II. Search for the Truth: The "Active" Arbitrator—Exploration of New (Or Different) Initiatives

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Overview

There are a number of different ways that one could approach the topic of the role of the arbitrator in the "search for the truth." I have elected to address this topic without any attempt at giving a paper grounded in scholarly research. There will be no citations to other cases and no footnotes. Rather, these remarks represent nothing more than an attempt to look at this question through the personal lens of my own anecdotal experience over the years and to reflect on the question of why I have acted in a more involved or a less involved fashion in specific cases.

The central premise of my presentation is three-fold.

First, while we are hired by the parties to resolve the particular grievance(s) submitted to arbitration, we have been given enormous trust and responsibility by the parties to determine not only the answer to the grievance but also how to best preside over a fair and appropriate process that will permit that decision to be made. This gift of authority places certain responsibilities upon us to act in what we believe is the best interest of all parties and to build both confidence and trust in the integrity of the process and the correctness of the outcome. We serve as the primary guardians of due process. Whenever possible, we should also be acting in a pragmatic way so as to leave the parties in a better collective position than we found them.

Second, all other things being equal, a more complete record should permit the arbitrator to reach the correct decision more often and engender greater confidence in the dispute resolution process itself. I firmly believe that reaching the "correct" ruling based upon the actual relevant facts and circumstances is of benefit to the parties and central to a fair dispute resolution process.

Third, the search for the "truth," while important, is only one goal of the labor arbitration process and must be tempered by

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appropriate consideration of a myriad of other goals of the labor arbitration process that also affect arbitrator conduct, at the hearing, before the hearing, and after the hearing.

A wide range of arbitral behavior—from the very "active" to the very "passive"—is often viewed as acceptable, and the same parties will utilize both active and passive arbitrators interchangeably. I believe that arbitral initiatives to further develop the factual record or to choose to remain silent with respect to certain issues is largely a product of two things: (1) the goals that the arbitrator believes are being served by the labor arbitration process, and (2) whether responsibility for attaining those goals rests primarily with the arbitrator, belongs solely with the parties, or is a shared function.

Arbitrator involvement in searching for the "truth" encompasses a range of arbitral behavior. One form consists of arbitral responses to party attempts to obtain and introduce information or witnesses. This may take the form of a request that the arbitrator use his or her authority to direct production of evidence or witnesses, either by subpoena or arbitral directive. Other times this may consist of responses to requests that the arbitrator limit the introduction of certain evidence or testimony, as in the case of motions in limine or objections. Another area consists of behavior done on the arbitrator's initiative, such as questioning of witnesses and/or advocates by the arbitrator or requests by the arbitrator that one or both parties produce information or witnesses that were not produced initially by either party. Yet another form of arbitral involvement in the search for the truth consists of arbitral "notice" of certain facts that are within the knowledge of the arbitrator and which tend to contradict or to explain other record evidence or which augment the record in other respects.

Despite the wide range of arbitral approaches and techniques regarding these areas, there are certain areas as to which general consensus likely exists.

First, there should be consensus that the arbitration decision must be based solely upon the record developed at the hearing and should not extend to matters that were not made part of the record and which cannot be recognized under the concept of arbitral notice.

A few examples should suffice. Suppose that the arbitrator is presiding over a case in which an employee is discharged for fighting in the parking lot of a plant and there is a credibility question as to whether certain eyewitnesses could have seen what was

testified to in light of their stated physical positions and certain obstructions described as existing in the parking lot. Neither party nor the arbitrator suggests a site visit. Can there be any doubt that it would be improper for the arbitrator to surreptitiously visit the parking lot and make extra-record observations and then rely upon them (whether or not referenced in the decision) in deciding the case? Similarly, an employee is discharged for excessive absenteeism and raises a medical reason for the absences. Can there be any doubt that it would be improper for the arbitrator to contact a friend who practices medicine in that field and obtain undisclosed expert opinion evidence and then consider that opinion when deciding the case?

Second, although the arbitration process is one in which the parties are the "owners" of the process, the arbitrator who presides over the process has obligations as well regarding the development of the record and the maintenance of a fair adjudicatory process. In some instances, arbitral behavior is regulated by ethical considerations (either pursuant to the Code of Professional Responsibility for Arbitrators of Labor–Management Disputes or some other ethical codes). The real area of divergence among arbitrators stems from where the line is drawn between a process that they direct as opposed to one that is controlled by the parties. Where the parties speak—as reflected in express contract language or past practice—they may well preempt arbitral discretion to approach an issue differently, absent some ethical or legal requirement to act otherwise. Where the parties have remained silent, however, the arbitrator enjoys vast discretion as to whether to act and, if so, how to act to facilitate additional record evidence that may permit greater access by the arbitrator to "the truth." The issue of when to act in situations where the parties have been silent is the central focus of the debate over arbitral involvement or activism and is at the heart of the divergent approaches utilized by highly experienced and acceptable labor arbitrators in this area.

The "traditional view" is that the arbitrator, like the collective bargaining agreement itself, is a "creature of the parties" and that the parties have primary ownership of the process both in areas where they have spoken through contract language and/or practice and in areas where they have chosen not to do so. Many of those arbitrators viewed themselves largely as the equivalent of baseball umpires – they simply call the pitches as balls or strikes, but otherwise remain silent and make sure that they do

not inquire into areas that the parties avoided, presuming that such avoidance was intentional.

To this group of arbitrators, there often is a strong reticence to become involved in the development of the factual record other than by way of responding to overtures from one or both parties—i.e., in connection with ruling on subpoenae or party requests for information, motions in limine, or disposing of party objections to proffered evidence. Whether due to an underlying belief that the primary responsibility for making factual arguments and adducing proof rests with the parties and their advocates or for other reasons, the default reaction is one that refrains from activism or involvement outside of reactive roles.

While many arbitrators continue to adhere to this approach, there are also many arbitrators who are significantly more involved proactively in the development of the record. This more active approach mirrors similar behavior exhibited today by many judges (both trial and appellate) and administrative hearing officers and by arbitrators who are adjudicating employment and other types of workplace disputes.

It is also my impression that many parties today welcome involvement by arbitrators that exceeds what the "traditional view" would suggest is acceptable or desirable. The key is to exercise good judgment as to whether under the particular circumstances greater involvement or activism is appropriate. Further, once the decision to be more involved has been made, it is critical to exercise further discretion and good judgment as to how to best accomplish that goal.

This paper discusses limited examples of situations that I have encountered in my own practice and attempts to be reflective with respect to my own behavior over the years. It is my hope that the selected examples will provide context with respect to the underlying decisions to be more active or involved in some situations and to refrain from such behavior in others. The scenarios also provide a ready vehicle for discussing some of the different tools that may be used to make the "missing" information part of the record.

Prior to discussing these illustrations, however, some discussion of the relevant goals to be served in the arbitration process appear appropriate.

Relevant Goals of the Labor Arbitration Process

Without any attempt to prioritize these goals in terms of their importance or application, which will vary from situation to situation, the goals of the labor arbitration process that are relevant to arbitral involvement or noninvolvement in efforts to search for the "truth" include the following:

1. *The arbitrator should reach the "right" answer to the issue(s) submitted for decision. To attain that goal, the arbitrator may need to take steps to ensure that the record is adequately developed to permit the arbitrator to fairly and appropriately understand and decide the matter in dispute.*

Reaching the appropriate result, based upon fact finding made as the result of careful analysis of an adequate record, is to be preferred generally over decisions that state that the arbitrator cannot determine what actually took place and are grounded primarily in legal concepts such as burdens of proof or persuasion.

Deciding a dispute based upon a record that is reflective of reality is preferred to deciding a case based upon a record that represents a distortion of the truth.

Parties and arbitrators alike often expect that a fair and thorough investigation occur as a part of just determination by an employer to discipline an employee and further expect that the results of that investigation be appropriately considered. Why should a fair adjudication in arbitration be less concerned with ensuring that it is made on the basis of an adequate record than the original determination that is being appealed?

2. *The arbitrator should serve as the guardian of a fair and transparent dispute resolution process. Transparency engenders added trust for both the process and the outcome.*

The process is one that can be intimidating to the parties and their witnesses. Many employees and managers have little or no familiarity with the process and may or may not have significant trust in their own side, let alone the other. One way to increase the level of trust that they should have in both the impartiality and integrity of the arbitrator and in the process is to act in ways that demonstrate the arbitrator's independent role and desire to ensure that the hearing and decisional processes are fair. This is reflected in arbitral rulings, in the respect shown to all participants, in the arbitrator's obvious interest in the subject matter of

the dispute and relevant prior experience (which may manifest itself in appropriate questioning), in maintaining precautions designed to minimize any concerns about one-sided or back door communications, and in maintaining transparency in other ways.

Explaining briefly the basis for any rulings made, including those relating to objections, should reinforce the perception that the arbitrator is acting for appropriate reasons.

Transparency can also be an effective tool when providing assistance at resolving disputes at the appropriate stage(s) of the arbitration. I inquire at the end of every case as to whether the parties desire the decision that they have hired me to provide or wish to explore a possible resolution. I engage in a series of disclaimers designed to ensure that the settlement process is also transparent in terms of my role and involvement. With limited exceptions, I do not "tip" my hand as to my likely decision in this process, take steps to ensure that the process remains free from arbitral pressure to settle the case, and generally do not have this dialog prior to the completion of the factual record (at which time all parties know precisely the nature of the matter being submitted for determination). By inquiring at the end of the case, rather than after openings or even earlier, one cannot be accused of prejudging the matter based upon limited knowledge of the case and one avoids what can be a protracted and wasteful process of prolonged attempts to settle at the beginning of the day. In appropriate cases, however, I will also inquire into the possibility of resolution at earlier stages of the case.

Questioning of witnesses and/or advocates is a primary tool of arbitrators to obtain more information relative to the "search for the truth." It is my experience that posing questions "for my education" that seek to either clarify conflicts in the record evidence or to reconcile the record evidence with other information or assumptions grounded in my experience from prior similar situations or cases often is met with acceptance and support, even from witnesses who are being examined critically. It is not uncommon for witnesses to comment "that's a good question" before responding. Primarily the questions are for clarification or furthering my understanding. Secondarily, questions convey that I am paying careful attention and take the role of decision maker seriously. Questions sometimes are used to identify areas of possible concern. Questions also require that witnesses interact directly with the arbitrator after having interacted for a much longer period of time with the advocates (often facing away from the arbitrator).

Questions sometimes expose issues of concern or preliminary leanings on a given issue and may lead to a resolution.

So as not to unduly interfere with the parties' right to present their cases as they deem beneficial, I generally hold my questions until after the completion of direct and cross and any further rounds of direct and cross. It is important, however, to make sure that after arbitral questions have been completed, the parties are permitted additional examination to respond to any matters that may have been raised by the arbitral questioning. I also try to avoid leading questions and to question in a neutral way that does not suggest any predisposition or a desire to engage in arbitral cross-examination.

Posing these types of questions to all witnesses/parties, rather than simply to one or a small number, may also assist in avoiding the appearance that the arbitrator has "taken sides" in some way.

Whether to question in a given area is bounded not only by the curiosity of the arbitrator but also by other considerations including, but not limited to: the critical or noncritical nature of the questions; whether pursuing the initiative will likely prevent the hearing from being concluded that day; whether the question will needlessly embarrass a witness or party; and the nature of the case in dispute (one may feel the need to obtain more complete information with respect to the discharge of a long-term employee or a significant contracting out dispute than in the case of a warning letter or a case of overtime bypass for a single incident of a few hours).

3. *The arbitrator must respect limitations that the parties have negotiated or have agreed to as reflected in past practice.*

The arbitrator's authority derives from, and may be limited by, the parties' agreement. The arbitrator should respect and honor those agreements. Areas that are often the subject of these agreements and are germane to the topic at hand include such matters as recognizing that particular evidence is not permitted (e.g., testimony from patients in a nursing home or hospital setting); restrictions on management calling bargaining unit employees as witnesses or the union calling managers or supervisors as witnesses; full disclosure provisions that limit the introduction of new evidence or arguments at the arbitration stage; limitations on the use of time-barred disciplinary actions; limitations on time in connection with certain expedited processes; limitations on briefing; requirements for bench decisions; contractual provisions regarding bifurcation (e.g., arbitrability and merits issues, or merits and

remedy issues); and limitations on hearing multiple grievances at the same time.

4. *The arbitrator should preside in a way that avoids unnecessary disruption to the parties' relationship. Maintenance of stability and fostering a successful collective bargaining relationship are appropriate goals of the arbitration process.*

Several years ago I was asked to arbitrate 30 related grievances seeking mid-term pay increases based upon claims of substantially changed job duties and responsibilities. I had performed limited ad hoc work for these parties over the prior ten years or so. The parties had a contentious relationship and treated arbitration much like litigation and even had a "loser pays" provision in the agreement. They expressed interest in presenting these cases to a single arbitrator, without use of attorneys, in order to save time and money. I advised them that I would not hear the cases under their traditional approach (one case, one day and briefs and full opinions) since it would not meet either of their stated goals—in other words, a prompt and inexpensive disposition of the claims. I offered, instead, to meet with them to design a system more appropriate for deciding those cases and which also would meet the stated needs of expedited time frames on resolution and limiting costs.

After discussion, we crafted together a med–arb system, with multiple cases heard each day and abbreviated written opinions confirming either the award or the resolution, and with costs for the process shared. The system was initiated on a trial basis. All 30 grievances were completed in six hearing days spread over a five-week period. The system proved to be a success and the parties continued its use in future cases—and their relationship improved.

The result was very good (but sometimes less than perfect) justice that was obtained much more quickly and with significantly less cost than would have been achieved using their normal arbitration system. Additionally, the parties and the individual grievants, stewards, and department heads were more involved in the process. I am expected to pose questions to an even greater degree than usual to assist in ensuring that I know what I need to know to decide the case despite the brief period of time devoted to the actual presentation of evidence and argument. I often provide bench rulings, with brief written opinions or awards to follow. I leave these hearings feeling that I have served beneficial roles, both as adjudicator over problems that the parties were unable to

resolve without outside assistance and as a peacekeeper in terms of their ongoing relationship.

Taking the initiative to broach alternatives to the parties in appropriate cases, whether on a case-specific basis or otherwise, is part of what we are hired to provide. Labor arbitrators hold positions of trust and respect and we should not forget that this entails the responsibility to lead in appropriate circumstances and in appropriate ways.

5. *The arbitrator is responsible for ensuring that the labor arbitration process is an efficient one, avoiding unnecessary delays and costs.*

This goal is part of the balance whenever additional information is sought—either by a party or on the arbitrator's initiative. Given the lack of discovery and the limitations in the way that many parties approach their grievance procedure, it is not uncommon for items to be raised at an arbitration for the first time. Alternatively, counsel may be involved for the first time shortly before the hearing and may have sent an information request that was not fully responded to prior to the hearing. The question is then presented as to whether to direct that the information be produced if the result will cause a second day of hearing and/or significant costs. The arbitrator should consider the likely significance of the information in question and the nature of the case prior to simply directing that the information be produced because it is believed to be relevant.

Similarly, if parties advise that they wish to schedule a second day to rebut some item of evidence, the arbitrator may be able to advise that the particular piece of evidence in dispute, while relevant, will not be case-dispositive. Based upon that assurance, the decision may be made to forego the particular rebuttal. Additionally, I have often urged the use of proffers—in essence, a stipulation that if called to testify, witness X would testify to particular facts. It is not a stipulation that those facts are accurate, simply a stipulation that the witness would testify in a particular way. This is particularly helpful in cases of cumulative evidence that is not deemed case-critical in the arbitrator's judgment.

6. *The arbitrator should act in ways that engender trust that the arbitrator has taken the decisional responsibility seriously.*

While excessive or one-sided questioning or requests for information jeopardize the perception that the arbitrator is unbiased, asking appropriate questions demonstrates that the arbitrator is engaged and is concerned with fully understanding the relevant facts and circumstances bearing upon the matters in dispute.

Being engaged also minimizes the potential that the arbitrator will make assumptions that, while reasonable generally, are factually inaccurate in the particular case.

A good example is whether to draw an inference from a missing document or witness. I always ask about whether the document still exists/is readily retrievable and whether the witness is still employed at the employer and/or is still in the area and available. The arbitrator may not even know whether a party will be seeking potential adverse inferences until closing or a posthearing brief. At that stage it will be too late to learn, for example, whether the parties each call members of the "other" side (if that fact is not clear already) or whether the "missing" witness died last year or moved abroad.

Similarly, the failure to introduce a copy of a surveillance tape might be explained by other considerations that the parties would not share with the arbitrator absent some expression of concern over the failure to have introduced the tape. It may be that the union viewed the tape and was just as happy as the employer not to introduce the tape. In those circumstances, inference would likely be inappropriate. But if the arbitrator has not asked about the tape or whether the union was provided a copy of the tape, it would not be possible to determine the appropriate circumstances surrounding the failure to introduce the particular item of evidence or failure to elicit testimony from the particular witness.

The crafting of an appropriate opinion accompanying the award that explains the rationale for the particular ruling also engenders trust for the propriety of the process and for the results.

7. *Where legal issues are presented for determination or where there are statutory provisions for appeal of the arbitration award, the arbitrator should preside over the process in a manner that is consistent with law and which will maximize the likelihood that the award will not be challenged or, if challenged, will be sustained upon appeal.*

I believe that the parties presume that the arbitrator is aware of the law as it relates to the matters in dispute. The parties or their advocates may or may not be expert in those provisions of law despite the fact that the claim implicates those legal issues.

If the arbitrator reasonably believes that a question of law is implicated by the claim, then situations will arise in which: (1) the arbitrator is familiar with the particular law or case law, but the advocates and parties do not appear to be knowledgeable; or (2) the advocates or parties appear knowledgeable, but the arbitrator is not; or (3) neither the advocates nor the arbitrator appear to be

fluent with respect to the particular legal question. Further, sometimes those issues are known to the parties prior to the hearing and other times they appear to arise during the hearing process as additional facts unfold for the first time.

While I believe that an arbitrator should not raise new claims or legal theories not espoused by the parties, the arbitrator does have a responsibility to "get it right" with respect to questions of law that are properly part of the matter being submitted for decision. Arbitrators must be willing to assume the role of teachers in some scenarios, the role of students in others, and to raise issues for all to research or consider in others. I take hearing notes on a computer and have copies of the relevant text and regulations of many commonly raised employment laws, as well as copies of many of the lead cases, on my computer's hard drive. They can be accessed, if needed, even during the hearing (in breaks or otherwise).

Two brief examples again underscore the problem. I was selected to hear a case involving a denial of disability benefits with respect to an employee in a manufacturing facility. The central dispute was whether the employee was disabled and improperly denied disability benefits. The advocates were nonattorneys. After opening statements, it became clear that: (1) the disability plan was insured and was covered by ERISA; (2) the employee had filed a benefit claim appeal and it had been denied by the insurance company; (3) the employer had taken no action that led to the insurance company's denial of the benefits; and (4) the collective bargaining agreement contained no language regarding disability benefits other than a single paragraph requiring that the employer continue to provide the existing disability plan to existing employees. After opening statements, and prior to taking testimony, I spoke to the advocates off the record and noted that there was a body of case law that held benefits claims appeals not to be arbitrable and noted that there was a question as to whether I had the jurisdiction to adjudicate a complaint that, under the terms of the plan, disability benefits had been improperly denied. After some discussion and a caucus, the union restated its claim, limiting its case to an assertion that the plan provisions that had been purchased by the employer from the insurance company did not meet the requirements of the agreement with respect to providing disability benefits coverage and that matter proceeded to decision. One may question why I raised the issue at such an early point in the case. If the advocates never appreciated the legal

limitations on arbitral authority, would it have been better to take extended medical testimony on the employee, only to then reject it in the written decision as irrelevant? Or should the arbitrator decide a question that was not properly substantively appealable simply because the advocate failed to articulate the objection? I believed that discussing the situation earlier in the process in that particular situation resulted in a better dispute resolution process than would likely have resulted if I had remained silent and simply taken the testimony and surprised the parties with the legal issue in the opinion and award. The particular legal issue of jurisdiction, moreover, was not one that was substantive and not likely subject to waiver.

In another case, an employee with about 18 months of service was discharged for excessive absenteeism. Several of the absences were claimed to be covered by the Family and Medical Leave Act (FMLA). Those absences, however, took place when the employee had worked for the employer less than six months and thus appeared to have occurred prior to the employee becoming administratively eligible for FMLA benefits. The employer had objected to consideration of FMLA issues on both procedural and substantive grounds, but did not raise the eligibility issue. I chose to raise the eligibility issue with the advocates off the record and, following that discussion, the FMLA issue was withdrawn, although the challenge to considering the absences as part of the basis for discharge under traditional just cause principles remained.

Arbitrators must be willing to engage in independent research with respect to issues that are properly raised by the parties and which are relevant to the disposition of the dispute. If new case law is uncovered, the arbitrator may choose to seek comment from the advocates on the matter or may opt to simply march forward to decision. That judgment will likely balance the delays and costs involved with returning to the advocates for additional argument and the desire to allow comment by the advocates as a matter of fostering a fair process, with the degree to which the arbitrator is persuaded that he or she has already gotten the law with respect to the issue "right."

8. *Service as a member of a "permanent" arbitration panel, sole umpire, or as a neutral chair of a tripartite board may affect not only whether and when to be involved, but also how one goes about being involved.*

The relationship enjoyed with the parties in a sole umpire or small permanent panel situation is more intimate in many respects and often entails different knowledge baselines on the part of the

arbitrator (and the parties) and different expectations in terms of the formality of the arbitration process itself.

Many tripartite boards or panels enmesh the arbitrator in discussions outside of the record with respect to both the merits of the case and procedures applicable to the disposition of the case. In terms of the "search for the truth," knotty questions often arise as to whether information shared during the board process may be considered by the arbitrator in deciding the case. Similarly, the board process provides the arbitrator with another tool to raise factual or process questions, both during the course of a hearing and thereafter. Rather than do so on or off the record directly with the advocates, those issues can be addressed with the party-appointed panel members initially.

The process is best served, in my view, if prior to the start of the case, the arbitrator spends a few minutes with the members of the panel, addressing the ground rules that will apply to the operation of the panel in the particular case (e.g., whether information will be kept confidential, how questioning by the panel will proceed, and the like). A similar conversation should occur at the conclusion of the case to address how the panel will confer with respect to the merits and the expectations of the party-appointed members relative to the arbitrator (and vice versa). By operating transparently, the potential for problems is significantly reduced and trust between the panel members can be built or enhanced. By leading appropriately, respect for the ability of the arbitrator to handle the particular case in a professional manner is also fostered.

9. *The arbitrator should resolve the issue(s) submitted for decision and generally avoid deciding other issues absent some strong indication by the parties that they require broader and/or collateral issues to be decided as well. Active exercise of case management responsibilities may be of great benefit to the parties, including, but not limited to, whether to: clarify the issue(s), bifurcate remedy or other issue(s), or provide assistance in helping to resolve the matter.*

The resolution of issues regarding whether particular information should be included or excluded from the record can be done on a nonprecedential, case-specific basis. Such limitations often elicit greater cooperation and acceptance of initiatives by the arbitrator than would occur if the parties believed that they were addressing how future similar (or not so similar) situations would be addressed.

Some cases include disputes over the scope of the matter being arbitrated. The arbitrator may not be able to provide meaningful

assistance at the beginning of the hearing, but may be able to do so as the case begins to unfold. It may even be necessary to take evidence "for what it is worth" pending clarification of the disputed issues.

If this approach is adopted, however, the arbitrator owes it to the parties to advise at the earliest possible stage precisely what the particular evidence is worth to avoid misleading both sides or creating a situation where significant rebuttal is taken to evidence that is of little value in the first instance.

Bifurcation of complex remedy or other issues may be helpful in a number of respects. If done by remand and retention of jurisdiction, it will provide the parties the opportunity to address those issues with maximum flexibility. It may also serve to eliminate large amounts of evidence at the initial hearings.

Tools for Developing the Record

The tools available to arbitrators to "search" for the "truth" include the following:

1. directing that certain evidence be produced;
2. signing a subpoena, where authorized by law, that has been requested on behalf of a party;
3. permitting a broader or more narrow factual record to be developed by means of rulings on objections and/or other comments at the hearing;
4. asking questions of advocates or witnesses as to particular assertions, facts, or theories;
5. advising parties of the consequences of a failure to produce a missing witness, document, or the like;
6. calling witnesses or marking documentary evidence on the initiative of the arbitrator; and
7. annotating the record with statements of fact, requests to incorporate other matters, or the like.

Illustrative Scenarios

I have divided the illustrations into three groups—one involving prehearing behavior, one involving behavior during the hearing, and one involving posthearing behavior. These simplified scenarios, along with my resolution to those situations, are pre-

sented and some brief overview is included as to the reason for that outcome.

Prehearing Scenarios

1. A subpoena *duces tecum* is received in the mail from the attorney for an employer (not showing as copied to counsel for the union) addressed to a physician, seeking that the physician appear at the company lawyer's office 10 days prior to the scheduled arbitration and bring with her copies of all records and notes regarding the grievant, including but not limited to records of an inpatient treatment for addiction. Should the subpoena be signed and, if not, what actions should be taken?

I declined to sign the subpoena absent some showing that appropriate releases were executed. The search for "the truth" was secondary to the desire not to issue a subpoena that violates the privacy rights of the grievant, as a patient, or misleads a physician into believing that dissemination of the medical information is legally appropriate. There are a variety of federal and state laws protecting patient rights to privacy of medical information generally, and of drug and alcohol treatment records in particular.

Additionally, the subpoena is a "discovery" subpoena that purports to require that the information be provided prior to the hearing to the attorney for one party. It is questionable whether arbitrators have that power under the Federal Arbitration Act and/or Section 301 of the Labor–Management Relations Act absent clear state law authorizing such behavior. While some arbitrators approach subpoena requests as wholly ministerial acts, I do not feel comfortable signing a subpoena that I know to be of doubtful legality.

I required that the union counsel be made aware of both the invocation of arbitral authority and the disposition by copying directly, or requiring that counsel for the employer copy, union counsel on both the request and the response. The desire for a transparent process in which I do not learn anything about a case or take action in connection with a case that is communicated to only one party outweigh any tactical considerations inherent in forcing disclosure of the witnesses/information sought by way of the subpoena process.

In short, if the agreement does not require disclosure of the information, a party may surprise the other side with a witness or information at the hearing, but once arbitral authority is invoked,

I believe that the better course is to ensure that all parties are aware of the invocation and any action taken. The fact that the "truth" may be more difficult to establish, in this case, failed to provide grounds in my view to sign the requested subpoena.

2. A subpoena was received from the union representative seeking to compel the attendance of Susan Smith at the hearing. I signed the subpoena and had the other side copied. A few days later I received a Motion to Quash, based upon the claim of counsel for the employer that Ms. Smith is a patient at the nursing home and the practice of the parties has been not to call patients as witnesses in cases of discipline for alleged employee misconduct, including abuse cases. A conference call was held at which the union asserted that, if Ms. Smith was not being called to testify, then the arbitrator should exclude hearsay statements of Ms. Smith made to nursing home managers or, alternatively, if such statements would be permitted, then the union should be entitled to an arbitral subpoena seeking that the employer disclose Ms. Smith's medical records to prove her allegedly severe senility.

I granted the Motion to Quash. Assuming that the practice has been acknowledged (and the practice is common in the industry) or there is a contractual provision precluding inferences from being drawn by the failure of any party to call a patient as a witness, deference to the parties' bargain and expectations trump the value of taking evidence from an individual who remains a patient in a nursing home and whose mental state is unknown. Prior to allowing hearsay reports of the patient's complaints, I would require, at a minimum, some representation of the patient's mental competence, but would not be inclined to sign a subpoena that probably violated state and/or federal privacy laws that protect the confidentiality of Ms. Smith's medical records. All references to Ms. Smith in the record should be done by some appropriate code, rather than by name.

3. Prior to the hearing, I received a telephone call from both attorneys. Union counsel moved to compel production prior to the hearing of a surveillance video of the grievant taken by a private investigator hired by the employer. The grievant was discharged for alleged false use of sick leave. The employer asserted that it would produce the video at the hearing, but wanted to first obtain testimony from the grievant as to his behavior/actions.

I ordered that a copy of the video be provided to the union for review. Consideration of a fair process and avoidance of inappropriate surprise, as well as a desire to preside over an efficient

process, outweighed the benefit of obtaining the testimony of the grievant prior to his or her knowledge of the contents of the video. Waiting at the hearing for an initial viewing will likely produce the need for a second hearing day for what should be a single-day arbitration. This situation differs from the discovery subpoena situation in scenario number 1 since the arbitrator has plenary power over the parties with respect to the subject matter of the dispute and may direct that information be provided as part of the obligation to ensure a fair and appropriate hearing. The fact that the union could have gone to the National Labor Relations Board to attempt to obtain the information does not preclude the request from being made to the arbitrator with appropriate sanctions imposed for any failure to comply.

Hearing Scenarios

1. Witnesses were sequestered. The case involved discharge for alleged theft and the facts were hotly contested. The employer called the grievant as its first witness. The union objected.

Assuming that there is no practice of the parties that would support a contrary approach, if witnesses are sequestered, then I permit the employer to call the grievant as its first witness. Absent some collateral pending criminal proceedings (which may require a different response), I do not believe that there is any right on the part of a grievant to refrain from testifying. Even though the employer has the burden of proving just cause, the grievant would remain in the hearing room throughout the testimony of the employer's witnesses. Having the grievant testify as to his or her version of events prior to testimony being introduced from the sequestered witnesses may well further a search for the truth and would permit each party to present its case as it deemed most appropriate. The union would retain the right to engage in its direct testimony of the grievant, on cross-examination, or wait and recall the grievant as part of its case-in-chief. After making such a ruling, however, I offer the union the opportunity to speak with the grievant prior to allowing testimony to be taken so as to ensure that any instructions or preparation that the union planned to conduct after that point in time, but prior to its possibly calling the grievant as part of its case-in-chief, could take place.

Significant numbers of arbitrators, however, preclude the employer from calling the grievant as a witness in a disciplinary case, finding that it is inconsistent with the burden of proof, and

others permit the employer to call the grievant, but only as its last witness. These differences are often reflective not only of individual differences in arbitral approach but also of regional norms.

2. Pursuant to prior practice, the employer may not call bargaining unit employees and the union may not call managers or supervisors. The case involved a discharge for alleged sexual harassment of another bargaining unit member by the grievant.

The employer investigated the complaint and the Human Resources Manager prepared a report summarizing his discussions with the alleged victim and with other bargaining unit employees. The HR Manager began to testify concerning his investigation and the union attorney objected on the basis that it is hearsay.

The rule against calling individuals from the other side was common years ago in many relationships and is less common today. The particular parties, however, had consistently applied that limitation for decades. On the one hand, I wanted to preserve that practice rather than erode it through exceptions. On the other hand, there was no way that the "truth" could be obtained without hearing directly from the other witnesses rather than relying solely upon the hearsay of the HR Manager. I finally indicated that I would call the employees as my witnesses and allow both parties the opportunity to examine them as well, preserving both the integrity of the record and the integrity of the prior practice and avoiding a change in the way in which the parties dealt generally with the arbitration process.

3. A truck driver was discharged for an accident. I had driven through the particular intersection hundreds of times before and knew certain facts about that intersection, traffic patterns, visibility, etc. The evidence at the hearing, however, failed to note a number of important relevant facts.

I noted my familiarity with the particular intersection and traffic patterns by way of a representation on the record. I allowed others to annotate or to introduce contrary or clarifying evidence as well. I did so on the record, rather than in the hallway. No objections were raised to that process.

4. Same scenario as number 3, with the following addition. I had Internet access during the hearing and was aware that Google Maps has a "street view" setting that enables one to see the intersection and surrounding roads in a 360 degree view. While Google Maps printouts were offered by the parties into evidence, the street view was not. The placement of a road sign denoting

the curve and speed limit were disputed that might have been revealed using the street view function.

This one was a much closer call. In the particular case, I did show the advocates, outside the hearing room, the "street view" feature of Google Maps and used as the example the particular stretch of highway involved in the accident. The particular search was inconclusive on the issue of the sign placement. One of the attorneys expressed some chagrin that I had accessed the information, but no objection was raised to my having done so or to my continued service in that case. If I had not already noted my familiarity with the particular intersection, I do not believe that I would have accessed the feature prior in discussing the matter with counsel, even though they introduced printouts from Google Maps.

Today, it is relatively simple to access to all types of potentially relevant information on line. It may be criminal records databases. It may be maps. It may be social networking sites. I would feel uncomfortable generally reaching out to those sources to learn something new, and believe that any such research without full disclosure to the parties is improper. Nor would such initiatives be risk free. If, after learning of such research efforts, through arbitral disclosure or otherwise, one side moved for recusal of the arbitrator, it may be that recusal would be required.

5. An employee who is a very active shop steward was terminated for leaving work without permission to retrieve his car from the parking lot, then returning to the time clock, and clocking out. A video surveillance DVD of the employee leaving the side door prior to the end of his shift was played and then the original DVD was offered into evidence. The date that surveillance began was a key, disputed fact, relevant to whether the employee was investigated following a complaint from a witness about his leaving the plant or whether the leaving early was known and condoned and the discharge was a pretext for discrimination based upon union activity. Upon being handed the DVD, I put it in my computer to see if it would play. It did. The question was: should I look at the metadata on the disk to see the date on which it was created? If so, how should the results be made a part of the record?

In the particular case, I did examine the file properties metadata and promptly asked the witness (the HR Manager) if she could explain the apparent discrepancy between her account as to when the item came to the attention of the employer and the

metadata which reflected knowledge at a much earlier point in time. She could not provide the needed explanation and, in fact, the information was very significant in terms of the ultimate disposition of the grievance.

6. A long-term employee with a clean prior record was discharged for insubordination. The HR Manager testified that there was a clear practice of sustaining summary discharges for insubordination and that this practice was even sustained previously in arbitration and cited by name to a case that I had issued a few years earlier. Nobody objected to that testimony. (Both advocates were, in fact, recent to the relationship and had not participated in the prior case.) I recalled the prior case, however, and knew that the employer had progressively disciplined that prior grievant five times for insubordinate behavior prior to finally terminating him.

I did not believe it appropriate to keep that information to myself and also did not feel it appropriate to rely upon the prior award if it was not made part of the record. I noted my recollection on the record (after having checked the award which was resident on my computer hard drive) and obtained agreement to add to the record a copy of the prior cited decision. I did not feel comfortable ruling on the just cause for the discharge of a long-service employee based upon record evidence that I knew was materially inaccurate.

7. In a discharge for a positive drug test, the expert witness for the employer was a drug testing lab technician who testified that a positive urine test for a metabolite of marijuana meant that the individual used marijuana within the two-hour period prior to the sample being given. I knew from expert testimony and other evidence in prior cases that this was not accurate. The union, which was represented by its local president who was participating in his first arbitration, said nothing.

I declined to issue a decision based upon a record that I knew contained material inaccurate information. I asked the technician for the basis of his belief, noting that it was my understanding from prior expert testimony and literature in other cases that the positive urine test results for marijuana did not establish the precise time of use.

8. In a discharge case in which the union alleged that the discharged employee was the victim of reprisal following his pursuit of a Workers' Compensation claim, the union offered an internal company memorandum that tended to establish the truth of that

claim. When asked where he got the memo, the Steward stated that he retrieved it from the waste basket of the HR Manager after hours. The company objected and moved to expunge the memo from the record.

If the Steward "hacked" the Intranet or went through the unlocked file cabinet in the HR Manager's office, should the ruling be the same? What if the memo was retrieved by "dumpster diving" instead?

These cases often pose knotty conflicts between the search for the truth, on the one hand, and not rewarding or encouraging inappropriate and/or illegal behavior, on the other. I have ruled both ways, depending upon the particulars of the case. In the dumpster diving and waste basket scenarios, I allowed the evidence into the record. In the hacking case (which I did not actually have), I would be inclined to exclude the evidence. I have also allowed surreptitious tape recordings of conversations made in violation of state law to be played where there was a material dispute over the content of a particular conversation on the theory that the particular state law violation was collateral to the arbitration and enforceable independently. A different outcome might attach if the state law precluded the introduction of illegally obtained evidence in judicial or administrative proceedings or if the employer was a public entity.

9. An employee was discharged for alleged dishonesty. The agreement has a provision that requires that disciplinary actions be expunged from the record after three years. The employer tried to introduce a prior suspension of the employee for dishonesty that was dated five years prior. The union objected.

Unless relevant to an issue of claimed lack of notice or to rebut specific contrary testimony from the grievant, the objection should be sustained. It can no longer be cited as proof of guilt of an underlying act of misconduct by virtue of the parties' agreement.

10. Two employees were discharged for fighting. I was hearing one case and another arbitrator was hearing the other. A third individual was in the area according to the testimony of all individuals. Nobody called the third person to testify.

Should the arbitrator remain silent? Ask that the third person be produced? Draw inferences from the failure of the third individual to testify and, if so, what types of inferences would be appropriate? Should inferences be drawn from the failure of either side to have called the other discharged employee and, if

so, what types of inferences should be drawn? Should a copy of the other arbitrator's award be requested if the decision in that case has already issued?

I did not seek to persuade the parties to call the other fight participant as a witness. Nor did I draw an adverse inference from the decision of the parties not to do so. The reasons for separating the two cases for separate rulings are obvious and understandable. The missing third person was more troubling and I inquired as to that person's availability. Once that was done, the parties usually inquire as to why I have made the request or will volunteer the reason that the individual was not being called to testify.

I have routinely asked for and accepted into evidence the award of the other arbitrator and given it whatever weight is appropriate in light of the differing records and the fact that, for better or worse, the parties chose to roll the proverbial dice twice in separate proceedings. The potential for inconsistent rulings is inherent in such a procedure.

11. Do any of the rulings in scenario 10 change if the arbitrator is the sole Umpire hearing appeals of the two separate grievances to arbitration? Should the two cases be consolidated? If there is objection, should the cases be decided independently of what was heard by way of evidence in the other? Is such an approach practical? Should ruling in the first case be deferred until evidence has been presented in the second case?

The more unusual scenario is one in which the same arbitrator presides over both cases. In the two instances in which I have confronted this situation, I have noted that it is not realistic to expect me to erase from my mind that which I heard in the other case and urge that the records be viewed together for purposes of resolving the grievances. Although that approach raises further due process issues since neither grievant would have been present throughout the entire joint hearing process, nobody has objected to date to this approach or asked that I apply "blinders" to the evidence and to my conclusions in the other proceeding. (A transcript cures this "defect" to some extent.) I persuaded the parties in one instance to wait to receive a decision in the first case until the second had been presented. In the second situation, I could not obtain joint agreement to act in the suggested manner, and I issued a decision in the first case based upon the record completed therein.

12. A particular document, prior arbitration decision, etc., is described in testimony, but nobody offers it. Should the arbitrator

ask that it be included in the record as the best evidence of what it actually says?

If the actual text of the document is significant, I will ask for it. I routinely advise parties that I cannot rely upon someone else's interpretation of an arbitration decision and that, if the ruling is significant, then I need to read it and draw my own conclusions as to that matter.

13. During testimony, copies of contemporaneous notes of a meeting were shown to the witness and to opposing counsel. The testimony described certain statements in those notes and certain items that, while covered in the witness' testimony, were not included in the notes.

Should the arbitrator ask to see the notes? Should the arbitrator ask that the notes be marked as an exhibit? If nobody mentioned any notes, should the arbitrator ask whether notes were taken of the meeting (which is material and whose substance is contested)? Should these rulings be affected by knowledge from prior cases with these parties that (1) they never introduce notes of investigatory or grievance meetings, or (2) they regularly do so?

I have honored an accepted practice of not introducing the notes. If the testimony suggested that I needed to see the notes, or if they had been "read" into the record in significant part, I typically "suggest" that we simply mark the notes as an exhibit.

If recollection regarding a particular meeting is significant, I will often ask if notes were taken, particularly if the testimony relates to a meeting that occurred some time ago, but will not generally ask that the notes be provided or marked as an exhibit absent a party request for introduction of the notes.

14. In a case with disputed facts, a witness was posed leading questions in critical areas on direct examination. There was no objection from the other side.

Should the arbitrator direct that the information be elicited by nonleading questions?

I am proactive in this area and frequently caution a representative to avoid leading in critical areas that are disputed and will be proactive in that regard even absent objection. If permitted to continue, it affects the quality of the evidence in ways that cannot later be easily cured.

15. In a case involving a discharge of a 30-year truck driver for recklessness in connection with an accident that resulted in a fatality, the parties have not put in evidence about the following:

1. the presence or absence of skid marks;
2. the police report, accident investigation report, or any collateral litigation and its outcome;
3. the grievant's prior driving record (and if there is a time period in the Agreement beyond which one cannot inquire—e.g., nine months in many Teamster Agreements); and
4. whether the grievant, who still is upset and cries at various points in the hearing when the accident is discussed, is actually capable of returning to a driving job?

Should the arbitrator inquire about any or all of these missing facts?

These cases often present difficult situations of attempting to balance party-imposed restrictions on the type of evidence that is admissible with the desire to reach the right result both as to the merits of the grievance and the remedy to be issued if the grievance is sustained. I have asked for each of these types of evidence in prior cases, although when the union advocate objected to my question seeking time-barred accident information, I have sustained the objection to my own question while noting, however, that if the prior accident record is shielded (as was the union's right), then I would not be able to rely as heavily upon the employee's prior long period of service as a possible mitigating factor.

16. In a bench arbitration process challenging a discharge, the ground rules afford each side 90 minutes of questions (direct and cross-examination combined). Time associated with questioning by the arbitrator was explicitly excluded from the 90-minute periods. After the union had used its full 90 minutes, the company called a witness in rebuttal who was a key witness to the events that triggered the discharge and who was not announced earlier as scheduled to testify. The union could not examine the witness, having run out of time.

Should the arbitrator more thoroughly examine the witness in these circumstances?

I did engage in slightly more extensive questioning of the witness out of an appreciation that the usual customary cross-examination would not be possible. In that case, however, the employer also ran out of time after about four minutes of direct, and I also questioned the witness with respect to those areas that the employer presumably would have examined.

17. The grievance related to an overtime bypass. The facts of the bypass were not disputed. The sole dispute concerned the

remedy—whether it should be make-up time or pay for the missed overtime opportunity. Neither side explained the overtime distribution system of the department in question (e.g., whether it zeroes out or not and, if so, at what intervals; whether overtime is distributed equally or is offered in seniority in each instance; etc.), and neither side offered evidence of how prior overtime bypass situations were remedied.

Should the arbitrator ask about these missing items?

I have done so, preferring a more complete record to a ruling that simply relies upon burdens of proof and an absence of record evidence. It is my impression that rulings which state, in essence, I have no clue as to what took place as to material facts but there is a burden of proof that has not been satisfied—these are among the least satisfactory types of rulings from both the arbitrator's perspective and from the perspective of the parties.

Posthearing Situations

1. I received the posthearing briefs in a case in which one of the claims was one of disability discrimination.

Should the arbitrator research the case law beyond that cited by the parties? Or Shepardize the cases that are cited to see if they are still good law? If additional research is performed and certain cases are found that appear to be persuasive or dispositive, should the arbitrator cite to them in the award or first ask the parties to comment upon them prior to relying on them?

I have Shepardized cases that I was going to reference in the discussion part of the award and researched case law on the outstanding legal issue. If I found case law that was significant and that did not appear to be very well established, I have returned to the parties for their views prior to citing to those decisions in my opinion and award.

2. In a federal sector case where review by the Federal Labor Relations Authority may occur based upon whether the award conflicts with law, rule, or regulation, should an arbitrator independently research either: (1) issues that they have presented; or (2) issues that they have not, but which the arbitrator believes must be addressed in order to issue a valid and enforceable award?

I have independently researched these issues, if needed, to make sure that I am not acting in a manner contrary to law. There is, however, a significant divergence of view on this point. It all depends upon whether "getting it right" and issuing a decision

that is likely to be upheld on appeal is more important than ensuring that the parties shoulder their obligations to advance and support the arguments in support of their positions.

In a recent case, the grievance in my case proceeded while a related grievance that was arbitrated at a different location presenting similar issues was pending appeal before the FLRA. When the FLRA issued its ruling in the other case, which was after briefing but prior to decision, I was provided a copy of that decision. I then scheduled a conference call and afforded the parties the opportunity to: (1) confirm that they still wanted the instant case to proceed to decision; and (2) provide supplemental argument as to the effect that the recent decision had on the case before me.

3. The arbitrator serves as the contract arbitrator under a collective bargaining agreement. After the record is complete in one case, but prior to ruling, a second case is heard in which facts are introduced that are relevant and likely dispositive in the first case, but which were not part of the record in that case.

Scenario A: The same employer and local union and counsel are involved in the second case as in the first.

Scenario B: The cases involve different plants under the same master agreement, different local unions and human resources officials, and different counsel.

Scenario C: The cases involve the same local union but different employers working under the same multi-employer collective bargaining agreement.

Should the first case be decided "blind" to the facts introduced in the second? Should the record in the first case be reopened to address those facts adduced in the second? If the issues in the second case are legal issues, rather than factual issues, is the approach the same?

In Scenario A, both parties are the same, and I have used an approach similar to that in the double discharge for fighting scenario noted above.

In Scenarios B and C, one side, but not both, is aware of the other "facts." I contacted both sides, referenced the particular facts in question, and sought further input as to both weight and as to whether they should or should not be deemed incorporated into the record. If I believed that the additional facts were not case dispositive, then I simply ignored them and afforded them no weight rather than cause the additional expense and disruption associated with the potential supplementation of the record.

4. While serving as the Chair of a tripartite Board of Arbitration and presiding over an executive session, one of the party-appointed members who was involved in the events that was at issue in the arbitration began to add new facts or raise new issues that were not raised by the initial presentations of the parties. There was no objection by the other party-appointed members of the Board, who agree with the accuracy of the representations as to those newly added facts/issues and who voice no opposition to the Chair being informed of those facts/issues. What should be done with those facts/issues?

What if they are not new facts, but simply a statement that the Board Member was involved and knows that the account of witness X is true or is not true? Should that statement be given any weight? Does it matter if the Chair has served on cases before with that party-appointed member and found her to be fair and reasonable in those other cases? Does it matter if that member is arguing to credit the other side's witnesses on the point?

I have traditionally declined to consider any such extra-record representations in deciding cases. I do not believe that merely because the speaker also serves as a member of the arbitration Board the Board is authorized to take notice of new facts not properly made part of the record and disclosed to the parties. Although such discussion may not change the outcome in a particular case, it may affect the choice of some of the language that may be contained in the decision of the board or panel in support of its holding.

Conclusion

There are no right or wrong answers to the question of whether, or in what circumstances, labor arbitrators should engage in proactive behavior designed to facilitate a "search for the truth." Decisions as to whether to add to the record being developed by the parties, and if so how to do so, are situational and nuanced determinations that often must be made in hearings without the opportunity for significant reflection. This paper has posited one paradigm that may be of some value when arbitrators make these fact-specific, case-specific judgments.

Ultimately, the way in which arbitrators exercise this authority will be a product of their own views of the goals of the labor arbitration process, the appropriate weighting of those goals in the particular situation, and the proper role of the labor arbitrator in the attainment of those goals.