examination even in courts of law.

Since there is no requirement for legal training on the part of either arbitrator or advocate, this issue can be and is largely ignored. The grossest violations will appear clearly to anyone, and the arbitrator should control flagrant abuses. Because testimony elicited by leading questions is not forceful and convincing, leading a witness frequently weakens the impact of his testimony and defeats its own purpose.

(b) *Cross-Examination*

In arbitration the scope of cross-examination is not limited, as it is in courts, to facts obtained upon direct examination and to matters that test the credibility of the witness. Although wide latitude is usually desirable on cross-examination, the harassing of witnesses by the opposite spokesman or browbeating them can and should be prevented by the arbitrator.

(c) *Impeaching Witnesses*

This term refers to tactics employed by counsel that are designed to reduce the reliance placed by the arbitrator on a witness's

direct testimony. Impeachment involves such matters as proof of prior inconsistent statements, proof of lack of accurate recall, and in some cases proof of prior criminal conviction for crimes involving moral turpitude.

> Example #16—"Attorney: Mr. Smith, at the Unemployment Compensation Hearing, didn't you state under oath that the Company had discharged you because of your union activity and for no other reason?"

Ruling: This question should be allowed for purposes of impeaching the grievant's testimony. It is not unknown for parties to make different claims as to the cause of discharge before different government agencies, depending upon the area of jurisdiction of that agency. This is no reason to permit such variances in testimony to remain unchallenged.

As a general rule, questions relating to prior criminal offenses are avoided in labor arbitrations in recognition of the fact that the parties have a continuing relationship to protect.

7. Resolving Credibility Issues

In civil courts where either of the parties elects a jury trial, then all questions of fact are decided by the jury and questions of law are decided by the judge. Where the case is tried "non-jury," then the judge passes upon questions of both fact and law. Arbitration hearings are similar to non-jury trials.

The majority of our Committee expresses the opinion that too frequently arbitrators refuse to resolve squarely issues of credibility. Sometimes, directly conflicting testimony is brushed aside with the comment that both parties could possibly be right in their testimony, based upon faulty recollection. If arbitrators avoid questions of credibility, such a policy may have a disruptive impact in the area of employee discipline. Forthright resolution of credibility issues has beneficial results.

8. Acceptance of New Evidence

The term "new evidence" relates to two phases of the arbitration procedure.

The first phase relates to evidence that is presented at the

hearing, but was not presented at any earlier stage of the grievance procedure.

> Example #17—"Attorney: Mr. Arbitrator, the Union will show that prior to ringing out his time card at 2:15 P.M., the grievant told Mr. Ryan, Foreman of Department B, that he was sick and was going home."

Ruling: Whether such evidence is admitted should depend on whether the person mentioned is available as a witness to refute the evidence offered.

The minority view of our Committee is that if the grievance procedure is to be given its fullest function, then the above offer of evidence should be declined absent proof that this evidence was not available for presentation during earlier stages of the grievance procedure.

On occasion, it may be desirable to grant a continuation of the hearing while necessary witnesses are secured to rebut surprise testimony.

The second aspect of this question relates to the offer of "new" evidence to the arbitrator after the close of the hearing.

> Example #18—"Attorney: (Letter to Arbitrator) Enclosed please find a copy of a payroll stub proving the Union's contention that the company has in the past paid overtime for Saturday as such and not as they claim, only as a sixth day."

Ruling: All arbitrators agree that *ex parte* submission of evidence after the close of the hearing is never allowed. Arbitrators are also of the general belief that it is proper to consider a motion to reopen the hearing for submission of newly acquired evidence by either party. The decision of the arbitrator to grant such a motion should take into consideration whether it was made for the purpose of delay.

9. Admissibility of Illegally Acquired Evidence

In general, the courts have refused to admit evidence improperly acquired in violation of the constitutional protection against illegal search and seizure. The issue in arbitration cases tends to relate to information which the company regards as confidential, such as inter-office memos, production records, etc.

> Example #19—"Attorney: The Union will offer into evidence a copy of a Company memorandum substantiating the Union position that the parties' intent was to pay overtime pay for Saturday as such."

Ruling: Where the authenticity of the evidence is not in question, and the sole issue is whether the party offering the evidence came into possession of it by "unauthorized means," then the cause of justice is probably best served by admitting the evidence. The problem can be avoided, and the probative value of the evidence increased, where the party seeking to introduce the evidence requests the other party to produce it.

Management members are of the opinion that where information has been improperly secured, it should be excluded. A strong minority view is to the contrary.

10. Conduct of the Arbitrator

The parties consider it the responsibility of the arbitrator to insure an orderly hearing. It is also considered to be his function to restrict undue repetition and to minimize emotional outbursts.

Since many parties regard the arbitration hearing as an industrial safety valve to let off steam, arbitrators tend to permit freer rein to expression of personal opinions than do courts of law. Many attorneys may feel that there is too much concession given in this area, but it is not particularly prejudicial to the ultimate decision of the issue.

More important is the degree to which the arbitrator goes in "assisting" in the "development of all the facts." This raises the basic issue as to whether an arbitration is fundamentally an adversary proceeding or merely a fact finding device. More often than not, where one party is represented by a competent spokesman, the arbitrator tends to render aid and assistance to the unassisted party in the presentation of his case. In the long run this practice probably results in better decisions than would be the outcome were the adversary concept to be strictly enforced.

Conclusion

The above report is meant to be illustrative, not definitive of the subject area. This entire subject should be studied in depth by a more permanent group.