CHAPTER X

PROBLEMS OF PROOF IN THE ARBITRATION PROCESS:

REPORT OF THE NEW YORK TRIPARTITE COMMITTEE*

Introduction

The members of this committee brought a solid background of experience (some 140 years in the aggregate) to their consideration of Problems of Proof in Arbitration. Five of the six members are attorneys; the sixth holds an advanced degree in economics and labor relations. Two members have taught arbitration courses at the college or graduate school level. Three members have had considerable governmental labor experience with agencies such as the National Labor Relations Board, National War Labor Board, National Wage Stabilization Board, and New York State Board of Mediation.

The labor and management attorneys have represented clients in such industries as paper, chemicals, machinery manufacturing, air transport, drug manufacturing, electrical manufacturing, electronics, steel, printing, newspapers, retail and department stores, transit, railroads, social agencies, broadcasting, aircraft manufacturing, metal fabricating, and the like. The arbitrators have served in an *ad hoc* capacity in dozens of industries and, additionally, have held continuing impartial chairmanships in such industries as publishing, merchant marine, shipbuilding, steel, aircraft manufacturing, electronics, government, and private welfare agencies, among others.

* The Committee consisted of Arthur Stark, National Academy of Arbitrators, Chairman; I. Robert Feinberg, National Academy of Arbitrators; Co-Chairman; Alan P. Perl, Labor Attorney, Labor Advisor, Department of Labor, Commonwealth of Puerto Rico, New York; Asher W. Schwartz, O'Donnell & Schwartz, New York; Henry Clifton, Jr., Buell, Clifton & Turner, New York; Herbert Prashker, Poletti, Freiden, Prashker, Feldman & Gartner, New York.

No attempt was made to formulate a general philosophy of arbitration in our discussions. Rather, we concentrated on the specified topics presented for our consideration. The result, both surprising and gratifying, was that we reached a consensus on most of the major items discussed. Some of our findings, it is true, are phrased in a somewhat laconic manner, leaving room for possible dispute about their application in a given situation. But we could not and did not expect to be able to chart every move in this complex field. Nor did we have sufficient time to pursue every facet of each topic although we had eleven meetings.

What follows is a workshop paper, not a definitive treatise on rules of evidence in arbitration. Obviously, the time and resources we could bring to bear and the wide range of evidence questions included on our agenda prevented us from dealing with any questions in depth and in detail. In preparing this paper, however, we did reach certain definite conclusions: *First,* that the arbitration process can profit from the development of well defined rules of evidence. *Second,* that organized tripartite consultation is a worthwhile method of developing such rules.

Conclusions

Our conclusions—unanimous unless otherwise indicated—are set forth as follows:

I. In General

A. The observance of rules of evidence as required in the courts should not be mandatory in arbitration. (This is consistent with AAA Rule 28: "Legal rules of evidence shall not be necessary." Also, NLRB: Rules of evidence are to be followed "insofar as practicable.")

B. An effort should be made to develop uniform rules of evidence in arbitration which should not vary from state to state.

II. Rules of Evidence in Arbitration Proceedings

A. *Presumptions*

Undoubtedly many presumptions could be considered applicable in arbitration proceedings. The following, however, are deemed to be the most useful:

1. When it can be shown that a letter has been mailed by U.S. mail, it shall be presumed to have been received.

2. Any writing of the company or the union which is published or delivered by an official or authorized representative of the company or union shall be presumed to have been authorized.

3. Any writing which is published or delivered by an official or authorized representative of any other organization or third party shall similarly be presumed to have been authorized.

All presumptions are rebuttable.

B. *Judicial Notice*

Judicial notice, where applicable, obviates the establishing of certain facts by competent evidence. This concept is applicable in arbitration.

1. Arbitrators should take judicial notice of any facts or law which the courts of law would generally notice. (These would include: (a) specific facts so notorious as not to be the subject of reasonable dispute; and (b) specific facts and propositions of generalized knowledge which are capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy.)

2. Considerations of fairness would seem to require that: (a) the parties notify the arbitrator and each other of facts concerning which they desire the arbitrator to take notice; or (b) in the absence of such notification, the arbitrator advise the parties of facts concerning which he will take notice.

C. *Exclusionary Rules*

1. *Hearsay*—testimony given by a witness who relates, not what he knows personally, but what has been reported to him by another and which is offered for the purpose of establishing the truth of what has been reported to him.

a. Any evidence qualifying in courts of law as an exception to the hearsay rule should be admissible in arbitration.

b. In addition, hearsay may be admitted by the arbitrator, at his discretion, if there are persuasive reasons for not requiring the

presence of persons quoted and if there is reasonable ground to believe that the statement quoted is trustworthy and if the evidence is of a nature that can be readily refuted if contested.

(Some members would state instead: In addition, hearsay may be admitted by the arbitrator, at his discretion, in exceptional cases, if there is powerful reason for not requiring the presence of the person quoted, and if there is reason to believe that the statement quoted is trustworthy.)

2. *Opinion*

a. Opinion evidence (evidence of what the witness thinks, believes, or infers in regard to the facts in dispute, as distinguished from his personal knowledge of the facts themselves) should be admitted if it would generally be admitted in a court of law (i.e., expert testimony).

b. An authorized and qualified witness may testify as to his reasons for believing the contract should be applied in a given manner.

c. In addition, the arbitrator, at his discretion, may admit any opinion testimony from a knowledgeable person if such testimony can be helpful in appropriately guiding him.

3. *Privileged Communications*

a. *Physician-Patient*

(1) Basically, a patient may claim as privileged his communications with his physician in any situation where such claim could be made in a court of law.

(2) An employee asserting a claim or defense based on a physical condition may assert the privilege. However, the consequences of nondisclosure are for the arbitrator to determine.

(3) The disclosure of the fact of a communication with a physician is not privileged, even though the content of a communication may be privileged.

(4) If an employee's employment or continued employment is, by contract, controlling practice, or company rule, conditioned on his physical condition, he may not claim the privilege.

(5) If an employee's employment or continued employment is not explicitly or implicitly, by contract, controlling practice, or a

company rule, conditioned on his physical condition, he may claim the privilege.

Note: In the event that an employee desires, for some special reason, to avoid the general disclosure of his communication with his physician, the arbitrator may, at his discretion, limit such disclosure to selected representatives of the parties.

b. *Husband-Wife*—A confidential communication between spouses is privileged where a witness is, at the time of testifying, one of the spouses.

c. *Grand Jury*—A witness is privileged to refuse to disclose a communication made to a grand jury by a complainant or witness unless the findings of the grand jury have been made public by virtue of having been filed in court or otherwise.

d. *Classified Information*—A witness who, in the course of his duties, acquired official information, such as classified information not open or disclosed to the public relating to the internal affairs of a government, is privileged to refuse to disclose such information. However, if the arbitrator has government clearance for access to such classified information, the privilege may not be claimed.

e. *Union and Employer Communications*—Intra-union and intra-employer communications are not privileged.

f. *Grievance Discussions*—Evidence concerning grievance discussions, other than offers of settlement or compromise, is not privileged unless the parties have explicitly agreed otherwise. (The labor members would limit such evidence to admissions and statements of position, unless the contract provides for some type of reporting of grievance discussions.)

g. *Witness-Attorney*—Communications between a union member testifying on behalf of a union and a union's attorney, or between a company employee and a company's attorney, are privileged.

4. *Best Evidence*—Where objection is made to the introduction of evidence of a secondary nature on the ground that it is not the best evidence, the original document should be produced unless it is shown, for reasons satisfactory to the arbitrator, that it is not

available. Reproductions of original documents shall be deemed the best evidence unless the authenticity of the purported original document is significantly in question.

5. *Parol Evidence*—See Part III in this report.

6. *Authentication of Documents*—Exchange of documents in advance, wherever possible, should be encouraged by the arbitrator in the interest of expediting the hearing.

7. *A Witness' Privilege*—A witness may invoke his constitutional privilege to refuse to disclose any matter or information which would tend to incriminate him. The term "incriminate," in this context, refers to a statutory crime.

III. When Is Parol Evidence Admissible?

Parol evidence, for purposes of this analysis, consists of testimony concerning discussions in the negotiation or drafting of an agreement which is offered to explain the meaning of a provision of that agreement.

A. Parol evidence is not admissible if the language of the contract provision in question is plain and unambiguous. It is admissible if the language in question is ambiguous. It is for the arbitrator to determine, in the last analysis, whether or not the disputed words are ambiguous and he may receive evidence on that question.

B. Parol evidence is admissible in testimony concerning reformation of the agreement if the arbitrator has jurisdiction of the issue involving reformation.

C. In the absence of a requirement in the written agreement that it can be modified only in writing, evidence of an alleged subsequent oral agreement which was intended to change or modify the contract is admissible.

D. Evidence of an alleged oral agreement made contemporaneously with a written agreement and which modifies or varies that written agreement with respect to a subject intended to be covered by the agreement's terms is not admissible.

IV. How Should Circumstantial Evidence Be Treated?

Circumstantial evidence tending to prove or disprove the matter in issue is admissible. The weight to be accorded such evidence is for the arbitrator to determine.

V. What Considerations Should Govern Admission of Evidence from an Adverse Party or Third Person?

A. In the absence of a privilege or other bar, an adverse party or third party should, if requested, be required to produce relevant evidence or to testify.

B. It is permissible for a party to call witnesses from the opposing side. The witness may be treated as a hostile witness, but it is incumbent on the arbitrator to insure that the direct examination is proper and that the witness is protected against unfair tactics. (Some members do not consider an adverse witness, *per se,* to be hostile.)

C. The existence of the power of subpoena varies from jurisdiction to jurisdiction. It should be available to the fullest extent legally permissible, with appropriate safeguards related to questions of specificity, relevance, undue burden, and the like.

VI. Standards of Examination and Cross-Examination of Witnesses

A. *Direct Examination*

Generally the arbitrator should assume that, in the absence of objection, leading questions are concerned with facts about which there is no real controversy. Upon objection, or should he feel it desirable for the witness to testify without aid even in this area, the arbitrator should restrict further leading questions.

B. *Cross-Examination*

Cross-examination need not be restricted to the scope of the direct examination, but the arbitrator should exercise reasonable discretion in this regard. If the questions are related directly or indirectly to the issue or to credibility, a reasonable latitude should be permitted.

The arbitrator is responsible for protecting the witness from improper tactics. This responsibility is spelled out in more detail in the section entitled, "Policing the Hearing." (See X below)

C. *Impeaching the Witness*

To impeach a witness is to call into question his veracity by means of evidence adduced for that purpose, or the adducing of proof that a witness is unworthy of belief. Ordinarily, a party may not impeach its own witness through his own testimony, except where he is a hostile witness or his testimony can be shown to constitute a surprise. (A hostile witness is one who manifests so much hostility or prejudice under examination that the party who has called him is allowed to cross-examine him, i.e., to treat him as though he had been called by the opposite party.) It is not improper to adduce evidence from other witnesses which contradicts or is inconsistent with the testimony of a prior witness called by the same party. It is not proper to introduce evidence or testimony concerning facts not relevant to the proceeding in order to discredit a witness except evidence of a conviction for perjury.

VII. Guides for Determining Credibility

While this is a subject of great importance, our Committee felt that it does not fall within the area concerning problems of proof and admissibility of evidence.

VIII. When Is the Use of "New" Evidence at Arbitration Hearings Permissible?

In theory, at least, one of the prime functions of the grievance procedure is to permit each party to re-evaluate its position in light of facts and arguments presented by the other, and thus to resolve disputes where possible. Full disclosure, therefore, is in the interest of the parties. To the extent that contracts specifically require such disclosure, new evidence offered at the arbitration hearing, though otherwise relevant, should be rejected.

In some situations, however, it is the practice of the parties not to present all the evidence during the grievance procedure. In other situations the parties may recognize from the outset that a particular grievance must be arbitrated and pass quickly through

the steps of grievance procedure. In cases like these, evidence not disclosed prior to the hearing should be admitted. In general, evidence discovered after the grievance was processed should also be admitted. The arbitrator, however, should grant adjournments or take other measures to insure a fair hearing and to protect a party taken by surprise as to evidence concerning a material issue.

(The labor members would revise the next to last sentence as follows: In general, evidence discovered after the grievance was processed, which tends to establish the validity of positions, facts or statements made before the grievance, should also be admitted.)

IX. How Does the Way Evidence Is Obtained or its Source Affect its Admissibility?

A. Evidence, including confessions and admissions, obtained in a manner or by means which violate an applicable criminal statute or constitutional prohibition is not admissible.

B. The party objecting to such evidence, confessions, or admissions, has the burden of proving that they were so obtained.

C. The weight to be given to evidence, confessions, or admissions which are admissible may be affected by the manner in which they were obtained.

X. What Is The Arbitrator's Responsibility for Taking the Initiative in Policing the Hearing?

The arbitrator is responsible for conducting an orderly hearing and should exercise initiative to that end. Since the principal purpose of the hearing is to provide the arbitrator with relevant and admissible evidence necessary to resolve the issue in an expeditious manner, he should not permit personal attacks, outbursts, argumentative, loud or abusive questioning, hectoring,* badgering, refusing to let the witness answer the question, or like behavior.

The arbitrator must afford each party an adequate opportunity to present its case by evidence and argument. He must determine, in individual situations, how much leeway should be given a

* Hector: To treat with insolence; bully; torment.

witness or representative in testifying or presenting his case. However, he should not permit the hearing to bog down with irrelevant matter or repetitious evidence or argument.

XI. Are the Pre-Trial Procedures Utilized by Courts Desirable in Arbitration?

In judicial pre-trial proceedings the parties: (1) define the legal and factual issues to be tried; (2) develop the evidence for use in the trial; and (3) apprise each other of the evidence likely to be produced.

Pre-hearing procedures for carrying out the first and third of these purposes would clearly expedite the trial of arbitration cases, especially in those situations where the grievance procedure has not satisfactorily developed the issues. It would be desirable, wherever possible, for the parties, either by agreement or at the arbitrator's request, to submit and exchange in advance of the arbitration hearing, statements of their claims and arguments and a summary statement of the evidence to be introduced. In appropriate cases the arbitrator, upon receipt of such statements, might ask one or the other party to submit supplementary statements further developing matters already covered or covering different matters. The arbitrator may require the parties to define the legal and factual issues to be tried prior to or at the commencement of hearings if he finds that such a definition is necessary to an orderly and fair hearing.

The arbitrator should confine the hearing to matters relevant to the real issues. He cannot do so, however, unless the issues are clearly defined before evidence is introduced at the hearing. The clear definition of issues prior to the hearing will eliminate many of the instances in which arbitrators admit evidence "for what it is worth" because, not knowing the issues, they cannot exclude it as irrelevant.