II. CREDIBILITY—A WILL-O'-THE-WISP

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Arbitration awards turn on facts. But the parties more often than not fail to agree on the facts. Their accounts of the critical events differ; their witnesses' testimony is in conflict. The arbitrator, unlike the judge who has the benefit of a jury, must resolve these questions of fact. He must determine what happened, which witnesses to believe, what testimony to accept. He must, in short, deal with the complex world of *credibility*.

This paper is an attempt to describe the factors which, for better or worse, influence our credibility findings. I do not mean to suggest that this is a purely rational process. On the contrary, many members of this Academy would admit that fact findings in the truly close case are often the product of a "judicial hunch." Judge Hutcheson described how this "hunch" comes into play. He was, of course, referring to trial judges, but his words are applicable to arbitrators as well:

> ". . . the [arbitrator] may, reconciling all the testimony reconcilable, and coming to the crux of the conflict, having full and complete picture of the scene itself furnished by the actors, re-enact the drama and as the scene unfolds with the actors each in the place assigned by his own testimony, play the piece out, watching for the joints in the armor of proof, the crevices in the structure of the case or its defense. If the first run fails, the piece may be played over and over until finally, when it seems perhaps impossible to work any consistent truth out of it, the *hunch* comes, the scenes and the players are rearranged in accordance with it, and lo, it works successfully and in order."[1]

Nowhere is this kind of intuition more evident than in matters of credibility. Consider the scenario in the following dispute: Foreman Smith and employee Jones have a heated argument on the plant floor. Smith insists that Jones punched him in the shoulder as he turned to walk away. Jones, however, insists he simply reached out with his hand and grabbed Smith's shoulder to get his attention. He says no blow was struck. There are no witnesses to this event. Management accepts Smith's account

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[1]Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 Cornell L. Q. 274, 283 (1929).

and gives Jones a five-day suspension for striking his supervisor. The arbitrator, six months later, is faced with their bare testimony and nothing more. He is asked, in effect, to decide which of the two men is lying.

Experience has taught me that, in this kind of situation, neither man may be consciously lying. When two people are involved in a highly emotional confrontation, their recollection of the facts is far from reliable. Each tends to repress whatever wrong he'd done. Each quickly recasts the event in a light most favorable to himself. As time passes, this distorted view of the event slowly hardens. By the time the arbitration hearing is held, each man is absolutely certain that his account of what happened is true. Perhaps neither man is then telling a deliberate untruth. Their own self-interest and self-image operate to limit their capacity for reporting the truth.

Notwithstanding these realities, the arbitrator has to make a ruling. He must cope with the conflicting testimony of witnesses, the fallibility of human beings, and the ambiguity of human experience. He must deal with matters unquantifiable and inexact. It is not an easy task. The tools at his disposal are the evidence itself, the arguments, and his own intelligence, experience, and judgment which together may provide him with the critical insight. He may also be aided by burdens of proof or presumptions of innocence. For example, in the suspension case just described, Jones would be entitled to a presumption of innocence and management would be saddled with the burden of proof.[2] These devices, long recognized in law, offer a convenient basis for decision where the credibility issue cannot be decided with any degree of confidence. If, in the hypothetical case, there was no reason to discredit either Jones or Smith, Jones might win his case on the ground that management had failed to satisfy its burden of proof.

Considerations such as these no doubt account for the reluctance of arbitrators, in drafting their awards, to discuss the credibility issue in any real detail. How does one explain an intuition? How can one express in words the questionable demeanor of a witness? How is one to relate the impact of his arbitration experience on the believability of certain testimony? Moreover,

[2]The party making a given factual assertion almost always has the burden of proving that assertion.

the witnesses involved in these cases must return to their work place. A heavy burden is placed on anyone whom the arbitrator characterizes as a "liar." Such a stigma can undermine a foreman's effectiveness or disrupt an employee's peer relationships. Even more important, the arbitrator knows there is no such thing as certainty in a credibility finding. He senses the possibility of error which inhibits his resort to categorical statement and limits his comments on credibility.

We can, nevertheless, profit from a review of the standards we use in evaluating credibility. There are problems with some of these standards—problems which have not been as fully explored or understood as they should be.

Standards

Demeanor

By demeanor, I refer to the manner in which a person testifies. That relates to his appearance, his gestures, his voice, his attitude—in short, his conduct as a witness. There are situations in which a man's testimony is completely undermined by his own demeanor. Consider the hypothetical case again. Suppose employee Jones is asked on cross-examination whether he actually struck Smith's shoulder with his fist. Suppose he hesitates, glances at his counsel, looks nervously about the room, clears his throat several times, and 30 seconds later answers "no" in a whisper. His demeanor suggests his answer is false.

Most of the time, however, the arbitrator cannot draw any positive conclusions from witness-stand behavior. I must confess I can rarely determine anything from a witness's demeanor. Is he perspiring heavily because of general nervousness or because of discomfort with the statements he is making? Is his facial tic, a twitching lip, or a flaring nostril a personal characteristic or a symptom of disbelief in his own words? There is no way the arbitrator can answer this type of question with any confidence. I have seen men with beatific expressions invoke God and tell a forceful and sensible story which later turns out to be a string of lies. I have seen confused men stumble through their testimony without a shred of confidence and tell a doubtful story which later turns out to be gospel truth. For me, a sterling appearance and directness are no more proof of truth than a motley look and meekness are proof of falsity.

The arbitrator, it must be remembered, has only the briefest contact with most witnesses. He is no expert on character analysis. He is aware of the great variations in human character and painfully aware of the impact which interest, anxiety, fuzziness, and even stupidity will have on a witness's testimony. He cannot rush to judgment. Moreover, he knows that consideration of witness demeanor is a highly subjective inquiry. What is suspect demeanor to me will be perfectly normal to another arbitrator. For each of us brings to this kind of investigation our own unique experience, values, and beliefs. We measure demeanor through the filter of our feelings, a process which must inevitably produce an element of distortion.

I mention these points not to discourage arbitral reliance on demeanor, but rather to caution against overreliance on this factor.[3]

There are certain practical problems as well which make it difficult to rely on demeanor. First, the typical arbitration is heard without the benefit of transcript. The arbitrator is responsible for making his own record of the testimony. He spends a good part of the hearing carefully writing down what each witness says. He obviously has little opportunity to study the witness's expression, his "body language," his tone or manner. Hence, he is unable to make the very observations which are necessary for an informed view of witness demeanor. Second, the busy arbitrator handles several cases each week. By the time he sits down to study a dispute he heard a month ago, he cannot recall the faces of the witnesses, much less their demeanor. He may, of course, have noted his observations of demeanor during the hearing. Absent such notes, however, he is in no position to reconstruct the witness's behavior and comment on demeanor.

Character of Testimony

Closely related to the witness's demeanor is the character of his testimony. The arbitrator sometimes gets a feeling about the witness's veracity from the overall manner in which questions are answered. If he is forthright and open, his testimony is strengthened. If he is evasive, his testimony is weakened. If he

[3]Administrative law judges for the NLRB routinely refer to "demeanor" of witnesses to support their fact findings. However, they rarely explain why one witness's demeanor was impressive while another's was not.

is highly emotional, his testimony is questionable with respect to the accuracy of his observations. These may not be decisive considerations. But they do help to color the arbitrator's impression of the witness. It is true that these characteristics (openness, evasiveness, emotionality) may be explained away. Assume a witness becomes evasive only in response to the badgering and bullying of counsel. It would be wrong in this situation to permit his evasions to undermine his testimony.

This standard is particularly important where the quality of the witness's testimony reinforces the charge made against him. Assume employee Jones, in our hypothetical, is charged with defiance of Smith's instructions. If his testimony at the hearing is belligerent and hostile toward supervision, the charge gains credence. His testimony indicates that defiance is part of his nature.

A fairly common weakness is the witness whose memory fails only when asked about the crucial matter in dispute. He gives detailed answers to a variety of questions. He seems to remember all of the events preceding the critical moment. But when the key question is posed, "Did you strike Smith?" Jones replies, "As best as I can recollect, no." This element of uncertainty, when contrasted to his earlier certainty, serves to undermine his testimony.

Perception, Recollection, and Communication

There are three distinct elements to any testimony. First, the witness must have received sense impressions. He saw, heard, or experienced something. This is commonly called "perception." Second, the witness must have recalled these impressions. He remembers what he saw, heard, or experienced. This is known as "recollection." Third, the witness must state his recollection to the arbitrator or some other tribunal. He explains what he remembers. This is referred to as "communication."

The witness can be attacked by showing he did not have the *opportunity* to perceive the matter about which he testified. Suppose, in the hypothetical, that Foreman McFall testifies that he saw Jones strike Smith in the shoulder. He seeks to corroborate Smith's account. But it appears from his testimony that he was stationed 50 yards from the scene of the incident, that several large pieces of machinery stood between McFall and Jones (or Smith), and that the latter two were located in a dimly lit area.

McFall's opportunity to perceive what happened was poor. His testimony therefore would be entitled to little, if any, weight. On the other hand, if it could be demonstrated that McFall was just five feet from the men with a clear and unobstructed view of the altercation, his testimony would effectively corroborate Smith's.

The witness can also be attacked by showing he did not have the *capacity* to perceive, recollect, or communicate the matter about which he testified. My hypothetical can be used again here. Jones and Smith had a heated argument before the alleged assault occurred. Assume the evidence indicates that Jones became furious and incoherent as a result of this argument. Assume further that, apart from insisting he did not strike Smith, he can remember practically nothing they said to one another. This gap in his memory reveals that his capacity to recollect the event is seriously impaired. If he cannot remember the argument, the probability is that his recollection is faulty with respect to the alleged assault as well.

A witness can be undermined by any such deficiency in perception, recollection, or communication. The arbitrator, in performing his job, must remain alert to such deficiencies. They may not always be apparent from a first reading of his notes or the transcript. They lie hidden in tangled syntax and muddy language. They are obscured by the sheer volume of testimony. They are sometimes discovered not in what the witness said, but rather in what he failed to say. The search may prove fruitless, but it is an essential part of the arbitrator's credibility determination.

Consistency or Inconsistency

Statements by a witness at the arbitration may be consistent (or inconsistent) with what he said earlier in the investigation of the case or in the grievance meetings. His statements on direct examination at the arbitration hearing may be confirmed (or contradicted) by what he says on cross-examination. A consistent story will strengthen his credibility; an inconsistent one will weaken his credibility.

These are truisms. They hardly require elaboration. The difficulty is that a man's consistency (or inconsistency) may be given too much weight. Those who are both quick-witted and untruthful by nature may fabricate stories which are so sensible that there is no need later for the slightest revision. Their consist-

ency proves nothing. Others who are dull and unobservant, with no command of language, may tell stories which later require extensive revision. Their inconsistency proves nothing. The arbitrator must address himself to more subtle considerations. Does the witness's inconsistency concern mere detail or the crucial matters in dispute? At what point does inconsistency of detail become substantial enough to discredit a man? Does the particular inconsistency indicate untruthfulness or just slovenliness of mind and eye? Can consistency itself become suspect where the witness has repeated his story in great detail many times without the slightest variation?

I do not suggest any answers to these questions. I do suggest that the arbitrator must go beyond the broad categories of consistency and inconsistency. He must remain skeptical. He must ask himself whether a lie is hidden behind a veil of consistency or truth is obscured by the distraction of inconsistency.

Fact, Confirming or Contradicting

The witness states the facts as he understands them. To the extent to which those facts can be shown to exist, independent of his testimony, his credibility is strengthened. To the extent to which these facts can be shown not to exist, his credibility is weakened. This is simply a means of measuring the quality of testimony against an immutable standard of fact.

Returning to our hypothetical, suppose Foreman Smith insists the altercation occurred at 8:02 A.M., just after the start of the shift. Suppose further that Jones's time card indicates he punched in at 8:05 A.M. that day, five minutes late, and that the clock house is a half mile from the spot where the incident took place. Clearly, the facts contradict Smith's claim as to the time of the confrontation. But that contradiction concerns a peripheral matter. It has nothing to do with the alleged assault or the surrounding circumstances. It certainly would not be grounds for discrediting Smith.

The arbitrator here must concern himself with the same kind of considerations mentioned above in the section, "Consistency or Inconsistency." Does the contradiction cover mere detail or the crucial matters in dispute? At what point do contradictions of detail become substantial enough to discredit a man? Does the contradiction suggest untruthfulness or just imprecision of mind and eye? A long list of such questions could be made. The

act of identifying testimony which is contradicted (or confirmed) by fact is only one step in the arbitrator's journey. He must then go on to evaluate the significance, if any, of this contradiction (or confirmation).

Inherent Probability

When two witnesses give conflicting testimony, their accounts will ordinarily intersect at different points. There will, in other words, be some agreement between them. Those areas of agreement may be crucial, for the arbitrator can, to a limited extent, extrapolate from what is known to what is unknown. He can use the agreed-upon points as guideposts around which to construct the most plausible picture of what happened. He then finds credible the witness whose testimony most closely conforms to that picture. His extrapolation helps lead him closer to the truth.

What I have just described is an exercise in history-writing, an attempt to capture the inherent probabilities of a situation. The arbitrator is not simply comparing the plausibility of competing accounts. He knows that one account will always seem more plausible than another and that a good many implausible things happen every day in the plant or the office. His object is to take a broad view of the evidence as a whole, including extrapolations from known facts, and attempt to sense what most likely occurred. This process is not always possible. But when it can be done, it is often an excellent way of resolving the credibility impasse.

Consider the hypothetical again. Assume both Jones and Smith testify that their argument began with Smith mentioning a planned change in work assignments and ended with Jones vehemently protesting the plan and threatening to "get Smith off the plant premises" if he carried out the plan. From the agreed-upon facts, the arbitrator could properly conclude that the inherent probabilities of the situation were that Jones did strike Smith.

Bias, Interest, or Other Motive

A witness should not be discredited because he has a bias or interest in the matter about which he testified. But such an interest is cause for suspicion and tends to weaken credibility. By the same token, a witness should not be considered truthful merely because he has no bias or interest in the matter about

which he testified. But his lack of interest tends to strengthen his credibility.[4] These are well-recognized tests. However, they are much easier to state than they are to apply.

The difficulty arises in cases where two witnesses give testimony which is totally in conflict. They tell parallel stories, and hence there are no intersecting points, no areas of agreement. Let me modify the hypothetical for purposes of illustration. Foreman Smith's position is the same. He claims that Jones argued with him and then struck him in the shoulder. But Jones says he didn't argue with Smith, didn't touch him, and didn't even see him that day. Suppose each man's testimony is perfectly consistent with what he'd stated earlier, is not contradicted by any proven facts, and is not undermined by demeanor. Suppose too that Smith and Jones had always had a good relationship, that there is no proof of Smith harboring any bad feeling toward Jones.

Management argues that Jones had an obvious interest in denying guilt, while Smith had no interest in charging Jones with an assault. It maintains that Smith, for these reasons, should be considered the more credible witness and his account of the events in question should be accepted. The union disagrees. It contends Smith has an interest at the arbitration hearing in proving that his initial charge was justified and he was truthful about the assault. It believes the "interest" test therefore has an equal impact on both men. Its position is that inasmuch as Jones and Smith are equally credible, the case should be decided in Jones's favor because of the presumption of innocence and management's failure to meet its burden of proof.

Arbitrators find this kind of case perplexing. We recognize that the foreman has no interest in making the charge in the first place unless the misconduct has actually occurred. We know this reality is not diminished by the foreman's interest at the arbitration hearing in proving that his initial charge was correct. We hence tend to side with management, for if interest is the only available means of comparing witness credibility, the foreman will appear more convincing. His word will frequently prevail. Unions have harshly criticized arbitrators for accepting the foreman's word over the employee's word.

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[4]This discussion assumes that interest will be evident to the arbitrator and ignores the real possibility of hidden interest (or bias).

A number of comments seem appropriate. First, the employee who denies wrongdoing has a clear interest in avoiding punishment. That interest, by itself, is no basis for discrediting his testimony. But it does serve to weaken his credibility just as the foreman's lack of interest serves to strengthen his credibility. The real issue thus becomes one of relative credibility. Only if the foreman's credibility is substantially greater than the employee's should management win. Interest alone may tilt the scales in some cases but not in others. There are, after all, a myriad of factors to be evaluated in each dispute. Not the least of them is the arbitrator's own intuitions, his feelings about the evidence, the arguments, and the very texture of the case. What must be avoided is an uncritical adoption of interest as a decisive factor in the close case, for that would mean that the foreman's accusation would always prevail over the employee's denial.

Character

The witness's character is an aid in measuring credibility. If he has a reputation for honesty and veracity, his credibility is strengthened. Indeed, his prior conduct in the work place may speak to the question of his character. Consider the hypothetical again. If Jones had worked for his employer for 25 years without ever being involved in any kind of altercation or insubordination, his denial of wrongdoing would be reinforced. It could be argued by the union that the charge involved misconduct that was not characteristic of him.

The converse of this proposition is equally valid. If the witness has a reputation for dishonesty and lying, his credibility is weakened. Jones's prior conduct could undermine his defense. For example, if he'd been employed just two years and had been disciplined five times for insubordination, his denial of wrongdoing would be less persuasive. It could be argued by management that the charge involved misconduct that was characteristic of him.

Admission of Untruthfulness

Occasionally the witness will admit at the arbitration hearing that he has been untruthful in some respect. Perhaps he has contradicted an earlier statement given to management. Perhaps he has contradicted earlier testimony at the hearing itself. In either event, his admission that he has been untruthful will

damage his credibility unless he has a sensible explanation for his change of position.

The arbitrator must keep in mind the large difference between innocent changes in position prompted by careful recollection or close questioning and deliberate changes in position prompted by fear of exposure or a need to strengthen his story. My concern here is the deliberate change where the witness previously made a statement he knew to be false. That falsity may sometimes be explained away, but if it is not, it will seriously weaken a man's testimony.

Arbitral Initiatives

It should be apparent from this discussion that the arbitrator has enormous discretion in making his credibility findings. The testimony he hears is, in many respects, vague and incomplete. The witnesses he observes are hard to characterize. The record he studies is full of gaps and ambiguities. The credibility standards he seeks to apply are inexact. Given these circumstances, he knows the possibility of error is ever present. These difficulties do not relieve him of his function. He must decide the case. Sometimes, however, he is aware that the likelihood of deciding correctly can be enhanced by further information. To obtain that information demands some initiative on his part.

Several questions come to mind. First and foremost, is it proper for the arbitrator to ask the parties for additional evidence? Some employers and unions see the arbitrator as playing an essentially passive role, receiving whatever they wish to give him and nothing more. They might well object to the arbitrator, on his own motion, seeking extra information. That view is, I think, mistaken. It is well settled that we have the authority to make this kind of request. The Code of Professional Responsibility (Part 5, Reference Paragraph 107) states that "an arbitrator may . . . request that the parties submit additional evidence, either at the hearing or by subsequent filing." That statement, in my opinion, reflects well-accepted arbitral practice.

I would like to explore ways in which "additional evidence" can be used to help resolve the credibility dilemma.

The Plant Visit

A full understanding of a witness's testimony depends on his ability to communicate clearly and the arbitrator's ability to understand him. There is a good deal of room for misunderstanding. To prevent that from happening, the parties often provide the arbitrator with photographs, sketches, blueprints, and so on. But a full sense of what the witness is describing can often best be realized by going to the scene of the incident. The old saw, "A picture is worth a thousand words," is appropriate here. The arbitrator can, by making a plant visit, see what the witnesses are talking about and thereby gain a better grasp of the testimony. The Code of Professional Responsibility (Part 5, Reference Paragraph 116) specifically says that "an arbitrator may also initiate such a request [for a plant visit]."

The Missing Doctor

How many times have we heard an employee testify that he was physically unable to work certain scheduled days. He relies on some cryptic language in a doctor's note. But it is not clear from the note whether the employee was disabled those days, whether the doctor saw him during this period, whether the note was prepared by the doctor or his nurse, and so on. The doctor is unable to appear at the arbitration hearing. It is impossible to determine the credibility of the employee's story without some hard information from his doctor. That can be done by arranging a tripartite (management, union, arbitrator) visit to the doctor's office, by placing a telephone conference call, or by permitting the arbitrator to contact the doctor independently by letter or phone. Without the doctor's testimony, the arbitrator is reduced to guesswork.[5]

[5]A somewhat different problem occurs when conflicting medical opinions are placed in evidence. The company doctor testifies that the employee is not disabled and can now resume work. The union doctor testifies that the employee is disabled. The parties themselves often resolve this kind of impasse by securing the opinion of a third "impartial" physician. If they don't and the arbitrator is called upon to decide, he must find one doctor's opinion more credible (i.e., more persuasive) than the other's. He has no expertise for this task. He needs help, and he should ask the parties for permission to consult with a physician of his own choosing in studying the case.

The Missing Witness

Sometimes an eyewitness to the events in dispute is available but missing. It appears that he is reluctant to get involved, and the parties have honored his reluctance by not asking him to appear at the hearing. If his testimony is vital to the credibility question, the arbitrator should make an effort to secure his presence and question him. His testimony is the kind of "additional evidence" that is critical to an informed decision. An example will help to illustrate the point. Suppose two employees are discharged for engaging in a knife fight in the locker room. Each claims that the other started the fight; each claims he acted only in self-defense. There is another employee who observed the entire fight but does not wish to testify. The arbitrator should call him as a witness and attempt to get his story.

The Missing Papers

In discipline cases, management will often take written statements from all people involved in the incident. Those people later testify at the arbitration hearing. But the parties, for some reason, do not always bother to place those statements before the arbitrator. I see nothing improper in the arbitrator's requesting copies of such statements. One of the ways to judge credibility is to compare the witness's testimony with his earlier assertions to see whether his story is consistent or inconsistent.

When a dispute turns on credibility, the arbitrator needs all the help he can get. Hence, if he sees there is "additional evidence" which has not been placed before him and which might help to resolve the credibility question, he may properly ask the parties for such evidence. That might involve a witness who has not been called to testify or a document which has not been introduced. He is responsible for his decision. He should, *where appropriate,* attempt to enlarge the record to insure a sound decision. I believe this kind of arbitral initiative should be exercised more often than it is.

Conclusion

Human choice is always, to some extent, arbitrary. Nowhere is this more evident in the arbitrator's work than with credibility findings, for the arbitrator often must make subjective judg-

ments in ruling that one witness is credible while another is not. The more subjective the judgment, the greater is the possibility of a mistake. To keep mistakes to a minimum, the arbitrator must reach out for a better understanding of the credibility standards and must methodically analyze the testimony in each case in light of those standards. Even that is not the whole picture. The arbitrator must also realize that we know truth "not only by reason, but also by heart. . . . " The intuitions derived from understanding others and one's self are important. Judge Frank explained the idea in these words:

> "If the [arbitrator] is to do his job well, he must have a capacity for 'empathy'—for 'feeling himself into' the motives and moods of other persons, the witnesses and litigants, each with his own singularities. The [arbitrator] should know that no man is a morality play figure, a Mr. Worldly Wiseman or a Mr. Faithful all of one piece. He should understand that each man is a unique bundle of varities and inconstancies. The [arbitrator] should, too, understand himself, his own prejudices and varying moods as they affect his estimates of witnesses, and should make allowances for these prejudices and moods. . . . [H]e should 'understand not only the varieties of men, but the variations of himself, and how many men he hath been'—and, I would add, how many men he is and will be. . . . "[6]

[6] *See* Jerome Frank, *Both Ends Against the Middle*, 100 U. Pa. L. Rev. 20, 37–38 (1951).