CHAPTER 3

THE SEARCH FOR TRUTH

I. THE SEARCH FOR TRUTH—THE WHOLE TRUTH

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Prologue

"The bright countenance of truth in the quiet and still air of delightful studies." Milton, The Reason of Church Government, Book II, Intro.

Epilogue

"A lie, turned topsy-turvy, can be prinked and tinselled out, decked in plumage new and fine, till none knows its lean old carcass." Ibsen, Pillars of Society, Act IV.

When invited to give a talk on this subject, I first thought that the invitation was an appeal to my conscience since I had missed the last several annual meetings of the Academy. But I promptly dismissed this idea on the premise that the program planners must be interested in achieving at least a tolerably good program. I next thought they may have been taking cognizance of my age and length of service and thus decided to tap whatever I could offer before the enfeebling drought of advancing years sets in.

Vainly motivated by this assumption, it seemed to me I should try to emulate some of my esteemed colleagues who have addressed other subjects[1] and thus essay an overall construct of

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[1]There have been a substantial number of such contributions. Without in any way attempting a complete survey, a few such readily come to mind. These are: Shulman, *Reason, Contract and Law in Labor Relations,* 68 Harv. L. Rev. 999 (1953); Cox, *The Legal Nature of Collective Bargaining Agreements,* 57 Mich. L. Rev. 28 (1958); Feller, *A General Theory of the Collective Bargaining Agreement,* 61 Calif. L. Rev. 662 (1973); and St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and Its Progeny,* 75 Mich. L. Rev 1137 (1977) and Arbitration—1977, Proceedings of the 30th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1978).

the arbitrator's role and practice in the search for truth, one which would be at once comprehensive, penetrating, innovative, and seminal. From this lofty plane I soon descended as I began to ponder the scope of any such project, time limitations, and, most of all, the constraints implicit in your own knowledge and sophistication. You would expect far more than I could deliver.

So, with a sense of relief, I decided to attempt something much less ambitious. What I propose to do is open with some general observations and follow these with a brief review of some specific procedural and other problems that arise in the arbitral search for truth. Various aspects of my subject have been discussed many times in the arbitration literature. In that connection, I would remind you that at the 1966 Annual Meeting of the Academy, the principal theme was "Problems of Proof in the Arbitration Process." Tripartite "area committees" from Chicago, California, Pittsburgh, and New York made their reports and four "workshops" were held to consider the respective reports, all of which were reported in the Proceedings.[2] There is probably little that is new to be said on the subject, but perhaps the justification for placing it on the program of this meeting of the Academy is that it continues to be a matter of lively, day-to-day interest to all who are involved in the arbitration process and an occasional revisitation with some of our mutual concerns has some value.

Some General Observations

1. The Scope of the Subject

The subject assigned to me is really vast. It encompasses, in actuality, the entire arbitration process. "Truth" by one recognized set of definitions means "conformity to knowledge, fact, actuality or logic," "fidelity to an original or standard," "reality or actuality," "sincerity, integrity, honesty," and some of the synonyms are "veracity," "verity," "verisimilitude," "candor," and "frankness."[3] Surely the search for truth in arbitration seeks these ends and is the *very core* of the matter.

In grievance arbitration, this is obviously so with respect to

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[2]Problems of Proof in Arbitration, Proceedings of the 19th Annual Meeting, National Academy of Arbitrators, ed. Dallas L. Jones (Washington: BNA Books, 1967).

[3]The American Heritage Dictionary of the English Language (Boston: Houghton-Mifflin).

simple (or complex) issues of fact, and it is also so, at least theoretically, in the area of contract interpretation. The question to the arbitrator in the latter case is, "What, if anything, did the parties really contemplate as the contractual solution to the problem in hand?" "What is the truth as to that?"

In interest arbitration, the search for "truth" becomes in part something different and more esoteric. The process can and usually does involve the weighing of factual contentions against the proffered "evidence" in applying, for example, accepted criteria such as wage rates and practices in the area or industry, current trends in wage and fringe benefit settlements, and the like. The process also, however, requires the exercise of judgment in selecting from among and weighing suggested criteria and, as to some kinds of issues, making a largely unaided determination. Here the arbitrator's inquiry is not so much what is the literal "truth" as what is fair and just. But perhaps this is just another definition of "truth."

2. The Arbitrator's "Expertise"

In all of this, the arbitrator is supposed to be aided by a special expertise. In grievance arbitration, where simple questions of fact are involved, I am frankly doubtful that this expertise counts for much. Especially in the review of employer disciplinary action, the basic question very frequently is one of credibility of witnesses. Certainly, a trial judge would be at least as competent in deciding this kind of question even though lacking experience with labor relations matters. Our jury system in civil and criminal law and procedure has as its very root the postulate that twelve or nine or six fellow citizens, selected at random, are more likely to get at the "truth" on issues of credibility than a single individual even though clothed in the mantle of the judge. And I must say, it must be nice from the point of view of the judge to be able to pass the buck to a jury. Perhaps arbitrators ought to be privileged to impanel a lay group of two or three persons (perhaps wives of other arbitrators) to hear and determine "simple" issues of fact where credibility is involved. I say this facetiously, of course. And I guess I have to assume that the parties are satisfied to go along with a solo performance by the arbitrator despite his noncontributory expertise.

Where the question is one of contract interpretation, the arbitrator's expertise, derived presumably from his experience and

background, is more clearly relevant and significant. The question often is what the parties intended by what they ambiguously wrote into their contract; in other cases, however, the search for truth requires an answer to the question whether the parties in fact intended to deal with the subject matter at all. Here the arbitrator usually faces the problem of limitations on his jurisdiction which rest on the generality that he is not to add to or subtract from what has been written. This type of jurisdictional constraint should result in a dismissal of the grievance if the arbitrator finds that the contract is silent on the substantive matter in issue. Yet my impression is that very few cases are returned to the parties where the issue is one of contractual intent, the contract is arguably ambiguous, and the subject matter is not encompassed by a specific limitation on the arbitrator's jurisdiction and authority. If this is the case, it must be the fact that the arbitrator in many instances is "gap filling." To use Ted St. Antoine's term, he is the parties' surrogate "contract reader" and is finding a putative contractual intent where the evidence of specific intent is really lacking.[4]

In so doing, he is performing a necessary function, one that the courts continuously perform in the interpretation of legislation. He will usually not confess that he is doing this; instead, he will find ways, more or less convincing and more or less theoretically defensible,[5] of rationalizing his conclusions consis-

[4]Examples are legion, but obviously include the following: (1) determining whether, and if so, what kind of implied limitations exist on the employer's right to "subcontract" or to assign to supervisors or other nonbargaining-unit employees work normally performed by bargaining-unit employees; (2) determining whether, and if so to what extent, a negotiated job-classification wage-rate structure implies limitations on the employer's right to make interclassification transfers of job duties or to assign employees to job duties normally performed by employees in some other classification; (3) determining whether, and if so with what consequence, a change in job content (or an increase in work load) invalidates a negotiated wage rate; (4) determining whether, and if so with what qualifications, there is an implied limitation on the right of the employer to require overtime work; (5) determining whether there is implicit authority in the arbitrator to modify a disciplinary discharge or other penalty even though cause for disciplinary action is found to exist; (6) determining that the employer is obligated to use a system of progressive discipline for non-"capital" types of employee derelictions where the contract does not expressly mandate it, and, indeed, determining what *are* the "capital" offenses where instant discharge is justified where there are no negotiated plant rules.

[5]Plenty of mechanistic clichés, borrowed from the dicta of jurists, are available and frequently used. The Elkouris list some of them in Ch. 9 of their useful work. They include the maxims "interpretation in light of the law," "agreement to be construed as a whole," "avoidance of harsh, absurd, or nonsensical results," "doctrine of 'ejusdem generis,' " "specific v. general language," "construction in light of context," "avoidance of forfeiture," and "interpretation against party selecting the language." Elkouri and Elkouri, How Arbitration Works, 3d ed. (Washington: BNA Books, 1973), at 318.

tently with the scope of his authority. So the "truth" in these kinds of cases is somewhat obscured by fiction. But, to quote Ted St. Antoine's typically clear, precise, and plain English on the matter, "The arbitrator cannot be effective as the parties' surrogate for giving shape to their necessarily amorphous contract unless he is allowed to fill in the inevitable lacunae."[6] The parties by and large presumably agree, since they keep retaining both us and the "don't add to" contract language. They must figure that we have enough horse-sense expertise to come to conclusions that are acceptable within the general framework of the agreement and the shop context or milieu that surrounds it.

In the area of interest arbitration, the arbitrator in his search for "truth" (that is, verity, fairness, justice, equity) is likewise aided, theoretically at least, and I think in fact, by his expertise. Surely it is to be presumed that one who has had substantial experience as a neutral in the handling of disputes concerning contract terms, especially if in the context of a tripartite tribunal, has gained valuable insights into the warp and woof of the collective bargaining process—the factors that reasonably may be deemed relevant and material in reaching conclusions concerning issues in dispute—and has the ability to analyze and evaluate the parties' respective contentions and, perhaps above all, the sophistication to make judgments concerning solutions that the parties can be expected to find tolerable. Surely, also, it is to be presumed that if the arbitrator is also an academic who has made a study of collective bargaining, he may bring an extra dimension to the task.

In passing, I would like to note that my experience with tripartite arbitration of interest disputes indicates that the other "arbitrators" often become the real advocates in the case, or at least a second set of advocates, with the consequence that the tripartite panel does not, except for the neutral, engage in a deliberative process. Rather, it is a head-to-head, toe-to-toe, adversarial engagement with the neutral who must have the vote of one other member on each or all issues (which in itself poses a problem). The neutral is subjected to intense pressure which is at least exasperating and sometimes almost intolerable. In this kind of situation there is typically a total lack of objectivity on the part of the partisan members, and the ability of each to hold

[6]St. Antoine, Arbitration—1977, *supra* note 1, at 44.

out his vote sometimes requires the neutral to make decisions that really do not represent his best judgment on the merits. I suppose that as to the mental anguish of the neutral, the Trumanism applies—"If you can't stand the heat, don't go in the kitchen"—and also that this is just one of the occupational hazards, although, I would note, not one as to which the damage to the neutral's psyche becomes fully compensable. I wonder whether the better procedure is either to have a panel of neutrals or to have partisan members with the right to voice but not to vote.

3. Some Deficiencies in the Process

Poor Representation. Like other arbitrators and, I am sure, most parties, I have noted some deficiencies in the arbitration process in relation to the search for truth. One such is inadequate representation of one party or the other. This may be due to lack of proper preparation, lack of skill, or deliberate indifference. In my experience this has been true more often on the union side than on the employer side, and I suspect that often the reason was that the business agent or international representative was overloaded and lacked the time to prepare thoroughly. There is an obvious risk that because of this the case will be lost. Moreover, the inadequacy can be so grave as perhaps to constitute a breach of the legal obligation of fair representation and a kind of arbitral malpractice.[7] There is also, for the arbitrator, the problem in this situation as to the extent of his responsibility, if any, to take initiatives to obtain the whole truth with respect

[7] *See* the discussion of this matter by Clyde Summers under the title *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation,* Arbitration—1974, Proceedings of the 27th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1975). Summers asserted that "the union owes the employees it represents the fiduciary duty to use reasonable care and diligence in investigating and processing grievances on their behalf" (p. 31). This observation provoked a rather heated discussion, some of it critical.

See also Aaron, *The Duty of Fair Representation,* in papers from the National Conference on the Duty of Fair Representation, ed. Jean. T. McKelvey (Ithaca: New York State School of Industrial and Labor Relations, Cornell University, 1977). In his review of the pertinent judicial decisions, Aaron discusses the question whether negligent conduct on the part of a union does or should constitute a breach of the duty of fair representation. He makes this interesting comment, among others: ". . . during the past few years I have arbitrated a large number of grievances—all involving discharges—for the same parties. In none of these cases has the union's position been even remotely vulnerable to a charge of bad faith, discrimination, or arbitrariness; yet in almost all of them the union's presentations, because of the lack of training and experience of its spokesmen, have been so inept as to prejudice the grievants' cases" (p. 21).

to that party's case. Surely there will be a temptation to take a more activist role in the proceeding than would have been the case had the representation of the two parties been of substantially equal quality. This probably will usually be limited to taking a more active part than would be normal in the examination of witnesses and in making inquiries as to whether factual areas have been investigated. But this may not be enough. Perhaps, in the interest of justice and fairness, the arbitrator should sometimes recess the hearing until certain obvious points or facts have been developed. This may be regarded as inconsistent with the concept that an arbitration, like a court adjudication, is adversarial and hence that if a party is poorly represented, he simply has to take his lumps. But the analogy to a court proceeding may be inapposite except in the most general sense. To recall a point many times made, a grievance arbitration, unlike a typical court case involving a one-shot encounter between parties who will probably not have a continuing relationship, is simply one of many incidents arising in a long-term collective bargaining context.

Inadequate Prehearing Disclosure. Another deficiency in many ad hoc arbitrations is inadequate prehearing sharpening of the issues and inadequate mutual disclosure by the parties of their factual claims and of the nature of their supporting evidence. We don't have the process of discovery available in connection with projected arbitrations, and I realize that its use as in judicial proceedings could be expensive and time-consuming. I do think, however, that the arbitration process would be facilitated if the parties, in advance of the hearing, would supply the arbitrator with the "pleadings" in the case (that is, the grievance and any written answers and any jointly prepared minutes of grievance-step meetings), stipulations of facts and of the issue or issues, to the extent this is possible, and brief statements of position and of proposed proofs. I believe this would tend to shorten hearings and prove helpful to the arbitrator in disposing of questions of relevance of proposed evidence.[8]

[8] *See* the interesting comments of Attorney Theodore Sachs on the lack of equivalency of the fact-finding process in arbitration as compared with judicial fact-finding, including the lack of prearbitration "discovery," in Arbitration—1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1976), at 135.

The Problem of Delay. A perennial problem in grievance disposition, as we are all aware, is that of delay—delay in processing a grievance to the arbitration level, delay in scheduling the arbitration hearing, delay in the filing of posthearing briefs, and, finally, delay in getting decisions out. It is shocking to be involved, as I have been recently, in the arbitration of a discharge which occurred in 1976, which was not appealed to the arbitration level until late 1976, was not heard in arbitration until July 1977, was the subject of posthearing briefs three months later, and was not decided until December 1977. This seemed to me to be a case of justice denied, even though in this instance the discharge was sustained, and I know there are much worse examples in the record books.

The arbitrator can do nothing about delay in processing grievances to the arbitration level. This is a problem for the parties to resolve if they choose to do so. But he can do something about delay in scheduling the hearing. If his caseload does not permit the setting of a reasonably early date, he can refuse to take the case, or at least suggest to the parties that they get another arbitrator. In this connection, it is relevant to recall that Part 2, Section J, of the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes provides: "It is a basic professional responsibility of an arbitrator to plan his or her work schedule so that present and future commitments will be fulfilled in a timely manner"; further, that "an arbitrator must cooperate with the parties and with any administrative agency involved in avoiding delays."

It is generally assumed that the arbitrator should go along with and, if he is busy, even welcome and routinely approve extensions of briefing time requested jointly by the parties or requested by one party without objection by the other. But I wonder whether doing so is consistent with the objectives of the Code. Where one party requests the granting of an extension of time, and the other party does not join in the request or does not oppose it, the request is normally granted where some kind of cause is shown. But should it be if the only ground for the request is that the party's counsel or other representative pleads a heavy work load or some other conflicting commitment? In any such case, where the extension is granted, might it not be appropriate for the arbitrator, at least in a discharge or some other case involving adverse action taken against the grievant, to levy a monetary

penalty in favor of the grievant even though the grievance is ultimately dismissed on its merits?

4. The Good Side

Despite its deficiencies, the arbitration process still has its obvious virtues, and my impression is that its acceptability and use are increasing both in the private and especially in the public sectors, and this despite Dave Feller's belief that arbitration's "golden age" is coming to an end.[9] Arbitration remains a civilized and apparently the most acceptable alternative to trial by industrial battle (the strike and the lockout). Grievance arbitration provides, for the benefit of the employee and the union, elemental due process and, to the benefit of the employer, a way in which employee unrest and dissatisfaction can be ventilated without resort to self-help job action. To the benefit of both parties it provides, as previously noted, a method of filling in gaps inevitably present in the collective bargaining agreement, and it thus organically is really an indispensable part of the collective bargaining process.

Some Procedural Matters: The Mechanics of the Search for Truth

1. Formality Versus Informality

Some hearings tend to be the grievance-arbitration counterparts of a courtroom trial as if before a jury. There is full and vigorous resort by counsel to the so-called rules of evidence, a demand for meticulous adherence to strictures of trial practice relating to the examination (on direct and cross-examination) of witnesses, and an aura of adversarial hostility and aggressiveness. Other hearings tend to be quite informal with little or no use of the tactics of the trial lawyer. I can recall a case where the "hearing" was held in the industrial relations director's office, I was seated at the director's desk, the partisan representatives were seated on either side of the desk, and they proceeded to make statements of the relevant facts without the use of witnesses and submitted the relevant documents; two to six

[9]Feller, *The Coming End of Arbitration's Golden Age*, Arbitration—1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1976), at 97.

cases were "heard" in a single day, all without partisan rancor.

There is, of course, no one correct and proper way to conduct an arbitration hearing. Our Code of Professional Responsibility states as a basic principle that the arbitrator "must provide a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence and argument" and, by way of amplification, adds, "Within the limits of this responsibility: an arbitrator should conform to the various types of hearing procedures desired by the parties."[10] Thus, if the parties (through their representatives) choose to make the hearing formal, highly adversarial, and procedurally rigid, we probably have to go along and play that game, making rulings on objections, insisting with counsel that proper "foundations" be laid for questions put to witnesses, permitting searching cross-examination, and the like. Whether this kind of hearing is more productive in the search for truth than the more relaxed kind of proceeding is problematical. Perhaps the answer depends on the kind of case it is and the kind of basic relationship the parties have with each other.

2. The Rules of Evidence

Related somewhat (although not intrinsically) to the matter of formality versus informality in the conduct of the hearing are the grist-of-the-mill problems of proof, particularly the application of the so-called "rules of evidence." In general, it seems to me, the most important criterion of the admissibility of proffered evidence is its relevance. At the same time, however, a persistent problem in determining relevancy is the one to which I have previously alluded, namely, the arbitrator's lack of knowledge prior to or at the outset of the hearing of the precise nature of the issue or issues posed in the case. The arbitrator typically reaches the hearing room with little or no information concerning the case. Opening statements of position and stipulations obviously can help in the determination of questions of relevance. Not infrequently, however, the respondent party (normally the employer) elects to reserve its opening statement until after the grievant's case is in. This, of course, complicates the problem of passing on relevancy questions.

[10]Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, Part 5.

It is generally accepted that the rules of evidence used (in varying degree) in court proceedings are not expected to be followed to the same degree in arbitration hearings. Yet they are frequently invoked by one side or the other, more so by lawyer than by nonlawyer advocates. This subject has been discussed so much that there is little more to be said. Arbitrators are sometimes criticized for letting in evidence, over objections, "for what it may be worth." Well, I've heard judges do the same thing. I do think it desirable to insist that the most authentic and reliable of varying kinds of available documentary evidence should be insisted upon, and it seems clear enough that "hearsay" evidence or testimony should be excluded if nonhearsay is readily available. Beyond that, it seems to me a liberal view of the admissibility problem is desirable, subject to the caveat that the arbitrator should not lose control of the proceeding and should seek to prevent undue redundancy and to minimize the introduction of irrelevant and immaterial evidence.

3. The Order of Proceeding, the "Burden of Proof"

There is sometimes confusion concerning the distinction between the order of proceeding at an arbitration proceeding and the burden of proof or persuasion, a distinction which need not be pointed out to this audience. The two concepts do, however, have some interrelationship. If, for example, the party having the burden of proof is also required to proceed first with its case, the other party, after hearing the moving party's case, has the option to make a motion to dismiss on the ground that the evidence adduced by the moving party is insufficient to sustain its burden. This is analogous to the ancient common law demurrer to the evidence or to a motion for a directed verdict. It is a tactic sometimes used in a grievance arbitration. In my experience, the motion is seldom used to the point of a decision not to present any evidence at all. The reasons are obvious. For one thing, it is not always so clear who has the burden of proof; but, more important, there is always the possibility that the arbitrator will not agree that at least a prima facie case has not been made by the moving party.

Now, which party in an arbitration proceeding, if either, has the burden of proof or persuasion, and is the question really of any great importance? The Elkouris say that "it is very difficult to generalize on the application of the doctrine of 'burden of

proof' in the field of arbitration,"[11] and they quote Ben Aaron as stating: "To insist that the complaining party carries the burden of proof is manifestly absurd. Neither side has a burden of proof or disproof, but both have an obligation to give the arbitrator as much guidance as possible." They also quote Harry Shulman as stating that "notions of burden of proof are hardly applicable to issues of interpretation."[12]

Yet one often hears the "defendant" (normally the employer) taking the position at a hearing or in a posthearing brief that the grievant employee or union as the complainant has the "burden of proof." If this is so, a generally recognized exception is the area of employee discipline or discharge on the issue of the existence of "cause" or "just cause," where there is a question of fact concerning whether the disciplined or discharged employee committed the act of misconduct charged against him. The rationale underlying this exception is not altogether clear.

Speaking of discharge cases, the Elkouris say the burden is generally held to be on the employer "because of the seriousness of this penalty."[13] If true, this is difficult to follow, and would seem to limit the application of the exception to discharge cases and perhaps cases of extended disciplinary layoffs. An alternative rationale could be that there is some analogy between industrial relations penalty systems and the criminal law, so that it is incumbent upon the employer as the charging party to prove fault and there is a presumption of innocence. Another approach could be to say that whichever party asserts the affirmative of a factual matter has the burden of establishing the fact, and, on the other hand, that the burden ought not to rest on the other party to prove a negative. Another rationale could be that in the area of discipline and discharge it is the employer who knows why the adverse action was taken, is in possession of the evidence on the basis of which the action assertedly was taken, and hence should have to show that the facts are what they were thought to be. Otherwise, presumably, the disciplinary action would not have been taken.[14]

The question of who has the burden of proof or persuasion

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[11]Elkouri and Elkouri, *supra* note 5, at 277.
[12]*Id.*, at 278.
[13]*Id.*, at 621.
[14]But arguably this proposition is too broad since in most cases where employer action of any kind is challenged, the employer is in possession of facts which assertedly were the basis of the challenged action.

has practical significance primarily where there are issues of credibility which the arbitrator finds himself unable to resolve, or the evidence does not preponderantly support either side. In either case the arbitrator may well simply so state, and the consequence in a case involving disciplinary action would be that since it was incumbent upon the employer to prove that the grievant committed the act or acts charged against him, the award would require rescission of the penalty.

In the arbitration of challenged disciplinary or discharge action, it is generally accepted that the employer proceeds first with its case in support of the challenged action. This is consistent with the view that the employer has the burden of proving cause in such cases. But even if the burden-of-proof issue were laid aside, it would make sense to insist that the employer proceed first. The employer acted presumably on the basis of its view of what the facts were and thus is in a position to explain what it deems the relevant facts to be and to exhibit the evidence upon which it relied. Requiring the employer to proceed first helps to sharpen the factual issues.

The same approach, it seems to me, could well be used in some other kinds of cases where management has taken some action adversely affecting the grieving employee. Examples of such cases would include the following: a demotion for alleged lack of job competence; bypassing a senior employee for alleged lack of sufficient or of as much ability as a less senior employee; subcontracting, where the question is whether the employer acted in good faith; the introduction by the employer of a new or changed job classification where the issue is the consistency of the wage rate with the negotiated wage structure; the manning of a new or altered machine, where the contract contains negotiated manning but permits the employer to act subject to grievance; or where there is an incentive-wage system and the employer has altered the job content of a classification and established a standard which is subject to grievance. In these kinds of cases, the challenged action as in the case of disciplinary action has been taken by the employer on the basis of management's view of what were the relevant facts, and arguably it would aid in the search for truth in the arbitration process if the employer were to proceed first. This is so irrespective of the disposition of the question of burden of proof or persuasion.

Where the issue is one of contract interpretation, it is generally accepted that the party charging a contract violation pro-

ceeds first with its case, and the defending party (normally the employer) typically will verbalize that the complainant has the burden of proof or persuasion. I see no reason to quarrel with this practice as to the order of procedure. Someone has to start, and it probably helps to sharpen the issue to hear first the details of the grievant's claim as to how the contract should be interpreted.

But as to the burden of proof or persuasion, I take it that the Shulman-Aaron position holds that the burden is no more on one party than on the other. Each is urging that its view of the contract be upheld, and the argument, I suppose, is that there is no reason in principle or logic (other than the fact that the complaining party has stirred up the rumpus by "suing" the other) for presuming that the defending party's view is correct and thus placing the burden on the other party. I would suppose, further, that the same result would be reached under the St. Antoine conceptualization of the role of the arbitrator as the parties' surrogate to render a "reading" of the contract. Each principal to the relationship with the arbitrator should be obliged, equally, to help the arbitrator render a proper "reading."

I agree, in general, with these views, but with certain qualifications or emendations. If the contract on its face appears to support the view taken by one party or the other, I should think it clear that the other party would inevitably have to be fairly persuasive in order to get its view upheld. If, on the other hand, the contract is ambiguous on its face, or if a latent ambiguity is established by the charging party, the arbitrator will have to make a determination with the assistance of the usual interpretative aids such as collective bargaining history or "past practice." Presumably, the usual view would be that the party claiming that collective bargaining history or past practice supports its interpretation has the burden of proof on either matter; but I suppose it could be contended with reason that if the other party has a different version of the collective bargaining history or of past practice, it has a like burden or responsibility.

One final question I would raise about the order of proceeding is whether a party having the right or duty to lead off with its case should be expected to put in its entire case before the other party commences. Suppose, in a discharge case, the employer has charged the grievant with the commission of acts A and B (such as two separate instances of the same kind of mis-

conduct, or two disparate acts of misconduct), each of which has been denied by the grievant, and the employer in its main case puts in evidence only as to act A, intending to withhold its evidence on act B until after the union puts in its case, including testimony by the grievant. The case can then take different turns. The union advocate might question grievant only as to act A, or might add a question obtaining grievant's denial of both acts. In either situation, should the employer, after the union's case has been put in, be permitted to follow with its evidence on act B, or should it be deemed foreclosed to do this? Does the answer depend upon whether grievant in his testimony either on direct or on cross-examination has denied the commission of act B, in which case the employer could claim it is simply offering rebuttal evidence? Is the union entitled to object on the ground that the employer failed to make a case as to act A when it had the opportunity and duty to do so, and cannot "lie in the weeds"? I confess I have some sympathy with this view, but I suppose that nevertheless the proper approach would be to let the employer put its evidence in. After all, it is the evidence—all the evidence—that is ultimately important in the arbitral search for the truth—the whole truth.

4. Calling Witnesses From the "Other Side"

Is there any problem about calling as witnesses at the arbitration hearing persons from the opposition side? May the employer in a discipline case call the grievant, fellow employees of the grievant, or some union official as witnesses? May the union call the grievant's foreman or other supervisors?

There should be no problem in general about the *right* of either party to do this or about the duty of the person called to appear and testify. If the grievant is called, he or she might, of course, seek to use a Fifth Amendment-type privilege against self-incrimination. The arbitration precedents, as the Elkouris point out, in general hold that there is no such recognized privilege, but that there is a minority view holding otherwise.[15]

An arbitration proceeding is not a criminal proceeding; hence there is technically no basis for reliance upon the Fifth Amendment. But this is not dispositive of the issue. Some of the basic

[15]Elkouri and Elkouri, *supra* note 5, at 267–68.

principles of our jurisprudence, notably the concept of due process, have been borrowed and applied in the negotiation of the grievance procedure and in its application, and the notion that an employee ought not to have to testify when a disciplinary penalty assessed against him is being reviewed has some appeal. The employee must, if called and if guilty of the act charged, either testify falsely or confess his guilt. Thus, if he is honest, he will convict himself out of his own mouth; if he is dishonest, he will have added to his dishonesty in testifying to the fact of his guilt if otherwise established. His dilemma will be acute. If an arbitrator regards the Fifth Amendment privilege as one of the really important constitutional guarantees, he may be inclined to think a like privilege should exist in the arbitral review of managerial action; if, however, he has some skepticism about the basic validity of the privilege in general, or if he thinks the employer-employee relationship has unique characteristics, he may well take a different view.

As a practical matter, of course, a witness called from the other side cannot be compelled to testify, since the arbitrator has no contempt powers and can at most issue a subpoena which can be enforced only through separate judicial proceedings. To be considered by the grievant, of course, is the question of whether his refusal or failure to testify will lead the arbitrator to infer that his testimony, if truthful, would have been damaging to him. To the extent this is so, it is obviously to the employer's advantage to attempt to call him, and it is to grievant's disadvantage that he does not proffer his testimony. While, arguably, the grievant and union are entitled to put the employer to its proofs, and thus grievant is entitled to refuse to testify, and while the union is, indeed, entitled to refuse to make any case at all, other than through cross-examination of the employer's witnesses, I tend to think this is poor tactics. I really think grievant ought to give his version.

There are other problems about calling persons to testify whose general interests identify them with the other party. It may not be good labor relations to do so, and some parties by tacit agreement refrain from doing so. If a person is called, there is the question whether by calling him he is made the witness of the party calling him so that that party is bound by his testimony and must examine him as on direct examination even though he is a "hostile" witness. My own practice has been to regard him from the outset as an adversary witness and hence to permit him

to be examined as if on cross-examination. But it may be that the better practice would be to regard him as the calling party's witness until his hostility develops, then to permit him to be questioned as if on cross.

5. Posthearing Unilateral Submissions: Requests for Reopening the Hearing

Procedurally, the hearing record is presumably complete with the close of the hearing. Occasionally, however, a party will try to submit something—a document or other alleged evidence—after the record is closed, or will seek unilaterally to have the hearing reopened to receive evidence on some matter as to which the record is alleged to be incomplete or in error or for the purpose of impeaching some of the testimony of record. How does and should the arbitrator react?

With regard to the unilateral submission, the easy and, I suppose, generally correct answer is that the arbitrator should refuse to accept the proffered submission unless the other party has no objection to its receipt. The practical difficulty is that he has already examined at least the transmittal letter and perhaps even the enclosure. He should, of course, insist that the other party be made aware of the proposed submission and be given an opportunity to voice objection to its receipt and, if it so elects, to comment on the substance of the proposed submission and, if it is received, to make its own counter-submission.

The unilateral request to reopen the hearing poses similar problems. According to the Elkouris, "Under accepted practice the arbitrator on his own motion, or upon request of a party for good cause shown, may reopen the hearing at any time before the award is rendered."[16] The 1951 Code of Ethics and Procedural Standards for Labor-Management Arbitration, as the Elkouris point out, contained the following provision:

> "When hearings are concluded, parties should not attempt to communicate any additional information to the arbitrator. If new evidence becomes available, written application for the reopening of the proceeding with the reasons therefor should be made to the arbitrator and a copy transmitted simultaneously to the other party."

[16] *Id.*, at 235.

The present Code of Professional Responsibilities does not speak to the issue at all, perhaps because the point is obvious and elemental.

The questions for the arbitrator are both procedural and substantive. If the request for reopening is cast in general terms—for example, a claim of the discovery of new evidence material to the case, without any specificity—does the arbitrator reject the request summarily because of his inability to determine materiality or good cause for reopening, or does he more or less automatically grant the request in reliance on the good faith of the proponent in claiming the existence of a solid basis for the reopening? One arbitrator with whom I have discussed the matter said he thought the latter would be the proper procedure. Alternatively, does the arbitrator, before making a ruling on the request, ask the proponent to state with specificity what the new evidence, if received, will purport to show? But if this course is pursued, and an amended request is filed but the arbitrator finally decides not to reopen the record and hearing, will his thinking about the case have been affected by what he has read in the amended motion?

There is further the question of what criteria the arbitrator will or should apply in passing on the motion. If the evidence to be proffered is "newly discovered," I suppose this ought not to be determinative if the indication is that it *should* with due diligence have been discovered and presented at the hearing. If the evidence to be proffered is for the purpose of discrediting material testimony or other evidence adduced at the hearing and was not readily available at the time of the hearing, the request for reopening should be granted. If the proposed evidence relates to some posthearing occurrence which tends to discredit a position taken at the hearing, and is material, the request for reopening should be granted. The ultimate yardstick, I should think, is what kind of action is reasonable under all the circumstances in the "search for truth—the whole (not partial) truth."

6. Tripartite Boards in Grievance Cases

A substantial number of collective bargaining agreements provide for tripartite arbitration boards. Quite often the parties will waive this provision on an ad hoc basis. Where they do not do so, the question arises as to how, procedurally and

substantively, the board is to function in the particular case.

The neutral as chairman will, of course, preside at the hearing and usually, by tacit agreement, make independent rulings on evidentiary and procedural matters. The partisan members, however, presumably have the right—and sometimes quite freely exercise it—to question witnesses. When a partisan member does this, he will usually, in my experience, assume the stance of the party which has appointed him, ask leading questions of the designating party's witnesses, and become, in effect, co-counsel with the party's advocate. The question I would raise in this regard is the extent of the neutral's responsibility to keep this sort of thing under control.

At the conclusion of the hearing the board must, of course, agree on how it is to proceed in deciding the case. Frequently the partisan members will at their request become in effect *functus officio* and agree that the neutral will decide the case, leaving appropriate space for concurring and dissenting signatures. But just as frequently the partisan members will want to participate in the decision-making process in some way. They may want an executive session before anything is prepared, at least in writing, by the neutral, or they may prefer (or the neutral may suggest) that he prepare a draft decision for examination by the partisan members, either of whom will then have the right (or the neutral may exercise the right) to convene an executive session to consider the draft. Where the latter procedure is followed, the neutral obviously has committed himself and normally it will take a good deal of persuasion to induce him to change his mind. However, it should be obvious that it is of the essence of the process that he has the right and obligation to do so if, at the executive session, he becomes convinced that his original conclusion was erroneous. Of course, when he does this he is likely to incur the wrath of the partisan member whose party has been upheld in the draft decision. In a recent case I did, in fact, change my mind as the result of the executive session, and the union partisan member, whose party became the victim, promptly wrote me as follows:

> "I want to express, on behalf of our Local Union membership, our total dissatisfaction and disappointment on your award in this case. It remains a mystery in our minds, when a decision is reached by the chairman and, after an executive session, the decision is reversed in his award.

"The membership of this Local Union has lost faith in the Arbitration Procedure, as a result of your indecisiveness. I will assure you we have no intention of employing your services as an arbitrator in the future."

(I should add that a check for the union's portion of my fee was nevertheless enclosed with the letter, and that the writer signed the letter "Sincerely yours.") I felt it desirable to respond and did so, although I rather imagine the effort was counter-productive.[17]

Another recurring substantive problem is likely to be the attempt of one or the other of the partisan board members, or both, to get before the chairman evidence outside the record made at the hearing. This can take the form of documents or other written material, or, more usually, what amounts to testimonial statements by the partisan member. This, of course, is at least technically improper, since the board is supposed to arrive at its decision on the basis of the evidence of record. It is perhaps tolerable, however, if the parties are aware from experience that their boards function in this manner and have in effect accepted it as a modus operandi.

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[17]My letter in response read as follows: "Receipt is acknowledged of your letter of November 16, 1977. I deem it desirable to make some response to your critical comments.

"The parties in their agreement called for the use of a tripartite arbitration board. I assume that *neither* party conceived that in an executive session held by a board it was to be the function of the partisan members simply to restate the views of their respective principals and then to concur or dissent from a decision proposed, in draft form, by the chairman, without any real opportunity to persuade the neutral to change his mind. If this were the intent, there would be no purpose at all in holding an executive session except to deal, perhaps, with the language proposed to be used in the opinion.

"I think I stated at the outset of our executive session that my draft decision was to be regarded as tentative, and that I assumed we all agreed that I reserved the right to make substantive changes. I think I also referred to certain 'gray' areas in the case which had given me some considerable difficulty. I listened to what you and Mr. —— had to say, and there was a general discussion. I believe I specifically stated, as we concluded, that I would review the points discussed and consider whether my analysis and decision should be changed.

"Subsequent to our session, I again reviewed the case. On reflection I became convinced that my original analysis and conclusions on the issue of managerial contributory fault, although having some reasoned support, on balance were incorrect. I therefore changed the proposed decision accordingly. I submit that this kind of approach to the task of decision making by use of tripartite board is what the parties bargained for.

"You refer to my 'indecisiveness.' The fact is I have seldom in an executive session changed my preliminary view as to what the decision should be in a grievance arbitration (as distinguished from an arbitration of the terms of a contract). But I most certainly *always* in my own mind reserve the right to do so, and so state to the partisan board members. Any other view of the nature of the functioning of a tripartite board would be entirely improper. I hope that on further reflection you can agree that this is so."

Concluding Remarks

This concludes my effort to make a contribution on the search for truth—the whole truth—in the arbitration process. Obviously, I have not sought to touch base with every facet of the subject. If what I have said has served to restimulate interest in and reflection about some of the matters discussed, my objective (and hopefully that of the program planners) will have been achieved.