

CHAPTER IV

PROBLEMS OF PROOF IN THE ARBITRATION PROCESS:

REPORT OF THE CHICAGO AREA TRIPARTITE COMMITTEE*

The Committee was asked to consider problems of proof which relate to the hearing phase of the arbitration process. The Committee has not, therefore, given consideration to the broad question of where the arbitration process belongs in the broad spectrum of labor-management relations. Nor did we consider the varying approaches to the decisional phase of the arbitration process. We limit ourselves to generalizations concerning the hearing phase of the arbitration process and the implications which may be drawn from these generalizations.

Our first conclusion is that it would be both unsound and unwise to attempt to prescribe a fixed set of procedural rules comparable to judicially adopted rules of procedure. There are significant differences between the position of litigants in the judicial process, and a company and a union arbitrating the unresolved disputes of their grievance procedure. These differences are obvious, well known, and often have been referred to. They include the fact that, unlike litigants in the courtroom, the relationship between the disputants, the labor-management relation, is a continuing one; that the arbitration process is voluntary and not compulsory; that it is private and therefore can be made as unique as the parties wish it to be; and that it generally involves parties

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more sophisticated and knowledgeable in the problems they bring to the arbitrator than the arbitrator himself.

The situation today is unlike the situation which confronted arbitrators shortly after World War II when grievance procedures were for the first time widely adopted throughout the country and grievance arbitration suddenly developed into a major enterprise. Today, most arbitrators come into plants where the parties have had a decade or more of experience with the grievance procedure. In the great majority of *ad hoc* arbitrations the parties have developed their own procedures for the arbitration hearing. These may seem imperfect to the arbitrator and indeed they may fall short of sound procedure, but the significant fact is that this is the procedure which the parties want and there are reasons why their procedure has evolved in its present form.

In many arbitrations, particularly in an *ad hoc* arbitration, the arbitrator enters the hearing of the case as a stranger. In fact, he is the only one who is strange in the proceedings. The parties on both sides of the table know each other well, sometimes intimately. They have spent years together across the table negotiating agreements and disposing of grievances. The nature and character of this relationship is unknown to the arbitrator. The context of the parties' experience is extremely important. Because the arbitrator in most situations is unaware of this experience, he must go slow, particularly in innovating procedures. Above all else he must exercise good common sense.

Just one illustration will suffice to indicate the degree of caution which the arbitrator must exercise. We refer to the question of how far an arbitrator should go in permitting the introduction of statements made by the parties or witnesses during the various steps of the grievance procedure, particularly statements made by union representatives as distinguished from statements of the grievant. It is important to the disposition of grievances that the parties feel free to speak candidly and openly to each other and to make full disclosure of all relevant facts. An arbitrator who receives evidence of such statements, even though he takes such evidence with the usual admonition that it will receive only such weight as it may deserve, may do a disservice to the parties, particularly if this evidence is relied upon in the decision. If the

parties realize that what they say in the grievance procedure may be used against them, this may inhibit their presentation during the grievance procedure and result in the withholding of information that would lead to a settlement of the disputes. The parties to the labor-management relationship and arbitrators have an obligation to make the grievance procedure as effective as possible. In one sense the success of the grievance procedure may be measured by the number of disputes that eventuate in arbitration.

We regard the hearing process as a fluid, flexible process which can be molded to the particular needs of the parties. Arbitration hearings vary greatly ranging from most informal types of proceeding to procedures which parallel the formal procedures of a court of law. An overstructured procedure may be a disservice.

It does not follow from the foregoing generalizations that the arbitrator may not be of service in the establishment of procedure. In general, the parties will proceed to present the case to the arbitrator as they have in other cases and in the manner in which they are most comfortable. Where there seems to be hesitation on the part of the parties as to how to proceed, the arbitrator should start the proceedings by asking the parties if they have an established procedure and, if not, to indicate what would be in order. There are some situations, particularly in *ad hoc* arbitration, where the parties have not had extensive experience in arbitration. When they look to the arbitrator for guidance as to how they should proceed, the arbitrator should feel free to indicate a procedure which may be suitable for an orderly and complete hearing of the facts relevant to the grievance.

Nor does it follow from the generalizations we have expressed that the arbitrator's role is completely a passive one. The arbitrator has a responsibility to keep control of the proceedings, to confine the hearing to relevant materials, and to protect the parties from going on *ad nauseum* in repetitive fashion on facts that have been well established. He should maintain an orderly and dignified procedure, patiently and kindly curbing emotional outbursts and protecting witnesses from being unduly badgered. He should let the parties present the case and reserve his questions until an appropriate time, avoiding anticipating evidence which the parties have planned to present and upsetting the order of

evidence which they have planned. We shall have more to say about this subject when we come to discuss matters of proof.

We would add one additional comment of a general character. It will be apparent from the discussion of the specific rules of evidence which follows that as to many of these rules we do not recommend strict adherence. We believe it is fundamental, however, to the proper conduct of an arbitration hearing that the arbitrator himself be familiar with and fully understand the rules of evidence. These rules by and large govern what evidence is to be admissible and the weight to be attached to evidence. The rules are based on many generations of judicial experience. They have as their primary objective the search for truth and generally the seeking to confine evidence so as to remove confusion, irrelevancy and manufactured facts. The significant consideration to bear in mind in relation to these rules is that they all have an underpinning of reason. They are not whimsical or arbitrary. Their objective is to encourage the process of unemotional and objective reasoning with the sole purpose to get at the truth.

It would, of course, be desirable in the search for truth if the parties in arbitration proceedings had sufficient background in the rules of evidence to understand the reasons behind the rules. Realistically, this may be too much to expect and certainly should not be a precondition to participation but it is essential that the arbitrator who presides have the requisite background to determine when limitations should be imposed upon the introduction of evidence. On occasions he will have cases presented to him in which either one side or both sides will be represented by counsel. Inevitably, no matter how sophisticated in labor-management relations the lawyers may be, reference will be made to the rules of evidence. The arbitrators should know the rules and particularly should know the reasons behind the rules. We would urge most strongly that this be considered as essential background for a neutral no matter what his calling may be.

The remainder of this report follows the discussion of the items set forth in the Common Agenda Items in the outline given to each of the workshop groups. Except for item 9 the conclusions reached have the unanimous approval of the Committee. We shall take up the items in the order in which they appear in the outline.

1. The Rules of Evidence in Arbitration Proceedings

a. *Exclusionary Rules (Hearsay, Res Gestae, etc.)*

Simply stated, the hearsay rule is that no statement made by a party not a party to the action is admissible for the purpose of establishing the truth of the matter asserted in the statement, unless it is or has been open to test by cross examination or an opportunity therefor. It was agreed that strict adherence to the hearsay rule as this rule has been developed by the courts is inadvisable in grievance arbitration. Even in the courts where cases are tried without a jury the rules against admissibility in hearsay evidence are substantially relaxed. The reasons for this apply with equal weight to the hearings before an arbitrator. The arbitrator recognizing the hearsay aspect of evidence will know that it is entitled to less weight. The right of cross examination also will act as a safeguard in this matter.

The hearsay rule has been described as "a fundamental rule of safety, but one overenforced and abused—the spoiled child of the family—proudest scion of our jury trial rules of evidence, but so petted and indulged that it has become a nuisance and an obstruction to speedy and efficient trials."¹ The right to cross examine needs no elaboration. Experience over the centuries has demonstrated that there cannot be complete reliance on mere assertion by anyone, however convincing, without scrutiny into its basis. Even the best witness is subject to weaknesses, failure of memory, conflict of interest, prejudice, inaccurate observation, etc.

There is considerable confusion about the hearsay rule. Not all statements which cannot be inquired into by cross examination are inadmissible. For this reason we agree that it is well that the term "res gestae" is referred to in relation to the hearsay rule. This Latin expression which means literally "things done or transacted" covers many utterances which in a lawsuit would be material as part of the issue in the case and utterances which form a verbal part of a relevant act of conduct. For example, an employee is disciplined for breaking into a fellow employee's locker. He may testify to a conversation with his fellow employee agreeing to give him access to the locker.

¹ *Wigmore on Evidence*, University Textbook Series, p. 238.

As to statements which form a verbal part of an act, the following limitations have usually been imposed: the words must accompany the conduct, the conduct alone must be equivocal, and the words must aid in giving legal significance to the conduct.

Another area of confusion in the application of the hearsay rule relates to statements which may be relevant as circumstantial evidence. Such statements are not offered as proof of the truth of the statements but go to show a person's good faith, his diligence, his knowledge, his belief, motive, irrespective of the truth of the information itself.

An illustration of this would be a case where a plant manager testifies in relation to disciplinary action imposed for an employee's slowdown. In explaining his presence in the portion of the plant where the slowdown occurred, he can testify that he came there because he received a telephone call from the foreman that something was going on that looked like a slowdown and that he accordingly went to that part of the plant to investigate the matter. The statement of the foreman with relation to the slowdown is not being offered here for the truth of the fact that there was a slowdown, but to explain how the plant manager came to the scene of the incident. The fact is that in addition to these categories of statements as to which the hearsay rule is not applicable a large number of exceptions have developed to the hearsay rule. The important point is that the arbitrator should know what is hearsay and what is not, even though he may admit all the evidence so that he can weigh the evidence accordingly. By and large evidence should not be excluded on the basis of the hearsay rule. Everything said or done by anyone concerned should be listened to and we should depend on the experience and good judgment of the arbitrator to separate the truth from untruth and to attach proper weight to what has been admitted.

b. *Relevance and Materiality*

It was agreed that, in general, it is unwise to exclude evidence on grounds of irrelevance and immateriality. After the arbitrator understands the issues and has some idea as to what is relevant, he can discourage evidence which appears to him to be of no help in resolving the issue. Even then he must exercise care to see that

the parties have had a full and complete hearing. It is to be remembered that hearings, particularly in disciplinary matters, provide a catharsis for the parties. The fact that they are given a right to get statements off their chests will have a beneficial effect in itself. Care must be taken, however, that in permitting evidence to be introduced, it relate to issues which are before the arbitrator and which had been the subject of discussion between the parties during the grievance procedure.

c. The Best Evidence Rule

It has been the experience of the committee that few problems arise in this area. What is involved is largely the matter of authenticity. The fact that there may be better evidence available is no reason to exclude relevant evidence. The reasons for accepting copies in lieu of originals includes such matters as loss, destruction, refusal to produce the original by an opponent, detention by a third person who will not surrender possession, physical or legal impossibility of removing the original, as, for example, a notice which is pasted on a wall, the inconvenience of removing business records that are in constant use and may not be conveniently removed and voluminous documents the production of which would be wasteful time. Recollection testimony should be permitted where neither the original nor a copy is available if this testimony can give the substance of the document.

d. Admissions (Offers of Compromise)

(1). *Admissions.* We are here concerned with admissions by the grievant or a duly authorized representative of the union or by a foreman or responsible official of the company. By an admission we mean a statement made prior to the arbitration hearing inconsistent with the claim or defense in the matter before the arbitrator. The statements being inconsistent, one or the other must be incorrect and a doubt is then thrown on the assertion being made at the hearing. In the absence of an explanation of the inconsistent statement, the statement asserted at the hearing may be discredited.

Most admissions of this character are made during the grievance procedure. The problem which confronts the arbitrator is to make

rulings which will not jeopardize the grievance procedures. The great bulk of grievances are disposed of by the parties prior to arbitration. We need not underscore the fact that in order that the grievance procedure be an effective vehicle for disposing of grievances, the parties and their representatives must have confidence they can speak freely and candidly with each other without fear of reprisal and without fear of having cases of significance prejudiced in the arbitration hearing by their statements. In a particular case the arbitrator may properly admit statements made during the grievance procedure, but the effect may be to freeze the grievance procedure thereafter and to defeat an objective of sound arbitration procedure, the preservation and enhancement of the grievance procedure.

With these generalizations as background, the committee agreed that admissions of the grievant during the grievance procedure present no problem. These certainly should be admitted in evidence. Admissions by other employees in the bargaining unit in the grievance procedure, and particularly the representatives of the union, fall into a different category. It is here the arbitrator should exercise the utmost caution. The distinction should also be borne in mind between statements made by union representatives in the presence of the grievant and not disputed by him and statements made by the union representative when the grievant is not present. In the former case there would appear to be little reason for excluding the evidence.

Sometimes admissions are contained in written minutes of meetings held in the various steps of the grievance procedure. A distinction, of course, should be drawn between minutes which are distributed to both company and union and minutes unilaterally kept by the parties. When there is a practice of joint distribution and an opportunity for correction, there is no problem. There was general agreement that unless parties have a contrary practice or understanding, minutes or answers to correspondence in the grievance procedure will not be accepted as proof if challenged, but will be received and given such weight as it may deserve.

(2) *Offers of Compromise.* There was agreement that offers of compromise should be excluded. The general rule developed in the courts is that an offer to compromise a claim is not evidence

of an admission that the claim is valid or of a dubious character. As a matter of experience, offers of this character are made to avoid time-consuming, irksome, or expensive arbitration procedures and may not signify in any way consciousness of liability. Moreover, as a matter of sound labor-management policy, offers of peace should be encouraged. If a party offers evidence relating to such a compromise, it can only be for the purpose of persuading the arbitrator that the offer is in itself an implied admission of liability or of weakness in the claim. Since offers to settle are made for reasons having nothing to do with the question of liability or of the ability to prove the claim, the arbitrator should reject the offer of such evidence. The admission of such evidence will be prejudicial to the grievance procedure and to the settlement of grievances and may do untold harm to the parties' relationships.

e. *Opinion Evidence (Including Expert Testimony)*

As used in the law of evidence, an opinion is inference from data observed or made available to the witness. The opinion rule followed by many courts is that when the data which is used as a basis for the opinion can be exactly and fully reproduced by the witness so that the jury can equally draw the inference from them, the witness' opinion will be excluded. This rule has been severely criticized by leading scholars for the reason that it is only very rarely that data can be exactly and fully reproduced in words. But in more practical terms, there is no harm in letting a witness offer his inference except for the time that it may take to do so. Quibbling about whether the opinion should be received will generally waste more time than receiving the opinion. The fact is that cross examination affords ample protection.

There is one area in which an arbitrator can justifiably refuse to receive opinion evidence. It occurs where the issue before the arbitrator is one of interpretation of an agreement and the opinion evidence offered goes to the witness' opinion as to what the contract means. But here again little harm will result from receiving the evidence. The arbitrator is not bound to give it any weight.

Expert testimony should, of course, be received. There was general agreement that the strict court rules for establishing the qualifications of the expert need not be insisted upon, although, as a

practical matter, most parties offering an expert witness will take pains to lay a detailed foundation for claiming that he is an expert. In weighing the testimony of an expert, attention should be given especially to the opportunity of the expert to have access to data which would give him a basis for expressing an opinion. Obviously an expert who testifies on the basis of what someone else has told him, in other words, on the basis of hearsay and not personal knowledge, is not entitled to have as much weight given to his testimony. Again primary reliance must be placed by the arbitrator on cross examination.

2. Admissibility of Parol Evidence

Generally speaking, when we use the term parol evidence, we use it in relation to the interpretation or application of an agreement and for the purpose of determining the meaning of words in the agreement. The primary source of interpretation of an agreement, of course, is the agreement itself, but parol evidence refers to everything in the parties' conduct or statements which may throw light on the meaning of the words in question.

a. *Is Parol Evidence Admissible To Reform the Agreement?*

What is involved in this question is not a rule of evidence, but an issue concerning the arbitrator's jurisdiction. In general, an arbitrator does not have jurisdiction to reform or to change the parties' agreement. In many contracts there is an explicit admonition or limitation on the arbitrator precluding him from adding to, subtracting from, or changing the parties' agreement. The classic case of reformation of contracts, however, is where there has been a mutual mistake in the preparation of the agreement which is contrary to what the parties intended. The arbitrator should receive evidence of this character since he has authority to interpret the contract as the parties intended it. In this case he would, in fact, be carrying out the parties' agreement and not violating the standard prohibition against making an agreement for them. But even reformation in this limited sense presents some areas of difficulty as, for example, where a company has taken over an agreement which has been in effect and applied in the manner grieved about for some time, or where a company has relied on the agreement in its present form for a long time. Here, as a

matter of substantive principle, the arbitrator can protect the party who has relied on the agreement by giving the reformation of the agreement prospective effect only.

b. *When Is Parol Evidence Admissible To Interpret or Explain Contract Provisions?*

The general rule is that where a contract provision is clear and unambiguous, parol evidence should not be entertained to vary its terms. As a practical matter, in almost every case where parol evidence is offered of this character, the party offering it contends that the language is ambiguous. The arbitrator is hardly in a position in the course of the hearing to make the determination that the language is free from ambiguity and so as a practical matter the evidence is offered and generally received. In general, the parol evidence offered falls into two categories: proof going to the collective bargaining history of the agreement, including the negotiations which preceded the agreement; and what we generally categorize as "past practice," or how the parties have by their conduct interpreted or applied the agreement. As to the collective bargaining history, no problem arises as to the introduction of the prior agreements between the parties where, in fact, an ambiguity exists. Prior agreements may be a valuable source of information in resolving ambiguities. More serious problems arise with relation to admissibility of evidence in connection with the negotiation process. Drafts of collective bargaining proposals exchanged by the parties present no problem. Proof of oral statements made at bargaining table, however, usually generates a substantial amount of testimony and seldom is of value. Nevertheless, there is no basis upon which such evidence can be excluded, assuming the issue of ambiguity exists, so long as the statements were made in the presence of both parties.

An even more troublesome problem arises when the evidence offered goes to collective bargaining negotiations in which the company involved was not at the bargaining table. This sometimes occurs in relation to collective agreements which are industry-wide in character. But even here there is no sound basis for excluding the evidence. The company has authorized another collective bargaining agent to represent it and should be bound by the actions of its agents.

The agency theory would have no application, however, to the situation where a company in the course of collective bargaining accepts a form contract tendered by the union. At the time of the negotiations, nothing is said by the union as to the source of the contract. The company applies the contract in accordance with what appears to be its clear meaning. The union then claims the application is erroneous because, in the negotiations with Company "X" from whose contract the clause was lifted, certain statements were made by the negotiators as to the intent of the claims. The arbitrator would be justified in rejecting this evidence at the arbitration hearing. The company should not be subject to a contention against which it has no defense.

The other area of parol evidence which is frequently offered in arbitration proceedings is evidence of past practice of the parties, by which we mean the parties' conduct in the application of the agreement. Item 4 of the Common Agenda Items raises the question as to whether proof of past practice should satisfy certain special standards. This question raises a substantive issue more than an issue of evidence. It goes to the question as to when an arbitrator shall determine that a past practice exists. It is agreed that generally arbitrators are warranted in holding that past practice does not exist unless certain standards are satisfied. The subject of these standards has been considered at length at previous National Academy meetings.² So long as there is a claim of ambiguity the arbitrator should listen to whatever evidence is offered on past practice.

c. Is Parol Evidence Admissible To Establish a Collateral Agreement?

By collateral agreement we assume what is meant is either a verbal or written agreement modifying or amplifying the parties' collective agreement. It was generally agreed that evidence of this character should be admitted, even if the contract between the parties states expressly that all prior agreements are incorporated

² Benjamin Aaron, "The Uses of the Past in Arbitration," *Arbitration Today, Proceedings of the 8th Annual Meeting of the National Academy of Arbitrators* (Washington: BNA Incorporated, 1955), pp. 1-11; and Richard Miententhal, "Past Practice and the Administration of Collective Bargaining Agreements," *Arbitration and Public Policy, Proceedings of the 14th Annual Meeting of the National Academy of Arbitrators* (Washington: BNA Incorporated, 1961), pp. 30-58.

in the agreement, and even where the agreement states expressly that all collateral understandings must be in writing. Here again the arbitrator must be relied upon to weigh such evidence and to give effect to such limitations on collateral agreement as may appear in the collective agreement.

3. How Should Circumstantial Evidence Be Treated?

Circumstantial evidence is all evidence which raises an inference with respect to some other fact other than testimony offered to evidence the truth of the matter asserted. The latter is referred to as testimonial evidence, sometimes as direct evidence. For example, an employee is discharged for injuring another employee by throwing a hammer at him. The discharged employee denies this charge. Evidence is offered by a foreman that he saw the aggrieved throw the hammer at the fellow employee. This is testimonial evidence. Evidence is also offered that the hammer was part of the standard tools in the possession of the aggrieved, that his hammer was missing from the tool box, and that the hammer in question has the initials of the aggrieved on it. The latter testimony is circumstantial in character. Similarly, fingerprints of the aggrieved on the hammer would be circumstantial in character.

Circumstantial evidence may have as much probative value as testimonial evidence. It should be received and it should be given such weight as it may deserve, considered in context with all other evidence offered. The principal difference between testimonial evidence and circumstantial evidence relates to the approach to assaying the evidence. The principal problem with testimonial evidence is making a determination as to the credibility of the witness. This involves an evaluation of the person, giving weight to psychological factors, etc. With circumstantial evidence, what is involved generally is the inductive process. The person offering the evidence desires a certain inference to be drawn from an evidential fact. The opponent may attempt to explain away this fact by pointing out some other and more plausible inference, or the opponent may deny that the claimed evidential fact is a fact or may set up a rival fact to overcome the evidential fact involved. Both testimonial evidence and circumstantial evidence may be scattered through a case involving a fact issue. Both kinds of

evidence have their own points of strength and weakness. The principal problem is the weight to be attached to them.

4. The Considerations That Should Govern Admission of Evidence From an Adversary Party or Third Person

a. Duty of Adversary Party To Produce Evidence or To Testify

In general, it is agreed that it is desirable that all facts should be elicited that will be of help to the arbitrator in ascertaining the truth. In the absence of a subpoena power given by statute, a witness cannot be compelled to testify or to produce evidence. Parties, of course, are free to comment on the failure of a witness to testify. Accordingly, while there may be a duty to facilitate the arbitration process by testifying, the duty is not enforceable. In view of the fact that the arbitrator holds the ultimate sanction, that of making the decision, parties are reluctant to deny the reasonable requests of the arbitrator for evidence which is in their possession. It is highly unusual for a company to refuse to make available seniority records or payroll records or personnel records which may be relevant to the issue when requested. When there is a state statute permitting the arbitrator to issue a subpoena, an arbitrator should be cautious in issuing subpoenas to the adversary party. In most cases the issuance of a subpoena is unnecessary since it may be assumed that the testimony of the adversary will be offered.

b. Calling Witnesses From the Other Side

In general it was agreed that it is unwise and undesirable to encourage calling witnesses from the other side. Except for unusual cases, such as the situation where the grievant knows best what occurred and the circumstances surrounding the occurrence, an arbitrator should rule that the grievant may not be called as a witness at the outset of the case in a discharge or disciplinary matter. Except for this limitation, no other limitations should be placed by the arbitrator on the parties calling witnesses from the other side.

c. Power of Subpoena: Does It Exist? Should It Exist?

In the absence of an express provision in a collective agreement

or understanding between the parties or a state statute authorizing the issuance of subpoenas, the arbitrator does not have power to issue a subpoena. It was agreed that it may be desirable to give such power to the arbitrator in order to make possible securing all facts necessary to reach the right decision. An employee whose testimony may be particularly relevant to an issue may no longer be employed by the employer involved in the arbitration proceedings. Such an employee, particularly if he is newly hired at another plant, is usually reluctant to ask for time off for this purpose. The issuance of a subpoena to such employees removes from them the burden of voluntary attendance at the hearing and clothes their appearance with a legality it otherwise would not have. Employers have also found that a witness who might be reluctant to testify against a fellow employee will do so if required by subpoena. It may, however, be unwise to use the subpoena power to compel such testimony. The characteristics of the labor-management relationship, particularly its continuing character, has special relevance.

Twenty-six states now have arbitration statutes under which the arbitrator is empowered to issue subpoenas. Arbitrators administering cases under rules of the American Arbitration Association (Sec. 23 of the Voluntary Labor Arbitration Rules) may issue a subpoena where the applicable law so authorizes. These rules provide:

“When the arbitrator is authorized by law to subpoena witnesses or documents he may do so upon his own initiation or upon the request of any party.”

When permitted either by law or by rules binding the parties, such as the rules of the American Arbitration Association, the arbitrator normally issues the subpoena at the request of either party. Occasionally arbitrators have reserved decision on the issuance of the subpoena subject to oral argument of the parties at the time of the hearing. This is proper procedure, particularly in cases where the right of the arbitrator to issue a subpoena or the materiality of the information sought may be contested.

d. Admissibility of Decision, Opinions, and Transcripts of Government Agencies such as Workmen's Compensation Boards,

Unemployment Compensation Commissions, or Labor Relations Boards

A distinction should be made between the admissibility of decisions and opinions and transcripts. The parties are asking the arbitrator for his construction of the contract or his determination whether a discharge was for proper cause. In general, decisions and opinions should be admitted—their persuasive effect will depend on whether the issues decided are relevant to the matters before the arbitrator and whether the board or agency involved adheres to proper procedures and due process safeguards. On the latter point it is clear that a decision made by an unemployment compensation commission or labor relations board, based upon an investigator's report and not upon a hearing of an adversary character, is entitled to little weight.

Transcripts of testimony before boards or agencies may be used for the purpose of impeachment or to establish admissions against interest and are clearly admissible only for such purposes.

5. Applicable Standards for Examination and Cross Examination of Witnesses

The problems arising under this general heading do not involve questions of evidence as such. We are here concerned with making certain that the evidence adduced is that of the witness, that it is in fact evidence and not what the counsel or representative wishes was evidence. We are also concerned that proof be made in an orderly manner and that the proceedings be conducted with appropriate dignity and decorum.

a. Direct Examination—Leading the Witness

The primary problem of the leading question is that it may put in the mouth of a witness the answer to a question which does not in fact conform to the witness' knowledge.

As a general rule, on non-controversial matters, such as the employee's background, his job history, etc., the arbitrator should in fact encourage the use of leading questions. On issues of fact which are central or close to the crucial issue, leading questions should be discouraged. Here the arbitrator, particularly in *ad hoc*

arbitrations, is on safer ground to withhold admonition in the absence of an objection. In some relationships the parties have customarily permitted wide latitude as to the form of question. The presence or absence of attorneys may be a relevant factor. Where one side is represented by a layman and the lawyer on the other side appears to be taking advantage of the situation, the arbitrator may be justified in requesting that the questions be rephrased.

b. Scope and Tactics of Cross Examination—Arbitrator's Responsibility To Protect Witness from Improper Tactics

The arbitrator plays a crucial role in the proceedings. He should discourage and shut off improper tactics such as redundant cross examination, abuse or intimidation of witness by threats or otherwise, the putting of involved questions not susceptible of intelligent response, shouting at witnesses, standing over witness, and the making of unseemly gestures.

In certain situations where tense emotional attitudes develop, it may be necessary for the arbitrator to overlook an emotional outburst. But in general it is the arbitrator's responsibility to prevent the proceedings from degenerating into a donnybrook. Calmness, patience, and a dignified demeanor by the arbitrator are essential requisites to the successful conduct of an arbitration hearing. It is generally his example that will guide the parties.

In general, if a party has witnesses who can establish the essential facts by direct testimony, cross examination to elicit such facts is a waste of time. We do not, in general, believe that the scope of cross examination should be restricted to the scope of direct. Where the cross examination appears to be getting into irrelevant matters, and objection is made, the arbitrator would do well to ask for an explanation of the purpose of the questions. Sometimes the zeal of an advocate may take him far afield and he may appreciate being guided back to the issue.

It is difficult to generalize as to the allowable latitude. Cross examination should not be interfered with unless it appears obvious that the questions have no bearing on the issues before the arbitrator or that the witness is not competent to answer the questions.

c. Impeaching the Witness

There should be no limitation in efforts to impeach a witness, particularly where cross examination is used to establish facts which are to be followed up by direct testimony. But impeachment does not mean harassment—and an arbitrator has an obligation to protect a witness from excessive badgering or repetitive examination on the same subject matter.

6. What Guides Should Be Followed in the Determination of Credibility?

The question put is so general as not to admit of a meaningful answer short of a treatise on the subject. The following guides are listed as illustrative only:

- a. Manner and demeanor of witness while testifying.
- b. Character and reputation of witness.
- c. Mental qualities of witness.
- d. Relative experience of witness.
- e. Emotional capacity of witness.
- f. Opportunity of witness to observe.
- g. Self-serving character of testimony.
- h. Interest or bias of witness.
- i. Failure to call on corroborative witnesses where available, as, for example, to support an alibi.
- j. Inconsistency—contradiction—self-contradiction.
- k. Motivation of witness.
- l. Probability of testimony under all of the circumstances.

While something would be gained from extensive discussion of the use of each of these guides in weighing the credibility of a witness, the subject does not lend itself to conventional teaching. Where issues of fact are involved, an arbitrator is well advised to pay very close attention to the testimony being offered. The guides set forth are common sense tests which should be borne in mind by the arbitrator. But in the last analysis, much depends on his knowledge of men and his experience.

7. Use of New Evidence at Arbitration Hearings

a. *Evidence Not Disclosed During the Grievance Procedure*

It was generally agreed that it is desirable in the development of sound labor-management relations and for proper operation of the grievance procedure for the parties to make full disclosure of all relevant facts during the grievance procedure. Nevertheless, if evidence not disclosed is offered, it should be admitted if the evidence offered is relevant to the issue and provided the opposite side is given full protection by adjournment if necessary.

There are two conflicting values here involved. On the one hand, it is desirable that grievances be settled during the grievance procedure and the disclosure of evidence may enhance the possibilities of disposition of the grievance. Granted the importance of preserving this value, the goal of reaching the right result in the arbitration proceeding should have greater priority. Non-disclosure may be justified when the parties make a full statement of their position during the grievance procedure but do not disclose detailed evidence. In these situations, non-disclosure of the details may be warranted in the particular context of the relationship, and this may become apparent during the arbitration proceeding. The non-disclosure of evidence is also less subject to criticism when both parties have access to the same sources. We would stress that the arbitrator has a duty to protect the party taken by surprise and if adjournment is requested to consider the new evidence, such a request should be granted.

b. *Evidence Discovered After Grievance Is Processed*

Sometimes evidence does not come to life until after a grievance is processed. This is frequently true where a party for the first time calls upon an attorney to prepare for arbitration. The attorney may suggest avenues of inquiry which have not previously been followed. It was agreed that, in general, evidence discovered after the grievance is processed should be admitted even if the evidence was available earlier, subject to protecting the other party from surprise by granting an adjournment if requested. Needless to say, the evidence should be related to the issues raised in the case. In disciplinary cases where it becomes clear that the only issue is

one of remedy, the new evidence may be admissible going to this subject.

8. The Sources Affecting the Admissibility of Evidence

We are here concerned with the admissibility of confidential company records or records not available to the union, items taken from employees' lockers, or picked out of wastebaskets, closed circuit TV systems, moving pictures, etc. On this issue the committee was divided. The principal problem appeared to be a civil rights issue. This issue was posed most sharply with relation to the breaking into of employees' lockers without consent and without a search warrant.

It was the position of the labor members of the committee that an employee does not give up all of his personal rights as a condition of employment. They are of the conviction that conduct, such as breaking into a locker exclusively assigned to an employee for his own use, forcible search of his person, or breaking into his automobile is conduct which should not be tolerated in the employer-employee relationship, and the arbitrator should exclude such evidence upon objection or on a motion to suppress.

While the committee was in agreement that the arbitrator should exclude a forcibly extracted confession, the management members of the committee were of the opinion that an employee does not have the right to have excluded from evidence in an arbitration case evidence which is relevant and important to reaching the right result.

A similar division of opinion took place with reference to the use of a closed circuit TV system. The committee was in agreement that if an employee is aware of the fact that he is being observed, the testimony of the observant should be admissible. The labor members took a position, however, that if an employee does not know of the existence of the TV system, the evidence should be inadmissible. The same division took place with reference to the use of motion pictures.

What is presented is an issue of considerable importance in the development of sound management labor policy. Does an employee give up his right to privacy within the plant? Outside the

plant he is protected by the constitution from search and seizure, even by police officers, and the breaking into of private property, including an automobile, is both a crime, and a tortious act. Why should the employee lose these protections once he enters the plant? The answer given by the company representatives is that when an employee takes a job, he takes the job with the knowledge that certain conditions may be imposed upon him and that he must adhere to plant rules and may also be required to give up certain rights which he has on the outside. An employee's locker which is assigned to him remains company property and the company has the same right to enter the locker that it has to open up any other files or containers in the plant.

On the other side, it is contended by the union representatives that the employee should be accorded the dignity and worth he has as a person whether or not he is in the plant, and that there is an undesirable and distasteful intrusion into his way of life when a company can break into his locker or monitor his actions by closed circuit TV or movie, or otherwise spy upon him. This demeans the employee instead of encouraging him to live up to high standards and may in fact cause resentment and in turn cause him to act in undesirable ways. At what point does the violation of privacy of the individual require the arbitrator to rule out the evidence? For example, one of the company representatives recognized as an exception a tactic condemned by the Supreme Court, the use of a stomach pump to force out the contents of an employee's stomach in order to ascertain whether or not incriminating evidence was swallowed.

The broader question presented to the arbitrator is that, absent a constitutional right or a right specified in the contract, may the arbitrator reject evidence because the manner in which it has been obtained is reprehensible or distasteful to him or because it is his opinion that sound labor-management relations would be better served by such exclusion. These are not easy questions to answer and deserve extensive discussion.

As to company records, the committee was in agreement that the union is entitled to see all records, that this is part of the national labor policy under the broad rules established by the National Labor Relations Board. Accordingly, there should be relatively

few records relevant to the issues not available to the union to examine. But even as to company records or letters not subject to production on request, the committee was in agreement that such records should be admissible in evidence.

9. The Arbitrator's Responsibility for Taking the Initiative in Policing the Hearing

This matter has been discussed at some length under item 5. Briefly, there is agreement that the arbitrator has an important responsibility to maintain an orderly proceeding, to conserve the time of the parties by discouraging repetition, and to protect the parties and witnesses from improper behavior. We have pointed out the value in occasionally permitting an employee to give vent to his feelings. This is a matter of judgment which the arbitrator can best exercise in the context of the particular case.

Optional Agenda Items

The committee had time only to consider four of the optional agenda items. These will be taken up in turn.

2. (a) *Admissibility of Notarized Statements*

It was generally agreed that notarized statements should be inadmissible in evidence except where used for purposes of impeachment or except where parties have a practice of using affidavits or have no objection to their introduction. It should be pointed out that in the course of litigation and in hearings before administrative agencies there are many routine situations involving no real controversy and yet some person's responsible statement must be obtained. Thus, affidavits have been permitted for the purpose of establishing the age of an employed minor, a chemical analysis, copy of bank records, etc.

(b) *Doctor's Statements.* It was agreed that doctor's certificates should be admissible in recognition of the difficulty of a busy doctor taking time to come to a hearing. There are occasions where the medical issue may become the central point of the case and here the arbitrator must be quite careful in determining whether the statement should be admitted. In general, the com-

mittee would admit the certificate of the doctor with the qualification that, absent the opportunity for cross examination, such evidence is entitled to less weight than medical evidence given in person by a doctor.

4. *Use of Pre-Trial Procedures*

It was agreed that pre-trial procedures may be helpful in cases where there are complicated issues of fact. Such procedures may be valuable in such a case to seek agreement on the procedures to be used in the arbitration procedure and also to secure stipulation of facts. In general pre-trial procedures are more useful under permanent umpire systems than in *ad hoc* arbitrations. It was also agreed that in general arbitrators should not initiate pre-trial procedures except for the discussion of the procedures to be followed. It was suggested that an alternative to a pre-trial procedure is to request the parties to submit a pre-hearing brief. Such a pre-hearing brief would acquaint the arbitrator with the issue in advance of the hearing and permit him to suggest possible areas of stipulation of fact and other procedures for expediting the hearings.

5. *Propriety of the Arbitrator Seeking Expert Advice in Making His Decision Without Informing the Parties of Their Comment*

The committee was of the opinion that it is improper for an arbitrator to seek expert advice without informing the parties. There are situations, however, where the arbitrator may suggest the use of an expert when the parties' experts are in conflict. This is particularly true in cases involving incentives or job evaluations. He should not, however, use such an expert without the consent of the parties, and should permit the parties to have access to whatever opinion is offered by the expert selected by him and to comment on the opinion before reaching his decision.

7. *The Best Answers to Questions of Proof in Discipline and Discharge Cases*

Only three matters were taken up.

d. *Use of Lie Detectors.* The committee was in agreement that the results of lie detectors should not be admitted in evidence on the ground of the unreliability of such evidence.

f. *Effect of Collateral Criminal Proceeding.* The committee was in agreement that such evidence may be admitted if it relates to the original cause of discipline or discharge but not if the purpose is to support a new or different charge not brought to the attention of the grievant or the union during the grievance procedure.

h. *Use of Transcripts (Court or Other) for Evidence or as a Basis for Cross Examination.* Considered under item 4 (d).