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## Preparation and Presentation of an Arbitration Case

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## PREPARATION AND PRESENTATION OF AN ARBITRATION CASE

JOSEPH S. MURPHY\*

This article deals primarily with the preparation and presentation of a case in labor arbitration. However, much of what is said here is equally applicable to the preparation and presentation of a commercial case. It is clear that the comments with regard to documents, witnesses, orderly presentation, and the like are basically the same whether one is arguing that a construction contract has been breached and that the fault lies with the contractor who was guilty of delayed construction, or whether one is defending against a charge of violation of an overtime clause dealing with equal distribution. In each case the arbitration practitioner must decide whether he, for purposes of clarity, will present the case in an historical, topical or logical order. Sometimes it may be wise, in view of the arbitrators selected, to follow the chronological order. Other times it may be desirable from the nature of the case to break it up into segments and treat each one individually, bringing the case to a close with all of the appropriate factors tied closely together. In any event the same fundamental problems exist. To avoid repetition, this article will concentrate on the labor-management rather than the commercial case.

At least four inter-related elements are essential for winning a case in arbitration: (1) a good case to begin with; (2) a good arbitrator; (3) painstaking preparation; and (4) sincere and effective presentation.

The first of these should be obvious. Yet, there are countless examples of unions bringing to arbitration grievances which obviously have no merit, in which the company is asked for benefits for which there is no sanction in the contracts. On the other hand, there are cases in which companies, perhaps out of a mistaken notion that in this way they are "backing up the foreman," refuse to redress an obvious wrong or where they ask the arbitrator to interpret the contract in a manner not consistent with its plain meaning.

Hardly a labor-management hearing takes place without one or both parties reminding the arbitrator that his function is to interpret and apply the contract, not change it. Nevertheless, it is too often obvious that one of those parties is trying to get the arbitrator to compensate through arbitration for that party's failure to achieve some benefit or advantage in negotiations. This is an abuse of the tool of arbitration for it overlooks the essentially *judicial* character of the process and would confuse it with compromise, negotiation and other

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techniques of contract-making. This is not to say that a party may not properly appear in arbitration, even with a bad case, when his object is to mitigate damages, or, in the case of a union, when he would like to convert a discharge to a disciplinary layoff. But even in such cases, arbitration can play its role most effectively if the parties have first tried to compromise the matter themselves.

In a sense, the second essential for winning an arbitration case—selection of a good arbitrator—is an aspect of preparation. The American Arbitration Association does its part by maintaining panels and, on the basis of the demand for arbitration and the answering statements, submitting lists which include experts in the field of the controversies. As an added safeguard, Association rules require the arbitrator to sign a form in which he affirms his impartiality and denies any personal or financial interest in the outcome of the dispute. Where parties feel the need for more information about an arbitrator, the Association invites inquiries and supplies all data to help disputants make choices in whom they can have utmost confidence. It must be frankly admitted that parties using American Arbitration Association tribunals do not avail themselves of this service as often as they should. Instead, they sometimes commit the self-defeating blunder of trying to select arbitrators on the basis of presumed bias as revealed in previous published awards. There is indeed much to learn, in reading arbitration awards and opinions, about common problems of industrial relations, and there is insight to be gained into how unions and companies solve those problems in other plants. But the experienced labor or management representative knows that there is much that goes into the making of an award that is not necessarily applicable to other situations—the exact wording of the contract clauses, the history of bargaining, past practice, demeanor of witnesses, and many other factors. To try to anticipate how an arbitrator might rule on a call-in pay or discharge case, for instance, on the basis of his previous decision would be as futile as to anticipate an umpire's decision on the next pitched ball on the basis of his last decision!

It is often not at the arbitration hearing itself, but long before it, in the stage of preparation, that cases are won or lost. Preparation should begin with a careful statement of the grievance with the object of seeing *all* its implications. This will direct attention to sections of the contract which shed light on the meaning of disputed clauses. Whether an employee is entitled to pay for a holiday occurring during a period of layoff, for instance, may depend not only on the holiday provision of the contract but on the meaning of the term "employee," as expressed in the seniority definitions, the recognition clause, the lay-off and re-hiring sections, or almost any other part of the agree-

ment. Arbitrators have often commented that it sometimes takes parties the better part of a hearing to make fully clear what the grievance is about. This is the result of poor preparation; it is hardly necessary to add that the party presenting the arbitrator with the clearest picture of the case has that much of an advantage over his adversary.

What is true of the contract also applies to other documents. Correspondence, records of disciplinary actions, minutes or notes taken at grievance committee meetings, payroll data—all of these may be pertinent and should be assembled *in advance* of the arbitration hearing. Where possible, photostatic copies should be prepared for the other party and for the arbitrator. Similarly, a party anticipating the need for records in the possession of the other party should request those documents in advance. The element of "surprise" at an arbitration is an over-rated one, and never more so than when one party demands a look at the other's books for the first time at the hearing—a demand which for obvious reasons cannot be complied with at that time.

Although, under arbitration law and the Rules of the American Arbitration Association, an arbitrator has the authority to subpoena persons or documents at the request of a party, the same results usually can be achieved without resorting to that irritant. A written request of the other party to produce the data at the hearing, a copy of which request may be submitted to the arbitrator, can usually have the desired effect. An attempt to conceal either documents or witnesses who might contribute to the arbitrator's understanding of the case is likely to have an adverse effect on the party guilty of such concealment.

Preparation of a case is not complete without a summary—perhaps in check-list form for use at the hearing—of what each witness is to bring out. And incidentally, the same should be done, insofar as it is possible, by anticipating the arguments of opposing witnesses. More than one case has been wisely withdrawn from arbitration and compromised as a result of careful, objective and dispassionate study of *all* the facts, from the point of view of *both* disputants. The most ardent advocates of arbitration as an important tool of industrial relations will be the first to concede that the settlement which parties arrive at by themselves is the most constructive of all.

The climax of the arbitration process is of course the hearing. Where preparation was adequate, it should be possible to present a case clearly with one's own witnesses and documents. The attempt to establish the correctness of one party's position through cross-examination of the other's witnesses is usually a sign of a poorly prepared case, and the impression it makes on the arbitrator is a negative one.

In fact, prolonged cross-examination of a hostile witness in expectation of breaking him down is usually to be avoided, despite the fact that it always looks easy and effective when seen in plays or motion pictures. An orderly presentation of one's own witnesses, with an outline of the case at hand to make certain that every point is made in the right order, and perhaps a summary of the case presented to the arbitrator in typewritten form to make doubly certain that nothing is forgotten when the time comes to write the decision, is infinitely more effective.

That arbitration is an informal proceeding, in which courtroom rules of evidence do not apply, has been stated many times. While true, it is nevertheless possible for parties to let this fact lull them into a false sense of security. It is not uncommon for an arbitrator to permit an attorney to ask "leading questions" which would not be allowed in court. And when evidence is objected to on the ground that it is "immaterial and irrelevant," the arbitrator is just as likely as not to admit such evidence for the time being, subject to later "weighing." But is such evidence really getting the weight it deserves and would have if presented in proper form? An opening statement, setting forth exactly what is to be proved and showing its relation to the whole problem, is often all that is needed for giving every witness and every piece of evidence its full weight.

The opening statement has still another function. It describes the framework in which the arbitrator must make his decision. There is obviously a difference, to cite one example, between the question "Did the company have the right to assign a laborer to a machine maintenance job?" and "Did the company have the right under the seniority provisions of the contract to assign a laborer to a machine maintenance job?" In almost every grievance coming to arbitration, the contending parties see the problem in somewhat different terms. Nothing is more effective in educating the arbitrator in these differences than a carefully expressed statement at the very beginning of the hearing.

When feelings are intense in a dispute, it is perhaps inevitable that parties on either side of the table will argue with each other. But this is something which should be avoided if possible. Companies and unions bringing disputes to arbitration are presumed to have tried without success to convince each other during grievance negotiation. The purpose of the hearing is to convince the arbitrator; across-the-table arguments distract from that purpose.

Other "do's and don'ts" will suggest themselves to the labor or management representative. He will not rely on a minimum of fact supported by a maximum of argument; he will describe the grievance accurately, knowing that the arbitrator will recognize exaggeration

for what it is; and he will avoid using witnesses whose sole function is to create antagonism, this form of "gamesmanship" serving only to perpetuate and multiply controversies and make it more difficult for parties to live with the award when it is rendered.

This article has dealt largely with measures the parties should take to improve the quality and effectiveness of their arbitration practice. It would be a mistake to conclude, however, that arbitration is still an untried procedure, a wilderness in which a path is still to be cleared. On the contrary, the overwhelming majority of labor-management cases proceed along lines described in the Code of Ethics and Procedural Standards for Labor-Management Arbitration, a basic guide drafted about eight years ago by the American Arbitration Association, the Federal Mediation and Conciliation Service and the National Academy of Arbitrators. It has been endorsed by more than a dozen state agencies, and even where it has not been officially adopted, its strictures govern the behavior of parties, arbitrators and administrative agencies.

It is precisely because arbitration *has* developed in a manner consistent with our best traditions of justice, fair play and voluntarism that this method of dispute settlement has become a vital extension of our democratic way of life, giving employees what amounts to additional protection of "due process" in their job rights and giving employers an outlet for quick and peaceful determinations which protect the whole system of "management rights."

Despite the wide practice of arbitration, the literature on preparing and presenting a case is not extensive. One of the pioneering articles in the field is entitled "Labor Arbitration Procedures and Techniques" by J. Noble Braden.<sup>1</sup> This article, based originally on lectures before labor and management groups, has been distributed to more than 100,000, and has had a profound influence on the thinking of those who present cases and those who write about the subject. Other articles have appeared from time to time in *The Arbitration Journal*, the quarterly publication of the American Arbitration Association, and have concentrated on particular aspects of the subjects. Two of these, by Byron R. Abernethy<sup>2</sup> and Clarence M. Updegraff<sup>3</sup> discuss what the arbitrator expects of the parties. Another article by Robert A. Levitt, Labor Counsel for the Western Electric Company,<sup>4</sup> is concerned exclusively with presentation within the hearing.

Several popular articles or checklists have appeared in various

1. This article was originally used for lectures at Pennsylvania State University, and was published by the American Management Association in "Personnel," Nov. 1946. Several revised editions have been published by the American Arbitration Association.

2. *An Arbitrator Speaks to the Parties*, 12 ARB. J. (n.s.) No. 1 (1957).

3. *Reflections of a Labor-Management Arbitrator*, 9 ARB. J. (n.s.) 70 (1954).

4. *Presenting an Arbitration Case*, 10 ARB. J. (n.s.) 72 (1955).

personnel journals, and labor educators within the labor movement have made notable contributions, including Leland Beard, United Glass & Ceramic Workers of North America, AFL-CIO-CLC.,<sup>5</sup> and Robert N. Elsner, IUE, District 7.<sup>6</sup> It is apparent that in the future more extensive literature will be appearing on the subject. Outlines of courses in labor-management arbitration and arbitration law,<sup>7</sup> both from a social studies point of view and a legal viewpoint, have appeared in *The Arbitration Journal*, and there is every evidence that with a continued increase in teaching the subject of arbitration new literature in the specific field of preparation and presentation will be appearing within the next few years.

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5. *So You're A Grievance man!*, published by Federation of Glass, Ceramic and Silica Sand Workers of America.

6. *Arbitration Procedures and Techniques*, Arbitration, District Seven IUE, AFL-CIO, Educational Department (1957).

7. *Outline of a Labor-Management Arbitration Course*, 10 ARB. J. (n.s.) 115 (1955); *An Outline of a Course in Arbitration Law*, 11 ARB. J. (n.s.) No. 3 (1956).