

# CHAPTER THREE

## ADVOCATES' AND ARBITRATORS' ISSUES

### I. Suggestions for Labor Arbitration Advocates

*by Barry Winograd\**

**Have you ever wondered how labor arbitrators approach cases? Is some special brand of justice applied, a secret ritual, or simple well-seasoned common sense? In anticipation of a recent labor management arbitration conference, I was asked to identify several “hidden principles” used in the labor field that might be helpful to advocates, especially those with less experience in the field. After speaking with a number of experienced arbitrators, I assembled their suggestions on handling labor cases.**

Some were a bit tongue in cheek (e.g., make sure the arbitrator has a parking space near the hearing, and an available phone; if you choose to insult the arbitrator, it is best not to begin with the phrase, “With all due respect...”). Others were more serious, but perhaps not so hidden. Here are the most salient suggestions on the handling of labor cases.

- *Be prepared or it may be held against you.* Estimate how long your case may last before contacting the arbitrator and before coming to the hearing. Don't keep this information a secret; let the arbitrator know it at the earliest opportunity. In addition, know your case inside and out. Is your case one that is in need of a theory? Are the weak points too weak to be faced? Ignoring these deficiencies may please your client but won't win favor with the arbitrator.
- *Evidence counts in arbitration.* Although most governing arbitration procedures provide that the rules of evidence need not be applied, this does not mean that these rules are entirely irrelevant and should be ignored. Evidentiary rules help guide arbitrators: for example, rules regarding business records made in the regular course of business; rules allowing non-hearsay admissions of a party; rules of privilege; and rules regarding prior bad acts (e.g., when previous discipline has been resolved by a completed grievance procedure).
- *When it comes to evidence, the door swings both ways.* A union in a discharge case that offers mitigating evidence indicating lengthy satisfactory performance in an attempt to reduce the penalty should be prepared to hear contrasting evidence of previous discipline, even if the discipline is otherwise unrelated to the principal misconduct alleged by an employer.
- *It takes two to do the “contract intent” tango.* Testimony about an individual's state of mind, or that of a negotiating team, is not the same as evidence of an understanding shared with the other side. It is shared intent that arbitrators seek to discover.
- *Prove it.* A variety of evidentiary devices can be used to obtain the proof you need. A subpoena is not only a Latin term, it is a powerful means of assembling evidence to prove

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your case. Many arbitrators decline to rely on hearsay alone to support the material elements of a claim or defense, but they may receive hearsay to corroborate direct testimony.

- *There are at least two sides to every case.* Let the arbitrator hear the stories that each side brings to the arbitration. In telling these stories, the devil is in the details: who, what, where and how did the events transpire? Arbitrators want to hear the merits of the case. For example, an objection that a grievance is untimely may be argued, but arbitrators generally prefer to let the merits be heard.
- *Don't overdo it.* Passion by the advocates and the parties may enliven an otherwise dull proceeding, but if carried too far, it can undermine the presentation of the case. Similarly, if the grievant or supervisor is a poor witness, a case that previously appeared sound may be subverted.
- *Contract gaps will be filled—by the arbitrator.* When the parties are unable to resolve a dispute because of a gap in contract language and negotiating history, they should not be surprised if the arbitrator resolves the problem by filling in the gap in a way they might not like.
- *Does it feel right?* Most arbitrators, most of the time, need to feel convinced. In this respect the burden of persuasion often is more than an esoteric legal concept; it offers arbitrators a useful tool to resolve close and difficult cases.
- *No bad deed goes unpunished.* In many cases, the arbitrator's most difficult task is finding the shades of gray between black and white. The concept of comparative fault—such as when a grievant lies during an investigation—may provide a basis to deny back pay, even if reinstatement is awarded. Conversely, an employer's violation of fundamental due process or uneven disciplinary treatment may justify reinstatement, even if the employee's misconduct precludes an award of back pay. In assessing such cases, equity goes to those who are deserving.
- *Take a hint.* When an arbitrator suggests reconsideration of settlement prospects, the case may not be as clear cut as the advocate first thought. An arbitrator's offer of a bench decision, to be confirmed later in writing, may suggest that post-hearing briefs are not really needed.