CHAPTER 6

# PROCEDURAL RULINGS DURING THE HEARING

This chapter consists of a collated set of excerpts from the transcripts of six separate workshops for members and guests of the National Academy of Arbitrators at their Washington meeting. The discussion guide was prepared by Arnold M. Zack in collaboration with Theodore J. St. Antoine. Professor St. Antoine edited this summary. Discussion leaders for the workshops were Academy members Howard S. Block, Sanford Cohen, John E. Dunsford, William J. Fallon, Myron L. Joseph, and Edward B. Krinsky.

## I. Third-Party Participation

In a hearing on an allegedly improper promotion, the incumbent, a junior employee who was chosen for the position over the grievant on the basis of supposedly superior qualifications, appears with counsel and demands to participate. Either the union or the company objects.

1. If you were the arbitrator, how would you rule?
2. Under what circumstances, if any, would you permit such a third party to sit and observe?
3. Would your answer differ if it were a public-sector dispute or a state with an open-meeting statute?
4. Would you allow such an observer to take notes? Make a tape-recording? Have a stenographer transcribe the proceedings?

JOHN F. MORGAN: I'm a union representative. The union takes the position that the arbitration is initiated by the union against the company. They are the two parties to the process. There is no need for the incumbent to be a part of it. The union would investigate as to the incumbent's rights prior to choosing to go to arbitration, and they have made the decision to go ahead on

the seniority rule and all the facts. The arbitrator should not permit any participation by the incumbent over the objection of the union.

EARLE BARTAREAU: I'm a management representative. We would object to an outside attorney representing this second employee in the dispute under any set of circumstances. It is a matter of principle. We don't want anybody except the correct representative, the union, in an arbitration case. We would not even want the incumbent's attorney to sit in and observe. The chances are that in some cases we would call the incumbent as our witness, but that is quite a different matter. I don't think we would object, however, to the incumbent employee—the one who got the promotion—sitting in and observing.

DAVID VAN OS: I am a lawyer who represents unions. I agree with the management representative who just spoke. We would object to the junior employee participating through counsel at the hearing. The union is not simply a legal-services mechanism for individual employees. The union is there upholding the integrity of the contract, whose terms and conditions apply to all employees equally. It is the union's statutory responsibility to apply the terms and conditions of the contract fairly to all employees, senior and junior, and all employees must bear both the privileges and the liabilities of that representation. That is the duty imposed upon unions by law under our system of exclusive representation. From my standpoint, we would object vehemently to an outsider's participation.

RAYMOND GOETZ: I take a kind of legalistic approach. I am there by virtue of an appointment pursuant to a collective bargaining agreement to which the union and the company are the parties. It is their agreement, and I am bound by what they agree on. I cannot compel them to do something beyond that agreement. My initial step, however, would be to take a little more affirmative action to induce the union to allow the incumbent to participate. If the union was not represented by counsel at the hearing, I would suggest that they take a short recess and check with their attorney to see whether legally they want to proceed in that manner. I would inform the union that if they insist, I will exclude the third party, but that they might have trouble down the road. The kind of participation I'd permit on behalf of the incumbent would depend on what the union's position finally was. At a minimum I would like to allow the incumbent's attorney to be there and to pass notes to the union if he wanted to;

that would at least allow the attorney to ask that a question be asked. I think, ideally, that the union should allow the incumbent's attorney to present the case with respect to his client.

WILLIAM E. SIMKIN: I would keep the incumbent out. The company took the action of promoting the junior man. I think it is the company's responsibility to present his case, and if he comes in and extols his own virtues, it just creates problems.

DAVID KABAKER: The incumbent has no place in this hearing. The incumbent has been selected for the job by the company. The protest is lodged by the grievant through the union. The situation might be different had the grievant asked to have his own personal representative there. But as it is, there is no reason whatsoever for the incumbent to be represented by separate counsel. I also think that each party, company and union, has a right to object to who is present at a hearing. I would rule him out if either party objected.

ROBERT NICHOLS: I am a union advocate from Chicago. First of all, I think it makes a great deal of difference as to who raises the objection. For example, there is a fairly strong suggestion from the Court of Appeals for the Eighth Circuit in the *Hussman* case that there might even be an affirmative obligation on the part of the union to produce counsel for each of the employees at the hearing. If the incumbent employee shows up with his own counsel and the union is silent, and only the company raises an objection, a strong argument can be made that the objection should be overruled. The individual and his attorney should be permitted to participate. On the other hand, if the union objects, I think great deference ought to be accorded that objection. While I recognize that the company may ultimately be a party to a lawsuit after the hearing if the union's objection is sustained, it is primarily the union that is on the firing line. It is their duty of fair representation that is at issue, and I assume they will have given some thought to that going into the hearing. I think the arbitrator in those circumstances ought to accord real deference to the union's views.

CAROL ZAMPERINI: I would ask the third party to leave in both cases. I think we are creating a dangerous situation when we ignore the fact that the contract is a contract between the two parties. I think it is dangerous, anyway, for us to start assuming that we have an obligation as arbitrators to take it upon ourselves to defend the interests of third parties in these situations. Here the grievant is being represented by the appropriate party

and that is the union. The company has its representative there to defend its decision to promote the incumbent. I think if one side or the other objected to the presence of outsiders, both the incumbent and his counsel should be asked to leave. If the incumbent believes that he was improperly dealt with by the union, there is access to another forum. I think that is the forum he should utilize.

BENJAMIN WOLF: This question has been answered in New Jersey. I had a promotion case in which I decided that the incumbent was improperly appointed. He was not a party to the proceeding. The case went to the highest court in New Jersey, which held that where a person has a substantial interest at stake, such as a promotion or a possible demotion if he had been promoted, he must be impleaded with his counsel if he wishes. Contrary to what I would have expected, we have an answer now from a high tribunal that such a person has an absolute right to participate. You cannot deprive this person of his job or his property rights without his being present and having an opportunity to defend.

PETER FLOREY: I have found that most business agents know more about the duty of fair representation than the arbitrators, and I think it would be presumptuous for me to tell the union representative what he very well knows. If the junior employee appeared with his own counsel, I would say that I have been retained by the company and the union and any outsider can participate only with their permission. Preferably we would thresh it out not in the hearing room, but off the record somewhere. I'd let the parties try to work out what they wanted to do, but I don't think I would do anything against the wishes of the union rep because he knows better than I what the risks are.

BARNETT GOODSTEIN: I would make the opposite ruling as long as there is just one objection, and not objections by both parties. If the employee who got the job came in with his own counsel and wanted to be heard, I would grant him the right to be heard with the understanding that if the ruling went against him, he could not then file a grievance and come back for a second hearing. That would start the process all over again, which might even give this grievant the right to go into the second hearing and be heard. And where would it ever end? We would have a multiplicity of arbitrations over the same issue. It should be heard one time with all parties in interest present and be thoroughly aired with everybody given a chance to be represented and have his day in court—and then it is over.

DOUGLAS STANLEY: I am an arbitrator from Canada. Under Canadian law any third party who is likely to be affected by an arbitration has not only the right to be present, but also the right to receive notice prior to the hearing of the fact that his interest could be affected and that he has a right to appear and be represented by counsel just as the principal party. That is not a statute, but the result of a series of judicial decisions reviewing arbitrators' awards.

CHARLES FEIGENBAUM: In the federal sector, contrary to what you have in the typical private-sector situation, the incumbent who lost the promotion and was downgraded back to his old job has a right of appeal, not to an arbitrator but to an outside administrative body. There have been a number of cases in which, after an arbitrator ordered that the incumbent be removed from a position and the grievant be given the job, the incumbent appealed and won the appeal. The employing agency then had two orders before it—two perfectly conflicting orders. Thus the federal-sector procedures don't really tell you how to handle this kind of problem.

THOMAS RINALDO: Under the rules of the American Arbitration Association, an arbitrator has the right generally to regulate the hearing and decide on the procedure. Even in a state where there is an open-meeting law, therefore, I think an arbitrator would have the right to exclude any person or admit any person or otherwise regulate the hearing as he deems appropriate until some court tells him otherwise.

STEVEN GOLDSMITH: On the question of taking notes or making a tape-recording, once it is settled that a third party is permitted to stay at least as an observer, I would permit them to do that.

BARNETT GOODSTEIN: I always allow anyone who wants to take notes or to record the proceedings for his own purposes, or to have a reporter there to prepare a personal transcript, to do anything he wants to for his own purposes only.

RAYMOND GOETZ: If I allowed third parties to participate, I would very definitely let them also tape the proceedings.

STEPHEN RICHMAN: I don't know how you prevent people from taking notes. With respect to using either a stenographer or a tape-recorder, I think the answer to that is "No." I am aware of Labor Board precedent—the *Bartlett-Collins* case that was affirmed by a court of appeals—which prohibits the taking of a transcript by a stenographer or a tape-recording in collective

bargaining over the objection of the other party. I don't see how a third person who is really not a party to the arbitration proceeding could come in and record it over the objections of a party, now that the Board and the courts have said that the presence of a stenographer or a tape-recording device may well stifle free and unfettered discussion of these issues.

PETER SEITZ: I conceive of the hearing as being conducted for one primary purpose, and that is to inform the arbitrator in a fairly conducted hearing of what he needs to know in order to make a just decision. He is supposed to control that hearing and its procedure, and keep order and decorum, and determine the order of proof so that he can understand what the case is about. Now, when you accept that as the purpose of the hearing, then you say to yourself: If somebody else is making a verbatim statement of stuff that may be off the record, is that outside person going to have a different record from the notes which the arbitrator takes or which the stenotypist takes (of course the stenotypist goes on or off the record as requested)? When you write your decision, you write it based on your notes. That other person has some other kind of record. What is the record in the case? This becomes confusing and raises all sorts of new problems. I think the kinds of questions posed here can only be answered by an inquiry as to the purpose of the whole arbitration procedure.

## II. "Due Process" Protections

During the arbitration of a discharge for theft, one party calls to the stand an alleged accomplice who has a case pending in criminal court for the same theft. The witness declines to testify. One party asks the arbitrator to direct the witness to testify; the other party objects.

1. If you were the arbitrator, how would you rule?
2. Under what circumstances generally would you extend the following "due process" protections to an arbitration proceeding in either the private or the public sector:
   a. Protection against self-incrimination, e.g., witness declines to testify or is absent from the hearing?
   b. Right to cross-examine one's accusers, e.g., written accusations from customers?
   c. Protection against unreasonable searches and seizure,

e.g., evidence has been uncovered by a search of lockers or lunch pails, or through confiscation of an employee's personal property (liquor, drugs, weapons)?

d. "Lawyer-client privilege" for internal communications, e.g., one party has testimony (or a stolen document) regarding communication between other side's representative and its witnesses that would clearly establish that its case was a fabrication?

NATE LIPSON: An arbitrator doesn't have any contempt powers. You can't compel anybody to testify. But the arbitrator does have an obligation to try to aid the parties to get a full and fair case into the record. I would ask the witness to testify. I don't think I could do much more than that. If the witness is a defendant in a criminal case, it would be understandable that the witness would refuse to testify and might have a constitutional basis for refusing to testify. The arbitrator is not that witness's counsel. Somebody else might well advise the witness not to testify. The arbitrator's obligation is to try to secure a full and fair hearing. So, the arbitrator's duties are different from the witness's rights.

DAVID KABAKER: I agree wholeheartedly with Nate Lipson. He used the word "request," but I would say "order him to testify."

STEVEN GOLDSMITH: As I understand it, the constitutional right against self-incrimination is one that can be invoked primarily in a criminal proceeding and it normally doesn't apply to an arbitration proceeding. In any case, this is a right which inures to the individual who is being asked to testify. If that individual objected, I would recognize his claim because it is quite clear that if he testifies with or without a transcript, he would be putting his liberty in jeopardy, and I think that is much more important than anything that I am hearing in the arbitration case.

WILLIAM G. MAHONEY: I would imagine that a person who has been accused of theft is not present at the arbitration voluntarily. Let's assume, then, that he has been subpoenaed under an appropriate statute. Now the question is the enforcement of the subpoena. I believe that when you go to court to enforce the subpoena, the matter is no longer private. You then have governmental action, and the constitutional privilege is applicable.

LARRY SCHULTZ: I don't agree that the Fifth Amendment comes into play. True, you have no contempt powers. On the

other hand, the arbitrator is allowed to draw an adverse inference if somebody who is called doesn't testify. If an arbitrator is faced with somebody pleading the Fifth, remind them that arbitration is not a criminal proceeding. Even if it is not the grievant who refuses to testify, I would feel entitled to draw an adverse inference against the party that called this recalcitrant witness. Unless they say they are calling the person as an adverse witness so they can engage in cross-examination, you have to assume that they are calling a witness who is going to support their case.

PETER SEITZ: I don't use adverse inferences. I decide the case on the evidence that is before me. If people refuse to testify, including grievants, there is simply no testimony against them. If the employer's evidence justifies a discharge—shows there is just cause for a discharge—I will uphold a discharge. But I think when you get into the question of adverse inference, you are getting into a very sophisticated and complicated problem. I frankly don't believe that I have the capacity to deal with it.

DAVID FELLER: If this kind of issue arose, I would advise the witness to get a lawyer, because if he starts answering any questions, he may waive his privilege. I think the arbitrator has an obligation in this situation, even if no objection is made.

JONATHAN DWORKIN: My respect for the distinction between shop law and civil law or public law would impel me to instruct the witness to answer questions with whatever power I might have. I suppose in a state that has a uniform arbitration act the question could be brought up in court on a citation for contempt.

CHESTER BRISCO: That matter is made rather simple for arbitrations in California. While the arbitration statute in California declares that the rules of evidence do not apply, it is stated elsewhere that privileges apply to all hearings. An arbitration is defined as a hearing. Therefore, if a privilege against self-incrimination is asserted in an arbitration, the arbitrator should sustain the privilege.

TED TSUKIYAMA: I have assumed that we are dealing with a private employer in this case. It may make a difference if the employer is the state government or a city or other municipality. The Fifth and Fourteenth Amendments would be inhibitions against state action. That may provide a basis for distinction in how an arbitrator might rule in this case.

GIL VERNON: To answer the question concerning written ac-

cusations, I have read awards that are quite old from the National Railroad Adjustment Board involving service employees with passenger contact whose discharges were upheld on the basis of written customer complaints. I don't agree with those awards, but there they are. The customers' written complaints were admitted under the hearsay exception of unavailability. The witness was unavailable and beyond the control of the employer. In a contemporary setting, I would admit statements if all the conditions were met under the unavailability exception; however, I would also stress that the employer could expect that no weight would be given to those written statements of persons who were not available for cross-examination.

JOANN THORNE: I am a labor relations officer of the Federal Railroad Administration. We shouldn't necessarily assume that we have an isolated incident like a patient or an airline rider who has a complaint and writes a letter. What if you have a person who gets repeated complaints? In the last three months, we have had 57 complaints on this particular person. In the federal sector where I work, the Civil Service Reform Act built in a provision that you could be disciplined for not being courteous to the public. Wouldn't it be appropriate in arbitration for management to walk in and say: "Here are 57 letters, Mr. Arbitrator. You can't expect us to bring in 57 people, but we feel by volume alone this is evidence of discourteous behavior."

THOMAS RINALDO: It seems to me that you have to afford due process to an employee who is being terminated from service. And due process means the right to cross-examine the accusers, and these are the complainants. I don't care if you have one or if you have a multitude of them. The burden of proof is on the employer before the employee can be discharged. That means they have to bring in good evidence. That means direct evidence, not hearsay evidence. You need witnesses. Their testimony has to be checked for accuracy through the process of cross-examination.

PETER SEITZ: Frequently in situations of this sort it is possible to get over the problem by agreement of the parties. I have had cases in which the parties agreed that I might talk to the complainant. I have had cases where the parties agreed that a deposition could be taken. For example, people come to New York and they have complaints about the hotel service. Then they go back to San Francisco. The arbitrator in such a situation has to be innovative in order to figure out ways of getting the facts. If

you can't get agreement on it, it seems to me that you can't admit the statements.

CARL YALLER: There are contracts, as in the health-care industry, which forgive the lack of live complainants, like patients, to testify concerning something such as patient abuse and direct the arbitrator to draw no inference from the absence of the complainant. Where a contract does not so provide, I think hearsay problems would make their statements worthless. If employers desire to avoid that, they can seek to negotiate similar provisions in their agreements which would forgive the absence of a customer or other third party.

CHARLES FEIGENBAUM: On the search of an employee's locker, you might decide, based upon past practice or the parties' understandings, that the company does not have the authority to do that—that there is a privacy right which inheres in the locker. But the Constitution only forbids unreasonable searches and seizures by the government, not private employers. The first issue concerning self-incrimination did present a constitutional problem because there was a question of whether or not the witness was waiving a right that he had with respect to a forthcoming criminal trial. Here the constitutional guarantee does not apply.

MARSHALL ROSS: Due process in the sense of fundamental fairness does apply to arbitration proceedings, and cases can be reversed if the rights of due process are not recognized. But those rights are very limited. They would include the right to have notice of a hearing in which you are involved, the right to confront your witnesses, the right to be represented, and the right to present witnesses in your behalf. Now, the guarantee against search and seizure is not a right of due process. That is a special right found in the Constitution that applies generally to governmental agencies. If evidence is procured by an employer's breaking into a locker, that is not a violation of due process. That may be a violation of the rights between the parties as a matter of accepted industrial relations practice, but that does not taint the evidence.

IVAN RUTLEDGE: I agree with the previous speaker that if you have good evidence, you ordinarily use it no matter how tainted, although there may be a counter-grievance because of the manner in which it was obtained. But suppose we are talking about a document purloined by one party from another. It seems to me that the arbitrator is being asked to join in the misbehavior

and to spoil the relationship between the two parties by allowing the arbitration process to be victimized by this kind of misconduct.

NEIL BERNSTEIN: In the courts, evidence obtained by unlawful searches or seizures is excluded solely as a device to discourage the police from engaging in such wrongful conduct. As an arbitrator, you have something of the same problem. The reason to throw it out, especially when you are talking about the case where the company finds something missing and they break open every locker in the plant and they find it in the grievant's locker, is that if you let the evidence in, what you are doing is telling the company: "Fine. Go ahead. Any time you have a problem, turn everything upside down and whatever you find is okay with me." I would be tempted to exclude it simply as a device to persuade the company to avoid this kind of action. I probably would be much more willing to do it if I were a permanent arbitrator. But, in any event, I think you have to keep in mind the value of deterrence.

SAM CHALFIE: I would recognize no privilege. I would let the employer search the locker, but he ought to have a member of the union—the steward or business agent or some rep—with him to help verify his credibility. If he did it without a union representative present, however, I still wouldn't keep that evidence from being introduced at the hearing.

JOANN THORNE: I have a problem with using internal documents of any kind. I constantly have dissent on my management team. I always have people saying: "You aren't really going to arbitrate this case, are you? It is a sure loser." If they put it to me in writing, and somehow the union got hold of it, I don't believe it should be admissible evidence. It is an opinion of one manager or perhaps input from one manager to another manager. It is a predecisional document. I don't think that such an internal communication, whether it be covered technically by the lawyer-client privilege or not, is appropriately introduced at an arbitration.

## III. Subpoenas

During the hearing one party insists that the other side has failed to produce a promised witness or certain promised documentation, and asks the arbitrator for a subpoena. The second party denies the promise and objects to the subpoena.

1. If you were the arbitrator, what would you do?
2. What if the second party says you haven't the legal authority to issue a subpoena, while the first party says you have? Or the first party says it doesn't know?
3. What if subpoenaed data are not provided, the disadvantaged party refuses to proceed without them, and the hearing has been arranged at considerable cost and inconvenience?

TONY OLIVER: It seems to me, assuming the subpoena power exists, that the fact of a promise is immaterial. If the arbitrator has the power to issue a subpoena, he can issue a subpoena.

LARRY SCHULTZ: The subpoena power of an arbitrator is covered under the U.S. Arbitration Act, 9 U.S.C. § 7. Some courts have held that this provision doesn't apply to labor arbitrators because the Act excludes "contracts of employment" from its scope. If you don't have the power there, you ought to look to see whether the state has adopted the Uniform Arbitration Act, which provides for subpoenas in Section 7. If you don't have that, courts have upheld subpoenas under Section 301 of Taft-Hartley in suits for specific performance of the labor agreement, which includes providing a full and fair hearing under the grievance and arbitration provisions. The authority is generally there.

JOHN F. LEAHY: Under the rules of the American Arbitration Association as well as under the statutes of many states, the arbitrator has the power of subpoena. I have also had the federal courts on many occasions back up a subpoena. I wouldn't issue it carelessly. I'd try to get the parties to work it out. But when the chips are down, I would issue a subpoena.

PHILLIP LINN: I don't think that as arbitrators we are normally operating under state law. And as one who moves from one state to another, I certainly don't want to have to take the responsibility for determining what is state law. More important, I am satisfied that we are under federal law. I am satisfied that we have subpoena power under the U.S. Arbitration Act. And I think we do ourselves a disservice if we look to state law. We have power to subpoena both witnesses and documents under the U.S. Arbitration Act. We have court decisions to support that power. Indeed, in one federal case, the court went so far as to say that, while the individual had attempted to subpoena under state law, the federal court at that point would simply

accept the subpoena as though it had been requested as a federal subpoena.

DANIEL KATZ: The question of the legal authority of the arbitrator to have his subpoena enforced is really a red herring in terms of what an arbitrator should do. It seems to me that the arbitrator has to focus on the question of whether the testimony that is sought is necessary to the conduct of the hearing. If it is and somebody has been tricked into not having the witness available, or if he hadn't been tricked but it is still essential testimony, the arbitrator can then render a ruling saying, "With whatever authority I have, I compel you to produce this witness."

LAURENCE SEIBEL: It would seem to me the first thing that an arbitrator would have to do is say, "Will you demonstrate for me the relevance of the kind of information you are seeking?" Suppose the union says, "We don't know. We'd like to look at the company's records having to do with X, Y, and Z." They are not prepared to tell me what they expect to find or why the information they seek is relevant. It would seem to me that I would have to know all that and be convinced that what they are seeking would be relevant evidence, material evidence, probative evidence. If I conclude that the union is off on a fishing expedition, or that its request is unduly burdensome, I would not grant the subpoena.

JONATHAN DWORKIN: Signing the subpoena is a strictly administrative nondiscretionary obligation of an arbitrator in the assistance of the parties at a hearing. The arbitrator has no authority whatsoever to make a predetermination as to what is or is not relevant. In my view, he doesn't even have the authority to make a determination as to what is or is not burdensome. Where subpoenas are issued in states having uniform arbitration acts, the courts determine whether the subpoena has to be honored or not, not the arbitrator. In the absence of such statutes, the arbitrator still signs the subpoena and the court still determines whether the arbitrator had the authority to do so. I don't like to see arbitrators interfering, before you even get into a hearing, with the party's right to call for and produce what evidence they believe is relevant.

DAVID FELLER: A subpoena may look like something that somebody has to obey, but in fact nobody has to obey it until a court tells them they have to obey it. By itself it merely has a kind of *in terrorem* effect. I regularly get subpoenas, tendered to

me by one party or another, several days before a hearing. I never ask what the witness is going to testify to and what its relevance is going to be. Now, I do think if somebody gives me a subpoena which I can see on its face is so burdensome that no court in its right mind would enforce it, I think, as a service to the parties, I'd say, "Look, if you insist that I sign this subpoena, I'll sign, but I'm telling you what I think. I suggest that you give me a more limited subpoena which would probably be enforceable and will much better serve your purpose."

BENJAMIN WOLF: I, too, think either side has a right to subpoena. It doesn't rest with the arbitrator to grant it or not to grant it. I think a subpoena ought to be signed as a pro forma matter. As a matter of fact, in many jurisdictions, you don't have to go to the arbitrator for a subpoena. An attorney just issues it. It seems to me that in every jurisdiction the attorney has some right of subpoena, whether he has to go to the judge or not. If he were to show me that I needed to sign the subpoena, I would sign it in every case. The other question which is posed is whether I should grant a continuance because of the late use of the subpoena. That would depend upon whether I thought the parties were entitled to it because of the circumstances. Here there may have been a promise that the material or the witness would be produced. That could have led the other side to omit the service of a subpoena. Consequently, the party who has been remiss ought not to benefit from that kind of practice.

CHARLES TRABAND: You can still continue with the hearing. There are things that are not going to be related to that one witness or piece of information which can be presented at your hearing, and then you can schedule another day.

JONATHAN DWORKIN: When an essential witness has not arrived at the hearing, I agree it's often better practice to receive whatever evidence is available that would not prejudice one side or the other. Then you make other arrangements. The Uniform Arbitration Act says an arbitrator must grant adjournments for good cause. Sometimes the parties will agree to complete presenting their evidence by affidavit, deposition, or conference telephone call.

PETER FLOREY: Suppose subpoenaed data are not provided, and the disadvantaged party refuses to proceed, asks for a continuance, and wants the other party charged for the extra day. The arbitrator doesn't have the power to fine one side or another for failure to do anything. The contract says that the fees

and expenses of arbitration are to be split, so you have the obligation to split them. Of course, the parties can go to court if they claim damages under some kind of contractual right to fine or damages.

PETER SEITZ: When it is shown to my satisfaction that a party has delayed the hearing unduly and deliberately, I will assess the cost of that particular delay to the delaying party. I don't hesitate to do that.

WILLIAM E. SIMKIN: I have been amazed to hear so much about subpoenas. In thousands of cases over the years, I may have had a dozen requests for subpoenas, but I have always been able to talk the parties out of it one way or another without any ruling whatsoever. Is our process now getting so formalized that this is becoming a major problem?

TOM GREEF: One of the reasons you are seeing more subpoenas, particularly in disciplinary cases where you may have one bargaining-unit member testifying against another, is that the union wants them subpoenaed. They want the member insulated from any internal union charges of unbrotherly conduct or the like, so they won't be subject to fines or other discipline. I think you are going to see more and more of that.

PHILIP SCHEIDING: I'm from the Steelworkers. In our latest contract, the 1980 contract in the major steel companies, and in the aluminum and can contracts, we have provided that one side cannot subpoena witnesses from the other side. We did that for good reason. Under our international union constitution, a member cannot give testimony against a fellow member. We were getting into some embarrassing situations because of one member appearing against another member, sometimes at the behest of the company, sometimes pursuant to a subpoena. We cured that problem contractually. In the absence of this type of contractual clause, I think the arbitrator should attempt to use his powers of persuasion. He should try to avoid a confrontation between the parties and find other ways to get necessary evidence into the record.

## IV. Absence of Grievant or Key Witness

In the arbitration of a discharge for theft, the grievant is not present at the hearing.

1. If no one said anything, would you ask about his whereabouts?

2. When, if ever, would you request or demand that he be present?
3. When, if ever, would you call the grievant (or any other seemingly key witness) to the stand on your own initiative?
4. What if the union said, "We wanted the grievant here to testify, but he's in jail after a jury finding of guilt on a criminal issue in this case"? Would you grant a continuance for two years, or would you seek another approach?

CHRISTINE BARKER: It is my feeling that if the union wants to run the case without the grievant there, it is the union's right to do this. The company might bring up the fact that the grievant is not there, but I don't think I would open my mouth as the arbitrator and ask where the grievant is.

EARLE BARTAREAU: As a management representative, if I had a discharge case and the grievant wasn't there, I think I would inquire why he wasn't there.

CHARLES TRABAND: I totally agree with that position. If you saw what happened to Anchor Motor Freight in the *Hines* case on the duty of fair representation, you know an employer could end up being liable for millions of dollars on a joint and several liability theory. I think if you are doing your job as a management representative, you should get it on the record: What is going on? Why isn't the grievant here?

BENJAMIN WOLF: I would hate to feel as an arbitrator that I was being used by the employer and the union to drop some employee who didn't even know about the hearing. Just for my own satisfaction, I would have to know that I had a genuine case, not one contrived between management and the union. I certainly would inquire as to the circumstances of the grievant's absence.

DAVID VAN OS: I'm a union advocate. There may be cases where the arbitrator ought to inquire, at least off the record, whether the grievant has been notified of the hearing. But I would not go any further than that. I do not think that it is the arbitrator's place to determine what sort of case the advocates should be attempting to present to him.

DAVID KABAKER: I certainly would ask where the grievant is and whether or not he was notified and why he isn't present. Even in industries where it isn't customary to have the grievant present, some courts have held that he is entitled to be present and to be represented by counsel.

ELLEN ALEXANDER: I would ask the person who had claimed to have given notice to state what that notice was. I would get into the record whether it was personal contact, like a conversation, or a certified letter, or whatever. But if I was satisfied that the notice had been adequate, I would probably proceed, although there are many arbitrators who would not. I think due process is always left up to the arbitrator even though fair representation may primarily be a matter for the union. Even though the parties were ready to proceed, I would still want to satisfy myself from the due-process viewpoint that there had been notice.

GEORGE NICOLAU: In a particular case, I have required counsel to contact the grievant on that very day and to come back and represent to me that the grievant had authorized him to proceed in his absence. It was done without any difficulty.

STEVEN GOLDSMITH: In an arbitration case where both sides are ready to proceed and there is no objection to the proceeding, but the grievant isn't there, I ask the union to state on the record what efforts they have made to get in touch with the grievant—telephone calls, letters, other efforts—and whether they have sat down with the grievant to discuss the facts, if they want to tell me about that. I will put that on the record to show in effect that the union is not at fault. We are going ahead after due notice to the grievant.

MARK KAHN: There are two distinct situations. One is where the union and the employer are equally surprised by the failure of the grievant to be on hand. I think there it would be a mistake to proceed. Obviously, the grievant could have been taken ill or been involved in a traffic accident, or whatever, and he would not be getting due process. I think the situation calls for a continuance and an investigation of the reasons for the grievant's not having appeared. An altogether different situation is where the union does take the position that we advised the grievant not to appear or he advised us that he wasn't going to appear and we want to go ahead. I think you go ahead.

IRVING BERGMAN: Around the New York area, the state designating agencies, e.g., the New Jersey State Board of Mediation and the New York Board, will advise the arbitrator on what to do if the grievant is not present. We are cautioned not to proceed, but to automatically grant a request for postponement. That will generally be made by the union in order to cover the possibility of that bugaboo we now have about lawsuits. After

the automatic adjournment is granted the first time the grievant doesn't show up, I make it a practice to insist the union give me copies of their receipts for certified mail and an affidavit of whoever it was—such as a business agent—who contacted the grievant and who said he would be there for the second hearing. I put that right in the award when I dismiss the petition or the demand for arbitration, as an explanation of the grievant's absence. That is done now to cover yourself against lawsuits because the agency doesn't want to be sued either.

WILLIAM GLINSMAN: When a grievant doesn't appear, I too require the union to provide proof that they have notified him. If they have such proof, I render an award that says that the grievant upon due and sufficient notice is entitled to show good cause why he was not available at the hearing. He may apply for a reopening within 30 days, and if he does not, I discharge him. You instruct the union in your award to send a follow-up telegram. They use a mailogram that is certified that they did notify the employee at the last address of record. Consequently, there is proof that the award is final and binding.

MARSHALL ROSS: I have had the situation more than once where the grievant was served proper notice but failed to appear, and at first the union wanted a continuance. Then there was an objection from the company on the ground that an employer has the right to refuse to have the matter withdrawn. If they insist, I think they have a right to go forward with the hearing because they may have engaged in a lot of expense and trouble, and they are entitled to be heard even though it wasn't their grievance.

WILLIAM FREDENBERGER: Sometimes the employer will move that the grievance should be summarily denied if the union does not produce the grievant. In this regard, it seems to me that it is a fundamental proposition that the union has both the burden of proof, in the usual nondisciplinary case, and the right to prove, in any case. If they can make that proof without the grievant being present, at least they should be given the opportunity to do so. So I would not grant the employer's motion in these circumstances.

RALPH NORTON: I'm a union advocate. In a discharge case the union may have concluded that the grievant was not properly terminated. Now they come to the arbitration proceeding and the union does not call the grievant. But the company still has not made its case. I think the arbitrator in this instance can't

draw an adverse inference. He has to make the determination on the basis of the evidence presented. It is the employer that has the burden of proof, that has to establish the case.

I. B. HELBURN: Just two observations: First, in the rare instance where the grievant has not appeared or has appeared and not testified, it was painfully obvious to me that the only thing the grievant could do by appearing on the stand was to weaken his or her case. Second, I am not sure that the matter is one of drawing adverse inferences so much as it is that the absence of the grievant's testimony either eliminates or severely diminishes the union's opportunity to rebut the case made through the evidence presented by management. Both approaches, of course, may lead to the same conclusion—the grievant loses.

WILLIAM E. SIMKIN: If the discharged person is at the hearing and does not testify, I have never called that person as a witness. But almost invariably at the tag end of the hearing, I'll turn to the grievant and say, "Look, do you have anything to say for yourself?" And usually they say something and then I may have a few questions I want to ask, but I don't officially call them as a witness. Sure, I have drawn adverse inferences from the grievant's failure to testify. But that is why I usually ask those questions. I want to give him a chance.

JAMES MCMULLEN: I would not call the grievant. If I thought that I needed additional evidence, I would indicate privately to counsel what it was I thought I needed. I would give counsel the opportunity to make that decision himself. That is his decision.

CAROL ZAMPERINI: I think the arbitrator should just be satisfied to know that the grievant is there and not make any move to call the grievant. I don't think that the arbitrator should put himself or herself in a position where they are going to conduct the case for either party.

MORRISON HANDSAKER: While I do not disagree with that position in general, I have called the grievant when the union made no attempt at all to put in any defense for the grievant. It seemed to me that maybe he was being railroaded.

ZEL RICE: I don't think I would call a supposed key witness either. I think I would let someone know that there was some information that I would be interested in hearing, but I don't think I would call him myself.

PAUL ROTHSCHILD: I think you indicate to the parties what you need. Then it is up to them to decide whether they are going to risk your displeasure and not provide you with the information for whatever it is worth. But I don't call witnesses.

RICHARD MITTENTHAL: I think the arbitrator does have some larger obligation to find out the facts in the controversy which the parties, for one reason or another, unknown to the arbitrator, have not bothered to bring out. I remember a knife fight in which two employees were discharged because the company was unable to determine who initiated the fight. A third person was there throughout the fight whom the union and management had attempted to question without success because the man was afraid to testify. I worked out an arrangement with the agreement of all parties to preserve the confidentiality of his testimony. He came in and testified, and it became perfectly clear which of the two grievants was lying.

JEROME GREENE: The last hypothetical, where the grievant has been found guilty and is in jail, is relatively easy. Most of the time they throw in the towel before they get to arbitration. Otherwise, it depends upon how long the grievant is going to be in jail. If he is going to be in for only six months or even a year, I would put it up to the parties as to what they want to do.

## V. Witnesses From Opposing Sides

In the arbitration of a discharge for insubordination, the employer calls a bargaining-unit member as a witness and the union objects.

1. As the arbitrator, how would you rule?
2. Suppose the employer calls the grievant as its first witness?
3. Would it make any difference if the union indicated it was going to call the grievant anyway—but on the assumption that the employer would previously have completed its case?
4. Would you allow the union to go first if it insisted on doing so as the party appealing to arbitration, even if it wished to start by calling company officials?
5. How would you rule if one party called the other party's lawyer or representative to testify as to nonprivileged matter, e.g., an observed incident? What if a lawyer offered himself as a witness for his own side?

HORACE WILLIAMS: I'm with a union. I don't think there is any justification for the company's calling a bargaining-unit witness. If that witness is going to testify, the company would have an

opportunity to cross-examine later anyway. The company has the burden of proof and should start with its own witnesses. If they need something from a union witness, they could get to that part of it when the union is presenting its case. If the union presented its case without calling that person, then I think an arbitrator would take another look and exercise some judgment on the need for that witness's testimony.

WILLIAM LEWINTER: As a general principle, reserving the question of the grievant, each side has the right to subpoena or call any witness they want. I permit that. I have even held against a party, relying on the burden of proof, that failed to call a witness from the other side. I presumed that the witness would have testified against them. They obviously knew of him. They had the right to call him, and they knew they had the right and they didn't call him.

GEORGE NICOLAU: In the broadcasting industry and a number of other industries, the parties have a rule that they do not call each other's witnesses. In other areas, again leaving the grievant aside, a party has the right to call anyone they want. There would be no problem with that.

PHILIP SCHEIDING: Suppose the company desires to call a union witness and the union representative reminds the arbitrator and also the man whom the company wants to call that if he testifies, he opens himself up to possible charges under the union constitution for giving testimony against a fellow member.

WILLIAM E. RENTFRO: This happens today with some frequency. Under the facts you described, I would allow the company to call the union member. If the international representative made such a threat in the hearing, I would admonish him against that kind of threatening. I would allow the witness to take the stand, and if he chose not to testify because of the problem he had with his constitution, that would be a privilege for him to assert. If he didn't want to testify, I wouldn't compel him. I couldn't.

MARSHALL ROSS: We are not here to enforce the union's constitution any more than we are here to enforce the federal constitution. If the company wants to call a union member to testify, I think they have a right to do so. Under the circumstances, it would be easy to accommodate the member by simply suggesting that the company obtain a subpoena. I also think that the employer has a right to call the grievant as its first witness. But

as a practical matter, I call the parties aside and point out that this might cloud their future industrial relations. I urge the company to refrain from calling the grievant until they make out a prima facie case. I never fail to obtain their assent to that method.

WILLIAM E. SIMKIN: I have no recollection of ever ordering an adverse witness to testify. I have had a number of cases where the request has been made. I have never granted that request. The only thing that I have ever done that even approaches it is that I may ask a few questions of my own at the end of the hearing. Fundamentally, it is the responsibility of each side to put on its own case with its own witnesses. Of course, they can cross-examine whoever shows up on the other side. But as to ordering someone to appear as an adverse witness, I am vigorously opposed to the whole notion.

MARK KAHN: I think it is bad practice for the employer to call the grievant as its first witness. If the union objects, I would uphold the objection. I think that the employer is under an obligation to present the employer's case, and the employer certainly should have witnesses and evidence to show why it discharged the person. I would, however, make some effort to ascertain whether the union intends to call the grievant as its witness. Receiving such assurance, I would certainly be firm on the fact that the employer can cross-examine the grievant later. The grievant will clearly be on the stand. If the union hedges and says that they don't know yet, I would say that we will see what happens. I have under such circumstances sometimes permitted the company to call the grievant last.

DANIEL BRENT: The hypothetical fact pattern mentioned that this was a case of insubordination. By definition, I suppose insubordination requires someone giving an order and someone refusing to carry that order out. So, in this particular situation, I think that it would be appropriate to have the person whose order was refused outline the basic facts for the arbitrator before requiring either observers or the grievant himself or herself to participate in the hearing. In the event that only bargaining-unit employees observed the fight or theft or other event and the supervisory personnel arrived on the scene or became involved at a later time, one can expedite the hearing by requesting the supervisor who meted out the discipline merely to set forth the facts to the limit of his or her knowledge. That seems to satisfy both parties, and we can proceed without becoming unduly

bogged down in highly technical arguments that we have heard in regard to this situation.

TERENCE CONNOR: As a management advocate, there are numerous occasions on which I would call the grievant first. For example, you may be in the situation where the grievant has made up at least two or three stories along the way through the grievance process, and you know that that person is capable of making up still another story to fit the facts that are presented by the management witnesses. What I am most concerned about, though, is how a group of arbitrators can come up with this exclusionary rule without any legal basis for it. There is nothing but the loosest kind of reasoning that it is not fair to ask someone to testify first in a termination case. It is a civil proceeding and a private law system, and I don't know the source of this right not to be called.

GABRIEL ALEXANDER: I was brought up in this business between two powerful institutions—the UAW and General Motors —and they were sophisticated and they had pioneers in the umpiring system, and they taught me what the expectations of this private tribunal were. It is really a question of the expectations of the parties. It comes back to the feeling of the shop. Now, I should qualify that because, as I got away from autos and arbitrated elsewhere and some management lawyer called the grievant or bargaining-unit witnesses, there was dead silence. Down in the rubber industry in Dayton, it was commonplace, and no one raised an eyebrow and I didn't open my mouth. If that was the way they were going to go with their system, it was of no concern to me. But the minute I heard a union sound incensed—"What are you trying to do to us?"—I knew I would be defeating the expectations of equal participants. From my experience, there isn't one in 95 management representatives who would do this.

RALPH HANNABURY: It bothers me considerably as a company advocate that so many arbitrators feel that they should dictate how a company should present their case. I firmly believe that nobody owns a witness and that either party should be able to put their case in through whomever they wish. If a company wants to call a grievant first, whether or not an arbitrator likes that, I don't think he should try to block it.

VICKIE HEDIAN: I'm a union representative. My point is that there are two sides and there are two cases to be presented. The employer may want to call the grievant, and the union may not

want to or may want to reserve the right to make that decision once it hears the employer's case. If you let one person put on the case they want, you may be denying the other person the chance that they want. When you are balancing those two things, remember that the burden of proof is on the employer. We are entitled to have the grievant not testify at all if we don't think they have put in enough evidence to prove their case.

ROBERT J. MUELLER: I am going to be in the minority, but I will let the employer call the grievant or anyone else adversely, provided that they don't have restrictions in their contract or understandings or past practice not to call members of the union to testify against each other. The grievant is the one who is asking for a remedy and is invoking the process. Many times when it is a contractual issue the union will call a company witness adversely to start their case out. I see no problem either way.

PETER FLOREY: Just a matter of statistics: This question was discussed at a regional meeting of the Academy recently, and the arbitrators were split about 50-50, almost evenly, on the question of whether or not management can call the grievant as its first witness.

THOMAS RINALDO: The same principles apply to calling the other party's lawyer or representative to testify as to nonprivileged matters. I think you can call anybody as long as you are not talking about privileged information.

CHARLES TRABAND: Sometimes the union's representative, usually a business agent, will have been party to negotiations and will offer a statement as proof and subject himself to cross-examination. Calling the other side's attorney is often an exercise in futility as a practical matter because he certainly is not going to say what you want him to say. You can get into some technicalities about calling a witness and about when you are bound by what your witness says and when you can treat him as an adverse witness. I think we have to be aware that we're in arbitration and not in court and try not to get caught in those technicalities. Let's get the facts on the record. That's all we're trying to do.

DONALD WECKSTEIN: The problem with calling a lawyer as a witness is that the code of ethics that governs lawyers says that a lawyer shall not be a substantive witness, at least on a nontechnical matter, where that person is also counsel. I doubt whether that would apply to a labor arbitration. Certainly it's quite com-

mon for business representatives serving as counsel in the absence of a lawyer to be witnesses as well—sometimes giving narrative statements, sometimes having someone else examine them. They are obviously not subject to the lawyer's code of professional responsibility. Why should it be any different unless there's something inherently unethical about a lawyer testifying as a witness? As I see it, the reason for that prohibition is two-fold. One, the lawyer might destroy his independence of judgment. I figure that's something for the parties to judge, not for me. The other is that in a court trial the jury might be confused as to whether the lawyer is playing the role as advocate or as witness. Arbitrators, of course, are superior to juries at keeping such things separate. So I would say that that ethics rule probably does not apply to labor arbitration.

## VI. Medical Affidavits

At the hearing, one of the parties produces a letter from a board-certified physician detailing the results of a hospital examination of an employee, with the conclusion that the employee was "disabled" and unfit for work during the disputed period. The other party objects to the report as hearsay.

1. As the arbitrator, how would you rule?
2. If either the board-certified physician or the company plant doctor were "on call" and ready to come and testify, would you call him if neither party did?
3. Would you accept the report of an examination by the company's physician or nurse if the employee's counsel objected on the grounds of doctor-patient privilege?

ED 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.

HOWARD LEBARON: Sometimes these physicians' reports can be dispositive of whether, in fact, the employee was absent be-

cause of an illness on the pertinent date. If that is so, this note is of great value. Now we come to the next question with respect to medical notes or letters or extended documents from a doctor, a diagnosis and prognosis, where we don't require the doctor to be present since they are so busy and so expensive. This is still a document which cannot be cross-examined. It is of dubious probative value, in my mind. There may be a different opinion. Most of us have had a lot of cases where you have a document from the union and a different document from the company, and they are in direct conflict. On occasion I have suggested to the parties that they bring the doctors in. And the testimony has also been in direct conflict. You have to resolve that conflict just like any other.

WILLIAM LEWINTER: Suppose the company has received the medical form we are talking about in the grievance procedure. The company has not told the union that they were going to contest the use of it, and they reasonably could expect it would be presented in an arbitration. Now, in that situation, I am prone to accept the document. If it shows me that there has been some form of diagnosis, some form of treatment, I am going to give it weight. I am not going to let the other side start to contest it on the basis that doctors do this and doctors do that. I now have evidence in front of me, and if you don't have sufficient conflicting evidence, you are going to find that I accept this as a valid, substantive piece of evidence in the case.

ROLAND STRASSHOFER: There is a practical solution to the problem that arises when there is a substantial question about the authenticity of the document. I have found that the parties will usually agree to a phone conference. I call the doctor immediately. I ask him when we can arrange for a discussion. As long as everyone can hear what is going on in the phone conversation, that seems to suffice, unless, of course, a serious issue does emerge during the phone conversation. In that event we may have to adjourn until we can have the doctor come in personally.

GERRY BOYLE: I am a labor advocate. It is my experience that these reports routinely come in under the business-record exception to the hearsay rule. But in talking about privilege, one thing we ought to keep in mind is whom the privilege belongs to. The privilege does not belong to the lawyer or doctor. It belongs to the patient or client. I have had several situations where there was some medical information in the file that the

grievant didn't want disclosed, so they wouldn't give a release to get the medical records. In those situations I have indicated to them that we can't go forward with the case until they sign that release. They get to make their own decision on whether we go forward or not.

BARRY BROWN: What the advocate just said is true except that most people, when they have applied for insurance benefits, disability benefits, absence pay, or something similar, have usually filed a waiver or a release with the company in order to take the physical examination or submit to some doctor's review. If there is such a release, I would receive the document. However, if the patient—the grievant in the case or whoever it is that this doctor's statement is about—objects and exercises their privilege, then I would refuse to receive it on the basis of the doctor-patient privilege. The question then is, can an arbitrator draw any conclusions from the grievant's objection to the admission of the document. I am sure the advocate for the side trying to propose the document would raise the argument that some conclusions should be drawn. I think it would be dangerous to do that, but at least that would be the argument.

ANTHONY BALDWIN: In your hypo regarding the privilege, I can't conceive of a situation where an employer wouldn't have the employer's doctor or the staff doctor examine the employee. In that situation, especially if there was an industrial accident, it would seem to me that we wouldn't have the problem of the privilege.

## VII. Closing Arguments, Briefs, Remedies

In a discipline case the union suggests that, to save time and money, the parties dispense with briefs and rely on closing arguments. The company says it will agree only if it is allowed to close last, since it had to open first.

1. As the arbitrator, how would you handle a dispute over the order of closing arguments?
2. How do you respond to a disagreement between the parties about the need for briefs? Do you ever express your own preference in a particular case?
3. If neither party raises a remedy issue, do you?
4. Under what circumstances, if any, would you grant a union's request for interest on back pay? At what rate?

SAMUEL CHALFIE: It has been my policy to tell the parties at the close of the hearing that if they want to make oral argument or if they want to file briefs, it is for them to agree between themselves. It's utterly amazing, but I have had a party say that he wanted to give an oral argument and file a brief, and the other one wisely says that he will just file a brief. On closing arguments, again I give them all the leeway they want. But the one who opens the case will open the closing argument, followed by the other. If they want to rebut, they each rebut in the same manner.

ZEL RICE: I handle it almost exactly as a court does. The party that opens gets to close. They give the final argument. They also go first. In between the other party gets a chance to make their own points and respond to the points of the first speaker.

ED TEPLE: On the question of who gives the oral summation first, I would simply say, "Look, you can both have rebuttals, so it doesn't matter who goes first and who goes last. I'll listen to you all until you're both satisfied that you've got everything before me the way you want to do it." That usually handles it very nicely.

THOMAS RINALDO: I always give the parties an opportunity to submit briefs if they want to submit briefs. If it is a particularly difficult case, involving complex language of the contract or shop, I may request briefs.

CAROL ZAMPERINI: If one side or the other requests briefs, then I would allow briefs. I might argue against them and say they may not be necessary. I might point out that the only thing they're likely to include in those briefs are statements that have already been made at the arbitration. But if either side wants them, then I think it's a privilege that should be extended. Whether the other side wants to file a brief or not at that point is up to them, although it probably behooves them to do so.

DALLAS YOUNG: I have suggested to the parties that short summaries rather than formal briefs are very valuable. They ensure that the arbitrator does not miss a point which has been developed by one of them. They can be extremely helpful if he must summarize the respective positions of the parties without any briefs. Short summaries can also be money-saving.

GERRY FELLMAN: An arbitrator may assume that the authority to provide an appropriate remedy is implicit in the submission, but you could be buying trouble. It's so easy, when the parties give you the submission agreement, to say, "Oh, by the way, am

I correct that you meant to include a line, what shall the remedy be, after, was the discharge for just cause?" I would recommend that everyone, as a matter of course, ask the parties that at the start of the hearing. You may save a lot of hassle. I've seen the question briefed heavily, and it's a waste of time that could be avoided at the hearing.

PHILLIP LINN: We have the strangest rule in the Tenth Circuit. If there hasn't been a remedial issue put before the arbitrator, the arbitrator may not fashion an enforceable remedy. You may find there was a contract violation, but you cannot provide a remedy without clear authorization. That is not true in other circuits.

JOANN THORNE: I would like to add something from the federal sector's standpoint. A lot of times in our arbitrations the remedy is more complex than the merits, and we've gotten into some very detailed arguments on the applicability and permissibility of remedies. If an arbitrator who has a federal case doesn't ask for and hear argument on remedy, they're doing themselves a disservice and are likely to get appealed.

ROGER SCHNAPP: As a management advocate, I think remedy can be very important. Often what appears to be crystal clear is not crystal clear. What if the grievant has been working, or has received unemployment compensation benefits, or has had a period of disability? Then the remedy can be critical. I would like the arbitrator in the award to deal as specifically as he can with the remedy that he believes to be fair.

BEN GILLINGHAM: I raise the remedy issue if the parties don't. I am surprised at the number of times in which the parties will get so involved over the question of the substantive issue that the matter of the remedy may get overlooked entirely. Often I find by asking, "What is the union proposing as a remedy in the event that it prevails?" we get a lot of clarification on the substantive nature of the issue and the union's theory of the case. Or you may discover that the problems of remedy that were already running through your head are greatly simplified by learning the remedy which the union seeks.

ZEL RICE: If you are going to do that, it is a good idea to do it at the start of the hearing, whenever possible, because of the inference that the employer might otherwise get that you have already made up your mind.

EDWARD PERELES: I would raise the question in a very neutral way. But I don't want to ask the parties about the remedy until

they have clarified the issue. So where the issue is cloudy in the beginning, I wouldn't ask for the remedy early.

SOL YAROWSKY: There is a great reluctance on the part of arbitrators to allow interest, first, because it is an element of damages over and above back wages, and because in a majority of cases other arbitrators would frown upon the addition of interest to a back-pay award. It is practically never requested in the grievance. It is only an afterthought, possibly even in the posthearing brief. But if an arbitrator concludes that the violation of the contract was rather grievous, interest should be allowed. You ask at what rate. A number of arbitrators, and I include myself in that group, follow the lead of the NLRB. They have a very definite rule of allowing interest on their back-pay awards. It is a fluctuating rate. It is not a constant rate, like 6 percent in the old days. It varies with the market. It is subject to revision at the end of every six months.

IRVING BERGMAN: The NLRB has a right to fashion a remedy, and they justify their interest charge on that ground. It is an appropriate remedy to make whole. Absent anything in the contract, the only remedy that an arbitrator has on reinstatement with back pay is to give the man the hourly rate of pay that he would have earned if he had worked. There are arbitrators who have granted interest nevertheless. I don't know that it has been contested. In my view, the arbitrator probably has no right to do it. The contract doesn't say anything about making him whole.

THOMAS RINALDO: I have awarded interest in a very limited case, and that is where there was a flagrant violation of some employee's rights. I granted interest at the rate of 4 percent two years ago.

PHYLLIS SENEGAL: If you are going to allow interest, I think you should use the interest rate that the state allows you to attach to any judgment. I think in some states it is 8 percent; in others it is 12 percent. I think I might grant a union's request for interest under certain circumstances, where there was a tremendous abuse and the employee suffered a tremendous amount of damage in terms of his income or lost his house.

JOHN SHEARER: I'm not an attorney; I'm an economist. I have no trouble at all with the concept of interest in a back-pay award. I do not understand how an award can be a make-whole remedy without taking into account the changing value of the dollar. My attorney friends have yet to convince me that interest is in any way punitive damages or anything of the sort. As to the rate of

interest, except for extenuating circumstances, I generally use an approximation of the Consumer Price Index for the relevant time period.

HOWARD COLE: If the contract is silent or merely speaks generally of remedy, I think it is fair to say that the parties have negotiated for the arbitrator to have the right to issue what in his judgment is an appropriate remedy. In reaching their bargain, they presumably had in mind a long history of collective-bargaining practices throughout varying relationships, including their own. The general collective-bargaining practice has been not to award interest, but to rely upon the rough justice approach. Is it really fair to expect the arbitrator to plow that new ground against years of the no-interest practice, or is the burden on the party desiring interest on back-pay awards to seek that change in negotiations?

## VIII. Token Presentations, Agreed Awards, and Disqualification of the Arbitrator

During the hearing the representative of one of the parties says to the arbitrator, in the presence of the other party's representative but out of the hearing of the grievant, "The union is only taking this case to arbitration because of fear of a lawsuit."

1. If you were the arbitrator, how would you respond? Specifically, should you disqualify yourself?
2. Would your answer differ if the grievance involved a contract interpretation rather than discipline?
3. Would your answer differ if the statement were made at or near the end of a long hearing rather than at or near its beginning?
4. What if the representative told you the parties had agreed that the grievance should be denied? Would it make a difference if they had agreed that the grievance should be sustained?

BARBARA DOERING: I would consider disqualifying myself if the union said they were going to arbitration because they feared a lawsuit. If the company said it, I'd say they were entitled to their opinion. I would, of course, disqualify myself if I felt the union was really telling me they wanted to throw the case.

MARK KAHN: I think you should disqualify yourself. There

could conceivably be exceptions, especially if the union representative were to agree to have the grievant made aware of this observation and if the grievant were to agree to go ahead. That would take something extremely unusual. The hypothetical may be more difficult if you have just completed three full days of hearing and, as bags are being packed, the union representative says that. Once the hearing is over, I think you are in a position at least to make a judgment as to whether the grievant was well represented. You can be well represented in a losing case. The simplest situation, of course, is where you determine that the grievant has a winning case in spite of that remark. The remark becomes irrelevant. But if you feel that the grievant has been well represented, that the union hasn't taken a dive, it is not trying to sabotage the grievant, it is just a sincere but improper remark, I think I would probably say that I have heard the case and that I thought a good case was made for the grievant. The parties have a big investment now—three days. I'd be likely to ignore it.

WILLIAM E. SIMKIN: We have got a ruling of the Ethics Committee bearing on this, which I disagree with. As I read it, it says that in this kind of situation, you have two alternatives: one is to resign; the other is to go to the grievant and tell him what has happened and ask the grievant whether he is willing for you to proceed to decide the case in view of what has happened. That second point of going to the grievant and telling him the story, I think, is a serious mistake. That creates all kinds of problems in the relationships of the parties and is something that an arbitrator under no condition should do. I do agree completely that we have the obligation to press continually to make sure that there is no improper collusion.

DAVID KABAKER: Even if the union said it feared a lawsuit, the union has a right to assume that they can pursue any grievance to avoid a lawsuit. That wouldn't bother me, but it would bother me if the union says that they know they have a losing case. That is entirely different, and I would consider withdrawing. I think I would be inclined to disregard the statement at the close of the case.

MIRIAM MILLS: I think it makes a difference whether the union's action is overt or covert. If they engage in dreadful eye-rollings and give you that sort of message, I think then that the arbitrator is permitted to be more intrusive in the case and to permit more latitude in questioning the witnesses, because

my own feeling would be that the grievant is not being well represented. If, however, they were to say it straight out, regardless of the costs, it becomes improper. I also think it doesn't make any difference whether the grievance involves a contract interpretation rather than discipline. Whether it is a person or a principle, the union shouldn't throw the case.

IDA KLAUS: If the company and union approached the arbitrator and said that this is a loser and we fully expect the award to be for the company, that is a fix. They are telling you that it is a fixed case and they want you to render a decision for the company, and I would immediately disqualify myself. I would do the same if they said they wanted me to sustain the grievance. Either way, I would disqualify myself in those circumstances.

DAVID KABAKER: I think the last question presents two different possibilities. Where they want an award without your hearing any testimony, that is a fix. I think the other situation is where the company and the union representatives come and say that they recognize the merits of the grievance. At that point you say to them, you are proposing to withdraw and settle the grievance. And they say that they would like to have a stipulation of settlement, and they would like to have that incorporated in the award. That is an entirely different situation.

CHARLES FEIGENBAUM: My own reaction is that it's a very different situation if they both agree that the grievant should be reinstated with back pay as opposed to their both agreeing that the termination should be upheld. In the first instance, the grievant certainly isn't being harmed, the union isn't being harmed, and the company isn't being harmed, as opposed to the other situation where clearly the grievant is being harmed. I think any theoretical abuse of the arbitration process is offset by whatever the needs of the parties were that made them feel they had to go through this charade. I guess I would go along. It may be collusion, but it's a benign collusion in this situation.

GEORGE NICOLAU: The Code of Professional Responsibility says that prior to the issuance of an award, the parties may jointly request the arbitrator to include in the award certain agreements between them concerning some or all of the issues. The parties may say, "Please put in, too, the fact that the grievance is sustained." The Code goes on to state that if the arbitrator believes that a suggested award is proper, fair, sound, and lawful, it is consistent with professional responsibility to adopt it.

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*Program Chairman's Note and Acknowledgment:* The foregoing comments in Chapters 5 and 6 reflect the spontaneous reactions of the participating arbitrators and advocates. If my own experience is any guide, no one should be held bound forever by the views expressed. People respond differently to the dynamics of live situations, to the needs of particular parties, and to small and not-so-small variations in the facts. Opinions change over time.

I should like to acknowledge an enormous debt of gratitude to all the program participants, especially to the discussion leaders whose own wise observations were ruthlessly excised in accord with my perhaps perverse notions of fairness. Finally, deep appreciation is due my secretary, Nan Druskin, and her colleagues on the secretarial staff of the University of Michigan Law School, for patiently transcribing over 36 hours of recorded tapes, and for carefully organizing the resulting mass by subject matter so as to facilitate my selection process.

T. J. S.