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SOME PROCEDURAL PROBLEMS IN ARBITRATION

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INTRODUCTION[1]

By training and experience, lawyers are accustomed to deal with problems within a well-defined procedural framework. Familiarity with established rules of conduct, however archaic and nonsensical they may be, apparently does not breed contempt; on the contrary, it seems to enhance the average lawyer's feelings of security and self-confidence. Conversely, he is apt to become uneasy, irritable, even indignant, when compelled to function within a system of loose and fiexible procedures, inconsistently applied according to a logic that to him is at best obscure and often inscrutable. The attorney who is not a labor relations specialist, and who only occasionally becomes involved in a dispute arising out of collective bargaining, is thus inclined to regard labor arbitration as a somewhat untidy and puzzling system. The primary purpose of this article, therefore, is to contribute to the general practitioner's understanding of the manner in which procedure is made to effectuate the arbitration process. Even if that purpose is achieved, however, it does not necessarily follow that the system will become more attractive. *Tout comprendre, c'est tout pardonner* bespeaks a generosity of attitude that is out of place here; it is entirely possible that our hypothetical lawyer's distaste for arbitration procedures may grow in direct proportion to his increased understanding of them. Nevertheless, the good lawyer must learn to adapt himself to new situations and to function effectively even within a system that he dislikes. Stated in another way, therefore, the purpose of this article is to suggest ways in which the general practitioner can, through a better understanding of arbitration procedures, enhance his own usefulness as a participant.

Underlying and coloring any discussion of this subject, of course, is a concept of the nature and purpose of the arbitration process. The most mature and potentially most constructive view is that arbitration is an integral part of the grievance procedure, which is itself the heart of the collective bargaining process. The purpose of the grievance-arbitration procedure is not merely to decide the right and wrong of actions already taken by employers, unions, and employees; it is,

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1. This article is addressed to lawyers. It is written, however, with the profound conviction that no one can be so legalistic as a layman and that every procedural problem referred to in the text has been either created or complicated in countless numbers of cases by unlicensed shop-lawyers representing both labor and management.

beyond that, in the words of Harry Shulman, "to make the adjustments required for the maintenance of operations during the term of the agreement within the framework of the clarities, the ambiguities, the hopes, and the fears which the agreement symbolizes."[2]

Now this concept of arbitration, which Professor Shulman expounded so eloquently and practiced with brilliant success during his lifetime, is by no means universally held. Moreover, as he himself recognized, it can be effectively applied only in situations in which the relationship between the arbitrator and the parties is a close and continuing one. Our hypothetical attorney is much more likely, however, to find himself involved in ad hoc arbitration cases, that is, those heard by an arbitrator selected for the particular occasion only, who usually has no detailed knowledge of the collective agreement or of the manner in which it is customarily administered. Necessarily, the procedures followed in these cases are different, and generally more formal, than those adopted in the hearing and disposition of grievances submitted to a standing umpire or an impartial chairman. Most procedural "problems" occur in ad hoc arbitration; accordingly, we must concentrate our attention on that type of case.

FRAMING THE ISSUE

The typical collective bargaining agreement outlines the steps of the grievance procedure that must be followed before the dispute can be appealed to arbitration. Ideally, the movement of the grievance through the successive steps specified in the agreement is similar, in at least one respect, to the movement of a law suit from the trial court to the highest appellate tribunal; that is, the issue initially submitted is stripped of irrelevancies and reduced to its barest essentials in the course of this refining process. Some points are settled by adjustment along the way, others are dropped. Facts are clarified and are frequently stipulated. Thus, by the time the grievance finally reaches arbitration, the parties have sharply defined their points of difference, and have reduced to a minimum their disagreement with respect to "the facts."

Alas, what an immeasurable distance there is between this Heaven of theoretical perfection and the Hell of actual practice! An attorney called in to represent one of the parties in arbitration will discover, frequently if not typically, that the issue to be submitted is only distantly related to the original grievance and was cast in its present form during informal discussions following the last step of the grievance procedure; or that the initial complaint has grown in amplitude

2. *The Role of Arbitration in the Collective Bargaining Process*, in COLLECTIVE BARGAINING AND ARBITRATION 23 (Institute of Industrial Relations, University of California 1949).

and ambiguity at each step of the grievance procedure, instead of undergoing the prescribed reducing treatment; or, worst of all, that the parties now cannot agree as to what issue or issues are in dispute and should be submitted to arbitration. In short, the neat little controversy that he anticipated, with its well-ordered facts and carefully delineated boundaries, all too often turns out to be a sprawling, shifting free-for-all, a jumble of conflicting claims, arguments, and objectives.

A case in the condition just described obviously must be confined within some kind of procedural framework before being submitted to an arbitrator for decision. The most commonly used instrument for that purpose is the submission agreement, a document setting forth, among other things, the issue or issues to be determined by the arbitrator. The submission agreement properly should serve two principal purposes: first, to tell the arbitrator, as precisely as possible, the questions he must resolve, and second, to place such limitations upon his discretion as the parties agree are necessary and desirable.

Any well-trained lawyer should be able to draft a submission agreement that will state the issue clearly, briefly, and simply. Unfortunately, the attorney we have in mind is handicapped by his training and experience in purely adversary proceedings; his automatic reaction is to protect his client's interests by winning the case, if possible, before the matter is even heard by the arbitrator. Frequently, therefore, the lawyer who has had little or no collective bargaining experience tries to draft a submission agreement on a "heads-I-win-tails-you-lose" basis. Such tactics are to be deplored because they defeat the very purpose the arbitration process is intended to serve: the peaceful, cooperative solution of a problem affecting both parties to the collective agreement.

Another impulse that the inexperienced attorney has difficulty suppressing is to insist that the submission agreement set forth the exact provision of the agreement relied upon by the other side. Suppose the union has grieved over the transfer of an employee, against his will, from the day to the night shift. The company will naturally inquire what article and section of the agreement it has allegedly violated. Let us say that the union representative cites section B (transfers) of the seniority article and that this claim is duly set forth in the submission agreement. So far so good; but now suppose that during the arbitration it becomes apparent that the issue really involves the interpretation and application of section D (shift preference) rather than section B. Our hypothetical lawyer may be inclined to insist that the arbitrator refuse to hear any argument relating to section D, on the ground that this provision was not specified in the submission agreement. Again, we must reject such an approach, not

only because it smacks of sharp practice, but because it is contrary to the best interests of both parties. The point that must never be lost sight of is that arbitration is intended to settle problems, not to evade them.

Some practitioners will doubtless object that the supposititious cases discussed above are really quite absurd, and that any moderately intelligent attorney, however inexperienced, would not engage in the tactics described. Moreover, they may disagree with the thesis that the problem raised by a grievance should be dealt with on the merits whenever possible, pointing out that some issues are not properly arbitrable, because they either have not been fully explored in earlier stages of the grievance procedure, or are expressly excluded from arbitration by the terms of the agreement, or are outside the scope of its provisions. With respect to the first objection, the writer can only say, on the basis of considerable experience, that both lawyers and laymen frequently do adopt the tactics discussed above, and that the examples given are by no means as extreme as others that could be cited. The second point, however, is an important one that merits further consideration.

One rule to which all arbitrators give lip service, but which is more honored in the breach than in the observance, is that no issue should go to arbitration until it has been thoroughly worked over in the grievance procedure. Since this rule is so manifestly sensible, why should it not be scrupulously observed? The reason can be found in the nature of ad hoc arbitration. An arbitrator chosen for the particular case only is usually a stranger to one or both parties and knows little or nothing about the way the grievance procedure functions. Charges by one party that the other has raised a new issue or argument at the hearing will invariably be met by outraged denials and the assertion that the point was emphasized time and again at earlier stages of the case. What is the arbitrator to do? If the party professing to be surprised can demonstrate that it will require more time to prepare evidence and argument to meet the new issue, the arbitrator may decide to grant a postponement. Such a situation occurs relatively infrequently, however, because in most cases each side has anticipated all the arguments of the other. Moreover, having gone through the time-consuming and troublesome procedure of selecting the arbitrator, both parties are inclined to finish up the case without further delay. What usually happens, therefore, even in cases in which there has been a quite obvious failure to "exhaust" the grievance procedure, is that the parties complain bitterly to the arbitrator about each other's lack of good faith and then go on with the hearing.

The standing umpire or impartial chairman can deal with this type of problem much more effectively. He knows the parties intimately,

is thoroughly familiar with the functioning of the grievance procedure, and is thus able to discern whether he is being confronted by an isolated instance or a chronic condition. His continuing relationship with the parties makes it much more feasible for him to refer a case back to the grievance procedure, and many an umpire does exactly that when he feels that the parties are tending to postpone all purposeful collective bargaining on disputes until the final stage of arbitration.

Many collective agreements expressly exclude from arbitration grievances dealing with particular matters, such as the fixing of wage rates for new jobs or the introduction of new methods or processes. If the exclusion is clear, the arbitrator must observe it; this is one case in which the problem raised, however serious or urgent it may be, is beyond his power to resolve. Lawyers new to arbitration, however, are sometimes prone to look for restrictions on the arbitrator's authority that are not expressly set forth in the agreement. Such a practice is dangerous and ought to be undertaken only with great caution. For one thing, arbitration, as has been so frequently observed, is a substitute for a strike or lockout, and most agreements permit employees to strike and employers to lock out over issues not subject to arbitration. Convincing an arbitrator that he lacks jurisdiction over a particular grievance may thus prove to be a Pyrrhic victory. Moreover, the nature of a collective bargaining relationship can often change rapidly and quite unexpectedly; last year's argument, or even last week's, may sometimes turn out to be inappropriate, if not downright embarrassing, in today's case. It therefore behooves the representatives of both parties to use very sparingly the argument that the arbitrator lacks jurisdiction over the grievance.

Most grievances are predicated on the alleged violation of one or more specific provisions of the collective agreement. Occasionally, however, the grievant may assert that the conduct complained of is impliedly forbidden by the agreement. This raises problems in framing the issue that an inexperienced or overzealous attorney may complicate rather than resolve. His error will be to insist that if the complainant can point to no express provision in the agreement that has allegedly been violated, there is no arbitrable issue. At first blush, this position seems sound, particularly if the agreement narrowly defines an arbitrable grievance as a complaint arising out of a violation or interpretation of any provision thereof. Suppose, however, that the agreement specifically states that *any* unresolved grievance over wages, hours, or working conditions may be submitted to arbitration. Suppose, further, that the grievance in question concerns a condition closely related to several matters dealt with in the agreement but not directly covered by any of its provisions. Now the argument that there is no arbitrable issue seems far less persuasive.

For purposes of illustration, let us consider this case. The agreement contains a provision that supervisors shall not routinely perform the regular assigned duties of any employee in the bargaining unit. The union filed a grievance protesting the repeated performance by various supervisors of duties regularly assigned to employees in one or more classifications listed in the agreement. In this case, insistence by the company's attorney that the only arbitrable issue is whether his client violated the contract provision described above would probably meet with violent objections from the union. At the same time, his determination to protect the employer from the whims of an arbitrator's unfettered discretion would probably impel him to reject the union's proposal that the issue be simply whether the company practice was justified under all the circumstances.

The problem thus raised is a difficult one. We may note in passing that it arises almost exclusively in ad hoc arbitration; under an umpire system the parties probably would simply lay the facts before the umpire and let him decide whether or not the practice should be allowed to continue. In the ad hoc case, assuming a degree of sophistication on both sides, the union's version of the issue would be preferable, provided the dispute was a hot one and the parties had a reasonable amount of confidence in the arbitrator's judgment. If, on the other hand, the grievance did not reflect a serious problem and the arbitrator was an unknown quantity, adoption of the company's version might be the wiser course. The point is that the attorney's approach to this type of situation must be flexible rather than doctrinaire.

PRESENTING THE CASE

Many of the so-called problems encountered in presenting a case in ad hoc arbitration are, even more than those involved in framing the issue, purely synthetic. Several of the difficulties referred to in the preceding section arose out of the nature of the grievance or the language of the collective bargaining agreement. By contrast, most of those dealt with below, as we shall see, are entirely man-made. Regrettably, one must report that these problems are often fabricated by lawyers whose experience in trial work handicaps their effectiveness in arbitration cases. This seeming paradox is actually easily explained. The trial of a law suit is an adversary proceeding in which the principal aim is to win by any legitimate means. Procedural technicalities are of the utmost importance, and interim rulings on such matters as burden of proof, admissibility of evidence, scope of cross-examination, and the like, may decisively affect the outcome. Indeed, as every lawyer knows, the line between procedural and substantive questions is frequently a shadowy one. The trial attorney is thus conditioned to take full advantage of all the exclusionary rules of evidence, to exploit

the elements of surprise and suspense, and, especially in jury trials, to attempt to sway the emotions when the chances of persuading the intellect seem dim.

In contrast to the trial of a law suit, an arbitration hearing is, or should be, a cooperative effort by the parties and the arbitrator to bring out all facts and arguments relevant to the dispute. True, the proceeding retains something of an adversary character: in terms of the language of the award, one side usually "wins." On the other hand, since the relationship between the parties is a continuing one, each usually realize that it is better to "lose" a case than to "win" it at the cost of a permanent impairment of the collective bargaining process. Consequently, many of the tactics commonly used in the trial of a law suit are regarded as bad form, or even as indications of bad faith, in an arbitration proceeding.

The contrast between the objectives and procedures of an arbitration hearing and those of a law suit has been so generally noticed by arbitrators, lawyers, and laymen that one is puzzled by the ubiquity of certain procedural arguments in arbitration. Of these, surely the most senseless is the dispute over which side should proceed first. An insistence that the other side has the burden of going forward implies a plaintiff-defendant relationship in which the former must set up a prima facie case before the latter is obligated to respond. But this concept is plainly inapplicable to an arbitration proceeding. As an extension of the grievance procedure, an arbitration hearing serves many purposes, not the least of which is to give the grievant the satisfaction of knowing that the other party has been compelled to account for its conduct before an impartial third person. Again, the hearing may serve to educate a union committee, or a group of foremen, on the manner in which their respective actions may subsequently be reviewed and questioned. Even when it is apparent to an arbitrator, therefore, after the complaining party has presented its case, that the grievance lacks merit, he will almost never grant a request by the opposing party for an immediate ruling in its favor.

It is interesting to note in this connection that many a grievance that appears to be worthless because of the inept manner in which it is presented is ultimately sustained on the basis of evidence supplied by the opposing party. Observe that in such cases the adversary character of the proceeding is made completely subservient to the principle that the parties have a mutual responsibility to bring out all the relevant facts.

We may conclude, therefore, that the determination of the order of presentation in an arbitration case should depend exclusively on how the facts can best be developed in an orderly way. Thus, the increasingly frequent practice of having the employer proceed first in a

disciplinary case is not based on the notion that he has a legal obligation to set up a prima facie case; rather, it springs from a recognition that the facts of the case can be more meaningfully developed at the outset by the employer than by the union. On the other hand, when the facts are stipulated or the dispute concerns the interpretation of one or more provisions of the collective agreement, it is the common and sensible practice for the grievant's representative to lead off with a statement of his position and supporting arguments.

Another largely synthetic problem, which seems to have the same fatal attraction for lawyers and arbitrators that the Tar Baby had for Br'er Rabbit, is that of burden of proof. This issue commonly arises in disciplinary cases and usually boils down, not so much to a question of which side has the burden of proof, as to how much proof will be required. The origins of this artificial dilemma are obscure, but a good case can be made for the theory that it results from the historic conquest of common sense by rhetoric. On some occasion in the faraway past an arbitrator, momentarily intoxicated by his own eloquence, referred to the discharge of an employee as "economic capital punishment." Unfortunately, the phrase stuck and is now one of the most honored entries in the *Arbitrator's Handy Compendium of Clichés.* A sentence of death is, of course, almost invariably associated in people's minds with a verdict of guilty beyond a reasonable doubt, a fact that has been systematically exploited in arbitration cases arising out of alleged wrongful discharges of employees. Indeed, the criminal-law analogy, of somewhat dubious applicability even in this restricted form, has been argumentatively extended in some cases far beyond the reaches of logical thinking. The contention is occasionally made, for example, that since discharge equals economic capital punishment, it follows that: (1) the employee must be deemed innocent until proved guilty; (2) the employer must prove his guilt beyond a reasonable doubt; and (3) all doubts must be resolved in favor of the employee. Sometimes the argument goes one step further: (4) the same reasoning should apply to all disciplinary actions of the employer because these may ultimately lead to discharge.

Now, let us see how much of the foregoing makes sense and how much is pure drivel. Perhaps the best way to begin is by reining in the runaway metaphor, "discharge is economic capital punishment." Often, particularly in periods of full employment, it is nothing of the sort, and by the time the grievance reaches arbitration the employee may be happily employed somewhere else. The union may have good reasons for pressing for a final determination of the issue involved, but even if the arbitrator decides the discharge was improper, the employee may not be interested in reinstatement. Every experienced arbitrator has had cases of this type; they usually involve

discharge for such reasons as excessive absenteeism or tardiness, inability to get along with supervisors or fellow employees, or substandard work. No one seriously questions that the employer has the burden of proving these facts or, conversely, that the burden of proving the employee was unfairly discriminated against rests upon the union; but to insist in such cases that the proof must establish guilt beyond a reasonable doubt is to impose a standard that is both unattainable and unwise.

Those who are prone indiscriminately to apply the criminal-law analogy in the arbitration of all discharge cases overlook the fact that employer and employee do *not* stand in the relationship of prosecutor and defendant. It cannot be emphasized too often that the basic dispute is between the two principals to the collective bargaining agreement, that is, the company and the union. At stake is not only the matter of justice to an individual employee, important as that principle is, but also the preservation and development of the collective bargaining relationship. The standing umpire is, in a sense, a partner in this relationship and, as compared with the ad hoc arbitrator, he has much more freedom to take into account the long-term interests of the parties in deciding disciplinary cases. The discretion of the ad hoc arbitrator is subject to far greater restrictions than that of his more fortunate colleague, but he can still make some contribution to the enduring relationship between the parties by refusing to apply rigid and abstract standards of proof to situations in which they are obviously inapplicable. And in the complex and varied context of modern industrial life such situations arise constantly. The case of the employee sleeping on the job, or of the worker accused of punching another man's time card—these and many others are often incapable of proof beyond a reasonable doubt, and the most the arbitrator can say is that, more likely than not, the penalty was justified. How much weight he gives to the doubts that inevitably arise may frequently depend on a variety of considerations having absolutely nothing to do with the amount of proof adduced in the particular case: the employee's past record, his length of service, or the possibility of severe economic forfeiture resulting from discharge, on the one hand, or the effect of his reinstatement on the morale of supervisors and fellow employees, or the restraining influence it would have on a joint company-union program for stamping out certain undesirable conditions, on the other. The one thing we may be sure of is that, if the arbitrator is familiar with the facts of industrial life and understands that his function is creative as well as purely adjudicative, he will not evaluate the evidence solely on the basis of rigid standards of absolute proof or presumptions of innocence.

There are some disciplinary cases, however, in which the arbitrator

is justified, indeed required, to observe the same exacting standards of proof that prevail in a criminal proceeding. These are the instances in which an employee is disciplined for having allegedly committed some act of moral turpitude, such as stealing, engaging in aberrant sexual practices, or participating in subversive activities. Since upholding the disciplinary penalty for these or similar acts permanently brands an employee just as surely as a criminal conviction would, the arbitrator will generally insist in such cases that the employer prove his charges beyond a reasonable doubt.

The difficulty is, of course, that these cases, by their very nature, are rarely susceptible of such conclusive proof. Moreover, the nature of the supporting evidence frequently makes it inadmissible, for reasons to be discussed below. Here the inexperienced or overzealous advocate, intent upon winning the case for his client, may insist that all the employer need prove is his good faith and the inherent reasonableness of his conclusion that the employee is guilty as charged. For the reasons previously stated, however, the more-likely-than-not standard, even when supported by convincing evidence of the employer's good faith, affords insufficient protection to the employee in these cases.

Before leaving the subject of the amount of proof required in disciplinary cases, it may be well to warn inexperienced attorneys not to rely upon certain words of art that arbitrators use carelessly in their opinions. When an arbitrator writes that the company or the union has proved a particular point "by a preponderance of the evidence," he may be implying the conscious application of a standard of proof; much more likely, however, he is simply using an expression which comes trippingly off the tongue and which has no real connection with the degree of proof he will require in future cases of the same type.

We have thus far considered the questions of the burden of proof and the amount of proof required only in so far as they apply to disciplinary cases in general and to discharge cases in particular. In other types of grievances these issues really have no place at all. Suppose the dispute involves the interpretation of a vacation eligibility provision or the application of the seniority article to promotions. To insist that the complaining party carries the burden of proof in such cases is manifestly absurd. Neither side has a burden of proof or disproof, but both have an obligation to cooperate in an effort to give the arbitrator as much guidance as possible.

The reader should be warned, however, that the positiveness with which the views in the preceding paragraph have been set forth reflects the intensity of the writer's feelings, not the extent to which they are supported by others. The so-called reserved rights theory, under which it is asserted that any management right not specifically

taken away or restricted by the collective agreement is reserved in all its primordial force exclusively to the employer, has many supporters. If the theory be accepted, then, of course, a union challenge to any management action that is not specifically covered by the agreement ought logically to carry with it the burden of showing that the action taken constitutes an abuse of discretion. It is doubtful, however, whether even those arbitrators who incline toward the theory follow this extension of it in practice.

By far the greatest number of procedural problems arising in ad hoc labor arbitration concern the introduction of evidence and the examination of witnesses. These are the problems, too, which seem to bring out in some attorneys those irritating qualities that comprise the average layman's stereotype of the lawyer. A few of the more unpleasant of these traits may be mentioned in passing. First, by a wide margin, is the use of legal mumbo-jumbo: the monotonous objection to the introduction of evidence on grounds that it is "incompetent, irrelevant, and immaterial," or "not part of the res gestae." A close second is the eat-'em-alive method of cross-examination: the interrogation of each witness as if he were a Jack the Ripper finally brought to the bar of justice. Last, but scarcely least, there is the affectation of what may be called advanced documentship: throwing an exhibit at one's opponent across the table, as if contamination would result if it were handed over in the normal way, or contemptuously referring to the opponent's exhibits as "pieces of paper that purport to be," and so forth. These tactics may be well suited to stage or cinema portrayals of the district-attorney-with-a-mind-like-a-steel-trap or the foxy defense counsel at work, but they are wholly out of place in an arbitration proceeding. Moreover, they can be counted upon almost invariably to exacerbate the feelings of those on the other side and to initiate bitter and time-consuming arguments between the parties.

The purpose of this article, however, is not to formulate a code of good behavior in arbitration proceedings, but to examine the major procedural issues that arise. Let us turn our attention, therefore, to some of the common problems attendant upon the introduction of evidence.

Despite the generally accepted principle that arbitration procedures are necessarily more informal than those of a court of law,[3] objections to evidence on such grounds as that it is hearsay, not the best evidence, or contrary to the parol evidence rule, are still frequently raised in

3. See, *e.g.*, AMERICAN ARBITRATION ASSOCIATION, VOLUNTARY LABOR ARBITRATION RULES, Rule 28: "The parties may offer such evidence as they desire. . . . 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. . . ."

ad hoc arbitration. To the extent that these and similar objections are intended to exclude the proffered evidence, they generally fail. The arbitrator is interested in getting all the relevant facts he can; his principal objective is to render a viable decision, and any information that adds to his knowledge of the total situation will almost always be admitted.

This is not to say, however, that the arbitrator will evaluate all the evidence on an equal basis. Even non-lawyers learn by experience that many of the legal rules of evidence are founded on common sense and fairness. Thus arbitrators, when interpreting a specific provision of a collective bargaining agreement, commonly give weight to evidence of alternative provisions offered and rejected during previous negotiations. Yet nothing will build a healthier respect for the wisdom of the parol evidence rule[4] than a dispute between the parties over the meaning of a contract provision, in which one side adduces testimony purporting to show that the negotiators intended something different from what they wrote. Such testimony, invariably contradicted by the other side, serves only to confuse the arbitrator and to convince him that, for better or for worse, he must apply the disputed language as it is written.

Similarly, a competent arbitrator may be depended upon substantially to discount some kinds of hearsay evidence that he has admitted over objection. He will do so selectively, however, and not on the assumption that hearsay evidence, as such, is not to be credited. If, for example, a newly appointed personnel manager, or a recently elected business agent, offers a letter to his predecessor from a third party, the arbitrator is likely to ignore the fact that the evidence is hearsay; if satisfied that the document is genuine, he will give it such weight as its relevancy dictates. On the other hand, hearsay testimony about statements allegedly made by "the boys in the shop" or by executives in the "front office," though perhaps not excluded from the record by the arbitrator, probably will have no effect on his decision.

While the foregoing discussion by no means covers all types of problems involving the admissibility of evidence, it should be sufficient to indicate the manner in which such problems can be dealt with quickly and easily, without prejudicing the rights of either party. If counsel thinks certain evidence should not be credited by the arbitrator, he need only state his objection and the reasons therefor, making it clear that he is not opposing the admission of the evidence, but is arguing only that the arbitrator should give it little or no weight. This approach has the virtues of saving time, avoiding arguments, and assuring the opposing party that his case will not be thrown out on a technicality. The latter point is of considerable importance

4. Although, strictly speaking, the parol evidence rule is not a rule of evidence, it may be treated as such for purposes of this discussion.

to parties who have had little or no previous experience with arbitration and who are unfamiliar with the rules of evidence. They are chiefly concerned with getting their version of the facts before the arbitrator, and they have great trouble understanding why he should not be willing at least to consider what they have to say.

The difficulty that the above approach presents to our hypothetical attorney is that it requires him to put a great deal of faith in the judgment of an arbitrator who is likely to be a perfect stranger. All his inclinations are the other way; he would rather assume that the arbitrator will deal with the evidence in as wildly unpredictable a fashion as any jury, and govern himself accordingly. It is only natural, therefore, that he should try to keep out of the record any evidence that he believes should not be considered by the arbitrator. Complete acceptance of the more informal and, for him, more risky procedures generally followed in arbitration will come, if it ever comes, only after a certain amount of reassuring experience with the process.

In the matter of examining and cross-examining witnesses the rules and practices of the law courts are again, unfortunately, apt to be more of a hindrance than a help. The lawyer new to arbitration sometimes has difficulty understanding that the principal purpose of interrogating a witness is to develop, as quickly as possible, *all* the relevant facts, not merely a judicious selection of his own. To his dismay, the arbitrator may intervene at any time to bring out, through his own questions, the very points that counsel has been at great pains to avoid. Similarly, cross-examination is seldom restricted to matters covered on direct. The practice of cutting off a witness in mid-sentence with a curt "That's all" is definitely not observed, and some arbitrators make a point of asking the witness, at the conclusion of his examination, whether he has anything else he wants to say. They do so, not in the hope of developing more pertinent evidence, but simply in order to let the witness have his say, to "tell the arbitrator all about it." The practice has its drawbacks, particularly since arbitration seems to turn up a high percentage of witnesses suffering from the ability of total recall. Nevertheless, it directs attention once again to the fact that arbitration is part of the grievance procedure and, as such, serves more than one purpose. In addition to providing a forum for the final disposition of unresolved disputes, it permits the participants to blow off steam, to experience a catharsis that relaxes tempers and eases tensions.

There is, however, one clear exception to the general rule of informality in the introduction of evidence and the examination of witnesses. It occurs in the situation previously referred to in the discussion of standards of proof: the case of an employee disciplined

for alleged acts of moral turpitude. For the same reasons set forth in the earlier discussion, the employee should be permitted to invoke some of the legal rules of evidence for his own protection. In most instances of this kind the principal problem concerns the rights of confrontation and of cross-examination. Two cases from the writer's files will serve to illustrate the point.

In the first case, A was discharged for allegedly operating a gambling ring inside the plant. At the outset of the hearing, the company announced that its information had been supplied secretly by employees B and C (not named); that B and C were afraid to confront A and to testify at the hearing because of possible retaliation by local mobsters allegedly working with A; that D, a supervisor who had originally interviewed them, was willing to testify under oath as to what B and C had told him and to submit to cross-examination; and that B and C had agreed to give their sworn testimony secretly to the arbitrator, but not in the presence of A or of any union representative. On motion by the union, the arbitrator ruled that the proffered testimony of D was inadmissible. He also refused to hear the testimony of B and C in secret.

In the second case, W was discharged for alleged theft of company property. In its opening statement the company explained that the city police had found a cache of company merchandise at the house of X, one of W's fellow workers. Under questioning by the police, X had broken down and had admitted stealing the merchandise. He had then named a number of other employees, including W, who he said had conspired with him to steal from the company. The police had made a tape recording of X's statement, which was available to the company, but which was not offered in evidence. Neither did the company propose to call X, who had also been discharged but whose whereabouts were known. Instead, it called Y, a city detective who had apprehended and interrogated X. Y testified on direct examination as to what X had confessed to, verified that X had implicated W, but, on instructions from the company's counsel, did not name any other of the alleged conspirators mentioned by X. The company's attorney gave as his reason for so instructing Y the fact that the other employees mentioned by X had either been investigated and cleared by the company or were still under surveillance. The company was anxious not to embarrass those who had been found guiltless or to give advance warning to those who were still suspect.

Counsel for the union argued that since not even the tape recording of X's interrogation by the police had been introduced, he had no adequate basis for cross-examining Y, and that Y's testimony ought therefore to be disregarded. The arbitrator agreed. The more difficult question of whether even the tape recording should be admitted

was not raised, because the company decided not to offer it in evidence. In view of the fact that under the applicable state law X himself could have been subpoenaed, however, a motion by the union to exclude the tape recording probably would have been sustained.

There can be little doubt that under the strict rules of evidence applied in cases of the type illustrated above a guilty man sometimes goes unpunished. That is unfortunate, but in this country we are firmly dedicated to the proposition that our own system of justice, with its underlying concept of due process of law, is worth much more than what it costs. In industrial jurisprudence, as well as in criminal law, one of our primary concerns is to protect the rights of the innocent, even if by so doing we sometimes fail to punish the guilty.

Conclusion

The foregoing discussion has dealt with some of the more common procedural problems encountered in ad hoc labor arbitration. Limitations of space have precluded the consideration of a number of others; but enough has been said to provide the basis for a few conclusions about the nature of the arbitration process, the manner in which procedural rules and practices can enhance or vitiate its effectiveness, and the lawyer's role in framing the issue and presenting a case in arbitration.

The underlying thesis of this article is that arbitration is an integral part of the system of industrial self-government established through collective bargaining, and that its purposes are to adjudicate unresolved grievances in accordance with the rule of law established by the collective agreement, to educate the parties as to their rights and responsibilities under the agreement, and to provide the basis for the continued growth and improvement of the collective bargaining relationship. Because of the transiency of his association with the parties and his lack of familiarity with their agreement, the ad hoc arbitrator can at best make only a small contribution toward the achievement of these purposes; but if he and the parties keep them in mind, they can make arbitration something more than an adversary proceeding in which each side seeks only to win a favorable award, regardless of its implications and long-term consequences.

We have seen that attempts to frame the issue too narrowly may result in circumventing the very problem giving rise to the grievance, and that procedural rules designed to exclude evidence are, with few exceptions, inimical to the purposes of arbitration. Keeping in mind the ad hoc arbitrator's formidable handicap—unfamiliarity with the parties and with the nature of their relationship—we can

appreciate the wisdom of Shulman's observation that "the more serious danger is not that the arbitrator will hear too much irrelevancy, but rather that he will not hear enough of the relevant."[5]

It does not follow, however, that because the arbitration procedure is informal, it must also be anarchic or disorderly. Certain practices, based on common sense and simple courtesy, are observed in most cases. Thus, usually, evidence is introduced through witnesses; each witness is cross-examined before the next is called; and the bulk of the argument is reserved until all the evidence has been submitted. Any competent arbitrator should be able, with a minimum amount of assistance from the parties, to maintain order and to assure that each side has a fair and equal opportunity to present its case.

Now, let us return to our initial point of departure: the role of the general legal practitioner in ad hoc arbitration. Is it his fate merely to cope as best he can with this strange institution, or can he contribute to its development? Most assuredly he has a great deal to offer. As many an arbitrator will testify, a well-trained lawyer who understands the nature of collective bargaining and the purposes of arbitration is always a welcome participant. His ability to outline the dispute clearly and simply, to come directly to the point at issue, to present his evidence in an orderly fashion, and, finally, to sum up his arguments and to relate them to the record made at the hearing, not only aids the cause of his client, but also enhances the worth of the arbitration process. The principal responsibility of our hypothetical attorney, therefore, is to inform himself as extensively as possible about the nature, purposes, and common practices of arbitration; by so doing he will prepare the way for the effective use of his considerable talents in the common interest of employers, unions, and the public at large.

5. Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1017 (1955).