CHAPTER 6

A DEBATE: SHOULD LABOR ARBITRATORS RECEIVE EVIDENCE FOR "WHAT IT'S WORTH"?

I. UNION PERSPECTIVE

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Is arbitration an extension of collective bargaining, a continuation of the collective bargaining relationship, or an alternative to litigation? Which conceptual "model" is the correct foundation for analysis of our debate topic? One way of addressing this first issue is to describe two scenarios presented to the National Academy member who travels to the appointed location for the first day of arbitration. The arbitrator may confront very different scenes from one day to the next.

1. You may find a group of union and company representatives, together with bargaining unit members, standing around amicably discussing a common work issue, settling other pending grievances, or talking about their kids. The advocates are meeting to work out some stipulations, frame the issue, and agree on what exhibits and testimony to present. You are greeted warmly with the statement, "We have a problem we haven't been able to resolve, and we need your help." The entire room is permeated with a good measure of trust and mutual respect at all levels—members, rank-and-file leadership, union staff, supervisors, management and human resources representatives, as well as opposing attorney advocates. You are greeted warmly on a first name basis, and you know the names of many of those present.

2. By contrast, you enter the designated conference room to find two rows of tight-lipped, glaring adversaries sitting across the table from each other. The tension and hostility in the room are palpable. It becomes very apparent sooner if not later that the union members are at odds with, or at the very least distrustful of, their union. The business agent despises the grievant, and is in a

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major fight with the company to appease the membership. The union advocate is less than fully prepared. The company is in a major campaign to "teach the union a lesson" about arbitrating supposedly nonmeritorious grievances (which is understood by the other side of the table as an attempt to "break the union"). The supervisors and human resources representative fear for their future with the company if they do not win the case because the boss is very much a presence at the hearing. The two advocates do not like each other, and are truculent and inclined to overreaching even on their best days. Both have been encouraged by their clients to be their most aggressive on this particular day. Brief, terse introductions are made. Nothing has been done before your arrival, and nothing can be agreed upon. There is a dispute about what contract is in effect, what grievances are to be presented, and, of course, there will be acrimonious bickering before agreement on the issues. There will be several long and unpleasant days before the case is submitted for discussion.

With these contrasting examples in mind, I believe that the answer to whether arbitration is an extension of collective bargaining or of the union-management relationship is clearly "Yes." Your role as an arbitrator is very different depending on the character of the bargaining relationship presented. In the first case, you may very successfully function as a facilitator and mediator to help the parties reach a mutually satisfactory solution. In the second, you must function more as a judge, if not as a referee. Each of you will bring a particular combination of skills, styles, and creativity, whether it be with humor or stern admonitions.

What Does Arbitration Mean to the Union?

As a separate but interrelated topic, I pose the question, "Why do unions take grievances to arbitration?" The first and overwhelmingly predominate reason is that they want to win the cases. They may be convinced that a grievance has merit, and that the employer is wrong. Unions may seek victory to rectify a power imbalance with employers. They may use a victory to demonstrate their effectiveness to the membership and leadership. Unions may need a victory to show their membership that they stand behind them (or better stated) that they lead them in their struggle.

Those reasons suggest that the arbitration should be understood as an extension of a union's continuous organizing, and not just an isolated "day in court." (I define organizing as educating, involv-

ing, and empowering employees to believe in, support, and participate on behalf of the collective whole). This model of arbitration is based on the assumption that the membership knows about and may participate in the decision to arbitrate a particular grievance. The membership is directly concerned in the outcome because there may be monetary reward, but also because its sense of security and well-being will be enhanced by victory.

Once having decided to take a grievance to arbitration, there is (or should be) a second interrelated goal for the union. Ideally, all who participate on the union side—whether as grievant, steward, observer, or witness—will find by the end of the day that their commitment to the union has been enhanced by the arbitration experience. The union advocate, especially if a lawyer, must have abilities of rigorous analysis and technical lawyering skills. However, that is not enough. As a union lawyer, if I am at my best, I am functioning as an organizer as well as an advocate. How that can and should be done is not the subject here, but suffice it to say that the "organizing" aspects of collective bargaining must be recognized as part of arbitration. Stated in its simplest form, the meaning of arbitration for workers is to deal with their employer on an equal basis, and have reflected in the process respect for them as workers, for the jobs they perform, and for their contributions as union members at the workplace.

Union's General View of Evidence "For What It's Worth"

Does this mean that "anything goes"? Am I going to argue that any and all testimony about whatever might make the union side feel better should be allowed? I do not take that position because the first and most important motivation on the union side is to win the case.

With some experience, I have come to a working hypothesis that most cases are won or lost because just a few central points were clearly established. In discipline cases, for example, the events that are the basis for the discharge often occurred over the course of very finite periods of time—sometimes a matter of minutes. There are a great many facts related to any case, but arbitrations are won or lost within a fairly narrow range of contested territory. My working assumption about arbitrators' state of mind is that they will see the union case as weak or nonexistent if a great deal of time and energy is spent attempting to introduce evidence outside of the critical areas of dispute. The same may be said about evidence that

is irrelevant or unreliable. Therefore, I vigorously encourage union members and their representatives to offer only testimony or documents that will further the objective of winning the case. I attempt to explain to them that the arbitrator may very well not give credence to our strong points if they are mixed in with meritless claims, particularly when all of the arguments have been presented with comparable fervor. Everyone is involved in the process and consensus is reached most of the time. Unions goals are served, and there is little if any "junk evidence" offered by the union side.

Whether offering testimony or documents, or whether objecting to their admissibility, following argument, I have on many occasions heard the arbitral statement: "I will admit this evidence for what it's worth." Within the arbitrator community in Northern California, I take this to mean "this evidence is not worth anything, but I'll let it in anyway." I understand the arbitrator to be saying (1) the evidence is neither relevant nor probative, (2) it has no persuasive impact, (3) it will not assist in making a decision, (4) the opposing party need not respond with evidence or argument, and (5) the proponent may proceed only if a truly short amount of hearing time is taken.

In my experience, evidence is admitted into the record "for what it's worth" to allow discharge grievants their day in court, and to minimize offending or upsetting party advocates or representatives. Moreover, such evidence is frequently admitted because it takes less time than arguing about the subject with a persistent, aggressive, or resourceful advocate. Many times the stated rationale is to avoid grounds to vacate the award, but I do not take this to be a serious legal concern.

My feeling about this practice depends on a number of different factors. The most important consideration is whether I trust the fundamental good judgment of the arbitrator, and whether I am assured that the union or the grievant truly will not be prejudiced in any way by the introduction of the evidence "for what it's worth." If this is the case, I can confidently tell the union representative and the members in a caucus, "Don't worry about it. It means nothing. We can disregard it. It won't affect the decision." If I do not have that confidence in the arbitrator, and especially if the relationship between the union and the employer is marked by distrust, power imbalance, or a predominant inability to resolve problems short of arbitration, then I will resist admitting evidence more vigorously.

In the context of a poor relationship, or with an arbitrator whose reliability is questionable, the admission of evidence "for what it's

worth" results in all of the negative consequences commonly recognized. Hearing time is prolonged by additional questioning of more witnesses or continuances to respond to matters that should have no consequence. This, of course, results in increased costs. For all concerned, the participants are distracted from the critical and dispositive factual and legal disputes. To the degree that this practice reflects an arbitrator's not taking responsibility for the hearing, it creates uncertainty for the participants on both sides. In an atmosphere permeated with suspicion and hostility, admitting evidence "for what it's worth" heightens animosity and hard feelings.

The debate format for this panel presumes that unions advocate admission of "junk" evidence not relevant or material. I dispute that presumption. In my experience, and in the experience of other attorneys in our office with whom I spoke in preparation for this panel, employers more frequently seek to introduce evidence that should not be admitted. This is true in both discipline and contract interpretation cases.

"Worthless" Evidence in Disciplinary Cases

Without reciting authority, we can all agree that the employer bears the burden of proof and the burden of going forward to establish "just cause" for discipline. The existence of "cause" must stand or fall on the reasons known to and relied upon by the employer at the time of the disciplinary action. The arbitrator must decide whether there was "cause" for the discipline as charged in the discharge letter or disciplinary notice. The issue of whether there was just cause must be framed by the content of that discharge notice. Employer efforts to expand the reasons for the discharge are common, and too frequently allowed. Employer evidence of past discipline not set forth in the discipline notice is frequently admitted. Testimony and documents about past misconduct or failure of performance that was not the subject of prior discipline is offered and admitted much too frequently, "for what it's worth." None of this evidence should be admitted. Period.

I agree that prior discipline not set aside by grievance or arbitration may be admitted, if referenced in the discipline notice, to establish awareness that the behavior, which is the subject of the present discipline, is wrong. It also may be admitted to show similar past misconduct for progressive discipline analysis, or to affect the remedy if the current misconduct is proven. This assumes that

there is no contractual prohibition or limitation as to the time or type of discipline that can be relied upon. The only admissible evidence about prior discipline is the disciplinary write-up, whether it be a warning or suspension, and any board of adjustment decision or settlement document ultimately resolving the discipline. Any embellishing testimony, for purposes of further description or amplification, is improper.

If prior discipline is not set forth and relied upon in the discipline letter, then it must be rejected.[1] This is a very important issue, both for the parties' relationship and for the union as an institution. The union has to decide whether to take a case to arbitration, incur costs, and risk a loss. It has to base its decision on an assessment of the merits of the grievance. If the employer discharges an employee for some act of serious misconduct (without reliance upon past performance or misconduct) and the union judges that the employer cannot carry its burden to prove the level of discipline imposed then its entire evaluation process is sabotaged if the employer can supplement its case with matters not initially alleged as reasons for the discharge. This is perceived by the union as a double cross and a betrayal. It is very damaging to the relationship. It also creates great uncertainty for the union in fulfilling its duty of fair representation.

I support this argument with its corollary. The union side must live with prior discipline not set aside, even though that discipline may have been wrong or excessive, and even though the grievant may not be culpable in any way. This can occur because the union cannot financially afford to arbitrate every warning or suspension, including those imposed without cause. Alternatively, the prior discipline may stand because the union was less than fully effective in timely pursuing a grievance. The union and the grievant must "live with" that prior discipline even if its very existence on the record can and does cause considerable tension and bad feeling on the union's side. The union cannot present evidence that the underlying facts should be disregarded or minimized.

Likewise, if discipline has not been imposed in a timely fashion, using the disciplinary penalties and procedures established for

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[1]Discipline notices often refer to a "pattern of prior poor performance" or some other vague reference. Even with such language, the employer must not be allowed to offer evidence of prior misconduct, poor performance, or reports of impropriety that did not result in discipline if the purpose of admission is to establish progressive discipline or to affect the remedy.

that workplace, then for purposes of the arbitration at hand the alleged past wrongdoing must be disregarded. Past rule violations or misconduct that went undisciplined must be excluded from the arbitration record. Anything else is an indefensible double standard.

For the individual grievant, the admission of improper evidence causes fear and extreme unease. Moreover, the admission of such evidence makes it difficult for the union advocate to explain what the case is about. Explaining to a grievant what is proper and improper evidence is close to impossible when that grievant has been smeared with hearsay reports of bad attitude, improper conduct, etc. The union loses all credibility in its effort to prepare and present an effective and focused case. Back at the workplace, the union is described as either ineffective, or "in bed with the employer."

To summarize, a union evaluates a case based on what is alleged in a discipline letter. It decides whether or not to arbitrate, consistent with its duty of fair representation, based on the allegations set forth in a discharge notice. Matters not set forth in such documents are, by definition, not "relevant." This improper evidence is very prejudicial to the arbitrator's opinion of the grievant. It does have persuasive effect. It can almost never be effectively neutralized. It should not be admitted "for what it's worth."

Evidence in Contract Interpretation Cases

In a contract interpretation case, one basic question for the arbitrator to decide is the meaning of the contract language at issue. If the language is clear and unambiguous, then extrinsic evidence is neither necessary nor appropriate. After all is said and done, most experienced arbitrators examine the agreement in its totality and decide for themselves what they think it means.

Nonetheless, "bargaining history" evidence is offered and admitted in most contract dispute arbitrations. The purpose of this evidence is to assist the arbitrator in carrying out what I describe as the "mythical task" of determining "the intent of the parties" in drafting the particular language. The task is "mythical" because intent is by definition a subjective state of mind. The people who bargained the language, whether it be the negotiators for each side or the other party participants, had no real mutual intent. Each side negotiated for directly opposite results. As a matter of reality,

mutual intent is either disputed or never existed in the vast majority of contested cases actually arbitrated. Thus, the word "intent" is a fiction.

For all of these reasons, the "law of arbitration" is quite clear that admissible "bargaining history" evidence may be (1) written proposals exchanged between the parties at the bargaining table, (2) contract provisions bargained both before and after the disputed language, (3) what was said by participants at the bargaining table on the record about the proposals, and (4) on occasion, documents or presentations advanced to either the union or to management about the meaning of the language in preparation for ratification or approval. Admissible evidence is limited to open communication between the parties. The so-called "intent" is inferred from the bargaining, not from the thoughts or opinions or emotions of the participants.

However, this principle is often disregarded. How many times have you heard variations of the following questions:

- "What is your understanding of the meaning of this provision?"
- "What did you intend when you made that proposal?"
- "What was the intent of your agreement on Article _____?"
- "What did you believe that the union meant when it made its proposal on Article _____?"
- "Would the union / company have agreed to Article _____ if it understood that the (other party) was going to take its present position in arbitration?"

An objection made to any of these questions should be sustained. It does not matter whether the improper question is asked of a union representative, a rank-and-file leader, a lawyer negotiator, or the president of the company. My reasoning for this position is not based on the litigation model that the strict rules of evidence should be adhered to in order to maintain the formality and regularity of the proceedings. This is a fundamental collective bargaining issue. Arbitration is explicitly an extension of that bargaining because the parties are directly testifying about it. If an employer at arbitration claims an "intent" or meaning that was not articulated at the bargaining table, that employer is acting in bad faith. Although paragraphs would be necessary to thoroughly develop this line of thought, please accept that allowing improper bargaining history testimony from either side is damaging to the relationship. I uniformly and rigorously argue against its admis-

sion "for what it's worth." I do my best to educate union witnesses about what is competent evidence, and to ask questions in proper form.

What About Fairness?

As panel members, we were urged to address in our opening statements whether we as advocates want you as arbitrators to establish and implement your sense of fairness based on the needs and desires of the advocates, the other party representatives, or the grievant. Speaking for the union side, my simple answer is "everybody." On the union side there are several "constituencies": the union advocate (who may be an outside lawyer), the union representative, the rank-and-file leadership, the grievant or grievants, and union member witnesses. Although the union advocate may be experienced and knowledgeable, others present in the room may be attending their first arbitration. The union advocate may be the individual who selected you, and who may determine your future acceptability, but everyone is important to the continuing collective bargaining process and to the strength and continuing viability of the union. Reports will be given to employees back at the workplace. The day will be discussed, oftentimes in great detail. "How did the union do?" "Is it worth the time and potential risk to side with and participate in union activities?" Those present must have some understanding of what happened and why.

Although the response to objections may be clear to you and to some in the room, I urge you to take the time and effort to explain why you are admitting or not admitting certain evidence. Explain why the evidence of undisciplined allegations cannot be admitted into evidence. Explain why the subjective state of mind of a participant in the collective bargaining is not admissible. This explanation may assist the advocate's understanding, but equally importantly, it will benefit others in the room.

I have one final comment related to the revitalized American labor movement described by John Sweeney[2] during your last annual meeting. The emphasis on organizing new members may have an impact on arbitration under established collective bargaining relationships. First, if the most able and experienced union

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[2]Sweeney, *Distinguished Speaker: Organizing for Our Future—We Are All Strawberry Workers*, in Arbitration 1997: The Next Fifty Years, Proceedings of the 50th Annual Meeting, National Academy of Arbitrators, ed. Najita (BNA Books, 1998), 22.

representatives are shifted to organizing work, then newer and less experienced union staff will have increased responsibility for contract administration. If substantial amounts of local union budgets are shifted to new organizing, this will require placing greater responsibility on stewards and rank-and-file leadership to file, process, and even arbitrate grievances. If this substantial transformation of the labor movement takes place in the next 10 years, workers will have increased responsibility for administering and enforcing their own collective bargaining agreements. This will require a tremendous education job for the labor movement. It will also require your patience, understanding, and good judgment in carrying out your responsibilities as arbitrators, a role that you well understand.

II. MANAGEMENT PERSPECTIVE

JUDITH DROZ KEYES*

The rules of evidence do not emanate from anyone's desire to bureaucratize or overly formalize hearings. Rather, they have evolved from principles of fairness and reliability. Recognizing fully that labor arbitrators are more savvy than your average judge or juror about such matters, nonetheless there is little reason to think it any more fair to admit irrelevant evidence in an arbitration hearing than to do so in any other forum. Nor is there much reason to consider hearsay evidence any more reliable in arbitration than in a court trial.

In 1967, the Chicago Area Tripartite Committee of the National Academy of Arbitrators made the point in these words:

> We believe it is fundamental . . . to the proper conduct of an arbitration hearing that the arbitrator . . . be familiar with and fully understand the rules of evidence. These rules by and large govern what evidence is to be admissible and the weight to be attached to evidence. The rules are based on many generations of judicial experience. They have as their primary objective the search for truth and generally . . . to remove confusion, irrelevancy and manufactured facts. The significant consideration to bear in mind in relation to these rules is that they all have an underpinning of reason. They are not whimsical or arbitrary. Their

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> objective is to encourage the process of unemotional and objective reasoning with the sole purpose to get at the truth.
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> It has been suggested that properly understood legal rules of evidence have their foundation in reason, common sense, and necessity. . . . It is difficult to imagine that the legal rules of evidence which have evolved over centuries could not yield helpful suggestions for use by arbitrators and participants in arbitration cases.[1]

Labor arbitrators commonly admit into the record irrelevant evidence and hearsay evidence—evidence I will label "improper." At the risk of offending this distinguished audience, the reasons arbitrators admit this evidence seem to me to range from, at the one extreme, not knowing the rules of evidence, to, at the other extreme, a conviction that their sophistication and wisdom will allow them to sift efficiently through a bloated, unreliable record, so why worry about it. In the middle, I suppose, is the notion that one or both parties or the grievant will feel more satisfied, more like they have "been heard," if all the proffered evidence is allowed in, regardless of its impropriety.

Sometimes, the arbitrator admitting improper evidence simply overrules the objection, declaring the evidence to be sufficiently probative or sufficiently reliable to satisfy the arbitrator's sense of propriety. Other times, the arbitrator overrules the objection and allows the evidence "for what it is worth." While implying by so stating that the evidence is not worth much, arbitrators in this situation seldom define what the improper evidence is considered to be worth, leaving both the proponent and the opponent to wonder.

Again, to quote the Chicago Tripartite Committee, "Parties have a right to know what general standards an arbitrator uses in this critical determination of *what evidence is worth*."[2] I submit that if an arbitrator admits improper evidence into the record over a party's objection, the arbitrator should always define on the record what the evidence is considered to be worth. The arbitrator should explain to all present, on the record, whether the evidence will be accorded full weight and, if not, to what use the evidence will be put.

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[1]Problems of Proof in Arbitration, Proceedings of the 19th Annual Meeting, National Academy of Arbitrators, ed. Jones (BNA Books 1967), 89,246 (quoted in Hill & Sinicropi, Evidence in Arbitration, 2d ed. (BNA Books 1987), 6, 7).

[2]*Id.* (emphasis added).

For example, where the disputed evidence is hearsay—testimony offered for its truth by someone not a party to the event—the arbitrator may explain that the hearsay testimony will be received and that, if it is not disputed or refuted by proper evidence, it will be accorded its full weight. But if it *is* disputed with proper evidence, it will be accorded *no* weight. What it will be worth, in other words, is all or nothing.

Another example. If the disputed evidence concerns unrelated misconduct by the grievant occurring long ago, arguably irrelevant evidence, the arbitrator may admit it with the explanation that its worth will be limited to the purpose of offsetting the otherwise positive implication of the grievant's seniority, and that it will not be used for the purpose of evaluating the just cause for the discipline that is the subject of the arbitration.

I do not suggest that arbitrators should be overly rigid or zealous in excluding evidence that is even marginally relevant, or hearsay evidence that even arguably comes within one of the many modern exceptions. But evidence that is irrelevant, or hearsay evidence that has none of the indicators of reliability that would justify its admission, should not be admitted "for what it is worth." Such evidence has been determined to be worthless in our primary dispute resolution system. In the time-honored, time-honed alternative dispute resolution system of labor arbitration, when this worthless evidence is admitted, the arbitrator owes it to the parties and to the grievant to explain what worth it will be deemed to have.

III. NEUTRAL PERSPECTIVE

THOMAS T. ROBERTS*

Precisely 18 years ago this coming week, I rose at the National Academy of Arbitrators meeting in Los Angeles to challenge then-president Clare B. McDermott who was speaking on the topic of "Should Arbitration Behave as Does Litigation?"[1] The impertinent remark I addressed to the speaker was, "So you too are one of those lazy arbitrators who take nearly everything for whatever it may be worth."

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[1]McDermott, *The Presidential Address—An Exercise in Dialectic: Should Arbitration Behave as Does Litigation?*, in Decisional Thinking of Arbitrators and Judges, Proceedings of the 33d Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1981), 1.

Seven years later, at the annual meeting in New Orleans, I delivered a few remarks in support of limiting the arbitration hearing to what is relevant and what is material.[2] I now stand before you to repeat the same message. Please forgive the redundancy.

The approach I continue to advocate is founded upon concepts of economy: (1) an economy in hearing time otherwise wasted on the making of a record containing irrelevant or immaterial evidence; (2) an economy in time both before and after the hearing devoted to the research and briefing of material that will subsequently be found to be outside the inquiry of the arbitrator, but only upon receipt of the award; and (3) an economy in the fee of the arbitrator who may while constructing the award, by proclivity or through perceived need regale the parties with his or her analysis of irrelevant and immaterial portions of the record and/or the briefs.

These observations should not be construed as an endorsement of interference on the part of the arbitrator in the orderly presentation of a case. In the absence of an objection to proffered evidence, the arbitrator should stay out of the fight and permit the parties to make their own record. When an objection is advanced by an advocate, however, an opportunity is presented for clarifying the issues being tried. The advocate who objects to proffered evidence should be put to the task of stating the grounds for the objection while the proponent of the evidence should be required to state the reason for its admissibility. The arbitrator should then fully explain the basis for the ruling on admissibility. In doing so, the arbitrator defines and narrows the focus of the proceeding to that which is material and thereby guides the parties to direct their advocacy to the evidence on which the award will ultimately rest.

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[2]Roberts, *Memory and Searching for the Truth: II. Evidence: Taking It for What It's Worth*, in Arbitration 1987: The Academy at Forty, Proceedings of the 40th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1988), 112.