tors have been improperly allowed by some courts and arbitrators to preempt a central aspect of the act of judgment by triers of fact—the relative assessment of the testimonial credit of witnesses—by unwarranted acts of self-abnegation on the part of those courts and arbitrators who have admitted polygraph-test results to evidence and credited them with probative value.

Third, those acts of self-abnegation are unwarranted because even the best of polygraph operators (who see 80 percent of their peers to be a sorry lot) are not educationally or experientially nearly so well equipped as are professional triers of fact to distinguish deception from truthfulness, and to protect the innocent in the process.

For the polygraph operator, the search in each case is for "truth" or "deception," a venture in human understanding and perception for which he is rarely, if ever, prepared through education and experience. For the labor arbitrator, the search in each case is for a fair and rational decision within the parameters of the collective bargaining agreement.[153] It is for this professional effort that he is mutually selected by the disputants. If success attends, it will be marked by intelligence and empathy, and a humility of judgment that reflects our shared human failings.

Comment—

JOHN E. MCFALL*

I appreciate the invitation to the Academy's annual meeting. I must admit that when I was asked to be a discussant, I willingly accepted with not a small amount of anticipation. I thought it was going to be nice to comment upon the work of arbitrators for a change, as some arbitrators have commented on my work by saying such things as "I don't believe the company's witness," or "the company failed to prove its case," or "as the

[153] "Since the object of a trial is the ascertainment of the truth, we reason, and since the inventions of technology help ascertain the truth, we ought to make increased use of those inventions. This is an unexceptionable sentiment, so long as we remember that, in truth, the object of a trial is not the ascertainment of truth. The object of a trial is the resolution of a controversy in accordance with the principled application of the rules of the game. . . . There is no technology to do it for us." Younger, *Technology and the Law of Evidence*, 49 U. Colo. L. Rev. 1, 7 (1977).

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company concedes in its brief" (and then that is the point on which the arbitrator elects to base his decision in sustaining the grievance). But here is the one that really hurts: "The company's logic escapes me."

The difficulty of coming to grips with the search for the whole truth is highlighted very well by the papers that have been presented here this morning. For instance, Russell Smith says that in discipline cases the basic question is credibility, while Ted Jones says the question is not capable of resolution. My comments will be brief, considering the lateness of the hour, and directed to some of the practical considerations that I believe require attention. I shall also indicate where I agree or disagree with the positions that have been offered in the papers this morning.

First, let me make some comments about credibility resolutions in general. I have found that, on the whole, arbitrators in the cases I have handled have been less inclined to meet the credibility issue head on. I have found that judges and the Labor Board, as fact finders, are more inclined to make clear credibility findings. It may be that many arbitrators, particularly where they are on a permanent panel, are reluctant to offend one side or the other. I do not believe, however, that arbitrators or any fact finders can assume that both sides are consciously telling the truth. Nor can a fact finder assume the contrary. But credibility findings should not be skirted in an attempt to resolve the controversy through secondary determinations that may lead to a wrong result or that which was not the intent of the parties.

As Russell Smith points out, a general problem in getting the truth arises out of delay. I agree with that observation and submit that part of the reason for delay is the lack of qualified arbitrators acceptable to both parties. Perhaps this is something the Academy can give attention to in the future. I personally think that it would be helpful to both labor and management if a larger body of available arbitration talent, trained and experienced in the "law of the shop," were available.

Sometimes too much evidence and too much testimony can cloud the truth. I do not accept the proposition that more testimony, more evidence, more conjecture, more hearsay, and the like make the search for truth easier. Arbitrators have a tendency to let in anything the party offers with a comment that they will give it appropriate weight. As a representative of one of the parties, it is impossible for me to determine how much, if any,

rebuttal should be offered. Moreover, very often the party is left with no way to challenge the offered testimony or evidence. When matters that were raised at the last minute and had never been proffered in any of the grievance meetings are let into the record, a situation is created where it is easy for witnesses to lie or for one party or the other to cloud the truth. I am not suggesting that arbitrators strictly adhere to the rules of evidence, but a tighter hearing, made up only of highly probative, clearly relevant evidence and testimony, is more likely to produce the truth.

I am a believer in prehearing exchange of information, and in this regard I agree with Russell Smith's observation of the development of cases before arbitration. I submit that there should be discovery allowed in arbitration proceedings through the grievance procedures, or the arbitrators ought to require the parties to give their full positions and defenses prior to the hearing. The parties should not be allowed to present an alibi witness, present a defense, or raise a position at the arbitration hearing that they have not raised in the grievance procedure. This rule would not prevent the offering of evidence discovered at the last moment, but the party proffering such evidence should be required to meet the same sort of burden he has to meet in a court of law where the rules of discovery prevail. In the absence of the foregoing, arbitrations very often turn into trial by ambush. One party attempts to hide his evidence from the other and will not raise defenses or positions in the grievance procedure, knowing that the issue will ultimately go to arbitration. If the party were required to raise all defenses and name witnesses, for example, in the initial stages of the grievance procedure, a complete investigation could be accomplished, and this would probably have the salutary effect of leading to more settlements.

Union officials and members have often prevented the truth in arbitrations by bringing pressure to bear on witnesses in the bargaining unit. I have experienced situations where unions have refused to let members testify against another brother, or where they have established rules, enforceable by fine, forbidding one union member from testifying against another. It has made it extremely difficult to present a clear picture of all facts, where some witnesses have information that conflicts with the grievant's testimony, but such adverse witnesses are not available.

There is a great deal that company and union representatives can do in advance of grievances that will preserve the truth. I am referring here specifically to advice that the parties should reduce to writing as much as possible that would affect their rights. I try to advise my clients to reduce to writing all oral agreements of intentions and practices on which they want to rely.

Finally, I feel I should comment briefly on the paper presented by Ted Jones on the question of the polygraph. I am not a polygraph expert, nor am I a trained advocate for the use of polygraph examinations. I have had experience, good and bad, in use of polygraph evidence. I do know that polygraph examinations are used by a large number of employers, many of whom believe very strongly in their value. It seems to me that the issue upon which we should focus is that of the "reliability" of the polygraph result. Arguments about whether the polygraph is an invasion of privacy, or should be used by employers at all, seems to me to be immaterial to an arbitrator. Only if the question arises in the context of whether to discipline an employee for refusal to take the polygraph should an arbitrator be at all concerned with the moral, privacy, or constitutional questions. If a polygraph is 60 to 70 percent accurate, then it would seem to be substantially reliable enough to warrant its use under proper circumstances. For example, I have submitted polygraph evidence as corroborative to support eye-witness testimony in a discipline case. I think it would be a mistake to conclude that polygraphs are so unreliable that they should never be used or relied upon by an arbitrator.

Russell Smith suggests in his paper that a penalty might be leveled in favor of a grievant, where the grievance is denied, if the company asked for and received an extension of time to file a brief. I hope that comment is made with tongue in cheek. But if not, I submit that arbitrators should agree to pay a portion of the back-pay bill where it takes them more than a few days to render a decision on a discharge case.