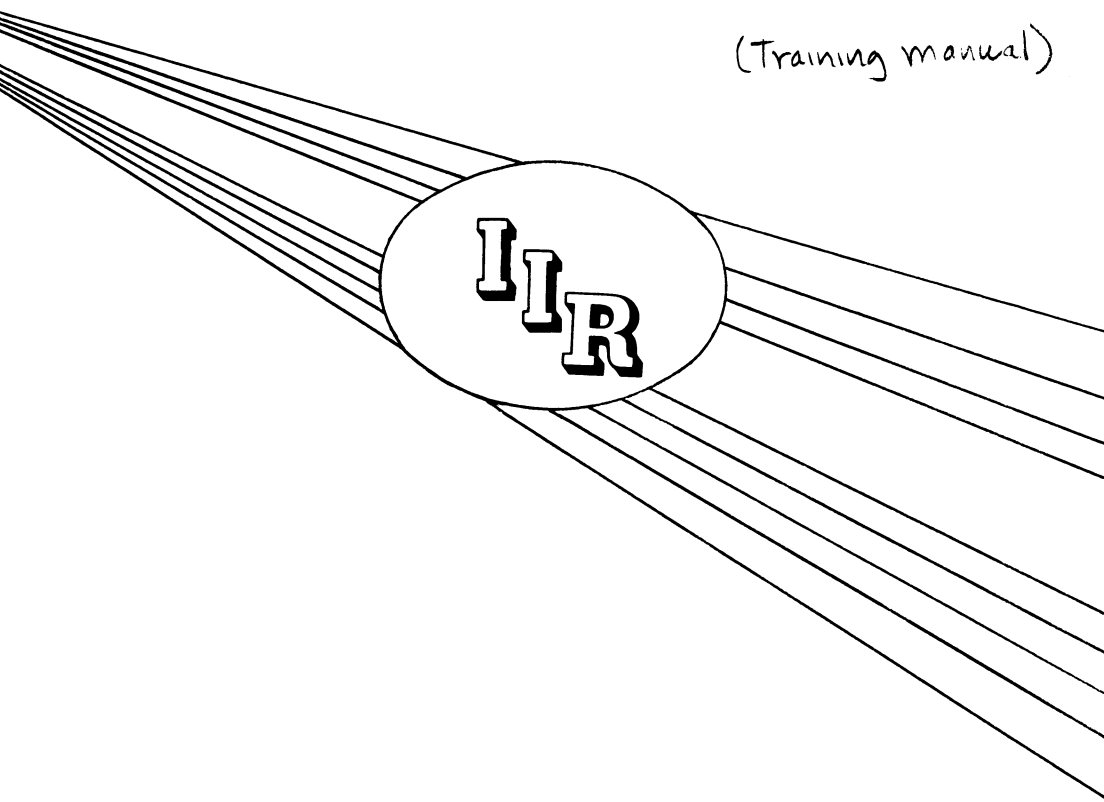
GRIEVANCE ARBITRATION: TECHNIQUES AND STRATEGIES

(Training manual)



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GRIEVANCE ARBITRATION: TECHNIQUES AND STRATEGIES...

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FOREWORD

The Institute of Industrial Relations is happy to present *Grievance Arbitration: Techniques and Strategies*, the latest volume in a series of training packages completed under the terms of a contract between the State of California and the University of California, Los Angeles. With funds provided for the State by the Federal Government, the State asked the Institutes at Berkeley and Los Angeles to assist in the training of state and local public managers and employees in the conduct of labor relations. A major portion of our role is to prepare and provide training materials such as this volume.

Public sector management and labor, like their private sector counterparts, are learning to live under collective bargaining agreements. Once these agreements have been negotiated, public managers and public employees are faced with problems of effectively interpreting and applying them. Disputes often arise during the day-to-day operations of an agency over the various subjects covered by an agreement. These disputes should be routed through the grievance procedure.

Settlement cannot always be reached in the various steps of those procedures, however, and often such disputes are presented to a neutral third party for mediation or arbitration.

The use of neutrals in public agencies follows the experience of the private sector which has repeatedly chosen to work within the arbitration system rather than using the courts. Arbitration is a private, quasi-judicial

system, sensitive to the needs of the employer-employee relationships. The special expertise of arbitrators in the fields of industrial and labor relations, the informal atmosphere, lower costs, and speed of the arbitration process are the primary reasons why arbitration has been preferred to the courts.

The success of arbitration depends in large part on the skill of advocates representing the disputing parties. Although there has been an increase in the use of lawyers as advocates, we believe that in many arbitration cases, a legal background is not a prerequisite. The successful advocate need not be a lawyer, but must be properly and thoroughly trained in the rules and techniques of labor arbitration.

This manual presents a "how-to" pragmatic guide to grievance arbitration: the advocate-to-be will find the arbitration process--from background and history to arbitration submission agreements to post-hearing briefs--thoroughly analyzed in one volume. Many of the sections of this manual can be found in other sources. But there is no one book or source that contains all of the material, edited and written expressly for the training of non-lawyers.

It is our hope that with the publication of this manual, *Grievance Arbitration: Techniques and Strategies*, capable people drawn from the ranks of state and local managers and employees can utilize the information provided to become successful advocates.

September, 1977

Frederic Meyers
Director

ACKNOWLEDGEMENTS

I would like to express my appreciation to Linda Jenson Paterson, attorney, for her invaluable research assistance in the preparation of this manual.

I also wish to thank Donald Becker, Director, Julian, Becker and Associates, for creating the Arbitration Simulation found in the lesson plan which accompanies this manual.

Special thanks is due to Rita Stearn, Program Representative, Center for Management Research and Education, UCLA, without whom this project could not have been accomplished.

John A. Spitz

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INTRODUCTION

Skilled labor arbitration is one of the most humane, yet highly principled private or quasi judicial systems in existence. How the parties use the arbitration process is up to them: it can be an adversary, legalistic, and lengthy battle, or in the hands of skilled professional advocates, a flexible, well-functioning system for working out mutual problems.

Arbitration as a grievance settlement procedure, the final step in that labor-management dispute, is the focus of this manual. In this introduction, we will first look at the general arbitration process, its prerequisites, its terms or vocabulary, and its functions. Then, a brief discussion of the various types of arbitration as well as its similarity to and differences from other kinds of dispute settlement procedures will be presented.

The next section of this introduction discusses the reasons for using arbitration rather than the court system to settle grievances. It is followed by a short history of grievance arbitration in the United States, including a review of important court cases that support and have structured arbitration.

The final section describes the various forms of grievance arbitration, especially the newer expedited forms which have emerged as alternatives to the increasingly costly traditional method. In the section on expedited arbitration, costs and the time required for grievance arbitration are reviewed as well.

ARBITRATION--OVERVIEW

I. Arbitration Definitions

Labor arbitration is usually defined as the process by which a collective bargaining dispute, voluntarily submitted, is settled by a neutral third party. After the presentation of evidence and arguments, the arbitrator, typically chosen by the parties to the dispute, makes a decision which, in most cases, is final and binding. Among the arbitrator's criteria are the contractual and/or economic facts presented at the hearing and demonstrated past practices.

For arbitration to be successful, it is imperative that the parties share a fundamental commitment to the process. The prerequisites for arbitration are agreement between the parties on the need for rational decision-making process and the ability mutually to choose a neutral arbitrator. Thus, compared to most other forms of dispute settlement which resort to some exercise of power (i.e., strikes or lockouts), arbitration is particularly rational and objective.

Arbitration performs many functions: it provides a safety valve beyond the normal grievance procedure; it can settle disputes without resort to strikes or other disruptive job actions; it can clarify contracts or test their application. Finally, arbitration creates an important outlet for tension by letting parties save face through the decision of a neutral third party.

The United States has a strong tradition of "umpires," that is, the acceptance of the concept of a neutral, third party who calls the play.

Sometimes the decision may not be what the player thinks is the right one, but the umpire calls the play as he sees it, and the call is final. The term *umpire* is even sometimes used to describe an arbitrator, especially one serving as a permanent arbitrator or as the chairperson of a panel of arbitrators, or during the life of the contract.

The agreement to submit a dispute to arbitration and to be bound by its outcome is called the *submission agreement*. The ruling of the arbitrator is usually called the *award*, as is the document in which the arbitrator presents the ruling and summarizes and evaluates the evidence.

II. Grievance and Interest Arbitration

Almost any dispute, short of a criminal action, can be submitted to arbitration. Both questions of fact and of law can be arbitrated, and even the format or content of the arbitration agreement itself can be arbitrated. In the field of labor relations, arbitration is generally divided into two types--grievance and interest.

Grievance or *rights arbitration*, the final step in the grievance process, occurs far more frequently than arbitration of interest disputes. In grievance arbitration, the award settles a dispute over the application or interpretation of an existing labor agreement. Since the arbitration in such cases determines the rights of the parties under a particular contract or agreement, this type of arbitration is also known as rights arbitration.

Interest arbitration determines a party's interest in the terms and conditions of employment; it is used in disputes over the terms of a new or a renegotiated contract.

III. Arbitration - Negotiation

Arbitration resembles negotiation in that it is a mechanism for balancing the interests of two parties. However, it is substantially different from negotiation because the ultimate agreement or resolution of their dispute is accomplished by a third party. Arbitration decisions are also usually final, and may be used as precedents, whereas negotiations may be reopened and are often modified.

IV. Arbitration - Mediation - Conciliation

Arbitration is also substantially different from mediation or conciliation because of its binding resolution of the dispute. Although both mediation and conciliation (the terms have come to be used interchangeably) use neutral third parties in their dispute settlement efforts, the parties in dispute must themselves agree on the resolution. Mediators or conciliators have no power other than their own persuasiveness.

V. Fact-finding and Advisory Arbitration

In fact-finding, there is no attempt to resolve the dispute, per se. Instead, the goal of fact-finding is simply to clarify the situation by finding and presenting the relevant facts. Sometimes, the fact-finding process will include recommendations. In California under the Rodda Act, this is the standard procedure. Advisory arbitration resembles the fact-finding process in that the ultimate decision is made by the employer. It is an effort to resolve specific issues by the arbitrator who renders an award *recommending* possible solutions. Although not widely used, advisory arbitration is generally found in the public sector where government agencies are reluctant to give an arbitrator what they view as the discretions and responsibilities which are theirs by law.

VI. Mediation-Arbitration

This form of arbitration, commonly called "Med-Arb," is a combination of the two systems. The neutral third party begins as a mediator, hoping to aid the parties in agreeing on facts and solutions to the conflict. If a point of impasse is reached, however, the third party begins as a mediator, hoping to aid the parties in agreeing on facts and solutions to the conflict. If a point of impasse is reached, however, the third party will take on the role of an arbitrator. At that point, the arbitrator takes the responsibility for rendering a binding and final award.

VII. Arbitration: Compulsory and Mandatory

Unless there are demonstrable procedural or criminal irregularities, the acceptance by parties of an arbitration award is compulsory; resort to arbitration itself is not. The parties voluntarily turn to arbitration to settle a particular conflict or to observe procedure for dispute settlement under a particular contract or agreement. Arbitration is "mandatory" only when the parties have *previously agreed* to handle disputes through arbitration when they arise. "Compulsory" arbitration, a type of *interest* arbitration, is very unusual: it has found some use in the public sector when the parties are ordered to arbitrate either by law or by specific decree.

VIII. Why Arbitrate?

Arbitration is an extension of collective bargaining as practiced in the United States. The purpose of collective bargaining is the resolution of differences between employers and employees over the terms and conditions of employment. After the question of representation has been settled,

the main problems in employer-employee relations arise from their disagreement over the terms or interpretation of their contracts or agreements. A labor contract furnishes only the framework of employment conditions and of collective bargaining. Disputes occuring during the term of the agreement, that is during its daily application, clarify the exact meaning of the agreement and provide the substance of the collective bargaining relationship.

Most collective bargaining agreements have established grievance procedures providing for dispute settlement. These procedures normally involve meetings of union and management officials at successively higher levels. In these meetings, the parties themselves attempt to resolve their dispute through clarification of issues and facts. If these discussions fail, they turn to third-party intervention. Thus, it is only the final step, when internal efforts haven't worked, that outside help or arbitration is being used.

Why have American employers and unions--over and over again--chosen to place their disputes in arbitration and bypass the court system? After all, in the eyes of the law, a collective bargaining agreement is like any other enforceable contract entailing the exchange of promises between two competent parties. In fact turning to arbitration, the disputing parties have in effect generated their own judiciary, which--unlike the courts (judges and juries)--they must pay for a decision. That is, arbitrators, unlike their counterparts in the public court system, charge a fee.

Why then has arbitration been preferred to the courts? There are essentially three pragmatic reasons: 1) arbitration is quicker; 2) arbitration is less expensive; and 3) arbitrators are more familiar with labor relations than their counterparts in the judiciary.

1) Arbitration is quicker: Preparing cases for the courts is usually a long, detailed and difficult process. Furthermore, the courts are struggling with an enormous workload and backlog of cases. If time is of the essence, as is often the case in labor disputes, waiting for a case to come to trial could be incendiary: tensions will mount, morale will decline, wildcat strikes may occur, and the overall employer-employee relationship will decline. By contrast, an arbitrator could settle a case much more quickly and return the workplace to normalcy.

2) Arbitration is less expensive: Taking an issue to court requires lawyers, and lawyers and their legal services are costly. Although the courts are free to all, salaries and other expenses involved in litigation ultimately far exceed the costs of the less formal and simplified arbitration process.

3) Arbitrators are familiar with labor relations: It can be said that judges are rarely very knowledgeable about labor relations and labor economics, unions and collective bargaining. By contrast, arbitrators, are specialists in the field of labor and industrial relations and are well-informed in the areas that pertain to the application and interpretation of labor agreements.

HISTORY OF LABOR AND GRIEVANCE ARBITRATION IN THE UNITED STATES

In the late nineteenth and early twentieth centuries, the term "arbitration" was mostly used to describe any means of settling a dispute as an alternative to strikes. The arbitration term meant negotiation between management and labor without a third party, what we would now call collective bargaining, as well as intervention by a third party without power to resolve the conflict, now called mediation.

Arbitration in the sense that we understand it today was first used in the famous Pennslyvania anthracite coal strike of 1871. The Committee of the Anthracite Board of Trade and the Committee of the Workingmen's Benevolent Association referred their interest dispute over "questions on interference with the works, and the discharging of men for their connection to the Workingmen's Belevolent Association" to Judge William Elwell of Bloomsburg, Pennsylvania. [2]

Between 1900 and 1920, major progress occurred in the development and practice of arbitration. The National Civic Federation, established in 1900, promoted conciliation and arbitration prior to World War I. In 1902 President Theodore Roosevelt appointed a United States Strike Commission to arbitrate another strike in the anthracite coal industry. On the Commission's recommendation, the first permanent grievance arbitration system in the United States was established. The Anthracite Counciliation Board arbitrated disputes between the operators and miners over the application and interpretation of the Commission's award, and any other conflicts ensuing from their

labor relations agreement. The Board was bipartisan. If the parties could not agree to settle the dispute themselves, they would then appoint a neutral umpire to render a final decision.

The printing, millinery, and clothing industries turned to arbitration without government intervention, and succeeded in resolving employee grievances without work stoppages. In 1910, the "Protocol of Peace" was negotiated to end a long and violent strike in the New York clothing industry. Louis Brandeis, then a lawyer, was the major instigator of the Protocol, as well as chairman of the arbitration board established by the Protocol to arbitrate both grievance and interest disputes.

In 1913, the Newland Act set up the Board of Mediation and Conciliation as an independent, permanent government agency to settle contract and grievance disputes in the railroads through voluntary mediation and arbitration. When the United States entered World War I, the government established several voluntary arbitration and adjustment agencies to handle labor unrest during the war, the most important of which was the National War Labor Board. It was empowered to intervene in any labor dispute affecting war production not within the jurisdiction of one of the special adjustment agencies.

After the war, President Wilson convened his Labor-Management Conference with the aim to establish a national private sector peacetime labor policy. But neither the session for the public nor the one for management and labor had any impact due to the antagonism between labor and management. Labor and management could not even agree on the right to bargain collectively. The "return to normalcy" had signaled a conservative shift, and little change until the era of the New Deal.

During the 1930s, New Deal policies encouraged unionization as well as collective bargaining. More and more often, arbitration provisions were included in collective bargaining agreements as the final step in grievance procedures.

During World War II, the second National War Labor Board (NWLB) was established to prevent lockouts and strikes over grievance disputes and generally to ensure industrial peace. The Board actively advocated mediation and arbitration in grievance disputes, to the point of requiring grievance arbitration clauses in several cases. The NWLB encouraged the inclusion of such clauses in all labor-management agreements, and succeeded in convincing many managers that arbitration would not usurp their rights retained and protected by such agreements.

The NWLB created a new image of respect for arbitration as well as for arbitrators. It carefully delineated the jurisdiction and scope of arbitrability, and it trained many professional arbitrators. Although the NWLB was dissolved in 1945, President Truman and his Labor-Management Conference unanimously recommended its policies, especially endorsing the inclusion of complete grievance and arbitration procedures in all collective bargaining agreements. The Conference also advocated that 1) arbitrators decide only those issues specifically submitted to them; 2) they be required to base their decisions solely on evidence presented at the hearings; and 3) they not add to, subtract from, or otherwise modify existing contracts or agreements.[3]

These recommendations were intended to discourage the use of arbitrators as a legislative or consultative force in the labor relations field. Arbitration should be only grievance, not interest arbitration. Thus, only *past* actions were to be evaluated in view of the contract; awards could only remedy past violations of already existing agreements. Any guidance or agreements for the future were not in the purview of the arbitrator and must come from the two parties themselves.

These attitudes were representative of the so-called judicial school. To them, the legitimacy of and respect for arbitration were integrally linked to its impartiality and consistency. The judicial school considered the labor agreement itself as paramount. All rights of either labor or management stemmed from that agreement; its language and intent were the first and last source of the decision. The agreement's intent was to be determined by the evidence presented at the hearing, and not by any arbitrator's conception of what was fair or equitable.

The advocates and supporters of the non-judicial or consultative school argued that industrial conditions were changing too rapidly, the field was too dynamic, and such an interpretation of the role of the arbitrator was too confining. William Simkin, a former president of the National Academy of Arbitrators, noted that cases with such clear-cut contractual directions or violations rarely reach arbitration and it was precisely the ambiguous cases that required arbitration. Simkin suggested that arbitrators must base their awards on present needs when the language of agreements made in the past proved too ambiguous. [4]

This controversy must be seen within the context of the post-war labor relations scene. In the 1950s, both union representation and the inclusion of arbitration clauses in collective bargaining agreements were gaining momentum. Unions and management had developed sophistication in labor relations, and often used lawyers in drafting their agreements. As a result, the process of arbitration itself--not the right to include it in a contract--was the focus of much discussion, development, and refinement.

In 1947 the Taft-Hartley Act was passed. Section 310(a) was worded ambiguously enough to create new controversy. Was the intent of the law to confer substantial jurisdiction in labor-management and arbitration disputes to the federal courts? Or had congress simply intended to confer jurisdiction over procedural and technical questions?

Textile Workers Union v. Lincoln Mills resolved these questions in 1957. The Supreme Court ruled that Section 301(a) intended to provide the Supreme Court with responsibility to construct applicable law from the existing national labor policies and "judicial inventiveness." [5]

In June 1960, the U.S. Supreme Court ruled on three United Steelworker cases which became known as the *Trilogy*. In effect, the *Trilogy* dramatically reduced the involvement of the lower courts in arbitration by limiting them to the determination of whether the parties had agreed to arbitrate.

Prior to the *Trilogy* decisions, it had been standard practice for courts hearing arbitrability cases also to consider the merits of such cases.

This practice was in large part due to the *Lincoln Mills* ruling. According to this policy--known as the Cutler-Hammer bonafide dispute doctrine--if one of the parties refused to submit a dispute to arbitration, the court will rule for arbitration *only if* the other party proves that an agreement to arbitrate grievances was made. In addition, the party must show that the issue in dispute was specifically covered by that agreement, and that the language of the agreement was either unclear or ambiguous enough to warrant arbitration.

In the *Trilogy* decisions, the Supreme Court directed lower courts (1) to abandon the Cutler-Hammer doctrine, and (2) to order arbitration whenever the agreement to arbitrate did not specifically exclude the grievance category in dispute, or if an allegation had been made that some contract provision had been violated "even if the assertion was patently frivolous." [6] If any doubt existed about the arbitrability of a dispute, the lower courts were directed to rule in favor of arbitration, that is, arbitrators alone should decide the dispute.

The *Trilogy* greatly increased arbitrators' prestige and authority. The Court's opinion (written by Justice Douglas) extensively described the role of arbitrators, including the power to create remedies by interpreting collective bargaining agreements. The *Trilogy* rulings also prohibited judicial review of arbitration awards and required judicial enforcement in all cases in which the award drew its "essence from the collective bargaining agreement." [7]

In a series of later decisions, the Supreme Court encouraged resort to arbitration in matters that had previously gone before the National Labor Relations Board (NLRB) for settlement. Since then, the NLRB itself has

followed a policy of preferring arbitration to its intervention when "...the proceedings appear to be fair and regular, all parties agree to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the (NLR) act." [8] noting however that the board is not legally bound to do so.

Arbitrators' expertise, authority, and quasi-judicial function in industrial and labor relations disputes are now widely recognized; the courts and the NLRB will no longer intervene in such areas unless an award or the conduct of an arbitral hearing clearly conflict with the law or a critical public policy. As a result of these post-war rulings, there is a growing body of federal case law clarifying the limits of arbitration, while at the same time increasing its applications to new areas.

GRIEVANCE ARBITRATION IN THE PUBLIC SECTOR

Not until 1959, almost twenty-five years after the Wagner Act, was some form of collective bargaining first legally sanctioned for public employees. In that year, Wisconsin was the first state to pass law permitting public employees to organize. The federal government as well as most of the other states have slowly followed that precedent.

Why did private sector collective bargaining practices spread so slowly to the public sector? With respect to collective bargaining, public agencies have been considered more essential than private sector enterprises because they are the sole providers of vital services such as fire and police protection. Therefore, the idea of organizing public employees has generated much negative response. The prevailing attitude that neither unelected individuals nor unelected groups should make public decisions and the existence of a nonpolitical civil service system have also inhibited collective bargaining in the public sector.[9]

In 1961, a special task force was established by President Kennedy. At that time, there was no official recognition of any employee representation groups and few federal employees were covered by a uniform grievance system. On the basis of the task force's recommendation, each federal agency was directed to create a grievance and appeal system. Advisory arbitration and the right to join or not join unions was also authorized.

In the 1960s state and local governments as well began to use grievance arbitration. Its use resulted from the inclusion of arbitration clauses in collective agreements negotiated between public employers and organizations

representing public employees. Although federal employees were, as of 1970, twice as likely to be covered by collective bargaining agreements as state and local employes, state and local employees who did have such contracts were far more likely to be covered by grievance arbitration clauses.[10]

Rhinelander City Employees, AFSCME, AFL-CIO v. City of Rhinelander in 1967 was the precedent-setting case in the struggle to gain legitimacy and legal enforcement of voluntary binding grievance arbitration.[11] In most states where the legislature has authorized agencies to negotiate such agreements, the authority of public employee organizations and public employers to include grievance arbitration clauses is now legally recognized.[12]

Today, the main conflict over authority in state and local government grievance arbitration is the result of overlapping jurisdiction of collective bargaining agreements and civil service codes. In ruling on such conflicts, the courts have generally noted 1) whether the civil service code intends to give jurisdiction to civil service board or commission exclusively; and, 2) whether the grievance in dispute is one of the traditional civil service concerns such as initial hiring, competitive examination and promotions or is an issue such as discipline and discharge, transfer, overtime, sick leave, etc.

Studies available in the mid-seventies indicate that unionization of public employees will increasingly expand. The data also show that as public employees negotiate contracts, binding arbitration will usually be included as the final step in grievance procedures: In 90% of all collective bargaining agreements negotiated contain arbitration clauses. From most indices, it is easy to draw the conclusion that arbitration is growing both in volume and importance for federal, state and local government employment.[13]

FORMS OF ARBITRATION: "EXPEDITED ARB"

Arbitration can take several forms: *Ad hoc* arbitration usually means that a single arbitrator is hired by the two parties for one case or for a particular series of cases. A *permanent* arbitrator is hired by the two parties for all arbitration arising for the duration of their collective bargaining agreement. An arbitration panel is usually composed of three arbitrators, often called a *tripartite* board: each of the two parties selects one arbitrator, who jointly choose a third to serve as chairperson. The award is decided by a majority vote of the board. Such boards may be either ad hoc or permanent.

The latest form--expedited arbitration--shows how far grievance arbitration has come from the days when it was still considered a new and controversial procedure. Arbitration's critics no longer question its legitimacy or value. Today, the frequent complaints are that arbitration is formal, complicated, and expensive. Pre-hearing briefs, transcripts, post-hearing briefs, witnesses, postponements and other delays ad infinitum all encumber the process. And they all cost money. According to an article in the AFLCIO *Federationist*, in 1975, the Federal Mediation and Conciliation Service (FMCS) estimated the average union cost for a simple case was $2,220, (management costs would be higher) and costs have continued to rise since then.

Initially, a major impetus for devising arbitration was as an alternative, avoiding the problems of the complex court system. Ironically, the two major drawbacks of the U.S. judicial system, rising costs and increasing delays, have now become characteristic of arbitration as well. Lawyers are frequently used to ensure proper handling of the numerous formal technicalities.

The arbitrator's fee is less than 15-20 percent of the total cost of arbitration. Transcripts lost-time personnel and postponement costs, lawyers' fees and expenses make up the remainder.[13] In 1975, the average case lasted 223 days, or more than seven months--181 days before the hearing and the rest during or after. Preparation time before the hearing, delays and postponements because of technicalities during the hearing, and a host of post-hearing formalities and briefs account for the burgeoning lapse between the time an arbitration appeal is filed and the time an award is presented. And the more people are involved in the hearing, the more time it will take simply to coordinate schedules.

During that period, all those involved in the dispute--the worker who is off the job until grievance is resolved, the foreman who must testify, and any management or union staff--will spend their time and productivity on the hearing. All these people's time lost from work adds up to a sizeable cost. Lawyers' fees, generally at least $1,000 per case, push expenses even higher. Finally, each page of a transcript is $2.75 minimum, and averages about 200 pages per day.

THE UNION'S COST OF TRADITIONAL ARBITRATION FOR A ONE DAY HEARING*

PREHEARING

Lost time:	Grievant and Witnesses (Obviously the cost of management's time will be higher) @$5/32 hours	$ 160.00
Lawyer:	Library Research @$40/4 hours	160.00
	Interviewing Witnesses @$55/4 hours	220.00
Filing Fee:	AAA (shared equally) $100	50.00

Total Prehearing Costs $590.00

THE UNION'S COST OF TRADITIONAL ARBITRATION FOR A ONE DAY HEARING* (Cont'd.)

HEARING EXPENSE

Arbitrator:	Fee (shared equally) 1 hearing day	100.00
	Expenses for meals, transportation, etc. (shared equally)	50.00
	Travel time one-half day (shared equally)	50.00
	Total Arbitrator $200.00	
Transcript:	$2.75 per page with two copies and ten-day delivery of 200 pages (shared equally)	325.00
Lawyer:	Presentation of case @$55/hour	330.00
Lost Time:	Grievant and Witnesses @$5/hour, 32 hrs.	160.00
Hearing Room:	Shared equally (Free under AAA)	25.00
	Total Hearing $840.00	

POST-HEARING EXPENSE

Arbitrator:	1-1/2 days study time (shared equally)	150.00
Lawyer:	Preparation of Post Hearing @$55/hour	440.00
	Total Post-Hearing	$590.00
Total Cost to Union		$2,220.00

*SOURCE: 1975 Averages estimated by AFL-CIO Department of Research. Of course, management's costs will be much higher, i.e. management's salaries, and therefore lost-time costs, are higher than those of union staff.

How did arbitration become so complicated and formal? Part of the blame should go to the development pattern characteristic of almost all institutions: as arbitration became accepted, all kinds of bureaucratic trappings slowly entrench themselves into its organization. Arbitration is particularly susceptible to this kind of problem and complication.

The blame for arbitration's unwieldly formality should be laid less on management and unions than on the side-effects of several court decisions. The *Trilogy* rulings limited the grounds for appeal to those cases involving questions of arbitrability or whether the award "draws its essence" from the agreement. (This in addition to the traditional grounds of irregular, discriminatory, or prejudicial misconduct of the arbitrator. See details, Tab D.) As a result of those rulings, the question of arbitrability is occasionally raised by the opposing party before the issue in dispute can be heard. If the award goes against the objecting party, then arbitrability may still be used as grounds for court review. The upshot of this tactic is that the hearing itself is plagued by formalities, briefs and transcripts which are usually needed only if the case is appealed.

In 1974, the *Alexander v. Gardner-Denver* decision added momentum to this trend toward formality. [14] In that decision, the United States Supreme Court ruled that a worker could use the Civil Rights Act (of 1964, as amended) for bringing a grievance, even if the issue had already been dealt with by grievance arbitration.

Thus, much of the delay and formality, and the resultant costs which may hinder the efficiency of arbitration are not intrinsic to the procedure.

There are several ways of keeping in check the complexity and formalities of arbitration and their concomitant costs. By avoiding formal proceedings, many of these costs can be eliminated or significantly reduced. Expedited arbitration is specifically designed to pare down the non-essentials in grievance arbitration. The initial experience with this form of arbitration was in private sector industries which experienced a special need of resolving disputes as quickly as possible. For example, the Actors Equity Association and the League of New York Theaters, as a precaution against the disruption of productions, arranged for six arbitrators to be preselected for use in any grievance disputes. Upon filing a request for arbitration, an arbitrator would be immediately appointed to hold the hearing, and then issue an award within 48 hours. Newspapers, the brewing industry and the industries of numerous waterfronts all use similar procedures. There are numerous reasons why such expedited measure might be taken: the high costs of work stoppages; union officials' need to serve their membership in a certain way; general worker unrest; or simply the high price of traditional arbitration.

Regardless of the initial incentive for utilizing expedited arbitration, the format of the system always contains certain key elements.[15]

1) A clear statement of the types of cases which may or ought to be arbitrated by the expedited procedure;
2) designation of enough arbitrators who can readily meet the stipulated time limits and rules of a regular selection process, such as using the AAA or FMCS rosters under their administration;
3) prompt and efficient handling of the appointment of arbitrators, scheduling of hearings, renumeration of arbitrators, and any other administrative details;

4) the commitment and cooperation of all the parties involved which is essential to making the system work.

Expedited arbitration is predicated on the notion that not all grievances must be handled in the same way. Cases which involve important issues of contract, which may be used as precedents; which could be extremely costly in terms of changes in wages or fringes; and sometimes cases which could lead to discharge are still handled through the traditional arbitration procedures. But routine discipline cases or those concerning questions of fact don't need the full-dress procedures.

General Electric and the IUE

Among the first companies to initiate an expedited arbitration program was General Electric. It negotiated an agreement with the IUE which would schedule hearings of discharge and promotion cases all within sixty days; eliminate detailed written opinions in these cases if there were no questions of contract interpretation, arbitrability, or just cause; and eliminated transcripts if the only issue was just cause for discipline or discharge.

The Steelworkers' Model

In 1971, the Steelworkers Union negotiated their well-known expedited arbitration procedure into contracts with all major steel companies. Although originally conceived as a one-year experiment, the program worked so well that it is still being used. The Steelworkers procedure was based on a comprehensive study of the overloaded traditional arbitration system. The study, conducted by a combined labor-management committee, advocated substantive changes in grievance procedures, as well as in arbitration.

The Steelworkers model uses a four or five-step grievance procedure culminating in either traditional or expedited arbitration. Many of the cases which go to arbitration would not have reached that level if supervisors and stewards had used their authority to settle disputes. But there are disputes that cannot be handled at that level. In such situations, when management and labor concur that the first steps in the grievance procedure are inappropriate, the study recommends that the parties agree to move the dispute to the level with proper authority.

Steps One and Two

The Steelworkers model stresses resolving grievances at the first two levels of the grievance procedure if at all possible. Both steps are oral, though after the Step Two hearing, a written record is prepared of all facts agreed to, all facts in dispute, and the issue as seen by both parties. Neither hearing can prejudice the position of either party.

Step Three

In Step Three, national level labor and management review the disputes in a joint attempt to resolve it. If they cannot settle the dispute at that level, they either direct it to traditional arbitration or to expedited arbitration if it is not a precedent-setting issue.

Step Four

If the dispute has been directed to traditional arbitration, high level union and management officials will attempt to resolve it in an earnest effort based on their previous experience. If the dispute was channeled to expedited arbitration, it returns to the local level.

If either party objects, then traditional arbitration procedure is used.

In the Steelworkers system, arbitrators are appointed according to geographic divisions, and selected by rotation and ability to hear the case within the agreed time limit. The parties at the local level must file for arbitration within ten days of receiving the minutes of the Step Three proceedings, the hearing must be scheduled within ten days of filing, and the arbitrator must make a decision within 48 hours.

Informality during the hearings is stressed: no briefs are filed, no transcripts are made, and though they are not excluded by the agreement, neither side uses lawyers.

Arbitrators must insure a full and fair hearing, but rules of evidence are also informal. If the arbitrator or the parties eventually decide that the issue is particularly complex or may be used to set a precedent, it can be referred back to traditional arbitration.

Mini-Arbitration Mold

A mini-arbitration procedure, based on the community rather than a union or industry, has been established in Columbus, Ohio. Its services are available for any union or company located in the Columbus area.

The Mini-Arbitration Program allows parties to decide themselves whether to use lawyers, briefs or transcripts. Once they have chosen a date for the hearing, the FMCS finds an arbitrator who can hear the case on that date.

The arbitrator is selected from a roster already designated by the Mini-Arbitration Program, and is paid on the basis of time and number of cases heard.

The fee per half day, one to two cases, is $100; for a full day, one or two cases, $150; and $200 per full day, three or four cases. Awards are mailed to the parties within 48 hours of the hearing.

The Mini-Arbitration Program is still too new to be evaluated. Some firms have utilized the program on a case-by-case basis, and it has been well-supported by both management and labor.

PUBLIC SECTOR USE OF EXPEDITED ARBITRATION

The United States Postal Service uses three arbitration methods, one for contract interpretations, one for issues involving dismissal or discharge, and an expedited form for non-serious or routine disciplinary cases.

Expedited arbitration has not performed as well as had been anticipated, though it is functioning much more smoothly than the other arbitration methods. All three methods are troubled by backlogs. Even so, cases in the backlogs of the two traditional methods are being routed to the expedited form, by mutual consent of the parties. The expedited method has a much smaller backlog of cases awaiting hearings, and, of course, requires much less time per hearing.

After a grievance has gone through the traditional first three steps, an appeal for expedited arbitration can be made. Arbitrators are drawn from both the American Arbitration Association (AAA) and the FMCS on a rotation basis depending on geographic location. The AAA filing fee of $100 per case and arbitrators' fees, usually about $200, are split by the two parties.

No briefs or transcripts are used; although lawyers are allowed they are rarely used by either party. The cases should be heard within ten days of filing, and the arbitrator should give a bench award and opinion within 48 hours of the hearing.

The postal unions have established a national arbitration board to process arbitration requests. The board chooses to send cases to either expedited or national arbitration, or back to the local level. If the local wishes

to arbitrate the case, they must do so at their own expense.

Postal Workers and representatives of the U.S. Postal Services have stated that they are satisfied over all with the expedited procedure and that generally the quality of justice was not diminished by its speed.

EXAMPLES OF EXPEDITED METHODS*

	Steelworkers--Basic Steel Industry	American Arbitration Association Service	AIW Local 562 --Rusco, Inc.	American Postal Workers--U.S. Postal Service	Mini-Arbitration Columbus, Ohio
Source of Arbitrators	Recent law school graduates and other sources	Special panel from AAA Roster	FMCS Roster	AAA, FMCS Rosters	Its own "Joint Selection and Orientation Committee" from FMCS Roster
Method of Selecting	Preselected Regional Panels. Administrator notifies in rotation	Appointed by AAA Regional Administrators	Preselected panel by rotating FMCS contacts	Appointed by AAA Regional Administrators	FMCS Regional Representative by rotation
Lawyers	No limitation, but understanding that lawyers will not be used	No limitation	No lawyers	No limitation, but normally not used	No limitation
Transcript	No	No	No	No	May be used
Briefs	No	Permitted	No	No	May be used
Written Description of Issue	Last step Grievance Report	Joint submission permitted	No	Position paper	Grievance record expected
Time from the request to hearing date	10 days	Approximately 3 days depending on arbitrator availability	10 days	Approximately 7 days depending on arbitrator availability	Not specified
Time of Hearing to Award	Bench decision or 48 hours	5 days	48 hours	Bench decision written award 48 hours	48 hours
Fees (Plus Expenses)	$100 1/2 day $150/day	$100 filing fee Arbitrator's normal fee	$100 1/2 day $150/day	$100 filing fee $100 per case	$100 1/2 day, 1 or 2 cases; $150/full day, 1 or 2 cases; $200/day, 3 Or 4 cases

* Source: AFL-CIO AMERICAN FEDERATIONIST

Some agreements have incorporated the AAA's expedited rules. (These rules are included in the Appendix to Tab B.) The rules provide that in the case of a dispute, the regional AAA office will fix the date of the hearing and appoint an arbitrator from its roster. No transcripts are used, but restrictions on lawyers, briefs or precedent-setting are left to the parties. The award is presented within five days of the hearing. The AAA charges a $100 filing fee per case, and the arbitrator's fee is additional.

Some companies have experimented with this method simply by jointly notifying the AAA that they have agreed to arbitrate specified cases under their existing agreement using the AAA procedure. An agreement incorporating AAA expedited arbitration rules should specify the publication date of the rules being used, so that any subsequent changes will not be automatically--that is, without the parties' review--incorporated into their agreement.

The performance of expedited arbitration since the Steelworkers program is reported as positive. Both unions and management are usually pleased with its speed and low cost, and usually neither believes that the quality of justice has been diminished. The wide variety of models attests to the flexibility of the concept. It is important to note, however, that in many models the whole grievance procedure has been overhauled, not just the arbitration step.

9 WAYS TO CUT ARBITRATION COSTS*

1

Arbitration should be prompt. An important "hidden" cost in labor arbitration is the time lost to executives, union representatives and workers. The cost of legal fees can also be significant. All of these items can be reduced by expediting the procedure. Furthermore, the "back pay meter" may be ticking while you are waiting for an eventual decision. Even where financial risk is not involved, a quick decision is usually better because keeping a grievant on the hook is bad for employee relations.

2

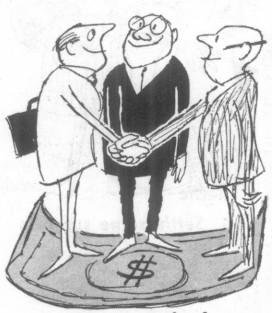
Don't order a transcript unless you really need it. Court reporting is expensive. Transcripts delay the award. The arbitrator can't start writing his opinion until he gets the record. Furthermore, arbitrators feel obliged to read every word. That means study time at the per diem rate. In some cases, transcripts are worth what they cost. But most of the time they serve only to double the total expenses of arbitration.

3

Question the arbitrator's fee if you think it is too high. The arbitrator is serving the parties. He should be paid a fair fee. Under AAA procedures, you are told his per diem rate in advance of his appointment. By reducing travel time, the number of hearings and study time, you have some control over the amount of the arbitrator's fee. When necessary, ask the AAA to speak up about an unreasonably high fee.

1. *Finish fast*

2. *Reduce the reporting*



3. *Agree on the fee*

*Sources: American Arbitration Association

4

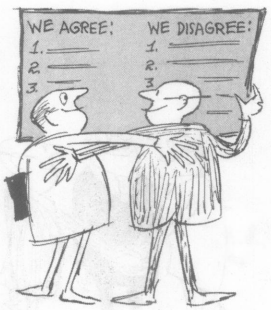
Clarify the issues before the first hearing. Why spend hours of hearing-room time establishing facts that aren't really in dispute? When parties come in prepared with the names and seniority dates of grievants, amounts of money involved and other details of record, it not only cuts hearing-room time but shortens the arbitrator's study time as well. In labor arbitration, the matter has already gone through the grievance procedure. A badly organized presentation serves no good purpose.

5

Sometimes, parties don't really need long opinions. Parties can ask the AAA to request the arbitrator to simplify or eliminate his opinion. In a few cases, it may be appropriate for the arbitrator to handwrite his award and a brief opinion at the close of the hearing, delivering it to the parties at once. If you don't need an opinion as a guideline for the future, consider the possibility of eliminating it. The arbitrator's bill will be substantially smaller. The dispute may be resolved sooner.

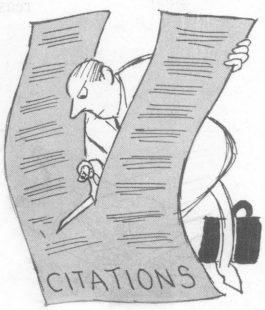
6

Avoid unnecessary citations. When parties indulge in needless citations they only compel the arbitrator to "go to the books" himself. That takes study time. Citation of awards by other arbitrators may be necessary in some situations. But be accurate. Don't rely on digests or headnotes alone. Above all, be selective.



4. Settle some subjects

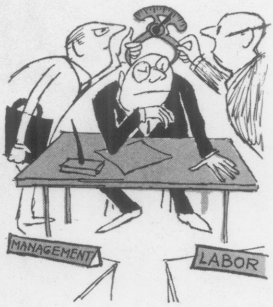
5. Ask for an answer



6. Cut your citations

7. Save the smoke screen

8. Stick to schedule



9. Measure your man

7

The labor arbitrator is an experienced professional. Exercise restraint in submitting arguments about procedural matters. Generally, a simple but accurate presentation of your facts and arguments will put the sophisticated arbitrator in a position to make a decision.

8

Don't break your date with the arbitrator. When a hearing date is set, keep it. Don't ask for postponements unless absolutely necessary. The arbitrator is a professional man whose time means money. He may be turning down another case on the day when your hearing is scheduled. Some arbitrators make a charge for postponements on short notice. This custom will grow unless parties exercise restraint.

9

Find out about an arbitrator before you select him. A man who never arbitrated a job evaluation dispute, for instance, may have to be educated at your expense. Look up the arbitrator in the Summary of Labor Arbitration Awards and other reporting services. This will give you a better idea of his qualifications. If it's an AAA case and you need more information, don't hesitate to ask.

FOOTNOTES

1. Brook I. Landis, *Value Judgements in Arbitration.* (Ithaca, Cornell University, 1977) p. ix.

2. Edwin E. Witte, *Historical Survey of Labor Arbitration.* (Philadelphia, University of Pennsylvania Press, 1952).

3. J. Noble Braden, "The Function of the Arbitrator in Labor-Management Disputes," *Arbitration Journal* 4 (1949):35

4. William Simkin, *Acceptability as a Factor in Arbitration Under an Existing Agreement.* (Philadelphia, University of Pennsylvania Press, 1952). pp. 40 and 43.

5. *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1957).

6. Harry Platt, "The Arbitration Process in the Settlement of Labor Disputes," *Journal of the American Judicature Society* 31 (1947): 57.

7. *United Steelworkers v. Enterprise Wheel and Car Corporation,* 363 U.S. 593 (1960)

8. Spielberg Manufacturing Company, 112 NLRB 1080 (1955).

9. Gerald M. Pops, *Emergence of Public Sector Arbitration* (Lexington, Massachusetts, D.C. Heath and Co., 1976). p. 18.

10. Felix A. Nigro, *Management-Employee Relations in the Public Service,* (Chicago: Public Personnel Association, 1969.)

11. 35 Wisconsin 2nd. 209, 151 N.W. 2d 30 (1967).

12. Preliminary Report of the Task Force on State and Local Government Labor Relations, 1967 Executive Committee of the National Conference of Governors, p. 44.

13. Nigro, op. cit. p. 120.

14. *Alexander v. Gardner-Denver,* 405 U.S. 36 (1974).

15. Michael F. Hoellering. "Expedited Grievance Arbitration: The First Steps", *Industrial Relations Research Association Series,* Proceeding of the Twenty-Seventh Annual, (Winter Meeting, Dec. 1974).

B

TAB B

BEFORE THE HEARING

In this tab, we begin the "how-to" portion of this manual. Under the heading of "Before the hearing" are the factors to consider before an arbitration hearing --- from the decision to arbitrate to the process of selecting an arbitrator. The sections in this tab follow in approximately the same order as the steps an agency would take once a dispute has gone through the grievance procedure without reaching a settlement.

The first section, "When and When Not to Arbitrate" lists a series of questions an agency should answer to determine if arbitration is really the right step. These questions not only frame the issue in dispute and clarify its significance (or lack of) for the agency, but also attempt to break-down impasses by suggesting different perspectives. If these questions indicate that the agency should try once more for settlement, the second section, "Mechanics of Settlement" provides the who, when, and how, as well as a checklist for thorough preparation.

If a decision is made to arbitrate, there are two ways to set the process in motion. One is by an arbitration submission agreement; the other is be a demand for arbitration, if the parties have already negotiated an arbitration clause into their collective bargaining agreement. The third section covers in detail the various factors which must be discussed and either implicitly or explicitly dealt with in an arbitration clause.

The fourth section considers the other alternative, "The Arbitration Submission Agreement." A sample submission agreement and a sample demand for arbitration are included with these sections.

"Arbitrability" is analyzed in the next section which reviews the questions in terms of legal constraints, standard procedures, and special implications for the public sector.

"The Selection of the Arbitrator," a major factor in determining the success of an arbitration hearing, is discussed next. This section covers the basic qualities or traits to look for, ways of researching potential arbitrators, the arbitration agencies and the methods by which two parties agree to one arbitrator.

The Appendix to Tab B includes the portion of the California Civil Code on arbitration as well as various informational and procedural documents of the arbitration agencies. In brief, the state law is applicable in disputes which do not involve interstate commerce and thus are not under the jurisdiction of the NLRA. The appendix includes the arbitrators' Code of Ethics, the AAA's rules for voluntary arbitration and expedited arbitration, the code and functions of the FMCS, questions and answers on the CSCS and other information.

WHEN AND WHEN NOT TO ARBITRATE

The Questions

(1) Who is right?

(a) Carefully evaluate all facts, including discussions with the first-line supervisor directly involved.

(b) Thoroughly review the *entire* agreement.

(c) Test, check and evaluate the agency's position in light of discussion on similar grievance disputes.

(d) Study the bargaining history of the contract provision involved. Why was it included in the contract? Who proposed it? Who wrote it? Were any changes sought by either side?

(e) Consider the custom and practice on the matter in issue. Are there previous grievances under this clause? How were they resolved?

(f) Thoroughly research applicable arbitration precedents.

Example: "Overtime shall be distributed equally so far as practicable." Before going to arbitration on this issue, "management should have a conviction based upon careful investigation that its agents have acted within the spirit and scope of the contractual requirements. Management should not

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Source: Adapted from a statement of John O'Hara, attorney, at the 20th Annual Meeting of the National Academy of Arbitrators, Los Angeles, California.

expose itself to the possibility that an arbitrator will point out in her or his award the unjust discrimination in the administration of a provision that calls for fairness and equal treatment.

(2) Is the issue sufficiently important?

(a) What purpose will be served by arbitration? Will it establish a needed guideline? Clarify an ambiguous provision? Or settle a continuing dispute?

(b) What will be the cost financially of a potential adverse decision and any precedent such a decision might set?

(3) Can the case be won?

(a) What oral or written evidence supports management's position? The union's position?

(b) How effective (credible) are the available witnesses?

(c) Who will present the case for the other party?

(d) What evidence and witnesses are available to the other party?

(e) Who has equity on its side?

Example: Management may have to institute a revised sick leave policy because of the widespread abuse of the old system. The contract may leave management free to make revisions, but the first case that goes to arbitration should not involve a literal application of that policy to a female employee with substantial seniority who wanted time off to bear a child, but failed to fill out the proper form.

(f) Which side will have to bear the "burden of proof?"

(g) Who will be the arbitrator?

(4) What will be the effect of winning or losing?

Example: The agreement does not say whether overtime is compulsory or voluntary. Past practices are fragmentary and inconclusive. Management needs a great deal of overtime in an unexpected area of manpower shortage. Eighty or ninty percent of those asked to work overtime are willing to do so. Eventually the percentage who will voluntarily work overtime drops to seventy percent and many will consent only to a limited amount. The collective bargaining agreement has about six months to go until expiration. Management issues an edict that all employees will be required to work scheduled overtime unless excused. The union challenges the directive.

(a) What would be the effect of a ruling that overtime is compulsory?

(b) How many of the reluctant thirty percent would quit or accept discharge?

(c) Of those who would work overtime against their wishes, how many would give a fair day's work?

(d) Would this ruling create a strong issue for the union in the upcoming negotiations?

(e) What would be the effect of losing?

(5) What settlement is possible?

Weigh possible settlements which might be acceptable to both parties.

MECHANICS OF SETTLEMENT

I. WHO: The advocate who negotiated the contract ---

A. He understands the agreement best and is responsible for its interpretation;

B. Is also in the best position to negotiate a viable settlement.

II. WHEN: As soon as possible, but any time during the process.

III. HOW: A. See if multiple issues are involved --- ideally you can trade one that's low on your priority list, but is high on the union's, without asking the union to violate its duty of fair representation.

B. Look for numbers (e.g., a five-day notice requirement to change work schedules might be modified to five days excluding Saturday, Sunday and holidays).

C. Actually rewrite contract:

use a side letter which normally will find its way into next contract, or verbally agree and over time establish a new "past practice";

if individual is involved try to apply the remedy solely to that employee--this works best when union claims the grievant is politically important to them or is just a general hell-raiser;

if union agrees not to demand same remedy for similarly situated employees then they should agree not to advertise the settlement.

D. Internally notify:

1st - all management personally involved in processing the case of the settlement and why Top management changed its position;

2nd - all other affected management.

Checklist of Considerations in Settling Arbitration Cases:

1. Keep grievance answers short and justifications verbal if at all possible.
2. Examine the total contract, any correspondence and the written grievance:

   A. Is the cause of the grievance a process that's been violated -- an act that management promised to perform or avoid performing? Or is equity involved -- an unreasonable, arbitrary or capricious action?

   B. Consider your personnel policies and your rules and regulations as well as the contract itself --
   has the grievance process been properly followed?
   Was the grievance submitted by the proper party to the proper party within agreed upon time limits?
   Was the original grievance resolved and now the union is grieving another issue brought up in one of management responses?

C. If so, ask for new grievance to be heard in normal grievance process; if refused, argue arbitrability before defending the merits.

3. Obtain as many facts as possible --- *not second hand facts* --- to evaluate and develop the theory of your case.
4. Consider the type of arbitrator that might be selected given the type of case involved.
5. Estimate the costs of arbitrating the case. (See section on costs in Tab A.)
6. Evaluate the priority of the dispute:

   Can you place a dollar value on it?

   Is it a policy matter or can a revised procedure deal with it?

   What is its labor relations significance?

   If you win the battle of the case, will you lose the war by creating bigger problems in contract negotiations?

   What is your estimate of the union's level of priority?

   Are there political ramifications for your elected officials or the line-staff management relationship.

THE ARBITRATION CLAUSE

Once a dispute arises, the adversarial atmosphere often prevents constructive measures from being suggested. The advantage of integrating arbitration clauses into a collective bargaining agreement is that the procedures already will have been officially sanctioned when a dispute arises, and can be easily initiated.

The clause provides the authority for arbitration by specifying the circumstances when it can be used and the procedures which must be followed. Of course, it is impossible to foresee all questions and considerations which could arise under an agreement.

This section discusses the elements which are often found in grievance arbitration and arbitration clauses. Most issues can be covered under a general clause; a clause needn't deal explicitly with each element or question considered below. The parties may choose to deal with some elements only implicitly, or only on a case-by-case basis when the need arises. But each element or question ought to be directly considered in light of the needs of the parties when formulating the arbitration clause.

In addition to presenting questions to pose when writing an arbitration clause, some examples of clauses are included below.

The Questions

1. What are the prerequisites for invoking arbitration?
   a) Must all the preceding steps in the grievance process be completed first?

b) Must the individual grievant(s) request arbitration? Or may the union initiate the hearing with or without the acquiesence of the grievant(s)?

Example: "Any grievance which remains unsettled after having been fully processed pursuant to grievance procedure (may be brought to arbitration) ..."

2. Who should submit an arbitration request?

a) The union on behalf of an individual or group of grievants?
b) The union alone?
c) Management alone?
d) Both parties jointly?
e) An individual or group without the union's concurrence?

Example: "If a grievance is not settled in the fourth step, either party may submit the dispute to arbitration..."

3. What are the time limits?

a) When should a party invoke arbitration?

Example: "Within 30 days of receiving written answer to step four"

b) Should the parties select an arbitrator, or request a roster from an outside source and then select an arbitrator?

Example: "If the parties cannot agree on an arbitrator within 20 days after the submission to arbitrate, then the American Arbitration Association should appoint an arbitrator..."

c) When shall an arbitrator return the award?
d) Are there any circumstances under which the time limits will be extended?

4. How many arbitrators will there be?

   a) A single, neutral arbitrator?
   b) An arbitration board consisting of one or more arbitrators selected by each party and a neutral chairperson?

Example: "An arbitrator will be agreed upon by the two parties." "The arbitration panel will be composed of one member appointed by the agency, one member appointed by the union, and a member agreed upon by the two parties..."

5. How will the arbitrator be selected?

   a) Should the parties appoint a "standing arbitrator" or "permanent umpire" to hear all grievance arbitration under the agreement?
   b) Should they appoint a standing panel of arbitrators from which to selected the arbitrator for a specific dispute?
   c) Should they try to agree informally on the arbitrator and only use the more formal means of selection if they can't agree?
   d) Should they request the names of a specified number of arbitrators from the rosters of the California State Conciliation Service, (CSCS) FMCS, or the AAA? If so, will each party alternately strike a name? Which party strikes first? If all the names are vetoed by one or both parties, may they request another list?
   e) If the parties use a board, who selects the neutral chairperson? The parties themselves? Or their representatives on the board?
   f) How will another arbitrator be selected if the first one chosen cannot serve?
   g) What happens if the parties fail to select an arbitrator?

Procedure in (d) above is widely used, but there is a trend toward other procedures which avoid the delay of requesting a list from an outside source.

6. Where shall the hearing be conducted?

   a) On the agency premises, or on "neutral" ground?
   b) At a place specified in the agreement? Or at a place specified by the arbitrator? Should the arbitrator only specify a place if the two parties cannot agree?

7. What procedural rules will be followed during the hearing?

   a) Will the rules of the AAA be followed?

   b) Will the rules of a court of law be followed?

Most often, rules similar to those enunciated by the AAA will be applied; the rules of evidence used in a court of law usually are not. (See the section on evidence in Tab C.)

8. How will questions of arbitrability be resolved?

   a) Does the arbitrator resolve such questions?
   b) Or are questions of arbitrability heard by some outside authority?
   c) Should such questions be resolved before the issue in dispute is considered?

Different agencies take different approaches. The federal government has the Assistant Secretary of Labor resolve questions of grievance and arbitrability pursuant to the Federal Executive Order No. 11491, as amended.

9. What is the scope of arbitration? Of the arbitrator's authority?

   a) Is arbitrator limited to interpretation and application of the terms of the negotiated agreement?

Example: "(Arbitration may involve) either (a) the interpretation or application of a provision of the agreement, or (b) a disciplinary penalty including discharge...alleged to have been imposed without just cause..."

b) May the arbitrator interpret or apply any higher agency regulations, regulations of outside authorities, executive orders or laws which bear on the dispute? i.e., those cited or referenced in the agreement.

c) If the arbitrator may not interpret such regulations, orders or laws must the arbitrator accept management's or union's explanation of their meaning? Or should the arbitrator use an interpretation from some other source?

d) Should the arbitrator rule that established past practices, though not specifically mentioned in the agreement, are binding on management?

e) May the arbitrator change or modify the terms of the negotiated agreement?

f) Are any portions of the agreement specifically *excluded* from interpretation or application by the arbitrator?

Example: "The arbitrator shall not have the power to add to, subtract from or modify any of the terms of this agreement, or any agreement supplementary thereto, nor to pass upon any controversy arising from any demand to increase or decrease wage rates, except as provided in Article X of this agreement."

g) Should the arbitrator frame the issue or issues to be resolved if the parties can't agree on a statement of the issue(s)? Should the hearing be suspended until they can agree?

Arbitrators in the private sector are usually asked by the parties to frame the issue if they can't agree.

10. What is the status of the arbitrator's award?

    a) Does it bind the parties?
    b) If it is advisory what level management official should reject or accept it? When must officials refer the award to a higher level within the agency.

Example: "The arbitrator's award shall be final and binding on both parties. Any award of the arbitrator may be modified or rejected by mutual written agreement of both parties. Each case shall be considered on its merits and the collective agreement shall constitute the basis upon which decisions shall be rendered. No decision shall be used as a precedent for any subsequent case."

11. What remedies if any many the arbitrator award?

    a) If a violation of the agreement is found, are the remedies the arbitrator can award to be specified by the parties in a joint statement at the opening of the hearing?
    b) May the arbitrator award back pay to the grievant(s)?
    c) May the arbitrator order remedial action for employees other than the grievant(s) in the case?

The remedies which may be awarded are normally determined by the arbitrator, but not always. For example, the Federal Comptroller General has ruled that back-pay awards in non-discriminatory cases are prohibited by law.

12. Will employees appearing at the hearing for the union be on offical time?

    a) The grievant(s)?
    b) Union representatives presenting the case for the union?

c) Witnesses called by the union?

d) Shall those on official time be paid for the entire time, or only for the time they actually participate in the hearing?

13. Shall the parties file pre-hearing or post-hearing briefs? (See the section on briefs in this tab as well as the section on expedited arbitration in Tab A. See Tab D on post-hearing briefs.)

14. Will the arbitrator be asked to return his decision and award within a specified number of days?

Usually the arbitrator is requested to present an award within thirty days...but that deadline is often not met due to delays requested by the parties.

15. Who shall pay the arbitrator? Who shall pay for hearing transcripts?

Example: "The parties shall share equally the arbitrator's fee, the cost of a hearing room, and the cost of a shorthand report, if requested by the arbitrator. All other expenses shall be paid by the party incurring them."

Costs are customarily shared. Some agreements stipulate that the losing party should pay the costs in order to discourage frivolous arbitration. But that approach has many disadvantages, including making arbitration into a costest rather than a method of solving problems.

SAMPLE FORM FOR

DEMAND FOR ARBITRATION*

TO: (Name) *P.U.C., City of Budgetville, California*

(Address) *100 South Lane*

(City and State) *Budgetville, California*

The undersigned, a Party to an Arbitration Agreement contained in a written contract, date_____, which agreement provides as follows:

(Quote Arbitration Clause)

Any dispute, claim or grievance arising out of or relating to the interpretation or application of this agreement shall be submitted to arbitration under the Voluntary Labor Arbitration Rules of the American Arbitration Association. The parties further agree that there shall be no suspension of work when such dispute arises and while it is in process of adjustment or arbitration.

hereby demands arbitration thereunder.

NATURE OF DISPUTE:

The union claims that John Smith was unjustly discharged.

REMEDY SOUGHT:

Reinstatement with full back pay and all seniority rights to the date of discharge.

You are hereby notified that copies of our Arbitration Agreement and of this Demand are being filed with the American Arbitration Association at its *San Francisco* Regional Office, with the request that it commences the administration of the arbitration.

Signed *John Jones*

Title *Int'l. Rep., XYZ Union, Local XXX*

Address *122 West Street*

City and State *Budgetville, California*

Telephone *405 - 482-1899*

To institute proceedings, please send three copies of this Demand and the Arbitration Agreement, with the administrative fee, as provided in Section 43 of the Rules.

Case No. _____

* Source: AAA

THE ARBITRATION SUBMISSION AGREEMENT

Once a decision has been made to take a dispute to arbitration, the arbitration process can be set in motion in several ways. If the union and the agency have negotiated an arbitration clause into their collective bargaining agreement, then a demand for arbitration, under the terms of that clause, should be filed. (A sample of a demand for an Arbitration form follows this section.) Either party may serve notice on the other according to the procedures described in the arbitration clause. Then the parties file a submission agreement which must be signed by both parties. The submission document should succinctly summarize the issue in dispute, the relief sought, and affirm the parties' commitment to arbitration. If an arbitration clause is not included in the collective bargaining, the parties may still file a submission agreement. But in this case the submission agreement must specify the terms normally negotiated into an arbitration clause.

The goal of a submission agreement is to briefly frame the specific issue in writing as a question or series of questions for the arbitrator. The submission agreement should be written as precisely as possible. The arbitrator must solely answer the questions and issue specifically raised in the submission. The submission agreement defines the arbitrator's authority in the same way that an arbitration clause would. Hence it may also stipulate the procedure for the hearing and any other restrictions. (In the sample Submission Agreement which follows this

section, the procedure of the hearing is governed by the Voluntary Labor Arbitration Rules of the American Arbitration Association. The AAA encourages parties to use that code by simply including it in submission agreements or arbitration clauses.)

It is imperative that the submission is carefully written since the award by law is limited to address the issues stated therein. The arbitrator's award may be appealed if it considers matter not in the submission. Since the *Trilogy* rulings, one of the few grounds on which an arbitration award may be overturned is that the arbitrator exceeded the authority given by the submission or strayed from its stated concerns.

If the parties cannot agree to identify or state the issues in a particular way, then each may provide its own submission.

The arbitrator, if authorized, will frame the issue after considering the two submissions. To save time and money, each party should state what it considers the issue to be, specifying its view of which facts are in dispute and which are mutually accepted.

SAMPLE OF A

SUBMISSION TO ARBITRATION*

Date:

The named Parties hereby submit the following dispute to arbitration under the VOLUNTARY LABOR ARBITRATION RULES of the American Arbitration Association:

> Did the company violate Article IV, Section 9 of the contract by assigning a general helper to clean and replace electrical fixtures at a time when maintenance employees were on layoff? If so, what compensation is due the senior maintenance employee?

We agree that we will abide by and perform any Award rendered hereunder and that a judgment may be entered upon the Award.

Employer *Public Utlities Company*
City of Budgetville, California
Signed by *John Doe* Title *Director, Personnel*
Address *100 South Lane*
Union *X Y Z Union* Local *XXX*
Signed by *John Jones* Title *Int'l Representative*
Address *122 West Street, Budgetville, California*

PLEASE FILE TWO COPIES

* Source: AAA, which will supply these forms on request

SELECTION OF THE ARBITRATOR

If a grievance has gone through the various steps of the grievance procedure negotiated into the collective bargaining agreement, and the parties still cannot reach a settlement, the procedure--of arbitration--begins. The selection of an arbitrator is the first consideration in that process.

Methods of Choosing an Arbitrator

While there are many different methods of choosing an arbitrator, they can be grouped into five basic categories:

(1) The parties agree to submit a specific dispute to a specific arbitrator or umpire. An arbitrator is appointed ad hoc to hear that case. The agreement may be based either on an arbitration clause in their collective bargaining agreement or on a single arbitration submission agreement made for this particular dispute.

(2) The parties agree to select an arbitrator from a list requested from an arbitration agency such as the California State Conciliation Service, the American Arbitration Association, the Federal Mediation and Conciliation Service, or another neutral third party. This method is often used because the arbitration agency or other source maintains rosters of people whose education and experience qualify them to serve as arbitrators in terms of knowledge, intelligence, honesty and impartiality. As in (1), the agreement to select an arbitrator is based on either an arbitration clause or submission agreement.

(3) The parties agree in an annual or longer-term contract that a certain

person--usually called a permanent arbitrator--shall act as arbitrator or umpire for grievance disputes arising under the contract.

(4) In a special submission, the parties agree that a designated third party, such as the Director of the Federal Mediation and Conciliation Service, the California State Conciliation Service or the American Arbitration Association shall name the arbitrator for the specified dispute. This is typically the method used in expedited arbitration.

(5) Each of the parties agrees in an arbitration clause or in a submission agreement to one (or more) arbitrators to a panel, and either the arbitrators named by the parties or the parties themselves will select an arbitrator to serve as chairperson of the panel. Under this type of agreement the parties usually ask the CSCS, FMCS, or AAA to appoint an additional arbitrator if any of the selected arbitrators cannot hear the case within the designated time limit.

These five methods can be divided into two sub-categories. In one, the arbitrators are drawn from the rosters of arbitration agencies or recognized sources of capable umpires. In this category, the parties rely on their sources to make a thorough check of anyone referred to them as a potential arbitrator. There is a strong indication that if a person is on the rosters of any of the recognized arbitration agencies, he has the requisite background and experience to be an arbitrator. These agencies carefully evaluate all candidates before placing them on their lists. In the other category, the parties themselves are responsible for finding suitable arbitrators.

In either case, the parties almost always carefully scrutinize a potential arbitrator in the light of their particular needs and interests.

Qualifications of Arbitrators

Of course, the most important quality an arbitrator must possess is impartiality. It is imperative to find a person with the discipline and intelligence to decide issues on their merits, and eschew any personal information or bias in evaluating the case.

The best arbitrator is one whose integrity has been demonstrated to the parties by past professional performance. However, simply because a person has previously served in a partisan position in the field of labor relations does not necessarily disqualify that person from serving as an arbitrator. Arbitration is like the field of law: some of the best judges and defense lawyers were once district attorneys.

All arbitrators should adhere to the Code of Ethics (included in the Appendix to this tab). Any alleged violations of the Code of Ethics are submitted to the Committee on Ethics of the National Academy of Arbitrators. In addition to having demonstrated the qualities described above, an arbitrator must not have any pecuniary interest in the outcome of a dispute or be personally or financially related to either party.

Researching the Arbitrator

Once again, when choosing an arbitrator you should pay special attention to the factors which may be the most critical in your particular case. You want to find out as much as possible about the views the arbitrator has taken toward the kind of matter in dispute. Thus two other questions must be answered before selecting an arbitrator. First, how did a potential arbitrator rule on similar or related cases? Second, based on published awards

of previous cases, has that arbitrator made clear, well-organized, logical decisions within the boundary of the submission agreement?

A number of sources provide information helpful in researching a potential arbitrator, for example, the biographical data sheets furnished by arbitration agencies whenever names are drawn from their rosters. These data sheets, in addition to occupation, education, and age of an arbitrator, give synopses of arbitration and other relevant experience, as well as professional affiliations, etc.

One may use services which supply information on arbitration awards. Not all awards are published, in fact, most often they are not. The arbitrators themselves decide which awards they wish to submit to publication but they must have the approval of the parties. Although the majority of arbitration cases are not published, a large number are available and may be used to evaluate the arbitrator.

The Bureau of National Affairs publishes the *Labor Arbitration Reports*, which contain arbitration awards as well as the names, adresses, birth dates, training, occupations and positions held, affiliations, and publications of many arbitrators. This publication also has an *Index Digest* which includes the names of the international, national, or local unions involved in the cases published.

The Commerce Clearing House (4025 West Peterson Avenue, Chicago, Ill. 60646) publishes a series, *American Labor Arbitration Awards*, which is similar to the BNA publication noted above. In fact, many cases can be found in either of these two series.

The *Who's Who of Arbitrators*, published by Prentice-Hall, Inc. (Englewood, New Jersey), also lists arbitrators (age, address, education, occupation, experience, affiliations, publications), their published awards, and a variety of other information.

Simpson and Staff, Inc., offer an in-depth report on arbitrators' qualifications and background, available on a leased service basis only. This report service, which is regularly updated, compiles and publishes analyses of arbitration records, subjects heard, awards to management and to unions, management reactions and consensus, as well as the arbitrators' education and occupation. An information pamphlet and sample data sheet from Simpson and Staff, Inc., is included in the Appendix to this Tab.

Usually the arbitration agencies will have records of cases previously heard by an arbitrator. Or you may ask parties who have received awards from any arbitrators being considered for their evaluations. Sometimes Chambers of Commerce or other employer organizations will have lists of local arbitration awards. Contact as many as possible of the parties which have previously used an arbitrator. Ask them to be as specific as possible about either criticisms or favorable comments. Remember that those who have lost a case may tend to be biased.

Here are some questions that may be relevant to your case:*

1. What was the issue in dispute?
2. Did the arbitrator consider elements such as past practices of the parties, the history of collective bargaining on the disputed issue, etc., as well as the relevant contractual provisions?

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*Source: Adapted from Walter E. Baer, *The Labor Arbitration Guide* Homewood, Illinois: Dow-Jones-Irwin, (1974)

3. Did the arbitrator accept the concept of reserve management rights (i.e., except where specifically abridged or limited by the collective bargaining agreement, all rights and privileges are retained by management.)?
4. Did the arbitrator indicate a position on the scope of arbitration in the public sector? How did the arbitrator view his or her jurisdiction relative to public sector constraints (i.e., Charter, County, Statutory Law, etc.)?
5. Was the conduct of the hearing informal or legalistic? How so? (Be explicit, i.e., Did the arbitrator rule on the objections? Follow the rule of evidence? Give examples.)
6. DId the arbitrator ask many questions or basically rely on what was presented?
7. Did the arbitrator request a transcript of the hearing or rely on notes?
8. How long after the hearing was the award presented? Was it within the prescribed time?
9. Was the opinion written in a clear, concise, logical and easily understood fashion?
10. What was the fee? Was it justified by the length and the complexity of the case?
11. Would the party use this particular arbitrator again? Why?

Even if an arbitrator is not chosen for a particular case, keep your research data for future reference. Start an arbitration file containing all information on selection, evaluation, and qualifications of arbitrators.

The Selection Process

Once the research is completed, the actual selection process begins. The parties must find some way of jointly choosing one person to arbitrate the case. The usual procedure requires both parties to submit or to use a list of arbitrators' names prepared by an arbitration service. The parties then take turns striking names from the list. Unless specified by contract or

agreement, the parties draw lots or use a similar procedure to decide who will strike first. Why is it important who strikes first or last? Usually the lists contain an odd number of arbitrators; the party which strikes last, therefore, will be able to make a selection between the final two choices.

In another procedure sometimes used, each party has a given *number* of strikes, striking names of arbitrators that it does not wish to use from the list. Each party then assigns a rating to the remaining names--a number in declining order--indicating its preference. The arbitrator with the highest average rating would thus be chosen to hear the case.

If the parties cannot agree to select an arbitrator from existing lists, they must either develop a new list of their own or request a new list from the arbitration agency which supplied the first one. In such case the whole research process must begin again. Naturally, it is in the parties' own interest to select a mutually acceptable arbitrator from the first list in order to avoid the time and expense of more research.

ADVANCE PREPARATION

The arbitrator will hold a hearing or several if necessary, to get facts in the case and the views of the parties. Unless the parties have agreed on special formal rules, procedure at the hearing will be determined by the arbitrator (or chairman of the arbitration board). Normally it will be quite informal.

Some of the elementary rules of preparation for the hearing are almost self-evident, but they are worth noting as a handy checklist.

1. Reexamine the basic facts of the grievance. Decide which ones may be in dispute, for they will have to be proved through witnesses, documents or other evidence. Check the contract clauses which may be applicable. Go over the discussions and records of the case in the grievance procedure. Gather any material which will have to be given or shown to the arbitrator.

2. Get all the facts. Do not skip over unfavorable facts in preparing your case. By recognizing them in advance you will be in a sounder position to evaluate their effect on the case and to check on their accuracy and limitations instead of being surprised and unprepared when they are suddenly raised before the arbitrator.

   Review past practice, what has been done in similar situations in the past? What was the union's position then? Check on any background which may provide helpful perspective for the arbitrator.

If the case hinges on duties of a job or the physical surroundings of a work place examine them so that you may be personally familiar with them. Consider having the arbitrator visit the work place if necessary.

3. Arrange for witnesses to verify the facts at the hearing. The arbitrator is not familiar with the case and will have to be informed of all the details. In most cases it is best to do so with the aid of witnesses.

4. Review your reasoning--how the union interprets the facts and their significance. Decide what you will emphasize and how you can present it most effectively to persuade the arbitrator to accept your view of the case.

5. Prepare an outline of the evidence, the points to make, and how to make them. In addition, put in writing, for your own use, all aspects of the case to help get the picture straight. This will help assure that no significant point is overlooked in the preparation or forgotten during the hearing.

6. Anticipate the union's points. Allow for the views which will be advanced by the union so that you can deal with and counteract them as necessary before the arbitrator. The discussions during the efforts to settle the grievance will help show what the union is likely to contend. Judge what are likely to be the weak spots in management's presentation. Figure out how you will answer criticism of management's views, so that you will be ready to defend and substantiate them.

7. Check other arbitration rulings on similar grievance cases. If possible, examine also the decisions which have been made by your arbitrator in other cases. What kind of reasoning or evidence has been most persuasive to him in the past?

8. Consult other representatives of the management. Use the written outline noted in point (5) above as a basis for getting their thoughts. Talking the case over with them will normally turn up some valuable viewpoints and suggestions on items which may have been overlooked or covered inadequately. The cross-exchange in such consultation often provides a helpful preview of the questions which will arise in the arbitration hearing.

   If another representative of the management is to take a major part in the presentation of the case to the arbitrator, be sure that he is briefed thoroughly on all aspects of the case. Make sure that no one who will participate in the presentation is only half-prepared.

   Any indications that he may be unfamiliar with basic elements of the dispute can be detrimental to the management's case.

GENERAL RULES: PREPARATION FOR ARBITRATION*

1. When selecting an impartial arbitrator or chairman look for intelligence, honesty, experience and courage. The broader the arbitrator's background of knowledge, the more likely he is to understand your case fully and to decide it correctly.

2. Try to get, as early as possible, a complete understanding of the opposite party's evidence and contentions. This may lead to a settlement. It will, at least, tend to prevent your being "surprised" at the hearing.

3. Avoid being so steeped and stubborn in your own feelings about the dispute that you cannot see the possible merits of your opponent's position. You can't defeat their contentions if you refuse to understand them.

4. Remember that fixing a time and place for a hearing requires commitments for numerous people. Be as considerate of the others as they should be of you in adapting other work to arrange attendance at the hearing. After the date is fixed, do not try to change it.

5. Make a searching, full examination of the testimony of your own witnesses well before the hearing. Make a brief, logical summary of their evidence and write a preliminary statement of the contentions you will make at the hearing. This will aid you to plan a full, logically organized, and persuasive presentation of your position.

*Source: Dr. Clarence M. Updegraff
Adapted from a bulletin published by the Bureau of Labor and Management, State University of Iowa, Iowa City, Iowa.

6. Be sure that all of the people who will be in your group at the hearing understand who will be the principal spokesman for your side, who the witnesses will be, and what will be the main substance of their testimony. This will contribute to making the hearing orderly and efficient.

7. Try to agree with the opposing party as to wording the exact question or questions to be submitted to the arbitrator and have a written memorandum stating the same signed by both parties prior to the dates set for the hearing. Deliver a copy of this to the arbitrator as soon as it is ready, or offer it at the beginning of the hearing.

8. If there are several issues to be submitted, try to agree with all other parties in advance on the order in which they will be taken up at the hearing.

9. Prepare a brief, written pre-hearing summary of your contentions and deliver one copy of it to the arbitrator and one copy to your opponent at the beginning of the hearing or prior thereto. If possible, agree with the opposition for both parties to do this at the same time.

10. Have copies of all documents which you desire to present as evidence ready for delivery at the hearing. Have also at least one copy of each one for your opponent unless you know he has copies of same.

11. If a view of a place, a machine or an operation would seem to be helpful, have a picture, drawing or blueprint of it ready for introduction in evidence or arrange in advance that it will be available for observation and for the arbitrator to go to see it during the hearing so that as little time as possible will be required.

12. Be on time, or early if at all possible, in arriving at the place set for the hearing. Tardiness wastes the time of others, is discourteous, and creates a generally bad impression.

13. If there is any question in your mind as to the expenses of arbitration, ask the arbitrator about it at the earliest possible time.

CHECKLIST FOR PREPARING LABOR ARBITRATION CASES*

1. What is the specific complaint or charge? Does the written grievance sufficiently state the issue?

2. What are the relevant, true facts? Be careful about relying on a single person's version of the facts. Be sure to verify them.

3. Were steps in the grievance procedure followed? Were time limits observed?

4. What were the contentions of the parties during the grievance procedure?

5. What are the name, age and years of service of grieving employee(s)?

6. What are the job classifications, duties and rate of pay of these employees?

7. What is their seniority status?

8. Is their past record an issue?

9. Prior statements made by any of the principals.

10. Obtain any correspondence between the parties.

11. Note department rules and/or procedures if pertinent.

12. Are there excuses or mitigating circumstances?

13. What witnesses will you use, if any? What will they say?

14. Will your witnesses be available? Must they be relieved from duty to attend the hearing?

15. Study all relevant provisions of the collective contract. Have the parties treated or interpreted these provisions before? If so, how?

16. Study the arbitration clause. Is your case or issue arbitrable?

17. Can it be shown to the satisfaction of the arbitrator that management's action was <u>either</u> within its prerogative, reasonable, and fair under the circumstances, or arbitrary, discriminatory, or a violation of contract or based on some mistake?

---

*Source: American Arbitration Association

18. If a pertinent provision of the contract is ambiguous, will custom, habit, past practice or bargaining history help to illuminate it?

19. What is the past practice in the plant or agency in regard to the issue? Is it a practice that the parties had a right to rely on?

20. If two provisions of the contract conflict, can you convince the arbitrator that one should prevail?

21. Does any federal or state statute bear on the subject?

22. Is there any need for citing prior actions of management in similar circumstances?

23. Are medical examinations, hospital records, reports or testimony of doctors needed?

24. Can any use be made of correspondence, photographs, maps, blueprints, drawings, charts, seniority lists, job classification lists, personnel records, blackboards, etc. Will the opposing side challenge their accuracy?

25. Will your opening statement be oral or written?

26. What will you propose as the submission agreement?

27. How much authority do you intend for the arbitrator to exercise in arriving at a solution? Do you intend for him or her to simply decide "yes" or "no" or do you intend to grant him or her authority to remedy the situation?

28. Who is the principal speaker for presenting your case?

29. Choose the arbitrator(s).

30. Set the time and place of hearing?

31. Will you need a stenographic record of the proceedings?

32. Have you anticipated the opponent's evidence and arguments?

33. Are there other awards available on the same or similar issues which may offer additional arguments or indicate the weight assigned by arbitrators to various positions?

NOTES ON THE PRESENTATION OF THE CASE

Agency version of facts:

_____

_____

_____

Union version of facts:

_____

_____

_____

Union arguments:

1._____

2._____

3._____

4._____

Management arguments:

1._____

2._____

3._____

4._____

Support Needed:

Exhibits

_____

_____

_____

Witnesses

_____

_____

_____

Adversarys' exhibits

_____

_____

_____

Notes on presentation of case

_____

_____

_____

ARBITRATION ANALYSIS FORM

Summarize issue (if discipline case, include both accusation against employee and disciplinary action by employer).

_____

_____

_____

_____

_____

Remedy sought

_____

_____

_____

Points on which union and management probably can agree:

1._____ 5._____

2._____ 6._____

3._____ 7._____

4._____ 8._____

Provisions in agreement union will rely upon:

1.

2.

3.

Provisions in agreement management will rely upon:

1.

2.

3.

ARBITRABILITY

If there is a legitimate argument involving the arbitrability of a dispute or of a particular issue, it should be raised as the first topic in the proceeding and resolved before the hearing advances further. The arbitrator may hear the case before ruling on arbitrability. However, if at all possible the arbitrator will generally rule on arbitrability before considering the merits of the case.

Once the preliminary arbitrability questions have been examined, the arbitrator will dismiss the case if the matter is found not to be arbitrable. But many times the question of arbitrability is inextricably interwoven with the issue in dispute. In such instances the arbitrator will rule that the merits of the case must be heard before the question of arbitrability is decided.

Most collective bargaining agreements that contain arbitration clauses require the arbitrator to resolve questions of arbitrability. Relatively few indicate that the question be reviewed by a judge. A very small number either require a judge to hear the question (unless the parties have agreed otherwise) or permit the question to be heard by both an arbitrator and a judge. Many collective bargaining agreements have no provision for settling an arbitrability problem simply because it was not considered during negotiations.

Should a case of arbitrability be taken to arbitration or handled by courts? It is usually better to direct arbitrability conflicts to an

arbitrator unless there are substantive or procedural problems which exceed the arbitrator's jurisdiction. Otherwise, the courts would simply refer the matter back to arbitration. Since the *Trilogy* rulings the courts tend to view arbitrators as more expert than judges in matters of contract interpretation (See History section in Tab A). Unless the parties have specified otherwise, the courts usually conclude that the subject is arbitrable and must be heard by an arbitrator.

To review the principles established by the *Trilogy* rulings and subsequent cases, the courts may only rule if a contract includes an applicable arbitration clause; if the contract was violated; and if the violation is within the scope of the arbitration clause. The U.S. Supreme Court has also ruled that the courts may only consider the arbitrability of the case, and not examine the merits of the issue.

In the years since the *Trilogy* decisions, a body of case law has developed covering arbitrability. These new rulings set forth:

1. When a contract has an arbitration clause which does not specifically exclude the matter in dispute, the court must order arbitration without considering the merits of the case.
2. An award which is limited to "the interpretation and application of the collective bargaining agreement" must be enforced by the court without any review of the reasoning which led to that award.
3. The issue of damages for violation of a no-strike clause must be treated by the courts as any other issues; that is, the court will decide whether the parties have contractually agreed to resolve such issues through arbitration. If they did so agree, then such issues will be arbitrated, if not, the courts will decide the dispute.

4. The arbitrator, not the court will decide if the contract's procedural requirements which stipulate the condition for hearing a case on its merits have been met.
5. State courts have concurrent jurisdiction with the federal courts on cases involving breach of agreement. However, the courts must apply federal law whenever state and federal law conflict.
6. An award beyond the scope of the collective bargaining or submission agreement may be struck down by the courts. But the courts cannot review the reasoning behind such an award; they may only indicate that it has exceeded its authority.

Substantive and Procedural Arbitrability

There are two separate questions of arbitrability which can be raised in reference to the arbitration clauses in collective bargaining agreements:[1] when a party claims that a subject was specifically excluded from the agreement, it is a question of *substantive arbitrability*;[2] when a party objects that the requisite procedures have not been followed, then it is a question of *procedural arbitrability*.

Substantive Arbitrability: Scope of Arbitration

The arbitrability of an issue is most often challenged on the basis that it is not covered by the collective bargaining agreement. If that claim can be substantiated, the arbitrator does not have jurisdiction and should not rule on the merits.

Questions of this type cannot be covered by any general rules. Each individual question must be evaluated in relation to the circumstances surrounding it. Thus, a grievance may be in violation of procedure and still be ruled valid. Arbitrators have ruled that a grievance could not be dismissed even though it had not been filed according to the contract because no one objected to that impropriety during any one of the earlier grievance steps. Empirical review of published arbitration awards indicates that most arbitrators consider procedural issues of this nature to be waived if not raised during the initial grievance steps. In some cases, failure to report an infraction before the stipulated time limit has resulted in the forfeiture of management's right to censure that infraction.

The agreement to arbitrate disputes is evidence of a fundamental commitment to the arbitration process. This commitment has been often cited as the foundation on which procedural questions are resolved. For example, if there is a question whether to assume a reasonable time limit to invoke arbitration in the absence of any specific provisions, it will be answered to a large extent in terms of the basic conception of grievance arbitration's function. It is a perfectly valid judgment to say that a grievance should be handled promptly or be considered dropped. And from that judgment, it follows that arbitration should be invoked within a reasonable period of time or not at all. That particular value judgment can be inferred from the basic arbitral scheme, which the parties have explicitly supported in their agreement to arbitrate.

Bifurcated Hearings

When a grievance is contested for either procedural or substantive reasons, there are two potential issues to be considered; the first issue involves whether the grievance is procedurally or substantively faulty to a degree that renders it non-arbitrable. The second issue, if the grievance has been deemed arbitrable, is whether the claim has sufficient merit to be substantiated or sustained.

If the employer seeks to have the grievance denied on both levels -- (1) procedural or substantive deficiency which makes it unarbitrable, and (2) the merits of the case -- management has two chances to win an award in its favor.

Sometimes the parties have stipulated provisions either in the agreement to arbitrate or in their collective bargaining agreement which resolves this problem. Some contracts require arbitrablity to be decided before the merits of a case may be heard, but very often the wording of the agreement is ambigious on whether arbitrability should be decided first. It is probably best for the parties to specifically stipulate in their collective bargaining agreement what procedure is to be followed.

A bifurcated hearing may be the best solution to this problem. Under such a system, the issue of arbitrability would be considered first in a separate hearing. Such a system is usually in the best interest of the party contesting the arbitrability of the grievance (which is usually management). By dividing the hearing into two distinct parts, the

the arbitrator will not be prejudiced by the merits of the case when considering the technical arguments on arbitrability. In practice, however, the bifurcated system is not too attractive to an arbitrator who prefers to hear both issues at once and thus save time and travel.

An optimum situation would be for arbitrators to disqualify themselves from hearing the merits of the case if they have already heard the arbitrability arguments. One or both parties may object to this approach because they will have to pay two arbitrator's fees if the case is declared arbitrable, but the bifurcated system has much to recommend it in terms of rationally handling questions of arbitrability. Once an arbitrator has heard both issues in full, it will take a well-disciplined and very intelligent mind to keep the two issues segregated. It is very difficult, if not impossible, for the arbitrator to remain uninfluenced by the merits of the case when ruling on its arbitrability.

Arbitrability in the Public Sector

The authority of the public sector management rights, unlike private sector management rights, is not based on a reserved rights theory. Public management rights are basically derived from their implicit inference or explicit statement in general or statute law. This widely held position has important implication for arbitrability in the public sector.

In recent years, private sector arbitrators have tended to de-emphasize the concept of reserved management rights. However, in the public sector,

The U.S. Supreme Court has ruled that "matters which are strictly a function of management are not arbitrable." In practice, this ruling has been translated into the doctrine that the arbitrator determines just what constitutes management functions. In other words, an arbitrator must decide whether a given practice is a management function. That decision can only be made in terms of the meaning and application of the specific collective bargaining agreement. Thus the scope of an arbitration clause and the scope of management rights or operating clause also determine whether a given dispute raises substantive questions.

Procedural Arbitrability: Meeting Precedent Conditions

There are a multitude of common contract provisions which stipulate procedures from the beginning of the grievance process to the presentation of the arbitrator's award. Typical questions are: If a contract requires that a grievance be filed within ten days after the event on which it is based, and the grievance is filed two months later, is it arbitrable? What if it was common practice of both the union and management to process grievances even though they were that tardy? If no precise time limit is given, what constitutes a reasonable time limit? What happens if a step in the grievance procedure is skipped; is the dispute still arbitrable?

It is questions of details like these that provide the basis of procedural arbitrability. These details are almost taken for granted during contract negotiation: they are simply subsumed in the agreement to arbitrate unsettled grievances arising from questions of contract interpretation.

arbitrators are frequently reluctant to impinge upon managerial rights by finding that an issue is arbitrable or subject to the discretion of an arbitrator. Arbitrators are reluctant because arbitration may infringe upon the specific power vested in public agencies by either statute or constitutions.

In the first and widely recognized appraisal of the impact of public sector considerations on the arbitrator's function, Eli Rock found that the concept of public sector sovereignty had weakened the extent and jurisdiction of public sector arbitration.[1] The frequence of advisory arbitration is much higher in the public sector, while the scope of bargaining may be much more proscribed. In most cases, public sector management attempts to severly limit the extent of arbitrability as defined in the arbitration clause.

In public sector arbitration, the parties must carefully scrutinize both statutes and arbitration clauses to see exactly where the boundaries of arbitrability are drawn. In many cases, the pre-existence and continued jurisdiction of a civil service commission will substantially reduce the authority or jurisdiction of an arbitrator.

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1. Eli Rock, "Role of the Neutral in Grievance Arbitration in Public Employment," in Dallas Jones (ed), *The Arbitrator, the NLRB and the Courts* (1970).

SAMPLE OUTLINE OF PRE-ARBITRATION BRIEF

1. The Parties Involved:

   a. background of agency and union--type business, size of plant, and departments involved and their functions;

   b. individuals involved in the grievance;

   c. prior history of the grievance--when filed and to whom presented, and dates appealed to higher steps.

2. Summary of the Grievance:

   a. statement of the issue(s);

   b. argument(s) for decision sought;

   c. a copy of the grievance.

3. Provisions of the Agreement Violated:
   list the provisions alledgedly violated and submit a copy of the agreement to the arbitrator.

4. The Issue:

   state the question you believe the arbitrator should answer.

5. The Facts of the Case:

   present a chronological account of the facts in the case;

6. Outline of party's arguments and evidence to support its position.

7. Outline of Direct and Cross Examination of Each Witness.

8. Legal Authorities:

   a. rules of law (cases, statutes] supporting argument(s);

   b. court/grievance arbitration decisions on comparable facts supporting argument(s).

9. Outline of Summation.

APPENDIX

APPENDIX

CALIFORNIA CODE OF CIVIL PROCEDURE

CHAPTER 461

An act to repeal Title 9 (commencing with Section 1280) of Part 3 of, and to add Title 9 (commencing with Section 1280) to Part 3 of, and to amend Section 1053 of, the Code of Civil Procedure, and to amend Sections 1730 and 3390 of the Civil Code and Sections 1647.5 and 1700.45 of the Labor Code, relating to arbitration.

In effect September 15, 1961

[Approved by Governor May 22, 1961. Filed with Secretary of State May 22, 1961.]

The people of the State of California do enact as follows:

Repeal

SECTION 1. Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure is repealed.

SEC. 2. Title 9 (commencing with Section 1280) is added to Part 3 of the Code of Civil Procedure, to read:

TITLE 9. ARBITRATION

CHAPTER 1. GENERAL PROVISIONS

Definitions

1280. As used in this title:

(a) "Agreement" includes but is not limited to agreements providing for valuations, appraisals and similar proceedings and agreements between employers and employees or between their respective representatives.

(b) "Award" includes but is not limited to an award made pursuant to an agreement not in writing.

(c) "Controversy" means any question arising between parties to an agreement whether such question is one of law or of fact or both.

(d) "Neutral arbitrator" means an arbitrator who is (1) selected jointly by the parties or by the arbitrators selected by the parties or (2) appointed by the court when the parties or the arbitrators selected by the parties fail to select an arbitrator who was to be selected jointly by them.

(e) "Party to the arbitration" means a party to the arbitration agreement:

(1) Who seeks to arbitrate a controversy pursuant to the agreement;

(2) Against whom such arbitration is sought pursuant to the agreement; or

(3) Who is made a party to such arbitration by order of the neutral arbitrator upon such party's application, upon the application of any other party to the arbitration or upon the neutral arbitrator's own determination.

(f) "Written agreement" shall be deemed to include a written agreement which has been extended or renewed by an oral or implied agreement.

References to other laws

1280.2. Whenever reference is made in this title to any portion of the title or of any other law of this State, the reference applies to all amendments and additions thereto now or hereafter made.

CHAPTER 2. ENFORCEMENT OF ARBITRATION AGREEMENTS

Validity of agreements

1281. A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.

Court order

1281.2. On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:

(a) The right to compel arbitration has been waived by the petitioner; or

(b) Grounds exist for the revocation of the agreement.

If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such controversy may not be refused on the ground that the petitioner's contentions lack substantive merit.

If the court determines that there are other issues between the petitioner and the respondent which are not subject to arbitration and which are the subject of a pending action or special proceeding between the petitioner and the respondent and that a determination of such issues may make the arbitration unnecessary, the court may delay its order to arbitrate until the determination of such other issues or until such earlier time as the court specifies.

Stay of action

1281.4. If a court of competent jurisdiction, whether in this State or not, has ordered arbitration of a controversy which is an issue involved in an action or proceeding pending before a court of this State, the court in which such action or proceeding is pending shall, upon motion of a party to such action or proceeding, stay the action or proceeding until an arbitration is had in accordance with the order to arbitrate or until such earlier time as the court specifies.

If an application has been made to a court of competent jurisdiction, whether in this State or not, for an order to arbitrate a controversy which is an issue involved in an action or proceeding pending before a court of this State and such application is undetermined, the court in which such action or proceeding is pending shall, upon motion of a party to such action or proceeding, stay the action or proceeding until the application for an order to arbitrate is determined and, if arbitration of such controversy is ordered, until an arbitration is had in accordance with the order to arbitrate or until such earlier time as the court specifies.

If the issue which is the controversy subject to arbitration is severable, the stay may be with respect to that issue only.

Appointment of arbitrator

1281.6. If the arbitration agreement provides a method of appointing an arbitrator, such method shall be followed. If the arbitration agreement does not provide a method for appointing an arbitrator, the parties to the agreement who seek arbitration and against whom arbitration is sought may agree on a method of appointing an arbitrator and that method shall be followed. In the absence of an agreed method, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails to act and his successor has not been appointed, the court, on petition of a party to the arbitration agreement, shall appoint the arbitrator.

When a petition is made to the court to appoint a neutral arbitrator, the court shall nominate five persons from lists of persons supplied jointly by the parties to the arbitration or obtained from a governmental agency concerned with arbitration or private disinterested association concerned with arbitration. The parties to the agreement who seek arbitration and against whom arbitration is sought may within five days of receipt of notice of such nominees from the court jointly select the arbitrator whether or not such arbitrator is among the nominees. If such parties fail to select an arbitrator within the five-day period, the court shall appoint the arbitrator from the nominees.

Chapter 3. Conduct of Arbitration Proceedings

Arbitrator

1282. Unless the arbitration agreement otherwise provides, or unless the parties to the arbitration otherwise provide by an agreement which is not contrary to the arbitration agreement as made or as modified by all of the parties thereto:

(a) The arbitration shall be by a single neutral arbitrator.

(b) If there is more than one arbitrator, the powers and duties of the arbitrators, other than the powers and duties of a neutral arbitrator, may be exercised by a majority of them if reasonable notice of all proceedings has been given to all arbitrators.

(c) If there is more than one neutral arbitrator:

(1) The powers and duties of a neutral arbitrator may be exercised by a majority of the neutral arbitrators.

(2) By unanimous agreement of the neutral arbitrators, such powers and duties may be delegated to one of their number but the power to make or correct the award may not be so delegated.

(d) If there is no neutral arbitrator, the powers and duties of a neutral arbitrator may be exercised by a majority of the arbitrators.

Hearing

1282.2. Unless the arbitration agreement otherwise provides, or unless the parties to the arbitration otherwise provide

by an agreement which is not contrary to the arbitration agreement as made or as modified by all the parties thereto:

(a) The neutral arbitrator shall appoint a time and place for the hearing and cause notice thereof to be served personally or by registered or certified mail on the parties to the arbitration and on the other arbitrators not less than seven days before the hearing. Appearance at the hearing waives the right to notice.

(b) The neutral arbitrator may adjourn the hearing from time to time as necessary. On request of a party to the arbitration for good cause, or upon his own determination, the neutral arbitrator may postpone the hearing to a time not later than the date fixed by the agreement for making the award, or to a later date if the parties to the arbitration consent thereto.

(c) The neutral arbitrator shall preside at the hearing, shall rule on the admission and exclusion of evidence and on questions of hearing procedure and shall exercise all powers relating to the conduct of the hearing.

(d) The parties to the arbitration are entitled to be heard, to present evidence and to cross-examine witnesses appearing at the hearing, but rules of evidence and rules of judicial procedure need not be observed. On request of any party to the arbitration, the testimony of witnesses shall be given under oath.

(e) If a court has ordered a person to arbitrate a controversy, the arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party ordered to arbitrate, who has been duly notified, to appear.

(f) If an arbitrator, who has been duly notified, for any reason fails to participate in the arbitration, the arbitration shall continue but only the remaining neutral arbitrator or neutral arbitrators may make the award.

(g) If a neutral arbitrator intends to base an award upon information not obtained at the hearing, he shall disclose such information to all parties to the arbitration and give the parties an opportunity to meet it.

Representation

1282.4. A party to the arbitration has the right to be represented by an attorney at any proceeding or hearing in arbitration under this title. A waiver of this right may be revoked; but if a party revokes such waiver, the other party is entitled to a reasonable continuance for the purpose of procuring an attorney.

Subpoenas

1282.6. Upon application of a party to the arbitration or upon his own determination, the neutral arbitrator may issue subpoenas for the attendance of witnesses and subpoenas duces tecum for the production of books, records, documents and other evidence. Subpoenas shall be served and enforced in accordance with Chapter 2 (commencing with Section 1985) of Title 3 of Part 4 of this code.

Oaths

1282.8. The neutral arbitrator may administer oaths.

Depositions

1283. On application of a party to the arbitration the neutral arbitrator may order the deposition of a witness to be taken for use as evidence and not for discovery if the witness cannot be compelled to attend the hearing or if such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally at the hearing, to allow the deposition to be taken. The deposition shall be taken in the manner prescribed by law for the taking of depositions in civil actions. If the neutral arbitrator orders the taking of the deposition of a witness who resides outside the State, the party who applied for the taking of the deposition shall obtain a commission therefor from the superior court in accordance with Sections 2024 to 2028, inclusive, of this code.

Witness fees and mileage

1283.2. Except for the parties to the arbitration and their agents, officers and employees, all witnesses appearing pursuant to subpoena are entitled to receive fees and mileage in the same amount and under the same circumstances as prescribed by law for witnesses in civil actions in the superior court. The fee and mileage of a witness subpoenaed upon the application of a party to the arbitration shall be paid by such party. The fee and mileage of a witness subpoenaed solely upon the determination of the neutral arbitrator shall be paid in the manner provided for the payment of the neutral arbitrator's expenses.

Award

1283.4. The award shall be in writing and signed by the arbitrators concurring therein. It shall include a determination of all the questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy.

Service of copy of award

1283.6. The neutral arbitrator shall serve a signed copy of the award on each party to the arbitration personally or by registered or certified mail or as provided in the agreement.

Time limit

1283.8. The award shall be made within the time fixed therefor by the agreement or, if not so fixed, within such time as the court orders on petition of a party to the arbitration. The parties to the arbitration may extend the time either before or after the expiration thereof. A party to the arbitration waives the objection that an award was not made within the time required unless he gives the arbitrators written notice of his objection prior to the service of a signed copy of the award on him.

Correction of award

1284. The arbitrators, upon written application of a party to the arbitration, may correct the award upon any of the grounds set forth in subdivisions (a) and (c) of Section 1286.6 not later than 30 days after service of a signed copy of the award on the applicant.

Application for such correction shall be made not later than 10 days after service of a signed copy of the award on the applicant. Upon or before making such application, the applicant shall deliver or mail a copy of the application to all of the other parties to the arbitration.

Any party to the arbitration may make written objection to such application. The objection shall be made not later than 10

days after the application is delivered or mailed to the objector. Upon or before making such objection, the objector shall deliver or mail a copy of the objection to the applicant and all the other parties to the arbitration.

The arbitrators shall either deny the application or correct the award. The denial of the application or the correction of the award shall be in writing and signed by the arbitrators concurring therein, and the neutral arbitrator shall serve a signed copy of such denial or correction on each party to the arbitration personally or by registered or certified mail or as provided in the agreement. If no denial of the application or correction of the award is served within the 30-day period provided in this section, the application for correction shall be deemed denied on the last day thereof.

Expenses of arbitration

1284.2. Unless the arbitration agreement otherwise provides or the parties to the arbitration otherwise agree, each party to the arbitration shall pay his pro rata share of the expenses and fees of the neutral arbitrator, together with other expenses of the arbitration incurred or approved by the neutral arbitrator, not including counsel fees or witness fees or other expenses incurred by a party for his own benefit.

CHAPTER 4. ENFORCEMENT OF THE AWARD

Article 1. Confirmation, Correction or Vacation of the Award

Petitioning court to confirm, correct or vacate award

1285. Any party to an arbitration in which an award has been made may petition the court to confirm, correct or vacate the award. The petition shall name as respondents all parties to the arbitration and may name as respondents any other persons bound by the arbitration award.

Response to petition

1285.2. A response to a petition under this chapter may request the court to dismiss the petition or to confirm, correct or vacate the award.

Contents of petitions

1285.4. A petition under this chapter shall:

(a) Set forth the substance of or have attached a copy of the agreement to arbitrate unless the petitioner denies the existence of such an agreement.

(b) Set forth the names of the arbitrators.

(c) Set forth or have attached a copy of the award and the written opinion of the arbitrators, if any.

1285.6. Unless a copy thereof is set forth in or attached to the petition, a response to a petition under this chapter shall:

(a) Set forth the substance of or have attached a copy of the agreement to arbitrate unless the respondent denies the existence of such an agreement.

(b) Set forth the names of the arbitrators.

(c) Set forth or have attached a copy of the award and the written opinion of the arbitrators, if any.

Same

1285.8. A petition to correct or vacate an award, or a response requesting such relief, shall set forth the grounds on which the request for such relief is based.

Court confirmation

1286. If a petition or response under this chapter is duly served and filed, the court shall confirm the award as made unless in accordance with this chapter it corrects the award and confirms it as corrected, vacates the award or dismisses the proceeding.

Grounds to vacate

1286.2. Subject to Section 1286.4, the court shall vacate the award if the court determines that:

(a) The award was procured by corruption, fraud or other undue means;

(b) There was corruption in any of the arbitrators;

(c) The rights of such party were substantially prejudiced by misconduct of a neutral arbitrator;

(d) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted; or

(e) The rights of such party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.

1286.4. The court may not vacate an award unless:

Conditions for vacating award

(a) A petition or response requesting that the award be vacated has been duly served and filed; or

(b) A petition or response requesting that the award be corrected has been duly served and filed and:

(1) All petitioners and respondents are before the court; or

(2) All petitioners and respondents have been given reasonable notice that the court will be requested at the hearing to vacate the award or that the court on its own motion has determined to vacate the award and all petitioners and respondents have been given an opportunity to show why the award should not be vacated.

Grounds for correcting award

1286.6. Subject to Section 1286.8, the court, unless it vacates the award pursuant to Section 1286.2, shall correct the award and confirm it as corrected if the court determines that:

(a) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

(b) The arbitrators exceeded their powers but the award may be corrected without affecting the merits of the decision upon the controversy submitted; or

(c) The award is imperfect in a matter of form, not affecting the merits of the controversy.

Same

1286.8. The court may not correct an award unless:

(a) A petition or response requesting that the award be corrected has been duly served and filed; or

(b) A petition or response requesting that the award be vacated has been duly served and filed and:

(1) All petitioners and respondents are before the court; or

(2) All petitioners and respondents have been given reasonable notice that the court will be requested at the hearing to correct the award or that the court on its own motion has de-

termined to correct the award and all petitioners and respondents have been given an opportunity to show why the award should not be corrected.

Rehearing

1287. If the award is vacated, the court may order a rehearing before new arbitrators. If the award is vacated on the grounds set forth in subdivision (d) or (e) of Section 1286.2, the court with the consent of the parties to the court proceeding may order a rehearing before the original arbitrators.

If the arbitration agreement requires that the award be made within a specified period of time, the rehearing may nevertheless be held and the award made within an equal period of time beginning with the date of the order for rehearing but only if the court determines that the purpose of the time limit agreed upon by the parties to the arbitration agreement will not be frustrated by the application of this provision.

Dismissal of proceedings

1287.2. The court shall dismiss the proceeding under this chapter as to any person named as a respondent if the court determines that such person was not bound by the arbitration award and was not a party to the arbitration.

Force and effect of judgment

1287.4. If an award is confirmed, judgment shall be entered in conformity therewith. The judgment so entered has the same force and effect as, and is subject to all the provisions of law relating to, a judgment in a civil action; and it may be enforced like any other judgment of the court in which it is entered.

Force and effect of award

1287.6. An award that has not been confirmed or vacated has the same force and effect as a contract in writing between the parties to the arbitration.

Article 2. Limitations of Time

Limitation: Petitions to confirm, vacate or correct

1288. A petition to confirm an award shall be served and filed not later than four years after the date of service of a signed copy of the award on the petitioner. A petition to vacate an award or to correct an award shall be served and filed not later than 100 days after the date of the service of a signed copy of the award on the petitioner.

Same: Response

1288.2. A response requesting that an award be vacated or that an award be corrected shall be served and filed not later than 100 days after the date of service of a signed copy of the award upon:

(a) The respondent if he was a party to the arbitration; or

(b) The respondent's representative if the respondent was not a party to the arbitration.

Service of petition

1288.4. No petition may be served and filed under this chapter until at least 10 days after service of the signed copy of the award upon the petitioner.

Same

1288.6. If an application is made to the arbitrators for correction of the award, a petition may not be served and filed under this chapter until the determination of that application.

Date of service of award

1288.8. If an application is made to the arbitrators for correction of the award, the date of the service of the award for the purposes of this article shall be deemed to be whichever of the following dates is the earlier:

(a) The date of service upon the petitioner of a signed copy of the correction of the award or of the denial of the application.

(b) The date that such application is deemed to be denied under Section 1284.

CHAPTER 5. GENERAL PROVISIONS RELATING TO JUDICIAL PROCEEDINGS

Article 1. Petitions and Responses

Petitions and responses

1290. A proceeding under this title in the courts of this State is commenced by filing a petition. Any person named as a respondent in a petition may file a response thereto. The allegations of a petition are deemed to be admitted by a respondent duly served therewith unless a response is duly served and filed. The allegations of a response are deemed controverted or avoided.

Summary hearing

1290.2. A petition under this title shall be heard in a summary way in the manner and upon the notice provided by law for the making and hearing of motions, except that not less than 10 days' notice of the date set for the hearing on the petition shall be given.

Service

1290.4. (a) A copy of the petition and a written notice of the time and place of the hearing thereof and any other papers upon which the petition is based shall be served in the manner provided in the arbitration agreement for the service of such petition and notice.

(b) If the arbitration agreement does not provide the manner in which such service shall be made and the person upon whom service is to be made has not previously appeared in the proceeding and has not previously been served in accordance with this subdivision:

(1) Service within this State shall be made in the manner provided by law for the service of summons in an action.

(2) Service outside this State shall be made by mailing the copy of the petition and notice and other papers by registered or certified mail. Personal service is the equivalent of such service by mail. Proof of service by mail shall be made by affidavit showing such mailing together with the return receipt of the United States Post Office bearing the signature of the person on whom service was made. Notwithstanding any other provision of this title, if service is made in the manner provided in this paragraph, the petition may not be heard until at least 30 days after the date of such service.

(c) If the arbitration agreement does not provide the manner in which such service shall be made and the person on whom service is to be made has previously appeared in the pro-

ceeding or has previously been served in accordance with subdivision (b) of this section, service shall be made in the manner provided in Chapter 5 (commencing with Section 1010) of Title 14 of Part 2 of this code.

Time for filing response

1290.6. A response shall be served and filed within 10 days after service of the petition except that if the petition is served in the manner provided in paragraph (2) of subdivision (b) of Section 1290.4, the response shall be served and filed within 30 days after service of the petition. The time provided in this section for serving and filing a response may be extended by an agreement in writing between the parties to the court proceeding or, for good cause, by order of the court.

Service

1290.8. A response shall be served as provided in Chapter 5 (commencing with Section 1010) of Title 14 of Part 2 of this code.

Findings and conclusions

1291. Findings of fact and conclusions of law shall be made by the court whenever an order or judgment, except a special order after final judgment, is made that is appealable under this title.

Preference over other civil actions

1291.2. In all proceedings brought under the provisions of this title, all courts wherein such proceedings are pending shall give such proceedings preference over all other civil actions or proceedings, except older matters of the same character and matters to which special precedence may be given by law, in the matter of setting the same for hearing and in hearing the same to the end that all such proceedings shall be quickly heard and determined.

Article 2. Venue, Jurisdiction and Costs

Venue

1292. Except as otherwise provided in this article, any petition made prior to the commencement of arbitration shall be filed in the superior court in:

(a) The county where the agreement is to be performed or was made.

(b) If the agreement does not specify a county where the agreement is to be performed and the agreement was not made in any county in this State, the county where any party to the court proceeding resides or has a place of business.

(c) In any case not covered by subdivision (a) or (b) of this section, in any county in this State.

Same

1292.2. Except as otherwise provided in this article, any petition made after the commencement or completion of arbitration shall be filed in the superior court in the county where the arbitration is being or has been held, or, if not held exclusively in any one county of this State, then such petition shall be filed as provided in Section 1292.

Petition for an order to arbitrate

1292.4. If a controversy referable to arbitration under an alleged agreement is involved in an action or proceeding pending in a superior court, a petition for an order to arbitrate shall be filed in such action or proceeding.

Continuing jurisdiction

1292.6. After a petition has been filed under this title, the court in which such petition was filed retains jurisdiction to

determine any subsequent petition involving the same agreement to arbitrate and the same controversy, and any such subsequent petition shall be filed in the same proceeding.

Stay of action

1292.8. A motion for a stay of an action on the ground that an issue therein is subject to arbitration shall be made in the court where the action is pending.

Consent to jurisdiction

1293. The making of an agreement in this State providing for arbitration to be had within this State shall be deemed a consent of the parties thereto to the jurisdiction of the courts of this State to enforce such agreement by the making of any orders provided for in this title and by entering of judgment on an award under the agreement.

Costs

1293.2. The court shall award costs upon any judicial proceeding under this title as provided in Chapter 6 (commencing with Section 1021) of Title 14 of Part 2 of this code.

Article 3. Appeals

Appealable orders

1294. An aggrieved party may appeal from:

(a) An order dismissing or denying a petition to compel arbitration.

(b) An order dismissing a petition to confirm, correct or vacate an award.

(c) An order vacating an award unless a rehearing in arbitration is ordered.

(d) A judgment entered pursuant to this title.

(e) A special order after final judgment.

Appellate review

1294.2. The appeal shall be taken in the same manner as an appeal from an order or judgment in a civil action. Upon an appeal from any order or judgment under this title, the court may review the decision and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the order or judgment appealed from, or which substantially affects the rights of a party. The court may also on such appeal review any order on motion for a new trial. The respondent on the appeal, or party in whose favor the judgment or order was given may, without appealing from such judgment, request the court to and it may review any of the foregoing matters for the purpose of determining whether or not the appellant was prejudiced by the error or errors upon which he relies for reversal or modification of the judgment or order from which the appeal is taken. The provisions of this section do not authorize the court to review any decision or order from which an appeal might have been taken.

SEC. 3. Section 1053 of the Code of Civil Procedure is amended to read:

Meetings and actions of referees

1053. When there are three referees all must meet, but two of them may do any act which might be done by all.

SEC. 4. Section 1730 of the Civil Code is amended to read:

Avoidance of sale or contract

1730. (1) Where there is a contract to sell or a sale of goods at a price or on terms to be fixed by a third person, and such third person, or a person appointed pursuant to Title

9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure relating to arbitration, without fault of the seller or the buyer, cannot or does not fix the price or terms, the contract or the sale is thereby avoided; but if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2) Where such third person or person appointed pursuant to Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure is prevented from fixing the price or terms by fault of the seller or the buyer, the party not in fault may have such remedies against the party in fault as are allowed by Chapters 4 and 5 of this act.

SEC. 5. Section 3390 of the Civil Code is amended to read:

Obligations not specifically enforceable

3390. The following obligations cannot be specifically enforced:

1. An obligation to render personal service;

2. An obligation to employ another in personal service;

3. An agreement to perform an act which the party has not power lawfully to perform when required to do so;

4. An agreement to procure the act or consent of the wife of the contracting party, or of any other third person; or,

5. An agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable.

SEC. 6. Section 1647.5 of the Labor Code is amended to read:

Valid provisions

1647.5. Notwithstanding Sections 1626 and 1647 of the Labor Code, a provision in a contract providing for the decision by arbitration of any controversy under the contract or as to its existence, validity, construction, performance, nonperformance, breach, operation, continuance, or termination, shall be valid:

(a) If the provision is contained in a contract between an employment agency and a person for whom such employment agency under the contract undertakes to endeavor to secure employment,

(b) If the provision is inserted in the contract pursuant to any rule, regulation, or contract of a bona fide labor union regulating the relations of its members to an employment agency,

(c) If the contract provides for reasonable notice to the Labor Commissioner of the time and place of all arbitration hearings, and,

(d) If the contract provides that the Labor Commissioner or his authorized representative has the right to attend all arbitration hearings.

Except as otherwise provided in this section, any such arbitration shall be governed by the provisions of Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure.

If there is such an arbitration provision in such a contract, the contract need not provide that the employment agency

agrees to refer any controversy between the applicant and the employment agency regarding the terms of the contract to the Labor Commissioner for adjustment, and Section 1647 shall not apply to controversies pertaining to the contract.

A provision in a contract providing for the decision by arbitration of any controversy arising under this chapter which does not meet the requirements of this section is not made valid by Section 1281 of the Code of Civil Procedure.

SEC. 7. Section 1700.45 of the Labor Code is amended to read:

Same

1700.45. Notwithstanding Section 1700.44 of the Labor Code, a provision in a contract providing for the decision by arbitration of any controversy under the contract or as to its existence, validity, construction, performance, nonperformance, breach, operation, continuance, or termination, shall be valid:

(a) If the provision is contained in a contract between an artists' manager and a person for whom such artists' manager under the contract undertakes to endeavor to secure employment,

(b) If the provision is inserted in the contract pursuant to any rule, regulation, or contract of a bona fide labor union regulating the relations of its members to an artists' manager,

(c) If the contract provides for reasonable notice to the Labor Commissioner of the time and place of all arbitration hearings, and

(d) If the contract provides that the Labor Commissioner or his authorized representative has the right to attend all arbitration hearings.

Except as otherwise provided in this section, any such arbitration shall be governed by the provisions of Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure.

If there is such an arbitration provision in such a contract, the contract need not provide that the artists' manager agrees to refer any controversy between the applicant and the artists' manager regarding the terms of the contract to the Labor Commissioner for adjustment, and Section 1700.44 shall not apply to controversies pertaining to the contract.

A provision in a contract providing for the decision by arbitration of any controversy arising under this chapter which does not meet the requirements of this section is not made valid by Section 1281 of the Code of Civil Procedure.

Application

SEC. 8. This act applies to all contracts whether executed before or after the effective date of this act except that Section 1293 of the Code of Civil Procedure, as added by this act, does not apply to any contract executed before the effective date of this act but Section 1293 does apply to any renewal or extension of an existing contract on or after the effective date of this act.

ARBITRATORS' CODE OF ETHICS

Foreword

This "Code of Professional Responsibility for Arbitrators of Labor-Management Disputes" supersedes the "Code of Ethics and Procedural Standards for Labor-Management Arbitration," approved in 1951 by a Committee of the American Arbitration Association, by the National Academy of Arbitrators, and by representatives of the Federal Mediation and Conciliation Service.

Revision of the 1951 Code was initiated officially by the same three groups in October, 1972. The Joint Steering Committee named below was designated to draft a proposal.

Reasons for Code revision should be noted briefly. Ethical considerations and procedural standards are sufficiently intertwined to warrant combining the subject matter of Parts I and II of the 1951 Code under the caption of "Professional Responsibility." It has seemed advisable to eliminate admonitions to the parties (Part III of the 1951 Code) except as they appear incidentally in connection with matters primarily involving responsibilities of arbitrators. Substantial growth of third party participation in dispute resolution in the public sector requires consideration. It appears that arbitration of new contract terms may become more significant. Finally, during the interval of more than two decades, new problems have emerged as private sector grievance arbitration has matured and has become more diversified.

JOINT STEERING COMMITTEE

Chairman
William E. Simkin

Representing American Arbitration Association
Frederick H. Bullen
Donald B. Straus

Representing Federal Mediation and Conciliation Service
Lawrence B. Babcock, Jr.
L. Lawrence Schultz

Representing National Academy of Arbitrators
Sylvester Garrett
Ralph T. Seward

November 30, 1974

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Preamble

Background

Voluntary arbitration rests upon the mutual desire of management and labor in each collective bargaining relationship to develop procedures for dispute settlement which meet their own particular needs and obligations. No two voluntary systems, therefore, are likely to be identical in practice. Words used to describe arbitrators (Arbitrator, Umpire, Impartial Chairman, Chairman of Arbitration Board, etc.) may suggest typical approaches but actual differences within any general type of arrangement may be as great as distinctions often made among the several types. 1

Some arbitration and related procedures, however, are not the product of voluntary agreement. These procedures, primarily but not exclusively applicable in the public sector, sometimes utilize other third party titles (Fact Finder, Impasse Panel, Board of Inquiry, etc.). These procedures range all the way from arbitration prescribed by statute to arrangements substantially indistinguishable from voluntary procedures. 2

The standards of professional responsibility set forth in this Code are designed to guide the impartial third party serving in these diverse labor-management relationships. 3

Scope of Code

This Code is a privately developed set of standards of professional behavior. It applies to voluntary arbitration of labor-management grievance disputes and of disputes concerning new or revised contract terms. Both "ad hoc" and "permanent" varieties of voluntary arbitration, private and public sector, are included. To the extent relevant in any specific case, it also applies to advisory arbitration, impasse resolution panels, arbitration prescribed by statutes, fact-finding, and other special procedures. 4

5 The word "arbitrator," as used hereinafter in the Code, is intended to apply to any impartial person, irrespective of specific title, who serves in a labor-management dispute procedure in which there is conferred authority to decide issues or to make formal recommendations.

6 The Code is not designed to apply to mediation or conciliation, as distinguished from arbitration, nor to other procedures in which the third party is not authorized in advance to make decisions or recommendations. It does not apply to partisan representatives on tripartite boards. It does not apply to commercial arbitration or to other uses of arbitration outside the labor-management dispute area.

Format of Code

7 **Bold Face** type, sometimes including explanatory material, is used to set forth general principles. *Italics* are used for amplification of general principles. Ordinary type is used primarily for illustrative or explanatory comment.

Application of Code

8 Faithful adherence by an arbitrator to this Code is basic to professional responsibility.

9 The National Academy of Arbitrators will expect its members to be governed in their professional conduct by this Code and stands ready, through its Committee on Ethics and Grievances, to advise its members as to the Code's interpretation. The American Arbitration Association and the Federal Mediation and Conciliation Service will apply the Code to the arbitrators on their rosters in cases handled under their respective appointment or referral procedures. Other arbitrators and administrative agencies may, of course, voluntarily adopt the Code and be governed by it.

10 In interpreting the Code and applying it to charges of professional misconduct, under existing or revised procedures of the National Academy of Arbitrators and of the administrative agencies, it should be recognized that while some of its standards express ethical principles basic to the arbitration profession, others rest less on ethics than on considerations of good practice. Experience has shown the difficulty of drawing rigid lines of distinction between ethics and good practice and this Code does not attempt to do so. Rather, it leaves the gravity of alleged misconduct and the extent to which ethical standards have been violated to be assessed in the light of the facts and circumstances of each particular case.

1

Arbitrator's Qualifications and Responsibilities to the Profession

A. General Qualifications

1. Essential personal qualifications of an arbitrator include honesty, integrity, impartiality and general competence in labor relations matters. 11

An arbitrator must demonstrate ability to exercise these personal qualities faithfully and with good judgment, both in procedural matters and in substantive decisions. 12

a. Selection by mutual agreement of the parties or direct designation by an administrative agency are the effective methods of appraisal of this combination of an individual's potential and performance, rather than the fact of placement on a roster of an administrative agency or membership in a professional association of arbitrators. 13

2. An arbitrator must be as ready to rule for one party as for the other on each issue, either in a single case or in a group of cases. Compromise by an arbitrator for the sake of attempting to achieve personal acceptability is unprofessional. 14

B. Qualifications for Special Cases

1. An arbitrator must decline appointment, withdraw, or request technical assistance when he or she decides that a case is beyond his or her competence. 15

a. An arbitrator may be qualified generally but not for specialized assignments. Some types of incentive, work standard, job evaluation, welfare program, pension, or insurance cases may require specialized 16

knowledge, experience or competence. Arbitration of contract terms also may require distinctive background and experience.

17 b. Effective appraisal by an administrative agency or by an arbitrator of the need for special qualifications requires that both parties make known the special nature of the case prior to appointment of the arbitrator.

C. Responsibilities to the Profession

18 **1. An arbitrator must uphold the dignity and integrity of the office and endeavor to provide effective service to the parties.**

19 a. To this end, an arbitrator should keep current with principles, practices and developments that are relevant to his or her own field of arbitration practice.

20 **2. An experienced arbitrator should cooperate in the training of new arbitrators.**

21 **3. An arbitrator must not advertise or solicit arbitration assignments.**

22 a. It is a matter of personal preference whether an arbitrator includes "Labor Arbitrator" or similar notation on letterheads, cards, or announcements. *It is inappropriate, however, to include memberships or offices held in professional societies or listings on rosters of administrative agencies.*

23 b. *Information provided for published biographical sketches, as well as that supplied to administrative agencies, must be accurate.* Such information may include membership in professional organizations (including reference to significant offices held), and listings on rosters of administrative agencies.

2

Responsibilities to the Parties

A. Recognition of Diversity in Arbitration Arrangements

1. An arbitrator should conscientiously endeavor to understand and observe, to the extent consistent with professional responsibility, the significant principles governing each arbitration system in which he or she serves. 24

a. Recognition of special features of a particular arbitration arrangement can be essential with respect to procedural matters and may influence other aspects of the arbitration process. 25

2. Such understanding does not relieve an arbitrator from a corollary responsibility to seek to discern and refuse to lend approval or consent to any collusive attempt by the parties to use arbitration for an improper purpose. 26

B. Required Disclosures

1. Before accepting an appointment, an arbitrator must disclose directly or through the administrative agency involved, any current or past managerial, representational, or consultative relationship with any company or union involved in a proceeding in which he or she is being considered for appointment or has been tentatively designated to serve. Disclosure must also be made of any pertinent pecuniary interest. 27

a. The duty to disclose includes membership on a Board of Directors, full-time or part-time service as a representative or advocate, consultation work for a fee, current stock or bond ownership 28

(other than mutual fund shares or appropriate trust arrangements) or any other pertinent form of managerial, financial or immediate family interest in the company or union involved.

2. When an arbitrator is serving concurrently as an advocate for or representative of other companies or unions in labor relations matters, or has done so in recent years, he or she must disclose such activities before accepting appointment as an arbitrator.

An arbitrator must disclose such activities to an administrative agency if he or she is on that agency's active roster or seeks placement on a roster. Such disclosure then satisfies this requirement for cases handled under that agency's referral.

a. It is not necessary to disclose names of clients or other specific details. It is necessary to indicate the general nature of the labor relations advocacy or representational work involved, whether for companies or unions or both, and a reasonable approximation of the extent of such activity.

b. *An arbitrator on an administrative agency's roster has a continuing obligation to notify the agency of any significant changes pertinent to this requirement.*

c. When an administrative agency is not involved, an arbitrator must make such disclosure directly unless he or she is certain that both parties to the case are fully aware of such activities.

3. An arbitrator must not permit personal relationships to affect decision-making.

Prior to acceptance of an appointment, an arbitrator must disclose to the parties or to the administrative agency involved any close personal relationship or other circumstance, in addition to those specifically mentioned earlier in this section, which might reasonably raise a question as to the arbitrator's impartiality.

a. Arbitrators establish personal relationships with many company and union representatives, with fellow arbitrators, and with fellow members of various professional associations. There should be no attempt to be secretive about such friendships or acquaintances but disclosure is not necessary unless some feature of a particular relationship might reasonably appear to impair impartiality.

4. If the circumstances requiring disclosure are not known to the

arbitrator prior to acceptance of appointment, disclosure must be made when such circumstances become known to the arbitrator.

5. The burden of disclosure rests on the arbitrator. After appropriate disclosure, the arbitrator may serve if both parties so desire. If the arbitrator believes or perceives that there is a clear conflict of interest, he or she should withdraw, irrespective of the expressed desires of the parties. 38

C. Privacy of Arbitration

1. All significant aspects of an arbitration proceeding must be treated by the arbitrator as confidential unless this requirement is waived by both parties or disclosure is required or permitted by law. 39

a. Attendance at hearings by persons not representing the parties or invited by either or both of them should be permitted only when the parties agree or when an applicable law requires or permits. Occasionally, special circumstances may require that an arbitrator rule on such matters as attendance and degree of participation of counsel selected by a grievant. 40

b. *Discussion of a case at any time by an arbitrator with persons not involved directly should be limited to situations where advance approval or consent of both parties is obtained or where the identity of the parties and details of the case are sufficiently obscured to eliminate any realistic probability of identification.* 41

A commonly recognized exception is discussion of a problem in a case with a fellow arbitrator. *Any such discussion does not relieve the arbitrator who is acting in the case from sole responsibility for the decision and the discussion must be considered as confidential.* 42

Discussion of aspects of a case in a classroom without prior specific approval of the parties is not a violation provided the arbitrator is satisfied that there is no breach of essential confidentiality. 43

c. *It is a violation of professional responsibility for an arbitrator to make public an award without the consent of the parties.* 44

An arbitrator may request but not press the parties for consent to 45

publish an opinion. Such a request should normally not be made until after the award has been issued to the parties.

46 d. It is not improper for an arbitrator to donate arbitration files to a library of a college, university or similar institution without prior consent of all the parties involved. When the circumstances permit, there should be deleted from such donations any cases concerning which one or both of the parties have expressed a desire for privacy. As an additional safeguard, an arbitrator may also decide to withhold recent cases or indicate to the donee a time interval before such cases can be made generally available.

47 e. *Applicable laws, regulations, or practices of the parties may permit or even require exceptions to the above noted principles of privacy.*

D. Personal Relationships with the Parties

48 **1. An arbitrator must make every reasonable effort to conform to arrangements required by an administrative agency or mutually desired by the parties regarding communications and personal relationships with the parties.**

49 a. *Only an "arm's-length" relationship may be acceptable to the parties in some arbitration arrangements or may be required by the rules of an administrative agency. The arbitrator should then have no contact of consequence with representatives of either party while handling a case without the other party's presence or consent.*

50 b. *In other situations, both parties may want communications and personal relationships to be less formal. It is then appropriate for the arbitrator to respond accordingly.*

E. Jurisdiction

51 **1. An arbitrator must observe faithfully both the limitations and inclusions of the jurisdiction conferred by an agreement or other submission under which he or she serves.**

52 **2. A direct settlement by the parties of some or all issues in a case, at any stage of the proceedings, must be accepted by the arbitrator as relieving him or her of further jurisdiction over such issues.**

F. Mediation by an Arbitrator

1. When the parties wish at the outset to give an arbitrator authority both to mediate and to decide or submit recommendations regarding residual issues, if any, they should so advise the arbitrator prior to appointment. If the appointment is accepted, the arbitrator must perform a mediation role consistent with the circumstances of the case. 53

a. Direct appointments, also, may require a dual role as mediator and arbitrator of residual issues. This is most likely to occur in some public sector cases. 54

2. When a request to mediate is first made after appointment, the arbitrator may either accept or decline a mediation role. 55

a. *Once arbitration has been invoked, either party normally has a right to insist that the process be continued to decision.* 56

b. *If one party requests that the arbitrator mediate and the other party objects, the arbitrator should decline the request.* 57

c. *An arbitrator is not precluded from making a suggestion that he or she mediate. To avoid the possibility of improper pressure, the arbitrator should not so suggest unless it can be discerned that both parties are likely to be receptive. In any event, the arbitrator's suggestion should not be pursued unless both parties readily agree.* 58

G. Reliance by an Arbitrator on Other Arbitration Awards or on Independent Research

1. An arbitrator must assume full personal responsibility for the decision in each case decided. 59

a. *The extent, if any, to which an arbitrator properly may rely on precedent, on guidance of other awards, or on independent research is dependent primarily on the policies of the parties on these matters, as expressed in the contract, or other agreement, or at the hearing.* 60

b. When the mutual desires of the parties are not known or when the parties express differing opinions or policies, the arbitrator may exercise discretion as to these matters, consistent with acceptance of full personal responsibility for the award. 61

H. Use of Assistants

62 **1. An arbitrator must not delegate any decision-making function to another person without consent of the parties.**

63 a. *Without prior consent of the parties, an arbitrator may use the services of an assistant for research, clerical duties, or preliminary drafting under the direction of the arbitrator, which does not involve the delegation of any decision-making function.*

64 b. *If an arbitrator is unable, because of time limitations or other reasons, to handle all decision-making aspects of a case, it is not a violation of professional responsibility to suggest to the parties an allocation of responsibility between the arbitrator and an assistant or associate. The arbitrator must not exert pressure on the parties to accept such a suggestion.*

I. Consent Awards

65 **1. Prior to issuance of an award, the parties may jointly request the arbitrator to include in the award certain agreements between them, concerning some or all of the issues. If the arbitrator believes that a suggested award is proper, fair, sound, and lawful, it is consistent with professional responsibility to adopt it.**

66 a. *Before complying with such a request, an arbitrator must be certain that he or she understands the suggested settlement adequately in order to be able to appraise its terms. If it appears that pertinent facts or circumstances may not have been disclosed, the arbitrator should take the initiative to assure that all significant aspects of the case are fully understood. To this end, the arbitrator may request additional specific information and may question witnesses at a hearing.*

J. Avoidance of Delay

67 **1. It is a basic professional responsibility of an arbitrator to plan his or her work schedule so that present and future commitments will be fulfilled in a timely manner.**

68 a. *When planning is upset for reasons beyond the control of the arbitrator, he or she, nevertheless, should exert every reasonable effort*

to fulfill all commitments. If this is not possible, prompt notice at the arbitrator's initiative should be given to all parties affected. Such notices should include reasonably accurate estimates of any additional time required. To the extent possible, priority should be given to cases in process so that other parties may make alternative arbitration arrangements.

2. An arbitrator must cooperate with the parties and with any administrative agency involved in avoiding delays. 69

a. *An arbitrator on the active roster of an administrative agency must take the initiative in advising the agency of any scheduling difficulties that he or she can foresee.* 70

b. *Requests for services, whether received directly or through an administrative agency, should be declined if the arbitrator is unable to schedule a hearing as soon as the parties wish. If the parties, nevertheless, jointly desire to obtain the services of the arbitrator and the arbitrator agrees, arrangements should be made by agreement that the arbitrator confidently expects to fulfill.* 71

c. *An arbitrator may properly seek to persuade the parties to alter or eliminate arbitration procedures or tactics that cause unnecessary delay.* 72

3. Once the case record has been closed, an arbitrator must adhere to the time limits for an award, as stipulated in the labor agreement or as provided by regulation of an administrative agency or as otherwise agreed. 73

a. *If an appropriate award cannot be rendered within the required time, it is incumbent on the arbitrator to seek an extension of time from the parties.* 74

b. If the parties have agreed upon abnormally short time limits for an award after a case is closed, the arbitrator should be so advised by the parties or by the administrative agency involved, prior to acceptance of appointment. 75

K. Fees and Expenses

1. An arbitrator occupies a position of trust in respect to the parties and the administrative agencies. In charging for services and expenses, 76

the arbitrator must be governed by the same high standards of honor and integrity that apply to all other phases of his or her work.

77 **An arbitrator must endeavor to keep total charges for services and expenses reasonable and consistent with the nature of the case or cases decided.**

78 **Prior to appointment, the parties should be aware of or be able readily to determine all significant aspects of an arbitrator's bases for charges for fees and expenses.**

a. *Services Not Primarily Chargeable on a Per Diem Basis*

79 By agreement with the parties, the financial aspects of many "permanent" arbitration assignments, of some interest disputes, and of some "ad hoc" grievance assignments do not include a per diem fee for services as a primary part of the total understanding. *In such situations, the arbitrator must adhere faithfully to all agreed-upon arrangements governing fees and expenses.*

b. *Per Diem Basis for Charges for Services*

80 (1) *When an arbitrator's charges for services are determined primarily by a stipulated per diem fee, the arbitrator should establish in advance his or her bases for application of such per diem fee and for determination of reimbursable expenses.*

81 *Practices established by an arbitrator should include the basis for charges, if any, for:*

(a) hearing time, including the application of the stipulated basic per diem hearing fee to hearing days of varying lengths;

(b) study time;

(c) necessary travel time when not included in charges for hearing time;

(d) postponement or cancellation of hearings by the parties and the circumstances in which such charges will normally be assessed or waived;

(e) office overhead expenses (secretarial, telephone, postage, etc.);

(f) the work of paid assistants or associates.

82 (2) *Each arbitrator should be guided by the following general principles:*

83 (a) *Per diem charges for a hearing should not be in excess of actual time spent or allocated for the hearing.*

(b) *Per diem charges for study time should not be in excess of actual time spent.*

(c) *Any fixed ratio of study days to hearing days, not agreed to specifically by the parties, is inconsistent with the per diem method of charges for services.*

(d) *Charges for expenses must not be in excess of actual expenses normally reimbursable and incurred in connection with the case or cases involved.*

(e) *When time or expense are involved for two or more sets of parties on the same day or trip, such time or expense charges should be appropriately prorated.*

(f) *An arbitrator may stipulate in advance a minimum charge for a hearing without violation of (a) or (e) above.*

(3) *An arbitrator on the active roster of an administrative agency must file with the agency his or her individual bases for determination of fees and expenses if the agency so requires. Thereafter, it is the responsibility of each such arbitrator to advise the agency promptly of any change in any basis for charges.*

Such filing may be in the form of answers to a questionnaire devised by an agency or by any other method adopted by or approved by an agency.

Having supplied an administrative agency with the information noted above, an arbitrator's professional responsibility of disclosure under this Code with respect to fees and expenses has been satisfied for cases referred by that agency.

(4) *If an administrative agency promulgates specific standards with respect to any of these matters which are in addition to or more restrictive than an individual arbitrator's standards, an arbitrator on its active roster must observe the agency standards for cases handled under the auspices of that agency, or decline to serve.*

(5) *When an arbitrator is contacted directly by the parties for a case or cases, the arbitrator has a professional responsibility to respond to questions by submitting his or her bases for charges for fees and expenses.*

(6) *When it is known to the arbitrator that one or both of the*

parties cannot afford normal charges, it is consistent with professional responsibility to charge lesser amounts to both parties or to one of the parties if the other party is made aware of the difference and agrees.

95 (7) *If an arbitrator concludes that the total of charges derived from his or her normal basis of calculation is not compatible with the case decided, it is consistent with professional responsibility to charge lesser amounts to both parties.*

96 **2. An arbitrator must maintain adequate records to support charges for services and expenses and must make an accounting to the parties or to an involved administrative agency on request.**

3

Responsibilities to Administrative Agencies

A. General Responsibilities

4

Prehearing Conduct

102 **1. All prehearing matters must be handled in a manner that fosters complete impartiality by the arbitrator.**

103 a. The primary purpose of prehearing discussions involving the arbitrator is to obtain agreement on procedural matters so that the hearing can proceed without unnecessary obstacles. If differences of opinion should arise during such discussions and, particularly, if such differences appear to impinge on substantive matters, the circumstances will suggest whether the matter can be resolved informally or may require a prehearing conference or, more rarely, a formal preliminary hearing. When an administrative agency handles some or all aspects of the arrangements prior to a hearing, the arbitrator will become involved only if differences of some substance arise.

104 b. *Copies of any prehearing correspondence between the arbitrator and either party must be made available to both parties.*

5
Hearing Conduct

A. General Principles

1. An arbitrator must provide a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence and argument. 105

a. *Within the limits of this responsibility, an arbitrator should conform to the various types of hearing procedures desired by the parties.* 106

b. An arbitrator may: encourage stipulations of fact; restate the substance of issues or arguments to promote or verify understanding; question the parties' representatives or witnesses, when necessary or advisable, to obtain additional pertinent information; and request that the parties submit additional evidence, either at the hearing or by subsequent filing. 107

c. *An arbitrator should not intrude into a party's presentation so as to prevent that party from putting forward its case fairly and adequately.* 108

B. Transcripts or Recordings

1. Mutual agreement of the parties as to use or non-use of a transcript must be respected by the arbitrator. 109

a. *A transcript is the official record of a hearing only when both parties agree to a transcript or an applicable law or regulation so provides.* 110

111 b. An arbitrator may seek to persuade the parties to avoid use of a transcript, or to use a transcript if the nature of the case appears to require one. *However, if an arbitrator intends to make his or her appointment to a case contingent on mutual agreement to a transcript, that requirement must be made known to both parties prior to appointment.*

112 c. If the parties do not agree to a transcript, an arbitrator may permit one party to take a transcript at its own cost. The arbitrator may also make appropriate arrangements under which the other party may have access to a copy, if a copy is provided to the arbitrator.

113 d. Without prior approval, an arbitrator may seek to use his or her own tape recorder to supplement note taking. The arbitrator should not insist on such a tape recording if either or both parties object.

C. Ex Parte Hearings

114 **1. In determining whether to conduct an ex parte hearing, an arbitrator must consider relevant legal, contractual, and other pertinent circumstances.**

115 **2. An arbitrator must be certain, before proceeding ex parte, that the party refusing or failing to attend the hearing has been given adequate notice of the time, place, and purposes of the hearing.**

D. Plant Visits

116 **1. An arbitrator should comply with a request of any party that he or she visit a work area pertinent to the dispute prior to, during, or after a hearing. An arbitrator may also initiate such a request.**

117 a. *Procedures for such visits should be agreed to by the parties in consultation with the arbitrator.*

E. Bench Decisions or Expedited Awards

118 **1. When an arbitrator understands, prior to acceptance of appointment, that a bench decision is expected at the conclusion of the hearing,**

the arbitrator must comply with the understanding unless both parties agree otherwise.

a. *If notice of the parties' desire for a bench decision is not given prior to the arbitrator's acceptance of the case, issuance of such a bench decision is discretionary.* 119

b. *When only one party makes the request and the other objects, the arbitrator should not render a bench decision except under most unusual circumstances.* 120

2. When an arbitrator understands, prior to acceptance of appointment, that a concise written award is expected within a stated time period after the hearing, the arbitrator must comply with the understanding unless both parties agree otherwise. 121

6

Post Hearing Conduct

A. Post Hearing Briefs and Submissions

122 **1. An arbitrator must comply with mutual agreements in respect to the filing or nonfiling of post hearing briefs or submissions.**

123 a. An arbitrator, in his or her discretion, may either suggest the filing of post hearing briefs or other submissions or suggest that none be filed.

124 b. When the parties disagree as to the need for briefs, an arbitrator may permit filing but may determine a reasonable time limitation.

125 **2. An arbitrator must not consider a post hearing brief or submission that has not been provided to the other party.**

B. Disclosure of Terms of Award

126 **1. An arbitrator must not disclose a prospective award to either party prior to its simultaneous issuance to both parties or explore possible alternative awards unilaterally with one party, unless both parties so agree.**

127 a. Partisan members of tripartite boards may know prospective terms of an award in advance of its issuance. Similar situations may exist in other less formal arrangements mutually agreed to by the parties. In any such situation, the arbitrator should determine and observe the mutually desired degree of confidentiality.

C. Awards and Opinions

1. The award should be definite, certain, and as concise as possible. 128

a. When an opinion is required, factors to be considered by an arbitrator include: desirability of brevity, consistent with the nature of the case and any expressed desires of the parties; need to use a style and form that is understandable to responsible representatives of the parties, to the grievant and supervisors, and to others in the collective bargaining relationship; necessity of meeting the significant issues; forthrightness to an extent not harmful to the relationship of the parties; and avoidance of gratuitous advice or discourse not essential to disposition of the issues. 129

D. Clarification or Interpretation of Awards

1. No clarification or interpretation of an award is permissible without the consent of both parties. 130

2. Under agreements which permit or require clarification or interpretation of an award, an arbitrator must afford both parties an opportunity to be heard. 131

E. Enforcement of Award

1. The arbitrator's responsibility does not extend to the enforcement of an award. 132

2. In view of the professional and confidential nature of the arbitration relationship, an arbitrator should not voluntarily participate in legal enforcement proceedings. 133

QUESTIONS AND ANSWERS ABOUT THE CALIFORNIA STATE CONCILIATION SERVICE

What is the objective of the State Conciliation Service?

To help prevent work stoppages resulting from labor disputes and to assist employers and unions in the prompt and peaceful settlement of labor-management issues.

Who administers the State Conciliation Service?

The Director of the State Department of Industrial Relations, through the Supervisor of Conciliation and a staff of 17 Conciliators.

Where are the offices of the State Conciliation Service?

The headquarters office is in San Francisco, and other offices are located in Los Angeles, Fresno and San Diego.

Who can request intervention of the State Conciliation Service?

Any bona fide party to a labor dispute, either the employer or association of employers, or the union or any employee group, or any representative of a bona fide party.

How do you make a request for intervention?

It may be made by letter, telegram, or a telephone call at any one of the four offices of the Service.

What is the State Arbitration Panel?

It is a roster of the names of qualified private persons who have agreed that their names may be submitted to parties in dispute.

What is the difference between an arbitrator and a conciliator or a mediator?

An arbitrator is a "judge". He is an impartial, neutral person who has been asked by the parties to settle an issue or issues for them. In an arbitration, the arbitrator decides the issue or issues, and his decision is final and binding on both parties. A mediator does not have authority to direct or determine any particular course of action. His responsibility is to help the parties reconcile their differences.

Will a State Conciliator serve as an arbitrator?

No. The Service's policy does not allow Conciliators to act as arbitrators. In exceptional situations, the Supervisor of Conciliation may act as an arbitrator.

What help does a State Conciliator provide in an arbitration?

By request, he may assist the parties in drafting the arbitration submission agreement, and in making any necessary arrangements for the arbitration hearing.

How does one request an arbitrator from the State Arbitration Panel?

Upon a confirmed joint request, the Supervisor of Conciliation will submit the name or names of qualified private arbitrators from the State Arbitration Panel.

Who pays the private arbitrator of the State Arbitration Panel?

The fee and expenses of private arbitrators are customarily borne equally by the parties.

State of California
Agriculture and Services Agency
DEPARTMENT OF INDUSTRIAL RELATIONS
STATE CONCILIATION SERVICE

STATE LABOR DISPUTES PANEL

Name:	Telephones: Bus. Res.
Residence Address:	
Business Address:	
Present Employment or Professional Status:	

Memberships in Arbitration Associations:

Memberships in Labor Relations or Industrial Relations Organizations:

Arbitration and/or Factfinding Panels (Federal, State, A.A.A., Industry) on which I have served:

Geographical areas in California in which I am available:

Types of Arbitration or Factfinding cases in which my name should not be submitted:

I (shall/shall not) accept assignment in an expedited arbitration (no reporter, no written briefs) rendering a verbal award at conclusion of session.

Industries, companies, public employers and/or employee organizations, or unions with which I am or have been connected in a capacity that could raise a question as to the advisability of my appointment as an arbitrator in a dispute involving a particular industry, company, or union:

I (will/will not) serve as an ad hoc conciliator on assignment by the Supervisor of California State Conciliation Service at a uniform daily rate, per diem, and travel allowance consistent with that of a staff conciliator on a contract basis in accordance with my availability.

I have been engaged in labor arbitration/factfinding for (span of time):

_____

_____

Approximate number of cases in which I have served as an arbitrator or factfinder:

_____

Recent or outstanding cases in which I have been involved:

Company/Public Employer	Union/Employee Organization	Type of Dispute	Date

CT - Contract Terms
WR - Wage Reopening
SC - Sub-contracting
M - Mediation
D - Discipline
JE - Job Evaluation
INT - Interpretation
F - Factfinding
INC - Incentives
S - Seniority
O - Other

Academic Degrees	College/University	Year

Attached is a Resume' showing my background, qualifications, etc., for the information of the parties when my name is submitted on a list of Arbitrators or Factfinders.

Signature:_____

Date:_____

SCS form ArbPan/1.0

RESUME:

NAME: _____

(In the space below, briefly provide us with information which can be sumbitted to persons requesting Arbitrators or Factfinders.)

Signature: _____

Address: _____

_____

Telephone: _____

RULES OF AMERICAN ARBITRATION ASSOCIATION

Editor's Note:

The following are the rules of the American Arbitration Association, as amended and in effect June 1, 1975.

1. Agreement of Parties—The parties shall be deemed to have made these Rules a part of their arbitration agreement whenever, in a collective bargaining agreement or submission, they have provided for arbitration by the American Arbitration Association (hereinafter AAA) or under its Rules. These Rules shall apply in the form obtaining at the time the arbitration is initiated.

2. Name of Tribunal—Any Tribunal constituted by the parties under these Rules shall be called the Voluntary Labor Arbitration Tribunal.

3. Administrator—When parties agree to arbitrate under these Rules and an arbitration is instituted thereunder, they thereby authorize the AAA to administer the arbitration. The authority and obligations of the Administrator are as provided in the agreement of the parties and in these Rules.

4. Delegation of Duties—The duties of the AAA may be carried out through such representatives or committees as the AAA may direct.

5. National Panel of Labor Arbitrators—The AAA shall establish and maintain a National Panel of Labor Arbitrators and shall appoint arbitrators therefrom, as hereinafter provided.

6. Office of Tribunal—The general office of the Labor Arbitration Tribunal is the headquarters of the AAA, which may, however, assign the administration of an arbitration to any of its Regional Offices.

7. Initiation Under an Arbitration Clause in a Collective Bargaining Agreement—Arbitration under an arbitration clause in a collective bargaining agreement under these Rules may be initiated by either party in the following manner:

(a) By giving written notice to the other party of intention to arbitrate (Demand), which notice shall contain a statement setting forth the nature of the dispute and the remedy sought, and

(b) By filing at any Regional Office of the AAA two copies of said notice, together with a copy of the collective bargaining agreement, or such parts thereof as relate to the dispute, including the arbitration provisions. After the Arbitrator is appointed, no new or different claim may be submitted to him except with the consent of the Arbitrator and all other parties.

8. Answer—The party upon whom the demand for arbitration is made may file an answering statement with the AAA within seven days after notice from the AAA, in which event he shall simultaneously send a copy of his answer to the other party. If no answer is filed within the stated time, it will be assumed that the claim is denied. Failure to file an answer shall not operate to delay the arbitration.

9. Initiation Under a Submission—Parties to any collective bargaining agreement may initiate an arbitration under these Rules by filing at any Regional Office of the AAA two copies of a written agreement to arbitrate under these Rules (Submission), signed by the parties and setting forth the nature of the dispute and the remedy sought.

10. Fixing of Locale—The parties may mutually agree upon the locale where the arbitration is to be held. If the locale is not designated in the collective bargaining agreement or submission, and if there is a dispute as to the appropriate locale, the AAA shall have the power to determine the locale and its decision shall be binding.

11. Qualifications of Arbitrator—No person shall serve as a neutral arbitrator in any arbitration in which he has any financial or personal interest in the result of the arbitration, unless the parties, in writing, waive such disqualification.

12. Appointment from Panel—If the parties have not appointed an Arbitrator and have not provided any other method of appointment, the Arbitrator shall be appointed in the following manner: Immediately after the filing of the Demand or Submission, the AAA shall submit simultaneously to each party an identical list of names of persons chosen from the Labor Panel. Each party shall have seven days from the mailing date in which to cross off any names to which he objects, number the remaining names indicating the order of his preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an Arbitrator to serve. If the parties fail to agree upon any of the persons named or if those named decline or are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the Administrator shall have power to make the appointment from other members of the Panel without the submission of any additional lists.

13. Direct Appointment by Parties—If the agreement of the parties names an Arbitrator or specifies a method of appointing an Arbitrator, that designation or method shall be followed. The notice of appointment, with the name and address of such Arbitrator, shall be filed with the AAA by the appointing party.

If the agreement specifies a period of time within which an Arbitrator shall be appointed, and any party fails to make such appointment within that period, the AAA may make the appointment.

If no period of time is specified in the agreement, the AAA shall notify the parties to make the appointment and if within seven days thereafter such Arbitrator has not been so appointed, the AAA shall make the appointment.

14. Appointment of Neutral Arbitrator by Party-Appointed Arbitrators—If the parties have appointed their Arbitrators, or if either or both of them have been appointed as provided in Section 13, and have authorized such Arbitrators to appoint a neutral Arbitrator within a specified time and no appointment is made within such time or any agreed extension thereof, the AAA may appoint a neutral Arbitrator, who shall act as Chairman.

If no period of time is specified for appointment of the neutral Arbitrator and the parties do not make the appointment within seven days from the date of the appointment of the last party-appointed Arbitrator, the AAA shall appoint such neutral Arbitrator, who shall act as Chairman.

If the parties have agreed that the Arbitrators shall appoint the neutral Arbitrator from the Panel, the AAA shall furnish to the party-appointed Arbitrators, in the manner prescribed in Section 12, a list selected from the Panel, and the appointment of the neutral Arbitrator shall be made as prescribed in such Section.

15. Number of Arbitrators—If the arbitration agreement does not specify the number of Arbitrators, the dispute shall be heard and determined by one Arbitrator, unless the parties otherwise agree.

16. Notice to Arbitrator of His Appointment—Notice of the appointment of the neutral Arbitrator shall be mailed to the Arbitrator by the AAA and the signed acceptance of the Arbitrator shall be filed with the AAA prior to the opening of the first hearing.

17. Disclosure by Arbitrator of Disqualification—Prior to accepting his appointment, the prospective neutral Arbitrator shall disclose any circumstances likely to create a presumption of bias or which he believes might disqualify him as an impartial Arbitrator. Upon receipt of such information, the AAA shall immediately disclose it to the parties. If either party declines to waive the presumptive disqualification, the vacancy thus created shall be filled in accordance with the applicable provisions of these Rules.

18. Vacancies—If any Arbitrator should resign, die, withdraw, refuse or be unable or disqualified to perform the duties of his office, the AAA shall, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in the same manner as

that governing the making of the original appointment, and the matter shall be reheard by the new Arbitrator.

19. Time and Place of Hearing—The Arbitrator shall fix the time and place for each hearing. At least five days prior thereto the AAA shall mail notice of the time and place of hearing to each party, unless the parties otherwise agree.

20. Representation by Counsel—Any party may be represented at the hearing by counsel or by other authorized representative.

21. Stenographic Record—Any party may request a stenographic record by making arrangements for same through the AAA. If such transcript is agreed by the parties to be, or in appropriate cases determined by the arbitrator to be the official record of the proceeding, it must be made available to the arbitrator, and to the other party for inspection, at a time and place determined by the arbitrator. The total cost of such a record shall be shared equally by those parties that order copies.

22. Attendance at Hearings—Persons having a direct interest in the arbitration are entitled to attend hearings. The Arbitrator shall have the power to require the retirement of any witness or witnesses during the testimony of other witnesses. It shall be discretionary with the Arbitrator to determine the propriety of the attendance of any other persons.

23. Adjournments—The Arbitrator for good cause shown may adjourn the hearing upon the request of a party or upon his own initiative, and shall adjourn when all the parties agree thereto.

24. Oaths—Before proceeding with the first hearing, each Arbitrator may take an Oath of Office, and if required by law, shall do so. The Arbitrator may, in his discretion, require witnesses to testify under oath administered by any duly qualified person, and if required by law or requested by either party, shall do so.

25. Majority Decision—Whenever there is more than one Arbitrator, all decisions of the Arbitrators shall be by majority vote. The award shall also be made by majority vote unless the concurrence of all is expressly required.

26. Order of Proceedings—A hearing shall be opened by the filing of the oath of the Arbitrator, where required, and by the recording of the place, time and date of hearing, the presence of the Arbitrator and parties, and counsel if any, and the receipt by the Arbitrator of the Demand and answer, if any, or the Submission.

Exhibits, when offered by either party, may be received in evidence by the Arbitrator. The names and addresses of all witnesses and exhibits in order received shall be made a part of the record.

The Arbitrator may, in his discretion, vary the normal procedure under which the initiating party first presents his claim, but in any case shall afford full and equal opportunity to all parties for presentation of relevant proofs.

27. Arbitration in the Absence of a Party—Unless the law provides to the contrary, the arbitration may proceed in the absence of any party, who, after due notice, fails to be present or fails to obtain an adjournment. An award shall not be made solely on the default of a party. The Arbitrator shall require the other party to submit such evidence as he may require for the making of an award.

28. Evidence—The parties may offer such evidence as they desire and shall produce such additional evidence as the Arbitrator may deem necessary to an understanding and determination of the dispute. When the Arbitrator is authorized by law to subpoena witnesses and documents, he may do so upon his own initiative or upon the request of any party. The Arbitrator shall be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the Arbitrators and all of the parties except where any of the parties is absent in default or has waived his right to be present.

29. Evidence by Affidavit and Filing of Documents—The Arbitrator may receive and consider the evidence of witnesses by affidavit, but shall give it only such weight as he deems proper after consideration of any objections made to its admission.

All documents not filed with the Arbitrator at the hearing but which are arranged at the hearing or subsequently by agreement of the parties to be submitted, shall be filed with the AAA for transmission to the Ar-

bitrator. All parties shall be afforded opportunity to examine such documents.

30. Inspection—Whenever the Arbitrator deems it necessary, he may make an inspection in connection with the subject matter of the dispute after written notice to the parties who may, if they so desire, be present at such inspection.

31. Closing of Hearing—The Arbitrator shall inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies, the Arbitrator shall declare the hearings closed and a minute thereof shall be recorded. If briefs or other documents are to be filed, the hearings shall be declared closed as of the final date set by the Arbitrator for filing with the AAA. The time limit within which the Arbitrator is required to make his award shall commence to run, in the absence of other agreement by the parties, upon the closing of the hearings.

32. Reopening of Hearing—The hearings may be reopened by the Arbitrator on his own motion, or on the motion of either party, for good cause shown, at any time before the award is made, but if the reopening of the hearing would prevent the making of the award within the specific time agreed upon by the parties in the contract out of which the controversy has arisen, the matter may not be reopened, unless both parties agree upon the extension of such time limit. When no specific date is fixed in the contract, the Arbitrator may reopen the hearings, and the Arbitrator shall have 30 days from the closing of the reopened hearings within which to make an award.

33. Waiver of Rules—Any party who proceeds with the arbitration after knowledge that any provision or requirement of these Rules has not been complied with and who fails to state his objection thereto in writing, shall be deemed to have waived his right to object.

34. Waiver of Oral Hearing—The parties may provide, by written agreement, for the waiver of oral hearings. If the parties are unable to agree as to the procedure, the AAA shall specify a fair and equitable procedure.

35. Extensions of Time—The parties may modify any period of time by mutual agreement. The AAA for good cause may extend any period of time established by these Rules, except the time for making the award. The AAA shall notify the parties of any such extension of time and its reason therefor.

36. Serving of Notices—Each party to a Submission or other agreement which provides for arbitration under these Rules shall be deemed to have consented and shall consent that any papers, notices or process necessary or proper for the initiation or continuation of an arbitration under these Rules and for any court action in connection therewith or the entry of judgment on an award made thereunder, may be served upon such party (a) by mail addressed to such party or his attorney at his last known address, or (b) by personal service, within or without the state wherein the arbitration is to be held.

37. Time of Award—The award shall be rendered promptly by the Arbitrator and, unless otherwise agreed by the parties, or specified by the law, not later than thirty days from the date of closing the hearings, or if oral hearings have been waived, then from the date of transmitting the final statements and proofs to the Arbitrator.

38. Form of Award—The award shall be in writing and shall be signed either by the neutral Arbitrator or by a concurring majority if there be more than one Arbitrator. The parties shall advise the AAA whenever they do not require the Arbitrator to accompany the award with an opinion.

39. Award Upon Settlement—If the parties settle their dispute during the course of the arbitration, the Arbitrator, upon their request, may set forth the terms of the agreed settlement in an award.

40. Delivery of Award to Parties—Parties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail by the AAA, addressed to such party at his last known address or to his attorney, or personal service of the award, or the filing of the award in any manner which may be prescribed by law.

41. Release of Documents for Judicial Proceedings—The AAA shall, upon the written request of a party, furnish to such party at his expense certified facsimiles of any papers in the AAA's possession that may be required in judicial proceedings relating to the arbitration.

42. Judicial Proceedings—The AAA

is not a necessary party in judicial proceedings relating to the arbitration.

43. Administrative Fee—As a nonprofit organization, the AAA shall prescribe an administrative fee schedule to compensate it for the cost of providing administrative services. The schedule in effect at the time of filing shall be applicable.

44. Expenses—The expenses of witnesses for either side shall be paid by the party producing such witnesses.

Expenses of the arbitration, other than the cost of the stenographic record, including required traveling and other expenses of the Arbitrator and of AAA representatives, and the expenses of any witnesses or the cost of any proofs produced at the direct request of the Arbitrator, shall be borne equally by the parties unless they agree otherwise, or unless the Arbitrator in his award assesses such expenses or any part thereof against any specified party or parties.

45. Communication with Arbitrator—There shall be no communication between the parties and a neutral Arbitrator other than at oral hearings. Any other oral or written communications from the parties to the Arbitrator shall be directed to the AAA for transmittal to the Arbitrator.

46. Interpretation and Application of Rules—The Arbitrator shall interpret and apply these Rules insofar as they relate to his powers and duties. When there is more than one Arbitrator and a difference arises among them concerning the meaning or application of any such Rules, it shall be decided by majority vote. If that is unobtainable, either Arbitrator or party may refer the question to the AAA for final decision. All other Rules shall be interpreted and applied by the AAA.

ADMINISTRATIVE FEE SCHEDULE

Initial Administrative Fee: The initial administrative fee is $50.00 for each party, due and payable at the time of filing. No refund of the initial fee is made when a matter is withdrawn or settled after the filing of the Demand for Arbitration.

Additional Hearings: A fee of $25.00 is payable by each party for each second and subsequent hearing which is either clerked by the AAA or held in a hearing room provided by the AAA.

Postponement Fees: A fee of $25.00 is payable by a party causing a postponement of any scheduled hearing.

REGIONAL DIRECTORS

Boston, Richard M. Reilly, 294 Washington Street
Charlotte, John A. Ramsey, One Charlottetown Center
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No. 792 17:71

AMERICAN ARBITRATION ASSOCIATION RULES FOR EXPEDITED PROCEDURES

Editor's Note

The rules issued by the American Arbitration Association for expedited arbitration, under which parties relinquish some procedures of traditional arbitration in order to receive a quick decision, follow.

AMERICAN ARBITRATION ASSOCIATION EXPEDITED LABOR ARBITRATION RULES

1. Agreement of Parties—These Rules shall apply whenever the parties have agreed to arbitrate under them, in the form obtaining at the time the arbitration is initiated.

2. Appointment of Neutral Arbitrator —The AAA shall appoint a single neutral Arbitrator from its Panel of Labor Arbitrators, who shall hear and determine the case promptly.

3. Initiation of Expedited Arbitration Proceeding—Cases may be initiated by joint submission in writing, or in accordance with a collective bargaining agreement.

4. Qualifications of Neutral Arbitrator —No person shall serve as a neutral Arbitrator in any arbitration in which that person has any financial or personal interest in the result of the arbitration. Prior to accepting an appointment, the prospective Arbitrator shall disclose any circumstances likely to prevent a prompt hearing or to create a presumption of bias. Upon receipt of such information, the AAA shall immediately replace that Arbitrator or communicate the information to the parties.

5. Vacancy—The AAA is authorized to substitute another Arbitrator if a vacancy occurs or if an appointed Arbitrator is unable to serve promptly.

6. Time and Place of Hearing—The AAA shall fix a mutually convenient time and place of the hearing, notice of which must be given at least 24 hours in advance. Such notice may be given orally.

7. Representation by Counsel — Any party may be represented at the hearing by counsel or other representative.

8. Attendance at Hearings—Persons having a direct interest in the arbitration are entitled to attend hearings. The Arbitrator may require the retirement of any witness during the testimony of other witnesses. The Arbitrator shall determine whether any other person may attend the hearing.

9. Adjournments—Hearings shall be adjourned by the Arbitrator only for good cause, and an appropriate fee will be charged by the AAA against the party causing the adjournment.

10. Oaths—Before proceeding with the first hearing, the Arbitrator shall take an oath of office. The Arbitrator may require witnesses to testify under oath.

11. No Stenographic Record—There shall be no stenographic record of the proceedings.

12. Proceedings—The hearing shall be conducted by the Arbitrator in whatever manner will most expeditiously permit full presentation of the evidence and the arguments of the parties. The Arbitrator shall make an appropriate minute of the proceedings. Normally, the hearing shall be completed within one day. In unusual circumstances and for good cause shown, the Arbitrator may schedule an additional hearing, within five days.

13. Arbitration in the Absence of a Party—The arbitration may proceed in the absence of any party who, after due notice, fails to be present. An award shall not be made solely on the default of a party. The Arbitrator shall require the attending party to submit supporting evidence.

14. Evidence—The Arbitrator shall be the sole judge of the relevancy and materiality of the evidence offered.

15. Evidence by Affidavit and Filing of Documents—The Arbitrator may receive and consider evidence in the form of an affidavit, but shall give appropriate weight to any objections made. All documents to be considered by the Arbitrator shall be filed at the hearing. There shall be no post hearing briefs.

16. Close of Hearings—The Arbitrator shall ask whether parties have any further proofs to offer or witnesses to be heard. Upon receiving negative replies, the Arbitrator shall declare and note the hearing closed.

17. Waiver of Rules—Any party who proceeds with the arbitration after knowledge that any provision or requirement of these Rules has not been complied with and who fails to state his objections thereto in writing shall be deemed to have waived his right to object.

18. Servicing of Notices—Any papers or process necessary or proper for the initiation or continuation of an arbitration under these Rules and for any court action in connection therewith or for the entry of judgment on an Award made thereunder, may be served upon such party (a) by mail addressed to such party or its attorney at its known address, or (b) by personal service, or (c) as otherwise provided in these Rules.

19. Time of Award—The award shall be rendered promptly by the Arbitrator and, unless otherwise agreed by the parties, not later than five business days from the date of the closing of the hearing.

20. Form of Award—The Award shall be in writing and shall be signed by the Arbitrator. If the Arbitrator determines that an opinion is necessary, it shall be in summary form.

21. Delivery of Award to Parties—Parties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail by the AAA, addressed to such party at its last known address or to its attorney, or personal service of the award, or the filing of the award in any manner which may be prescribed by law.

22. Expenses—The expenses of witnesses for either side shall be paid by the party producing such witnesses.

23. Interpretation and Application of Rules—The Arbitrator shall interpret and apply these Rules insofar as they relate to his powers and duties. All other Rules shall be interpreted and applied by the AAA, as Administrator.

The AAA Has Made Special Arrangements To Reduce The Cost of Arbitration Under These Rules. Details Are Available At The AAA Regional Office Administering The Case.

REGIONAL DIRECTORS

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SEATTLE—720 Third Avenue
SYRACUSE—731 James Street
WASHINGTON — 1212-1214 Sixteenth Street, N.W.

FMCS ARBITRATION POLICIES, FUNCTIONS AND PROCEDURES

Editor's Note

Following is text of Federal Mediation and Conciliation Service arbitration policies, functions, and procedures, effective October 21, 1968.

Part 1404—Arbitration

Sec.

AUTHORITY: Secs. 1404.1 to 1404.13 issued under Sec. 202, 61 Stat. 153, as amended; 29 U.S.C. 172. Interpret or apply Sec. 3, 80 Stat. 250, Sec. 203, 61 Stat. 153; 5 U.S.C. 552, 29 U.S.C. 173.

SEC. 1404.1—ARBITRATION

The labor policy of the United States Government is designed to foster and promote free collective bargaining. Voluntary arbitration is encouraged by public policy and is in fact almost universally utilized by the parties to resolve disputes involving the interpretation or application of collective bargaining agreements. Also, in appropriate cases, voluntary arbitration or fact-finding are tools of free collective bargaining and may be desirable alternatives to economic strife in determining terms of a collective bargaining agreement. The parties assume broad responsibilities for the success of the private juridical system they have chosen. The Service will assist the parties in their selection of arbitrators.

SEC. 1404.2—COMPOSITION OF ROSTER MAINTAINED BY THE SERVICE

It is the policy of the Service to maintain on its roster only those arbitrators who are qualified and acceptable, and who adhere to ethical standards.

Applicants for inclusion on its roster must not only be well-grounded in the field of labor-management relations, but, also, usually possess experience in the labor arbitration field or its equivalent. After a careful screening and evaluation of the applicant's experience, the Service contacts representatives of both labor and management since arbitrators must be generally acceptable to those who utilize its arbitration facilities. The responses to such inquiries are carefully weighed before an otherwise qualified arbitrator is included on the Service's roster. Persons employed full time as representatives of management, labor, or the Federal Government are not included on the Service's roster.

The arbitrators on the roster are expected to keep the Service informed of changes in address, occupation or availability, and of any business connections with or of concern to labor or management. The Service reserves the right to remove names from the active roster or to take other appropriate action where there is good reason to believe that an arbitrator in not adhering to these regulations and related policy.

SEC. 1404.3—SECURITY STATUS

The arbitrators on the Service's roster are not employees of the Federal Government, and, because of this status, the Service does not investigate their security status. Moreover, when an arbitrator is selected by the parties, he is retained by them and, accordingly, they must assume complete responsibility for the arbitrator's security status.

SEC. 1404.4 — PROCEDURES; HOW TO REQUEST ARBITRATION SERVICES

The Service prefers to act upon a joint request which should be addressed to the Director of the Federal Mediation and Conciliation Service, Washington, D.C. 20427. In the event that the request is made by only one party, the Service may act if the parties have agreed that either of them may seek a panel of arbitrators, either by specific ad hoc agreement or by specific language, in the applicable collective bargaining agreement. A brief statement of the nature of the issues in dispute should accompany the request, to enable the Service to submit the names of arbitrators qualified for the issues involved. The request should also include a copy of the collective bargaining agreement or stipulation. In the event that the entire agreement is not available, a verbatim copy of the provisions relating to arbitration should accompany the request.

SEC. 1404.5—ARBITRABILITY

Where either party claims that a dispute is not subject to arbitration, the Service will not decide the merits of such claim. The submission of a panel should not be construed as anything more than compliance with a request.

SEC. 1404.6—NOMINATIONS OF ARBITRATORS

(a) When the parties have been unable to agree on an arbitrator, the Service will submit to the parties the names of seven arbitrators unless the applicable collective bargaining agreement provides for a different number, or unless the parties themselves request a different number. Together with the submission of a panel of suggested arbitrators, the Service furnishes a short statement of the background, qualifications, experience and per diem fee of each of the nominees.

(b) In selecting names for inclusion on a panel, the Service considers many factors, but the desires of the parties are, of course, the foremost consideration. If at any time both the company and union suggest that a name or names be omitted from a panel, such name or names will be omitted. If one party only (a company or a union) suggests that a name or names be omitted from a panel, such name or names will generally be omitted, subject to the following qualifications: (1) If the suggested omissions are excessive in number or otherwise appear to lack careful consideration they will not be considered; (2) all such suggested omissions should be reviewed after the passage of a reasonable period of time. The Service will not place names on a panel at the request of one party unless the other party has knowledge of such request and has no objection thereto, or unless both parties join in such request. If the issue described in the request appears to require special technical experience or qualifications, arbitrators who possess such qualifications will, where possible, be included in the list submitted to the parties. Where the parties expressly request that the list be composed entirely of technicians, or that it be all-local or non-local, such request will be honored, if qualified arbitrators are avilable.

(c) Two possible methods of selection from a panel are—(1) at a joint meeting, alternately striking names from the submitted panel until one remains, and (2) each party separately advising the Service of its order of preference by numbering each name on the panel. In almost all cases, an arbitrator is chosen from one panel of names. However, if a request for another panel is made, the Service will comply with the request, providing that additional panels are permissible under the terms of the agreement or the parties so stipulate.

(d) Subsequent adjustment of dis-

putes is not precluded by the submission of a panel or an appointment. A substantial number of issues are being settled by the parties themselves after the initial request for a panel and after selection of the arbitrator. Notice of such settlement should be sent promptly to the arbitrator and to the Service.

(e) The arbitrator is entitled to be compensated whenever he receives insufficient notice of settlement to enable him to rearrange his schedule of arbitration hearings or working hours. In other situations, when an arbitrator spends an unusually large amount of time in arranging or rearranging hearing dates, it may be appropriate for him to make an administrative charge to the parties in the event the case is settled before hearing.

SEC. 1404.7 — APPOINTMENT OF ARBITRATORS

(a) After the parties notify the service of their selection, the arbitrator is appointed by the Director. If any party fails to notify the Service within 15 days after the date of mailing the panel, all persons named therein shall be deemed acceptable to such party. The Service will make a direct appointment of an arbitrator based upon a joint request, or upon a unilateral request when the applicable collective bargaining agreement so authorizes.

(b) The arbitrator, upon appointment notification, is requested to communicate with the parties immediately to arrange for preliminary matters such as date and place of hearing.

SEC. 1404.8 — STATUS OF ARBITRATORS AFTER APPOINTMENT

After appointment, the legal relationship of arbitrators is with the parties rather than the Service, though the Service does have a continuing interest in the proceedings. Industrial peace and good labor relations are enhanced by arbitrators who function justly, expeditiously and impartially so as to obtain and retain the respect, esteem and confidence of all participants in the arbitration proceedings. The conduct of the arbitration proceedings is under the arbitrator's jurisdiction and control, subject to such rules of procedure as the parties may jointly prescribe. He is to make his own decisions based on the record in the proceedings. The arbitrator may, unless prohibited by law, proceed in the absence of any party who, after due notice, fails to be present or to obtain a postponement. The award, however, must be supported by evidence.

SEC. 1404.9—PROMPT DECISION

(a) Early hearing and decision of industrial disputes is desirable in the interest of good labor relations. The parties should inform the Service whenever a decision is unduly delayed. The Service expects to be notified by the arbitrator if and when (1) he cannot schedule, hear and determine issues promptly, and (2) he is advised that a dispute has been settled by the parties prior to arbitration.

(b) The award shall be made not later than thirty (30) days from the date of the closing of the hearing, or the receipt of a transcript and any post-hearing briefs, or if oral hearings have been waived, then from the date of receipt of the final statements and proof by the arbitrator, unless otherwise agreed upon by the parties or specified by law. However, a failure to make such an award within thirty (30) days shall not invalidate an award.

SEC. 1404.10 — ARBITRATOR'S AWARD AND REPORT

(a) At the conclusion of the hearing and after the award has been submitted to the parties, each arbitrator is required to file a copy with the Service. The arbitrator is further required to submit a report showing a breakdown of his fees and expense charges so that the Service may be in a position to check conformance with its fee policies. Cooperation in filing both award and report within fifteen (15) days after handing down the award is expected of all arbitrators.

(b) It is the policy of the Service not to release arbitration decisions for publication without the consent of

both parties. Furthermore, the Service expects the arbitrators it has nominated or appointed not to give publicity to awards they may issue, except in a manner agreeable to both parties.

SEC. 1404.11 — FEES OF ARBITRATORS

(a) No administrative or filing fee is charged by the Service. The current policy of the Service permits each of its nominees or appointees to charge a per diem fee for his services, the amount of which is certified in advance by him to the Service. Each arbitrator's maximum per diem fee is set forth on his biographical sketch which is sent to the parties at such time as his name is submitted to them for consideration. The arbitrator shall not change his per diem fee without giving at least ninety (90) days advance notice to the Service of his intention to do so.

(b) In those rare instances where arbitrators fix wages or other important terms of a new contract, the maximum fee noted above may be exceeded by the arbitrator after agreement by the parties. Conversely, an arbitrator may give due consideration to the financial condition of the parties and charge less than his usual fee in appropriate cases.

SEC. 1404.12—CONDUCT OF HEARINGS

The Service does not prescribe detailed or specific rules of procedure for the conduct of an arbitration proceeding because it favors flexibility in labor relations. Questions such as hearing rooms, submission of prehearing or post-hearing briefs, and recording of testimony, are left to the discretion of the individual arbitrator and to the parties. The Service does, however, expect its arbitrators and the parties to conform to applicable laws, and to be guided by ethical and procedural standards as codified by appropriate professional organizations and generally accepted by the industrial community and experienced arbitrators.

In cities where the Service maintains offices, the parties are welcome upon request to the Service to use its conference rooms when they are available.

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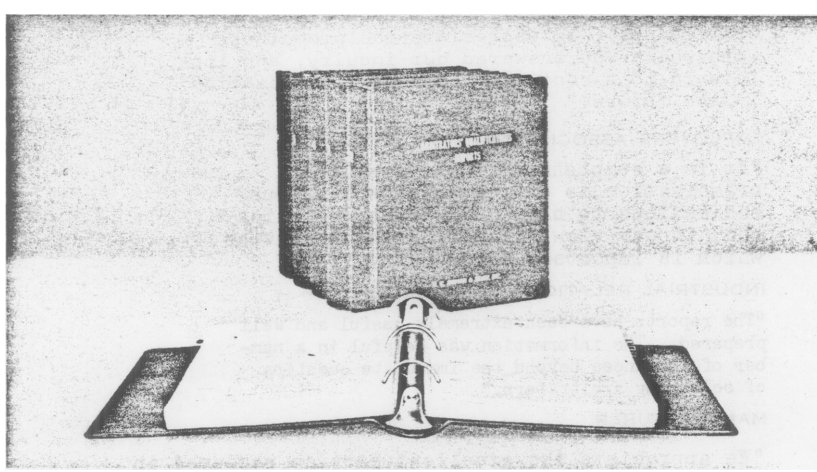

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REPRESENTATIVE COMMENTS

PROMINENT ARBITRATOR

"It is a pleasure to cooperate with you in furnishing biographical data and case history. The matter of the selection of an arbitrator is no easy one. Any assistance that can be rendered in connection therewith is certainly worthwhile."

LEGAL COUNSEL

"Our thanks for your most comprehensive and informative evaluation of the panel of arbitrators. We appreciate the promptness with which you answered our inquiry, and look forward to a continuing pleasant association in the future."

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"It is a comprehensive service, the organization is extremely conscientious and anxious to help its client companies and, in our view, is performing a service which is important to industry."

INDUSTRIAL RELATIONS COUNSELOR

"The reports have been extremely useful and well prepared. The information was helpful in a number of instances beyond the immediate question of selecting arbitrators."

MANUFACTURER

"We appreciate the excellent service rendered in assisting us to select a qualified arbitrator."

EVERY EXPERIENCED TRIAL LAWYER is keenly aware of the difference between trying a case before a judge whose personality, inclinations and abilities are known to him as compared with a trial before a judge who is virtually a total stranger, and of the difference between the trial of cases before two different judges both of whom are well known to him. Judges differ from one another in as many ways as do people of any other professional class, differing in learning, intelligence, experience, general knowledge and in temperament, and such differences exist as between two judges whom we may consider as being of equal judicial ability. And still, though these differences are readily ascertainable and often obvious, it is remarkable how few of the lawyers appear to take these factors into consideration when appearing in court. While obvious attempts to flatter the court or to ingratiate one's self into the good graces of the court have a favorable reaction only in very rare instances, it is equally true that counsel can gain the respect and confidence of the judge by able advocacy and the appreciation of the court by adapting his trial methods to the personal equation of the particular judge before whom he is appearing. Therefore it is the custom of many able advocates, when about to try a cause or make an argument before a strange judge, to learn as much about his judicial personality as possible, frequently supplementing this by attendance in his court as a spectator and observer. * * *(*"Planning and Trying Cases"* -- *Charles W. Fricke, Judge Superior Court, Los Angeles County, California – West Publishing Company, St. Paul, Minn.)*

* * * *

How much more true of arbitrators and of the arbitration process are Judge Fricke's recommendations as to courts and the judicial process!! The arbitrator is judge of law and of fact, - he is both judge and jury. We believe that our Arbitrators' Qualifications Reports Service supplies vital information of this character not elsewhere readily obtainable. We invite your consideration of this conditionally-privileged service in the light of your requirements.

INSPECTION OFFER

Available to management and counsel for a 15-day free trial. No obligation incurred if reports are returned at end of trial period.

Name: Doe, John A.

Education: Univ. of Chicago, A.B., 1922; A.M., 1924; Yale Univ., LL.B., 1929; Harvard Univ., J.S.D., 1932

Occupation: Professor of Law, University of Midwest, Illinois

ANALYSIS OF RECORD

Born 1900. Permanent arbitrator, A.B.C. Corp. and UAW (since 1958). Formerly, public member, RWSB (1950-52); Industrial Relations Director, C.D. Corp. (1940-46); panel member, Federal Mediation & Conciliation Service, American Arbitration Assn.; member, National Academy of Arbitrators, Industrial Relations Research Assn.; served in 250 cases (since 1949).

Subjects Treated
(Does not represent caseload)*

Awards to Employer	Awards to Union
- Discharge for theft of property*	- Mitigation of discharge a/c failure to
- Seniority vs. lateral transfer (22 LA 992)	report (8 LA 1384; 63-1 ARB 4170)
- Duty of employee to mitigate damages (8 ALAA 30519; 61-1 ARB 8494)	- Senior's right to work during vacation shutdown*
- Right to change job content (24 LA 897; 64-1 ARB 2985)	- Right of employee to refuse to work with untrained employee (8 ALAA 34609)
- Right to hire from outside*	- Revision of incentive standards*

* Private Awards

Management Reaction: 42 approvals; 10 for any case; 28 for non-technical disputes; 4 for interpretation cases.

7 disapprovals; 5 critical of decisions in rates of pay cases; 2 in job evaluation disputes.

Conducts orderly hearing; does not permit introduction of irrelevant data (3 dissents); gives no indication of bias during hearing or in award; does not compromise (4 dissents); does not put burden of proof improperly on employer (2 dissents); observes restrictions of contract language (1 dissent); gives weight to past practice when contract is ambiguous (2 dissents); confines himself to terms of submission agreement; adheres to the record in rendering opinion and award (1 dissent).

Other comment: Excellent arbitrator (repeated). Adept at evaluating testimony of witnesses. Gives weight to pertinent citations. Does not try to remedy contract deficiencies by imaginative interpretation. Qualified for appointment as permanent arbitrator in various industries.

Contrariwise: May compromise on minor issues. Impatient in approach. Decision in technical matter was poorly reasoned with conflicting conclusions.

Consensus: Qualified with reservations on technical issues. Special Report: Views his authority as broad. Recognizes reserved rights doctrine. Requires due process in discharge cases. Prefers a courteous, professional approach with thorough documentation and careful explanation as evidence is presented. Post-hearing briefs recommended. Our firm's experience in several non-technical cases before him has been satisfactory.

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TAB C

DURING THE HEARING

Tab C is a comprehensive guide to the arbitration hearing itself. Beginning with the "Customery Order of Arbitration Hearings" and going through "How to alienate Arbitrators and Lose Cases," Tab C details step by step the methods and procedures used in arbitration hearings.

The first section, "Caveat: Emphasis on Adversary Methods and Procedures in arbitration" indicates overall attitude of this Tab: courtroom procedures are to some extent applicable to arbitration hearings, and an intelligent adaption of these procedures can be very productive. For example, one of the next sections, "The Hearing Planning Process," applies the skills used in preparing for a trial to planning an arbitration hearing. First the section poses a number of questions designed to determine the correct stragegy for a specific hearing. Second, a checklist for preparing for the hearing based on that strategy is presented.

Some general guidelines for advocates behavior during the hearing are given. It is followed by a series of sections to be used in selecting and preparing witnesses, including instructions for the witnesses, and suggestions for examination questions.

The next four sections all deal directly with the application of the procedures for advocates in arbitration hearings; "Persuasion in the Hearing," "Direct Examination," "Cross-Examination," "Objections," and "Closing Arguments."

The next two sections deal with contract interpretation and just cause in grievance disputes. A chart indicating the criteria by which arbitrators decide contract interpretation cases is presented.

The final two sections in this Tab fall under the heading of "A Word to the Wise." Both list mistakes which advocates make that hurt their position by alienating the arbitrator.

CUSTOMARY ORDER OF ARBITRATION HEARING*

1. Definition of the Issues (writing of submission agreement): stipulation of agreed upon facts; statement of facts in contention.

2. Oath of arbitrator (considered waived if not requested).

3. Agreement on order of presentation, or stipulation by arbitrator of order of presentation.

4. Opening Statement.

5. Presentation of case by initiating party:
   a. direct examination of witnesses, followed by opposing advocate's cross-examination;
   b. presentation of information, exhibits, or data.

6. Presentation of case by opposing party:
   a. direct examination of witness, cross-examination;
   b. presentation of information, exhibits or data.

7. Rebuttal--the final rebuttal statement is by the initiating party.

8. Questions by arbitrator, if desired.

9. Visit to the plant (if arbitrator wishes to visit the site of the issues).

10. Summation by advocates for both sides. (Usually the order is the reverse of the opening statements.)

11. Subsequent opportunity for information (arbitrator may ask the parties to come back prepared to provide additional data or argument).

12. Post-hearing briefs may be provided at the request of one or both of the parties, or on the instruction of the arbitrator:
    a. They are provided either by simultaneous presentation within a stated number of days, or by exchange and rebuttal.
    b. They are usually mailed simultaneously within a set number of days with a copy to the opposition. Rebuttal, if any, is within a set number of days after the briefs have been simultaneously mailed.
    c. They should be <u>short</u>; they should <u>refer to facts disclosed</u> at the hearing; they should <u>emphasize remedy</u>.

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*This is the customary order which may be waived either by the arbitrator's initiative or at the request of either party.

CAVEAT: EMPHASIS OF ADVERSARY METHODS AND PROCEDURES IN ARBITRATION

To what extent are legal rules and procedures applicable to grievance arbitration hearings? Although arbitration is judicial in form in that it is a hearing presided over by a "trier of fact," arbitration hearings are not governed by a rigid code of legal tradition or exact rules of procedure. Arbitration, regardless of the use of lawyer-advocates, and sometimes lawyer-arbitrators, is still very different from a trial in a court of law.

In a trial, the two contesting parties either have no relationship other than being involved in alleged misconduct, or, if they have a relationship such as being parties to a contract, the trial has resulted from a breach or an act which effectively terminated that relationship. By contrast, grievance arbitration is only one episode in a continuing relationship between labor and management, and emphasizes remedying the breach so that the labor-management relationship can continue. These are the basic reasons for not arbitrating in the spirit and form of adversary litigation: 1) such tactics usually are unnecessary; and 2) they could also severely damage and disrupt the future relationship between the parties. "For the parties' goal in using the process is primarily to further their goal of uninterrupted production under the agreement."[1]

However, no matter how the rules and proceedings of courts may be looked upon by the layman, they originated through human experience and the concern for fairness, equity and logic. Thus, even though arbitration is

not legally governed by those rules, their intelligent application should abet the quality of justice produced in arbitration hearings.

The following sections draw on the experience and acumen of lawyers and the courts, but must be read with an eye to their adaptation to the needs and rules of arbitration hearings. To a large extent, the articles have been written or edited so that the adaptation has already been done. This introductory section sounds a warning that 1) the two proceedings--an arbitration hearing and a trial in a court of law--diverge, and 2) advocates should carefully decide when and when not to emphasize adversary methods in arbitration.

For example, the laws governing objections in a trial court are not legally binding on an arbitrator. Still, arbitrators are usually fair and reasonable people who will recognize when an objection is based on the concern for justice. If some evidence violates the hearsay canons of lawyers, and an objection is presented with explanation why it should be sustained, the arbitrator will listen. The basic distinction is that in a court of law, it sometimes suffices to say, "I object on the grounds that it is hearsay," (or "leading the witness" or "non-material") whereas in an arbitration hearing, the reason, not the category of objection, should be presented cogently and persuasively or the arbitrator will not accept it.

It is worth noting that an excessively legal demeanor may harm an advocate's case. Arbitrators, who tend to be fully conscious that a hearing is not a proceeding in a court of law, may regard the injection of courtroom mannerisms as either condescending or merely delaying and counterproductive. Remember, as an expert, the arbitrator can evaluate dubious evidence better than a jury of laymen.

SOME GENERAL GUIDELINES FOR ADVOCATES' BEHAVIOR DURING ARBITRATION HEARINGS

1. Do not shout or speak more loudly than necessary. Never use provocative words or epithets which create bad impressions and cloud rather than clarify issues.

2. Strive for clarity and coherence in your oral presentation. Avoid repetition; if a colleague has stated facts or arguments, do not relate them.

3. Avoid mixing presentation of facts and arguments, which could confuse and may weaken your case. **Witnesses can only supply facts, not arguments.**

4. Do not interrupt the opposing party's statements or presentation of evidence. Wait until you cross-examine opposing witnesses. This also protects you and your witnesses from interruption.

5. Have witnesses wait in the room or in an adjacent room so they will be ready when called. **Decide if witnesses should be sequestered.**

6. Prove your case by your own witnesses. Do not try to establish it by evidence gleaned from opposing witnesses. Cross-examination is a dangerous weapon: Never ask a question unless you know the answer in advance. Be prepared to prove that a contrary answer is false.

7. Keep cross-examination <u>short</u>. Do not unduly prolong cross-examination in attempts to get damaging admissions. The more questions asked, the more opportunity a hostile witness has to give adverse testimony.

8. Each party has the right to ask leading questions when cross-examining hostile witnesses. Save time by asking your witnesses leading questions, excepting at points where disputed facts are involved. Testimony on controverted matters should be brought out by questions which do not suggest the answer, if possible.

9. During the hearing, do not mention nor refer to old and long-settled former frictions or acts of misconduct by your opponent unless the matters brought up are clearly relevant to the issue at present in dispute.

10. Do not make picky, whimsical, or unnecessary objections to testimony or arguments of the other party which waste time and confuse issues. The arbitrator will recognize weak testimony such as hearsay or immaterial and irrelevant statements without repetitive interruptions.

11. Make advance provision for a public court reporter if you have extraordinarily long or highly technical matters to present, or if you wish for

any reason to preserve a reliable record of the hearing. Thus, it will insure that the arbitrator will have all the evidence and will not have to rely on memory. If a case is relatively simple, ask the arbitrator to rely on notes.

THE HEARING PLANNING PROCESS*

Introduction

Before the first witness is called, a number of decisions must be made. These would include:

1) What points should be proved in order to establish your case?
2) Which witness(es) should testify on each point to be proved? (Documents or data can only be entered by witnesses' testimony.)
3) In which order will the witnesses testify?
4) What will be the order of the testimony of each witness?
5) What visual aids will be used in connection with the testimony of the various witnesses?

The answer to each of these questions first requires a variety of strategic sub-decisions. Each of these involves choosing from among a number of possible alternatives. Each decision must be made with a view toward accomplishing the aims of direct examination--i.e.,

1) Establishing all the essential elements of the case and
2) Persuading (convincing) the arbitrator of the truth and accuracy of the testimony.

The following checklist is presented to assist you in preparing for a hearing. The questions illustrate the strategy of sub-decisions to which we have referred.

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*Here are a few terms with which not everyone may be familiar:
Direct Examination: the first questioning of a witness, by the advocate representing the side which has called that witness.
Cross-examination: The questioning of the witness by the opposing advocate on the testimony given in direct examination.
Redirect Examination: The second questioning of the witness by the advocate who called that witness, after the cross-examination.
Re-cross-examination: The second questioning of the witness by the opposing advocate after re-direct examination. Re-direct examination and re-cross-examination can go on ad infinitum, but it is rarely necessary or wise to always try for "the last word."

Checklist of Questions to be Answered in Preparing for the Hearing

1. *Points to cover:*
   a. What are the key elements of your case?
   b. On what additional factors is testimony needed to create an image which will persuade the arbitrator to decide in your favor?
2. *Choice of witnesses:*
   a. What witnesses can potentially establish the required facts and create the desired image?
   b. What is your assessment of the credibility and persuasiveness of each witness in terms of background, experience, reputation, personality and competence to testify?
3. *Order of witnesses:*
   a. Should a witness relate the complete story? If so, which witnesses are in a position to relate the complete story?
   b. Should witnesses offer cumulative testimony? If so, should their appearances as witnesses be interspersed with other witnesses during the trial? Or should they be put on the witness stand consecutively? What may be the effect of interspersing them? What may be the effect of having them appear consecutively?
   c. To what extent is repetitive testimony desirable or undesirable from the arbitrator's standpoint? In what way can you present cumulative testimony so that it will not be boring?
   d. Which witnesses offer important testimony but suffer from limited pursuasive appeal? What should their function be, and at what point in the order of witnesses should they testify?

e. Which witnesses have a strong credibility potential but cannot offer important testimony? What should their function be, and at what point in the order of witnesses should they testify?

f. Should witnesses be called in chronological order?

4. *Order of each witness' testimony:*

a. Should the purpose for which witnesses are called determine the order in which they relate testimony, i.e., are witnesses being used to relate all or most of the entire story or are they being called to reinforce or emphasize just a particular portion?

b. If a witness is being used to relate the entire story or a major portion, should the testimony be in chronological order or focus immediately on the important facts which are needed or desired?

c. If a witness' function is to reinforce or emphasize particular portions of the story, should the witness rely upon the concept of the first impressions and testify about specific portions of the story immediately after background and sequence-setting questions? Has prior testimony really made clear to the arbitrator the significance of the portion of the story on which the witness is testifying?

5. *Visual aids:*

a. What is the function of real or tentative evidence, including visual aids?

b. Would visual aids, used either in place of or in conjunction with oral testimony, be preferable to simply using the oral testimony of a witness?

Before the hearing, you must make the foregoing strategic decisions. In reaching each decision go beyond your own intuition and consider the following section which covers what various psychologists and lawyers say about persuasion.

PREPARING WITNESSES*

The better the job of preparing a witness for an arbitration hearing, the greater the credibility (believability) of your witness, and the closer you will be to persuading the arbitrator of the rightness of your case. In a normal arbitration hearing each witness will be brought in to make a few fundamental points, and need not feel compelled to go beyond that.

1. Points to be made - At an early stage in the preparation for arbitration, develop the main arguments to be made. Once these have been identified, then develop the necessary evidence and testimony. To deliver testimony, you need witnesses. Each witness should be brought into the hearing to make some clearly defined point(s). Witness should have a general idea what point their testimony will stress.
2. Select qualified witnesses - Pick out witnesses who are the best qualified (of those available) to testify. Ask questions which will establish their qualifications to testify.
3. Prepare questions to develop qualifications and make points - Once the points to be developed have been prepared and the witness selected, write the questions to be asked. Give the witness a "dry run" on the exact questions to be asked, so their answers will be known ahead of time.
4. Prepare the witness for possible cross-examination - It is possible that the other side will attempt to develop some point of theirs

*Source: The University of Wisconsin, School for Workers.

from your witness. Instruct witnesses to answer questions honestly and factually; they should not give opinions on cross-examination, only facts. The opposing advocate may attempt to confuse a witness or contradict earlier testimony. If witnesses are confused, they should say so, or ask for a rephrasing of the question. In many instances, certain questions are to be expected, so give the witness some advance warning. Tell witnesses to look the questioner in the eye, don't mumble, and act relaxed. They should take enough time to give clear and unevasive answers.

SUGGESTIONS FOR QUESTIONING WITNESSES IN AN ARBITRATION CASE

Information needed from the Witness	Questions which will put that Information on the Record
. Name	What is your name?
. Position	What is your position the agency?
. Relationship to case	Are you acquainted with the grievant?
. Expertise--if an expert witness	In what capacity?
. Length of employment (if necessary)	How long have you been with Public Utilities Company?
. Knowledge of grievant	Were you present when the grievant refused to obey the order given by Foreman Johnson to the grievant?
. Observed incident involving grievant	Would you tell the arbitrator what happened?
. Location of the incident	Exactly where did this occur?
. Time	What time was it?

With experience much of this will become routine and you will not need this much detail. Remember that the bulk of the presentation should be facts and evidence. Argument, most of the time, is a minor part of the case.

ORDER OF WITNESS GUIDE

Name	Expected to establish	Planned (or probable cross-exam) questions
I. For Management:		
II. For Union:		

INSTRUCTIONS FOR WITNESSES*

You, as a witness in a hearing, have a very important job to do since, in order for the arbitrators to make a correct and wise decision, he must have all of the evidence put before him truthfully.

You already know that you should tell nothing but the truth. But there are two ways to tell the truth: one is in a halting, stumbling, hesitant manner, which makes the arbitrator doubt that you are telling all of the facts in a truthful way; the other is confident and straightforward, which shows that you have faith in what you are saying. You help yourself, the party you are testifying for, and the arbitrator by giving your testimony in this last way.

To assist you, here is a list of time-proven hints and aids, which, if followed, will make your testimony much more effective.

Suggestions to a Witness

1. As a witness, try to visit the scene before the hearing. Stand on all corners and become familiar with the place. Close your eyes and try to picture the scene, the objects there, and the distances.
2. If possible, before you testify, visit a hearing and listen to other witnesses. This will make you familiar with a hearing, and help you to understand what will happen when you give your testimony.
3. Wear clean clothes. Dress conservatively.

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*SOURCE: Adapted from The Practical Lawyer

4. Do not chew gum while testifying or taking the oath.
5. Don't memorize what you are going to say.
6. Be serious at all times. Avoid laughing and talking about the case in the halls, restrooms, or any public place.
7. Talk to the arbitrator. Look at the arbitrator most of the time and speak frankly and openly as you would to any friend or neighbor. Do not cover your mouth with your hand. Speak clearly and loudly enough so that everyone can hear you easily.
8. Listen carefully to the questions asked of you. No matter how nice the other advocate may seem on cross-examination, he may be trying to hurt you as a witness. Understand the question. Have it repeated if necessary; then give a thoughtful, considered answer. Do not offer a snap answer without thinking. You can't be rushed into answering, although, of course, it would look bad to take so much time on each question that the arbitrator might think you were making up an answer.
9. Explain your answers if necessary. This is better than a simple "Yes" or "No." Give an answer in your own words. If a question can't be truthfully answered with a "Yes" or "No," you have a right to explain the answer.
10. Answer directly and simply only the question asked, and then stop. Do not volunteer information not actually asked.
11. If your answer was wrong, correct it immediately.
12. If your answer was not clear, clarify it immediately.

13. The arbitrator only wants facts; not hearsay, or your conclusions or opinions. You usually can't testify about what someone else told you.

14. Don't say, "That's all of the conversation," or "Nothing else happened." Say instead "That's all I recall," or "That's all I remember happening." It may be that after more thought or another question you will remember something important.

15. Be polite always, even to the other advocate.

16. Don't be a smart aleck or a cocky witness! This will lose you the respect of the arbitrator.

17. You are sworn to tell the truth. Tell it. Every material truth should be readily admitted, even if not to the advantage of the party for whom you testify. Do not stop to figure out whether your answer will help or hurt your side. Just answer the questions to the best of your memory.

18. Don't try to think back to what was said in a statement you made. When a question is asked, visualize what you actually saw and answer from that. The arbitrator may think a witness is lying if the story seems too "pat" or memorized, or if several questions are answered in the same language.

19. Do not exaggerate.

20. Stop instantly when the arbitrator interrupts you, or when the other advocate objects to what you say. Do not try to sneak your answer in.

21. Give positive, definite answers when at all possible. Avoid saying "I think," "I believe," "In my opinion." If you do not know, say so; don't make up an answer. You can be positive about the important things that you naturally would remember. If asked about little details that a person naturally would not remember, it is best to just say that you don't remember. But don't let the cross-examiner get you in the trap of answering question after question with "I don't know."
22. Don't act nervous. Avoid mannerisms which will make the arbitrator think you are scared, or not telling the truth or all you know.
23. Above all--this is most important--do not lose your temper. Testifying for a length of time is tiring. It causes fatigue. You will recognize fatigue by certain symptoms: (a) tiredness, (b) crossness, (c) nervousness, (d) anger, (e) careless answers, and (f) the willingness to say anything or answer any questions in order to leave the witness stand. When you feel these symptoms, recognize them and strive to overcome fatigue. Remember that some advocates on cross-examinations will try to wear you out until you will lose your temper and say things that are incorrect or that will hurt you or your testimony. Do not let this happen.
24. If you do not want to answer a question, do not ask the arbitrator whether you must answer it. If it is an improper question, your advocate will take it up with the arbitrator for you. Don't ask the arbitrator for advice.

25. Don't look at your advocate or at the arbitrator for help in answering a question. You are on your own. If the question is improper, your advocate will object. If the arbitrator then says to answer it, do so.

26. Do not "hedge" or argue with the other advocate.

27. Do not nod your head for a "Yes" or "No" answer. Speak out clearly. The court reporter must hear.

28. If the question is about distances or time and your answer is only an estimate, be sure that you say it is only an estimate. Be sure to think about speeds, distances, and intervals of time before testifying, and discuss the matter with your advocate so that your memory is reasonable.

29. When you leave the witness stand after testifying, wear a confident expression, not a downcast one.

30. There are several questions that are known as "trick questions." If you answer them the way the other advocate hopes you will, your answer may sound bad to the arbitrator. Here are two of them:
(a) "Have you talked to anybody about this case?" If you say "No," the arbitrator knows that is not right because good advocates always talk to a witness before they testify. If you say "Yes," the advocate may try to infer that you were told what to say. The best thing to do is to say very frankly that you talked to whomever you have--advocate, party to the dispute, etc.--and that you were just asked what the facts were. All you do is tell the truth.

(b) "Are you getting paid to testify in this case?" The advocate asking this hopes your answer will be "Yes," thereby inferring that you are being paid to say what your side wants. Your answer should be something like: "No," I am not getting paid to testify. I am only getting compensation for my time off from work, and the expense (if any) it is costing me."

31. Go back, now, and reread these suggestions so you will have them firmly in your mind. We hope they won't confuse you. We hope they will help. They aren't to be memorized. Ask the advocates about anything you don't understand. You will find there is really no reason why you should be nervous while testifying. If you relax and remember that you are just talking to some neighbors, you will get along fine.

PERSUASION IN THE HEARING: ATTENTION AND COMPREHENSION

I. Attention. Obviously before a message can be understood and reacted to, it has to be received. Studies of the process of attention distinguish between the factors necessary for attention-getting and those critical for attention-holding. The uniqueness of the communicator--voice, appearance, style, and the ways he is introduced--increase attention-getting. Similarly, the opening rhetoric of the message will increase attention: novelty, the medium through which it is presented, its salience against a background of competing stimuli all affect attention-getting.

On the other hand, to hold attention, communication must be at a level of complexity appropriate to the audience. It must be not so simple as to bore them or so complex as to be incomprehensible. Beyond some point, the more effort required to attend to the message, the less it will be attended. External situational distractions and some internal sources of distraction (anxiety, daydreaming, etc.) also compete with focused attention.

II. Comprehension. Comprehension of the message is influenced by aspects of its organization and structure, clarity and vividness of presentation, built-in summaries, restatement, rehearsal opportunities, and the use of the audience's language. The recipient's intelligence, relevant experience, openmindedness, "cognitive tuning set" (readiness to pass the information on to be entertained, to be tested, etc.),

all determine whether the material is comprehended. Comprehension can also be severely limited by attitude; biases or prejudices will hinder comprehension. 1/

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[1]Zimbardo-Ebbensen, *Influencing Attitudes & Changing Behavior* (pp. 18-19).

EVIDENCE

Arbitrators are not usually bound by legal rules of evidence, unless provided by statutes or special arbitration agreements. The application of technical rules of evidence might prevent the parties from including all facts. Thus arbitrators usually hear all evidence which each party believes pertinent. An arbitrary refusal to accept all relevant evidence is grounds for vacating an award. However, arbitrators may rule during the hearing or in the decision against the propriety of specific evidence.

If the arbitrator knows that a type of evidence is unreliable, misleading or prejudicial, and therefore inadmissible in a court of law, the evidence will probably not influence the arbitrator's decision.

I. Procedural Protections

Most types of evidence are admissible in arbitration proceedings, regardless of the weight given them by the arbitrator. But some types are either inadmissible or limited under specific provisions because of certain common law rules which must be observed in arbitration proceedings.

1. *Right to cross-examination:*

An arbitrator will not allow evidence to be submitted if the other party is not allowed to see it. The parties not only have the right to see or hear evidence but also to cross-examine witnesses. Any new data submitted in post-hearing briefs is grounds for a new hearing.

Deviations from normal procedure (such as affidavits from people unable to attend the hearing) may result in the arbitrator disregarding the evidence.

2. *Withholding evidence until hearing:*

Parties must be allowed access to all exhibits in order to prepare defense or rebuttal. Withholding of previously-known evidence until the hearing is highly discouraged.

3. *Outside testimony:*

Some cases are helped by the testimony of outside persons. Arbitrators often restrict such testimony (especially "character witness") unless the parties agree to its admission. However, testimony by experts knowledgeable about witnesses (i.e., doctors) or plant operations is sometimes essential.

4. *Inspection by arbitrator:*

When both parties consent, the arbitrator may make a personal investigation of cases (i.e., on site inspection).

5. *Improperly obtained evidence:*

Evidence obtained by illegal or unethical means, and entrapment, (a plan pursued solely for the purpose of exposing a person in a wrongful act) are usually rejected by arbitrators.

6. *Offers of compromise:*

Any offers suggested during negotiations on the case are usually given little or no weight by arbitrators since they represent normal and desirable efforts to reach a settlement. If such offers were given significance, it would deter efforts to settle.

When an objection to evidence is made, the arbitrator should not evade it. The extent that rules of evidence are applied depends on the discretion and fairness of the arbitrator -- an award cannot be challenged unless it deprives the party of the basic right to have all pertinent and material evidence heard.

It is appropriate for an arbitrator to allow cross-examination beyond the scope of direct examination. They rarely sustain objections to evidence for legalistic reasons. Rather than stating objections in courtroom terminology, you should discretely explain that such evidence is secondhand, unreliable, beside the point, off on a tangent or clearly immaterial and irrelevant.

II. Hearsay Evidence

There is no rule in arbitration on hearsay evidence. It is admissible in arbitration "for whatever it's worth." The basic objection to hearsay is that secondhand testimony prevents the adversary from cross-examining the person quoted (and frequently misquoted). In courts of law hearsay is considered incompetent and is inadmissible.

Witnesses should not relate alleged facts as told to them unless there is no other technique of presenting them. The person with firsthand knowledge should tell the story, unless the facts are agreed to by your adversary or can be proven better by records or documents. Base your case on the best and most authentic evidence available.

III. Circumstantial Evidence

Circumstantial evidence are facts or circumstances which infer the principal issue or fact. Courts, juries and arbitrators can and do reach conclusions based on circumstantial evidence if the evidence is logical and substantial.

Evidence concerning circumstances from which legitimate inferences and conclusions may be drawn is admissible in courts of law and in arbitration if it tends to substantiate or disprove the issue in question.

IV. Parol Evidence

Parol evidence is usually word-of-mouth statements of intent or verbal agreements. It never refutes a written agreement, but may be used to explain ambiguous language.

V. Opinion and Expert Evidence

Witnesses should testify to facts; the arbitrator forms opinions and draws conclusions. However, experts with special training or skills may also state opinions on subjects relating to their fields because their qualifications increase their credibility.

VI. Evidence of Character and Veracity

This type of evidence is excluded in both civil and criminal cases in courts of law. It is considered unreliable, and tending both to incite prejudice and to sidetrack the discussion.
This type of evidence occurs when the reputation of witnesses or a party is attacked to enable the trier of the facts to properly evaluate their testimony. When so attacked, the accused usually counters by presenting evidence demonstrating their veracity and credibility.

One of the purposes of cross-examination is to test the credibility, candor, bias or memory of a witness. Questions on the prior criminal convictions designed to affect the credibility of the witness, not to prejudice the arbitrator, are acceptable.

VII. Evidence of Prior Misconduct

A prior conviction even if the other offense was similar cannot be used to prove a separate, later offense. But in the case of an employee who has been disciplined, should past infractions be considered? What about warnings and reprimands? They will usually be considered in arbitrating a discipline or discharge case, if the company argues that they were factors in the ultimate discipline or discharge. Work records are usually considered since a good record is a favorable factor.

DIRECT EXAMINATION

I. Leading Questions*

The term "leading questions" refers to any question, including its context and answer structure which is phrased so that it appears to the witness that the advocate desires or expects a certain answer; yet the advocate's expectation could not have been derived solely from what the witness has already said in the interview.

A. Forms of leading.

A question may be leading because of the *context* in which it appears; this leading context may be of a personal or impersonal type. The following is an example of the personal context.

The President has made several public statements advocating freer trade between nations. Do you think we should eliminate some of the tariff barriers that have been erected against free trade?

The direction of the affect of this loaded context cannot be predicted unless the witness' attitude toward the president is known. Nevertheless, it is highly probable that changing the context as in the example below would obtain a different response from many witnesses.

Socialists have historically advocated free trade among nations. Do you think we should eliminate some of the tariff barriers that have been erected against free trade?

*Source: GORDON ON INTERVIEWING, 1973.

In contrast, the impersonal context does not mention the point of view of any individual or group, but brings into play certain facts and logical relationships which tend to influence the answer in one direction. The next question is put into two different contexts tending to bias the response in opposite directions.

In view of the fact that the United States is the richest country in the world do you think that the defense budget should be cut as much as 25 percent?

In view of the fact that about 80 percent of the total federal taxes are spent on past, present, and future war expenditures, do you think that the defense budget should be cut as much as 25 percent?

There is little doubt that a random sample poll of the United States, using the two forms of the question, would show significantly different results.

Even when no leading context is provided, the question may be loaded by simply using *emotionally charged* words. For example, compare these two questions:

How do you feel about minorities moving into this area?

How do you feel about minorities invading your neighborhood?

Even though in sociology *invading* is not an emotionally charged term, to the witness *moving into* would appear more neutral.

A third way of loading a question is to structure the answer in a way that restricts witnesses by *omitting a category* most appropriate for them. Compare these two questions:

What is your religion? Protestant, Catholic, or Jewish?

What is your religion? Protestant, Catholic, Jewish, agnostic, atheist, or free thinker?

It is highly probable that the second form would elicit a smaller number of Protestant, Catholic, and Jewish responses.

A fourth way of leading is to make *challenging statements*. The respondent will often change his general point of view expressed in the interview if the advocate consistently challenges one type of statement and allows the opposite type to go unchallenged. Any of the following would be considered a challenge to some degree: "How do you know that?" "Do you think you could back up that statement with evidence?" "Give me a specific example of that." "That sounds very unusual, I have never heard of such a thing happening. How do you account for that?" "Are you sure that your observations are correct?" "That seems to contradict what you said before."

The effects of such challenges depend upon how sure the witness is of rapport, the extent to which the witness is inclined to show deference to the advocate, and the tone of voice in which the challenge is made.

B. *Effects of leading questions.*

In the literature on interviewing there seems to be a preponderance of opinion, usually based upon direct experience in interviewing, that the leading question should be avoided. For example, Cannell and Kahn suggest that "Questions should be phrased so that they contain no suggestion as to the most appropriate response."[1]

Kinsey takes an opposite position at one point in his discussion of interviewing methods; he advocates putting the burden of denial on the witness.

Becker, who takes the position that challenging the witness in an aggressive manner does not necessarily bias the response, points out some of the conditions under which he could obtain more valid information from public school teachers regarding race relations problems in the school. He says that a basic condition for success was

...the professional bond of courtesy which the teacher feels obligated to extend to the interviewer. She felt she must avoid being unpleasant. Such tactics will not prove effective in all situations nor would one want to use them...where, for example, your research places you in continuous contact with those being studied, as in a long-term community study, it might be wisest to avoid the possibility of antagonizing informants which lies in this stratagem....Finally...the informant must not be of a higher social status than the interviewer because the unspoken etiquette of such a relationship leaves the informant free to be rude through evasiveness and implausibility, free to ignore the demands of the questioner who is stepping out of the confines of his deference role.[2]

After reviewing much of the literature and his own experiences, the writer suggests that the following factors account for the different effects of leading questions.

It is helpful to distinguish between three types of situations, one in which the leading question helps to obtain more valid information, another in which valid information is obtained in spite of the leading question, and a third situation where the leading question actually distorts the answer. Here are some of the most important characteristics of the type of situation in which the leading question helps to obtain more valid information:

a) Witness has accurate information clearly in mind,

b) but there is a tendency to withhold it, either because reporting the correct answer would violate the etiquette requirements of the situation, or because the correct answer is potentially damaging since it admits a violation of public ideals of some type.

c) Witness either accepts these ideals as valid or assumes that the advocate does so.

d) Under the above three conditions the leading question is useful *if* it leads in a direction contrary to the public ideals.[3]

Regardless of whether the bias of the question is toward or away from the correct answer in the case of a particular witness, such a leading question will be helpful. If the witness' correct answer happens to be in violation

of the public ideals, then the question is biased *toward* the correct answer and the witness is more likely to admit the deviant behavior. This is particularly true when the advocate's manner shows that the witness is expected to have done the deviant behavior and that will not be condemned for it. Thus the use of the leading question under these circumstances is based upon the assumption that in general people are less likely to falsely plead guilty than they are to falsely plead not guilty; therefore the bias should be toward guilty.

There are circumstances in which valid information is obtained in spite of the use of leading questions. Here the following conditions are important:

a) The information is clear in the witness' mind, free from fading memory, chronological or inferential confusion.

b) Neither the information to be reported nor the relationship between the advocate and witness consitute a threat.

c) There is no etiquette barrier between witness and advocate.

To illustrate these circumstances let us assume that an advocate is attempting to discover what happened at a meeting attended by the witness and how she felt about what transpired. Further assume that the meeting lasted one hour, that 15 people attended and that it consisted of a short speech and a discussion of the pros and cons of an increase in the public school tax levy. The meeting occurred the night before the interview. Note that all the questions are

leading in that they either suggest possible answers or exclude other possible answers, yet none of them cause distortion in the witness' information.

Advocate: How many people were at the meeting, about 100?

Witness: Oh no, there were 15 including the speaker; I know them all. There are very few people interested in the public schools, particularly in the summertime.

A: What time did the meeting start, 8 or 8:30?

W: We always start at 7 as we did last night.

A: Did you just have an informal discussion?

W: No, we also had a speaker from Columbus.

A: Was his talk about the usual sort of things which education people have to say about child psychology?

W: The topic was "What can the taxpayer buy for his school tax dollar."

A: Oh, I see. Did you feel that the speaker had little of value to say as is so often true of people speaking on this topic?

W: No, he had quite a bit to say; we selected him because of his analytical objectivity.

A: Do you feel that an excellent speaker of this type will exert a strong influence on improving the public schools?

W: He won't have any strong *direct* influence on the community since he was speaking to only 15 people, but there is a possibility that this will spark some activity among the vitally interested people.

To avoid being led astray by the "harmless" leading question, the advocate should be reminded that often it is impossible to know in advance that all leading questions will be harmless. In any case, it is a good plan to avoid the use of leading questions rather than hope they are of the harmless variety unless the situation calls for their intentional use.

There are types of situations in which leading questions are definitely harmful because they bias the witness away from the truth. The following conditions are significant:

a) The witness does not have the information clearly in mind because of fading memory, chronological or inferential confusion; and, therefore, is susceptible to suggestions from the advocate.

b) The information requested is not important to the witness, and there is little motivation to strive to remember the accurate information.

c) The witness does not feel free to say "I don't know" because she or he is threatened by the advocate or because the etiquette of the situation requires showing deference to the advocate.

d) The question leads in the direction of a false answer.

These conditions typically prevail in settings where the witnesses are subordinates in the same community or organization as the advocate.

For example, Agency X, a large corporation, has been carrying on an intensive "educational" program pointing out the virtues of working for Agency X--

such as its pension plan, job rotation plan, retraining for automation, and family health insurance. In the excerpt below the advocate is working for the personnel department and is studying the problem of recruiting workers to reduce labor turnover. Four years ago when the witness came to work for the company, the same advocate had talked with him. The objective of the present interview is to obtain a complete picture of the factors accounting for why the witness came to work for Agency X. In the course of the interview the following loaded questions obtained these responses:

A: We are doing a study of why people come to work for Agency X and why they stay so long. How long have you been working for us?

W: About four years, I guess.

A: Why did you pick this agency to work for?

W: Gosh, that was a long time ago. Let me see...

A: Yes, it was quite a while ago. Who were you working for before you came here?

W: For Agency Y.

A: Why did you leave there? Didn't you like it?

W: No, it wasn't a very pleasant place to work.

A: Did they have a pension plan like ours or a job rotation plan, training for automation, family health plan, or that sort of thing?

W: No, they didn't have any of those benefits like we do here.

A: What did you wife think about your choosing Agency X?

W: She was glad I could get the job...she likes the family health plan very much, and I like the system of rotating jobs every three months after you

have been here a couple of years. It makes things interesting. I learn a lot that way about the company as a whole. I can't understand people who like to hold down one job all the time.

A: Did you hear about this company through ads in the paper?

W: I spent a lot of time looking at the ads to find a good job.

A: Why did you choose to work for Agency X?

W: It is a very progressive company. It has a lot of good personnel policies like I mentioned before. For example, I hope I can benefit from the in-service training program so I can be upgraded when we get more automated.

With question 1 the advocate begins to furnish a biasing context in the phrase "why they stay so long" rather than "why people come and go." Question 2 is loaded with the assumption that the witness "picked" the present agency to work for when actually he might have preferred another but was not accepted. Question 4 suggests an easy way for the witness to avoid the threat of saying that he was fired. Question 5 supplies the answer for questions 6 and 8. In questions 5 and 6 the advocate does not probe to distinguish between what the respondent and his wife like about Agency X before he applied for the job. Only the latter could have been a reason for coming to Agency X.

Question 7 supplies an answer to what would have been a less biased question: "How did you first hear about Agency X?" After four years the witness' memory might be vague on how he heard about Agency X and any suggested answer would be tempting. In question 8 the advocate again assumes that the respondent chose to work at Agency X. Reponse 8 gives the "company

line" answer suggested by the advocate in question 5 even though response 2 indicates a possible fading of memory.

The overall effect of these leading questions is to suggest invalid answers readily given by the witness due to communication barriers.

The following conditions describe another type of situation in which a leading question will distort the response:

1. The witness clearly remembers the information and, therefore, is able to give it accurately; but

2. the correct response constitutes threat to the witness since it is either in violation of public ideals or the apparent wishes of the advocate;

3. or, the correct response violates certain etiquette requirements of the situation; or

4. the question is slanted toward the public ideals and, for the witness, toward a false answer.

These conditions frequently occur when the advocate is perceived by the witness as a superior. However, in such cases, the threat, the etiquette barrier, or the leading must be stronger to distort the response since the witness has the correct information clearly in mind. The witness must consciously distort the response to compromise in the situation.

II. Framing questions*

What practical rules can you use as an aid in framing specific questions? Experienced trial lawyers invariably find it much easier to frame questions well than to tell a novice how to do it. They have developed habits of interrogation and a "feel" for what is and what is not appropriate; they find it easier to perform than to explain. But even if you do not have the benefit of extensive experience, you can anticipate accurately the subject matter that you will cover with each witness, and you can frame your questions in advance. In due course, practice will help you develop your phrasing of questions to meet the requirements of proper interrogation. The suggestions that follow admittedly can give you little help in phrasing a question during the hearing because there is then insufficient time to think of a proposed question and subject it to tests such as these.

A. *Ask only one question at a time.* Compound sentences are sometimes hard to understand. Answers to compound questions are worse; they are likely to be incomplete, ambiguous, or both.

B. *Avoid negatives in the question,* if possible. Consider this exchange:

Q--"You do not know whether Jones was there?"

A--"Yes."

Did the witness mean "Yes, I know," or did he mean "Yes, it is true that I do not know," or did he mean "Yes, Jones was there"? If noticed, this doubt can be rectified by another question, and the loss is simply that of delay and a slight danger of confusion. But if you fail to call for clarification, you may have lost a vital point by having the answer misinterpreted.

*Source: KEETON'S TRIAL PRACTICE AND METHODS, 1973.

C. *Make the question brief.* Both the witness and the arbitrator must remember all of the question to understand it correctly.

D. *State the question in simple words* used in everyday conversation. You want the witness and the arbitrator to understand both the questions and the answers. This is not, however, a recommendation for use of slang or bad grammar.

E. *In summary, make the question clear.* It is not enough that you and the witness understand each other's questions and answers. The arbitrators are less familiar with the facts and circumstances than either you or the witness.

NOTES

1. Charles F. Cannel and Robert L. Kahn, "The Collection of Data by Interviewing," in Leon Festinger and Daniel Katz, *Research Methods in the Social Sciences* (New York: The Dryden Press, 1953), p. 346.

2. Howard S. Becker, "A Note on Interviewing Tactics," *Human Organization* Winter, 1954), pp. 31-32.

3. Lois R. Dean, "Interaction, Reported and Observed," *Human Organization* (Fall, 1958), No. 3, p. 36, demonstrates the tendency of the witness to falsify his report in the direction of the acceptable norms.

CROSS-EXAMINATION TECHNIQUES*

1. Introduction

Countless books, movies, television shows and attorney "war stories" have produced a widespread image of cross-examination as the ultimate key to victory in a trial. Perhaps cross-examination is, as Wigmore argued, "the greatest legal engine ever invented for the discovery of truth."[1] of this assertion may be questioned. What is true, however, is that such statements have turned cross-examination into an "art." The irony is that instead of impelling attorneys to prepare carefully their cross-examination, the "art form" image often has an opposite effect: attorneys often fail to prepare and just hope that a witness will make some sort of mistake during cross-examination.

To some extent, cross-examination is an art --- you probably will be better at it as your experience grows. But if you follow the suggestions in this section, you will not only be able to do a competent job of cross-examination, but also have a solid base upon which to improve.

A major theme of trial and hearings techniques is the central role played by human nature and human experience. To a large extent, advocates' success rests on their ability to relate theories to the experiences of the arbitrator. Cross-examination is but another facet of this ability.

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* Source: Adpated from a paper by Paul Bergman.

1. *Wigmore on Evidence*, 3rd. Ed., Vol. V § 1367.

II. Objectives Of Cross-Examination

A. To Discredit the Witness

Again, we can look to literature and drama for the image of the aim of cross-examination: to leave the witness a quivering, helpless hulk on the witness stand. Or, to phrase it more objectively, to discredit the witness. This is one objective which is rarely a factor in an arbitration hearing.

B. To Discredit the Testimony of the Witness

It is impossible and probably counter-productive to villify every witness produced by the opposing party. However, it may be possible to show the arbitrator that a witness may be mistaken in one or more areas of testimony. This assumes that you do not like what the witness has testified and want to discredit the witness. In many circumstances, however, cross-examination is an opportunity not to discredit what has come before, but to build new testimony favorable to you.

C. Challenge "Established" Facts

A contradiction has more impact when two witnesses called by the same side disagree than when witnesses called by opposing sides disagree. The possibility of such contradiction is increased by the rule permitting exclusion of witnesses from the hearing.

D. To Produce Affirmative Testimony

A fourth major objective of cross-examination is to use it to contribute favorable testimony. That is, you may elicit testimony which does not contradict the witness or other witnesses, but which produces affirmative testimony to aid your case. The most obvious example of this is when the witness, during direct examination, has testified to certain facts that hurt your case, and also to other facts that are helpful. Your cross-examination could consist simply of getting the witness to repeat the favorable portions of the testimony. A more difficult task is to bring out new, favorable facts during cross-examination.

In other words, the most important point to realize is that cross-examination is not limited to trying to show that a witness is lying and that you should structure your cross-examination accordingly. Your may want both to discredit the witness by showing bias, and to elicit testimony favorable to your case. You are more likely to achieve both goals if you first develop the favorable testimony. Witnesses will be more likely to give helpful testimony if you have not first tried to expose them as biased people whose testimony is unworthy of belief.

III. Determine Whether to Cross-Examine

Another primary consideration is also one of the most abused: if the witness hasn't hurt you, don't cross-examine. Knowing this is one thing, practicing it is another--because advocates are too inclined to interpret the testimony of an opposing witness as harmful. Nevertheless, there are clearly situations in which staying seated and silent is your best tactic.

It is rare that you take issue with everything said by an opposing witness. You may only plan to controvert the opposing party on only one or two issues. In such a situation, a wide-ranging cross-examination dilutes the impact of the issues on which you will ultimately rely.

Thus, the decision whether to cross-examine is a complex one. In some cases, no cross-examination at all is appropriate; in others, witnesses should be cross-examined only on particular points of testimony. The crucial factor is to make these decisions in light of your overall theory of the case, with an eye to the issues you will emphasize in closing argument.

IV. Types of Cross-Examination

Traditional legal literature suggests many trusty rules for cross-examination. Such suggestions may be useful, but they also smack of the advice given to a rock climber before a difficult climb: "Don't fall." The problem is the same: knowing the rule does not

really assist you to carry it out. Perhaps it is more helpful to look at cross-examination in terms of three categories: (1) the advocate can present evidence which will refute the witness; (2) although the advocate cannot directly refute the witness, the witness' story is inconsistent with common experience; (3) the advocate cannot refute the witness, and the witness' story appears credible. Let us analyze each situation.

A. *Cross-examiner can present evidence which can refute the witness.* If there were more of these situations there would be fewer ulcers among litigation specialists. In this situation, the witness has testified to certain facts on direct examination, harmful to the cross-examiner's case. The cross-examiner, however, has information admissible in the record which can refute at least some of those facts.

The key phrase here is "admissible in the record." It means that the cross-examiner can show, through someone or something other than that witness' own testimony, that what the witness has testified is not correct. Clearly, this is a cross-examiner's strongest position.

It is important to note that the strength of the cross-examiner's position depends on the strength of the contrary evidence, which may vary from unmistakably proving the witness a liar to merely giving the arbitrator a small reason to pause and reflect on the testimony.

What are the implications of this analysis for the cross-examiner? For one thing, it contradicts the notion, "do not ask a question unless you know the answer." If you receive an answer favorable to your case, fine. But, if it is unfavorable, you may refute it with extrinsic evidence. In many situations you may even want the witness to give an answer unfavorable to your case, so that you may introduce extrinsic evidence.

B. *Cross-examination based on inconsistency of testimony with human experience.*

Even if you cannot directly controvert what a witness says, you can attempt to show that what the witness said is improbable. Rarely, if ever, will the whole of a witness' testimony be improbable. Were that so, "No questions" might be the cross-examiner's best tactic. By analyzing closely the testimony, however, you may be able to show that portions of it are improbable. This stresses again the need for careful prehearing planning. If you know at least the outlines of the case against you, you can carefully measure the opposing party's case against common experience.

Usually you can show that some part of the opposing case seems improbable. Although you have done so does not entitle you to close your books, stack up your papers, and look to the other side for a concession statement. The importance of showing the unlikelihood of certain testimony depends on: (a) the importance of the

improbability to the rest of the witness' testimony, e.g., does belief in the witness' entire testimony depend upon belief in the testimony which you have shown is improbable; (b) the importance of the testimony to the opponent's case as a whole; (c) the extent to which the testimony varies from common experience; and (d) the witness' explanation, if any, for the improbability.

How does one cross-examine to show the improbability of testimony? No one answer can be given, as the method depends on the nature of the improbability. One method is to develop the improbability explicitly during the cross-examination. In general, you attempt to do this by juxtaposing in one question the two circumstances which you feel make a story improbable. Such a question might be: "Now, despite the fact that you and your supervisor had always had a very good relationship, you are telling us that you got frightened just because he grabbed your arm?" Such a question makes the point of your cross-examination apparent. But it may also give the witness a chance to explain the improbability.

The method you use must be chosen on a case-by-case basis. In general, the greater the improbability, the less need you will have to ask a question that attempts to make the improbability explicit. On the other hand, remember that people do not always

behave as common experience suggests they will, and that there are often quite mundane explanations for what seems to you to be very improper behavior.

Another line of questioning uses the primacy-recency theory of memory. The basis of this theory is that if there is a series of similar events, people will remember best the first and last events. Thus, when the questioner emphasizes that the first event was the most memorable, she/he knows the probable answer to those questions, and is not merely fishing. In this way, the common-experience theory permits you not only to structure the argument to convince the arbitrator but also permits you to effectively lead an adversary witness in a desired direction.

It has probably become evident how much of cross-examination is really based on common sense. If you will take the time to think and prepare, you will find you have more common sense than you may think you have.

C. Cross-examination based on hope and prayer.

It is this situation which haunts most advocates: the opposing party's main witness has testified and has told a completely believable story which does not seem at all to be at odds with common experience; you have no extrinsic impeaching evidence except your client tells a different story; the arbitrator has

turned to you and says "Cross-examine." In this circumstance, you probably have to cross-examine---if you don't challenge the witness at all, you lose.

In some cases, cross-examiners often "go fishing." That is, they poke around in different areas, hoping something may turn up. There is nothing "wrong" with this---the key point to remember is only go fishing if you must challenge the witness and other methods have proved fruitless.

It is in fishing expeditions that the old advice "do not ask a question you do not know the answer to" and "never ask anything except a leading question" are the least helpful. How can you lead a witness when you do not know where you want him or her to go?

One approach to such questions is to test the witness' ability to observe and recollect. In this approach, the cross-examiner is hoping that the witnesses will testify differently than during direct examination, and thus impeach themselves.

In this approach, an effective technique is "hop, skip, and jump." Here your questions range over the scope of testimony, but out of chronological order. The hope is that the witness will become confused and forget a story that may have been memorized. Thus, the advocate hopes that the witness will change his testimony from the direct examination. However, the all-too-frequent reality is that the factfinder or the advocate winds up just as confused as the witness.

Do not merely permit witnesses to repeat and amplify on their direct examination!

Finally, one other factor deserves mention here. To some extent, the decision whether to fish or not for a favorable answer must be based on an honest, impartial assessment of your party and its witnesses. Of course, as a general matter you "believe" in your party and in your party's cause. But the decision to ask a particular question or to cross-examine may turn on how candid you feel your party has really been with you.

V. Summary of Rules of Effective Cross-Examination

1. Prepare for your cross-examination.
2. Don't cross-examine unnecessarily; know when to stop.
3. Don't ask a question unless you know the answer.
4. Don't repeat the damaging testimony of the witness unless you can clearly impeach him.
5. Avoid too many objectionable questions.
6. Ask leading questions with well-chosen language.
7. Word the question so that the answer is limited to the information you seek.
8. Observe the witness closely for reactions to questions, for conduct while answering.
9. Discover the witness' weakness, relate it to the case; e.g., witness has poor vision--therefore couldn't observe incident clearly.

10. Vary the order of questions so memorized testimony is disrupted.
11. Ask questions at such a rate that the witness does not have time to contrive an answer.
12. Do not cross-examine on true statements unless repetition will help your case.
13. Use impeaching statements, documents, records if advisable.
14. Avoid offensive questions.
15. Expose the interest of the witness in the case.

OBJECTIONS

I. Objections to Form of Question

A. *Question is Ambiguous or Unintelligible*

If a question cannot be understood, it is objectionable on the ground that it is ambiguous or unintelligible.

When interrogating a witness, the advocate should ask questions that are intelligently phrased, concise, and clear in meaning. Neither the witness, the advocate, nor the arbitrator should have to guess what a question means. If the question cannot be understood, the advocate should object that it is ambiguous (vague) or unintelligible. Then, the question will usually be rephrased in order to clarifying its meaning.

Note: This objection differs from the objection that a question is too general, i.e., permits the witness to respond with irrelevant or otherwise inadmissible matter. In brief, each question (1) must be stated so that it is easily understood, and (2) must call for specific and relevant testimony.

B. *Question is Compound*

A question is objectionable on the ground that it is compound if it contains two or more questions.

General questions, when asked of unfriendly witnesses, may prove dangerous. Unfriendly witnesses, especially if they are experienced witnesses such as experts, often exploit the freedom general questions give them and

include harmful matter in their answers that would otherwise be inadmissible. Thus, the general question "Why?" should be used very discriminately during cross-examination.

C. *Question Has Been Asked and Answered*

A question may be objectionable on the ground that the witness has already been asked and answered a substantially similar question on the same subject matter.

Note: This differs from the objection that proposed evidence is cumulative and merely adds to other similar evidence on a point, i.e., calling four expert witnesses to give similar testimony.

A problem with repeating a question is that repetition may give undue emphasis to the evidence. Counsel often attempts to highlight favorable testimony by covering the same matter more than once. This frequently occurs on redirect examination, when advocates may try to go over the same ground covered during direct examination.

D. *Question Misquotes A Witness*

A question misstating what a witness has said is objectionable. If there is any uncertainty regarding what the witness actually said, the arbitrator should resolve that uncertainty (i.e., by asking the recorder to read the disputed answer).

E. *Question Is Argumentative*

A question is argumentative and therefore objectionable if it:

(1) asks for the purpose of persuading the arbitrator rather than to elicit information or;

(2) calls for an argument in answer to an argument contained in the question or;

(3) calls for no new facts, but merely asks the witness to assent to inferences drawn by the advocate from proved or assumed facts.

F. *Question Assumes Fact Not in Evidence*

A question that assumes unproved facts to be true is objectionable. Such questions attempt to indirectly bring before the arbitrator unproven or disputed statements. They may also trap the witnesses into implicitely affirming these statements without meaning to do so.

A question that assumes facts not in evidence is usually objectionable on the additional ground that it is leading. Such a question is leading because it asks the witness to affirm a suggested fact; it is also misleading by implying that this fact is already in evidence.

Many advocates mistakenly believe that on a cross-examination they can freely state facts which have not been proved (and perhaps cannot be). Counsel during cross-examination often resort to "catch" questions to try to get a witness to say something he does not intend. (i.e., When did you stop beating your wife?)

The California appellate court has observed that "did you know that" questions are repeatedly condemned as being outside the wide latitude permitted on cross-examination because they are "designed not to obtain information or test adverse testimony but to afford cross-examining counsel a device by which his own unsworn statements can

reach the ears of the jury and be accepted by them as proof . . . ."

G. *Question Calls For Speculation*

To speculate is to answer on the basis of conjecture; a question that invites the witness to speculate is objectionable. Two examples of speculative questions are:

> "How much of the top soil on your land was washed away by reason of the rain being diverted onto it from the road?"
>
> Or, "Is it possible, Miss Smith, that there could have been other meetings?"

II. Objections to Offered Evidence

A. *Irrelevant*

"Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

The evidence must have some probative value, i.e., it must tend to prove or disprove a fact--this is the traditional concept of relevancy.

B. *Hearsay*

Hearsay evidence is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." To be hearsay, evidence must be of an out-of-court statement. "Statement" may be defined as:

(1) oral assertions;
(2) written assertions; and
(3) nonverbal assertive conduct intended to communicate some fact without words, e.g., sign language, symbols, or signals.

Offered To Prove Truth of Matter Stated

The primary reason for excluding hearsay is that such evidence is unreliable because the person who said it was not under oath at the time of the statement and cannot be cross-examined. The veracity of that person (called the "declarant"), however, is not relevant unless the truth of the statement is in issue. Therefore, if a witness is asked "What did Jones tell you about how the accident happened," the question is objectionable only if the evidence is offered to prove how the accident happened. Only then is it relevant that Jones, the hearsay declarant, was not under oath when he made the statement and is not subject to cross-examination.

There are fourteen broad categories of exceptions to the hearsay rule under the Evidence Code. These are:

(1) Confessions or admissions
(2) Declarations against interest
(3) Prior statements of witnesses
(4) Spontaneous, contemporaneous, or dying declarations
(5) Statements of mental or physical state
(6) Statements relating to wills or to claims against estates
(7) Business records
(8) Official records or other official writings
(9) Former testimony
(10) Judgments
(11) Family History
(12) Reputation, or statements concerning community history, property interests or character
(13) Dispositive instruments or ancient writings; and
(14) Commercial, scientific, or similar publications.

CLOSING ARGUMENTS*

I. Purpose of Closing Argument

The purposes of closing arguments are the following:

(a) to identify the principal issues to be resolved;
(b) to provide the arbitrator with a way of thinking about each of those issues which will produce the conclusion desired by the advocate; and
(c) to convince the arbitrator that this way of reasoning is correct. (This may require a demonstration that the way one's adversary views the case is incorrect.)

II. Reference to Common Experience During Closing Argument

The advocate will frequently wish to draw the attention of the arbitrator to her/his own actual, analogous and vicarious experiences. These kinds of references will be particularly desirable when analyzing the probative value of circumstantial evidence and when analyzing the credibility of testimony by way of "comparison with human experience." However, the desirability of relying upon comparisons and analogies to familiar experiences raises several questions.

First, there is the question of what argument is proper. The hearing concerns the specific case in dispute. Is it appropriate, therefore, and if so to what extent, to ask the arbitrator to take common experience into account?

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*Source: Adapted from David Binder and Paul Bergman, 1974(c).

The best general guide is not to assert your personal opinion of the case, and not to assert as a fact something which is not in the record. Common experience, well-known facts, even examples from fiction, etc. may be used to bolster or illustrate argument. For example, to illustrate the strength of circumstantial evidence it may be pointed out that Robinson Crusoe knew another man was on the island by seeing another set of footprints in the sand; he did not have to see the man.

However, the closer the hypothetical comes to the facts of the case, the greater the danger of asserting facts not in evidence. For example, if your example of circumstantial evidence is supposing a witness' tools were found at the scene of the incident and indeed no such tools were found, you've raised the danger of confusing the arbitrator. Remember, you can illustrate an argument, but not introduce specific facts.

Finally, common events of social significance may be the subject of argument (e.g., the decreasing purchasing power of the dollar, unemployment, etc.). But the argument may be improper if too specific or too similar to the facts of the case.

Comparisons and analogies must be meaningful as well as proper. Be careful not to assume that your own experiences are universal. Is it fair to conclude that most everyone has probably called out the name of someone he thought he knew only to find out on closer inspection that he was mistaken? If so, then an argument which draws the arbitrator's attention to various aspects of such common experience is likely to be meaningful.

III. Tactical Options

There are a number of tactical options the advocate can use during closing argument. These options are generally usuable regardless of the content of the argument itself.

1. *Implicit vs. Explicit Conclusions:*

On any given issue, advocates have two choices when stating the closing argument. Advocates can marshall the evidence and request the arbitrator to draw a conclusion. Or advocates can marshall the evidence and then explicitly state their own.

Social psychologists have suggested that when factfinders draw their own conclusions, they may be more persuaded of its validity then when the conclusion is drawn for them.[1] Leaving arbitrators free to draw their own conclusions may make advocates seem more credible (less biased). On the other hand, an explicit conclusion has the advantage of clarity. To promote clarity advocates should not only marshall the evidence and state their conclusions, but also explicitly spell out why the evidence points to such conclusions.

According to most studies, the intelligence of the audience and the complexity of the issue under review play a substantial role in determining whether one or the other of these forms of argument is effective.[2]

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1. For a review of the thinking and research of social psychologists on the question of implicit vs. explicit argument see McGuire "The nature of attitudes and attitude change" *The Handbook of Social Psychology*, Vol. III (2nd Ed.) pp. 208-210; Freedman, Carlsmith & Sears, Psychology (2nd Ed.) pp. 289-291.

2. Ibid. note 2.

Where the issue is relatively simple and the audience intelligent, the implicit form of argument appears more effective. However, if the case is complex or audience sophistication is lacking, the explicit argument may be more fruitful.

The next question advocates should consider explicitly is why particular items of evidence point in a particular direction. In terms of technique, no task in closing argument is more difficult to execute. In terms of effectiveness, no task may be more important. If one subscribes to the purpose of closing argument as we have outlined it above, frequently it is impossible to persuasively provide the arbitrator with a specific way of thinking about the case unless you explicitly state <u>why</u> the evidence points to a particular conclusion.

To make this particular point clear, consider two types of closing arguments.

In the first you would not explicitly state why the evidence points to a particular conclusion.[3] Almost all potential conclusions are left to the arbitrator. In short, the argument did little more than frame the issue and marshall the evidence.

The second type of argument is much more explicit. Though it leaves the <u>ultimate</u> conclusion to the arbitrator, it is quite explicit in

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3. Note: One can in theory explicitly explain the probative effect of evidence without explicitly stating his ultimate conclusion.

terms of providing a way of thinking about the evidence. This closing argument not only expressly concludes that the evidence is plausible but also provides a very explicit line of reasoning concerning why it is. The argument explicitly provides a very concrete way of thinking about the evidence.

2. *Anticipating Adversary Arguments*:

Anticipating and refuting opposition arguments has not always proved successful. Less intelligent people are often adversely effected by this technique. Clear-cut situations in favor of the advocate may become confused. Arguments that would otherwise never have been considered[4] may be taken into account.

The question of whether to refute or ignore arguments raises a closely related issue of tremendous significance. Should one raise and attempt to refute potentially irrational or inappropriate ways of reasoning about a case? Should an advocate point out why supervisor Smith's or shop steward Jones' testimony should not be evaluated differently from other witnesses merely because of their status? If there is any suspicion that the arbitrator may employ an improper mode of reasoning to decide the case, discuss the inappropriateness of such reasoning.

Refuting an opposition argument may make a closing argument quite complex if there is conflicting testimony. It may therefore be helpful to provide an example of the potential structure of a refutation

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4. Note: Merely because your adversary fails to make argument certainly does not mean it will not be considered by the factfinder.

argument under these circumstances. Assume that two witnesses have positively affirmed and two witnesses have positively denied a statement or situation. In arguing the case the advocate may include the following:

(a) why the supporting witness should be believed;
(b) why the opposing advocate will argue these witnesses are incorrect, why your adversary's analysis is erroneous;
(c) why the opposition witnesses are incorrect; and
(d) why the opposition advocate will argue their witnesses should be believed and why that analysis is erroneous. Some of these arguments may overlap.

Obviously, each conflict in the testimony cannot and need not be analyzed to such an extent. However, keep in mind these four consideratons because crucial issues may require detailed analysis.

3. *Repetition:*

Is it worthwhile to repeat the significant portions of an argument? Or is repetition likely to be counter-productive? Obviously constant repetition will result in boredom, if not outright displeasure. However, repetition does appear to increase learning and therefore repeating significant portions of an argument--in different ways--may well be beneficial.[5] Though the advocates have thought the matter through many times and are therefore thoroughly familiar with the argument, the arbitrator is only hearing the argument the first time.

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5. Freedman et al ibid, p. 290; McGuire ibid pp. 211-212.

4. *Climatic or Anti-Climatic Order:*

Assume one has several arguments to make. Should the strongest argument be first (anti-climax)? Or should the best be saved for last (climax)? Though many people have a personal preference, research on the issue has been unable to prove one is better than the other.[6] All that can be said is don't relegate the best to the middle. It is at that point that the audience's attention is the poorest.

5. *Length of Argument*:

The question of how long to make an argument is important in two respects. First, most people have a relatively short attention span. Secondly, when people stop paying attention, but are required to sit and pretend to listen, they often become aggravated. In the arbitration situation the arbitrators may even become so irritated that they, perhaps unknowingly, become adverse to the side making them endure that boredom.

The question of length of argument is, therefore, in part a question of how to maintain the attention of the arbitrator. Among the factors which psychologists have identified as helpful in maintaining attention are variety and novelty.[7]

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6. McGuire ibid pp. 213-214; see also Minnick, *Art of Persuasion* (2nd Ed.) pp. 260-262.

7. Minnick, op. cit., Kahneman, *Attention and Effort*.

An argument has variety when it contains changes and contrasts. Many arguments lack this quality on (1) structural, and (2) intonational levels.

On the structural level, variety is often missing because the arguments lack an overt structure. As a consequence, the arbitrator has little indication when one issue is concluded and another begun. The whole presentation blends into one long recital without beginning, end, or middle. It is more effective to commence with a statement of the issues to be discussed and explicitly state when a new issue is addressed (i.e., "I would now like to spend a few moments discussing why ...").

On the intonational level, remember that a highly emotional, forceful presentation can be as much of a monotone as a presentation totally devoid of emphasis. There is, of course, no one right tonal quality. Whatever is your natural tonal form of argument--you must vary the pitch if you are to gain attention.

"Novelty" means adding something new. The testimony has been concluded; from the arbitrator's point of view, what can the advocate add? Far too many closing arguments add nothing. They merely summarize what individual witnesses have testified.

There are two principal ways in which a closing argument can bring new matters before the arbitrator. First, the advocate can provide

an organized view of the evidence. Usually several witnesses have testified and each has probably touched upon several issues. A closing argument should integrate the testimony of different witnesses in relation to a specific issue. It should provide a new focus on disparate pieces of evidence, perhaps through the use of a chart or graph (which adds clarity and variety).

Secondly, instead of merely reciting what testimony has been presented, the closing argument will present the material from a different perspective which emphasizes the same conclusions.

Of course, not all theories of the case are persuasive or successful. A theory will carry persuasive weight only if the explanation for the behavior is plausible when compared with common experience, i.e., represents in terms of probability, when considering experience in general, a rather likely behavior.[8]

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8. For a further discussion of the probability aspect of this type of reasoning see Binder *"Trial Level Decision Making and Techniques*, pp. 12-18, 42-45.

THE USE OF STATISTICAL DATA IN ARBITRATION*

/Although directed primarily to *interest* arbitration hearings, this article is also useful for grievance or contract interpretation dispute hearings when statistical data are deemed appropriate./

Statistical material can be of vital importance in arbitration, but such data are often incorrectly used. Many statistical presentations could be improved immeasurably by application of certain elementary principles.

First there must be a clear statement of those issues. Unless these are well-defined, it is difficult to build a good statistical case. The proposals of both parties should be carefully analyzed. In developing the statistical material for an arbitration, it is important to collect data not only to support your own case but also to rebut that of the other side.

A "theory of the case" should be formulated in the light of the issues and the statistical exhibits prepared so that they point directly to the issues and support the theory.

I. Sources. It is extremely important that the persons preparing the case have a wide knowledge of sources of data. Too frequently important statistical information is overlooked to the detriment of the case.

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*Source: Adapted from Maurice I. Gershenson, Chief of the Division of Labor Statistics and Research, California Department of Industrial Relations, 1954.

Among the more important sources and publications are the reports of Federal and State government agencies. It is essential to know that in addition to the formal reports of some of these agencies it is possible to secure special tabulations on request. Private research agencies maintained by employer and union organizations, banks, trade associations and chambers of commerce are important sources of useful information.

II. Know what the data mean. Too frequently statistics are used in a manner which indicates the person presenting the data does not know what they mean.

The Consumer's Price Index is a simple example. The indexes are often presented in an arbitration to demonstrate that the cost of living in one city is higher (or lower) than in another. This is incorrect usage. The Consumer's Price Index cannot be used to measure inter-city differences in the cost of living; it can only be used to measure time-to-time changes in a particular city.

Another common error in the use of the Consumer's Price Index is to compute percentage change by subtracting one index from another. This demonstrates a lack of understanding of what an index is and, also, of how to compute percentage changes.

There has been great confusion concerning the distinction between wage rates and the statistics of average earnings, such as those published by the Bureau of Labor Statistics for the United States and by the Division

of Labor Statistics Department of Industrial Relations, for California.

In addition to misunderstandings of the different statistical series, there is confusion concerning various technical measures such as averages, interquartile range, standard deviation, etc. There is also a failure to consider comparability or lack of comparability of data.

III. Methods of compilation and analysis. A knowledge of the methods of compiling and analyzing statistical data is imperative, in addition to knowing what the figures themselves mean. A simple example is afforded by that seemingly innocent term "the average." Too frequently the parties do not know that there are several types of averages--the mean, the median, the mode; and they may fail to consider weighted vs. unweighted averages. These errors can make a far-reaching difference in a case.

There are many methodological considerations in connection with wage data. How were the figures compiled? Were job descriptions used in the collection of the data or merely job titles? What does the "interquartile range" mean? When should it be used and when avoided?

Another question to consider is, "What is the correct base period or starting point?" There is no such thing as a correct starting point. In arbitration the parties each try to establish that base period which will be most favorable to their case. Arbitrators frequently like to use the base time of the last settlement, but this should not preclude those preparing cases from using another base time if a logical presentation can be made.

IV. Preparation of case. Explore all possibilities and review all data which may be helpful to the case. Try various series, ratios, combinations, etc. Use only such materials as is relevant to the case.

If it is necessary to collect original data such as wage rate information, earnings, hours worked, etc., be sure to use good techniques of collection to insure the highest degree of success in obtaining the information sought. There are a great many pitfalls in the collection of data, and it is a much more technical and difficult process than is generally believed.

One important "must" in the preparation of statistical material is absolute mathematical accuracy. Check your own figures carefully, and regularly check those presented by the other side. Sometimes a bad error in one exhibit can affect the credibility of all others.

If one column in a statistical table is based on others be sure to indicate clearly how the data were derived. It is not enough to say "It is clear from column 3 that..."

V. Presentation of statistical data. A well-prepared case can be ruined by poor presentation. Statistical exhibits should be presented so that the facts are crystal clear to the arbitrator. This means simplicity of presentation.

A table with one or two columns of figures is more effective than a solid page of statistics that may bewilder the reader. A chart with one or two lines is much better than one with a maze of trends. Table and chart titles should be simple and clear.

Charts can be very effective in demonstrating trends and comparisons. Optical illusions, however, should be avoided and the opponent's exhibits reviewed carefully to detect such illusions.

Every statistical exhibit should be accompanied by a statement pointing out the important facts portrayed. Prepare legible copies and have a sufficient number for all members of the board and for the opposing side.

One word of caution: do not fudge. Don't try to put over tricky statistics. I remember a case where such an attempt failed miserably. It was a case involving furniture workers. One of the attorneys brought in an exhibit which purported to give the national average wage for each of the occupational classifications in the industry. The average for each class was considerably under the corresponding rates in San Francisco.

When the source of the data and method of compilation were questioned, it was found that:

1. The attorney collected wage rate information only from such states as Alabama, Mississippi, South Carolina, etc. There were no rates from states in the northern part of the country.

2. For each occupational classification three averages were compiled--the arithmetic mean, the median and the mode. For the final exhibit the average which was lowest was selected and presented as the average rate for the country as a whole.

Although this is an extreme case, it demonstrates the tricky and inconsistent statistics which should be avoided.

Care should be taken in preparing and presenting statistical exhibits for rebuttal. Make very clear the specific point or points the exhibit is intended to rebut.

I have been able to touch only superficially here a few of the aspects of this technical business of preparing and presenting statistical material for arbitrations. In conclusion, I want to urge all those who may become involved in arbitration proceedings and who do not have statistical experience to seek the assistance of technicians--persons who are familiar with statistical and accounting data and techniques. It will pay dividends.

CRITERIA USED IN DECIDING DISCIPLINE JUST CAUSE CASES

A body of case law has developed from both court decisions in public sector just cause appeals cases and the decisions of arbitrators in cases where a public employee has grieved a disciplinary action through a negotiated appeal procedure providing for arbitration. The results of civil service type hearings are generally not included in this case law because these cases are not published unless reviewed by the courts, and because cases are usually decided on a discrete basis without using the case law, or precedent,approach.

Studies of judicial and arbitral decisions in public sector discipline cases have shown that the courts and the arbitrators have used similar criteria and reasoning in making their determinations. The reasoning and criteria used in public sector cases are similar to those developed for private sector hearings.

The degree of proof required to uphold a discipline action in a case appealed to an arbitrator appears to vary with the type of offense in question and/or the standards of the particular arbitrator. Often, in more serious cases such as discharge for stealing, arbitrators adhere to the level of proof required by the courts, namely, requiring the employer to prove beyond a reasonable doubt that the employee was disciplined for just cause. For lesser charges, many arbitrators will accept proof that is "clear and convincing."

The criteria used by arbitrators in determining just and sufficient cause for disciplining an employee are based on case law developed in past arbitration rulings. These criteria are posed as questions below. Should any of the questions be answered in the negative for a given case, an arbitrator would probably find that just cause for a disciplinary action did not exist.

Criteria Used By Arbitrators In Just Cause Appeals Cases*

1. Did the agency give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?

   Note 1: The forewarning or foreknowledge may properly have been given orally by management or in writing through the medium of typed or printed sheets or books of rules and of penalties for violation thereof.

   Note 2: There must have been actual oral or written communication of the rules and penalties to the employee.

   Note 3: A finding of such communication does not in all cases require a "no" answer to Question No. 1. This is because certain offenses such as insubordination, coming to work intoxicated, drinking intoxicating beverages on the job, or theft of the property of the agency or of the fellow employees are so serious that any employee in the industrial society may properly be expected to know already that such conduct is offensive and heavily punishable.

   Note 4: If there is no contractual prohibition or restriction, the agency generally has the right unilaterally to promulgate reasonable rules and give reasonable orders; and these need not have been negotiated with the union.

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* Adapted from the criteria developed by arbitrator Carroll R. Daugherty.

2. Was the agency's rule or managerial order reasonably related to the orderly, efficient, and safe operation of the agency's business?

   Note: If an employee believes that the rule in question is unreasonable he must nevertheless obey it (in which case he may file a grievance afterwards) unless he sincerely feels that to obey the rule or order would seriously and immediately jeopardize someone's personal safety and/or integrity. Given a firm finding to the latter effect, the employee may be said to have justification for his disobedience.

3. Did the agency, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

   Note 1: This is the employee's "day in court" principle. An employee has the right to know with reasonable precision the offense with which he is being charged and to defend his behavior.

   Note 2: The agency's investigation must normally be made before its disciplinary decision is made. If the agency fails to do so, its failure may not normally be excused on the ground that the employee will get his day in court through the grievance procedure after the exaction of discipline. By that time there has usually been too much hardening of positions.

   Note 3: There may of course be circumstances under which management must react immediately to the employee's behavior. In such cases the normally proper action is to suspend the employee pending investigation, with the understanding that (a) the final disciplinary decision will be made after the investigation and (b) if the employee is found innocent after the investigation, he will be restored to his job with full pay for lost time.

   Note 4: The agency's investigation must include an inquiry into possible justification for alleged rule violation.

4. Was the agency's investigation conducted fairly and objectively?

   Note 1: At such an investigation the management official may be both "prosecutor" and "judge," but he should not also be a witness against the employee.

Note 2: It is essential for some higher, detached management official to assume and conscientiously perform the judicial role, giving the commonly accepted meaning to that term in his attitude and conduct.

Note 3: In some disputes between an employee and a management person there are no witnesses to an incident other than the two immediate participants. In such cases it is particularly important that the management "judge" question the management participatant rigorously and thoroughly, just as an actual third party would.

5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

Note 1: It is not required that the evidence be preponderant, conclusive or "beyond reasonable doubt." But the evidence must be truly substantial and not flimsy.

Note 2: The management judge should actively search out witnesses and evidence, not just passively take what participants or "volunteer" witnesses tell him.

6. Has the agency applied its rules, order, and penalties even-handedly and without discrimination to all employees?

Note 1: A "no" answer to this question requires a finding of discrimination and warrants negation or modification of the discipline imposed.

Note 2: If an agency has been lax in enforcing its rules and orders and decides henceforth to apply them rigorously, the agency may avoid a finding of discrimination by telling all employees beforehand of its intent to enforce hereafter all rules as written.

7. Was the degree of discipline administered by the agency in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the agency?

Note 1: A trivial proven offense does not merit harsh discipline unless the employee has properly been found guilty of the same or other offenses a number of times in the past. (There is no rule as to what number of previous offenses constitutes a "good", a "fair" or a "bad", record. Reasonable judgment thereon must be used.)

Note 2: An employee's record of previous offenses should not be used to discover whether he was guilty of the immediate or latest one. The only proper use of his record is to help determine the severity of discipline once he has properly been found guilty of the immediate offense.

Note 3: Given the same proven offense for two or more employees, their respective records provide the only proper basis for "discriminating" among them in the administration of discipline for said offense. Thus, if employee A's record is significantly better than those of employees B, C, and D, the agency may properly give A a lighter punishment than it gives the others for the same offense; and this does not constitute true discrimination.

The principles underlying these questions may be used as a guide for disciplinary policy. These principles may be briefly stated as:

. Discipline must be applied to employees in a manner that is fair and not discriminatory.

. The proof of misconduct must be adequate.

. The investigation must be fair.

. The rules applicable to employees must be made clear to those employees.

. The penalties for violation of rules must be clear.

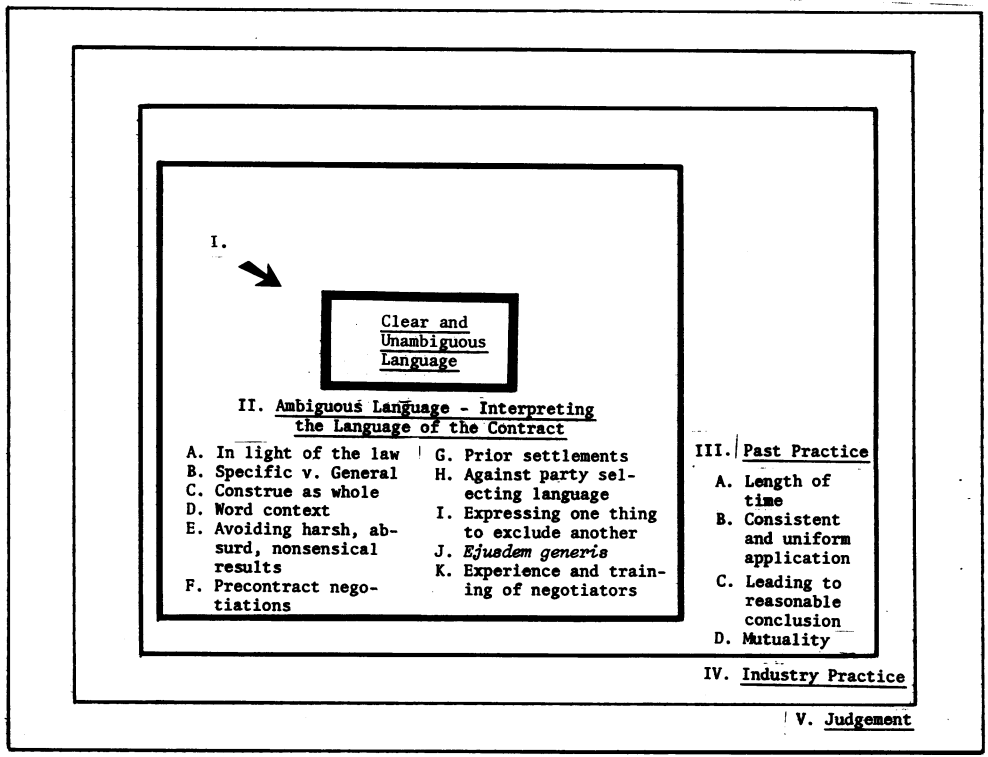
. The penalty must fit the seriousness of the defense.

. Except for very serious cases, progressive discipline must be applied.

Adherence to these principles should aid management in acting in a fashion that appears to be not "discriminatory, arbitrary, or capricious" -- that is, acting in a manner which an arbitrator would consider reasonable.

Records of past arbitration decisions also provide the data for the building of the defense of the disciplined employee. Standard arguments used by employee organizations have been identified for rule and insubordination types of disciplinary appeals cases. These arguments further define the criteria used in evaluating the reasonableness of a disciplinary action.

DETERMINING THE MUTUAL INTENT OF THE PARTIES-- ARBITRATOR CRITERIA IN CONTRACT INTERPRETATION



VI. Other Criteria

A. Avoidance of penalty

B. No consideration of compromise offers

HOW TO USE THIS CHART

This chart illustrates the criteria by which arbitrators interpret the contract. The overriding purpose of the criteria is to determine the mutual intent of the parties; that is, what the parties meant the agreement to mean when they wrote it.

The chart works outward; that is, the more important the criteria, the closer it is to the center. The arbitrator tries to determine the intent from clear and unambiguous language in the contract. If the relevant words are ambiguous, he applies the tests listed in the second box. If this does not resolve the dispute, he looks to Past Practice, Industry Practice, or simply makes a reasonable judgement.

The terms used in the chart are defined in the pages that follow.

The other criteria categories include criteria which may contribute to a decision but will not decide it.

Each arbitrator weighs criteria differently. However, this chart shows you the way an arbitrator would evaluate a case.

This chart is titled "Determining the Mutual Intent of the Parties" because that is the overriding goal of the arbitrator. No matter what criteria he employs, he is there to determine what the mutual intent of the parties was when they wrote the contract.

EXPLANATION OF TERMS

1. Clear and Unambiguous Language

-Language which does not have two or more reasonable explanations.

-Always used as the most important criterion except in unique or extenuating circumstances. If there is clear and unambiguous language in the contract relevant to the case, that clear and unambiguous language will be the basis for the award.

-Ordinary dictionary definitions are used except when stated. Trade and technical terms will be interpreted in trade or technical sense unless clearly used otherwise.

-The parties may think the language ambiguous but the arbitrator makes the final judgement.

-Language has to be read carefully in the context of the entire case. The particular language in one section of the contract may be clear but the meaning may be doubtful from a lack of harmony between all the sections of the contract.

2. Ambiguous Language Interpretation

If the language is not clear and unambiguous, the language must be interpreted by the arbitrator. He uses the following principles, in differing degrees of importance, to rule on ambiguous language.

a. Interpretation in light of the law

If two interpretations are possible, one making agreement lawful, the other making it unlawful, the lawful interpretation will be used.

b. Specific language over general language

Specific language supercedes general language.

c. Agreement to be interpreted as a whole

-Arbitrators generally determine meaning not from a single word or phrase, but from the contract as a whole. They look at a section in relationship to the entire agreement.

-All provisions of the contract are construed to have meaning. If one interpretation of a section renders another section meaningless, and a second interpretation gives the section some meaning, the second interpretation will be used.

d. Construction in light of word context

Ambiguous words can be given meaning by viewing them in light of their context in the contract.

e. Avoidance of harsh, absurd or nonsensical results

When one interpretation of an ambiguous provision leads to harsh, absurd or nonsensical results, an alternative interpretation is used.

f. Precontract negotiations

-The arbitrators may look at notes and records of negotiations to determine the mutual intent of the parties.

-If a party tried to get a particular clause in the contract but didn't succeed, the sense of the clause will not be used in overall interpretation.

g. Prior settlements as aid to interpretations

The arbitrator may utilize prior settlements involving the ambiguous provisions as precedents in determining the award.

h. Interpretation against party selecting the language

The drafter of the contract should have been able to prevent doubt about meaning. If both parties agree that language is ambiguous, the drafting party, if there is one, will probably lose.

i. Expressing one thing to exclude another

To mention one item of a group or class of items, and not to mention the others, is construed to mean that other(s) item(s) were intentionally excluded.

j. Doctrine of ejusdem generis

Where general words follow a list of specific terms, the general words will be interpreted to include or cover only things of the same general nature or class as the specific terms unless it is proven that the parties intended a wider definition.

> Example: a clause providing that seniority shall govern all cases of layoffs, transfer, "or other adjustment of personnel" should not be interpreted to require that overtime be allocated on the basis of seniority.

k. Experience and training of negotiators

Strictness of interpretation of an ambiguous agreement may depend on the experience and training of the negotiators. If they were very skilled, the arbitrator will apply a strict interpretation. If less skilled, he will be more liberal.

3. Past Practice

-Refers to practice which is reasonable uniform response to a recurring situation over a substantial length of time, which both parties recognize as proper. Past practice indicates the intent of the parties and is only relevant when the contract language is ambiguous.

-Past practice may be used in deciding arbitrations when the following statements are true:

a) the practice has been around a substantial length of time.
b) the practice has been consistently and uniformly applied.
c) the use of the practice would lead to a reasonable and logical conclusion
d) the practice has been mutually accepted:
mutuality can be established by a direct agreement by both parties, by implication of sufficient generality and duration, or by silence--that is, no objection by either party.
e) arbitrators disagree on how to weigh each of the variables

-If the practice is conflicting or unclear, the arbitrator will probably not give it much weight.

4. Industry Practice

If the language and past practice is unclear, the arbitrator may consider how others have handled the problem. He may look to:

-other units of same employer under same clause
-other agreements by one employer with several unions
-other agreements by several employers with one union

5. If nothing else is relevant, arbitrator will base his ruling on what is reasonable, equitable, and not harsh, absurd, or nonsensical.

6. Other Criteria

a. Avoidance of forfeiture or penalty

If an agreement can be interpreted in two ways, one which would result in one party paying a penalty, and one which would not, the arbitrator will tend to use the latter interpretation.

b. No consideration to compromise offers

"No consideration" will be compromise offers or concessions offered by one party and rejected by the other during negotiations preceding arbitration.

A WORD TO THE WISE

The wise advocate is not only aware of what wins a case, but also of conditions and behaviors which work against him. Below is a summary of the remarks of a panel of experienced arbitrators discussing their "pet peeves." This summary is followed by a list of ten ways to alienate arbitrators (and lose cases).

ARBITRATORS' PET PEEVES*

- The parties have not used the grievance procedure as it is intended to be used, before going to arbitration.
- The advocates have not prepared their cases well in advance of the hearing.
- The parties have not conferred with each other in an attempt to get a stipulation of fact and to formulate the issue(s) that they are going to ask the arbitrator to decide.
- The bringing of cases to arbitration which do not belong in arbitration. This includes cases where:
  - -The union brings cases to arbitration rather than telling a grievant he was wrong. The union tries to get a contract interpretation from the arbitration to give it a benefit it couldn't get at the bargaining table.

-Management backs up a supervisor who makes a poor decision, using the arbitrator's decision as a substitute for proper supervisory training.

- Deliberately picking a poor arbitrator where the case seems weak, so as to increase the party's probability of winning. Even should the party win this case, they may suffer a long-range loss because of what the arbitrator may say in his opinion.

- The advocate has not organized his case in a sequential or chronological manner and/or does not guide the data documentation and testimony through the hearing in a sequential manner.

- The parties have not conducted an adequate investigation including not carefully examining and cross-examining their own witnesses thoroughly in advance. The advocate should not be surprised at the answers of his witness during the hearing.

- The parties bring in outside lawyers who turn the arbitration proceeding into a battle-like courtroom-type adversary proceeding. The costs to the parties are increased not only in a monetary sense, but in terms of disrupted relationships. After the arbitration, the parties in a collective bargaining relationship must continue to live together.

*Summarized from "Arbitrators' Pet Peeves," Labor Arbitration for Union and Management Representatives, Joyce M. Najita, Ed., Industrial Relations Center, University of Hawaii, 1976.

HOW TO ALIENATE ARBITRATORS AND LOSE CASES*

From a speech - "Gamesmanship in Labor Arbitration" by Lewis M. Gill*

1. Always be late for the hearing. The best plan is to stroll in at least 35 minutes late. Do not offer any explanation.
2. Start off with a few ill-founded technical objections. Claim that the demand for arbitration is in imperfect form, or that Step Three in the grievance procedure was bypassed, or demand that the other side have the burden of presenting its case first. Be persistent - continue arguing the point even though the arbitrator indicates impatience to get on with the hearing.
3. Make it clear that you distrust the arbitrator. An occasional hostile or suspicious glance is effective, along with a sigh of resignation whenever he questions some point you are making.
4. Object to the introduction of most of your opponent's evidence. Cite the law of evidence at length, preferably incorrectly. If the arbitrator overrules you, glare balefully and reserve your rights of appeal to the courts.
5. Interrupt your opponent frequently in mid-sentence. Complain angrily to the arbitrator if your opponent does the same to you.
6. When cross-examining your opponent's witness, use a sneering tone. Demand "yes" or "no" answers. Imagine you are on television - put on a great dramatic show.
7. Never admit that anything the opposition says is true. Make no concessions, even on minor points.

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* Source: Proceedings of the Fifteenth Annual Meeting of the National Academy of Arbitrators, copyright 1962 by BNA, Inc., Washington, D.C.

8. Cover the same ground several times. Develop irrelevant points at length. Demand recesses to send to the plant for additional witnesses to corroborate these points further.

9. When presenting exhibits, have them in as inconvenient form as possible. Don't prepare summaries of bulky records - just dump them in raw form in the arbitrator's lap. Provide no copies for the other side.

10. Be sure not to state a clear theory of your case. Do not analyze the issue at the beginning or end of the hearing - spend the time on a denunciation of the motives of your opponent.

D

TAB D

AFTER THE HEARING

The hearing is adjourned after the parties have submitted all their evidence and arguments. If the parties decide to submit briefs or other documents, the hearing is formally considered closed on the date the arbitrator receives these documents.

TIME LIMITS

This official date of closure is the point at which the reckoning begins for time limits within which the award is to be rendered. Some collective bargaining agreements may contain time limits for the rendering of the awards. The AAA and the FMCS have a thirty day time limit unless the parties and arbitrator have agreed upon another time period or if another time period is required by law. If there is no specified time period, the award should be made within a "reasonable" time. Under California law, the parties set the time period (if not contained in the bargaining agreement) or the rule of "reasonable" time prevails.

TARDY AWARDS

If an award is not made within the specified time period, and no extensions have been agreed upon, it is possible that the award be held invalid. In some states, including California, the right to object to a late award is waived if the parties do not object before the award is issued. In cases under the NLRA, if objection is not made prior to the award and if the party or parties cannot show harm due to the delay, there is little chance of invalidating the award.

POST-HEARING BRIEFS

The post-hearing brief is a written document, submitted to the arbitrator by the parties, as a supplement to the original presentation of the case, after the hearings are adjourned.

One or both parties may request to file a post-hearing brief. On occasion the arbitrator may request a brief.

Should one party request to file the brief, the request is a privilege granted to both parties as a requisite of a "fair hearing." The request is made before the hearing is closed.

The date for the submission of the brief is worked out among the parties and the arbitrator. The briefs are simultaneously sent to the arbitrator and the other parties. When a service such as the AAA is used, the briefs may be submitted to them for distribution. Occasionally an agreement is made to permit briefs and reply briefs.

Some arbitrators discourage the use of briefs. Others ask the parties to choose between presenting a closing argument or submitting a brief. Many arbitrators favor the receipt of well prepared brief of the case as an aid in the writing of the opinion.

Pros and Cons of Using a Post-Hearing Brief

If post-hearing briefs are used, the time to final decision is further delayed and the costs of arbitration are higher.

THE USE OF PAST ARBITRATION DECISIONS AND CITATIONS

In an arbitration case, precedents are not as influential as in a court case. However many arbitrators do regard previous decisions as the common law of arbitration. Appropriate well chosen citations of previous decisions included in your case and brief could help your position. Past decisions on similar cases between the same parties are most effective. Citing the awards and reasoning of this arbitrator, or others, which have upheld your position in similar situations can be influential. Citations which serve to illustrate the weight given by arbitrators to particular circumstances and arguments may be considered. The use of citations should be limited in number and those chosen should be to the point. Excessive or inappropriate citations may have a negative effect on the arbitrator. Numerous citations also increase the study time of the arbitrator and increase the time and cost of the process.

Should the other party have cited past rulings, these should be examined. Their applicability can be refuted in your brief, showing how the facts or circumstances differ from your situation.

Past rulings may be helpful beyond direct citation in the post-hearing brief. The wisest course of action is to research relevant past decisions before choosing the arbitrator or presenting the case. As discussed earlier, an arbitrator's past decisions may disclose his mode of interpretation and decision and indicate how favorable he might be to your position and circumstances. His past opinions may indicate the factors upon which he places importance, and his mode of reasoning. These facts

should be kept in mind in both pre-hearing and post-hearing briefs and in preparing the presentation of the case.

The decisions and opinions in similar cases also aid in preparing the briefs and the case, and may suggest new considerations and approaches.

SOURCES OF ARBITRATION AWARDS

There are two major labor arbitration reporting services. The Bureau of National Affairs (BNA) publishes Labor Arbitration Reports and the Commerce Clearing House publishes Labor Arbitration Awards. Public sector cases are also covered in BNA's Government Employee Relations Reporter (GERR) and in Labor Arbitration in Government published monthly by the AAA. California Public Employee Relations (CPER), a monthly published by the Institute of Industrial Relations, University of California, Berkeley, reports on leading California public sector arbitration cases in its section called "Neutrals' Log." Public education cases may be found in Arbitration in the Schools published monthly by the AAA. In jurisdictions where employee relations boards exist, they may provide information on previous cases.

The following pertinent information may be found by using the described procedures with the major reporting services.

1. Arbitrators rulings in similar cases.

Look for the subject area in the Topical Index in the back of each volume of CCH Labor Arbitration Awards, and in the loose-leaf weekly advance sheet binder. In BNA's Labor Arbitration Reports, use the Contract Terms Interpreted section in the back of the Cumulative Digest and Index volume. Each of the preceding indices contains the case references available in digest and detailed form in one or another of the volumes of each series, by volume and page. The BNA Index also contains brief digests of each decision for your inspection. If the digest indicates it is a useful case, you can then go back to the appropriate volume and read the entire case.

2. A specific arbitrator's previous rulings.

You can read earlier published decisions of an arbitrator you may have on an arbitration list given you by AAA, FMCS or a state labor relations agency. If your agency subscribes to BNA's Labor Arbitration Reports, check the Directory of Arbitrators in the back of each volume (for young arbitrators or recent cases) or the Directory of Arbitrators published in the Index volume discussed under 1 above. The CCH series contains a Table of Awards by Arbitrator in the front of each bound volume. The BNA Index contains a brief career resume of each arbitrator whose decisions are published in the volume or previous volumes. Each arbitrator's decisions are footnoted by volume and page number, and may easily be looked up. Private services associations may provide this information for employers. R.A. Simpson, Ridgewood, New Jersey, operates an "Arbitrators' Qualifications Reports Service" which provides the records and decisions of arbitrators on a leased service basis. Associations such as the Merchants and Manufacturers Association in Los Angeles can provide pertinent information for members. (For further information, see section on "Selecting the Arbitrator.") Large employee organizations may research and keep files on arbitrators.

3. Previous arbitration cases that either party has been involved in.

You can get an idea of how an employer or union will argue by checking earlier cases involving the same employer or union. CCH publishes a Table of Awards by Party, found in the front of each volume, and BNA publishes a Table of Cases in the back of each volume. Each of the preceding tables contains references by international and local union and by employer.

4. Cases involving "new" twists.

Grievance disputes of relatively recent types can be checked out in the loose-leaf binders of either services described above, which are added to weekly.

THE AWARD AND OPINION

The Award

The arbitrator states his decision in the "award." The award is usually written and must be signed by the arbitrator.

The award should be definite and specific, and deal with all matters within the submission agreement.

The Opinion

The award is often accompanied by a written opinion, stating the reasoning behind the decision.

A good opinion contributes to the acceptance of the award. It demonstrates to the parties that the arbitrator understands the case and that the award is basically sound.

The opinion also aids in clarifying the agreement. The principles put forth and the reasoning used act as a guide for interpreting the contract and for resolving future disputes. The opinion also aids in decision-making about bringing future disputes to arbitration.

It is not always necessary to request an opinion. An opinion raises the cost of arbitration and prolongs the time to the issuance of the award.

A risk is taken that the arbitrator might comment on matters not specific to the disputed issue, influencing or stimulating later disputes.

Generally, should the case involve clarification and interpretation of the agreement which will have future value and/or the case have large monetary consequences, an opinion is desirable.

NEW MATERIAL AND REOPENING THE HEARING

New material does not belong in the post-hearing brief. New evidence should be subject to cross examination, and is best presented with both parties present.

Should there be new evidence, the neutral must decide whether to reopen the case. The arbitrator may, by his own motion or request of the parties for good cause, reopen the hearing at any time before the award is rendered. If there is a time limit for rendering the award, the date should be altered to allow for the delay caused by reopening. Where both parties request reopening the arbitrator will probably reopen the case. Should one party object, the arbitrator must decide if there is reasonable cause. The arbitrator will consider:

- If the new evidence is of enough import to modify the conclusions that could be drawn from the evidence already on the record.
- If the new evidence merely duplicates corroborative material with minimal impact.
- If the new material is a response to detrimental evidence provided by one side, of which the other party was unaware. If so, has the party only now had the opportunity to prepare a response?

If the arbitrator feels the party is offering the new evidence as being necessary to his making the determination he will be more prone to accept the evidence than if he believes the party is acting to harass the other party or delay the award.

In some cases where evidence becomes available after the hearing is closed, the parties may agree that the evidence be submitted to the arbitrator with the opposition party responding in writing, rather than formally re-opening the hearing.

For clarification of points, the arbitrator will call on one or both parties for information, or ask for written documents, without reopening the hearing.

AFTER THE AWARD

When the award (and opinion) is issued, read the entire document. Give associates and/or constituents an understanding of the reasoning. Associates should understand why the party won or lost. This understanding helps in accepting the decision, dealing with similar disputes and in deciding whether a future dispute should go to arbitration.

After the award is issued, the arbitrator is "functus officio"--his responsibility had ended and he has no further connection with the case. Technically, he cannot receive any more evidence, amend his opinion or award or reopen the case unless the parties give him authority anew, for the purpose they stipulate. In some states as California this concept has been modified so that the courts or the parties may request clarification or correction within a limited period of time after the award is served (thirty days in California).

An application for correction must be made no later than 10 days after the award was served. The party must deliver or mail a copy of the

application to the other party, who may submit a written objection to the application within 10 days after the application is delivered or mailed. The arbitrator will deny the application or correct the award. Generally the need for correction involves an obvious clerical error or mathematical errors.

THE STATUS OF THE AWARD

Where there is a valid agreement for binding arbitration, the award is binding and enforceable by the courts.

Appeal may be brought to the courts. However, according to California law the court generally will not vacate the award unless the court determines that:

(a) The award was procured by corruption, fraud or other undue means;

(b) There was corruption of any of the arbitrators;

(c) The rights of such party were substantially prejudiced by misconduct of the neutral arbitrator;

(d) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted; or

(e) The rights of such party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefore or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title. (California Code Civil Procedures, Sec. 1286.2)

These provisions follow the common law, the thrust of which indicates that an arbitration award will not be reviewed substantively, but only for procedural error, fraud or misconduct on the part of any party involved, bias or lack of jurisdiction of the arbitrator, or violation of public policy, constitutional issues, conflicting regulations public fiscal and budgeting matters and questions of tenure in public education.

The Vallejo case underscored the California court's tendency to look and apply precedents arising from the NLRA to California public sector arbitration cases for the most part, particularly in regard of grievance issues to the arbitration process.[1]

The courts are most likely to involve themselves in cases concerning constitutional/civil rights. Under current federal law and practice, the use of one avenue of recourse for victims of discrimination does not preclude their using other avenues of remedy. The U.S. Supreme Court decision in Gardner-Denver specifically permitted the victims of alleged civil rights discrimination to apply to the courts for relief under the Civil Rights Act after an arbitration hearing concerning the same grievance.[2] The Court, specified that the employee in such a procedure was not receiving a review of the arbitration decision but was independently asserting a statutory right. In such a case, the court will consider the arbitration decision and take it into account to the degree that:

-- The collective bargaining contract has provisions which conform substantially to Title VII of the Civil Rights Act.

-- Procedural fairness was observed during the arbitration hearing.

-- The record is adequate with respect to discrimination.

-- The arbitrator has specific competence.

Proof that these conditions were substantially met will increase the likelihood that the court's ruling will be consistent with the awards.

If constitutional rights as due process can be construed to have been violated, the courts may intervene. The decision of the California Supreme Court in Skelly v. State Personnel Board,[3] which overturned a ruling of the California State Personnel Board on the grounds of an employees' state and federal constitutional due process rights having been violated, along with other decisions, has been taken to indicate a broader scope of judicial review of public sector arbitral decision.[4]

These decisions indicate that where civil or constitutional rights might be involved, the personnel and grievance procedures as well as the arbitration hearing procedure must be more formalized to ensure, and provide proof of, compliance with public policy, law, and procedural requirements. Although this formality may be disliked as being antithetical to the purpose of using arbitration rather than the courts, and because of an increase in time and costs involved, this formality may be necessary to uphold the integrity of the private arbitration system. (Meeting the tests of the courts increases the likelihood that, arbitral decisions will be upheld.) As the courts uphold these decisions, the greater the trust that will accrue to the arbitration system as it is demonstrated that the private judicial system can dispense industrial justice, taking into account current problems of public policy and law.

NOTES

1. *Fire Fighters, Local 1186 v. City of Vallejo*, 12C 3d 608 (1974).

2. *Alexander v. Gardner-Denver*, 415 US 3b (1974).

3. *Skelly v. State Personnel Board*, 15 Cal. 3d 194 (1975). For discussion of *Skelly* and its implications, see *Employee Discipline*, Institute of Industrial Relations, UCLA, 1977.

4. Benjamin Aaron, "The Impact of Public Employment Grievance Settlement on the Labor Arbitration Process," Reprint No. 255, Institute of Industrial Relations, UCLA, 1976, pp. 40, 41.

E

TAB E

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GLOSSARY OF SELECTED TERMS

ADJOURNMENT OF HEARINGS

The postponement of hearings in an arbitration. The arbitrator has the power to postpone a hearing until another time at the request of either party or when he himself decides to do so. The Uniform Arbitration Act and the California Arbitration Act provide that an award may be vacated if an arbitrator has refused to postpone a hearing when sufficient cause has been shown for adjournment.

AFFIDAVIT

A sworn statement or written declaration made upon oath before a notary public or other authorized officer. An affidavit is one of the methods used to introduce evidence in an arbitration. Where the witness is available and could be cross-examined, the arbitrator may refuse to accept such an affidavit.

AMERICAN ARBITRATION ASSOCIATION (AAA)

A private non-profit organization founded in 1928 to promote the study of arbitration and perfect its techniques. The AAA is solely an administrative or impartial arbitration agency whose officials never act as arbitrators. It maintains panels from which arbitrators may be selected, and provides administrative personnel and procedures for cases being arbitrated under its rules. The five most important arbitration categories or tribunals are Commercial, Accident Claims, Labor, International, and Inter-American. The AAA has its headquarters in New York City and maintains 21 regional offices throughout the country.

APPEAL

A proceeding for obtaining a review of a decision. In arbitration the right to an appeal is seldom provided. An award may be challenged in court by a motion to vacate. In labor arbitration, such motions are generally based upon allegations that the arbitrator exceeded his authority. In some countries the arbitral procedure provides for an appeal to a higher arbitral tribunal, but this procedure is not common in the United States.

ARBITRABILITY

The extent to which an employer is obligated to arbitrate a particular grievance or dispute. The answer is usually determined either by an arbitrator or a court. Procedural arbitrability involves determining if specified steps have been carried out prior to the initiation of the arbitration. Substantive arbitrability concerns the scope of the arbitration clause.

ARBITRATION

A method of settling disputes through recourse to an impartial third party who holds a formal hearing, takes testimony, and issues a decision which is usually final and binding. Grievance arbitration, also known as rights arbitration, involves disputes arising over the interpretation and application of the contract. Interest arbitration is used in settling disputes over the negotiation of the provisions of a new contract. Arbitration is voluntary when both parties, of their own volition, agree to submit a disputed issue to arbitration,and compulsory if required by law. If arbitration is advisory, the arbitrator's award is not binding on the parties.

ARBITRATION, ADVISORY

See: Arbitration

ARBITRATION, COMPULSORY

See: Arbitration

ARBITRATION, FINAL OFFER

The process whereby the arbitrator must select either the employer's or employee's final offer on issues in dispute.

ARBITRATION, GRIEVANCE

The arbitration of disputes that arise during the term of a written agreement and involve the interpretation and application of that agreement. The arbitration clarifies the meaning of the agreement provisions and renders a decision when disagreements cannot be resolved at the lower levels of the grievance procedure. It is sometimes referred to as arbitration over the rights of the parties under the agreement.

ARBITRATION, INTEREST

Arbitration of disputes that arise over the negotiations of a new agreement on the modification of the terms of an existing agreement. It is to be distinguished from grievance arbitration which involves the interpretation or application of the existing agreement.

ARBITRATION, VOLUNTARY

See: Arbitration

ARBITRATOR

An impartial third party to whom disputing parties submit their differences for decision. An ad-hoc arbitrator is one selected by the parties on a case-by-case or temporary basis. The selection procedure is generally written into the collective agreement and provides that if the parties are unable to agree on a mutually acceptable arbitrator, they will refer the selection to a specified individual or agency. A permanent arbitrator is one whose name is written into the collective agreement. He automatically becomes the arbitrator in all grievance cases reaching the arbitration step for the life of the agreement or until the parties relieve him of his responsibilities.

ARBITRATOR, AD HOC

See: Arbitrator

ARBITRATOR, PERMANENT

See: Arbitrator

ARBITRATOR'S AUTHORITY

The power of an arbitrator to hear and determine a dispute, derived from law and from the agreement of the parties. In some cases the authority of the arbitrator may be confined to the stated terms and conditions of the agreement, or to contractual questions other than matters having economic impact, or to disciplinary matters. At the other extreme, the arbitrator's authority may encompass not only the terms and conditions of employment, but also any alleged violations of the employer's rules and regulations or even pertinent statutes and ordinances. Some clauses permit the arbitration of any and all matters in disagreement between the employer and the employees, regardless of whether they are related to their agreement.

AUTHORITY OF THE ARBITRATOR

See: Arbitrator's Authority

AWARD

The decision of an arbitrator in a dispute. The award is based on the testimony of both parties, the parties agreement, past practice and relevant laws and regulations. The arbitrator's award is usually preceded by a written opinion which analyzes the evidence and issues raised by the parties and expresses the arbitrator's reasons for his decision. In some cases the parties may ask the arbitrator to issue a summary award, which settles the disputed issue but excludes the additional material in the opinion.

BACK PAY AWARDS

Under most arbitration clauses, an arbitrator may order reinstatement of an employee who has been discharged or suspended without just cause. The arbitrator may reduce the penalty by reinstating the grievant, without back pay, or may reduce back pay to the extent that the employee has been receiving compensation from another job or from unemployment compensation funds. Some contracts restrict the arbitrator's authority to fashion a remedy.

BRIEF

A written statement of fact and law in support of a party's position, which is submitted to an arbitrator either before or after the hearing. It usually cites relevant court decisions, prior arbitration awards and the language of the contract.

CHALLENGE OF ARBITRATOR

The right of a party in arbitration to question the qualifications of an arbitrator with the aim of stopping his appointment or removing him from office. However, such challenges seldom occur in labor arbitration where the parties know the arbitrators and participate in their selection.

CLAIMANT

The party who initiates the arbitration by giving notice to the respondent, or defendant, of his intention to arbitrate. The employee organization is usually the claimant.

CLOSING ARGUMENT

A final oral statement made by each party in an arbitration which usually summarizes and emphasizes the points upon which the parties wish to base their case.

COLLYER DOCTRINE

The 1971 *Collyer* decision of the NLRB broadened the Board's deferral to arbitration policy (see SPIELBERG DOCTRINE). Under *Collyer* the Board would defer many unfair labor practice cases to arbitration *prior* to arbitration if the dispute is *contractual* in nature, if there is an agreement providing for final and binding arbitration, and a "reasonable" construction of the agreement would preclude a finding that the disputed conduct violated the NLRA.

Two recent NLRB decisions (1977), *Roy Robinson Chevrolet* and *General American Transportation Corp.*, have narrowed the Board's deferral policy. The Board will no longer defer to arbitration in cases involving alleged union discrimination or discharge.

COMPENSATION OF THE ARBITRATOR

The fee the arbitrator receives for his services, usually on a per diem basis with added allowance for study and travel. The parties usually share the costs equally. It is possible to reduce the costs of arbitration by expediting the hearing procedure, eliminating transcripts and briefs, and by permitting the arbitrator to file a summary award. Under the Expedited Rules of the AAA, arbitrators charge only for the hearing day.

CONCURRENT JURISDICTION

A situation where one of the parties may be authorized to seek a remedy from the courts, from the National Labor Relations Board or from arbitration. For example, the collective bargaining agreement and the National Labor Relations Act may protect related rights. If a worker is discharged without just cause, his grievance may be subject to arbitration. But if he were discharged for union activities, he may have a right to file an unfair labor practice charge with the NLRB. A question may arise as to which tribunal should have primary jurisdiction. To cope with this conflict, the NLRB has determined, in the *Collyer* case, that the Board will withhold its jurisdiction in favor of arbitration if certain conditions exist. Where an award has been rendered on such a case by an arbitrator, the NLRB may defer to it.

DELEGATION OF THE ARBITRATOR'S AUTHORITY

The authority of an arbitrator cannot be delegated,but with the consent of both parties, the arbitrator can consult outside experts to verify certain facts. Such consultation is not a delegation of the arbitrator's authority because the ultimate decision still lies with the arbitrator.

DEMAND FOR ARBITRATION

The initial notice by one party to the other party of an intention to proceed to arbitration under the terms of their agreement. The demand should include a description of the dispute, the names of the parties, a copy of the arbitration clause and a statement of the remedy or relief being sought. Copies of the demand are sent to the opposing party and the administrative agency.

ENFORCEMENT OF ARBITRATION AGREEMENTS

Recent court decisions have provided for specific means for the enforcement of agreements to arbitrate. The most influential of those was the United States Supreme Court decision in *Textile Worker Union v. Lincoln Mills* (1957) which found that Section 301 of the

Taft-Hartley Act gave the federal courts the power to compel comliance with an arbitration clause in a union contract.

EVIDENCE

See: Rules of Evidence

EXCLUSIONARY CLAUSE

A clause in a collective bargaining agreement which specifies that certain subjects be excluded from arbitration.

EXECUTION OF THE AWARD

The signing and delivery of the award with whatever formalities as may be required by law.

EX PARTE ARBITRATION

An arbitration in which a party does not participate because he is unwilling to submit to arbitration. Most administrative agencies allow for arbitration to proceed in the absence of one party, providing the absent party has been given ample notice of the hearing.

EXPEDITED LABOR ARBITRATION

The procedure whereby the parties give up some of the procedural advantages of traditional labor arbitration in order to get a quicker decision at a reduced cost. The AAA's Expedited Labor Arbitration Rules provide that hearings will be scheduled within seven days of the appointment of an arbitrator, there are no transcripts or briefs, there is a single hearing, and the award is due no more than five days after the hearing.

FEDERAL MEDIATION AND CONCILIATION SERVICE

Federal Mediation and Conciliation Service (FMCS). An independent agency of the Federal Government, established under Title II of the Labor-Management Relations Act, 1947, to mediate and conciliate labor disputes in any industry affecting commerce, other than in the railroad and air transportation industries. The FMCS provides governmental facilities for labor contract mediation and maintains a panel of arbitrators.

FINALITY OF AWARD

The principle that an arbitration award is final and binding upon the parties, subject to being vacated on statutory or common law grounds. Finality is an essential requirement of an award. Therefore

all issues raised by either party must be disposed of in the award. Failure to resolve all issues may endanger the validity of the award.

GRIEVANCE

A statement of dissatisfaction, usually by an employee or employee organization, but sometimes by the employer, concerning the application or interpretation of an existing agreement or traditional work practices. The method of dealing with individual grievances is usually spelled out in the contract and provides for discussions at progressively higher levels, with arbitration often being the last step.

GRIEVANCE ARBITRATION

See: Arbitration

HEARING

The oral presentation of a case in arbitration. The fundamental requirements for a hearing are that the arbitrator be present, that the persons whose rights are affected be given a notice of the proceedings, and that the parties be heard and allowed to present all relevant evidence and to cross-examine witnesses appearing against them.

IMPARTIAL CHAIRMAN

An arbitrator who is the only impartial member of an arbitration board established jointly by the employee organization and the employer.

INTEREST ARBITRATION

See: Arbitration, Interest

INTERIM AWARD

Most arbitration statutes in the United States require that arbitration awards be final, and that they determine all of the issues submitted. But where the parties have given expressed or implied consent for an interim award, arbitrators may be authorized to determine some but not all of the issues. Interim awards are sometimes rendered by labor arbitrators in situations where further studies must be made by the parties before the remaining issues can be determined.

INTERVENTION

The act by which a third party requests to be acknowledged as a party in an arbitration between two other parties. An arbitrator must often determine whether the intervener's interests adequately represented by the existing parties. Arbitrators have generally been reluctant to grant intervention over the objection of the parties.

IRREVOCABILITY OF THE ARBITRATION AGREEMENT

Once an arbitration agreement has been properly incorporated into a contract, it cannot be evaded under modern arbitration statutes unless the entire contract is revoked.

JUDICIAL NOTICE

The recognition by a labor arbitrator of certain facts in a case as being self-evident or of common knowledge. A process whereby arbitrators may recognize statutory laws of other jurisdictions, the official acts of governmental agencies, the common practices in collective bargaining, and all other such matters which are so well-known that a party should not be put to the burden of having to establish them by proof.

JUDICIAL REVIEW IN ARBITRATION

A review of the arbitration award by a court at the request of one of the parties to determine if the award is enforceable. A judicial review cannot concern itself with the sufficiency of evidence or the merits of the award, nor can the award be vacated because of alleged errors of law or fact. The two questions specifically left in labor arbitration by the Trilogy decisions for the court to determine are whether an agreement to arbitrate exists and whether the arbitrator remained within his authority in making his award.

JURISDICTION

The legal right of the arbitrator to exercise authority. It is usually defined and limited by the parties' contract.

LACHES

The undue or unreasonable delay in asserting a right which might present the enforcement of that right or result in its loss. Arbitrators may consider laches when selecting a remedy to a dispute. For example, an arbitrator might rule that if a party had "slept on its claimed rights" for too long a time it might have lost all claim to those rights.

LIABILITY OF ARBITRATOR

A labor arbitrator is immune from civil or legal action for any award he may render, and is not required to explain the reasons for his award, nor testify as to his performance. Without such immunity, a losing party could expose the arbitrator to the hazards of a lawsuit.

MEDIATION

The participation by a third party in dispute negotiations for the purpose of helping the parties resolve their disagreement. The mediator may meet with the parties separately, or may arrange joint conferences. He tries to facilitate the bargaining process by clarifying the issues and helping the parties to discover areas of possible compromise. The mediator may offer suggestions, but he cannot force either party to accept a solution. Sometimes the mediator may recommend that the parties agree to arbitrate the remaining issues.

MODIFYING THE AWARD

The correction of errors in an award by a court or an arbitrator. Under most statutes an award may be corrected if there is a miscalculation of figures or a mistake in a description. But in correcting such errors the arbitrator or court is not to reexamine the merits of the decision.

MOTION TO COMPEL ARBITRATION

A form of legal action used by the moving party to petition a court to compel the other party to arbitrate. Where a motion to compel is deemed necessary, the supporting affidavits and documents should provide evidence that there is an agreement to arbitrate, that a dispute exists, and that the opposing party has refused to arbitrate. The court cannot consider the merits of the controversy.

MULTIPLE GRIEVANCES

The filing of two or more unrelated grievances by the union, to be heard in a single hearing before the same arbitrator. The union's right to file multiple grievances depends upon contract language and past practice.

NATIONAL ACADEMY OF ARBITRATORS

An organization founded in 1947, to foster high standards of knowledge and skill on a professional level among those engaged in the

arbitration of industrial disputes. The National Academy is not an agency for the selection or appointment of arbitrators. At its annual meeting, lectures on various aspects of arbitration are delivered, which are published by the Bureau of National Affairs under the title "Proceedings of the Annual Meeting of the National Academy of Arbitrators."

NATIONAL PANEL OF LABOR ARBITRATORS

A list of some 2,000 persons skilled in labor arbitration, who are available through the twenty-one regional offices of the AAA to serve as arbitrators throughout the United States. Arbitrators are carefully screened by the AAA for impartiality before being appointed to the panel.

NOTICE OF HEARING

A formal notification of the time and place of a hearing which is sent to both parties in a dispute by the arbitrator or an administrative agency.

OPEN-END GRIEVANCE PROCEDURE

A grievance procedure which has as its final step the right to strike. Such agreements are increasingly rare as contracts now provide for final and binding arbitration.

OPENING STATEMENT

Brief statements made at the opening of a hearing by the advocates, intended to inform the arbitrator of the nature of the dispute and of the evidence they intend to present. It is usual for the complaining party to be heard first, but the arbitrator may vary this at his discretion.

OPINION

A written document in which the arbitrator states the reasons for his award. An opinion usually precedes the award and is not considered to be part of the award. In some cases the parties may ask the arbitrator not to issue an opinion in order to reduce the cost and delay of arbitration.

PAROL EVIDENCE RULE

Evidence given by a witness in court or in an arbitration as to the making of a contract. Parol evidence usually applies to testimony concerned with discussions held at the time of the negotiation of the agreement, in order to explain the meaning of a provision in that agreement. If the wording of an agreement is ambiguous,the arbitrator

usually admits parol evidence and determines what weight it should be given.

See also: Rules of Evidence

PAST PRACTICE

A course of action knowingly followed by an employee organization and an employer over a period of time regardless of whether or not the contract explicitly permits such action. Both parties may not have specifically agreed to the action, but it is regarded as normal by the employees. Past practice becomes significant in arbitration when one of the parties submits evidence of it to support its claim.

PERMANENT ARBITRATOR

See: Arbitrator

POST-HEARING BRIEFS

Written documents either requested by the arbitrator or submitted to him by the parties in a dispute as a supplement to the original presentation of the case after hearings have already been held. Post-hearing briefs set forth the parties' interpretation of the facts and their arguments in support of their case. They are based entirely upon material presented at the hearing and should not contain new information that was not included in the hearing.

PRECEDENT

The concept that prior decisions serve as a rule which is binding on later decisions. Prior decisions are not binding upon a labor arbitrator although they may be considered in determining a case. The parties, however, may treat prior decisions on the same point as precedents, particularly under the permanent arbitrator system.

PRE-HEARING CONFERENCE

A meeting between the arbitrator and the parties prior to the hearing to examine the issues involved and possibly establish procedural rules. The parties may submit pre-hearing briefs setting forth their versions of the grievance and their supporting arguments. Pre-hearing conferences may serve as a means of expediting the proceeding by enabling the arbitrator to become familiar with the case prior to the hearing.

PRIVACY OF ARBITRATION

The practice that the arbitrator not disclose the terms of an award

until after it has been delivered simultaneously to both parties. Any publication or disclosure should be made only with the consent of the parties.

REHEARING

The reconsideration of an award which may result in a new arbitration before the same or different arbitrators. A rehearing may be ordered by a court as a result of a challenge to an award or a motion to confirm, modify or vacate the award. Under some statutes the court may recommit the matter to the same arbitrator where the award is not mutual, final and definite. If the grounds for vacating the award are corruption, fraud, or other misconduct of the arbitrator, a rehearing will usually be ordered before a new arbitrator. If an arbitrator has made an error in computations, some statutes do not require a rehearing. The court may make the corrections and enforce the award.

REINSTATEMENT

The return of a discharged employee to his former job through the decision of an arbitrator. The crucial issue in discharge cases is whether the discharge was for a just cause and whether the penalty was fair and reasonable. An employee may be reinstated with full back pay or he may have the amount of back pay reduced or even eliminated. The extent of back pay depends on the arbitrator's reasons for reinstatement and the arbitrator's power to fashion a remedy which may be limited by the parties.

REOPENING OF HEARINGS

An arbitrator may reopen a hearing on his own motion or at the request of a party. The arbitrator may wish to reopen the hearing to have the parties clarify the issue or present further testimony. A party may request a rehearing for the presentation of new evidence. Before granting such a request, the arbitrator should offer the opposing party the opportunity to present his objections. If reopening the hearing would delay the award beyond the 30-day time limit specified in the AAA Rules, or beyond the contractual time limits, the matter may not be reopened unless both parties agree.

RESIDUAL RIGHTS

Those powers which an employer has held in the past and which have not been reduced or eliminated by court decisions or the collective bargaining agreement. The residual rights doctrine gives management the benefit of the doubt concerning specific rights on which the contract is silent.

RES JUDICATA

The legal doctrine that once a legal claim has been decided it can never again be litigated. The purpose of res judicata is to prevent repetitious lawsuits. Once a case has been properly determined under arbitration its issues are res judicata and cannot be raised again. Arbitration based on a valid contract has the same status as a lawsuit in the eyes of the court.

RESPONDENT

The defendant or party who receives a notice of intention to arbitrate from the claimant. The employer is usually the respondent.

RIGHTS ARBITRATION

See: Arbitration

RIGHT TO COUNSEL

Each party to a labor arbitration has a right to be represented by a lawyer. However, this is not a requirement and employee organizations and employers are often represented by lay persons experienced in arbitration.

ROTATING PANELS

A panel of arbitrators selected on a rotating basis for the life of the contract. By this method, parties to a contract are able to expedite the selection process while still using arbitrators who are familiar with their contract and their relationship.

RULES OF EVIDENCE

Courtroom rules of evidence are not controlling in arbitration. They may have some influence upon the admissibility of evidence in arbitration, but they are generally felt to be too restrictive in a hearing which is adapted to the needs of the parties. Under AAA Labor Arbitration Rules, the arbitrator determines whether evidence is relevant and material, when hearsay may be admitted, when to accept a copy instead of the original document, and when to admit evidence of oral agreements. Before making a ruling on contested evidence, the arbitrator will listen to the parties' arguments on the issue. Ordinarily, labor arbitrators are willing to accept evidence submitted by either party, for whatever probative value it may have, but an arbitrator is unlikely to be persuaded by irrelevant or immaterial evidence.

SCOPE OF ARBITRATION

The number and extent of issues as specified in the arbitration agreement which can be referred to arbitration in case of a dispute. A narrow clause in an arbitration agreement may include only that which would relate to the validity, interpretation,or application of the agreement. A broad clause may include any controversy or claim arising out of or relating to the contract.

See also: Arbitrator's Authority

SPIELBERG DOCTRINE

A landmark decision of the National Labor Relations Board, issued in 1955. The Board ruled that in the case of an alleged unfair labor practice which violated both the Taft-Hartley Act and the parties' contract, the Board would defer to arbitration provided specific conditions were met. These include a fair hearing, acceptance of the award by the parties, a proper consideration and determination of the unfair labor practice issues by the arbitrator and a decision which is compatible with the policies of the NLRB. If these conditions are not met,the NLRB may take jurisdiction after the arbitration award is issued.

STATUTE OF LIMITATION

A statute which determines the time during which an action may be taken to enforce any legal claim or right. In labor arbitration, the term is also loosely used for the time periods contained in the collective bargaining agreement. These agreements may contain time limitations for performing various acts such as filing a grievance or appealing the decision of an officer of the company in the grievance procedure. Both courts and arbitrators vary in their treatment of such provisions. The United States Supreme Court in *John Wiley & Sons v. Livingston* held that it is up to the arbitrator to decide whether there was compliance with the time limitations provided in the contract.

SUBMISSION AGREEMENT

A document used to initiate arbitration of an existing dispute, stating the nature of the dispute and affirming the parties' intentions to arbitrate and abide by the award. Parties not originally bound by an arbitration clause may use a submission agreement to refer their dispute to arbitration. The agreement establishes the extent and limit of the arbitrator's authority.

SUBPOENA POWER

The power to issue a legal writ requiring the appearance of a

particular witness or the presentation of specific evidence. The subpoena power of an arbitrator depends upon the state in which he is functioning. In some states an attorney for either party, as an officer of the court, has the power to issue a subpoena. In practice, it is not usually necessary for an arbitrator to issue a subpoena since his warning of a possible adverse inference concerning the failure to produce a witness or evidence is usually sufficient to convince the parties to produce them.

SUPPLEMENTAL AWARD

An award in which the arbitrator corrects or supplements his original decision. It may be a correction, modification or amendment of the earlier award, and may be made only if the parties have agreed to give the arbitrator the authority to issue a supplemental award.

TRANSCRIPT OF HEARING

A verbatim record of an arbitration hearing usually in the form of a stenographic report. If only one party asks for a transcript, that party must pay for it. Otherwise the costs are shared by the parties. Parties may reduce the costs of arbitration by eliminating the transcript.

TRILOGY CASES

The landmark decisions delivered simultaneously in 1960 by the United States Supreme Court dealing with arbitrability and the enforcement of awards. On the issue of arbitrability it was held that the courts are limited to determining whether there is a collective bargaining agreement in existence, whether there is an arbitration clause, and whether there is an allegation that a provision of the agreement has been violated. If the arbitration clause is broad enough to include the alleged dispute, then arbitration must be ordered. On enforcement of awards the Court ruled, if the arbitrator stays within the submission and makes his award within his authority as established by the contract, then the award must be enforced. In either arbitrability or enforcement cases, the courts are not to examine the merits of the cases. They are not to substitute their judgment for that of the arbitrator, nor shall they refuse to require arbitration because they believe a claim is frivolous or baseless.

TRIPARTITE BOARD

An arbitration board usually composed of one or more members selected by each party and a neutral member who is selected by both parties to act as chairman.

UNFAIR LABOR PRACTICE

An act on the part of a union or an employer which interferes with the rights of employees to join labor unions and to engage in collective bargaining. Section 8 of the National Labor Relations Act makes such conduct unlawful and empowers the National Labor Relations Board to prevent or to remedy it. State statutes may also declare certain acts as "unfair labor practices." Arbitrators have no jurisdiction over unfair labor practices except in those cases where such practices also violate collective bargaining agreements.

VACATING AN AWARD

A court ruling to have an award set aside. An award can be vacated on proof of partiality of an arbitrator or when the arbitrator exceeds his powers which the parties established in their agreement, or when he imperfectly executes the award. Other grounds for vacating an award are corruption, fraud, or other misconduct on the part of the arbitrator, or where the arbitration failed to follow the procedure established by the applicable statute. The right to object to such irregular procedure may be lost if the party proceeds with the arbitration without making its objection known. Under most modern arbitration statutes a proceeding to vacate must be instituted within 30 to 90 days after the delivery of the award.