

## CHAPTER 5

### ADMISSIBILITY OF EVIDENCE

This chapter consists of a collated set of excerpts from the transcripts of six separate workshops on “Admissibility of Evidence” in which members and guests of the National Academy of Arbitrators participated at their Washington meeting. Each portion of the discussion was preceded by a segment of a videotape of a mock arbitration hearing, the script for which was prepared by Arnold M. Zack and Richard I. Bloch. The roles of company and union counsel were performed, respectively, by Norman White of Harrisburg, Pa., and George Cohen of Washington, D.C. The Academy acknowledges its deep appreciation for their participation and absolves them of all responsibility for the content of their presentations. Discussion leaders for the workshops were Academy members Dana E. Eischen, Joseph F. Gentile, Margery F. Gootnick, Emily Maloney, William P. Murphy, and Carlton J. Snow. Theodore J. St. Antoine prepared and edited this summary.

#### **I. Grievant’s Prior Employment Record**

**GEORGE COHEN:** Good morning, Madam Arbitrator. It’s nice to see you again, notwithstanding your ruling the last time we were before you. My name is George Cohen. I’m counselor for the union. This is the grievant, Susan Low, whose discharge is the subject of the hearing today. We have done at least one productive thing this morning—counsel for the company and I have stipulated as to the issue. It is whether or not the termination for the alleged theft was for just cause and, if not, what would the appropriate remedy be. In a case such as this where a discharge is being alleged for a theft, the burden rests on the company, and the company counsel will have to proceed.

**NORMAN WHITE:** We accept that burden with great glee in this case, Madam Arbitrator, for we have a thief among us. The thief is sitting right here—Ms. Low, Susan Low, who has stolen some

\$450 worth of the company's product, which is soap, as you know, in this case. We'd like to start the proceeding by introducing the prior work history, which includes her performance, absenteeism, insubordination, tardiness, and just about everything else . . . [interrupted].

COHEN: Stop! Hold on a second here! Let's not get carried away with ourselves. We agreed to an issue. It is *one* issue and *one* issue alone. Did she or did she not engage in an act of theft? If she did, we have acknowledged that, even though this is a first-instance discipline, she would be properly subject to discharge. What her past history is about, Counselor, is no more relevant than what your or my past history is about. Let's get on with the day. Have you got a case?

WHITE: It is going to be shown at this hearing that the theft engaged in here was part of a pattern of conduct on the part of this employee which is proven positively by the prior performance as I've indicated . . . [interrupted].

COHEN: Absolutely not, Madam Arbitrator! I think we have to have a ruling at the outset. None of this background, this past history, is relevant. None of it should be permitted into the case. Any of it that comes in may be prejudicial to my client. Therefore, we ask you to rule immediately on the preliminary matter.

WHITE: We agree with that, Madam Arbitrator. You rule.

#### *Discussion*

1. How would *you* rule?
2. In what kind of case would you allow the grievant's prior record?

DANIEL KATZ: I'm a union advocate. I heard Mr. Cohen say that, in terms of the remedy, there was a stipulation on behalf of the employee that if she were found guilty of stealing, discharge was the appropriate remedy. So he wasn't going to contest the appropriateness of the penalty if the arbitrator found that there was a theft and that the employee was responsible for it. The evidence therefore can't come in as part of the evaluation of whether termination was an appropriate punishment. It can't come in either to prove whether the theft occurred because all the specifics that the employer representative cited were instances of poor employee conduct, but nothing that would prove a theft. Absenteeism was one of those I heard mentioned,

and the other misdeeds were equally unconnected with whether an employee is likely to steal or not. There was thus no pattern or practice of theft that was attempted to be proven. Because there was no indication that the evidence was going to be relevant to either of those two issues, the arbitrator has to reject all of that employment record.

**JOHN LONGBARN:** Let me make the other argument as a representative of management. While the company agreed that theft was one of the issues, they then got into the remedy. Did they not say, "What shall be the remedy?" My experience in these hearings is that you always end up, if the employee's record is good, with the argument that the remedy is inappropriate in the circumstances of a long, good record. It seems to me that when the record is bad, the company is entitled to put on the other side since clearly the remedy is opened by the framing of the issue.

**RICHARD KANNER:** I think "just cause" has two facets—that is, the substance of the charge and the remedy—and so the past record is ordinarily admissible on the issue of remedy. But you have an unusual twist in this case. When the union representative stipulated that the discharge was appropriate if the theft was found, the remedy was no longer an issue. I therefore don't think that the past record would be admissible because it is not probative of any issue before the arbitrator.

**BARRY BROWN:** I would allow the employer's submission of this evidence. There are several theories. First, although the employer seems to have agreed that the only issue is the question of theft, in his arguments he immediately went into a "last-straw" theory in which the cumulative overall employment record of this employee justified discharge. And it would seem that that's inconsistent with his supposed agreement that the only issue was one of theft. Secondly, an arbitrator is usually faced with the question whether reinstatement is even a possibility, and it would seem that an employee's total employment history would influence the arbitrator on whether this employee could be a productive and useful employee if reinstated. Finally, it would appear that the overall record of the employee might go to the question of her intent and possibly credibility on the issue of theft.

**NED COHEN:** I think the point is you may not find theft, but you may find gross misconduct in handling of material with no intention of thievery. Material is still lost, and therefore the

grievant is guilty of some omission or commission of a wrongdoing and is deserving a disciplinary penalty. At that point, to determine the extent of the proper disciplinary penalty, the past record is very important. If it is an all-or-nothing deal and everybody has agreed to that, however, and if I'm not an activist arbitrator, I accept their premises and, of course, it's not admissible.

EDWARD PINKISS: This kind of evidence is sometimes offered as bearing on credibility. Some of it may be very remote on credibility, but suppose some of it really does have a bearing on credibility—for example, prior instances of dishonesty of one kind or another. The temptation could be to say, "Well, it has a bearing on credibility." If you follow that temptation, and I'm not advocating it, can you back out when you're then faced with trying six prior incidents, mushrooming the case into four or five days of hearing? If you go down that path, you may never turn back.

BRUCE WAXMA: I represent a union. The charges against the employee in a discipline matter ought to be precise charges. Many contracts so provide. One of the problems with admitting the prior record is that usually it would not have been part of whatever offense the employee would have been charged with coming into the arbitration. I presume she was charged with stealing 400-odd dollars worth of soap. To permit the employer in this instance to bring in the past record makes it extremely difficult for the grievant to defend herself because it's unlikely that there was any such expectation on behalf of the grievant or counsel. They would have to defend against what is in effect an open-ended charge, and so I think it should be outside the scope of the proceeding.

GEORGE LARNEY: I think the arbitrator ought to ask whether there is anything in the parties' agreement that provides for the introduction of a past disciplinary record, because some contracts do provide for that. It is also relevant to have a past record if you have a system of progressive discipline. Or there may be allegations of disparate treatment, and the past record would be appropriate under those circumstances.

DAVID KABAKER: What I want to point out is that we are on opening statements here. They haven't presented any evidence yet. I think the request for admission of the past record isn't in order at this point. They have stated what the issue is. Now they are ready for testimony. I don't think we have to treat this

question of the disciplinary record or the rest of her past history. It may not even come in. I think you should hold off any ruling on that at this time.

ALLEN WEISENFELD: An arbitration is presumed to be different from the proceedings in the civil and the criminal courts with respect to the rules of evidence. In this case, while the past record seems to be of no evidentiary value with respect to the charge that led to her discharge, to make an issue at the onset of the hearing seems to me almost pointless. The arbitrator might well say, "Look, I don't think the record is of any value, but if you insist upon letting it go in, I'll accept it merely to avoid an argument—a protracted argument over admissibility."

LEO WEISS: Admitting a document which I presume I'm not going to consider because it's irrelevant or prejudicial, but will let into the evidence in order to avoid an argument, doesn't strike me as proper arbitral practice. While we do not apply the rules of evidence strictly, we don't throw them out the window. Where a document is allowed into evidence, the union advocate cannot say to himself or to his client, "Well, that's a useless document. They're not going to get anywhere with that." Because whatever you say at the hearing, who knows what you'll do when you get back to the office? The document is in evidence and the arbitrator may change his mind. And what happens is that the union advocate is in the position of defending against three past incidents of discipline which the arbitrator has said he's not going to consider. That is going to extend the hearing and bring in a lot of other irrelevant material. I think it's a responsibility of the arbitrator under such circumstances to make a ruling. He must admit it or he may exclude it, depending on how he looks at it, but I don't think he can admit it on the basis that was stated earlier.

## II. Spotters' Reports

WHITE: Madam Arbitrator, as part of our evidence, at this point we would like to introduce the report of an outside, independent detective agency. This report is the compilation actually of reports of spotters who watched the soap area and saw the grievant take the soap without authorization.

COHEN: Absolutely not, Madam Arbitrator, absolutely not! We are talking here about triple hearsay. We are talking about a report. First, you tried to introduce evidence about my griev-

ant's past history; now you want to bring in a document like that. Inadmissible!

WHITE: We have a right to submit the material that we used to form our decision to discharge this grievant. There is absolutely no question that the people involved are proper, righteous, and upstanding individuals, all of whom produced truthful reports which we wish to introduce to you today.

COHEN: All right. Here is what we will do, Counselor. We will stipulate that the detective agency, in fact, sent this report in and that the report was the basis upon which you terminated my client.

WHITE: Madam Arbitrator, we expect to have to put these reports in because the first spotter no longer works for our agency. He has taken an excellent job with another employer. He's gainfully employed. The second spotter unfortunately wishes to have his identity kept secret. We all know the history of this union, the manner in which they handle the people in this plant, and we cannot have his identity revealed. The third spotter has retired to Hawaii and is doing well there. Of course, you understand the expense involved in bringing him here.

COHEN: Well, Madam Arbitrator, I would have thought that at least my worthy opponent would understand that even I cannot cross-examine a report. You know that and I know that. Your three spotters can be anywhere in this world doing anything they want. That is their business. But if they are not here, then the document doesn't come in and nothing is admissible. You don't have a case against us, and we'll pack up our bags and go home.

WHITE: These reports were prepared by upstanding and decent people who are trying to root out the theft and impropriety in the plant. Madam Arbitrator, we urge you to find this document admissible.

#### *Discussion*

1. Would you admit the whole report? For what purpose?
2. Would you admit the reports of Spotter No. 1 who's gone? Spotter No. 2 who's still in the plant? Spotter No. 3 who's in Hawaii?
3. Under what circumstances would you admit such hearsay declarations without the author being present for cross-examination?

JONATHAN LIEBOWITZ: I think the answer is clearly that the report should not be admitted, and the reason is that, while the rules of evidence need not apply in arbitration, there are times when they should indeed apply. This is one of them, because if you admit the reports and the investigators are not available to testify and to be cross-examined, it would deprive the grievant of a fundamental right to confront the evidence against her and to cross-examine the witnesses. True, it is also a fundamental part of the company's case against the grievant, which the company counsel stated earlier he had a right to present—namely, the reasons for the discharge. But that presentation has to be in a manner which can be met by confrontation and by cross-examination. The document is hearsay, but beyond that there are fundamental reasons to apply the hearsay rule here and not to admit the reports. The difficulty arising from the fact that the investigators are not available for what seem to be bona fide reasons outside the control of the company is simply one of the problems that the company confronts in presenting the case. It must have competent evidence available. If the arbitrator rules to the contrary, the union and the grievant would be prejudiced to an extent which should not be permitted.

NEIL BERNSTEIN: What we're trying to decide as an arbitrator is whether the company had just cause to do what it did. The company has established that it discharged this person on the basis of this report. If you want to talk about the hearsay rule, we don't have legally, in my opinion, a hearsay problem. This is a part of the *res gestae*. This is the actual evidence upon which the company acted. So, not only is it admissible, it's vital to the case because that's all that we're talking about: was this report sufficient basis for the company to do what it did? That really depends upon exactly what's in the report. And I don't care whether it's a spotter's report or a report from a fireman; I don't care whether the people are available or they're unavailable. But I certainly feel that it's crucial for the arbitrator to have the factual evidence upon which the company made its decision. You then get into the question as to what it says and how credible it is and the related issues. But the report is unquestionably admissible in my view.

WILLIAM E. SIMKIN: I'd let them all in for whatever they're worth. I'd like to see what the reports are. I may pay no attention to them in the end, but they are still part of the reason the woman was fired. Now I'd like to know why she was fired.

EVA ROBINS: Of course I'd accept the document. If the company wants to present that as the basis of its decision, I would take the reports and give them whatever weight I want. It seems to me I should know about the basis on which a judgment was made by the company. It may fall flat on its face, but it is the question of admissibility we are discussing. The report is admissible in my opinion.

PAUL ROTHSCHILD: I don't see the relevance of letting the report in for some other purpose. We started out in this case to resolve one issue—whether she stole the soap or didn't steal the soap. Now, what other purpose would you be allowing the report in for except for the truth of the matter? That's all that's at issue here.

JAMES E. JONES, JR.: The fact is that management said, "We are introducing the affidavits of these respectable people to show you the basis on which we made our decision." That seems to me to change the purpose from introducing them for the truth of what was asserted therein, with the cross-examination problem that would raise. Whether or not the company should have acted on the reports is a matter that comes out later. That is a different question, and I would reserve my answer on that point.

ELLIOTT GOLDSTEIN: The union stipulated that it knows why management acted. The question was: Was there just cause? And under those facts I think the reports and the basis of the company's action are irrelevant. If all you wish to do is show that something was said to the company, what was said has to have relevance. In light of the union's stipulation, that is no longer a relevant issue.

TED TSUKIYAMA: I think that these admissibility questions would become much easier for the arbitrator if he first steps back and examines his role in conducting these hearings. If he considers himself a finder of fact who is to examine this matter on a de novo basis, then I think the rules of evidence or analogies to them may be applied with some reason. On the other hand, there's an abundance of arbitral literature that arbitrations of disciplinary matters are really appellate in nature, that they're essentially a review of management's action. Now, when you're sitting in appellate review, you're not supposed to make rulings on what's admissible and what's not. The record I am looking for is what did management consider in making its decision. If management relied on triple hearsay or worse in making the decision, I myself have no problem that it's admissible. But

then I think there should be considered the propriety, the just-cause aspect, of management's taking this type of disciplinary action, utilizing or relying on this kind of material.

**JAMES MARKOWITZ:** I guess I would accept the report into evidence, but I would tell the company point-blank that without the opportunity to cross-examine, I would not give it any weight. If they want me to give it weight, they should bring the witnesses in, because at this stage of the hearing the report seems to be a crucial part of the company's case. It is very important that the company understand what I am going to do. There is a problem with admitting evidence not for its truth, but for some other reason. If you don't have lawyers presenting the case, the parties might not have the foggiest notion of what you are talking about, and they may end up being very confused. I am concerned that if I take in the document and then later find for the company, the union is going to say, "What do you mean he didn't look at the truth of it? He read that and the so-and-so found that those detectives were right, and we never got a chance to cross-examine them."

**HERBERT FISHGOLD:** I think that if that report is the only evidence the company has to support its discharge, I wouldn't let it in. Normally, the argument made by companies for trying to submit reports and not the people is that they don't want to blow the cover. We have a situation here where there are apparently three spotters involved. Spotter No. 1 no longer works for the company and has another job. He may have another job in the same city. There is no reason why that person can't come in and offer testimony. As for Spotter No. 2 who still works there, I can see why the company wouldn't want to call that person, but that is their problem. And with regard to Spotter No. 3 who now has retired and lives in Hawaii, there could have been a request made prior to the hearing, or perhaps even at this time if it is the only evidence they have, for the opportunity to take a deposition with the right of counsel for the grievant to cross-examine.

**RAYMOND GOETZ:** Just to change the facts slightly, assume that only the second affidavit is offered—that of the detective who is still with the agency. I still would hold it inadmissible and would dismiss the management argument that this exposes the identity of the detective. Frankly, I don't think that is very realistic. I have had cases where they do bring in the detective and it does not destroy their effectiveness if you have a community of any size.

**DONALD WECKSTEIN:** Some arbitrators would put a shield be-

tween the spotter as a witness and the parties and let them examine from behind the screen. I had a recent case in which we had an affidavit that was offered and not admitted, but we did get a stipulation to examine and cross-examine the witness by conference telephone call. That could be done whether the witness was in Hawaii or in the next room. If revealing the identity of the witness would be harmful to that witness's future, while a telephone call is not as good as being able to observe the demeanor of the witness on the stand, it's certainly better than the written report. If the report was the basis of the management action, I think that's an acceptable compromise.

WAYNE HOWARD: I would disagree slightly. If the parties want to protect the spotter, it is incumbent upon them to put such procedures in their collective bargaining agreement. In the absence of those procedures, I don't think the spotter should be protected.

CORNELIUS PECK: What we ought to think about is that this grievant's reputation and her future job prospects are at stake. We must balance that against the company's concern for preserving the anonymity of the spotters. It isn't very difficult for me to decide which way that balance goes. I think, though, one could just tell the company that that's the way I look at it and if you still want to give me that sheet of paper, well, I'll take it. But I don't think much of that kind of evidence on a charge as serious as this.

### III. Decisions of Other Tribunals

WHITE: Madam Arbitrator, you certainly can't reject this next item that we are going to offer. That is the record from a criminal court that Ms. Low was found guilty of theft of \$450 worth of soap. She was given a one-year suspension. You know that that is admissible.

COHEN: I sure can object, Counselor. Now let's just look at this. First, Counselor, as you know, different parties were in that proceeding. The union was not present. We did not cross-examine. A different burden of proof was applicable. This is not a criminal proceeding. You are here to prove a contract discharge and justify it under a collective bargaining agreement. That's an entirely different issue. The conviction is irrelevant, and we object to its admissibility.

WHITE: Even you know that the burden in a criminal case is

higher than that in this case under a collective bargaining agreement. Surely that fact plus the fact that the conviction rendered in that case is a public document, available for public inspection, ought to make it admissible.

COHEN: We are not in a criminal proceeding, Counselor. You had your day to do what you tried to do to this individual and you did it. We are here under the contract. We remain adamant and object to the admissibility of that document.

WHITE: Madam Arbitrator, we suggest that you take this for what it's worth.

#### *Discussion*

1. How would you rule on the admissibility of decisions of other tribunals? Judge or jury conviction? No plea? Guilty plea? Acquittal? Unemployment compensation ruling?
2. Does it make any difference that it's a public document if it's a public-sector or federal arbitration case?
3. If the employer later tried to get the court record in during an attempt to impeach the grievant, would you let it in?

MYRON JOSEPH: It seems to me that the arbitrator is employed by the parties to make a determination both as to fact and as to the relevance of that fact in light of their contract. I think that most arbitrators take the position that a determination by any other body cannot be considered by them and they should not be given any information about it because that would bias them and make it impossible for them to make an independent judgment. For that reason the finding of an unemployment compensation judge as well as the finding of a criminal jury or judge would be irrelevant and would not be admissible in the proceeding.

KATHLEEN JOHN: I wouldn't hold either one of them admissible because the issues are different in each case. For instance, in a criminal case you are seeking to prove the guilt or innocence of the defendant, whereas in the arbitration proceeding the essential issue is just cause. Similarly, in the unemployment compensation hearing, although the just-cause issue does come up, just cause is defined differently for unemployment purposes than it is in an arbitration proceeding.

HARRY DWORKIN: My own feeling is that an arbitrator is called upon by the parties to hear a case de novo and he should not

be bound or hamstrung by the decisions of other tribunals that considered matters in accordance with their rules, their standards, and the evidence before them. If we are going to receive a conviction into evidence as *res judicata* or as determinative of an individual's guilt, what would you say to the converse? Suppose an employee is charged with possessing marijuana or another drug and he is found not guilty or is acquitted. Is that conclusive at the arbitration hearing? On the contrary, management may not have had much evidence at the criminal proceeding, but comes before the arbitrator armed with a lot of credible, substantial evidence. My view is that the parties would be better served and the arbitration process would be better served if you would not even entertain the results of other proceedings, but hear the case on the merits on the basis of the evidence and testimony and reasoning as it is presented before the arbitrator. I think that would be more in conformity with the arbitrator's responsibility to decide the case and issue an award in accordance with the parties' own agreement. I think it would be permissible, however, to offer into evidence or use in cross-examination a plea of guilty in another forum because that is an admission against interest on the part of the grievant. I think it would also be permissible to submit evidence either on direct or cross-examination as to what an individual may have said concerning the matter in the presence of another individual or in another forum. That is different from the conclusions or the determinations of the other tribunals.

BURTON KAINEN: As a management representative, I'll take up the invitation to argue for admission of the conviction. I was frankly flabbergasted when I heard three arbitrators flatly say that they would not admit it. I would not have thought that this was a difficult question. In the jurisdictions that I am familiar with, one of the grounds for vacating an arbitration award is the refusal of the arbitrator to consider relevant evidence. It seems to me that a conviction of a crime in the courts of the jurisdiction in which this incident occurred is relevant evidence in a civil trial; if, for example, the company were suing the grievant in a civil trial for restitution, the conviction would be perfectly competent, relevant evidence, and would be either *res judicata* or at least collateral estoppel as to some of the points. When the arbitrator says to me that he will not admit that into evidence, I think I have a very good ground for vacating that award. I think he has *got* to consider it.

DAVID FELLER: I would admit the fact of conviction. I would not regard it as binding on me because the question of whether there was just cause for discharge is a different question from what the jury and the judge had to decide. However, it is a fact that the individual was convicted. I would not take the testimony or the transcript. I would simply admit the fact of conviction and I would say that I will accept it as a fact unless the grievant denies there was a conviction. I would make it clear, however, that I don't regard the conviction as binding on me. Now, the answer to your second question is that I would allow statements that were made in the course of the earlier proceeding to be used to impeach the witness if the grievant testified. Those are statements that were made, whether made in a criminal case or to a neighbor or to anyone else as to which there is some evidence, and I am entitled to question the grievant about that. I would also admit the fact that there was a nolo plea or a guilty plea, with a recognition that many times people plead guilty in a plea bargain when they really think they are innocent. And I would allow the grievant to explain her plea if she wanted to—for example, to say that the district attorney threatened to send her up for 15 other offenses and her best way out of it was to plead guilty.

WILLIAM LUBERSKY: I'm a management attorney. First, I think we are missing something in the analysis. The real question is whether that record of conviction is relevant. Now what does the record of conviction prove? It proves that a judge did something or a jury did something. It doesn't prove that the grievant did or didn't do anything. The transcript is admissible. It can contain admissions against interest; it can be useful for credibility purposes. But very often what is brought out in a criminal trial is completely different evidence from that in the arbitration. There are also different parties, as the union representative said.

JOANN THORNE: It seems to have been stipulated at the beginning that if a theft had occurred, discharge was the only penalty that was permissible. What we're looking at now is not whether the penalty was correct, but whether or not in fact the theft took place. And if a court found beyond a reasonable doubt that indeed a theft took place, I think the arbitrator would look ridiculous to suddenly say, "No, a theft didn't take place." So, though I would agree that an unemployment compensation referee applies different standards, and I would agree that a court doesn't decide just cause for discharge if there was a question

of penalty, here the issue is simply, did the theft take place or not. I don't see how you could not admit a court verdict that it did take place.

**BENJAMIN WOLF:** That would be an abrogation of the function of the arbitrator. The arbitrator is the one to make the decision. Sometimes the parties provide in their contract that it is cause for discharge if an employee is found guilty of theft in a criminal proceeding. That would be the only occasion an arbitrator should admit that kind of verdict. I don't know what might have gone in as evidence before the other tribunal. But certainly what the parties have bargained for is this arbitrator's judgment on the basis of what is presented to her. The admission of that kind of evidence not only removes the principal function of the arbitrator, but also seems highly prejudicial. You don't know in this case whether the employer is going to be able to produce the evidence which proves to you that the employee is guilty of the theft. It still is an adversary proceeding, and the benefits as well as the disadvantages of that kind of proceeding have to be recognized and respected by you because that's your function.

**CARLTON SNOW:** I suggest that you would do things differently on the federal level because the 1978 Civil Service Reform Act indicates that arbitrators ought to consider even the decision of that judge.

#### **IV. New Evidence at Hearing**

**WHITE:** At this point, Madam Arbitrator, the company would like to introduce the printout on its soap shortages during the past period in question. It will show without question that the soap shortage coincided with the accused theft—in this case by that *thief*.

**COHEN:** Madam Arbitrator, I hate to keep objecting to everything counsel does, but I have to do it because everything he does apparently is going to be improper today. Now let's review where we are. In the first two steps of the grievance procedure, we asked the company specifically, "Do you have any documentation relating to shortages of this soap?" And we were told, "No, we do not." We took that at face value. What do the first two steps of this procedure mean if the whole effort between the parties isn't to resolve the dispute at the earliest point based on knowledge that both sides have equally available to them? Otherwise we're going to make a mockery out of the whole griev-

ance procedure. Again, several weeks ago in anticipation of this hearing, just because I was concerned that someone from this company might come up with some last-minute information, I called you, Counselor, and I said, "Do you have any documentation that will relate to the shortages?" I was told once again that you did not. Where did you get these, Sir? When did they become available?

WHITE: Just as the grievant is entitled to counsel, so too is the employer entitled to counsel, Madam Arbitrator. If a document wasn't used before, that is not my problem, nor would it be the problem of Mr. Cohen if he sat on this side. We submit to you that we have the right to put before you such evidence as you need to determine this case.

COHEN: This is new evidence that was deliberately withheld from the union so that the union could not be properly prepared when it came to the hearing. In good-faith understanding, no such documentation exists. Madam Arbitrator, you rule.

#### *Discussion*

1. Would you receive such an exhibit if convinced that the company deliberately kept it from the union?
2. Under what circumstances would you accept new evidence to which the union (or company) did not have access during the processing of the grievance?

STEVEN GOLDSMITH: I think this one is easy. I assume that there is no requirement in the contract for that kind of disclosure in the course of the grievance procedure. I would take the evidence subject to an opportunity for the union to have a look at it.

CARL YALLER: I suggest that this is an exquisitely easy case—the other way. I think it's unusual in that the record in question was specifically requested by the union. A more typical situation is where management has documentation, unrequested by the union, which was also not presented during the steps below. My position in either case would be that the entire purpose of the grievance procedure is frustrated when either party presents evidence which was available earlier but which was withheld so it could be used to sandbag the opposition at the hearing. I don't think that an arbitration should be the industrial equivalent of a walk through a mine field. The idea is to ferret out whatever

evidence one party has against the other, so an intelligent decision can be made whether the case warrants arbitration or whether it ought to be settled. When a party chooses not to share a germane piece of evidence which would aid the other party in making an informed and intelligent decision, or in preparing for arbitration if necessary, the penalty should be that they simply cannot introduce it. While that may impose hardship in the immediate case, the lessons learned for future labor relations and the effective functioning of the grievance procedure justify the exclusion.

I. B. HELBURN: I would give the union time to look over the material, but I think ultimately I would accept it. I have to assume that while the company's behavior is clearly tacky and possibly counterproductive, they have thought that issue through. If that is the way the parties want to conduct their relationship, then an ad hoc arbitrator is not likely to be in a position to reform them overnight.

WALTER GERSHENFELD: It is not my job to reform the procedure. I don't really want to know whether there was anything wrong in the withholding of the information. The proper course of action for the union, if there is such a belief, is the filing of a grievance complaining about the company's misuse of the grievance procedure and detailing what they might consider would be an appropriate remedy.

GIL VERNON: I think the big question here is the reason the evidence was withheld. I would think the union or the arbitrator would have the right to question the company in this case as to why it wasn't available. We have to recognize that both parties often get more thorough as the deadline for arbitration approaches and the investigation of the facts becomes more complete. Sometimes things are overlooked earlier or are unavailable. Sometimes new exhibits are prepared just before the hearing. But if there was a deliberate bad-faith attempt to keep the evidence from the other party, if it was withheld solely for ambush value, I would not admit it.

JOHN SANDS: The problem, in the first place, is that you've got a piece of evidence that is probative and relevant to the issue. In the second place, you do have a very important value at stake—the integrity of the grievance procedure in the earlier steps. Is the answer to protecting the integrity of the system excluding this evidence, which is material and competent and whose exclusion, in New York State at least, could conceivably be a basis for

judicial vacatur of your award? When such a confrontation occurs, I find it useful to have a conference with the opposing counsel to make these points and say, "Well, look, if we are to preserve the integrity of the grievance procedure, perhaps the case ought to go back to an earlier step where it can be reviewed." The party responsible for the delay can pay any extra costs and then bring the grievance back up. But I really think it's a mistake to reject out-of-hand material, competent evidence on a point such as this.

**EARL CURRY:** I think we have to look at the purpose of the exclusionary rule. It seems to me that it's based in this scenario on whether or not the "new evidence" is in fact new evidence or is merely corroborative evidence. Does it only corroborate the charges that the company has already made, or is it really a new charge coming in against the grievant? If it's essentially a new charge, and particularly if the union has asked for the documentation, then I think it should be excluded. But if it's not a new charge, if it is simply something to corroborate testimony that the company has already put forward, then it seems to me that it ought to be accepted.

**FRED WITTE:** I certainly don't subscribe to a company's withholding a document, particularly when it's asked for ahead of time. However, there are steps that union counsel can take here. He can ask to receive a copy of the printout; he can ask for a day's adjournment or a week's adjournment so he can study it. Now, we management attorneys regularly see grievants change their stories. They'll come in and they'll confess, "No, it didn't happen that way. It happened this way." And this is after having an initial discipline meeting; this is after going through four or five steps in the grievance procedure and having benefit of counsel and also the benefit of their union representatives. But they still lied or withheld information or changed the story. Again, I don't subscribe to it, but if arbitrators take the testimony of grievants who change their story or come in with new facts, they should also take it from the company.

**DAVID FELLER:** In a discharge case I tend to be more liberal with a grievant coming in with a different story from what was told at the lower steps of the grievance procedure. I will allow the grievant to tell whatever his or her story is, and I will allow the company to cross-examine about how it was just the opposite at the earlier hearing. I will not say to a grievant that this is new information. A grievant will say he has an alibi witness,

that he wasn't on the picket line. I will not say, "You can't put that in because you didn't say that at the second or third step of the grievance procedure." And so in a disciplinary case I would act a little differently toward the union side than toward the employer side. On the other hand, my general view is that you ought to exclude to the maximum extent possible material that was not introduced earlier. If you don't, you encourage the parties to withhold evidence and you destroy the grievance procedure.

### V. Grievant's Postdischarge Conduct

WHITE: Madam Arbitrator, at this point I would like to introduce a letter that we sent to the grievant following her termination concerning some conduct which she engaged in during the grievance proceedings in this case. While processing the grievance, we told her we were going to fire her anyway for what she did there. She threatened our personnel manager and started to get into a fight with him. Had we not been able to restrain her, it would have been a terrible situation.

COHEN: Madam Arbitrator, first of all, we all know this is a violation of the most fundamental proposition in discharge cases: *after*-discharge facts obviously cannot be introduced into evidence. Now, I would like the record to show, because my client's personality is being impugned, that she is 5'1" and weighs 111 pounds. Your personnel manager is a 6'4" graduate of Notre Dame and was a middle linebacker . . . . We stipulated that the issue is whether the discharge was for just cause. If not, what should be the remedy?

WHITE: Madam Arbitrator, in framing the remedy, you have the right, indeed the duty, to know her postdischarge conduct, particularly as it relates to her relationship with the personnel manager.

COHEN: This is trying what is left of my patience, Madam Arbitrator. The record has to reflect that there has never been one word of discussion at any point in the grievance procedure about this situation. This individual was already terminated. She was not an employee within the meaning of anything, Counselor, at the time in question. Therefore, we vigorously object to any such evidence coming in. It obviously prejudices my client's case. What you are trying to do is to try three cases here, aren't you, Counselor? One is her conduct as background; the

other is the event in question, for which you apparently don't have any evidence; and the third is what she did on her way to her vacation after she was fired.

WHITE: If she did something that relates to her job on her way to her vacation after being fired, we can bring it in here. Now we are all part of the judicial system here. We understand the concept of judicial economy. If she wasn't going to be fired for the original theft of the soap, she would have been fired for this conduct. We've done it anyway. You might as well hear both of these situations today, Madam Arbitrator.

*Discussion*

1. Would you consider the "second" firing for threatening the personnel manager sufficiently related to the first, for theft, to make the second admissible?
2. If the second firing had not been brought up in the grievance procedure and was a surprise to union counsel, what would you do? Would you consider the union's refusal to consider the second termination during the grievance processing as a waiver and hear both terminations in arbitration?
3. Under what circumstances, if any, would you hear both terminations?

EARL CURRY: This is a new charge against the grievant. That's the major reason I would not accept the document. Secondly, the alleged incident occurred after the company made the decision to discharge the grievant for stealing soap. Her alleged threats to the personnel manager all occurred after the fact and have nothing to do with whether she did or did not steal the soap. That is the stipulated issue. And thirdly, I think it's manifestly unfair to hold an individual who has just been told that she's been discharged to the same standard of conduct that we normally hold people to regarding their demeanor and decorum in industrial society.

JAMES McMULLEN: It seems to me that the evidence is arguably relevant with respect to the remedy. It cannot be used by the arbitrator to determine the propriety of the employer's initial action in discharging the grievant, but I believe he can properly take it into account in determining the question of reinstatement—for instance, whether to return the grievant to that company.

Maybe the conduct in this particular case wasn't egregious enough to affect a remedy, but arguably it is relevant.

**MARK KAHN:** What you really have here is a problem of a second incident of misconduct which can't properly be brought into the case you are entitled to hear—the case that has gone through the grievance procedure and is properly in arbitration. If the grievant has subsequently done something for which she deserves to be discharged, that is a separate charge. The employer should discipline the grievant for her postdischarge misconduct, and that would be heard separately unless the parties agreed to consolidate it.

**IDA KLAUS:** I think this is a totally separate offense which has no bearing on the offense before the arbitrator. It should be kept separate. I do not believe that it comes within the realm of a remedy question. That is a special case. In my experience the parties pretty well understand that they may not bring up such evidence. They try it. When they are rebuffed on it, they accept it. They know what the procedures should be.

**HOWARD LEBARON:** I would accept the evidence as going to remedy, but not as going to whether the grievant was justly discharged. If she had so polluted the work environment by this conduct that her reinstatement would be a disturbing factor, I would consider that in deciding whether or not to reinstate her.

**JAMES WHYTE:** I had always thought that what went on during the grievance procedure was privileged. I would have a great deal of trouble admitting that if I were an arbitrator in this case.

**LEO WEISS:** It seems to me that there are things that go on in the grievance procedure that are not privileged and could be brought in. Not everything is part of settlement discussions, which are generally considered privileged. Suppose, for example, the grievant says at the first step of the grievance procedure, "Yes, I lost my temper and I hit so-and-so because of what he said." Or suppose there's an assault on someone—the supervisor or the personnel manager—or there are threats to witnesses: "If you come in and testify against me, I'll blow your head off." It's true that the company couldn't have considered that at the time of the discharge, but it seems to me that it's an appropriate consideration for the remedy. To put an employee back to work after you have heard evidence that he is threatening other employees, or physically assaulting the supervisors, is not performing your proper function as an arbitrator. I think that the arbitrator has a lot broader authority under the contract in formulating

a remedy than he has in determining what the basic issue is, which is something that's normally decided between the company and the union.

### VI. Stolen Documents

COHEN: Madam Arbitrator, it appears that the union finally has an opportunity to introduce something into evidence. This is a letter from the plant manager to the personnel director. I would like to read into the record this very poignant paragraph: "Dear Larry: We've got the wrong person. Susan didn't do it. Norma did. But let's go forward against Susan anyway. Her record is so bad that she'd be fired for her next tardiness anyway."

WHITE: Where did you get that?

COHEN: I happened to find it in my file folder earlier today. It probably just arrived there.

WHITE: That is a stolen in-house company document. I demand that it be handed over, Madam Arbitrator. You cannot sanction that kind of conduct on behalf of a member of the bar or anybody who is part of the system of solving industrial relations cases.

COHEN: This document speaks for itself and makes it clear that what we have here in the soap industry is a railroad case. You are trying to railroad an innocent person by having her terminated for something she didn't do, Counselor.

#### *Discussion*

1. Would you admit such a stolen document?
2. Would you allow it to be used to impeach the testimony of the plant manager?

BRUCE BOALS: I would admit it, tainted as it is, simply because of the old fable of the dog and the rabbit. The rabbit is running for his life and the dog is running for a meal, and I'll leave it there.

ARVID ANDERSON: The charge in this case involves theft. If you sanction accepting a stolen document, you are sanctioning theft as a basis of defense. I find the reasoning unacceptable.

CHARLES REHMUS: Without regard to legal rules, I wouldn't admit it, assuming it can be shown that this was a stolen privi-

leged or private company document. I think the potential dangers to the parties' relationship and to the collective bargaining process are so great if you start admitting documents of this kind, no matter what its weight might otherwise be, that I would keep it out.

ELLIOT BEITNER: I think the damage to the relationship of the parties is done. If the company indeed has this type of exculpatory evidence and withheld it and went forward with this termination in a hearing, it's very damning and damaging. It is so damaging and so probative that to deny admissibility because of the union's method of obtaining it might go to the basic guarantee of due process for a grievant. Certainly an arbitration hearing is not a criminal proceeding, but there is a duty imposed on a prosecutor to provide the other side with exculpatory evidence. While there may be no such duty in the collective-bargaining relationship, I think there is a tradition that would suggest not going forward in a case where there is this type of evidence. Without condoning the idea of stealing documents, I think you'd have to let the letter in.

IVAN RUTLEDGE: On the constitutional point, I don't see that the arbitrator has any responsibility to ride herd on private people. Both the Fourth and Fourteenth Amendments give rise to an obligation to safeguard the public from the lawlessness of the police. We don't have any instance here of a policeman having stolen something. But I do think that whether it comes from the U.S. Arbitration Act or from some sense of the *Steelworkers Trilogy*, there is a fundamental principle of procedural regularity that's germane to the arbitration process. On that I subscribe to Mr. Rehmus's doubts about participating in this kind of warfare.

MARSHALL ROSS: I sense a tendency on the part of some arbitrators to apply the exclusionary rule as if they had the obligation of policing the parties with respect to their bargaining relationship. I don't think an arbitrator really has the authority or can take upon himself that responsibility. I might point out to the parties informally that there's a danger of straining their relationship if this kind of conduct goes on. But beyond some such admonition I don't think an arbitrator has the right, by excluding good evidence, to attempt to regulate the bargaining relationship between the parties. I assume that in this case the document satisfies the hearsay rule as a business-record excep-

tion or as an admission against interest, or that some other foundation can be laid for it. On that basis it seems to me that an arbitrator must permit the document presented to be received into the record.

STEPHEN FORMAN: The rules of evidence which would prohibit the introduction of this kind of document in a criminal case are designed to prevent the police from becoming a bully. They are constitutional guarantees. Here you don't have that problem. It is true that there might be some reason to disfavor such evidence because you don't want to encourage stealing from the company. But anybody who broke into locked rooms or pilfered drawers, whether it be the grievant or other people, will doubtlessly be the subject of a separate future grievance. Break-ins and thefts are obviously against company policies and rules. The letter certainly goes to the truth which they are trying to get at in this case, but I don't think the purpose of the rules of evidence in a criminal case applies here at all. While I represent management, I think that if I were an arbitrator, I would admit the document.

DON WECKSTEIN: I agree with the conclusion that the mere fact that evidence is illegally obtained would not preclude its admission in an arbitration hearing. I have another problem here, though. There is one rule of evidence that I apply in addition to relevancy, and that is the rule of privilege. If the matter was part of the attorney's work product or part of an attorney-client privilege, I think I would exclude it on that ground.

PHYLLIS SENEGAL: In the final analysis, would anybody actually sustain the dismissal of an employee when that kind of letter is presented? The real problem I see with the letter is authenticating it. Suppose the plant manager doesn't testify and you can't use it to attack his credibility or prove that that's his signature on it. But otherwise how could anyone say, "Well, I am going to sustain this dismissal as a curb on union counsel's activity or as a curb on somebody else's activity"? You couldn't do that.

CHET BRISCO: I wonder if the question of admissibility here isn't really the wrong question. Even if the document is not admitted, it seems to me what the attorney for the union would do is simply call the apparent originator of that document as an adverse witness and ask him whether it was written or not. And then it would come in by virtue of impeachment.

## VII. Lie Detector Tests

COHEN: Madam Arbitrator, we'd like to have marked for identification as Union Exhibit No. 2 the results of a lie detector test which the grievant voluntarily underwent approximately one week after her termination. I have a memorandum of points of authority, Counselor, in case you are not familiar with those citations.

WHITE: How long have you been holding on to that? What kind of precedent is this? Are we going to allow the parties to hold things back until the last minute? If so, how are we going to solve these cases at the earliest possible point? You can't allow them to introduce that, Madam Arbitrator!

COHEN: You didn't even ask us whether we had taken a lie detector test, as we had asked you about your documents. The truth of the matter is, we just didn't think the company would believe the outcome of the test. But we are confident, when you review this document for its authenticity and validity, Madam Arbitrator, you'll recognize it supports our position—namely, that the grievant didn't commit this theft.

WHITE: Let me get serious, Madam Arbitrator. In this jurisdiction and in most jurisdictions in this country, lie detector tests are not admissible. I submit to you, aside from the fact that they are not scientifically reliable, you cannot show me a case where they have been admitted. They cannot be admitted here for the additional reason that you cannot have evidence held back until the crucial moment in the hearing where we have no time to prepare.

COHEN: As a matter of fact, Madam Arbitrator, this is an admissible document and it speaks to a vital issue in this proceeding. We ask that it be received.

### *Discussion*

1. How would you rule on the effort to introduce data at the arbitration hearing which were held back throughout the processing of the grievance, but which were never specifically requested by the other party?
2. How would you handle the difference of opinion on the admissibility of the lie detector test results?
3. Under what circumstances, if any, would you admit the results of the lie detector test?

PETER FLOREY: On the first question, unless the contract specifically provides that there has to be disclosure of all information at one of the prior levels of the grievance procedure, I think either party can come in with whatever evidence they want to introduce at the arbitration. On the second question, I think this is a good example of a situation where the parties have to realize that rulings can work both ways. In one case one party makes a particular argument and in the next case it's the other party. Employers, especially in the retail industry, want to introduce lie detector tests to prove guilt or dishonesty on the part of employees. As a rule, arbitrators will reject the results of lie detector tests on the ground that they are unreliable. By the same token, if a union wants to submit the results of a lie detector test to prove the innocence of an employee, I think it should similarly be rejected on the same ground.

RICHARD HARTZ: Objection sustained to the polygraph test. It is a piece of hearsay. There is no opportunity for cross-examination. The polygraph operator is not present.

I. B. HELBURN: I would go further and say that even if the examiner were present to establish his own credentials and qualifications and be cross-examined, and even if he emerges clean as a whistle from that process, the results of the polygraph itself are too unreliable to be given any credence at all.

RAY GOETZ: I think you can change the facts a little, though, so it is not quite so obvious. For example, put the operator there to qualify himself and to be subject to cross-examination and assume the polygraph results are offered only after a question concerning the credibility of the grievant has been raised. I am troubled by questions of credibility, and I am always reluctant to rule out anything in a grievant's favor. It does seem to me that perhaps a polygraph (Ted Jones's article in our 1978 Proceedings to the contrary notwithstanding) is evidence of what happened to this grievant's blood pressure and respiration when she was asked these questions. I would never accept it as proof of the ultimate question of guilt or innocence, but I might accept it as some evidence on the question of credibility.

JAMES STERN: I am familiar with Jones's article. I also share his opinion. One of our distinguished colleagues, however, has given a good argument for an opposite conclusion. In a situation where the operator was present, his position was that the polygraph results should be admissible because management based its determination on the lie detector evidence and he, as an

arbitrator, listens to all the evidence that management took into account in order to determine whether management had just cause.

SAMUEL CHALFIE: Under no circumstances would I admit a lie detector test unless it had been agreed upon by both parties prior to its administration.

CHARLES REHMUS: Suppose the company and the union stipulated that the grievant's responses to a properly administered lie detector test by an appropriate individual selected by the company would determine whether the grievant should be reinstated. Would you refuse to accept it?

PETER SEITZ: I always wait for an objection. If there is no objection and if they both stipulated that the lie detector test was going to determine the guilt or nonguilt of the person, I would under those very unusual circumstances take it. But I've never heard of such a case.

HOWARD LEBARON: My reading of the literature convinces me that polygraph tests are not reliable. It gives me considerable pause even if the parties stipulated that the polygraph test would not only be admitted, but would be considered as evidence of the truth of the statements made by the respondent to the test. I'm not so sure that the arbitrator should accept that kind of stipulation.

GEORGE NICOLAU: About eight years ago, when I was chairman of the labor committee of the bar association in New York, I was the principal author of a report called *The Lie Detector in the Search for Truth*. We did a great deal of research on the subject, and all of that research was leading me to the conclusion that I would not accept lie detector tests on the grounds of their utter unreliability. Then, during the course of a demonstration by the foremost polygraph expert in the New York City area, our estimable colleague, Tom Christensen, flunked the test, and I realized that our conclusions were right!

NATE LIPSON: There are various problems with a lie detector. In the first place, it only measures physical reactions—blood pressure, respiration rate, perspiration, things like that. Then an operator has to interpret the data. That is highly subjective. You can get results from people who are inexperienced as well as from those who have worked with the process over the years. These are among the reasons most jurisdictions don't admit this kind of evidence. It is also clear that there are certain people who are pathological liars and about whom it is impossible to

determine anything whatsoever from an analysis of their responses. What we have at best is a method which may be indicative of credibility and may be a help in evaluating testimony, but certainly nothing that is conclusive. An arbitrator who accepts that kind of evidence and gives it substantial weight and uses it to determine credibility is, in my opinion, making a grave error.

**BERT GOTTLIEB:** I am an industrial engineer as well as an arbitrator. At one time I did extensive research into the whole lie detector area. I sat in on the examinations of about six different major lie detector companies, and I saw the sleaziest operations I have ever seen in my life. Even attorneys and medical people who were lie detector operators didn't follow the so-called "ethical practices of lie detectors." I also think arbitrators ought to know that today the laws of about 20 states forbid or limit the use of lie detectors in employment.

### **VIII. Burden of Proof**

**COHEN:** Madam Arbitrator, the union would like to sum up its case. The termination should be set aside and reinstatement with back pay should be ordered. There was no evidence whatsoever against the grievant other than that some company spies went into this parked car, while she was in the plant working at her job, and found some soap. That, plus the fact that she was located somewhere in the area of the plant where the theft supposedly took place, constitute the entire case that the company was able to bring forward here today. In a case such as this, Madam Arbitrator, where the company is claiming that this individual committed a crime on company property during the course of her employment, I need not remind you that the company has the heavy burden of establishing guilt beyond a shadow of doubt. The company, of course, fell completely short of that mark.

**WHITE:** Madam Arbitrator, our evidence speaks for itself. The thief has been unmasked. As you know, we don't have photographs of her taking the soap, but the circumstantial evidence demonstrates that we have met our burden. She is guilty. By the way, the burden is guilt by a preponderance of the evidence. This is a civil, not a criminal, case and the civil standard should apply. We urge that this grievance be denied.

*Discussion*

1. What is the appropriate burden of proof to sustain a termination action?
2. Is circumstantial evidence sufficient to meet that burden?

**WILLIAM FALLON:** My standard of proof in a case involving discharge for theft is proof beyond a reasonable doubt (not “shadow of a doubt”) because if I have a reasonable doubt as to the guilt of that person, I have great difficulty finding that the discharge was for just cause. Circumstantial evidence is sometimes the most reliable evidence that arbitrators have available. The credibility questions presented by direct testimony are sometimes pretty rough. Circumstantial evidence, in my judgment, can satisfy the standard of proof beyond a reasonable doubt.

**GERRY FELLMAN:** First of all, with regard to circumstantial evidence, I agree that circumstantial evidence may very well be more reliable than evidence from eye witnesses whose memory may be faulty or whose perceptions may be faulty. There are eminent arbitrators on all sides of this question of burden of proof. I believe that an arbitration proceeding is not a criminal case and that it is improper to place upon management the reasonable-doubt burden of proof. Some famous criminal lawyer talked about the one drop of ink that falls into the bathtub full of water and that is the equivalent of reasonable doubt. If you have the slightest doubt, then you acquit. I think that is too demanding in arbitration. On the other hand, I believe that more than a preponderance of evidence should be required. I agree with those arbitrators who use the clear-and-convincing-evidence test. I realize that sometimes all of these tests are really irrelevant because the arbitrator weighs the evidence and makes up his or her mind, and the somewhat slight variations in the tests don’t make a great deal of difference.

**TIA DENENBERG:** If I were to say what burden of proof I use, I guess it would be the preponderance standard, but personally I think arbitration is a common-sense proceeding. When the arbitrator is convinced, that is when the case is decided. We can try to make intellectual distinctions in theory; in practice, in each case when we are convinced, we are convinced. But I am firmly of the opinion that this is not a criminal proceeding; it is not a court proceeding. I object to creeping legalism coming into the

proceedings and making us think we are in court when we are not. I think both parties should put on their best case, introduce substantial evidence, and then the man in the middle or the woman in the middle will make an honest call. I, for one, would certainly never impose a criminal burden on an employer in this situation.

**PETER FLOREY:** Essentially what Tia said is that the principles of burden of proof merely evolved as charges to the jury by the judge. What we have to decide is a completely different matter. In the last analysis we have to decide whether it was reasonable for management to impose discipline.

**ZEL RICE:** It seems to me that you have to use less than the beyond-a-reasonable-doubt standard unless you're going to require the employer to have an FBI to investigate every single situation that arises in his plant. I don't think that you can expect an employer to put together the kind of case to establish a basis for discharge that you expect the police to prepare when someone is facing the death penalty.

**HERB SABGHIR:** The State of New York in its contracts with some of its public employees does specifically provide that the test is a preponderance of the evidence. Now, regarding the last comment, some persons maintain that discharge is the industrial death sentence. What if the penalty is not discharge? It's suspension for a week, for two weeks, short of the death sentence. Would you all use preponderance? In the absence of any language in the contract specifying the standard of proof, would you want to apply beyond-a-reasonable-doubt if it's termination, but a lower standard if it's a suspension?

**PAUL ROTHSCHILD:** I think it's absolute nonsense to talk about death sentences unless you are really going to put somebody to death. That's not what's at stake in a discharge for theft. How many times are we going to put that guy back so he can take another shot at stealing company equipment?

**C. B. ROSSER:** There is, of course, some controversy on the standard of proof. It seems to me, however, that the body of arbitral case law is now flowing toward clear and convincing proof rather than proof beyond a reasonable doubt or a preponderance of the evidence. It seems to me that we're not talking about a criminal case here, and therefore beyond-a-reasonable-doubt is not appropriate in an industrial situation like this.

**STEPHEN FORMAN:** As a management attorney I have never understood why you should have a different burden of proof

depending on whether you are being fired for absenteeism or some other infraction of the rules or for stealing. Now, a reason that proof beyond a reasonable doubt is required in a criminal case is that if you are found guilty, you are sent to jail, you are fined, and you are labeled with a conviction for criminal offense, whether it be a misdemeanor or a felony. If you are fired, you are fired! Some arbitrators say the difference is you are labeling this person a thief and by doing that you are presumably going to make it more difficult for her to find future employment. I always say that we are more than willing to respond to any employment inquiry that this person was discharged for cause. Period. We have no desire to prevent the person from getting a job in the future. We are simply firing this person for cause, and on that basis he is suffering a discharge for the reason he stole, the same as if he suffered discharge for any other rule infraction. I don't understand why we need a different burden of proof.

DAVID FELLER: I don't think anybody has made that kind of distinction here. I think that most of us have said, "I prefer not to use beyond-a-reasonable-doubt; maybe a clear-and-convincing standard," but that is just playing games with words. I don't distinguish between a discharge for failing to report to work for ten days or a discharge for stealing in terms of the burden of convincing me that what is charged in fact occurred.

WILLIAM FALLON: I agree that the same standard has got to be applied to any type of case and not just to one that is akin to a criminal case. It has got to be applied to a tardiness case, absenteeism case, or whatever. But if you leave the hearing room or finish the briefs with a reasonable doubt as to the guilt of the aggrieved, I don't see how you can be convinced that management has sustained its burden.

RUSSELL POWELL: On the subject of circumstantial evidence, they've done studies about the validity of eye-witness testimony and it's distressingly poor. Elizabeth Loftus of Seattle produced a book with several other scholars which shows that eye-witness testimony is very unreliable, generally speaking. People used to speak about circumstantial evidence pejoratively, and I think they should reexamine that position.

BRUCE FRASER: The book by Elizabeth Loftus is entitled *Eye Witness Testimony*. It contains a whole range of articles on the subject. Subsequent to that, *Psychology Today* carried several pieces. There's also a paper in the Proceedings of the National

Academy two years ago, authored by myself, that reviews a lot of this and other material about the dangers of eye-witness testimony.

PETER SEITZ: I'd like to know what else is new. I mean, the dangers of eye-witness testimony have been known for generations. Münsterberg at Harvard wrote all about it in the early years of the century. On this business of the burden of proof, I just have to be convinced. I look at the contract, which is my Bible, and it says that a man can be discharged or disciplined for just cause. The parties don't tell me what the burden of proof shall be, or to what extent I must be satisfied with the evidence. Yet I hear about me all of this learning which is taken from the criminal courts, which is taken from the administrative agencies, which is taken from the civil courts. This noon I listened to Ted Jones deliver his Presidential Address. Jones says, "Look at the contract," and I think Jones is right.