CHAPTER 10

THE USE OF HEARSAY IN ARBITRATION

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A common, if not dominant, procedural problem in labor arbitration is the admission and use of hearsay evidence. What should an arbitrator do when hearsay is offered into evidence? Is it important for an arbitrator to know what is and what is not hearsay evidence? Should hearsay evidence be admitted as a general rule? If hearsay evidence is admitted, what weight should it be given?

Whether to admit hearsay evidence is one of the most common questions confronting arbitrators. As a general rule, I believe that hearsay evidence should be admitted in an arbitration hearing. This allows arbitrators to receive the complete picture of all relevant facts without encountering legal technicalities. It permits advocates—who are often untrained in the jurisprudence of evidence—to present a complete case to the arbitrator. It also forces arbitrators to deal with the underlying reliability and relevancy of each offered item of evidence.

Many courts and arbitrators recognize the fact that hearsay evidence helps the arbitrator establish a fair understanding of the facts and issues of the case.[1] One arbitrator has stated:

> Admission of hearsay is justified to keep arbitration from becoming too cumbersome through procedural wrangling, or by the requirement that every witness who might be brought in be required to appear.[2]

Clearly, arbitrators must be given complete control over the admission of evidence. This nonlegalistic philosophy has been

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[1]*See Walden v. Teamsters Local 71*, 468 F.2d 196, 81 LRRM 2608 (4th Cir. 1972); *Instrument Workers Local 116 v. Minneapolis-Honeywell Regulator Co.*, 54 LRRM 2660 (E.D. Pa. 1963); *Chippewa Valley Bd. of Educ.*, 62 LA 409 (McCormick, 1974); *Fenwick Fashion*, 42 LA 582 (Elbert, c. 1964).

[2]Eaton, *Labor Arbitration in the San Francisco Bay Area*, 48 LA 1381, 1385 (1976), *reprinted from* 22 Arb. J. 93 (1967).

adopted in Rule 28 of the American Arbitration Association (AAA) which states:

> The Arbitrator shall be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary.[3]

In a narrow sense this rule adopts the theory that the arbitrator should be the absolute finder of fact and judge of relevance. From a broader view, however, one arbitrator has determined that AAA Rule 28 mandates the admission of hearsay evidence. According to this approach, because Rule 28 fails to specifically grant arbitrators the authority to exclude incompetent evidence, the arbitrator is required to admit all such evidence. Under this reasoning, because hearsay evidence is considered incompetent under common law evidence rules, arbitrators do not have the authority under Rule 28 to exclude such evidence.[4]

At a minimum, Rule 28 advocates a general philosophy that arbitrators need not conform to procedural legalism. Thus, some arbitrators admit hearsay evidence.[5] Many more arbitrators, however, exclude hearsay evidence based upon common law rules or the Federal Rules of Evidence (FRE). These reasons for not admitting hearsay evidence, however, are unfounded and simply wrong. Admission of hearsay evidence allows the arbitrator to receive a complete picture of the factual evidence and allows the parties to state their case without procedural technicalities.

Technicalities limit the ability to present a proper and complete case in arbitration. Many advocates are unskilled in the intricacies of hearsay evidence. Even many lawyers are unable to determine whether an offered item is hearsay. By adopting a rule that all evidence is automatically admitted, procedural complexities are eliminated. Nonlawyer advocates are, thereby,

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[3]American Arbitration Association, Voluntary Labor Arbitration Rules (1988).
[4]*See Lever Bros. Co.*, 82 LA 164, 167 (Stix, 1983), stating:

> My interpretation of Rule 28 is that, while I am to be the judge of the "relevancy and materiality" of hearsay evidence that is offered, I am not empowered to exclude it as incompetent. The traditional general objection is, "Incompetent, irrelevant, and immaterial." Since the rules do not empower the arbitrator to decide the "competence" of evidence that is offered, and expressly say that "conformity to legal rules of evidence" shall not be necessary, I believe I have to receive hearsay evidence—unless the opposing party or I, as arbitrator, persuade the proponent of the evidence that it is of so little probative value that he can skip it without impairing his proof.

[5]*Ambassador Convalescent Center*, 83 LA 44 (Lipson, 1984).

allowed to offer any relevant evidence. Evidence that is inherently unreliable—as is much hearsay evidence—can be bolstered with additional direct or indirect evidence, forcing the arbitrator to review the weight of the evidence. Admitting hearsay evidence as a general rule allows and compels arbitrators to go through the relevancy and reliability tests for each item of evidence.

Often, hearsay evidence is declared inadmissible simply as a matter of law. A general rule which excludes hearsay evidence, however, may eliminate highly relevant and reliable items of evidence. The mandatory admission of hearsay evidence forces arbitrators to "take the evidence home." Once the hearsay evidence is forced upon the arbitrator, an analysis of its relative worth must be made, and each item must be tested for its relevancy and reliability.

Admitting all hearsay evidence in arbitration requires analysis of the evidence on the part of the arbitrator. Under general principles, when any evidence is offered, two issues are presented: (1) the admissibility of the evidence and (2) the weight of the evidence. When an arbitrator excludes evidence merely because it is hearsay, no additional analysis is necessary. Admission of hearsay as an absolute rule, however, requires the arbitrator to explain why nonreliable hearsay evidence should be disregarded, or why relevant and reliable hearsay evidence should be given weight. This forced exercise ensures that appropriate analysis is made.

With these concepts in mind, clearly hearsay evidence should be admitted into arbitration. An arbitrator should not rely on standard rules of legal admissibility, which allow the arbitrator to avoid the true evidentiary issue, i.e., how much weight the evidence should receive. When hearsay is offered, the most logical and appropriate response by the arbitrator is to recognize it as hearsay, with an admonishment to the parties that "it will be given weight commensurate with its relevance and reliability."

The Recognition of Hearsay Evidence

To complete the arbitral process once the hearsay evidence is admitted, the arbitrator must apply the standard relevancy and reliability tests. These tests are required to some degree with all evidence. However, hearsay deserves an extra degree of scrutiny

as a result of its inherent weaknesses. That does not mean hearsay evidence should be automatically excluded, however.

Prior to applying this extra level of scrutiny, arbitrators must be able to recognize traditional hearsay evidence. Without such recognition the evidence may be given an inappropriate amount of deliberation.

A complete review of the hearsay rule is beyond the scope and intent of this paper. Hearsay, however, is easy to define but much harder to recognize. The Federal Rules of Evidence (FRE) define hearsay as:

> (c) a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.[6]

Rule 801 goes on to define the terms "statement" and "declarant":

> A statement is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.[7]
>
> A declarant is a person who makes a statement.

To formulate an arbitral definition, with the assistance of the federal rules, hearsay could be described as an oral, written, or nonverbal assertion not made while testifying, which is being offered to prove the truth of the matter asserted. According to FRE:

> Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.[8]

Thus, in federal court hearsay is not admissible unless a recognized exception is met. This is also true in most state courts.

The federal rules list approximately 30 exceptions to this general rule. Most of the recognized exceptions are narrowed to specific factual settings. However, rule 803(24) states that even if no specific exception is listed in FRE, if the statement is trustworthy, material, and relevant the court may admit the evidence.[9] This so-called residual or catch-all exception to the hearsay rule was adopted in an attempt to "provide sufficient flexibility to permit the courts to deal with new and unanticipated situations,"

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[6]Federal Rules of Evidence 801.
[7]*Id.*
[8]*Id.*, 802.
[9]*Id.*, 803(24), commonly called the "residual hearsay exception." *See also* Rule 804(5).

"to preserve the integrity of the specifically enumerated exceptions," and "to facilitate the basic purpose of the Federal Rules of Evidence: truth ascertainment and fair adjudication of controversies."[10] The catch-all exception in essence forces federal judges to apply the relevancy and reliability tests to all hearsay evidence. Therefore, even though hearsay is not admissible in federal court, it may be admissible if it is relevant and reliable. However, because of the possible weaknesses of hearsay evidence, judges are required to exclude the evidence unless its reliability is established.

Using the proposed rule that hearsay is automatically admitted in arbitration hearings, the arbitrator would always be required to apply the reliability tests. The first step in arbitration, therefore, is identifying hearsay. As I have noted, to determine whether offered evidence is hearsay, an arbitrator can use the simple definition: "an oral, written, or nonverbal assertion, not made while testifying, which is being offered to prove the truth of the matter asserted." If it is determined that the evidence is hearsay, the arbitrator can proceed to apply the appropriate level of scrutiny.

Out-of-Court Statement

To break this definition down into its component parts, the first question is whether the assertion is an out-of-court statement. According to FRE an out-of-court statement includes any oral or written assertion that is not occurring or did not occur before the judge. Before it is labeled hearsay, however, the oral or written statement must be intended as an assertion by the declarant in regard to the matter for which it is offered as proof. For example, if a person screams in pain or begins to laugh, these statements are not intended as assertions and therefore are not out-of-court "statements" for hearsay purposes.

Referring to case 2(5)[11] as a more appropriate example, if an individual presents a written job offer received from a customer to show excellence as an employee, the job offer may be admitted in court since it was not intended as an assertion that the employee was a good employee. In other words, it was not intended to prove the truth of the matter asserted. It was pre-

[10]Moore's Federal Practice, Vol. 11, VIII-201 (Matthew Bender, 1989).
[11]The reference is to case material in Addendum.

pared only for the purpose of making a job offer. However, in arbitration, applying the rule that all relevant evidence is admitted, the issue is not admission but weight. Therefore, in both federal court and arbitration, the issue is whether the finder of fact determines the evidence to be reliable.

Nonverbal Conduct

Nonverbal conduct that is "deliberate" or intended as an assertion is treated as a statement for hearsay purposes. This includes examples such as nodding and pointing. Under FRE nonverbal conduct not intended as an assertion is not hearsay. This issue rarely arises in arbitration, however, because most advocates do not perceive the hearsay problem. This "implied assertion" problem arises when a person acts without intending to communicate a belief. If the nonverbal conduct shows belief that the fact is true, it may be considered an implied assertion. For example, to demonstrate that an employee is trustworthy, the union may offer evidence that fellow employees often leave valuable items entrusted to the grievant's care. These actions by co-employees would not be intended to assert that the declarants trusted the grievant. Under FRE these implied assertions are not hearsay and are admissible. In arbitration, however, these statements should be considered hearsay because of their potential weaknesses. In such cases arbitrators should apply extra scrutiny with regard to the evidence. For example, even though the declarant did not intend an assertion and therefore was probably not motivated to lie, the declarant's understanding and knowledge of the grievant's trustworthiness would still be an issue.

Silence

Another issue arising under the implied assertion rule is whether silence or inaction is hearsay. Frequently unions offer evidence that co-employees did not complain when the grievant participated in certain conduct. Alternatively, in a theft case the employer may offer evidence that the employee did not deny taking the missing items. If we automatically admit the evidence, we at least eliminate the admissibility question. Arbitrators, however, still must apply the relevancy and reliability tests.

Under FRE, if the inaction or silence was not intended as an assertion, it is not hearsay.[12] Rule 803(7) treats the absence of an

[12]Federal Rules of Evidence 803(7).

ordinarily made entry, offered to prove the nonoccurrence of the event that would have been recorded, as an exception to the hearsay rule. The Advisory Committee's Note, however, observes that it probably is not hearsay under the federal rules but is included as an exception to resolve cases treating such evidence as hearsay not within any exception.

How should a witness's silence be treated in arbitration? Assuming it is not an admission by the party opponent, an arbitrator must start by admitting the testimony about silence or inaction. The test then becomes: Should it be given the same weight as other direct evidence? The relevancy and reliability of the silence or inaction is important in considering whether to give the evidence any weight. In these cases an arbitrator must decide whether a reasonable person would have spoken or acted rather than remain silent. The answer to this question may assist in the reliability finding. If the arbitrator finds a reasonable person would have responded, the witness's inaction may be more reliable.

Offered to Prove the Truth

Another issue is whether the evidence is offered to prove the truth of the matter asserted. As a general rule, an out-of-court assertion is not hearsay if offered as proof of something other than the truth of the matter asserted. The fundamental reasoning behind not admitting hearsay evidence is that its truth or reliability is difficult to ascertain. If, however, evidence is offered for reasons other than its truthfulness, such close scrutiny may not be required.

Frequently evidence is offered for purposes other than an inference of the truth. For example as in case 1(1),[13] suppose a corrective action notice is offered at arbitration. The notice is a written statement not made before the arbitrator or as an assertion. It is offered to show not that the grievant actually violated the employer's rule but that the grievant was given notice of the pending discharge or discipline. Once this evidence is admitted, the arbitrator must determine whether the content of the notice is reliable for the truth of what it asserts (i.e., that the grievant violated the rule). This is usually true even when the notice contains statements of customer complaints. In other words, the

[13]See Addendum.

arbitrator now has items of evidence purporting to contain customer complaints. Unless these items are extremely relevant and reliable, it may be prudent for the arbitrator to explain that the evidence is hearsay in regard to the truth of customer complaints and that consideration, if any, will be commensurate with its relevancy and reliability.

Weight

Once the arbitrator has determined that the evidence is hearsay, it makes little sense to rule that it should not be admitted. The more appropriate response is to admit the evidence but to caution the parties that it will be given only the weight it deserves based upon its relevancy and reliability. What are the relevancy and reliability tests? Why do they become so important in dealing with hearsay?

Relevancy and Reliability

As a general rule, relevancy determines whether an offered item of evidence infers what is intended. Reliability, on the other hand, determines whether the offered item of evidence is worth inferring what is intended.

Relevancy and reliability were used originally to develop the rule against admission of hearsay evidence. At common law courts excluded evidence which was either not relevant or not reliable. Hearsay evidence was generally considered irrelevant or unreliable. Therefore, common law courts determined that, instead of continually confronting the relevancy and reliability of hearsay evidence, such evidence should be automatically excluded.

Under common law, therefore, hearsay evidence was admitted only under certain recognized exceptions. These recognized exceptions arose out of situations where the court found that even though the evidence was hearsay, it either was highly relevant or had a degree of reliability. For example, the residual exception specifically allows the admission of hearsay evidence which is sufficiently trustworthy, material, and relevant.

Other exceptions support the notion that hearsay evidence should be admitted if it is reliable or relevant. For example, a federal exception allows admission of an "excited utterance." According to FRE an excited utterance is:

> [A] statement relating to a startling event or condition made while the declarant was under stress of excitement caused by the event or condition.

The typical excited utterance is clearly an out-of-court statement and, if offered to prove the truth of the matter asserted, is hearsay. If the judge finds that the statement offered was an excited utterance, it is automatically admitted if relevant. An excited utterance is considered reliable because the declarant did not have time to generate a false response.

Because arbitrators do not and should not follow set procedural rules, the excited utterance should be admitted. The issue for the arbitrator is the weight to be given the evidence. Recognized exceptions to the rule against the admission of hearsay may provide arbitrators with support for considering an offered item. In other words, if a recognized exception to the rule exists, the arbitrator can cite the exception as authority that the evidence may be reliable. However, the existence of the exception is not by itself enough to support a finding that the evidence should be given great consideration. The arbitrator should review the underlying reason for considering the evidence reliable.

Relevancy

What is relevancy? How does an arbitrator determine whether an offered piece of evidence has a high degree of relevancy? If an item is not relevant, what should occur?

No evidence, regardless of its type or form, should be considered by an arbitrator unless it is relevant to an issue in the case. Traditionally two elements constitute relevancy: (1) materiality and (2) probative value.

1. Materiality is the relationship between the reason the evidence is offered and an issue in the case. To be material this relationship must be one of cause and effect. In other words, if evidence is offered—the cause—its presence must in some way affect an issue in the case—the effect. If the evidence offered does not affect an issue in the case, that evidence is immaterial and should not be considered.

In arbitration issues are determined by the parties and the contract. For example, if the hearing involves a discharge case, the usual issue is whether there was just cause for discharge. Evidence that the grievant was having an extramarital affair

which did not affect job performance would be immaterial. On the other hand, in the same hearing on the same issue, if the extramarital affair was taking place during working hours and it was affecting job performance, such evidence, regardless of form, would be material.

Another example of immateriality—e.g., case 1(5)[14]—arises where there is offered into evidence a note from a customer stating that the grievant "is an excellent addition to the store." In this case the arbitrator must determine whether the note affects an issue in the case. If an issue is whether the employee was liked by customers, the evidence clearly does affect the issue. If the issue was whether the employee stole money from the employer, however, the customer's note making a job offer would not in any way affect the issue.

How does materiality affect the weight of an out-of-court statement? The basic rule is that, if the out-of-court statement is not offered to affect an issue in the case, it should not be considered by the arbitrator. Under Rule 28 the arbitrator may exclude any immaterial evidence, such as hearsay evidence. In applying the materiality test, therefore, the question is: What issue does the evidence affect? If the arbitrator finds that the hearsay evidence affects an issue in the case, the out-of-court statement passes the materiality test.

2. *Probative value* is the degree to which offered evidence tends to establish the proposition it is offered to prove. In other words, probative value is based upon a determination of how much the evidence tends to make the existence of any fact more or less probable than it would be without such evidence. For example, a statement by a customer to a store manager that the grievant lived in a bad neighborhood would, without more, be very weak in inferring that the grievant stole money from the employer. However, a customer's statement that the grievant has been known to take other people's property might be probative on the issue of whether the employee stole money from the employer.

In applying the relevancy test, the arbitrator needs to consider not only the existence of material facts but also the extent of their probative value. The arbitrator must examine the important facts in the case. If an out-of-court statement is material and highly probative of an issue in the case, more consideration of

[14]*Id.*

the statement is appropriate. On the other hand, if the out-of-court statement is material but not highly probative, the arbitrator must apply the reliability test to determine how much weight the evidence should receive. Finally, if the out-of-court statement is not material and not probative of any issue in the case, the evidence is not relevant and should be given no weight.

Reliability

The reliability factor of out-of-court statements rests on the foundation of the common law rule against the admission of hearsay. According to Professor Lawrence Tribe:

> The basic hearsay problem is that of forging a reliable chain of inferences from an act or utterance of a person not subject to contemporaneous in-court cross-examination about the act or utterance, to an event that the act or utterance is supposed to reflect.[15]

In other words, anytime a person testifies at a hearing, the declarant's reliability is automatically an issue. The arbitrator generally reviews four risks in evaluating the reliability of the declarant:

1. The witness's perceptions regarding the event (Did the witness observe what actually occurred?),
2. The witness's recordation and recollection of the event (Did the witness remember the event the way it actually occurred?),
3. The witness's ability to properly narrate observations (Can the witness properly describe the event?), and
4. The witness's sincerity (Is the witness telling the truth?).

Because of these concerns, common law requires that witnesses testify only to the facts of which they have personal knowledge. For this reason testimony is given under oath, in person, and subject to cross-examination. These factors support a finding that the person is reliable.

The Oath

The oath or affirmation is often considered archaic. However, this process has developed over the centuries for good reasons. First, the oath has the effect of putting the witness in the proper

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[15]Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, at 958 (1974).

frame of "conscience" before offering testimony in the belief that this discourages a witness from testifying falsely. Second, the oath is believed to guarantee a witness's sincerity by requiring a verbal assurance to the arbitrator that the testimony will be true and sincere.

The problem with out-of-court statements, however, is that the declarant is seldom under oath. Therefore, in assessing the reliability of the out-of-court statement, the arbitrator should be skeptical about such statements. On the other hand, in many instances out-of-court statements made under oath are offered to arbitrators. For example, sworn affidavits and court transcripts do satisfy the oath reliability element. However, the oath by itself is seldom enough to ensure reliability.

As in case 2(7),[16] if an affidavit of the grievant's co-employee is offered by the employer to demonstrate that the grievant frequently borrowed or was in need of money, the arbitrator should cautiously consider this evidence in a case involving theft. Of course, the evidence should be admitted, but without further assurances of reliability it should not be given great weight.

Presence

Another evidentiary requirement is that the witness should present testimony in person before the arbitrator. This allows the finder of fact to observe the declarant's demeanor while speaking or acting. It is well established that nonverbal behavior is an important clue to credibility. If the finder of fact is unable to observe the declarant's nonverbal behavior, this critical element for determining credibility is lost, and this loss should be considered an important factor in determining the reliability of the out-of-court statement.

The Ability to Cross-Examine

The ability to cross-examine a witness has been called the "greatest legal engine ever invented for the discovery of truth." Observation of the declarant during cross-examination by an able adversary clearly provides the finder of fact with information regarding the witness's veracity and credibility. Cross-examination calls into question perception and memory as well as the description of the event and propensity or motivation to fabri-

[16]See Addendum.

cate. Cross-examination is by far the most important element for arbitrators to consider in determining reliability of testimony. The lack of cross-examination does not necessarily mean that the testimony is false but that it should not be relied upon as heavily as testimony subjected to the test of cross-examination.

Other Indicia of Reliability

The oath, presence, and cross-examination are all common law tests to determine a declarant's reliability. What other factors should be considered to determine whether a witness's perceptions, recordation, narration, and sincerity reach appropriate levels? Arbitrators use many other tests to determine whether a declarant is reliable or credible, based mainly upon common sense. In other words, is there a reason the evidence should be considered reliable? Arbitrators must apply these tests on an individual basis. However, there are common elements to help determine reliability. As Arbitrator Fleming noted:

> Arbitrators are not equipped with any special divining rod which enables them to know who is telling the truth and who is not where a conflict in testimony develops. They can only do what the courts have done in similar circumstances for centuries. A judgment must finally be made and there is a possibility that the judgment when made is wrong.[17]

In evaluating the reliability of any testimony, the Chicago Area Tripartite Committee of the Academy cited the following guides:[18]

1. Manner and demeanor
2. Character and reputation
3. Mental qualities of the witness
4. Relative experience
5. Emotional capacity
6. Opportunity of the witness to observe
7. Self-serving character of testimony
8. Interest or bias
9. Failure to call on corroborative witnesses where available (e.g., to support an alibi)
10. Inconsistency, contradiction, and self-contradiction

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[17]*General Cable Co.*, 28 LA 97, 99 (Fleming, 1957).

[18]*Report of the Chicago Area Tripartite Committee on Problems of Proof*, in Problems of Proof in Arbitration, Proceedings of the 19th Annual Meeting, National Academy of Arbitrators, ed. Jones (BNA Books, 1967), 149, 207.

11. Motivation
12. Probability of the testimony under all the circumstances

These factors apply to all witnesses, whether in court or not. When confronted with hearsay evidence, the arbitrator must determine its reliability without observing the out-of-court declarant. Nevertheless, many of these reliability factors are helpful.

When applying these factors, the arbitrator must first determine the in-court witness's reliability and then apply these factors to the extent possible to the out-of-court declarant. Thus, it is understandable that most hearsay evidence is not given great weight.

Conclusion

In conclusion, I have advocated a rule that would mandate the admission of hearsay evidence. I believe that this rule would allow the arbitrator to receive the full picture by reviewing all relevant evidence in a case. It would permit advocates to present the facts to the arbitrator without procedural technicalities. Finally, such a rule would clearly force the arbitrator to deal with the real evidence issues—that is, the relevancy and reliability of hearsay.

While it is clear that hearsay evidence has weaknesses and that arbitrators should not give full weight to every out-of-court statement offered to prove the truth of the matter asserted, arbitrators need not ignore all such evidence. Therefore, arbitrators must adopt a procedure for searching the record for this evidence and, upon discovering hearsay, must test it by balancing its relevancy and reliability. Only under this approach is the appropriate weight for hearsay evidence assured.

ADDENDUM

CASE 1

Customer Complaints

The Employer operates a retail grocery business. The Union represents most of the employees of the Employer, including the Grievant. The Grievant was hired by the Employer in 1981 to

work on a part-time basis in one of the Employer's retail stores. He worked as a part-time employee until his discharge on August 22, 1989.

On Monday, August 22, 1989, Mr. Tom, the Store Manager, issued the following Corrective Action Notice to the Grievant.

> On Monday, August 22, 1989, a customer met with me, Mr. Tom, Store Manager, and Ms. Sue, the Customer Service Manager, to disclose her opposition to advances and harassment by the Grievant directed to her, over the past 2 years. On 4-15-88, the Grievant was suspended for similar complaints and warned that if this persisted, it would mean termination. The Grievant is being placed on indefinite suspension without pay, pending termination review by the Personnel Department.

On August 31, 1989, the Employer's Division Personnel Manager, Mary, authorized the discharge of the Grievant after her investigation of the complaint referred to in Tom's suspension notice and her review of previous disciplinary actions taken against the Grievant. The notice of discharge stated that the Grievant was discharged for "actions which are inappropriate, intimidating and found offensive by some customers and employees."

Evidence was presented as follows:

(1) Documents from the Grievant's personnel file that relate to prior discipline of the Grievant.

(2) The testimony of management employees who investigated the 1989 incident which was the immediate cause of discharge and a 1988 incident which led to a disciplinary suspension of the Grievant.

(3) The Grievant's testimony.

Hearsay Problems

1. When the Employer offered to place into evidence the original Corrective Action Notice issued to the Grievant, the Union attorney objected on hearsay grounds.

2. The Employer did not present the testimony of the customers who were the object of the Grievant's allegedly inappropriate conduct. Rather, the employer relied upon the description of the Grievant's conduct given by those customers to management personnel. Union's attorney objects, as hearsay.

3. The Employer offered into evidence a statement made by the Grievant to a manager regarding the Grievant's inappropriate actions toward a customer. The Union objects.

4. During the Grievant's testimony, he offers into evidence a note he received from a customer which stated "he was an excellent addition to the store and he wished all of the store employees were as helpful as him." The Employer's attorney objects.

5. Finally, during the Grievant's testimony, he offers into evidence a written job offer the Grievant received from a customer, which the Grievant turned down. Grievant offered the evidence to show the customer thought the Grievant was an excellent employee and worth employing. The Employer's attorney objects.

CASE 2

The Ill Witness

The Employer, a janitorial service, had a contract with a nursing home to provide housekeeping services for the home. The Employer is a party to a collective bargaining agreement with the grievant's Union. The contract provided that an employee shall not be disciplined through discharge without first having received a prior warning in writing, except for acts of dishonesty, intoxication on jobs, or physical violence.

A set of rules promulgated by the Employer was posted at all times relevant prior to the events of discharge. The rules did not contain a provision prohibiting the borrowing of anything from patients of the home. Although such a rule was included in the rules of the home, those rules were not posted.

At the time of hiring, employees were told that they should not borrow money from patients. The employees were "generally" aware of this unwritten rule.

The patient of the home involved in this case is 70 years of age. Although she is alert and oriented and could otherwise live independently, she is subject to grand mal seizures, a condition which could bring on convulsions and loss of consciousness. The grievant was discharged for dishonesty and for borrowing money from the 70-year-old patient.

The evidence presented in the case consisted of:

(1) A copy of the rules which were traditionally read to new employees.

(2) A loan application the grievant made to a local bank and the bank's denial.

(3) The testimony of a nurse's aide who overheard the patient make reference to several small loans which the grievant got from her.

(4) The testimony of the director of housekeeping that the nurse's aide reported the overheard conversation to her.

(5) The testimony of a home social worker, who was asked by her supervisor to talk with the patient to ascertain the information about the borrowing. The social worker testified that the patient was reluctant to discuss the matter but finally affirmed the allegations.

(6) A copy of the social worker's notes of the meeting with the patient.

(7) A fellow employee's affidavit which stated that the grievant frequently borrowed from fellow employees.

Hearsay Problems

1. To demonstrate that the grievant knew employees were not supposed to borrow money from patients, the Employer offered into evidence a copy of the rules which were traditionally read to the new employees.

2. To demonstrate the Grievant needed money, the Employer got a copy of a document demonstrating that the grievant applied for a loan at a local bank and was denied the loan. The Employer got this information because the grievant listed the Employer on the application and the bank contacted the Employer.

3. To demonstrate that the grievant did indeed borrow the money, the Employer offered the testimony of a nurse's aide who overheard the patient make reference to several small loans which the grievant made from the patient.

4. To support the nurse's aide's testimony, the Employer offered the director of housekeeping to testify that the nurse's aide reported the conversation she overheard.

5. To substantiate the testimony of the nurse's aide and the information of the patient, the Employer offered a home social worker, who was asked by her supervisor to talk with the patient to ascertain the information about the borrowing. The social worker testified that the patient was reluctant to discuss the matter but finally affirmed the allegations, though she did not identify the borrower.

6. To support the social worker's testimony, the Employer offered the social worker's notes of her meeting with the patient.

7. To show that the grievant had a propensity to borrow money, the Employer offered an affidavit from a fellow employee that the grievant frequently borrowed from them.