National Academy of Arbitrators

SOUTHWEST/ROCKIES REGION

Advocate Training

February 21, 2020
Dallas, TX

NATIONAL ACADEMY OF ARBITRATORS

Southwest/Rockies Region
February 21, 2020 - Dallas, TX

SCHEDULE	TOPIC
9:00 – 9:15 A.M.	Welcome: Introductions ..... *Kathy Fragnoli/Paul Chapdelaine*
9:15 – 10:25 A.M.	**Issues that Arise Before and During Arbitration** • Subpoenas ..... *Don E. Williams (10 Minutes)* • Arbitrability ..... *Tom Cipolla (10 Minutes)* • Absent Accusers ..... *Angie McKee (15 Minutes)* • Past Practice/Collective Bargaining Agmt. ..... *Paul Chapdelaine (15 Minutes)* • Presenting a Contract Case ..... *Sidney Moreland (20 Minutes)*
10: 25 – 10:40 A.M.	**Break *(15 Minutes)***
10:40 – 12:00 P.M.	**The Anatomy of a Hearing** • Hearing Overview/Stipulation of Issue/ Opening Statements ..... *Kathy Fragnoli (15 Minutes)* • How to Admit Documents ..... *Pilar Vaile (10 Minutes)* • Direct and Cross Examination ..... *Pilar Vaile (15 Minutes)* • Common Objections ..... *Kathy Fragnoli (15 Minutes)* • Hearsay ..... *Sharon Gallagher (15 Minutes)* • Closing Arguments ..... *Angie Mckee (15 Minutes)*
12:00 – 1:00 P.M.	**Lunch *(1 Hour)***
1:00 – 1:15 P.M.	**Practice Arbitration/Review Roles**
1:15 – 2:45 P.M.	**Practice Arbitration** (simple scenario with one witness each side) • Opening • Direct Examination • One Joint Exhibit, One Exhibit Each Side • Cross Examination • Closings
2:45 – 3:00 P.M.	**Break *(15 Minutes)***
3:00 – 3:30 P.M.	**Debrief and Wrap Up** ..... *Paul Chapdelaine* • Challenges at tables? • Questions?

ISSUES THAT ARISE BEFORE AND DURING ARBITRATION

SUBPOENAS

Don E. Williams

Issuances of Subpoenas

Introduction: Voluntary arbitration is to promote constructive employment relations as alternative to economic strife with Federal Mediation and Conciliation, National Academy of Arbitrators, and American Arbitration Association use of certain procedure, codes and policies.

I. Rules for Arbitral Hearing as key to successful arbitration to ensure fairness and impartiality. Testimony and documents may be obtained in arbitration in accordance with the parties' agreement, the applicable institutional arbitration rules and provisions of law (federal and state arbitration acts, as applicable).

   A. AAA Labor Arbitration (LA) Rule 28: An arbitrator as is authorized by law may subpoena witnesses and documents independently or upon request.

   B. Employment rules are entirely different from arbitration rules.

   C. State Law: Some state arbitration statutes either do not give arbitrators subpoena authority or exempt labor contracts from law's coverage.

      1. Revised Uniform Arbitration Act, (RUAA) Section 7: has been adopted by thirty-five (35) states, including AR, CO, NM, and TX allows for issuing subpoenas.

      2. Texas Local Government Code, Chapter 143, Section 143.057 (f), 143.1016 (f) allows subpoenas in fire and police cases.

      3. Oklahoma: OK law only mentions subpoenas for books, records and witnesses in interest cases. The authority for grievances is usually in the CBA.

      4. Arkansas: There is some debate as to whether federal or state law applies to arbitration in Arkansas, an important question to deal with before other questions regarding arbitration can be answered [Subpoena Arkansas Judiciary, Rule 45].

   D. Federal Law

      1. Federal Rule of Civil Procedure, Rule 26: Duty to Disclose in federal court cases.

      2. Federal Arbitration Act, (FAA) applies to transactions under the Commerce Clause to contractually based mandatory arbitration.

3. National Labor Relations Act, (NLRA) Section 3 01: Federal labor law governs CBA Section 301 has no explicit provision dealing with subpoenas, and contractual approach does not cover third party non-signatories.

II. Arbitrators have authority to issue subpoenas, direct appearance and produce documents, set deadlines for compliance, and issue other rulings.

A. Authentication

1. If subpoenaed document is provided by a custodial party to the dispute, it is not automatically admissible if a violation of other rules of evidence.
2. Several states have laws specifically stating process for admissibility of deeds, court documents and records.

B. Relevance

1. Some arbitrators do not inquire into the purpose of subpoenas but sign and send back.
2. Some only inquire if objection is made to the issuing because do not want to lend their name to an improper activity.

- Only question appropriateness if a motion to quash is "filed."
- Other arbitrators believe they should know the reason for issuing before ordering an appearance, especially if a last-minute request.

3. Some treat as analogize to court proceedings.

C. Notice

1. Arbitrators differ on whether notice or copies of subpoena sent to opposing party.
2. RUAA, FAA and NLRA provide no guidance in issuing subpoenas.
3. Code of Professional Responsibility for Arbitrators, Section 4.1.b, states, “copies of any prehearing correspondence between the arbitrator and either party must be made available to both parties.”

- Other party has opportunity to make a timely objection.
- If subpoena is for non-party, the other side may not know of the existence or have an opportunity to object until hearing.

D. Prehearing Conference

1. UAA, Section 15 (a) allows arbitrator holding conference before hearing.
2. Telephonic conference call

III. Prehearing Appearance Subpoena

A. Generally, FAA, UAA and state arbitration statutes do not allow for discovery depositions or prehearing discovery.

B. Without discovery in arbitration, grievants have requested all of the agency or company documents or requested depositions in certain cases; however, increased costs.

1. Prior incidents or discipline for affirmative claim of disparate treatment
2. Subcontracting
3. Prevent unfair surprise

C. The Supreme Court held employer's refusal to supply union with information necessary for union's duty to enforce an arbitration agreement violates NLRA Section 8(a)(5) and union has similar duty under 8(b)(3).

D. The arbitrator allowed discovery of relevant material which is specific to comply without burdening with unwarranted costs and time delay.

IV. Enforcement

A. Adverse Ruling

B. Specific request

C. Outcome determining discouraged.

ARBITRABILITY

Tom Cipolla

Two Kinds – Procedural and Substantive

Procedural – Usually where it has been alleged that the Union has not followed the grievance procedure.

Substantive – The subject matter of the grievance is not an issue that the arbitrator can decide.

When Raised or Challenged:

- Before Arbitration – to court or the arbitrator
- During the Hearing – to the Arbitrator
- After the hearing – to court, if not waived by going forward to arbitration or otherwise delegating the decision to the arbitrator

Who Decides:

Case law indicates that procedural arbitrability is decided by the arbitrator and substantive arbitrability is decided by the court. However, the parties may explicitly appoint the arbitrator to decide the matter or the Company may raise either as an affirmative defense to the grievance.

Factors considered by the arbitrator:

- CBA language
- When it is raised
- Waiver
- Past Practice

What Can Be Done:

Follow grievance procedure and have language in place that spells out a grievance procedure that is easy/simple.

Craft language that permits the arbitrator to decide both kinds when they are asserted.

ABSENT ACCUSERS

Angie McKee

I. Common Examples

- Civilian complaints against law enforcement
- Secret Shoppers
- Co-workers (bargaining unit members)
- Customer complaints

II. Problems with Absent Accusers

- Hearsay
- Inability to cross-examine (fairness)
- Missing context
- Motivation
  - Prior contacts with grievant
  - Monetary
  - Trolling

III. What Arbitrators Will Consider

- Whether the complainant is disinterested
- Reasons why the complainant does not testify
- Amount of dispute regarding the substance of the complaint
- Whether the employer customarily investigates third party complaints
- Availability or lack of context for the allegation(s)
- Complainant's full statement(s)
- **CORROBORATION**

IV. How to Approach Absent Accuser Evidence

A. For the Proponent:

- Thoroughly investigate the complaint
- Corroborate as much as possible
  - Other witnesses to the event
  - Admission by the grievant
  - Documents/System data

B. For the Grievant:

- Attack motivation/bias of complainant
- Point out what it would be important to cross-examine about
- Point out discrepancies in the complainant's statement(s)
- Point out lack of corroboration

PAST PRACTICE
AND THE
COLLECTIVE BARGAINING AGREEMENT

Paul Chapdelaine

The Existence of Past Practices

A bone fide "past practice of the Shop" can be established by a pattern of action or inaction that is repeated regularly and is understood and accepted by the parties as the proper course of action to follow under the circumstances that exist.

- No easy formula for resolving disputes regarding a past practice.
- Sometimes referred to as "local working conditions" or "Common law of the plant."
- Absent a specific provision of the CBA, a past practice may be used to establish a separate, enforceable condition of employment, i.e. "Actions speak louder than words."
- Not a one size fits all. It depends on the particular plant setting, rather than theories of contract administration.

Binding Past Practices Have Certain Characteristics

In order to determine the existence of a binding past practice, most arbitrators will require clear and convincing evidence that the practice incorporated the following:

- The practice was clear and consistently applied.
- The practice existed for a sustained period of time and had occurred repeatedly.
- The practice was known and accepted by management and the union.
- The practice was mutually accepted by the parties and was not a special, one-time benefit or meant at the time to be an exception to a general rule.

Generally, the existence of a "past practice" requires all of the following four factors:

A. Clarity and Consistency: The course of conduct must be clearly defined and viewed as a practice that does not change during a specific set of conditions.

   1. It is not simply a course of action pursued by management or employees on more than one occasion.

   2. It is not an uncertain course of action that has been contradicted as often as it has been followed.

B. Longevity and Repetition: Repetition and longevity will normally be required to establish a practice.

1. A period of time must elapse during which a consistent pattern of behavior emerges.
2. Not simply an action that has occurred a few times.
3. There is no absolute standard as to how long a practice must exist or how frequently it must be repeated in order to be considered valid.
4. There is no formula, it is a matter of good judgment.

C. Acceptability: Both the union and management knew that the practice existed, and management agreed with the practice, or at least allowed it to occur.

1. It is not a discretionary act specifically reserved to management's right to run the business.
2. A past practice may be implied from long acquiescence to a course of action.
3. Acquiescence does not necessarily exist where employees have constantly protested the course of action through complaints and grievances.

D. Mutuality: The pattern of the behavior must be mutually acknowledged by the parties.

1. A product of joint determination to change the contract.
2. Can only be changed by mutual agreement or by a change in working condition.
3. Can be discontinued during negotiations through a "Zipper Clause."

Examples of past practice that have been found to be controlling.

- **To Clarify Ambiguous Contract Language:**

1. Past practice is relevant in establishing a meaning for ambiguous contract language.
2. The past practice must be related to the conditions that gave rise to the practice.
3. A past practice is not protected from repeal if the underlying conditions that led to the practice are changed.
    a. Management promptly reduced the number of equipment operators from five workers to four workers due to a technological advancement on a piece of equipment.

b. Hourly rest breaks that were given to steel plant crane operators based solely on the high temperatures in the crane cabs were lost when the cabs were air conditioned.

c. A brewery lowered the temperature in the beer storage area due to "marketing conditions." Although it inconvenienced the employees by requiring them to purchase extra clothing and to work in a less desirable environment, the change did not adversely affect the health or safety of the employees.

- **To Modify Apparently Unambiguous Contract Language:** A CBA defines a workday as eight hours, with an unpaid one-half hour meal break.

    1. In one department, the employees have consistently worked a straight eight hours with a paid, on-call meal break.

    2. The employer cannot unilaterally abolish the paid meal break over the Union's objections as long as the on-call status does not change.

- **As a Separate, Enforceable Condition of Employment:** For many years an employer has consistently and routinely given certain "extra-contractual compensation" to their employees that is not mentioned in the CBA.

    1. Christmas bonus or efficiency bonus plan.

    2. Reduced rate on home electricity to utility workers.

    3. Free milk or ice cream to dairy workers.

    4. Free beer to brewery workers.

- **Implementing General CBA Language:** What constitutes "just cause" and "proper" discipline under the agreement?

    1. Corrective action versus punitive action.

    2. Previous arbitration decisions.

    3. Disparate treatment.

LECTURE SERIES
PRESENTING A CONTRACT CASE

by Arbitrator Sidney Moreland, NAA

Foreword

This lecture is part of an ongoing series of advocate training on various arbitration-related topics with a focus on evidence and the burden of proof for advocates in training.

It is essential for the labor and employment advocate to have a working knowledge of contracts for at least 3 very salient reasons.

First, it is the contract that forms the jurisdictional basis for the arbitration right itself. The contract's arbitration clause is the legal consent to submission of the dispute to the arbitration process.

Secondly, the contract typically establishes some level of parameter regarding the functions of the grievance and arbitration operations. The contract provides the parties with the right and opportunity to create their own timelines and rules for the processing of disputes from notice to the final arbitration decision.

Thirdly, the contract provisions themselves form the basis for the manifesting issues requiring resolution. The grievance must identify some provision of the contract, which has allegedly been violated.

In some cases, the parties present counter views concerning how a specific provision of the contract should be interpreted and/or applied. Such disputes, commonly referred to as a contract dispute or a contract case, are the focus of this lecture.

I. REQUIREMENTS OF A CONTRACT:

The legal characteristics of a valid and enforceable contract are basic and should be known by the advocate of contract enforcement issues. The trained advocate learns to approach the contract case with a working knowledge of what makes a contract lawful, valid, and enforceable. Most contract disputes are attributable to the alleged shortcoming of at least one legal requisite.[1] It is noted that the elements of a contract become highly relevant in enforcement proceedings.

Object. Contracts must have an objective, typically the real motive of the parties. In employment matters, the principle objective is to gain employment for money by the employee and to procure labor services by the employer. These motivations of the

[1] The requirements of a contract may vary from state to state. The requirements of a contract in some states may or may not define and recognize the 4 contract elements identified in this lecture. Some jurisdictions combine the elements of a contract with the formation requisites, *discussed infra*.

contracting parties become the object of the contract and must be lawful. Distinguish between the object and motivating factor of the contracting parties (A's is to purchase a car for $1,000, while B's is to receive money and sell a car), which is easily confused with cause and consideration (car and money), *infra*. If for example, the car or the money are stolen, it is therefore not a lawful objective by A or B. Once the object is determined to be unlawful in nature, the contract is not valid.

If a contract has no lawful and discernible objective, it may be a mere communication, non-binding on the parties (*e.g.,* letter of intent, cooperative endeavor agreement, non-compete covenant). The language of the contract may or may not reveal whether discernible terms and lawful obligations to act or not act were the motivation or object. Lack of any honest motivation and/or a lawful object by the parties forms an argument against enforcement of the contract.

Cause. All contracts must also have lawful cause, *i.e.* the most proximate purpose of the contract or the essential reason which impels the contracting parties to enter into it and which explains and justifies the creation of the obligation created by the contract that does not or will not violate public policy as a result of its performance. Stated differently, a contract must give rise to obligations with a lawful cause.[2]

The cause of the contract must exist; it must be true; and it must not be illicit. Cause forms an argument against the enforcement of a provision that runs counter to recognized law or regulation (*e.g.,* wage and hour laws, workers compensation, safety regulations, bankruptcy obligation avoidance).

Capacity. Parties executing must have proper representational authority and all legal requisites to do so. Capacity forms the argument against altering contract terms by outside forces or by one who is not a party to the contract[3] (*e.g.,* assignment issues, corporate mergers/takeovers, change of bargaining rep.).

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[2] "As the enforcement of obligations with an unlawful cause would produce results prohibited by the law, or reprobated by morals, or against public policy, the public order is protected when an obligation is deprived of effects because of its unlawful cause. This function of cause makes it a very useful instrument in the hands of courts. Because of this function, courts in those civilian systems where cause prevails are adamant in preserving it in spite of the devastating attacks of writers who deny the usefulness of the idea of cause. Through cause, indeed, courts are allowed, when necessary, to delve deeply into the parties' subjectivity in order to uncover the unlawfulness of the reasons that prompted them to bind themselves. In that way, something like a policing of contracts takes place for the preservation of the public order. Here, a proper understanding of the matter requires a clear distinction between cause and object." Still Another Look at Cause by Professor Saul Litvinoff, Louisiana Law Review, Volume 48, Number 1, September 1987.

[3] "(1) No one can be bound by contract who has not legal capacity to incur at least voidable contractual duties. Capacity to contract may be partial and its existence in respect of a particular transaction may depend upon the nature of the transaction or upon other circumstances.
(2) A natural person who manifests assent to a transaction has full legal capacity to incur contractual duties thereby unless he is
(a) under guardianship, or
(b) an infant, or
(c) mentally ill or defective, or
(d) intoxicated." Restatement of Contracts (2d) 12.

Consent. The parties to a contract must execute the contract with freely given consent. Consent is also referred to as the "manifestation of mutual assent" and incorporates the requisites of the offer and acceptance, *infra*. Contract enforcement depends upon the underlying fact that both parties willingly and voluntarily entered into the contract and freely agree to abide by all of the contract's terms and provisions.[4] Duress, threats, or coercion upon a party may vitiate consent (*e.g.,* plant closure, job loss, benefits lost, discipline, extortion, blackmail).

II. FORMATION REQUISITES:

The substantive elements of the finalized contract should not be confused with the requisite elements of forming a contract, *to wit*:

Offer. The promise by one party to do or not do some specified future action.

Offer reflects *capacity* of the offeror to make the promise; the *capacity* of the offeree to accept the promise; and the *cause* of both parties for entering into the subsequent agreement.[5] The offer remains the genesis of all contract formations. A thorough understanding of the offer definition is important for the advocate of contract disputes.[6]

Acceptance. Assent by the other party to the promised offer. If the assent is without condition the offer is deemed accepted. If the assent is conditioned, it may be considered a counter offer. [7]

Acceptance reflects *capacity* of the offeror to make the promise; the *capacity* of the offeree to accept the promise; and the *cause* of both parties for entering into the subsequent agreement.

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[4] "(1) Except as stated in Subsection (2), the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.

(2) Whether or not there is a bargain a contract may be formed under special rules applicable to formal contracts or under the rules stated in §§ 82-94." Restatement of Contracts (2d) 17.

[5] "A person has reason to know a fact, present or future, if he has information from which a person of ordinary intelligence would infer that the fact in question does or will exist. A person of superior intelligence has reason to know a fact if he has information from which a person of his intelligence would draw the inference. There is also reason to know if the inference would be that there is such a substantial chance of the existence of the fact that, if exercising reasonable care with reference to the matter in question, the person would predicate his action upon the assumption of its possible existence…. The words "reason to know" are used both where the actor has a duty to another and where he would not be acting adequately in the protection of his own interests were he not acting with reference to facts which he has reason to know." Restatement of Contracts (2d) 4, Comment b, Reporter's Note.

[6] "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." Restatement of Contracts (2d) 24.

[7] "(1) Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.

(2) Acceptance by performance requires that at least part of what the offer requests be performed or tendered and includes acceptance by a performance, which operates as a return promise.

(3) Acceptance by a promise requires that the offeree complete every act essential to the making of the promise." Restatement (2d) of Contracts 50.

Consideration. Something of value, which is promised by one party in exchange for specified action or inaction. Consideration is distinguishable from a gift. Consideration may take several forms, besides monetary payment, such as a promise to perform a service; an agreement not to do something (forbearance); or even the mere reliance on the promise made.[8] Consideration is the tangible or intangible item of value to parties that induces the parties to enter into the contract. It may or may not be expressed in the subsequent terms of the contract.[9]

Consideration becomes the requisite *object* of the contract.

Meeting of the minds. Means the parties understood and mutually agreed to the terms and substance of the agreement.[10] Meeting of the minds is also defined as the actual assent by both parties to the formation of a contract including agreement on the same terms, conditions, and subject matter. Although a meeting of the minds was required under the traditional subjective theory of assent, modern contract doctrine requires only objective manifestations of assent.[11]

Fraud in the factum implies a party may have been fraudulently induced to enter into the contract, which also provides an example of assent being undermined and whereby a meeting of the minds may not have therefore occurred.

A meeting of the minds without misrepresentations reflects the requisite of *cause* and *consent*.

Without the existence of these four things during the forming of the contract; the contract is not valid, since the contract may not have been perfected.

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[8] "(1) To constitute consideration, a performance or a return promise must be bargained for.

(2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.

(3) The performance may consist of

(a) an act other than a promise, or

(b) a forbearance, or

(c) the creation, modification, or destruction of a legal relation.

(4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person." Restatement of Contracts (2d) 71.

[9] "When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term, which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court." Restatement (2d) of Contracts 204.

[10] "(1) The manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party or parties.

(2) A manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined." Restatement of Contracts (2d) 22. "(1) Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain. (2) The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy. (3) The fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance." Restatement of Contracts (2d) 33.

[11] See Legal Information Institute, Cornell University Law School, "meeting of the minds" defined.

Beyond the requisite elements of forming a valid contract and the lawfully recognized characteristics of the contract itself; contracts must be deemed enforceable in order to be valid. The standards for demonstrating a contract's enforceability is an important legal doctrine recognized for purposes of determining whether or not a grievance or protest of the contract's application can be lawfully remedied.

If a contract lacks the above-mentioned elements, it cannot be enforced. If the contract cannot be enforced, the grievance fails. The importance of a basic understanding of how contracts are formed by the parties and the contract's essential elements cannot be overstated.

III. STEPS OF A CONTRACT DISPUTE:

Grievance filing:

Procedural steps and timelines established by the parties.

Must identify the provision(s) of the contract allegedly violated. The contract provision should be specifically identified with a description of how said provision(s) have been violated. Specificity sets the tone early in a case.

(Examples discussed)

Avoid the disjointed presentation between the grievance allegations and evidence actually put forth. Grievance allegations that go unsubstantiated during the presentation of your case will haunt you in the end.

(Examples discussed)

Depending upon the grievance and notice procedures between collective bargaining parties, a contract case may be initiated through the filing of a grievance. The statutory provisions governing the parties may dictate a different process, such as parties under the Railway Labor Act and certain public bargaining units subject to different notice requirements.

The process initiating a contract dispute should identify the contract provision(s) in dispute and explain the factual context by which said provisions have been violated.

Grievance Steps:

Typically, contract cases require less involvement by the bargaining unit members. In this regard, a contract case may be conferenced with greater logistical ease. Take advantage of the narrowly focused issues over the disputed contract language and how it is or is not being applied. The evidence needed to resolve a contract dispute is typically limited to the contract itself and other evidence controlled by the principals. Take advantage of fewer complications.

Appeal of the denied grievance typically elevates the consideration of the grievance to a different level of the parties' organizational structure. It is important that the contract provisions in dispute remain in focus. Careful notes should be taken during these conferences for inconsistencies and acknowledgements concerning the contract provisions being debated.

Following the exhaustion of the grievance steps the unresolved contract dispute becomes subject to arbitration pursuant to said contract. Following selection of the Arbitrator, parties may consider whether or not a hearing is required. A number of contract disputes may be resolved through briefing alone.

(Examples discussed)

IV. WHAT THE ARBITRATOR NEEDS FOR RESOLUTION:

The Arbitrator should take the deductive reasoning approach recognizing the contract dispute involves either:

(a) a dispute concerning the ***interpretation*** of the contract language as applied to the undisputed factual conduct of the parties in the performance of the contract; *or*

(b) a dispute concerning the ***factual conduct*** of the parties in the performance of the contract with a mutually undisputed understanding of the contract language; *or*

(c) a dispute concerning ***both*** the interpretation of the contract language and the factual conduct of the parties.

The contract case is generally going to be either a, b, or c. Understand what the issues are and succinctly describe them to the Arbitrator. Channel your argument directly at the disagreement area.

If the contract provision(s) at issue are clear and unambiguous, the case can immediately be brought into focus by stipulating that the parties' actual performance is in conflict with the specified provision(s).

The evidence needed to resolve a contract case are not as broad and limitless as other types of disputes and advocates should seek to give the Arbitrator only what is needed to answer the questions required of resolving the issues.

Intent of the Parties

The intent of the parties at the time the contract was written is the most commonly argued issue in a contract case. Refer to "Cause," "Object," "Offer," "Acceptance," "Consideration," and "Meeting of the Minds," discussed *supra*. The mutually created contract language itself is generally the most direct evidence of the parties' true intent, and therefore takes precedence.

If the contract provision in dispute can be reasonably comprehended within its own verbiage by applying the commonly understood or accepted meaning of the words used; then the Arbitrator should strive to resolve the dispute purely within the four corners of the contract. Logically, the contract's wording is the parties' own language and typically will be the very best evidence of what the parties intended.

Common Sources of Evidence:

- *contract provision itself;*
- *other contract provisions that form relevant conditions;*
- *other contract provisions in conflict with the provision;*
- *dictionary or statutory definitions;*
- *bargaining notes;*
- *negotiation communications;*
- *testimony of negotiators;*
- *circumstances of the parties during the formation of the contract;*
- *past course of dealings and interactions between the parties;*
- *customary operations between the parties;*
- *customary operations between similar parties;*
- *presentations made to bargaining unit;*
- *ratification discussions and votes;*

If the intent of the parties while negotiating is unclear, their final contract terms will generally reflect it. If the intent of the parties while negotiating coincides with a fair and reasonable interpretation of the provision they mutually created, then the contract terms should be enforced as written.

(Discussion)

Past Practice of the Parties, Subjective Analysis

Past practice of the parties in the course of administering the contract provision in dispute is the second most argued issue in a contract case and should only be looked to in the absence of a fair, reasonable, and conclusive interpretation of the contract language itself. The parties' past practice may form both direct and circumstantial evidence; the latter being slightly less persuasive.

Common Sources of Evidence:

- *actual conduct of parties;*
- *testimony of employees;*

- *testimony of management;*
- *side letter/memorandum of understanding;*
- *corporate records;*
- *statistics;*
- *payroll records;*
- *economic data;*
- *previous contracts;*
- *negotiation communications;*
- *bargaining notes;*
- *proof of changes of circumstance;*
- *interaction between the parties reflected in meeting notes, emails, letters, or other communications;*
- *tax records;*
- *regulatory evidence from governing authorities;*
- *third party contracts pertinent to the issue in discussion;*

Other than preferred direct evidence of the contract itself, Arbitrators should be very reluctant to forego or abandon the parties' actual past practice; striving foremost to maintain as much subjective analysis upon the agreement language first; and the parties actual conduct second.

Without contract language or past practice; the Arbitrator's deliberation responsibility necessitously moves outside of the parties.

(Discussion)

Past Practice of Others, Objective Analysis

If the contract fails to address the issue and past practice of the parties is unclear or inconclusive, the Arbitrator may consider evidence of the past practice of similarly situated parties. As stressed above, the Arbitrator should be very apprehensive in undertaking any comparative analysis of the parties in dispute to that of other non-related parties. It becomes the third-tier analysis for good reasons.

First of all, it strains the relevancy test required of all evidence considered.

Secondly, the offered exemplary evidence must be carefully scrutinized for necessary similarities; considering commonalities such as, common ownership, processes, procedures, size, productivity, locale, work force, contract provisions, policies and procedures, etc.

Thirdly, the examination of the behavioral patterns of non-parties, while an acceptable common law thought process offering sometime fair comparison; is far more difficult to scrutinize without the direct testimony of the players being examined and compared to the real parties.

Common Sources of Evidence:

- *actual conduct of the parties at a different location (same company, different location);*
- *conduct of similar workplace operation;*
- *testimony of persons involved in the compared scenarios;*
- *other agreements utilized to govern conduct and operations similar to those of the parties at arbitration;*
- *comparable policies and procedures utilized to govern conduct and operations similar to those of the parties at arbitration;*

Equitable Remedy

For purposes of this lecture, the fourth and final method of arbitral resolution discussed is the Arbitrator's application of equity; meaning the deliberative process to be followed in the absence of any conclusive contract language; and/or evidence of the parties' intent; and/or evidence of the parties' past practice; and/or evidence of similarly situated parties.

While all arbitral remedies should result in fair and equitable solutions whenever possible within the application of the parties' own negotiated terms; a void of controlling terms or guiding practices requires the fabrication of a civil remedy based in equity. Like the Courts, an Arbitrator should render an equitable remedy when evidentiary restrictions prevent a sufficient, adequate, and conclusive legal remedy. In this regard, the Arbitrator may well be undertaking an interest arbitration form of dispute resolution.

Common sources of evidence:

- *Stare decisis;*
- *Common law judgments;*
- *Court rulings;*
- *Arbitration Awards;*
- *Precedent setting rulings or agreements;*
- *Applicable contract law or regulation;*

V. Contract Provision Challenges (DISCUSSION):

- Vague?
- Ambiguous?
- Unclear?

- Inconsistent?
- Outdated?
- Silent?
- Unenforceable?
- Outdated or prescribed?
- Conflicting Provisions?
- Violates law or regulation?
- Outside conditions/third party forces?
- Past practice conflicts with contract provisions?
- Past practice waives enforceability, right?
- Past practice creates contractual obligations?
- Procedural steps/timelines not followed?
- Nullifying conditions?
- Application of non-negotiated policy?
- Management rights scope?
- Negotiation rights scope?

VI. CASE STUDIES:

Case 1

Contract: *"Employees called out to service plant in an emergency situation shall receive call out pay. Call out pay is defined as 2.0 times the overtime wage rate of the employee for hourly work performed by the employee when called out."*

"Overtime shall be paid to employees who perform work outside of their regular 8-hour daily shift designated time frame and/or during their designated off days. Overtime pay is defined as 1.5 times the ordinary wage rate of the employee for work performed by the employee outside of their shift."

Facts: Employees are called out to restore plant to service at 2:00 a.m. and work until 11:00 a.m. Their daily 8-hour shift schedule is 7:00 a.m. to 3:00 p.m.

Company: Employees are entitled to 5 hours of call out pay, which represents the call out hours worked outside of the shift. Grievance denied.

Union: Employees entitled to call out pay are owed 9 hours of call out pay, which represents the total hours worked after being called out.

(Discussion)

What are the various problems associated with the contract language applied to the fact pattern? Are the facts in dispute? Are the contract provisions in dispute?

Case 2

Contract: *"Employees in Trainmen Service shall maintain any required Carrier and FRA certifications, licenses, or permits necessary for the service performed. Trainmen is defined to include Conductors, Engineer, Switchman, and Brakemen."*

Facts: Conductor operates remote controlled locomotive in yard switching operations with no FRA Engineer's certification. Conductor is removed from service for failing to possess the certification required to operate a locomotive.

Company: The Conductor had the obligation to procure and maintain an Engineer certification and to inform the Carrier if he was ineligible to operate the locomotive. Grievance denied.

Union: Remote control operation of a locomotive in a minor yard operation is not contemplated as a function performed exclusively by a certified Engineer. The Carrier should have prevented the Conductor from operating the locomotive. The Carrier's permissive action represents a waiver of the contract provision. The certification is not "necessary for the service performed."

(Discussion)

Did the parties intend for Engineer certification requirement to apply to RCO operation of a locomotive in a yard? Did RCO operated locomotives exist at the time the Contract was written? Is the Contract language to be taken literally since a certification paper is not technically required for the physical operation of a remote-control locomotive? Are the facts in dispute? Do the FRA regulations require an Engineer's certification to operate a locomotive by remote control? Can a party waive a contract provision?

Case 3

Contract: *"Player represents to Club that he is and will maintain himself in excellent physical condition…If Player fails to establish or maintain his excellent physical condition to the satisfaction of the Club physician, or make the required full and complete disclosure and good faith responses to the Club physician, then Club may terminate this contract."*

"Player understands that he is competing with other players for a position on Club's roster. If at any time, in the sole judgment of Club, Player's skill or performance has been unsatisfactory as compared with that of other players competing for positions on Club's roster, then Club may terminate this contract."

"If Player is injured in the performance of his services under this contract and promptly reports such injury to the Club, then Player will receive such medical care as the Club physician deems necessary and will continue to receive his yearly salary for the year of said injury."

Facts: Player reported shoulder injury in practice on 8-2-17 and rehabs through 11-19-17. On 10-1-17, Club terminates Player stating, *"In the judgment of the Club, your skill or performance has been unsatisfactory as compared with that of other players competing for position on the Club's roster."*

Company: Player was terminated pursuant to Club's contractual right to terminate Player for unsatisfactory skill or performance. There is no further compensation due. Grievance denied.

Union: Player was injured in the performance of his services under the contract and Club cannot terminate. Player maintained himself in excellent physical condition and made full and required disclosure when injured at practice. Player is entitled to his yearly salary for being terminated while injured in the performance of the contract.

(Discussion)

Is practicing in the performance of his services under the contract? Does the injury provision create a condition upon the Club's right to terminate Player? Do the provisions of the contract conflict?

Case 4

Contract: *"The Company shall notify the employee of any discipline rendered within 30 days of the occurrence giving rise to said discipline and shall cite the applicable work rule violation(s) which said discipline is based upon."*

Facts: Employee arrested for driving while under the influence of alcohol on 7-1-18 while off duty. Company learns of arrest on 8-20-18 and notifies employee that he is terminated.

Company: Employee terminated for Work Rule 5: *"Employees are expected to maintain good moral character and avoid unlawful or reprehensible conduct that may reflect poorly on the employee, company, other employees, and customers."* Employee was terminated within 30 days of Company's knowledge of the incident. Grievance denied.

Union: Employee arrest does not reflect lack of good moral character. Company failed to discipline employee within 30 days of the occurrence. Arrests are public record and the employee should be entitled to the advantage of public notice laws in the absence of contract language to the contrary.

(Discussion)

Is this a procedural issue or a contract case? Is it both? Does the resolution entirely rest upon the contract's language? Why or why not?

THE ANATOMY OF A HEARING

HEARING OVERVIEW

Kathy Fragnoli

- Arbitrator will ask if parties agree that the case is properly before him/her.
- Will ask for stipulations and motions.
- Arbitrator will ask for the statement of issue (e.g., *Was there just cause to terminate the grievant?*).
- Opening by each party (Management goes first on discipline; Union on contract cases).
- Direct
- Cross
- Closing

STIPULATION OF ISSUE

- An arbitrator will usually ask you if you have any "stipulations" at the beginning of the hearing.
- These are items you have agreed upon to save time and streamline the process.
- The more effort you put into doing this prior to the hearing, the more professional you look!
- Examples of stipulations:
    1. *The parties agree that the drawing of the scene prepared by the union is correct.*
    2. *The parties agree that the grievant's work history shows no prior discipline.*

OPENING STATEMENTS

Kathy Fragnoli

"You only have one opportunity to make a good first impression."

Mark Twain

- Do NOT reserve your opening statement. The arbitrator won't know what to listen for when the witnesses testify. You have the arbitrator's undivided attention. If you don't use this time to set out a roadmap of your case you are committing malpractice.
- Keep it simple.
- Use a timeline.
- Hand out your opening statement if there is no transcript before you begin. (Saves the arbitrator from writing it out.)
- Tell a story. Think of yourself as making a movie of the story you are telling.
- In a discipline/discharge case, don't forget to start with a description of the company, the employee's job duties, and seniority.
- If you are presenting a contract case, prepare one sheet of paper containing the contract provision at issue. Discuss how the other side's view of the language would hurt the operation (or the employee's quality of work life, if you are the union).
- It is very effective to address what your opponent may point out as the weakness in your case before they do. (*"Madam Arbitrator, management may try to argue that the grievant should be fired because of his bad attendance. However, we will show you that Mr. G had perfect attendance for three years and only missed work after his wife died in an accident this year."* Or *"Mr. Arbitrator, the union may try to tell you that there is a past practice of letting employees leave early. However, this was limited to one supervisor in one city for less than a month before that supervisor was removed."*)
- Never overpromise and underdeliver. If you make a splash with your opening and the testimony doesn't live up to the hype, prepare for consequences. You don't look truthful.
- End the opening with *"In summary, we will prove…."* Put your "elevator speech" at the beginning and end.
- Suggestion: Present your opening to a 10th grader. If they don't know what you are talking about, you may not either. (Friends who aren't in your industry will work as well.)

- Simplify to persuade.

Quiz: What one sentence appears to have most influenced the jury after hearing a year of evidence in the OJ Simpson Trial?

Bottom line: An opening statement is one of the most important tools in presenting your case. Never keep this at the bottom of the tool box.

HOW TO ADMIT DOCUMENTS

Pilar Vaile

The Basics

"Documents" include any writings offered as proof of a fact at issue in the case, such as email correspondence, notices of termination, grievances, written notes of interviews, contracts, work rules or polices, records related to prior discipline, etc.

Documents generally raise hearsay issues since they include out of courts statements. They may be offered to show how or why a party proceeded as they did. Under the more relaxed evidentiary rules applied in arbitration, they may also be offered to establish the facts stated therein, subject to minimum requirements of due process. (*Legal residuum rule*: you cannot establish a material fact solely through inadmissible hearsay, although such hearsay can corroborate admissible evidence.)

As with all evidence, admission of documents requires a showing of foundation – meaning, some basis for believing the proffered document is relevant, authentic, and admissible.

(a) Relevance:

- i.e., the document is material and probative – meaning it makes some fact at issue in this case more or less likely or probable.
- Relevance depends on the elements of your case, meaning what you have to prove to prevail on the claim of contract violation or improper discipline.

(b) Authenticity:

- i.e., the document is what it is purported to be.
- Authentication generally requires proof of authorship or origin, and may also require proof of transmission or receipt, particularly under any relevant "notice" requirements.

(c) Specific admissibility issues:

- Usually, establishing relevance & authenticity is sufficient for a document's admission. Sometimes, however, there will be specific admissibility issues that require additional foundation, such as relates to relevant hearsay exceptions (government records, business records, summaries, etc.).

Unless the document is a stipulated exhibit, you WILL need witness testimony from one of the following, to establish authenticity at the least:

1. Author,
2. Recipient(s); or
3. Records custodian or other "person with knowledge."

You may need more than one witness to establish foundation. Also, remember, you can lay foundation through questions on cross examination, as well as on direct.

General Format for Introduction

Foundational questions/answers, if any: [Ex: Did you interview X, did you take notes? Does the Agency maintain a record of time and attendance? Was a summary created?]. Then,

Counsel: **I am handing you what has been marked** Union/Employer Exhibit [blank] for identification purposes – please review it; when you are done, tell us if you recognize it and, if you do, what it is.

Specific Admissibility Issues

Q: Was the data contained in this document recorded contemporaneously by a person responsible for doing so? Do you maintain this document in the ordinary course of business?

Q: Were interviews taken as part of management's investigation into the alleged misconduct? Where the interviews relied on by the decision maker in issuing discipline?

The Closer

Witness: ['Mwa-Mwa-Mwa...']

Counsel: **I move for the admission** of Union/Employer Exhibit X.

If admission of the document is not opposed, it will generally be admitted. Consider likely documents from the other side, so you are prepared to object as necessary; consider likely objections to your documents, so you are prepared to respond. The Arbitrator will rule on any objections to the evidence. Make sure the admission is on the record, and periodically review & compare your list(s) of admissions; alternatively, make sure you all review exhibit lists before the hearing and record closes.

Tips/Reminders

Stipulate to joint exhibits if possible.

- At a minimum, it should always be possible for the Parties to stipulate to the admission of the relevant CBA(s), the grievance and/or grievance chain, and any proposal or notice of discipline at issue.

Try to get stipulations on other exhibits, such as duplicate documents; and documents for which the relevance and authenticity are not in question.

Bring extra copies for opposing counsel, the Arbitrator, the Witness(es), and the Court Reporter.

Hand opposing counsel the document to review, before you start questioning the witness about the specifics of the document (i.e., non-foundational questions).

Number pages of long documents in advance, or tab the relevant pages if only a few.

Search for documents exhaustively, but present them into the record judiciously; and draw the fact finder's attention to any buried information you want him or her to consider! (Flipside: be prepared for Arbitrator to also read any information that is relevant but not helpful to you.)

(Source: Modern Trial Advocacy, Lubet (4th ed.).)

DIRECT EXAMINATION

Pilar Vaile

The Basics

You do a "direct examination" of witnesses called in your case-in-chief, to prove your claims and allegations, or to establish facts in support of your defense. It is a generally a positive case but still plan for cross examination and use any opportunity to undermine the opposing party's case.

Two objectives:

(a) You must elicit facts & information sufficient to show the necessary elements of your claims (or from which they can be inferred), even if not in dispute!

(b) And you must also ultimately persuade the trier of fact as to your case, over that of the opposing party.

Possible goals with a given witness:

- Get undisputed facts into the record.
- Submit persuasive testimony on disputed facts.
- Lay foundation for documents or other exhibits.
- Submit facts and information related to this witness' credibility.
    - If credibility is not challenged, provide background information to humanize, such as family or educational history, what they do for a living, how long they lived in the community, etc.
    - If credibility is challenged, elicit testimony on witness' basis for knowledge, opportunity to observe, lack of bias or interest in outcome, etc.
- Impeach the credibility of another witness, such as by commenting negatively on their character for truthfulness, or by contradicting their testimony.

Form

Avoid leading questions, meaning questions that require a 'yes' or 'no' answer. What is a "non-leading" or "open-ended" question? Those beginning with: **Who * What * When * Where * How * Why**

Exceptions:

- Foundational questions – i.e., to show authenticity, relevance, etc.
- For facts not in dispute.
- Adverse witness – i.e., one from the opposing party's camp.
- Hostile or difficult witness – someone w/o formal affiliation but who is obstreperous or rambling.

Why does it matter if you use leading questions on direct examination in arbitration, where the technical rules of evidence do not generally apply?

- It can engender unnecessary objection and interrupt the flow of presentment of your case.
- Worse, it's usually just not very persuasive as an evidentiary matter, since it's Counsel's testimony, not that of the witness.

Some arbitrators suggest that you let witnesses tell the story in their own way, without questions. That can be effective, but a caveat: beware of "narrative" (or rambling and unstructured) testimony. This will eventually get an objection, even from an Arbitrator, since witnesses are supposed to be answering questions posed.

Remember, questions serve two very important functions: structuring the presentation of your best evidence consistent with your case theory/theme; AND comprehensibly educating the Arbitrator about the facts and/or case theory of your case or defense. Neither of these functions are met by monosyllabic testimony generated from leading questions, or by a rambling narrative.

<u>Suggestions/Reminders</u>

Consider jointly submitting stipulations of fact on:

- undisputed and frequently relevant facts, such as date of hire, date of incident, etc.
- Timelines
- past training, promotion, or discipline
- that witnesses would testify consistent with prior written statements in the record

Consider the characteristics of each witness selected:

- Avoid unnecessary duplication, seek the compelling and believable.
- Best: personal knowledge of a matter at issue, is able to perceive and relate the information, good demeanor & articulation, logical or sequential thinker/speaker, recognizes fact from fantasy or bias.

Typically, lay (versus "expert") witnesses can only testify to what they perceived with own sense (i.e., saw, heard, or did, including whether someone "looked" angry, fast, etc.), and cannot otherwise characterize events or testimony. We are usually more lenient in arbitration but remember it is not deemed persuasive just because it is introduced without objection!

Prepare for or "spoil" cross examination, by preemptively raising and reducing the impact of contrary facts:

Organize the content and pace of questions to (a) reiterate or emphasize the theory or theme of your case, while also (b) contributing to its overall persuasiveness. Keys to organization: primacy, recency, apposition, duration, and repetition.

Avoid: clutter, or testimony that doesn't advance the theme or theory; testimony that is non-essential and would lead to unprovable he said/she said arguments, or impeachment; and opening the door for questions you wish to avoid.

Start strong, end strong.

(Source: Modern Trial Advocacy, Lubet (4th ed.).)

CROSS EXAMINATION

Pilar Vaile

The Basics

In cross examination, you will again seek to add to your case, such as by filling in important gaps; or detract from the opposing party's case, such as by credibly impeaching or undermining the testimony just given.

Reasons for pursuing cross:

- Minimize any damage from direct
    - such as by adding facts for context, getting a "walk back," or discrediting this witness's testimony or character for truthfulness.
- Enhance your positive case
    - such as by using the cross to establish missing facts, or to lay foundation for other evidence.
- Detract from their case
    - such as by showing inconsistencies or weaknesses, and/or discrediting testimony or evidence.
- Explore doors or avenues opened during direct or cross.

Form and Content

i. Use short, leading, fact-based questions

ii. Questions are usually limited to the scope of direct.

- Consider asking to exceed the scope of direct, if it promotes efficiency and would not be prejudicial.
- Two other exceptions to the limitation on scope:
    - credibility of that witness; and
    - if the witness opens the door by interjecting new information on cross.

Other restrictions:

- You MUST have a good-faith basis in fact for your question – do not distort or obfuscate prior testimony

- Don't be argumentative – this can relate to demeanor, but also occurs when you insist that the witness agree with an opinion or characterization

- Don't intimidate, shout at, threaten, loom over, or badger

- Don't unfairly characterize the witness' prior testimony

- Don't assume facts not in evidence as the premise to a question

- No compound questions

You may not get an objection for all of these because of the less formal arbitration setting, but the questioning (and/or resultant testimony) will be less effective or persuasive.

Suggestions/Reminders

Be sure to maintain control of the witness and questioning. BUT, remember that to maintain control does not mean does not mean to dominate, harass, etc.

Control is maintained through the use of short, leading, fact-based or "propositional" questions, that do not contain words or characterizations with which the witness can quibble. Such short, fact-based questions can be clustered and organized to lead and/or cabin witnesses, and also to give rise to inferences for later argument.

Start gentle, to feel out the witness and hopefully establish a pattern of answering questions easily, i.e., being "well-controlled."

Thereafter, lead witness through what you need. Some practitioners suggest targeting no more than 3 points or issues on cross, to maximize impact and avoid pitfalls.

Avoid "ultimate questions," and questions to which you do not know the answer.

Keys to organization: as with direct, these include primacy, recency, and apposition, etc. but will also often involve indirection, misdirection and/or innuendo, to avoid forecasting where you are going to a recalcitrant witness, and to avoid inviting evasion, unwanted explanation, or other deflection on an "ultimate question."

If you lose control, try:

- A stern look.

- Holding up your hand.

- Semi-sarcasm (risky).

- Asking a new question during a natural pause.

- Letting witness wind up, then move on without addressing the digression.

- Make sure your next question is short and fact-based, to get the witness back on track.

- If the witness still refuses to cooperate, AND you have corrected the things about your questioning that invites quibbling, consider requesting an instruction for responsiveness from the Arbitrator.

If you have nothing to undermine or impeach, or nothing to do so with, and no other independent reasons for questioning the witness, you may decide to forego cross examination altogether:

- Does the negative information on direct have to be responded to through this witness?

- Can you get other needed testimony from a friendlier witness?

- Would the desired testimony be especially or uniquely persuasive coming from this witness?

Try to end on a solid point that is definitely admissible and undeniable, and that is central to your theory, evokes theme etc.

(Source: Modern Trial Advocacy, Lubet (4th ed.).)

COMMON OBJECTIONS IN ARBITRATION

WHAT'S YOUR ENDGAME? OBJECTIONS CAN BE ANNOYING…

Kathy Fragnoli

Objection	Purpose
Irrelevant	Purpose is to keep out evidence that doesn't have anything to do with the issue. Often used to block inflammatory evidence or testimony that evokes sympathy.
Cumulative/Repetitive	Goal is to streamline the case. Often used to prevent the arbitrator from hearing evidence too many times that is favorable to the other side.
Hearsay	If you heard someone repeat what someone else has said it is not reliable. The person who made the statement should be in the hearing so they are subject to cross examination. If not, who knows what was really said? (Think of the "Telephone Game" in 4th grade). If the statement isn't used to prove an issue ("truth of the matter stated") then it is allowable. Note that Hearsay is often allowed in by the arbitrator but its weight may be reduced
Leading	When you question your own witness on direct you shouldn't put words in their mouth, especially if the testimony is important. *"You left the patrol vehicle in the lot correct?"* should be replaced with, *"Where did you leave the patrol vehicle."* It's ok to lead on cross examination because the danger of an adverse witness following your lead is unlikely.
Lack of Foundation	Purpose of this objection is to make the other side explain the background leading up to the question. For example, if a company is asking a manager why he allows some people to take long breaks and not others, you should start with the fact that he is in charge of enforcing break times. It helps knit your evidence together.
Assumes Facts Not in Evidence	The purpose of this objection is to prevent a question that assumes that something is true that hasn't first been established. *"When did you start coming into work high?"* assumes that an employee came to work that way in this case.

Objection	Purpose
Misstates the Evidence	This objection is designed to stop the other side from asking a question in which the evidence has been characterized improperly. Opposing counsel may try to summarize what has been heard thus far in the arbitration to "trick" the witness or to paint a theme for the arbitrator that isn't based on prior testimony.
Vague and Ambiguous	This objection stops a witness from answering a question that isn't entirely clear. Counsel must rephrase if sustained. (Note that this is an overused and often abused objection that is usually just used to throw off the train of thought of the opposing advocate.)
Calls for Speculation	This is used when a witness does not have firsthand knowledge of a fact and appears to be guessing. Sometimes they are answering a hypothetical question. (If a foundation has been laid that the person is very experienced about the area of questioning then it may be proper for them to answer a hypothetical.)

HEARSAY: WHAT IT IS AND WHAT IT IS NOT

Sharon Gallagher

A. General Considerations

1. In arbitration, the Rules of Evidence are not strictly applied. Balancing of interests.
2. An informal process, designed to allow the parties to vent.
3. The parties' theories/visions of their cases should be respected.
4. Arbitrators must weigh evidence, decide relevance, materiality, credibility and apply principles of equity and rule on objections with no pre-hearing information to study.

B. Admission of Evidence – Does it advance the search for the truth?

1. Rules of evidence are a means to an end.
   a. What is the purpose of the rule to exclude evidence?
   b. Why does one party want the evidence admitted? Why does the other party want it omitted?

2. Formal concepts/definitions are difficult for laymen.
   a. **Material evidence**: evidence that would establish or refute one of the essential issues of the case or a defense to it. A material fact is one upon which the outcome of the litigation depends. Evidence that has a logical connection to an issue in the case.
   b. **Relevant evidence:** evidence which has any tendency to prove or disprove any alleged fact that is of consequence to the outcome of the case.
   c. **Probative evidence**: evidence which tends to or ultimately does prove an ultimate fact necessary to prevail in the case or to defend against it.

3. Personal Knowledge
   a. A witness, by definition, is someone who will state what they personally saw, heard or experienced.

      Examples:

      Q: What did you hear Grievant say to Supervisor? Objection: Witness not competent (noise in factory). SUSTAINED

      Q: How did Supervisor look and act when you saw her speak to Grievant that day? Objection: Witness not competent. OVERRULED

b. Opinion vs. conclusory evidence: What will happen, or what could or should have happened in a situation.

1) *Laymen* can give opinions if rationally based on their observations and helpful – sanity, speed, intoxication, handwriting.

2) *Expert opinions* – A witness may be qualified as an expert if subject matter of testimony is complex and based on a body of generally accepted scientific knowledge and the witness has sufficient training, education, or experience for reliance on her opinion of what will, should or could have happened.

Examples:

Union Tank Car case – Handwriting experts.

Waupaca County case – P.I. report, G.P.S. data.

C. Hearsay: Some Arbitrators admit it for "what it is worth."

1. Definition

a. A statement or act made out of court by a witness who has no personal knowledge of what was said or done or what occurred and the witness' statement is offered for the truth of the witness' second-hand statement/description of what occurred.

b. Why is hearsay excluded? Lack of reliability, fairness.

1) Case Example: *Union Tank Car* case – affidavit of cancer victim.

Examples:

Q: Did customers complain about the Grievant's language? Objection: Calls for Hearsay. SUSTAINED

Q: What, if anything, did the Grievant say when you asked where he had been? Objection: Hearsay. OVERRULED (party opponent).

Q: What did the Plant Manager say about the prior enforcement of the rule? Objection: Hearsay. OVERRULED (party opponent).

If the statement is not offered for the truth of the substance of its content, no hearsay problem arises. (background)

Examples:

Q: Was Grievant's social media posting discussed by other employees? Objection: Hearsay. OVERRULED: Not offered for the truth.

Q: Did employees say Grievant's social media posting was threatening? Objection: Hearsay. SUSTAINED

2. Some Common Exceptions to the Hearsay Rule in Labor Arbitration: Evidence that is considered especially reliable even though a competent witness is not available.
    a. Former testimony of unavailable witnesses: affidavits (*Union Tank Car* case), affidavit of cancer victim.
    b. Admissions against interest (or silence in the face of accusation).
    c. Business Records: medical records, timecards, personnel file documents, agency documents, etc.
    d. Learned treatises: arbitral notice.
    e. Statements against interest (not necessarily of a party).
    f. Contemporaneous written notes, reports, statements (FRE 803.5, allows).
3. Closing Remarks

    R. Mittenthal: "Credibility – A-Will-O-The-Wisp" *The Proceedings of the NAA*, *1978*, ed. Gershenfeld (BNA Books, 1979)

CLOSINGS

Angie McKee

I. Organization is Key

- Take time to compose your argument in an orderly, sensible way
- Frame the big issues at the outset, then break them down and discuss in detail
- Make your points as simply and straight-forwardly as possible
- Consider a timeline
- Have a firm command of the facts
- Know the "law"
  - What standard must be met to prove the case?
  - Enumerate all elements of that standard that are relevant to the case
  - Omit elements that are not relevant to the facts of your case
- Summarize your argument at the end, including highlighting the facts on which you think you should prevail

II. What to Include

- Restate the issue and relevant contract language or elements of just cause
- State the "law" – what the party with the burden of proof must prove in order to prevail on each issue – and each element of the applicable standard
- Weave relevant facts into the applicable "law"
- Discussions of witness credibility, if applicable
- Address the remedy requested

III. Oral Closings

- Use a written outline
  - Prepare outline ahead of time with room to write in relevant points from the hearing
  - Request time to finalize your outline before closing
- Consider using visual aids, such as printouts of relevant contract language
- Make each point succinctly and then summarize at end of argument

IV. Written Closings

- Use concise headings to preface each separate issue
- Break up long, complex sentences
- Limit each sentence to expressing one main thought.
- Beware of extraneous material from cutting and pasting
- Edit, edit, edit

V. Citing Prior Awards/Other Authority

- Read the cases you are citing
- Make sure the cases are "on point" factually and legally
- Explain why each cite is applicable to your case and why it should persuade the arbitrator on the issue
- Limit citations to those with most impact

PRACTICE ARBITRATION

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Paul earned a Bachelor of Science Business Degree from Northeastern Oklahoma State University and is an active member of the National Academy of Arbitrators. He is also an honorably discharged veteran of the United States Air Force and holds a valid FAA A&P license.

After working in several management positions at American Airlines, Paul assumed the position of Labor Relations Representative at American's aircraft overhaul facility in Tulsa, Oklahoma where he processed union grievances and represented the Company in arbitration. He transferred to the position of Employee Relations Counsel on American's headquarter staff in 1990 where he processed pilot grievances, represented the Company in arbitration, and participated in contract negotiations.

Following early retirement from American Airlines, Paul transitioned to the Union side as Director of Labor Relations with the newly formed *Independent Association of Continental Pilots*. He promptly established a non-confrontational, problem-solving relationship with management which allowed him to quickly resolve the majority of outstanding pilot grievances and avoid many other grievances altogether. Paul represented pilots in arbitration while also serving as the Union's election administrator and office staff administrator. After IACP merged with the *Air Line Pilots' Association* in 2001, Paul worked at ALPA as a Senior Contract Administrator until he retired from ALPA in 2004.

After retiring from ALPA, Paul began his arbitrator practice and he is currently serving on the arbitrator rosters of AAA, FMCS and NMB. He also serves on permanent arbitrator panels with the Houston Police Department/Houston Police Officers' Union, two Southwest Airlines/Transport Workers' Union panels, Federal Aviation Administration/Professional Association of Safety Specialists, and U.S. Postal Service/American Postal Workers' Union.

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Kathy Fragnoli has been licensed to practice law in Texas since 1979. She is a Magna Cum Laude graduate of Boston College and a graduate of Gonzaga University School of Law. Kathy was a senior attorney for American Airlines for 12 years and a Public Defender before that for two years. Kathy is a member of the National Academy of Arbitrators and arbitrates labor cases nationwide. She is on several permanent panels, such as the Houston Police Officer's Association, US Postal Service, Southwest Airlines and the Alaska State Employee Panel.

Kathy has conducted over 2,000 mediations and was recently under contract with the Pentagon to mediate high profile cases for the Air Force. She is one of 23 mediators in the nation profiled in *"ADR Personalities and Tips"* published by the American Bar Association and is the author of *"Peace at Work."*

Ms. Fragnoli was selected by her peers as one of the Best Lawyers in America for 2010 and 2011 in the field of dispute resolution and by *"D" Magazine* as one of the Best Women Lawyers in Dallas" in 2010. In 2015, 2016, and 2017, she was selected by her peers as one of the "Best Lawyers in Dallas" in the field of ADR.

Sidney S. Moreland, IV
Arbitrator
Baton Rouge, LA
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Arbitrator Moreland attended his first labor arbitration in 1983 as an apprentice under the late Arbitrator Dr. F. Jay Taylor.

Moreland was admitted to the federal FMCS Arbitrator Roster at the age of 26. Moreland has arbitrated over 2,000 railroad cases and over 500 other labor disputes in his 27-year arbitration career.

Moreland earned two undergraduate degrees (Pre-Law & Business Technology) from Louisiana Tech University. He is an honor graduate of the Southern Law School where he was selected for Law Review and received the American Jurisprudence Award for his research and achievement in the subject of Evidence.

Moreland arbitrates regularly for AAA, JAMS, NMB, FMCS, and is named as a permanent arbitrator on multiple panels for private parties. He has over 65 published awards ranging from procedural issues to FLSA, ERISA, ADA, Title IX, Bargaining Rights, and complex Wage and Benefit matters.

Moreland currently serves as Injury Grievance Arbitrator for the National Football League and the National Football Players Association.

Sharon A. Gallagher, Esq.

Sharon Gallagher has been a neutral in labor relations since her graduation from the University of Wisconsin Law School. After Graduation, Sharon worked for the NLRB for over 8 years, first in Washington, D.C., where she worked for various General Counsels including John Truesdale and John Higgins. Sharon then transferred to the NLRB Region 30 office in Milwaukee, where she worked as a Trial Attorney for four years. She left the NLRB in 1984 to take a position at the Wisconsin Employment Relations Commission as a Staff Arbitrator/Mediator/ALJ. Sharon worked for WERC worked for 25 years until she retired in 2009.

In 1994, while still employed full-time at WERC, Sharon began her private practice in grievance arbitration, interest arbitration and fact-finding. Sharon has been listed on various panels since the 1990's, including the Coal Arbitration Panel, the Chicago Transit and ATU panel, the Thermo-King and USW panel, the USPS/APWU and USPS/NPMHU panels. Sharon is listed on many ad hoc panels: United Airlines & Air Line Pilots' Assoc., AAA, FMCS, WERC, Minnesota BMS, Iowa PERB, Illinois Ed. Labor Rel. Bd., Delaware PERB, Oregon ERB, Washington PERC and NMB.

In October, 2009, Sharon became a member of the National Academy of Arbitrators. Sharon continues to hear and resolve grievances across the country full-time. From 2007 to 2016, Sharon served as a Board member of the Wisconsin State Bar's Labor and Employment Law Section. In 2014 -15, she served as Chair of the Section. Sharon has been a member of the Milwaukee Chapter of LERA since 2009 and she has been on the Board since 2016. In 2018, Sharon became the Neutral Vice President of her LERA Chapter.

Thomas A. Cipolla

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Thomas Cipolla received his Bachelor's degree in Political Science from St. Louis University and his Juris Doctor degree from Southern Methodist University. He is licensed to practice law in Texas, Missouri and Illinois.

He was Assistant Corporate Counsel for American Bakeries Company and was also Senior Industrial Relations Manager for Anheuser-Busch, Inc. before entering private practice. He was chief spokesperson in collective bargaining sessions for over 50 agreements and has tried over 100 labor arbitration cases as an advocate.

He has been a labor arbitrator since 1987 serving on panels for both FMCS and AAA. He has also been a Hearing Officer for the Civil Service Commissions of the cities of St. Louis, MO and El Paso, TX and for the St. Louis Board of Police Commissioners. He has been a permanent arbitrator for Lockheed Martin and the IAM and was also on a permanent panel of arbitrators for Anheuser-Busch and the IBT. He currently serves on panels for Laclede Gas and the USW; Southwest Airlines and the IAM; Southwest Airlines and the TWU; Compass Airlines and ALPA; Hormel Foods and the UFCW; Hollister, Inc. and the UAW; U. S. Customs and Border Protection and the National Treasury Employees Union; City of Houston Police Department and the HPOA; Transdev Services, Inc., and IBT Local 117; Smith's Food and Drug and UFCW 1565; Procter and Gamble and the Independent Oil Workers/CWA of Kansas City; and the USPS and the NALC.

Mr. Cipolla is a member of the National Academy of Arbitrators, the American Arbitration Association, the Association of Attorney-Mediators and LERA, Gateway Chapter.

Angie McKee, Esq.
Arbitrator
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Angela McKee (Angie) is an arbitrator based in Dallas, Texas. She is on the FMCS and AAA rosters as well as several permanent panels, and was recently selected to be an Independent Hearing Examiner for the Texas Workforce Commission. She has taught workplace conflict resolution and arbitration courses at the University of North Texas.

Angie received a bachelor's degree in Business Administration from Indiana University and a JD/MBA from the University of Texas at Austin. She has been a labor arbitrator since 2012 and has also interned for many National Academy arbitrators since 2009. Angie is a recovering attorney and in her prior life practiced commercial litigation at some of the largest law firms in New York City, Los Angeles and Dallas.

Don E. Williams, Esq.

PROFESSIONAL CAREER

1994 – Present - Arbitrator.

1983 to 1994- Sole Practitioner: Drafted Employment Contracts, Labor Agreements, State and Federal Courts in Employment, Tax, and Civil Disputes, Organized Corporations, Limited Partnerships, and LLC, represented corporations in EEOC, FLSA, and State employment disputes.

1981-1982 - General Counsel for Basin, Inc. and Texas Refining Cos. EEOC, taxation, labor relations

1978-1981 Private Practice of Law-wage and hour matters, Landrum-Griffm Matters, Title VTI Federal District Courts.

1975-1978 United States Magistrate Judge for the Western District of Texas.

1974 to 1975 County Attorney in Crane County, Texas

1973 to 1974 First Assistant District Attorney in Ector County, Texas.

1971 to 1972 Assistant District Attorney for Lubbock County, Texas.

CERTIFICATIONS:

JD Law Texas Tech University, 1970
Mediator, Texas, 1999

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Arbitrator Vaile is a NAA member and has been a private arbitrator since 2010.

She is a certified ALJ and her panel memberships include: the American Arbitration Association (AAA), Federal Mediation and Conciliation Service (FMCS),National Mediation Board (NMB); various state and local public sector panels (including those for California, D.C., Illinois, Michigan, Montana, Oregon, Phoenix, and Washington); and private panels for UFCW/Smiths, Kirtland AFB/AFGE in NM, and Freeport McMoRan.

Arbitrator Vaile has been involved in labor and employment adjudication since 2000, and a labor neutral since 2005. She spent of five years in class-action/complex litigation with the Youngdahl & Sadin labor/employment firm in Albuquerque, New Mexico; and then five years as the Deputy Director and hearing examiner for the NM Public Employee Labor Relations Board.

Arbitrator Vaile grew up in Lafayette, LA; spent three years in the Army (Ft. Gordon, GA), and three years in the LA National Guard; and then spent several decades in Albuquerque, NM. She now resides in Yuma, CO with her husband and two teenage sons.

Representative industry experience includes: Air Force, Army, DOD; Border Patrol; Bureau of Prisons; Coast Guard; Corps. of Engineers; clerical; communications; construction/building trades; custodial and maintenance trades; education—public, charter, primary, secondary, college and university; food service; government sector—Federal, State, Municipal and County; health care/hospitals; IRS; manufacturing (paper, sugar); mining, oil/gas refinery and/or transportation; Postal Service (APWU and NPMHU); prison/corrections; professional/paraprofessional personnel; public safety—police and fire; transportation; and Veteran's Affair.