

CHAPTER 10

EVIDENCE IN LABOR ARBITRATION: HOW ARBITRATORS RULE

GOING BEYOND “TAKING IT FOR WHAT IT IS WORTH”: ARE THERE BASIC PRINCIPLES OF EVIDENCE IN LABOR ARBITRATION?

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Historically, there has been a widely shared view that an evidentiary straight-jacket is something to be avoided in labor arbitration cases. As a corollary, advocates and arbitrators often speak of admitting evidence into a hearing, with the caution that it should be taken only “for what it is worth.”

This approach can be characterized as a *laissez faire* model of broad admissibility. It is distinguished from a judicial model relying on more restrictive rules of evidence. The *laissez faire* point of view finds authority in procedural guidelines governing arbitration hearings. For example, the widely followed rules of the American Arbitration Association state, “The arbitrator shall be the judge of the relevance and materiality of the evidence offered and conformity to the legal rules of evidence shall not be necessary.”¹ Similar leeway is reflected in statutes that provide a legal foundation for arbitration hearings.²

The *laissez faire* model is not simply the creation of those parties engaged in a privatized adjudicatory forum largely hidden from public view. The courts, too, have had a hand in developing this perspective. The Supreme Court, in the landmark *Steelworkers Trilogy*,³ recognized the unique nature of collective bargaining

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¹American Arbitration Association, Rule 28, Voluntary Labor Arbitration Rules.

²*See, e.g.*, Revised Uniform Arbitration Act, 7 U.L.A. 15 (2000); Cal. Civ. Proc. Code, §1282.2(d).

³*Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

arbitration to develop the so-called “law of the shop” by drawing on an arbitrator’s expertise and by establishing a narrow scope of judicial review.

In particular, the seminal *Warrior & Gulf* case reflects a high degree of judicial deference to the arbitration process by adopting the famous “positive assurance” test for an arbitrability dispute over subcontracting, with any doubt to be resolved in favor of going forward with an arbitration hearing.⁴

In understanding this admonition, the evidentiary facts before the court in *Warrior & Gulf* are instructive. The arbitration text in the contract afforded sweeping coverage over disputes regarding interpretation and application of the agreement. However, to oppose the petition to compel, the company relied on limiting language that excluded from arbitration matters “that are strictly a function of management.”⁵ As for other evidence before the court, management emphasized that the labor agreement was silent on the issue of subcontracting, despite union efforts in past negotiations to secure protective language, and that past practice in the workplace for almost two decades included other instances of contracting out.⁶

In considering *Warrior & Gulf*, a reader might ask why this was not deemed a sufficient evidentiary showing to justify court action blocking arbitration? It was not sufficient, in the court’s view, because positive assurance of exclusion from arbitration requires a higher degree of proof. The case was remanded for a determination by an arbitrator, the decisionmaker that the parties had bargained to use for labor disputes involving the contract.

The court in *Warrior & Gulf* may have been prescient in avoiding a knee-jerk reaction. On remand, the arbitrator concluded that management’s right to contract out had been exercised in an excessive manner beyond what it had previously undertaken, and contrary to bargaining table assurances that it would not increase the level of contracting out.⁷

Subsequent Supreme Court decisions reinforced the model of judicial deference to the arbitration process. In the *Misco* decision,⁸ an arbitrator reinstated the operator of dangerous equipment, overturning his dismissal after he was found in the presence

⁴ *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581–83.

⁵ *Id.* at 576.

⁶ *Id.* at 587–88.

⁷ *Warrior & Gulf Navigation Co.*, 36 LA 695 (Holly 1961).

⁸ *United Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987).

of marijuana in the company parking lot. The *Misco* case is best known for the court's disapproval of the sweeping use of "public policy" claims to vacate arbitration awards. But, for present purposes, *Misco* is important because significant evidentiary challenges to the arbitrator's decision also were presented to the court, and rejected.

In affirming the arbitration award, the *Misco* court upheld the arbitrator's exclusion of evidence that had been gathered separately from the decision to fire the employee; specifically, evidence that part of a marijuana cigarette had been found in the employee's car elsewhere in the parking lot. In dealing with the employer's objections, the court recognized that arbitrators have great leeway when conducting a hearing, and that evidentiary errors are not grounds for reversing a decision.⁹

This perspective was expressed again in the recent *Garvey* decision,¹⁰ in which the Court summarily reversed the Ninth Circuit's disapproval of an arbitrator's factual findings. The Court confirmed that evidence and credibility determinations are reserved for the arbitrator, who is contractually chosen by the parties to make such decisions, and not within the province of a reviewing court.¹¹

This line of judicial authority parallels professional publications and commentary reaching back to the earliest years of labor arbitration as an emerging field. A sampling of the many comments on this topic will suffice for now.¹² One of our illustrious pioneers, Harry Shulman of Harvard, offered the following remarks on the issue of the arbitrator's treatment of evidentiary submissions:

Ideally, the arbitrator should be informed as fully as possible about the dispute which he is asked to resolve. He should hear all the contentions with respect to it which either party desires to make. For a party can hardly be satisfied that his case has been fully considered if he is not permitted to advance reasons which to him seem relevant and important. The more serious danger is not that the arbitrator will hear too much irrelevancy, but rather that he will not hear enough of the relevant.¹³

⁹*Id.* at 39.

¹⁰*Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001).

¹¹*Id.* at 509–10.

¹²The leading treatise on the subject of evidence in arbitration contains a lengthy summary of the position favoring a minimalist approach toward relying on rules to exclude evidence at hearings. See Hill & Sinicropi, *Evidence in Arbitration*, 2d ed, at 17–20. Other comments are cited in Elkouri, *How Arbitration Works*, 6th ed. (BNA Books 1983), at 341–49.

¹³Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1017 (1955).

A similar point, taking issue with a restrictive judicial view, was expressed by William Murphy, our erudite professor from North Carolina, and a former Academy President:

Sound reasons support the rule of free admissibility. First, the exclusionary rules were developed principally in the context of jury trials, to prevent lay jurors from being misled. An arbitrator does not need this protective insulation. A second and broader consideration is how the exclusion of evidence may affect the perception of the employees and supervisors who are not familiar with legal technicalities. They want to tell the arbitrator what they think is important. . . . consideration is that the arbitrator who is asked to exclude evidence as irrelevant or immaterial is not in a very good position to make an intelligent ruling. A trial judge has the benefit of pleadings, pretrial conferences, and frequently pretrial briefs. This familiarity enables the judge to make informed rulings on admissibility. The arbitrator clearly is not in the same position. . . . When sitting without a jury trial judges do not normally observe the exclusionary rules. Why should arbitrators be more demanding?¹⁴

If we doubt that the approach favored by Professors Shulman and Murphy was widely shared, a revealing insight is provided by an educational booklet about labor arbitration produced 52 years ago by the Labor Relations Council at the University of Pennsylvania's Wharton School.¹⁵ My thanks to Walter Gershenfeld for locating and sharing this historical treasure. The booklet was an undertaking of 29 arbitrators from the greater Philadelphia area, including four former Academy presidents and other founders in the field. In one passage the authors underscore the need for broad evidentiary leeway for arbitration hearings:

The acceptability of the final award will be determined, to a substantial degree, by the parties' reactions to the Arbitrator as they observe him at the hearing. One of the ways to win acceptability for the award is to be patient in hearing all that both sides want to present. Each party should be allowed to continue for as long as it feels there is something

¹⁴Murphy, *The Ten Commandments for Advocates: How Advocates Can Improve the Labor Arbitration Process*, in *Arbitration 1992: Proceedings of the 45th Annual Meeting, National Academy of Arbitrators*, ed. Gruenberg (BNA Books 1993), at 253, 263–64. Later in the same presentation, Professor Murphy confronted the challenger head on:

Opponents of the rule of free admissibility of evidence have shrewdly created a catch phrase, which they have with considerable success turned into a weapon of disparagement and ridicule—"letting it in for whatever it's worth." This clever word play obscures the fact that all evidence, including that which is admitted without objection, comes in only for whatever it is worth, as determined later by the arbitrator.

(*Id.* at 265.)

¹⁵Labor Relations Council, Wharton School of Finance and Commerce, University of Pennsylvania, *Guides for Labor Arbitration*, (1953).

it should say. Such a procedure will give both parties the satisfaction that they have had their “day in court.”¹⁶

The views described by our Philadelphia associates were reflected more recently in an Academy presentation by advocate James Wright of Peoria, Illinois, analyzing the role of hearsay in labor arbitration.¹⁷ The author distinguishes, on the one hand, between broad admissibility of evidentiary submissions, and, on the other hand, subsequent assessments, perhaps restrictive in nature, of the reliability of the evidence and the weight it should be given:

Often, hearsay evidence is declared inadmissible simply as a matter of law. A general rule which excludes hearsay evidence, however, may eliminate highly relevant and reliable items of evidence. The mandatory admission of hearsay evidence forces arbitrators to “take evidence home.” Once the hearsay evidence is forced upon the arbitrator, an analysis of its relative worth must be made, and each item must be tested for its relevancy and reliability.¹⁸

Nevertheless, over the decades in which arbitrator discretion to be free from rules of evidence has been praised, others have voiced their disapproval of an open-door policy. This contrasting perspective favors a more rigorous approach when running a hearing to ensure economy in the process and to maintain focus on relevant issues.

In a study undertaken in several cities in the mid-1960s by Academy-sponsored “Tripartite” committees, an attempt was made to determine common and preferred approaches.¹⁹ Perhaps not surprisingly, although there was general agreement that rules of evidence need not be strictly observed in arbitration, dissenting views also were expressed by those who were uncomfortable with an “anything goes” perspective. For instance, the report from the Pittsburgh committee offered the following thought on the issue of relevance:

Justice Holmes stated that the rule of relevancy is a concession to the shortness of life. If parties may introduce evidence of facts not logically connected with the matter in dispute, the point in issue may be totally submersed in a flood of irrelevancies.²⁰

¹⁶*Id.* at 6-7.

¹⁷Wright, *The Use of Hearsay in Arbitration*, in *Arbitration 1992*, Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1993), at 289.

¹⁸*Id.* at 291.

¹⁹*Problems of Proof in Arbitration*, Proceedings of the 19th Annual Meeting, National Academy of Arbitrators, ed. Kahn (BNA Books 1967).

²⁰*Id.* at 51.

The evidence debate was sharpened in the Academy proceedings in 1982 when, under the guidance of Arnold Zack and Richard Bloch, a set of scripted evidence issues was presented to arbitrator panels for analysis.²¹ In reviewing arbitrator comments, major disagreements were apparent on a number of issues. For example, on the question of admitting an employer exhibit regarding past records of employee misconduct and performance in a discipline case involving theft, Academy member Leo Weiss was blunt in proposing rejection of the offer:

Admitting a document which I presume I'm not going to consider because it's irrelevant or prejudicial, but will let into the evidence in order to avoid an argument, doesn't strike me as proper arbitral practice. While we do not apply the rules of evidence strictly, we don't throw them out the window. . . .²²

Criticism of the *laissez faire* model was evident as well in a presentation by Jack Flagler in 1990 reporting on questionnaires distributed as part of a survey of advocates.²³ On the issue of arbitrators receiving evidence "for what it's worth," the study showed a widely shared objection:

The second most common complaint cited by the survey respondents centered on the controversial practice of admitting various forms of infirm evidence into the record "for what it's worth." The problem for both advocates is that neither can know what weight, if any, the arbitrator may ultimately assign to such infirm evidence as uncorroborated hearsay, unauthenticated documents, speculative or conclusory testimony, inadequate foundation, and sundry irrelevancies.²⁴

More recently, stern criticism of arbitration hearings with deficient evidentiary standards was leveled by Dan Boone, a union-side

²¹Zack & Bloch: *Admissibility of Evidence*, in *Arbitration 1982, Conduct of the Hearing, Proceedings of the 35th Annual Meeting*, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1983), at 107.

²²*Id.* at 111. In a similar vein, Academy member Jonathon Liebowitz expressed strong disapproval of admitting the report of an investigator relied on by an employer to prove an accusation of theft:

I think the answer is clearly that the report should not be admitted, and the reason is that, while the rules of evidence need not apply in arbitration, there are times when they should indeed apply. This is one of them, because if you admit the reports and the investigators are not available to testify and to be cross-examined, it would deprive the grievant of a fundamental right to confront the evidence against her and to cross-examine the witnesses. . . . The document is hearsay. . . . The difficulty arising from the fact that the investigators are not available for what seem to be bona fide reasons outside the control of the company is simply one of the problems that the company confronts in presenting the case. It must have competent evidence available.

Id. at 113.

²³Flagler, *Practices at the Hearing*, in *Arbitration 1990: New Perspectives on Old Issues, Proceedings of the 43rd Annual Meeting*, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1991), at 53.

²⁴*Id.* at 58.

advocate from Oakland, California, and a frequent participant at Academy meetings. In speaking to this body several years ago, he shared his disapproval of a personal, idiosyncratic model of conducting a hearing in which virtually everything is admitted as evidence and in which a labor-management relationship actually is undermined, not helped:

In the context of a poor relationship, or with an arbitrator whose reliability is questionable, the admission of evidence “for what it’s worth” results in all of the negative consequences commonly recognized. Hearing time is prolonged by additional questioning of more witnesses or continuances to respond to matters that should have no consequence. This, of course, results in increased costs. . . . In an atmosphere permeated with suspicion and hostility, admitting evidence “for what it’s worth” heightens animosity and hard feelings.²⁵

Instead of using an open-ended method for receipt of evidence, advocate Boone urged that questions of evidence and proof should be viewed through the prism of collective bargaining principles. As an example, he argued that the admission in a discipline case of uncharged misconduct violated the basic just cause principle of the negotiated relationship. To gain a sense of advocate Boone’s passion on the topic, I offer these comments:

Testimony and documents about past misconduct or failure of performance that was not the subject of prior discipline is offered and admitted much too frequently, “for what it’s worth.”

. . . .

When an employer discharges an employee for some act of serious misconduct (without reliance upon past performance or misconduct) and the union judges that the employer cannot carry its burden to prove the level of discipline imposed then its entire evaluation process is sabotaged if the employer can supplement its case with matters not initially alleged as reasons for the discharge. This is perceived by the union as a double cross and a betrayal. It is very damaging to the relationship. It also creates great uncertainty for the union in fulfilling its duty of fair representation.

. . . .

Past rule violations or misconduct that went undisciplined must be excluded from the arbitration record. Anything else is an indefensible double standard.²⁶

²⁵Boone, *A Debate: Should Labor Arbitrators Receive Evidence for “What It’s Worth”?*, in *Arbitration 1998: The Changing World of Dispute Resolution*, Proceedings of the 51st Annual Meeting, National Academy of Arbitrators, eds. Briggs & Grenig (BNA Books 1999), at 89, 93.

²⁶*Id.* at 93–95.

Another example offered by advocate Boone is the admission of bargaining history evidence that is not probative of the parties' shared intent. In assessing contract interpretation cases, the following reflects his views:

Admissible evidence is limited to open communication between the parties. The so-called "intent" is inferred from the bargaining, not from the thoughts or opinions or emotions of the participants.

. . .

My reasoning for this position is not based on the litigation model that the strict rules of evidence should be adhered to in order to maintain the formality and regularity of the proceedings. This is a fundamental collective bargaining issue. Arbitration is explicitly an extension of that bargaining because the parties are directly testifying about it. If an employer at arbitration claims an "intent" or meaning that was not articulated at the bargaining table, that employer is acting in bad faith.²⁷

Before turning to the subject of where we go next, let me mention that the debate over evidentiary standards has not always been deadly serious. There was at least one moment in time when the debate provided great theater, perhaps causing a small riot of laughter for those present. At the Academy's meeting in 1987, Tom Roberts shared his preference for a restrictive model of arbitration when handling evidentiary issues.²⁸ Soon after he began challenging the laissez faire model, Mickey McDermott rose from the floor to launch a counter-attack. What a moment it must have been; two of the finest arbitrators in the land, Academy legends and presidents, in a verbal match crystallizing the conflict. Let me share just a glimpse of that moment in time, beginning with Tom Roberts as the speaker:

Roberts: To receive any and all proffered evidence "for what it is worth" is to take the coward's way out. Arbitrators should meet their obligations to run an orderly hearing confined to the issues presented. . . .

McDermott: Wait just a moment! What is this nonsense? You may run a tight hearing, but you certainly are loose in your thinking. I simply cannot sit still and placidly accept such pedantic pronouncements—even after a satisfying lunch and at the final hour of the program.

²⁷*Id.* at 96.

²⁸Roberts, *Evidence: Taking It For What It's Worth*, in *Arbitration at Forty*, Proceedings of the 40th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1988), at 112.

Roberts: Well, I must say, this is the first time I have felt I would rather be a sitting judge than an arbitrator. If I were a judge, I would have my bailiff remove you from the courtroom! . . .

McDermott: I am not surprised by that petulant response, and I'll take it for what it is worth—nothing. . . .²⁹

A Simulation Exercise

Now that the stage has been set, it is time once again to see where we stand. In an effort to bring a measure of social science to the debate, a hypothetical arbitration case has been crafted with several evidence problems embedded in the fictional proceeding. A statement of basic facts has been written, more or less revealing what might be revealed in the course of opening statements at the start of a hearing. The statement of facts can be found in your book of Academy materials. Copies also were available as you entered the plenary session today. If you do not have your book or a copy, please raise your hand and a statement of facts will be delivered.

Here's what will be happening for the rest our session this morning. Skilled arbitration advocates for labor and management will offer brief three-minute opening statements. After that, they will argue the points that are raised in an unfolding series of evidence objections in the course of our mock hearing. Each side will be given no more than 60 seconds—a real New York minute—to argue its position. The problems will be projected on the screen in front of the room, for all to see.

But that's not all. You probably noticed that we have a distinguished panel of arbitrators at my side. They are not just talking heads or window dressing. We have assembled arbitrators who are ready to go to work. They will rule on the evidence issues and objections as they arise, much as we do in our daily arbitration practice. The arbitrators will be given 30 seconds to make a ruling. This is not billable time. After the rulings, if a few of the arbitrators have something to add, perhaps to explain or qualify a response, the opportunity to do so will be made available. No backtracking, please. After no more than a total of two minutes of comments, we will move on to the next problem. At the end, after rulings on 10 objections, the advocates will make brief three-minute closing arguments. A final question then will be posed. To keep the

²⁹*Id.* at 113–14.

presentation on track, I will be exercising a stern hand as the moderator.

In case you are wondering, you do not have to sit idly by while the rulings are being considered. You, too, get to participate by giving your answers after the advocates argue the point. You will have the same 30 seconds given to the arbitrators to respond. As a result of this collective effort, we will have hundreds of decision-makers for each problem that is presented.

To get started, everyone should have received a one-page form titled "NAA Chicago Evidence Survey." The panelists have a copy of the same page for their use. At the top of the page there are several spaces to be filled out with personal and demographic information that will help in analyzing the final data, while preserving anonymity. Below the spaces for personal information, you will find 11 numbers. Next to each number are the words "Yes" or "No" with a space to mark your answer. Please, this is important: do not mark anything next to a number until you are asked to do so in the 30-second time period for your ruling.

Is this too complicated? We hope not. We've tried to keep it simple. If you get lost as we roll along, feel free to ask your neighbor to get you back on track, but all answers must be an individual's alone. If we get maximum participation, there will be great value in this survey. By analyzing the responses, we will see if, in fact, there are commonly accepted evidentiary standards, or, to the extent not, some of the differences that exist in the field. Preliminary tabulations will be made this afternoon and evening by several volunteers thoroughly vetted to resist any overtures to skew the results one way or another. Please hand your responses to one of the volunteers when you are leaving after the session.

Yes, it is true, this exercise has inherent limitations because it is not in "real time," to use the parlance of our day. However, the presentation approximates reality in two important respects. First, unlike civil litigation, labor arbitration typically is undertaken without prehearing discovery or motions to exclude evidence. Labor arbitration often has surprises and other twists and turns, when you might least expect them. Second, by advancing the evidence issues in a cascading serial fashion, prompt rulings are required to permit the hearing to go forward without lengthy delays. Now, with those final thoughts, it is time to let the show begin.

The Case of the Accused Assistant

Employment Setting

As summarized in opening statements by the advocates at arbitration, the following basic facts are known to the parties from the disciplinary notice, other employer records, and grievance discussions.

Peter Vera was terminated on January 3, 2005, from his position as a nursing assistant at the Sunnyhills Home for Seniors in Anytown. Sunnyhills is part of a regional chain—Sunnyhills Living Centers—that owns facilities for elderly people. The Health Care Workers Union has collective bargaining agreements at several of the company's living centers, including Anytown. The dismissal notice was signed by Ellen Williams, who became the administrator at the Anytown facility 6 months ago.

Mr. Vera is 51 years old. He immigrated to the United States from the Philippines a decade ago. For the past 4 years, Mr. Vera worked at Sunnyhills as a nursing assistant. The employer's termination notice charges that Mr. Vera intentionally used excessive force on a 92-year-old resident, Eugene Brown, resulting in serious injury. Two years before Mr. Vera's termination, as recited in the dismissal, he was given a warning after he was accused of roughly handling a resident. The warning is the only instance of previous discipline in Mr. Vera's record.

Evidence known to the parties is that Mr. Brown is not independently ambulatory, but requires a wheelchair most of the time. When moving between his bed and the wheelchair, a hoist sometimes is used, in part because Mr. Brown weighs 200 pounds and is five feet, eight inches tall. Mr. Vera weighs 135 pounds, and is five feet, four inches in height. Mr. Brown suffers from acute respiratory problems, and, due to his rapidly declining health, he cannot testify.

The Incident Investigation

The incident giving rise to this dispute arose during the evening hours of December 27, 2004. The dismissal notice prepared by Ms. Williams relies on three witness accounts as the basis for the dismissal, cites a medical examination of Eugene Brown, and

states facts gathered in other aspects of Ms. Williams' investigation. Each witness summary was prepared on December 28 by Ms. Williams from what she was told during individual interviews. The medical examination of Mr. Brown was conducted later in the morning on December 28 by a company doctor.

One report relied upon in the notice summarized information provided by Mr. Brown's daughter, Alexandra Smith. On December 28, Ms. Smith told administrator Williams that her father complained during her morning visit that Mr. Vera grabbed and twisted his arm the night before, and threw Mr. Brown on to his bed. According to Ms. Smith, Mr. Brown said this caused him a great deal of pain in his elbow and upper arm.

Immediately after Ms. Smith's report, Ms. Williams visited Mr. Brown. She prepared a second witness summary based on his account. During the visit by Ms. Williams, Mr. Brown complained that his elbow was painful because Mr. Vera hurt him the night before by bending his arm and pushing him onto his bed. In her summary, Ms. Williams recorded that Mr. Brown criticized the company for hiring Mr. Vera because he does not speak English clearly, and because he often uses a foreign language when talking to other staff. Ms. Williams told Mr. Brown and Ms. Smith that she would arrange a visit by the company's doctor later in the morning.

Following Ms. Williams' visit with Mr. Brown, she continued her investigation by speaking with members of the staff. Her notes record her findings. Several employees advised her that Mr. Brown has periods of mental confusion, and that he is a troublesome resident who often is uncooperative. Some employees also commented that Mr. Brown, who is Caucasian, frequently makes derogatory comments about minority employees. In responding to questions by Ms. Williams, no employee could recall any unusual events on December 27, nor any report by Mr. Brown of being injured that night. His medical charts also are silent on the subject, although there are a handful of notations about past uncooperative behavior.

In talking to residents, Ms. Williams contacted George Jones, who is assigned to the room next to Mr. Brown's. She prepared a summary of his recollection. Mr. Jones told Ms. Williams that he heard two people speaking in loud voices at bedtime the night before. He could not make out the exact words being said, but he was able to identify the speakers as Mr. Brown and Mr. Vera. Not long after he heard their voices, Mr. Jones recalled that Mr. Brown

cried out in pain. As far as Mr. Jones knows, only Mr. Brown and Mr. Vera were in the next room.

The medical exam mentioned in the dismissal notice was conducted by a company internist who visits the facility three times a week. In examining Mr. Brown, the doctor observed swelling, redness, and painful sensitivity to touch. The doctor diagnosed Mr. Brown as having a severely sprained elbow. The doctor also found pronounced bruising along Mr. Brown's upper arm. No X-rays were taken. Ice packs, physical therapy, and muscle relaxation medication were prescribed.

In the employer's termination notice, Ms. Williams states that she spoke with Mr. Vera about the incident when he came to work on the afternoon of December 28. The union's shift steward was present. During the discussion, Mr. Vera filled out an Incident Report, a standard document used by the employer to track problems involving residents.

As stated in the termination notice, and as the Incident Report reflects, Mr. Vera denied ever using excessive force against, or verbally abusing, Mr. Brown. Mr. Vera explained to Ms. Williams that Mr. Brown initially refused to go to bed, and was yelling profane comments about Mr. Vera's ethnicity. Mr. Vera told her that Mr. Brown often spoke this way, he was used to it, and it didn't bother him. When pressed for details, Mr. Vera acknowledged that he did not follow the employer's protocol in three respects: by neglecting to call for assistance from another employee when dealing with a reluctant patient; by failing to use a mechanical hoist to move Mr. Brown; and by not recording the dispute on the patient's chart. He apologized for these errors, but explained that Mr. Brown's distress was not unusual, and that he waited a few moments for Mr. Brown to become calm. Then, as Mr. Brown was being lifted by Mr. Vera from the wheelchair, Mr. Brown yanked his arm away and fell to the bed. According to Mr. Vera, at this point Mr. Brown again began yelling and swearing, but made no mention of being hurt.

The Dismissal and Arbitration

Based on the witness reports and medical examination on December 28, and the interview with Mr. Vera, Ms. Williams placed Mr. Vera on investigatory suspension. There was no additional information discovered over the next few days that shed light on the allegations. After Ms. Williams conferred with the company's re-

gional vice-president, Mr. Vera was dismissed on January 3, 2005. As stated in the termination notice, Ms. Williams concluded that "Mr. Vera intentionally used excessive force on December 28, causing serious injury to Mr. Brown." A grievance and this arbitration followed.

The collective bargaining agreement between Sunnyhills and the Health Care Workers Union contains several sections that are relevant to the dispute. These include a provision establishing a standard of just cause for disciplinary action, and permitting summary dismissal for "patient abuse." The section regarding the grievance and arbitration procedure states that the parties will exchange necessary information to resolve disputes. The grievance procedure allows for lower-level protests over written warnings, but excludes warnings from arbitration. For arbitration hearings, the contract provides that the arbitrator will have authority to manage the course and conduct of the hearing, and that the rules of evidence need not be applied.

The advocates have stipulated to the following statement of the issues: Was there just cause for dismissal of the grievant; if not, what shall be the appropriate remedy? A number of problems confront the parties as the arbitration unfolds, including a motion to quash that has been reserved for argument following the opening statements. Prompt rulings by the arbitrator are required.

Questions for the Arbitrator

The Participants

Moderator Barry Winograd presented a series of 10 evidentiary questions for debate and resolution. Union Advocates Patricia A. Collins of Asher, Gittler, Greenfield, and D'Alba, Chicago, Illinois; and Gilbert A. Cornfield of Cornfield and Feldman, Chicago, Illinois; as well as Employer Advocates Howard L. Bernstein of Neal, Gerber and Eisenberg, Chicago, Illinois; and Marc Jacobs of Seyfarth Shaw, Chicago, Illinois; were given 60 seconds per side to argue their respective positions on each of the 10 objections. Arbitrators Terry A. Bethel, Morris Davis, Jane H. Devlin, Robert Perkovich, and Carol Wittenberg were allotted 30 seconds for their rulings. Respondents from the audience also were asked to record their rulings during the same timeframe as the arbitrators.

The questions and respective responses of the arbitrator panel (as excerpted by the editors) and the audience are set out below, along with the tabulation of audience survey responses.

Questions

Question 1. As the first dispute, the company moves to quash a subpoena duces tecum served by the union seeking documents from the facility's medical file for Eugene Brown that contain information regarding his mental condition. The employer moves to quash the subpoena in the absence of patient consent. Should the arbitrator deny the motion to quash, and, subject to an appropriate protective order, require production of documents in the facility's file regarding the patient's mental condition?

	Yes	No
Arbitrator Panel:	4	1
Audience:	272	54

Arbitrator Commentary

MS. DEVLIN (Yes): The investigation revealed that Mr. Brown is prone to periods of confusion, so it seems to me that his mental state here is clearly in issue. And although there is a right to privacy with respect to medical records, that right must be balanced against the right to a fair hearing and Mr. Vera's right to respond to the very serious allegations of patient abuse. In this case, I would allow in the records so that the grievor would have an opportunity to respond.

MR. DAVIS (No): If, in fact, the stipulated issue is whether there was just cause to show intentional use of excessive force resulting in serious injury, based on what I've heard thus far, there is no basis to view or review this matter of mental condition. The arbitrator's role here is to review and assess the efficacy of the employer's decision at the time that this occurred, and from the reports that we have in the record, there is nothing to indicate that mental condition was something that was considered. The issue is not whether it should have been considered, but, given the fact is it was not considered, it is not a relevant issue.

Question 2. As the company's lead witness, Alexandra Smith is asked what her father said about Mr. Vera, which prompted her report to Ms. Williams. The union objects that Mr. Brown's statement is hearsay if offered for the truth, and should be disregarded for that purpose. Should the union's objection be denied, permitting reliance on Ms. Smith's account of her father's statement as offered for the truth about Mr. Vera's conduct?

	Yes	No
Arbitrator Panel:	2	3
Audience:	180	145

Arbitrator Commentary

MR. BETHEL (Yes): If you are going to take hearsay—and this is hearsay—you have to have, I think, more evidence than we have here of unavailability or at least in medical records. This is hearsay, and although I don't think we need to consider all of the exceptions in Rule 803, what we are asking is whether this is the kind of evidence that is trustworthy? One kind of evidence that we often think of as trustworthy is a statement that people make asking for medical treatment. Well, he didn't ask his daughter for medical treatment in this case, and maybe she wouldn't be the appropriate person to ask for actual medical treatment.

MS. DEVLIN (No): In Canada, I think this would turn on two factors: One would be necessity, and the other would be reliability. In terms of necessity, Mr. Brown isn't able to testify, so that factor would be met. But I think different considerations apply with respect to reliability. Mr. Brown has had periods of confusion. There are also issues about derogatory comments that he has made, which may provide some basis for saying he had a motive to fabricate. In the end, I don't think it would be found that it meets the criterion of reliability.

Question 3. On cross-examination, the union's advocate asks Ms. Smith to recall a meeting a year before with two staff representatives and the administrator. Those attending the meeting discussed how to stop her father's repeated use of derogatory racial and ethnic comments toward employees. The company objects that this line of examination is irrelevant character evidence. Should the objection be denied, and evidence about the meeting be received?

	Yes	No
Arbitrator Panel:	3	2
Audience:	259	66

Arbitrator Commentary

MS. WITTENBERG (Yes): I think that the question of whether the patient showed bias or hostility toward Mr. Vera is an important element in determining whether he had a motivation to show him in a poor light. I understand that the comments that he made happened a year ago, but according to our fact pattern here, when he first spoke to the administrator, Ms. Williams, he complained that Mr. Vera should have been terminated because he doesn't speak English clearly. I think that's a disconcerting statement, and I think that the statement, when tied with his comments a year ago, are quite relevant to whether there is motive here.

MR. BETHEL (No): I am willing to listen to evidence that would establish bias, but if we are going to do that, I think we should bring people in who have experience, people who can talk about things that they have seen him do or things they've heard him say and not simply a report of some meeting that happened a year ago containing only general allegations.

Question 4. During testimony by Mr. Jones about what he overheard on December 27, the union objects that Mr. Jones' account identifying the voices of Mr. Brown and Mr. Vera, and Mr. Brown crying out in pain, constitutes inadmissible opinion and should be excluded. Should the arbitrator deny the objection, and admit the evidence of what Mr. Jones heard?

	Yes	No
Arbitrator Panel:	5	0
Audience:	286	40

Arbitrator Commentary

MS. WITTENBERG (Yes): First of all, I think as a lay person Mr. Jones can recognize a cry of pain, and so I think he can say what he heard, and he is subject to cross-examination. What I think is more interesting about this question is that he heard a cry of pain, and he heard voices, and he identified two individuals at about the time that the incident occurred. And very honestly, if you look at either the patient's explanation to his daughter of

what occurred or Mr. Vera's explanation, I find that Mr. Jones' testimony would support either version of the event.

MR. PERKOVICH (Yes): Looking in the more detailed statement of facts, there is a contractual provision that says the parties have agreed that the rules of evidence need not be applied. Now, I know that doesn't say "do not be applied" or "will not be applied" but the phrase "need not be applied" seems to me to be a bilateral expression of intent to handle the rules of evidence differently than it might be under other circumstances, and I think arguably provides more liberality in terms of letting evidence in.

Question 5. In Ms. Williams' testimony, the employer introduces as an exhibit the warning given to Mr. Vera 2 years ago for rough handling of a resident. This is the warning cited in the dismissal notice. The company proposes that the warning be received as an established, settled record of prior discipline, without review on the merits, to prove that Mr. Vera used excessive force in the past. The union objects that it was barred by the contract from challenging the warning in arbitration. Should the previous warning be received as an established, settled disciplinary record showing Mr. Vera's previous use of force on a patient?

	Yes	No
Arbitrator Panel:	2	3
Audience:	122	204

Arbitrator Commentary

MR. DAVIS (No): Simply stated, it should not be admitted to show the previous use of force. It may very well be that there was a mishandling or rough handling, but rough handling does not constitute the use of force on a patient. And for that reason, I would not accept it.

MR. PERKOVICH (Yes): A deal is a deal is a deal.

Question 6. In testimony by Ms. Williams, she reports discovering in Mr. Vera's personnel jacket a 3-year-old Incident Report based on a former resident's claim that he was pushed to the ground by Mr. Vera when they were on the outside patio. The file shows that Mr. Vera was cleared in the subsequent investigation, and no disciplinary action was taken. The union objects that the report is irrelevant. Should the previous Incident Report be received in evidence?

	Yes	No
Arbitrator Panel:	1	4
Audience:	32	293

Arbitrator Commentary

MR. PERKOVICH (Yes): It is propensity evidence, and I am inclined to agree that it is probably not very helpful because for the employer it is claimed that he did it, while, for the union, he was cleared. But I think that goes to its probative value, not its admissibility.

MS. DEVLIN (No): I don't really see this as a propensity issue because the employer conducted an investigation at the time, determined that the grievor wasn't at fault, so basically, I would accept the union's admission. I don't think the employer can now resurrect this incident.

Question 7. After Ms. Williams identifies the doctor's report she cited in the dismissal notice, the company moves that it be received in evidence. The union objects that a portion of the report is hearsay and cannot be taken as the truth. The doctor now works in another part of the country. The doctor's report quotes Mr. Brown as stating that Mr. Vera caused his injury by "grabbing and twisting" his arm. Should the doctor's report of Mr. Brown's statement about the cause of his injury be received for the truth?

	Yes	No
Arbitrator Panel:	1	4
Audience:	179	146

Arbitrator Commentary

MR. BETHEL (Yes): We don't have to apply the rules of evidence in arbitration, but we shouldn't pretend they don't exist either. This is a well-recognized exception. This man was talking to the doctor in order to receive medical treatment. The doctor, in fact, treated him. The assumption is that people will speak honestly to doctors about what happened to them. Having your arm grabbed and twisted is reasonably pertinent to the receipt of medical care, which is exactly what he did here. I think the entire report comes in. I am not sure about Vera's identity, but there is other evidence that puts Vera in the room if you believe Mr. Jones'

testimony. But with respect to these kinds of statements, what you look for in hearsay is a guarantee of trustworthiness, and I think you have that, one that is specifically recognized by the federal rules.

MS. WITTENBERG (No): I think what you can say is the patient has been consistent in his description of how the injury occurred. I don't think that you can say that consistency equals truthfulness, and I think what the doctor's report stands for is showing that there was an injury, but I don't think that it makes the patient's report any more reliable. We still do not have the patient before us. He has never been cross-examined. It is the same issue it seems to me with his daughter. I don't doubt that the doctor reported everything as he was told, but that doesn't convince me that this patient is credible.

Question 8. In the union's case, Henry Lane, its business agent, testifies about an offer made by Ms. Williams during the final step of the grievance procedure. Mr. Lane recalls that Ms. Williams proposed as a settlement the reinstatement of Mr. Vera on a last-chance basis, without back pay, explaining that the employer had proof problems. The company objects that the testimony about its offer is inadmissible as a privileged settlement discussion. Should the evidence of the company's settlement offer be admitted?

	Yes	No
Arbitrator Panel:	0	5
Audience:	6	320

Arbitrator Commentary

MS. DEVLIN (No): I would try to cut this off before the evidence even came out, and if I heard any discussion, any comment about the grievance procedure, I would make it clear to the parties right away that I didn't want to hear any evidence about settlement.

Question 9. In the direct examination of Mr. Lane, he testifies about the background of a contract provision that permits "summary dismissal" for patient abuse, recounting a conversation in the union's private caucus about the language. In the caucus, members of the union bargaining team discussed the "summary dismissal" exception being used only if the alleged misconduct was based on a direct eyewitness account, not circumstantial evidence. The company's advocate objects that evidence of what

was said in the union's internal discussion is irrelevant on the issue of contract interpretation. Should the evidence about the union's internal discussion be received to clarify the contract's meaning?

	Yes	No
Arbitrator Panel:	1	4
Audience:	25	302

Arbitrator Commentary

MR. DAVIS (No): Well, there is a standard contractual interpretation analysis. This is clear and unambiguous language. It states what it states, and there is no basis upon which to be concerned or to consider what the caucus did or discussed. It is not reflected in the language. It clearly cannot show the parties' intent with regard to how the wording should be interpreted so it should not be let in.

MR. PERKOVICH (Yes): From a strictly evidentiary point of view, I agree. But, in terms of cathartic effect, letting people feel good about saying what they believe needs to be said has some value. So what's the harm in receiving the evidence? Nothing. The company put somebody up to say the opposite. It is a wash, and we move on and everybody feels good about having said what they want to say.

Question 10. The last union witness, Mr. Vera, repeats his previous denial of intentional patient abuse and confirms his apology for protocol errors in handling the situation. Mr. Vera also testifies that he was the subject of a post-discharge administrative investigation by the Elder Care Licensing Authority. The Authority's investigator spoke with the employer's witnesses, including Mr. Brown, but concluded that probable cause to find misconduct by Mr. Vera was lacking. The investigator is present to testify about the conclusion, but the company objects that such testimony is irrelevant on the issue of just cause, and should not be received in arbitration. Should testimony about the report's conclusion be admitted on the issue of just cause?

	Yes	No
Arbitrator Panel:	1	4
Audience:	145	180

Arbitrator Commentary

MR. BETHEL (No): I think in terms of the rules of evidence the union is probably right; that there is an exception which allows this or at least factual findings like this to come in. I wouldn't let it in because I don't care about it. I am not interested in what other agencies have found, but I always know what they found by who offers the report.

Question 11. Based on the facts presented and your evidence rulings, do you conclude that the dismissal of Mr. Vera should be upheld? If not, what do you believe is an appropriate outcome?

	Yes (upholding dismissal)	No (rejecting dismissal)
Arbitrator Panel:	0	5
Audience:		Sizeable majority
Other remedy? _____		

An Empirical Postscript

A total of 329 respondents from the audience submitted survey forms. Approximately two-thirds of the respondents identified themselves as male, while a similar two-thirds majority self-identified as attorneys.

In terms of the evidentiary questions presented during the simulation, three showed a relatively close division of the house in terms of the percentage of those who would allow the receipt of the disputed evidence in face of the stated objection. On question 2, a slight majority would permit receipt of the daughter's hearsay report of her father's complaint and accusation (55%–44%). A comparable majority responded to question 7 by indicating that they would receive the treating doctor's report containing the patient's hearsay statement claiming that the grievant caused his injuries (54%–44%). On the other hand, a similar majority, with respect to question 10, would exclude the offered testimony of a licensing authority investigator concerning the investigator's conclusion that the evidence failed to support a probable cause finding of misconduct (44%–55%). The only other relatively close response was to question 5, with a majority of the audience deciding to exclude the grievant's previous warning for rough handling

of a patient on the grounds that the parties' contract barred its admission (37%–52%).

The audience provided a more definitive viewpoint on the remaining evidentiary questions. In response to question 4, the audience overwhelmingly allowed the testimony of a patient in an adjacent room who claimed that he could identify the patient's voice expressing pain (87%–12%). Similarly, the audience had little trouble with respect to question 3 in permitting testimony regarding reports of the victim's use of derogatory racial and ethnic comments (79%–20%). The majority sentiment shifted strongly toward the negative concerning three other questions. The audience rejected a three-year-old incident report regarding uncharged misconduct in question 6 (10%–89%), as well as testimony from an internal union caucus offered as bargaining history evidence to interpret the contract's summary dismissal provision in question 9 (8%–92%). Finally, the respondents resoundingly voted to exclude a prior settlement offer made by management in question 8 (2%–97%).

The votes of the arbitrator panel sided with those of the audience on all but two of the questions. Perhaps not surprisingly, both of the split decisions—involving questions 2 and 7—concerned issues on which the audience was closely divided.

The audience also was asked to vote on the outcome of the case. Like the arbitrator panel, a sizeable majority voted in favor of reinstatement with full or substantial back pay. A smaller majority would impose a suspension or other form of lesser discipline. Approximately 20 percent of the respondents favored either dismissal or reinstatement without back pay. A number of respondents either declined to specify the length of the suggested suspension or otherwise declined to render a decision on the merits.