Chapter 14

# ARBITRATORS AND THE RULES OF EVIDENCE

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## Introduction

I think the planning committee decided to invite me to speak when someone heard that I had an article accepted by the Loyola Law Review[1] that questioned some of the statements in several articles in *The Proceedings* of the Academy written by much more widely known members of the Academy than I on the subject of the Rules of Evidence[2] in labor arbitrations.[3] The major thrust

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[1]54 Loy. L. Rev. 297 (2008).

[2]The Rules of Evidence are a part of the law of both state and federal judiciaries. For the sake of convenience, only the Federal Rules of Evidence shall be referred to, hereinafter as the "Rules of Evidence."

[3]Earlier articles on this general subject include: Winograd, *Going Beyond "Taking It for What It Is Worth"—Are There Basic Principles of Evidence in Labor Arbitration?*, in Arbitration 2005: The Evolving World of Work, Proceedings of the 58th Annual Meeting, National Academy of Arbitrators, eds. Gerhard & Befort (BNA 2006), at 249. *See also* Roberts, *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), at 112; Roberts, *Ten Commandments for Advocates: How Advocates Can Improve the Process*, in Arbitration 1992: Improving Arbitral and Advocacy Skills, Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1993); Boone, et al., A Debate: Should Arbitrators Receive Evidence "For What It's Worth?", in Arbitration 1998: The Changing World of Dispute Resolution, Proceedings of the 51st Annual Meeting, National Academy of Arbitrators, eds. Briggs & Grenig (BNA Books 1999), at 9.

Several arbitrators have stated that they are capable of deciding cases without reference to the Rules of Evidence in their awards. Arbitrator Imes articulated the notion in *Wisconsin Dep't of Health & Soc. Servs.*, 84 LA 12 (1985): "In accepting it, however, the arbitrator is expected to have the expertise and experience to properly evaluate the evidence and to accord it the proper weight dependent upon the corroborating support for the evidence and the circumstances surrounding it." *Id.* at 222. In *Newark Airforce Station*, 87 LA 70, 73 (Van Pelt, 1985), the arbitrator said: "While a certain degree of procedural requirements are necessary in the interest of retaining order in an arbitral proceeding, it is well established that an arbitration hearing is held in the interest of obtaining the necessary facts for determination of the issues. Rigid adherence to the rules of evidence is not considered necessary. While various arbitrators follow different procedures in conducting their hearing, this Arbitrator has established a policy of permitting the parties to conduct their case without interference on the part of the Arbitrator. Therefore, evidence in the form of oral testimony or documentary exhibits is usually admitted subject to a later determination as to whether or not they will have any weight." Elkouri & Elkouri makes the argument that arbitrators should use the same standards as administrative law judges (ALJs) in ruling on evidentiary matters. It is stated: "Under the APA

of that piece was that those involved in arbitration—both arbitrators and advocates—would do well not to regard the Rules of Evidence as a hindrance to be avoided in presenting and deciding cases. Rather, they should use the Rules of Evidence as a tool to help them make more effective presentations and to write higher-quality decisions. Today's talk is only about how arbitrators can use the Rules of Evidence to their advantage in conducting hearings and writing decisions.

Perhaps a brief summary of some of those ideas in the earlier proceedings of the Academy is in order. One former President of the Academy referred to the Rules of Evidence as a "straight jacket . . . to be avoided in labor arbitration cases." Several distinguished Academy Members have advanced various reasons why this is so. These reasons include: "An arbitrator does not need the protective insulation" of the rules. The Rules of Evidence are "inimical to the purpose of arbitration." Using the Rules of Evidence in hearings inhibits witnesses in "getting things off their chests." You have heard most of this before, so I won't belabor the matter further, other than to say that these kinds of statements made perfect sense at the time they were made. However, I think that given the practical and legal environment within which we work today, those ideas may not be the best ideas for arbitrators to use in hearing and deciding cases. Today we work in an environment with many federal and state statutes that may have an impact

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[Administrative Procedure Act] most, if not all, evidence is admitted, but given only such weight, if any, as the hearing officers, that is, administrative law judges (ALJs), in their discretion and judgment believe appropriate. Equally with professional arbitrators, and unlike lay jurors, ALJs are deemed to possess the training and experience necessary to evaluate the reliability of proffered evidence and to disregard unsubstantial, unreliable or fairly prejudicial evidence in formulating their decisions." This is really the "let it in for what it's worth and sort it out in the decision" approach. Others have argued that this approach can lead to lengthy, contentious, and confused hearings.

Aaron, *Some Procedural Problems in Arbitration*, 10 Vand. L. Rev. 733, 743 (1957); Bornstein ed., Labor and Employment Arbitration, §5.01. The author doubts that the parties generally enter a hearing expecting that the arbitrator will not pay any attention to the Rules of Evidence. When an arbitrator walks into a hearing room and two lawyers hand him their business cards, I think the arbitrator can expect objections on evidentiary matters. At least in my experience, non-lawyer business agents and non-lawyer human relations advocates are not bashful about objecting to evidence that hurts their case. Clearly, an arbitrator should not impose the Rules of Evidence upon the parties against their wishes. An arbitrator should have no difficulty learning the parties' expectations in this regard. It is not at all uncommon for one party or the other to object to evidence introduced by the other side early in a hearing. When this happens, a simple way for the arbitrator to respond to an objection is to ask what the practice of the parties is. The objecting party will likely say something like, "We have always excluded hearsay evidence."

The author's experience with advocates has been fairly consistent. Quite properly, they will argue for the use of the Rules of Evidence when it suits their purposes and against the use of the Rules of Evidence when it does not.

on the way we analyze a case, or our decisions may require a company or a union to violate a federal or state statute. The parties may expect us to pay some attention to the Rules of Evidence. Indeed, some labor contracts specifically deal with evidentiary issues. For example, the contract in *Misco* "forbade the arbitrators to consider hearsay evidence."[4] *Misco* could have been presented to the arbitrator solely on the testimony of a company official who said that Cooper admitted he was arrested for possession of drugs, with the official saying he went to the courthouse and got an uncertified copy of Cooper's guilty plea and a copy of the police report, both of which were submitted to the arbitrator. On this record, many arbitrators would have to rely on what they consider hearsay evidence prohibited by the contract. If an arbitrator upheld the discharge on that record, I will let you argue whether the arbitrator was dispensing his or her "own brand of industrial justice" within the meaning of *Enterprise Wheel*[5] and *Garvey*.[6]

Today I want to talk about how the use of the Rules of Evidence can help us conduct fairer hearings and write better decisions. When I started thinking about how I conduct hearings and write decisions it occurred to me that I bring a lot of organized knowledge from different disciplines to bear in doing my work. I suspect most of you do the same thing. A person knowledgeable of the literature in labor-management relations would likely bring that to bear in many different kinds of labor disputes. Surely an arbitrator with an economic background would bring some of that knowledge to bear in deciding the proper reading of an ambiguous contract clause where the parties were in dispute over the economic impact of a decision on the company and the employees. I frankly do not see how an arbitrator who knows the substantive law

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[4]United Paperworkers v. Misco, Inc., 484 U.S. 29, 39 (1987). The labor agreement in *City of Okmulgee, Oklahoma*, 119 LA 1227 (Robinson, 2004), said: "The hearing shall be informal and the rules of evidence prevailing in judicial proceedings shall be persuasive but not binding." *See also* City of Edmond, 118 LA 1094 (Bankston, 2003); Carl & Hayden Veterans Med. Ctr., 118 LA 258 (Wyman, 2003); City of War Acres, 115 LA 335 (Woolf, 2000); Exxon Pipeline Co., 109 LA 951 (Abercrombie, 1997); State of Nebraska Dep't of Corr. Servs., 107 LA 910 (Imes, 1996). *County of San Benito*, 113 LA 231, 232 (Pool, 1999), contained an unusual provision. It read: "General rules of evidence shall apply. The hearing need not be conducted according to the technical rules of evidence." In *Barton Center, Senior Health Mgmt., LLP*, 121 LA 249, 250 (Kravit, 2005), a side agreement between a nursing home and the union stated: "The Employer shall investigate each and every charge of patient abuse. In the event the Employer determines the abuse was witnessed and has in its possession at least one written statement from a competent first hand witness, of the alleged abuse, or from a competent abused patient, the Employer shall terminate the employee."

[5]Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

[6]Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504 (2001).

of sexual harassment or Title VII could resolve a dispute under a contract with language that parallels Title VII without being influenced by the doctrines that have been developed there. I suspect that many of us refer to concepts such as discrimination, sexual harassment, or legitimate, nondiscriminatory reasons for treating employees differently, or bona fide occupational qualification (BFOQ), as those concepts have been developed either by courts or the Equal Employment Opportunity Commission, when we write arbitration awards. I do not see how as "contract readers" we can ignore some of the works of Corbin, Farnsworth, and Williston. Similarly, I do not see how we can ignore the National Labor Relations Act (NLRA) when interpreting a contract that says that the company will bargain with the union before contracting out bargaining unit work. I think we do rely on such bodies of knowledge, whether found in public law or elsewhere, in interpreting contracts, and it is probably beneficial.

I wonder about a parallel question. How can we not rely on what we already know from whatever source in writing our decisions? I suspect that most of us think that relying on our own experiences and outside knowledge from whatever source is a good thing. I rather suspect that the parties expect us to do this. I suspect that this is one thing that is discussed when company and union representatives have meetings in which they evaluate each of us. Because we do rely on these other bodies of knowledge in conducting hearings and writing decisions, why should we refuse to rely on the Rules of Evidence if they can help us?

I need to make one other point before getting into the details of my talk. I have taught the course in Evidence at my law school for more years than I care to admit. I am fairly familiar with the Rules of Evidence that come up in arbitrations on a recurring basis. I am not suggesting that someone who is unfamiliar with the Rules of Evidence must go out and learn them in order to run a good hearing. I am not an authority on Personnel Administration, Human Resource Management, Constitutional Law, or Title VII. I still get called by the Federal Mediation and Conciliation Service (FMCS) and the American Arbitration Association (AAA) about as much as I care to. My point is simply this: If you are familiar with the Rules of Evidence and they help, use them. If you are not, you can still run a good hearing and write a good decision. You would not be in this room today if you could not.

## Basic Argument

It is too late in the day to argue that arbitrators must or should always apply the Rules of Evidence in labor arbitration. The U.S. Supreme Court has said they do not too many times.[7] However, few have ever seriously suggested that arbitrators are prohibited from considering the Rules of Evidence or using them as a guide or a point of reference in ruling on the admissibility of evidence in labor arbitrations. Occasionally, a labor agreement prohibits such use. Nor are we prohibited from considering the Rules of Evidence in evaluating or determining the weight to be given various pieces of evidence, which is actually different from what jurors do. In fact, it is believed that many arbitrators pay more attention to the Rules of Evidence than is suggested by referenced literature in *The Proceedings* of the Academy opposing their use.

To the extent that the purposes of the Rules of Evidence are consistent with the goals of labor arbitration, it would seem to make good sense to use them, unless there is a very good reason for not doing so. Writers on the law of evidence have articulated several reasons for the existence of those rules. For example, the hearsay rule exists partly because of the long-held belief that jurors cannot properly evaluate statements made by persons who do not testify in a trial or hearing. Rule 402, the rule against the receipt of irrelevant evidence, has as one purpose controlling the length of a trial and keeping it focused on the disputed issue. Rule 404(a), which generally prohibits the introduction of character evidence to prove action in conformity therewith, has as its purpose keeping a trial focused on the central issue and keeping a jury from basing its decision on a party's good or bad character, unless character is substantially relevant.

The Rules of Evidence also serve as substantive policies relating to the matter being litigated. The allocation of the burden of

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[7]Wigmore, Evidence, §4(e), at 239 states: "Wigmore believes that the Rules of Evidence do not and should not apply in arbitration." Very early in Chapter 5, §5.01, *Evidence in Arbitration*, in Bornstein, et al.'s Labor and Employment Arbitration, 2d ed. , the authors state that, "The parties typically enter this process with a clear expectation that their story will be allowed to unfold without the need to worry over common law exclusionary gambits invoked by advocates in a courtroom." Fairweather, Practice and Procedure in Labor Arbitration, begins its chapter on Rules of Evidence with the statement, "Labor arbitrators usually adopt a liberal attitude toward the admission of evidence." Perhaps the best known treatise on labor arbitration, Elkouri & Elkouri: How Arbitration Works, 6th ed. (Ruben ed., BNA Books 2003), at 341, states, "Unless directed by the contract, strict observance of legal rules of evidence is not necessary in arbitration."

going forward and the risk of nonpersuasion, as well as rules on presumptions, are examples of rules designed to move the hearing forward and to force the party who normally has access to the information to produce it. The notion in labor arbitration that the company bears the risk of nonpersuasion in discharge cases while the union bears that risk in contract interpretation is based on the same theory. Another reason for several rules in the law of evidence is to ensure accurate fact finding. The requirement of firsthand knowledge (Rule 601), the rule requiring authentication of documents and exhibits (Rule 901), and the best evidence rule (Rule 1002) are designed to ensure the accuracy of the evidence upon which a decision is based. These policies and goals of the law of evidence are consistent with the basic goals of labor arbitration. To the extent that the use of the Rules of Evidence produces more accurate fact finding or fair hearings, arbitrators should not consider them a hindrance. The Rules of Evidence I mentioned, as well as others, have a long history, much longer than the post-War Labor Board experience of labor arbitration in the United States. They have worked fairly well in the courts for a long time.

Another point I wish to advance is that the application of the Rules of Evidence in labor arbitration hearings in most instances will not exacerbate the problems articulated by the critics of the use of these rules. To the contrary, arbitrators could apply the Rules of Evidence and improve the process in the very areas of concern to opponents of such use. For example, a point frequently made by opponents of the use of the Rules of Evidence is that their application has a chilling effect, preventing lay witnesses from simply telling their stories as they understand them. This, it is said, is detrimental to the process and can actually make for a more hostile workplace. The responsive argument herein is that applying the standards, for example, contained in Rules 401–403 on relevance and Rule 602 regarding firsthand knowledge need not necessarily convert an informal arbitration hearing into a formal "federal trial."

A further contention is that arbitrators, by paying attention to the Rules of Evidence, can make better judgments regarding the appropriate weight to be given to a piece of evidence. This is different from the use of the Rules of Evidence in a jury trial. As noted earlier, one of the basic reasons given, at least by arbitrators, for not applying the Rules of Evidence in labor arbitration is that they were designed to prevent unsophisticated and inex-

perienced jurors from being misled. It is said that arbitrators are more skilled at weighing evidence than untrained jurors; therefore, evidentiary standards need not be applied. Although it may be true that evidentiary rules prevent a jury from ever hearing unreliable evidence, an arbitrator can apply these same standards in order to avoid relying on unreliable testimony. Furthermore, it will be argued that arbitrators are frequently in no better position to judge the believability of hearsay evidence or to evaluate the weight to be given to such evidence than a jury of laypersons. The remainder of this presentation attempts to make these basic points by referring to specific Rules of Evidence in the context of rather common factual situations arising in labor arbitration.

## Specific Applications

*Relevance*

Rule 401 of the Federal Rules of Evidence defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 402 states: "All relevant evidence is admissible. . . . Evidence which is not relevant is not admissible." Rule 403 permits a judge to exclude relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Rules 401, 402, and 403 are easy to apply. As an example of the use of the definition of relevance in arbitration, consider a discharge case in which the company is discharging a truck driver for having a preventable accident.[8] The company wishes to introduce evidence that five years prior to the current accident, the grievant was insubordinate to a supervisor who asked the grievant to drive an unfamiliar route. There is no other discipline in the grievant's file. On the previous occasion, the company suspended the grievant for five days. The union representative objects to the introduction of the evidence of insubordination on the ground that it is irrelevant. When this happens, the arbitrator might ask the following question of the company representative: "How does

[8] *See* Discipline and Discharge in Arbitration (Brand ed., BNA Books 1998), at 259–60, for the meaning of a "preventable accident."

proof of insubordination five years ago make it more probable or less probable that the accident for which the grievant was discharged was preventable?" Many of us would likely conclude that the insubordination was irrelevant on the issue of whether the accident was preventable. Such a question should not inhibit the company's presentation of its case. The company representative might respond that proof of the insubordination might not make it any more or less likely that the grievant had the preventable accident for which he was discharged, but it would be relevant on the issue of whether the grievant is a good candidate for reinstatement should the arbitrator find that the accident was preventable, yet the penalty of discharge was too severe. Such an exchange need not make a hearing stiff, formal, or hostile.

To some, the foregoing example might seem somewhat off the mark because opponents of the use of the Rules of Evidence often argue that it is generally the relationship between the parties, not just companies, that arbitrators are trying to assist or protect by letting witnesses get everything off their chests. Using the preventable accident example again, suppose the grievant says that the supervisor fired him because he "had it in for me." The company objects on the basis of relevance. How does it prevent the grievant from telling his story if the arbitrator asks the union advocate, "Explain how the supervisor 'having it in for the grievant' makes it more likely that the discharge was not for just cause or that the accident was not preventable?" Upon being asked the relevance of the supervisor having it in for the grievant, the grievant then responds, "The boss's wife left him for beating her, and then she and I were married." By focusing on what is relevant under Rule 401, the arbitrator now has more information upon which to base the decision, specifically the possible motive of the supervisor, as well as whether to receive or reject the evidence as relevant as would be the case without questioning why the proffered evidence was relevant. The arbitrator has not prevented the grievant from telling his story. Rather, the arbitrator now has a fuller picture of the entire relationship between the grievant and the supervisor. Rule 401 gives the arbitrator a very broad standard by which to determine the relevance of the evidence. Thus, there need not be tension between receiving all relevant evidence under the definition of relevance contained in Rule 401 and letting the grievant "get everything off his chest." I am sure that over the years I have used the definition of "relevant evidence" far more as a rationale or framework for overruling a relevance objection and admit-

ting evidence than keeping it out. The phrase "any tendency" is extremely broad. It would seem that whether a ruling on a relevance issue intimidates the grievant, inhibits a grievant in telling his story, or unduly formalizes the hearing is more the result of how the arbitrator handles the relevance problem than the application of Rule 401. The arbitrator's demeanor and attitude have more to do with intimidating the grievant and the stiffness or formality of a hearing than do the Rules of Evidence.

Moreover, the "let it in for what it's worth" approach in this situation may be inconsistent with most arbitrators' sense of fairness. In the discharge of a truck driver for having a preventable accident, one may ask whether it is fair for the company to introduce evidence that the grievant had been insubordinate in the past, did not pay his taxes, did not pay his child support, or was generally an unpleasant fellow. The concept of fairness cuts both ways. It would be equally unfair in the judgment of many of us for the union in this very discharge case to prove that the grievant's supervisor did not pay his taxes and was behind in his child support payments or was an unpleasant fellow, unless such evidence were relevant on some issue in the case.

If an arbitrator makes definitive rulings on relevance, then the parties are in a better position to understand what the arbitrator considers important.[9] The parties are entitled to know whether the arbitrator thinks that being unpleasant or failing to pay one's taxes or child support is relevant. This should be made known to the parties at the hearing, not first in the decision. If the parties do not know what the arbitrator considers relevant, they have no choice other than "throwing in the kitchen sink" in the hearing, closing argument, or brief. Furthermore, the "let it in for what it is worth" philosophy can be detrimental to the relationship of the parties in some types of disputes. Suppose a company fires the grievant for sexual harassment.[10] Stock defenses in sexual harassment cases are "trash the victim" and put on proof that the employer allows its employees to say and do most anything to each other. Companies typically respond in two ways, by "trashing" the grievant and by introducing proof that they closely police employee conduct. An arbitrator courts disaster by letting everything in "for what it is worth" in this situation. An unstructured

[9]Zack & Bloch, Labor Agreement in Negotiation and Arbitration (1998), at 49.

[10]Arbitrator Kelley discusses some problems of proof in a sexual harassment case in *Charter Commc'ns*, 114 LA 769 (2000).

hearing in this kind of case can damage morale in the plant, as well as create an atmosphere where harassment victims simply will not come forward.[11] I think that in this kind of case, everyone is better off if the arbitrator receives only relevant evidence and refuses to admit anything deemed irrelevant to the company's or the union's claims or defenses.[12]

Although arbitrators rarely cite Rule 403, it is believed that they frequently use the essence of the rule both in their hearings and in their analysis of the evidence in writing their decisions. Rule 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Although it is doubtful that most arbitrators would exclude relevant evidence at the hearing because the prejudicial effect substantially outweighs probative value, when evaluating the importance of evidence in making a decision, this standard can be helpful in deciding on the true importance of certain evidence. When an arbitrator has a question about evidence being confusing or misleading, the arbitrator should resolve that question at the hearing, if possible. Arbitrators frequently apply the concept of "undue delay, waste of time, and needless presentation of cumulative evidence." How often has an arbitrator said, "I understand your point, move on," or "Counsel, you don't need to beat that dead horse anymore"?

*Character and Habit*

Arbitrators should also find Rule 404 of the Rules of Evidence a valuable tool rather than an impediment. Rule 404(a) states in part: "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion. . . ." Rule 404(b) states in part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity there-

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[11]These kinds of concerns were considered by Arbitrator Hockenberry in *American Safety Rayon Co.*, 110 LA 737 (1998). *See also Metropolitan Transit Operations*, 106 LA 68 (Daly, 1966), where there was evidence that the complainant's car tires were slashed after she reported sexual harassment to management.

[12]Tim Bornstein, *Arbitration of Sexual Harassment*, in Arbitration 1991: The Changing Face of Arbitration in Theory and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators ed. Gruenberg (1992), at 143.

> with. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. …

Typical character traits include honesty, peacefulness, aggressiveness, and so forth. Rule 404 is counterintuitive because we tend to think that a person tends to act in conformity with his or her character. If a person is regarded as a peaceful person, then we tend to think that he would be less likely to start a fight than would an aggressive person. One of the major purposes of Rule 404 is to keep the hearing or trial focused on the major issues in dispute.[13] Doing so has a number of desirable consequences. It is fair to the parties. It forces the decision maker to resolve the case on the basis of the most relevant evidence. It is also more efficient in terms of keeping the hearing within manageable time limits.

In discipline cases, employers have a tendency to introduce as much of the grievant's disciplinary record and other evidence of the grievant's misconduct and undesirable traits as the arbitrator will allow. The arbitrator's first responsibility is to conduct a hearing in accordance with the terms of the contract. That is one reason I quoted from the *Misco* case in the introduction. Some contracts specifically deal with this issue. Thus, if the contract prohibits the introduction of discipline that occurred more than, say, one year prior to the present discipline, the arbitrator must apply that contractual provision. If an employer discharged an employee for a series of offenses or for a course of unacceptable conduct—the straw that broke the camel's back situation—the arbitrator is obligated to hear proof on all the conduct for which the grievant was discharged. Absent any contractual provision on the subject, Rule 404 provides arbitrators a framework for making admissibility decisions and for determining how to use whatever evidence they receive. If the character evidence is not substantially relevant, it is inadmissible to prove action in conformity with a particular character trait under Rule 404.

Return to the case of a truck driver who is discharged for having committed a dischargeable offense by having a preventable accident. Assume that the driver had a previous accident that the company initially thought was preventable, but, after intervention

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[13] 1 McCormick, Evidence, §186, 5th ed. (1999); Mueller & Kirkpatrick, Evidence, §4.11, 3d ed. (2003). The Federal Rules of Evidence do not define character evidence. It has been defined as "a general description of a person's disposition or of a personality trait such as honesty, temperance or peacefulness." Weinstein's Evidence Manual, Student Edition, §7.01, 6th ed. (2003).

and further investigation by the union, concluded was not and reinstated the driver. Also, assume that this truck driver had been insubordinate in the past. Under a "let it in for what it's worth" approach, the arbitrator would admit any evidence concerning the accident for which the driver was discharged, evidence of the previous accident, and evidence of the insubordination. Assume also that during the hearing, the grievant testified that the current accident was not preventable because the truck's brakes malfunctioned; that he was only six months from retirement; and that his wife had recently incurred large medical expenses. Under a "let it in for what it's worth" approach, with the arbitrator having given no indication at the hearing of the relevance of any of this evidence, the purposes for which it might be used, or the importance the arbitrator might attach to any of it, the parties would have no idea what rationale an arbitrator might use in reaching a decision. An arbitrator could rule that the company failed to prove that the present accident was preventable and reinstate the employee with back pay. The arbitrator could also rule that the employee had a preventable accident, but feel sorry for him, reinstate him without back pay, and put him in the company's warehouse for the remaining six months of his career. The arbitrator might conclude that the grievant was a reckless driver based on the two accidents and uphold the discharge. The insubordination, the driver's closeness to retirement, and his wife's health might or might not be factors in any decision the arbitrator might make.

If an arbitrator, on the other hand, elected to use Rule 404 as a guide in ruling on admissibility issues and in analyzing the problem in writing an award, the arbitrator would likely make a decision on whether the grievant's last accident was preventable based on the evidence related to that particular accident as opposed to his first accident.[14] The arbitrator would not use the evidence of the previous accident for any purpose other than possibly to prove that the grievant had knowledge of a company rule that drivers could be discharged for having preventable accidents, or some permissible purpose under Rule 404(b). In the criminal context, courts often comment that character evidence cannot be used to prove "pro-

[14]Mueller & Kirkpatrick, Evidence, §4.5, 3d ed. (2003). In *Smith's Dairy Products Co.*, 115 LA 184, 189 n.6 (Sharpe, 2000), the arbitrator said: "It should also be noted that the Grievant's record of problematic relationships with customers Meijers Supermarkets and Mifflin Market does not substitute for proof that he behaved improperly with the instant customer. See, for example, Rule 404(b) of the Federal Rules of Evidence. Of course, this evidence would be relevant to the appropriate penalty if the Grievant's misconduct at the Mart were established."

pensity to commit a crime."[15] The same is true in arbitration. The previous accident would not be used to establish a propensity to have preventable accidents. The arbitrator would also likely rule that the testimony concerning the wife's illness and medical bills, together with the grievant's length of service with the company, was irrelevant on the issue of a preventable accident.

If the arbitrator were applying a just cause standard as opposed to a specific rule calling for discharge for having a preventable accident, the arbitrator could rule that the grievant had a preventable accident, but in view of his long service with the company and his wife's medical bills, reinstate the employee.[16] Rule 404 gives the arbitrator a framework within which to think through these kinds of problems. It also gives advocates more specific guidance about how the arbitrator might use the evidence presented in the hearing. This seems preferable to receiving everything for what it is worth, with no one knowing how the arbitrator might use the various pieces of evidence. Keeping Rule 404 in mind forces the arbitrator to focus on what caused the accident for which the grievant was discharged, as opposed to a generalized conclusion that the grievant is a reckless driver, or feeling sorry for the grievant because of his age or his wife's poor health. That focus should help the arbitrator in writing an opinion.

It will be recalled that one of the purposes of the Rules of Evidence is to provide a framework for fair trials. The use of Rule 404 can result in a hearing or decision that is "fairer" than one in which both sides are permitted to introduce evidence on whatever subject they wish, not knowing how it may or may not be used by the arbitrator. Many would think that reinstating a reckless driver because he was close to retirement is unfair to a company, or that discharging a driver for having a minor preventable accident, while taking into account past insubordination, is unfair. It is also worth noting that Rule 404 provides an arbitrator with a useful device for keeping a sexual harassment hearing within reasonable bounds.

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[15] Mueller & Kirkpatrick, Evidence, §4.11, 3d ed. (2003).
[16] *See* Ball-Icon Glass Packaging Corp., 91 LA 1 (Volz, 1991).

## Hearsay

Most arbitrators receive some hearsay testimony and documentary evidence containing hearsay in their hearings.[17] Some do it without question. Others receive it, then evaluate it in light of other evidence.[18] There are also arbitrators who refuse to base their decisions solely on hearsay.[19] Opponents of the use of the Rules of Evidence in arbitration cite the hearsay rule as a prime example of why Rules of Evidence are ill-suited for arbitration.[20] It is said that the hearsay rule is complicated, it keeps much highly probative evidence out of the record, and it is bad for industrial relations. Moreover, arbitrators are perfectly capable of distin-

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[17] Elkouri & Elkouri: How Arbitration Works, 6th ed. (Ruben ed., BNA Books 2003), at 317, 366–68.

[18] *See* Ambassador Convalescent Center, Inc., 83 LA 44 (1984); Exonmobile Refining & Supply, 120 LA 1734 (Eisenmenger, 2004).

[19] Lucas County Auditor's Dep't, 119 LA 1063 (Bordone, 2003), quoting Elkouri & Elkouri, *supra* note 18 at 450–51: "Evidence of a hearsay character such as this is often allowed to be presented at arbitration hearings, but is carefully weighed, once admitted, for its probative value. 'In many cases very little weight is given to hearsay evidence, and it is exceedingly unlikely that an arbitrator will render a decision supported by hearsay evidence alone.'" Lancaster, Ohio Bd. of Educ., 114 LA 673 (Feldman, 2000). *See also Georgia Pacific Corp.*, 86 LA 411, 416 (Clark, 1985), where the arbitrator said: "The only evidence submitted by the company regarding the behavioral effects of a given concentration of cannabinoids in an individual's urine was Andrews' testimony regarding conversations with persons not present a the arbitration hearing. Labor arbitration is not bound by the strict rules of evidence, of course. But Andrews' testimony regarding conversations with experts whose opinions were not subject to cross-examination is entitled to virtually no weight.").

[20] Rule 801 provides, in part:

The following definitions apply under this article:

(a) Statement. 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.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is 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.

(d) Statements which are not hearsay. A statement is not hearsay if—(1) Prior Statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or (2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.

guishing reliable hearsay from unreliable hearsay.[21] These propositions will be questioned in the context of the specific examples discussed below. I will concede that there are applications of the hearsay rule that are difficult and tricky. I will also concede that there may be situations in which a party may have considerable difficulty getting witnesses with firsthand knowledge to the hearing. However, even conceding such points, using the hearsay rule and taking the reasons for it into account can be very helpful in determining whether to receive hearsay evidence and the weight to give it, if received.

Companies and unions seek to introduce hearsay evidence in a wide variety of cases. The importance of the hearsay evidence to the ultimate result varies greatly from case to case. In a case involving the discipline of an employee for absenteeism, the company and the union may wish to introduce doctors' statements. In the case of customer complaints, the company may need to

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[21]Fairweather, Practice and Procedure in Arbitration, 4th ed. (1999), at 332; Wright, *The Uses of Hearsay in Arbitration*, in Arbitration 1992: Improving Arbitral and Advocacy Skills, Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1992), at 289. Elkouri & Elkouri: How Arbitration Works, 6th ed. (Ruben ed., BNA Books 2003), at 366 states:

The evidentiary value of the hearsay statement depends on the credibility of the declarant, who is, however, not subject to cross-examination and whose perception, memory, and truthfulness cannot be tested. For this reason hearsay evidence is excluded from jury trials unless the hearsay falls within one of the "numerous exceptions where 'circumstantial guarantees of trustworthiness' justify departure from the general rule."

Arbitrators are not in the position of lay jurors; they are expected to possess the cultivated judgment necessary to fairly determine the testimonial trustworthiness of the hearsay in question, and whether, in the absence of the ability to cross-examine the declarant, the opposing party has a fair opportunity and means to counter the testimony in an appropriate fashion.

Evidence of a hearsay character is often presented at arbitration hearings. Arbitrators will admit such evidence, but usually only after evaluating the reliability of the evidence. Where the reliability of the evidence is particularly questionable, arbitrators will exclude it. If the evidence is admitted, many arbitrators qualify its reception, because of the lack of opportunity for cross-examination, by informing the parties that it is admitted only "for what it is worth."

In *Ambassador Convalescent Ctr.*, 83 LA 44, 46 (1984), Arbitrator Lipscon accurately summarized the reasons for receiving hearsay in arbitrations: "There are good reasons for accepting hearsay evidence in a labor arbitration proceeding. Arbitration is generally informal and the participants are frequently nonlawyers, who can not be expected to handle cases on the basis of legal technicalities, including the Rules of Evidence. Facts are determined, not by a jury, but by an arbitrator, who is expected to have the experience and expertise to evaluate evidence and to accord the appropriate weight to hearsay. Frequently, hearsay is the only evidence available in the work place setting, and the automatic excusion of same could result in an incomplete record and a failure to accomplish a just result. On the other hand, an arbitrator must carefully bear in mind the inherent weaknesses in hearsay evidence, particularly in the context of a discipline case where the employer has the burden of proving just cause."

introduce a statement of a customer who is not willing to testify.[22] If the victim in an assault case or a sexual harassment case fails or refuses to testify, the company will be faced with a serious hearsay problem. Discharges or discipline based on reports of investigators frequently involve difficult hearsay issues.[23] Similarly, in patient abuse cases, the abused patient who complained to a relative about mistreatment may be either dead or incompetent at the time of the hearing. Before analyzing the hearsay rule and its exceptions individually, some discussion about how arbitrators and legal scholars have viewed hearsay is needed.

The authors of several of the classic treatises on evidence have enumerated what have come to be called the "hearsay dangers" or "hearsay risks."[24] They argue that hearsay is not reliable because the trier of fact (the jury or the arbitrator) cannot judge, firsthand, the perception, narration, and recollection of the declarant, the one who observed and initially spoke or wrote about an event.

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[22]In *Cub Foods, Inc.*, 95 LA 771, 772 (Gallagher, 1990), which concerned a discharge based, in part, on customer complaints, after noting that the Rules of Evidence do not apply in arbitration, the arbitrator explained why he considered the customer complaints reliable hearsay: "First, from the content of the hearsay descriptions of the grievant's conduct and from the circumstances in which those descriptions were reported to management witnesses, I find them to be intrinsically reliable. In other words, there is nothing in the content of the customers' complaints or in the circumstances in which the complaints were made that raises doubt about the reliability or veracity either of the customers or of the reporting witnesses. Second, and most important, there is little conflict between the hearsay evidence describing the grievant's conduct and the description of that conduct given in the grievant's testimony. For the most part, he has acknowledged that he made the statements attributed to him by the hearsay evidence."

In *Ramsey County, St. Paul, Minn.*, 88 LA 1103 (Miller, 1987), the employer transferred a deputy sheriff from a court bailiff position because he criticized a judge. The judge refused to testify. The arbitrator upheld the grievance, stating: "The general rule in arbitration, and the one to which the Arbitrator subscribes, is that hearsay testimony may be admitted in some circumstances where the customary rules of evidence proceedings would exclude it. Arbitrators generally admit such evidence but qualify its reception by informing the parties that it is admitted only 'for what it is worth.'…Hearsay may lend a degree of support to facts otherwise established by first-hand competent, reliable and probative evidence. But to rely absolutely and exclusively on pure hearsay (no testimony by the judges) is a proposition far beyond what the Arbitrator is prepared to accept, and one which is wholly unsupported by fellow arbitrators." 88 LA at 1107.

[23]In *Maurey Mfg. Co.*, 95 LA 148 (Goldstein, 1990), the company discharged the grievant for operating a game of chance in the plant. The company's case rested in part on the reports of an undercover agent. The arbitrator stated: "I have in several previous cases concluded that a discharge could not be sustained where the employer's uncorroborated evidence by an undercover agent or security officer was credibly denied by the employee, and the employer only countered that security employees have no motive to lie.…I recognize this is arbitration, and the strict rules of evidence do not apply. But the statements allegedly implicating the grievant cannot be considered trustworthy or reliable under these facts and the just cause standard so as to be given weight or credence. The statements were admitted into evidence, but my conclusion is that they were obtained under duress and thus can have no probative value as proof in this case." 95 LA at 153–54.

[24]Wigmore, Evidence, § 4(e); McCormick, 1 McCormick, Evidence, §245, 5th ed. (1999); Morgan; Mueller & Kirkpatrick, Evidence, §8.2, 3d ed. (2003).

The trier of fact is getting information secondhand. Some authors add a fourth danger—the person with firsthand knowledge of the event must understand the obligation to tell the truth. Supporters of excluding hearsay argue that the finder of fact needs to know if the one who saw an event perceived the event accurately. The finder of fact needs to know that one who saw an event has an accurate memory of what he or she saw. The finder of fact needs to know if one who saw an event speaks about it accurately and also needs to know if the observer understands his or her obligation to speak truthfully about it. Hearsay is inadmissible because the jury has no way of evaluating the out-of-court speaker or declarant's perception, memory, narration, or sincerity. Reliability of the hearsay statement is totally dependent on the credibility of the witness who testifies about the out-of-court statement of another. For example, suppose Declarant tells Witness that "Grievant assaulted Victim." In a discharge case for the Grievant assaulting the Victim, Witness testifies, "Declarant said Grievant assaulted Victim." The credibility or value of Witness's testimony is dependent on Declarant's perception, narration, memory, and sincerity, not that of Witness. A fact finder is impeded in determining the evidentiary value of that statement if he or she only hears Witness say "Declarant told me that Grievant assaulted Victim." I may be the dumbest person in this room, but I honestly believe that the limitations described in this paragraph apply to me, notwithstanding what Elkouri and several other authors have said about my cultivated "ability to determine testimonial truthfulness."

Federal Rule of Evidence 801(c) defines hearsay as 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." Certain prior statements of witnesses and admissions of a party opponent are not hearsay. There are 30 exceptions to the hearsay rule, including a broad residual exception. Rule 802 makes hearsay inadmissible.

A major difficulty in hearsay analysis is determining whether or not a statement other than one made at the hearing is offered for the truth of the matter asserted or for the truth of the contents of the statement. An out-of-court statement is hearsay only if it is offered to prove the truth of that statement. The corollary of this notion is that if a statement is not offered for the truth of the matter asserted or is offered for any other purpose, it is not hearsay.[25]

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[25]2 McCormick, Evidence, §246.

Arbitrators frequently make inaccurate statements both at the hearing and in their decisions in the following situation. A supervisor is asked, "Why did you fire the grievant?" The supervisor responds, "I fired the grievant because employee A told me that the grievant called him a dirty name." The arbitrator says or writes, "Yes, that was a hearsay statement, but I will receive it for what it is worth." Such a statement may or may not be hearsay, depending on the purpose for which it was offered. Although the supervisor is quoting someone else, the testimony may not be being offered for the truth of the matter asserted. If it is offered for the purpose of giving the supervisor's reason for firing the grievant, it is not hearsay. Proving that the grievant called employee A a dirty name is a separate matter. The very same statement of a declarant may be offered for the truth of the matter in one setting but not in another.

Many statements are made in arbitration hearings that are not offered for the truth of the matter asserted. For example, if an employee is being disciplined for smoking in a non-smoking area, anyone could testify that the grievant was present when a supervisor told the employees, "There will be no smoking in this area." The supervisor's outside statement is not being offered for the truth of the matter but instead to show that the grievant had been warned about smoking in the prohibited area. Under traditional arbitral doctrine, the company must prove that the grievant knew about the rule and that it made a fair investigation of the matter before imposing discipline on the employee.[26] A personnel official who investigates an incident for which an employee is being disciplined can testify about conversations that he or she had with other employees and supervisors during the investigation, and it would not be hearsay. It would be being offered to prove that the company made a fair investigation. Again, proving the misconduct is a separate matter.

Also, a statement is hearsay only if it is intended by the declarant as an assertion. Two examples using a route salesman illustrate this point. First, suppose the company is disciplining a driver for wasting time on his route and falsifying his activities on his handheld computer. The grievant tells the company that he finished a delivery to customer A at 3:00 p.m. The company telephones customer A and asks what time the grievant made the delivery on

[26]Elkouri & Elkouri, How Arbitration Works, 6th ed. (Ruben, ed., BNA Books 2003), at 969.

the day in question. The customer says 1:00 p.m. In the arbitration hearing, the company's Human Resources Manager testifies about customer A's statement to the company. Customer A's statement to the Human Resources Manager was intended to be an assertion concerning the time the grievant made the delivery, and it is hearsay on the issue of the time of the delivery. On the other hand, if the grievant made a delivery to customer A at 1:00 p.m. and customer A signed the driver's electronic computer signature screen indicating receipt of the goods, which, unbeknownst to the customer, records the time the signature screen was signed by the customer, in all likelihood the customer did not intend to make an assertion that the delivery was made at 1:00 p.m. by signing the signature screen. Hence, there is no hearsay problem with the use of the time of day stored in the computer, as well as the customer's signature on the signature screen.[27]

Federal Rule 801(d)(2)[28] excludes an "admission of a party opponent" from the definition of hearsay. The most common forms of admission occurring in arbitrations are (1) the party's own statement, and (2) a statement by the party's agent. Although the grievant is not technically a party in labor arbitration, the grievant probably falls within the general understanding of a "party" in the arbitration setting. As a general proposition, Rule 801(d)(2) would allow the company to introduce any previous statements of the grievant or for the union to introduce any previous statements of company employee witnesses, provided that the arbitrator was satisfied that the prior statements were made concerning a matter within the scope of the employment relationship. Such statements could be inconsistent or consistent with such witnesses' testimony at the hearing. I do not think that the application of Rule 801(d)(2) changes the way most of us run hearings.

There are 30 exceptions to the hearsay rule. Arbitrators frequently engage in inaccurate analysis when they receive a hearsay

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[27]Mueller & Kirkpatrick, Evidence, §8.4–8.9, 3d ed. (2003).

[28](2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

statement that falls squarely within an exception to the hearsay rule. Upon receiving the testimony, the arbitrator may say, "I will give it less weight because it is hearsay," or "Because it is hearsay, I will receive it for what it is worth." This suggests that because of the hearsay nature of the statement, it will be given less weight than a non-hearsay statement.[29] The fallacy in the arbitrator's thought process is the failure to recognize that a statement that falls within an exception to the hearsay rule is entitled to the same evidentiary weight as any non-hearsay statement. The hearsay rule does not require that evidence falling within an exception to the hearsay rule be given less weight than non-hearsay.

Routinely, witnesses make several types of statements in arbitration hearings that fall within exceptions to the hearsay rule. General hearsay objections to such statements should be overruled. Rules 803 and 804 of the Federal Rules of Evidence contain the exceptions to the hearsay rule. Rule 803 is a list of exceptions that applies even though the declarant is available to testify at the hearing. I will discuss only some of the 803 exceptions that arise frequently in arbitration hearings.

Rule 803(1) creates an exception for "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter." This exception applies to a wide variety of statements frequently introduced in arbitration. It applies to any activity the declarant is doing or has just completed. Suppose a truck driver-grievant is being fired for allegedly driving a truck down the highway at a high rate of speed and being ticketed by a policeman. At the time of the incident, the policeman gets on his radio and says to the dispatcher, "A truck just passed me, and I clocked it at 85 miles per hour." At the arbitration hearing, the officer's partner or the police dispatcher who heard the statement could be asked, "Did Officer Jones report clocking a truck at 85 miles per hour on the day in question?" The police officer's partner or the dispatcher could testify that the above-quoted words were spoken. Such a statement would be admissible under Rule 803(1) as a present sense impression.[30] The present sense impression testimony as to the officer's statement is entitled to as much weight under the Rules of Evidence as the officer's in court testimony. In a jury

[29]Elkouri & Elkouri, How Arbitration Works, 2d ed. (BNA Books 1997); Hill & Sinicropi, Evidence in Arbitration, 2d ed. (BNA Books 1987), generally Chapter 9.

[30]Mueller & Kirkpatrick, Evidence, §8.35, 3d ed. (2003).

trial, it is for the jury to give it the weight it considers proper. Neither should the arbitrator feel compelled to give it less weight unless there is a good reason to do so other than it being hearsay but within a recognized exception to the hearsay rule. It should also be noted that a tape recording of the statement, if properly authenticated, would also be admissible.[31]

Rule 803(2) is the "excited utterance" exception to the hearsay rule. [32] It is in several respects similar to the present sense impression exception. Suppose Smith and Jones, who is blind, are standing on a street corner. Again, using a truck driver as an example in a discipline case, suppose the grievant drives past Smith and Jones in his truck and Smith says to Jones, "My God, the truck must have been going 70 miles an hour when it hit the Mustang!" Smith has since left the area, and the company does not know where he is. Jones, who did not see the incident, could testify that Smith said, "My God, the truck must have been going 70 miles an hour when it hit the Mustang!" Smith's statement to Jones would be admissible under Rule 803(2) as an excited utterance.[33] Again, the arbitrator is not required to discount the probative value of the statement simply because it is hearsay. The evidence is admissible under a recognized exception to the hearsay rule, and the arbitrator is entitled to fully credit it or not, as would a jury.

In *Hugo Bosca Co.*,[34] the grievant, who was subject to a last-chance agreement, was discharged for indignantly throwing something down on a counter and rolling her eyes at a supervisor. The arbitrator admitted under Rule 803(2) another employee's statement that she could not believe that the grievant slammed something down on the counter, even though that person did not see the event. The arbitrator considered this statement as evidence of the fact that the grievant did throw something down on the counter. This analysis is consistent with many judicial decisions applying Rule 803(2).[35] This analysis could be applied to many excited utterances that are made from time to time in the work place. Responses to insults, assaults, or harassing behavior come to mind.

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[31]In *Indiana Bell Tel. Co., Inc.*, the arbitrator admitted a tape recording of a controlled buy of narcotics against the grievant.

[32]Rule 803(2) reads: "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

[33]Miller v. Keating, 754 F.2d 507 (3d Cir. 1985).

[34]109 LA 533 (Franckiewicz, 1997).

[35]2 McCormick, Evidence, §272 (1992).

Such statements, however, must be made before the stress of the event ceases to qualify as an excited utterance.[36]

Section 803(3) is an exception to the hearsay rule for statements of a person's "then existing mental, emotional, or physical condition," sometimes called the "state of mind" exception.[37] Because most statements of grievants and supervisors not made at the hearing are non-hearsay under Rule 801(d), Rule 803(3) would be used more frequently in the case of other employees and non-employees who had made statements outside the hearing.[38] For example, if a route salesman were being disciplined in connection with his or her dealings with an outsider, statements of the outsider's "then existing mental, emotional or physical condition" could be admissible under this exception. If an employee driver had an automobile accident, and the driver of the other vehicle said, "I'm not hurt. It was my fault. I am not going to report this accident," that would be admissible as a statement of the person's present physical condition,[39] as well as the declarant's mental condition or intent.[40] A supervisor could testify that an employee-assault victim reported that "grievant just struck me with a wrench and cut my head," even though the victim did not testify at the hearing. Statements of harassment victims would also be admissible under this exception if the statements related to their then-existing physical conditions or mental feelings resulting from the harassment. A statement of then-existing state of mind would not be admissible to prove that the grievant sexually harassed the other employee.[41] That would be a fact remembered that is not admissible to prove the fact remembered under Rule 803(3). I should point out that distinctions like this are exactly why some commentators say the Rules of Evidence have no place in labor arbitration.

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[36]Mueller & Kirkpatrick, Evidence §8.35, 3d ed. (2003).

[37]Such a statement is defined as "A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, identification, or terms of a declarant's will."

[38]In *Boise Cascade Corp.*, 114 LA 1370 (Crider, 2000), the arbitrator refused to receive documents authored by a former labor relations official of the company as evidence of his state of mind. The arbitrator thought the declarant's state of mind was irrelevant.

[39]Casualty Ins. Co. v. Salinas, 333 S.W.2d 109 (Tex. 1960).

[40]Adkins v. Brett, 193 P. 251 (Cal. 1920); Mueller & Kirkpatrick, Evidence, §8.38, 3d ed. (2003); 2 McCormick, Evidence, §§273–74 (1992).

[41]2 McCormick, Evidence, §276 (1999).

Rule 803(6), records of a regularly conducted activity,[42] applies to a wide variety of records of a company, its customers, suppliers, employees, and unions.[43] Rule 803(6) is one of the more important hearsay exceptions as far as labor arbitration is concerned. Arbitrators generally receive company business records without making any comment that they are hearsay and fall within a recognized exception to the hearsay rule or that they should receive less weight because they are hearsay. The company's business records are normally received in evidence with no objection from the union. Such records would include an employee's personnel record, time cards, production records, reports the company may be required to submit to government agencies, notes made during contract negotiations, etc. These kinds of records are admissible under Rule 803(6).

In recent years, some companies have installed software systems in their computers that permit supervisors to make memoranda of nearly any contact with an employee. Not infrequently, supervisors are told to make such records. All a supervisor or an employee with access to the system has to do is log on to it and type a memorandum of his or her encounter with an employee or supervisor, as the case may be. Such a memorandum, whether made by a bargaining unit employee or a supervisor, would very likely be admissible under Rule 803(6). This should be somewhat worrisome, especially for a union representative. It is a way of preserving detailed records of conversations with employees, which the employees or the union might never see until sometime in the grievance procedure or in arbitration. For example, a supervisor could write a memorandum about an encounter with an employee in 2002. The supervisor leaves the company in 2003 and is unavailable at the time of the hearing. In a 2008 arbitration, the

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[42]"Records of Regularly Conducted Activity—A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

[43]2 McCormick, Evidence, §288 (1992). In *Menasco Aerosystems Div.*, 100 LA 1061 (White, 1993), the company relied on records of the grievant's errors going back several years to support his discharge. The arbitrator cited Rule 803(6) in admitting them, although he said the Rules of Evidence do not apply in arbitration.

company could retrieve the memorandum, and it would probably be admissible under Rule 803(6) if relevant, unless the arbitrator concluded that the source of the information or some other circumstance indicated a lack of trustworthiness.

Rule 803(6) applies to a wide variety of records, certain of which are problematic. For example, investigative reports of nonemployee investigators involve a difficult application of the Rule.[44] Several well-respected arbitrators have had to deal with the situation in which the company hired an investigator either to engage in undercover surveillance of an employee or to investigate some other kind of problem for the company, such as an accident, inappropriate treatment of customers or patients, a fraudulent workers' compensation claim, or theft or drug use in the plant.[45] The investigator then submitted a written report to the company, which the company tried to use in arbitration.[46]

If the company later attempts to discipline an employee in connection with an incident investigated by an outside investigator, it may need to introduce the investigator's report. It will have at least two reasons for introducing the report. One is to show it made a fair and thorough investigation of the incident, and the second is to prove that the misconduct did, indeed, happen as the investigation revealed and, thus, there was just cause for discipline. The major problem in getting this type of evidence into the record under Rule 803(6) is whether it was the regular practice of the company to hire an investigator to make the memorandum, report, or record and whether receiving such a report is a regular part of the business of the company. Of course, the investigator could testify about everything done during the investigation.[47]

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[44]Elkouri & Elkouri: How Arbitration Works, (6th Ed. 2003), at 363–65; McCormick, *Id.*

[45]*University Med. Ctr.*, 99 LA 406 (Seidman, 1992), involved the discharge of a nurse who was rude to patients and others. She made statements to a "hearing officer" who was investigating the matter. The grievant did not testify at Arbitrator Seidman's hearing. The grievant's statements to the hearing officer were not "former testimony within Rule 804(b)(1) because that was not a judicial proceeding, and the grievant was not under oath. The arbitrator admitted a transcript of the grievant's statements to the hearing officer, noting: "Under the…facts and circumstances, admitting this transcript from the administrative hearing was proper. It was entitled to be given substantial weight in the light of the testimony adduced at the arbitration." 99 LA at 408.

[46]Bamberger's, 59 LA 879 (Glushein, 1972); Akron Gen. Med. Ctr., 772 ARB Section 8336 (Teple, 1977); Budd Co., 75 LA 281 (Sergent, 1980); and Dayton Pepsi Cola Bottling Co., 75 LA 154 (Keenan, 1980).

[47]This happened in *GTE N., Inc.*, 102 LA 154 (Kenis, 1993). The investigator testified. He quoted employees he interviewed. The arbitrator said that the Rules of Evidence do not apply in arbitration, but then added: "Nevertheless, this does not mean that testimony which is classic hearsay should be given probative weight, particularly when it relates to a pivotal point in this case." 102 LA at 159.

However, the company may want to keep the identity of the investigator secret if there is an ongoing investigation of theft from the company or drug use in the plant. Such a report would probably not meet the requirements of Rule 803(6) because it was probably not a regular part of the company's business to receive such reports from outside investigators.[48]

An arbitrator being asked to receive such statements in evidence must take several circumstances into account. If the investigator does not testify, and if it is not a regular part of the company's business to receive such reports, virtually everything in the report is hearsay. The investigator who made the report may or may not have an "axe to grind." The report may contain signed statements of still other employees or outsiders, creating a double hearsay problem.[49] The arbitrator has no way of judging the credibility of either the investigator who wrote the report or the witnesses who gave signed statements to the investigator if they do not testify. It simply cannot be said with positive assurance that the investigator was completely fair, competent, or honest. The arbitrator will probably not know from the written statements contained in the report whether the grievant and the persons giving statements were best friends or bitter enemies. Notwithstanding the hearsay issue involved, there are many published arbitration awards receiving such reports.[50] It is submitted that the better practice in this situation is for the arbitrator to do an analysis of the hearsay problems and sustain a hearsay objection unless the investigator testifies, especially if the report involves double hearsay. Such a ruling is fairer to the union. The company should have little difficulty in getting the investigator to testify. Arbitrators should make better decisions in cases involving these kinds of reports if they understand the hearsay rule and the hearsay dangers.

Medical records, doctors' excuses, and return-to-work statements also present special hearsay problems for arbitrators under either Rule 803(4) or 803(6). Anything an employee said to a doctor relevant to diagnosis or treatment would be admissible under

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[48]Johnson v. Lutz, 253 NY 124, 170 N.E. 517 (1930). McCormick calls this the leading case, stating that "courts have generally followed its lead in requiring all parts of the process to be conducted under a business duty." 2 McCormick, Evidence, §290 (1992), at 274–75.

[49]Hearsay within hearsay is covered in Rule 805, which provides: "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." 2 McCormick, Evidence, §324.1 (1992).

[50]Elkouri & Elkouri: How Arbitration Works, 6th ed. (Ruben, ed., BNA Books 2003), at 363–64, n.104.

Rule 803(4).[51] If the doctor tape recorded or made notes of his or her conversation with the employee being treated, these notes would be admissible as a record of a regularly conducted business activity under Rule 803(6). The employee's statements contained in the doctor's report would also be admissible because there has been compliance with Rule 805. Doctors' excuses from work and return-to-work statements are frequently admitted in arbitration hearings without question,[52] even though there can be hearsay problems with such statements. Not infrequently, employees being disciplined for absenteeism present doctors' statements to the company either shortly after their absence or illness or subsequently in an arbitration hearing. The circumstances surrounding how the statement was obtained, who signed the statement, when it was signed, and what the statement means vary greatly. A doctor's statement that says, "On September 15, 2005, I saw the grievant, who told me he had been running a fever for two days. I treated him for flu." would be admissible as a statement made for the purpose of medical diagnosis or treatment under Rule 803(4). The doctor's statement might also qualify as a record of a regularly conducted activity under Rule 803(6). This would clearly be the case if the doctor practiced industrial medicine and regularly wrote excuses for employees.

Doctors' statements that are alleged to be fraudulent and related issues present difficult hearsay questions. For example, suppose that an employee is being discharged for absenteeism, and one of the charged absences occurred on September 15, 2005. The union offered the doctor's excuse in evidence. The grievant testified at the hearing that he went to the doctor and obtained a doctor's excuse for September 15, 2005. The employee actually gave a note to the company written on a prescription pad, purporting to be signed by the doctor, simply stating that the employee was "seen in the office on September 15." The company became suspicious of the doctor's statement and upon investigation sent a representative to the doctor's office who returned with a written statement from the doctor saying, "I did not see the grievant in my office on September 15. The nurse signed my name on the prescription pad." The doctor's written statement is hearsay when offered to prove that the note on the prescription pad was not signed by him. It would not be a statement made by the grievant

[51] Safeway Stores, Inc. & Teamsters Local 117, 93 LA 1147 (Wilkinson, 1989).
[52] Elkouri & Elkouri, How Arbitration Works (Ruben ed., 6th ed., 2003), at. 398.

to the doctor for purposes of diagnosis and treatment. Whether the statement would qualify as a record of a regularly conducted activity is also questionable. However, the published arbitration awards involving discharges for submitting false medical reports to the company fairly routinely admit such doctors' statements. [53] Consider the following statement of Edwin R. Teple:

> I much prefer to have doctors testify, but I've had few experiences with that. They're expensive, and the parties don't see fit to bring them in as witnesses as a normal rule. Obviously, the doctor's letter is hearsay, but I usually accept it strictly as that and give it appropriate value. Often I have the same thing from both sides, and you have different doctors making different statements about the same matter. You have to judge. But if that's all a party has, I certainly wouldn't keep it out of my record.[54]

Arbitrators may need to be more suspicious of doctors' excuses, as well as other doctors' statements. Several years ago, there was a serious attendance problem in the mining industry in eastern Kentucky, West Virginia, southwestern Virginia, and Pennsylvania. In many mining communities, substantially all of some doctors' practices were made up of coal miners who worked for one or two large coal companies in the area. Rumors circulated that these doctors would write medical excuses for virtually any reason. This frequently happened on the first day of deer season. The practices of other doctors in these same communities were in large part pre-employment physical examinations for the coal companies. Thus, a substantial amount of these doctors' practices came from referrals from the coal companies. Given the various pressures that could be placed on doctors in this type of an environment, any kind of medical documentation could be said to be suspect.

Even if not directly applicable, the hearsay rule provides a sensible framework for dealing with the various problems related to suspect documents containing hearsay. In this environment, rather than disregarding the hearsay rules and saying that a doctor's receptionist could or could not sign a medical certificate that would be admissible, or having a personnel representative of the

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[53] Hill & Sinicropi, Evidence in Arbitration, 2d ed. (BNA Books 1987), at 169; Fairweather, Practice and Procedure in Arbitration, 4th ed. (1999), at 285; Chicago Area Tripartite Committee, in Problems of Proof in Arbitration, Proceedings of the 19th Annual Meeting, National Academy of Arbitrators, ed. Jones (BNA Books 1967), at 107–08.

[54] *Procedural Rulings During the Hearing*, in Arbitration 1982: Conduct of the Hearing, Proceedings of the 35th Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1983), at 162.

company testify that he went to the doctor's office and was told that the grievant did not see a doctor on the day for which he gave the company an excuse, the company or union, as the case may be, would do well to call the doctor as a witness or depose him or her with notice to the other side. Granted, it may be impossible to subpoena a doctor to testify because of local law or a court rule.[55] Nevertheless, the parties could depose the doctor. On more than one occasion when I anticipated that a doctor's testimony was going to be the decisive testimony in a case, I have arranged for everyone to go to the doctor's office and receive his or her testimony. One arbitrator has suggested handling this problem with a conference call. Such a procedure would provide the arbitrator with more reliable evidence and give the party against whom it is offered an opportunity to cross-examine the doctor. The foregoing examples concerning doctors' statements are good examples of a variety of situations in which an arbitrator's use of the Rules of Evidence could prove helpful by ensuring that the decision is based on the most reliable evidence available.

Another situation in which an analogous problem arises and which can involve Rule 803(6) is when the personnel director or investigator is the only person with any knowledge of the facts of a case. This is not uncommon in sexual harassment cases.[56] The union faces a similar problem when a business agent investigates a case for the union. For example, suppose an employee complains to the company that she is being sexually harassed by the grievant. The company interviews the harassment victim and concludes that the harassment did occur and discharges the grievant. The investigating company official writes a report containing the victim's signed statement and his or her conclusions. Before the hearing, the harassment victim quits the company and leaves town with no forwarding address. The problem is especially serious from the company's perspective if there are no other witnesses to the alleged harassment by the grievant, as is often the case. The victim's written statement is clearly hearsay and would not be admissible under Rule 803(5), recorded recollection, because the victim is not available to testify that she now has insufficient memory of the events to testify fully and accurately about them. The personnel director's report containing the victim's statement

[55] *See* Rule 32.01 of Kentucky Rules of Civil Procedure, which grants physicians the right to testify by deposition.

[56] This occurred in *Metropolitan Council Transit Operations*, 106 LA 68 (Daly, 1996).

may not qualify under Rule 803(6) because there may be a question concerning the trustworthiness of the victim's statement or because it was not a regular part of the company's business activities to record such statements. Should the company proceed with the discharge knowing that the only evidence it can produce at hearing is the written statement of the harassment victim, and also knowing that the arbitrator may not admit the victim's statement? Even if the arbitrator admits the victim's statement, will the arbitrator credit it over the live testimony of the grievant and the other union witnesses who testify in person? These are difficult questions for everyone involved in the case. Arbitration awards involving this set of problems have varied in their analyses and conclusions.[57]

As noted earlier, one of the purposes of the law of evidence is to ensure fair trials and hearings. Is it fair to discharge an employee based solely on the hearsay testimony of an absent witness? Then there is fairness to the company to be considered. Should a written statement taken by a union business agent of one who does not testify at the hearing, which denies that the grievant harassed the victim, be admissible against the company? The company's problem is a serious one because if it does not proceed with the discharge, and if the grievant harasses another employee, it will be in a virtually indefensible position, because it knowingly retained an employee who was previously accused of sexual harassment.[58]

*Authentication*

Rule 901 deals with the requirement of authenticating writings and various other types of exhibits that may be introduced in trial or hearing.[59] All that is required is that the party offering the document or exhibit introduce sufficient evidence to support a finding that the matter is what is purports to be. Arbitrator Snow applied Rule 901(5) in *5th Avenue Musical Theatre Co.*[60] There, the company objected to telephonic testimony. In overruling the company's

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[57]Veterans Admin. Med. Ctr., 87 LA 405 (Yarowsky, 1986); Indiana Gas Co., 109 LA 117 (Imundo, 1997); Metropolitan Council Transit Operators, 106 LA 68 (Daly, 1996); City of San Antonio, 90 LA 159 (Williams, 1987); Duke Univ., 100 LA 316 (Hooper, 1993); Clover Park Sch. Dist., 89 LA 76 (Boedeckerr, 1987).

[58]Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus. v. Ellerth, 524 U.S. 742 (1998); Lindemann & Grossman, I. Employment Discrimination Law, 3d ed. (BNA Books 1996), at 811.

[59]Rule 901(a) states: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what it purports to be."

[60]111 LA 820 (Snow, 1998).

objection, Arbitrator Snow said: "The Employer maintained that, to the extent union witnesses testified by telephone about this matter, the evidence deserved little or no weight. Federal Rules of Evidence, however, are reasonably flexible in permitting evidence of telephonic communication based on voice identification and identification based on content."

Parties in an arbitration generally agree that certain documents are what they purport to be; for example, the contract, the grievance, and company rules. If the union does not agree to the authenticity of unilateral company rules, the requirement of authentication is satisfied simply by asking the witness through whom the document or other exhibit will be introduced to state what it is.[61] That is all Rule 901 requires. It is believed that arbitrators generally comply with this rule, even though they may not realize it. In *Solutia, Inc.*,[62] the company discharged the grievant for submitting a false disability claim. The company introduced a videotape of the grievant engaging in activities inconsistent with his alleged disability. The company did not authenticate the videotape. However, the grievant testified that he was the one shown in the tape. The arbitrator said this was sufficient authentication. He also said that without the grievant's testimony, the tape would have been worthless. This constituted compliance with Rule 901.

## Conclusions

First, I am not advocating the strict adherence to the Rules of Evidence at all times. I am suggesting that arbitrators can use the Rules of Evidence to their and the parties' advantage as a guide or a tool in thinking about the weight to be given a piece of evidence in addition to the arbitrator's admissibility decision. I am sure there are many good arbitrators who do not know the Rules of Evidence and, hence, do not apply them. If the Rules of Evidence are not helpful to you, do not use them.

I think perhaps the most misguided point arbitrators have made against using the Rules of Evidence in arbitration is that arbitrators are skilled in sorting through evidence and really do not need the benefit or the protection of the Rules of Evidence. One arbitrator summed it up this way:

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[61]Elkouri & Elkouri: How Arbitration Works. 6th ed. (Ruben, ed. BNA Books 2003), at 317.

[62]121 LA 26 (Szuter, 2005).

> Rules of Evidence were developed over the years on the implied assumption that the jury in a court consists of people who are not particularly bright, and who might be less impressed by the high-blown testimony of an expert than they would be a good-old-boy who confides in them. . . . Arbitrators, by training, are presumably better qualified to evaluate the weight of hearsay evidence and put it somewhere on the spectrum between "strongly persuasive" and "vicious gossip."[63]

I frankly do not think that arbitrators are so bright that they can never use the help of the accumulation of the years of experience and wisdom that is embodied in the Rules of Evidence. This is especially true of hearsay testimony. The arbitrator has no foolproof way of evaluating the credibility or the accuracy of hearsay evidence. Receiving evidence for what it is worth without taking the Rules of Evidence and their purposes into account increases the chances of faulty fact finding. It is also unfair to the parties. Resolving disputed factual issues in situations in which people's livelihoods are at stake and where a company's money and reputation may be on the line is difficult and serious work. Arbitrators should be willing to accept all the help they can get in making sound decisions, even from the Rules of Evidence.

An arbitrator should be able to apply the Rules of Evidence in a hearing without belittling anyone and without impeding people in describing events that they saw or in which they participated. An arbitrator has many tools at his or her disposal with which to preserve the informality of a hearing if that is the desired goal. Likewise, an arbitrator can employ a variety of techniques, some of which involve the Rules of Evidence and others of which do not, that can help foster and preserve a good relationship between the parties.

The Rules of Evidence are also a useful tool for the arbitrator in evaluating the weight to be given to evidence. An arbitrator who thinks about the Rules of Evidence and attempts to apply them can look more closely and more systematically at the evidence in writing a decision than can an arbitrator who has no organized or disciplined means of evaluating evidence.

Finally, arbitrators follow the Rules of Evidence much more frequently than they realize. Because many arbitrators are already complying with many of the Rules of Evidence, it would seem that the impact of following the rules would be less than opponents of the use of the Rules suggest. To the extent that published

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[63]Baker Marine Co., 77 LA 121, 123 (Marlott, 1981).

arbitration decisions are an accurate reflection of arbitrable thought, I would argue that the more recent decisions suggest that arbitrators do not have the same attitude toward using the Rules of Evidence that they formerly did. The recent decisions seem more receptive to the Rules than the older ones and the NAA papers of the 1950s and 1960s.