PREPARATION & PRESENTATION OF AN ARBITRATION

Arbitration is extension of collective bargaining as it fulfills the foundation of enforcing and giving meaning to the words of the agreement.

It involves a decision by a neutral to which both parties have agreed to be bound and in that respect is somewhat like a court. It is however, less formal than a court. The arbitrator controls and maintains order in the court.

Why do we have a hearing before an arbitration? Why not just have union and employer advocates have a meeting with the arbitrator and then she/he decides?

There are very frequently, almost always, disputed facts. The arbitrator must hear everyone's version of what happened and then she/he decides what the "real facts" are. What, then, is the nature of arbitration? Education, but education to a purpose: persuading the arbitrator that you are right and should win. You must "prove" your case.

Even if you never expect to present a case in arbitration, knowing how it happens will make you a better representative for your members as you will have done your part to make sure the union has a winnable case.

KNOW YOUR GRIEVANCE AND ARBITRATION CLAUSES

THE ARBITRATION CLAUSE

The authority for arbitration is the clause in the labor agreement setting forth the circumstances under which it will be used and the procedure that will be followed. The following elements are common in arbitration clauses, although some of them are omitted where the parties see fit to do so.

1. Prerequisites to invoking arbitration.

"Any grievance which remains unsettled after having been fully processed pursuant to the grievance procedure . . ."

2. Its scope.

". . . and which involves either (a) the interpretation or application of a provision of this Agreement, or (b) a disciplinary penalty (including discharge) . . . alleged to have been imposed without just cause."

NOTE: Some agreements have more limited scope language and some expressly exclude some types of disputes from arbitration.

3. Scope of the arbitrator's authority.

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

4. Method of initiating arbitration.

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

5. Time limits.

   a. On initiating arbitration

"Within 30 days of the date of receipt of a written answer in step four of the grievance procedure."

b. On selecting an arbitrator.

"If the parties cannot agree on a third member within 20 days of the reference to arbitration, then the Union shall have the right to apply to the American Arbitration Association to appoint the third member."

6. Composition of arbitration board.

“An arbitrator will be agreed upon by the two bargaining committees. The arbitration board will be composed of one member appointed by the Company, one member appointed by the Union, and one member agreed upon by the parties.”

7. Method of selection of the arbitrator.

The usual methods are to strive first for agreement and then in case of a deadlock to ask the American Arbitration Association or the Federal Mediation and Conciliation Service for a name or a panel. A final selection is then made.

8. Procedural rules to be followed.

“The arbitration shall be conducted under the rules of the American Arbitration Association.”

9. Status of arbitrator's award.

“The arbitrator's award shall be final and binding on both parties. Any award of the arbitrator may be modified or rejected by mutual written agreement of both parties. Each case shall be considered on its merits and the collective agreement shall constitute the basis upon which decisions shall be rendered.”

10. Costs of arbitration.

“The parties shall share equally the arbitrator's fee, the cost of a hearing room, and the cost of a court reporter, if requested by the arbitrator. All other expenses shall be paid by the party incurring them.”

Procedural Arbitrability

This kind of issue deals with whether all of the steps of the grievance procedure have been complied with and have been complied with in a timely manner. Whether there is a question of procedural arbitrability is something that you should always know before you get to a hearing because if the company claims you have not followed each step, or if they claim that you did not do something timely, they have an obligation to let you know that as soon as you fail to do something that you should do, and a time when you could correct the alleged “defect.”

<u>Substantive Arbitrability</u>

In this situation what we are concerned with is whether the collective bargaining agreement has an arbitration clause and whether the matter or issue which you are putting before the arbitrator is covered by that arbitration provision. Another way to think about substantive arbitrability is to recognize that the arbitrator only has such power as the parties have given him or her in the contract. As noted, there are two parts to that power to decide a case, namely, whether there is an arbitration clause and whether the issue you are posing is subject to arbitration. In resolving this issue, there are several places within the collective bargaining agreement where one normally looks to decide whether the subject of your grievance is one that which can be presented to an arbitrator. Legally, all doubt about arbitrability is resolved in favor of arbitration.

The first place to look is a definition of a grievance. The broader it is, the easier it is to convince an arbitrator that he has the power or authority to decide a question about that subject matter. Another place to look is the management's rights clause, because on occasion a management's rights clause will exclude from arbitration a certain subject. Yet a third place to look within your collective bargaining agreement, is the "entire agreement" clause. The entire agreement clause, on occasion, may say something which limits what disputes can be presented to arbitration. Sometimes this clause is also called a "waiver" clause. In a clause that reads as follows would you think that there are any kinds of grievances which cannot be submitted to arbitration?

> This agreement constitutes the sole and entire existing agreement between the parties and supercedes all written agreements, commitments, and practices, whether oral or written, between the company and the union and expresses all obligations and restriction on the company.

It is important to understand that simply because management may have the right to do something, does not mean that subject matter is not subject to arbitration because there may be implied limitations on management. For example, management may have the right to schedule vacations, but it cannot do so in the fashion to discriminate against employees or cannot do so in arbitrary manner. What you must be concerned about if management says a dispute is not substantively arbitrable because of the management rights clause is that whether you can present something to the arbitrator is not the same thing as the determination of who has what prerogatives with respect to that subject matter.

Many times if an issue of procedural arbitrability is raised, the company will say to a union that the only thing they are willing to arbitrate is whether the dispute as itself procedurally arbitrable. That is a practice and procedure which we almost always counsel against doing. Generally speaking the inter-relationship between the facts of the grievance and how it was processed are so intermingled that you would not want to have two arbitrations over the same matter. And of course, two arbitrations double your costs and waste lots of time. Instead, you should always very firmly and strongly resist this suggestion by management saying to them that

you want to have one arbitration and that if they think the case is not procedurally arbitrable, they have a perfect right to raise that issue and present evidence which they believe establishes that you have not processed your grievance correctly.

EXERCISES

The language in the agreement is as follows:

RECOGNITION:

"The corporation recognizes the XYZ Union as the exclusive representative of the production and maintenance employees for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment or other conditions of employment."

GRIEVANCE PROCEDURE:

"Any employee having a grievance must first take the grievance up with the foreman within five days of its occurrence. If it is not adjusted within five days thereafter, it shall be reduced to writing and taken up by the floor steward and the foreman. If it is then not settled, it may be submitted to the Plant Supervisor within five working days, who shall then discuss it with the Union Business Agent."

ARBITRATION:

"Any matter concerning the interpretation or application of any terms of this agreement which are not settled by the grievance procedure may be submitted to arbitration within 10 working days after the final step in the grievance procedure to an arbitrator designated by the Federal Mediation and Conciliation Service. The arbitrator shall not have the right to add to or modify the agreement in any manner."

MANAGEMENT PREROGATIVES:

"The management of the Company and the direction of its working forces, including the right to hire, transfer, promote, demote, discipline, establish reasonable rules of conduct, or discharge for cause, to increase or decrease the working force as necessary, or to make work assignments is vested solely in the Company, provided that this will not be used for purposes of discrimination against any member of the Union, and subject to the terms and conditions of this agreement."

LAYOFFS:

“All layoffs will be done on the basis of plant seniority with the most junior person being laid off first.”

Are the following issues arbitrable?

1. It is claimed by 3 workers that their corner of the shop is unbearably hot. All attempts to ventilate by opening windows have little or no effect. It would be very expensive to move them because of waste of space and heavy machinery installations. The small electric fans which have been set up around the area have hardly any effect. The workers are demanding a huge exhaust fan.

2. The Employer says that a group of workers is conspiring to cut down output. He has issued warnings to these employees.

3. The work in the plant is slow. The Employer puts everybody on a four-day week, resulting in the loss of hours. The plant is situated far from the place where most people live, and commuter tickets are bought for 30-day periods regardless of the number of rides. The Union files a grievance that the Employer has violated the layoff language.

4. The plant has a maintenance department which has been doing most of the inside painting and minor repairs. The employer closes down during a two-week vacation period and calls in outside union painters to repaint the inside walls. The Union claims that two maintenance men have been deprived of two weeks' work.

5. A man was fired on March 15th because of alleged inefficiency. He reacted with disgust and told the boss he had no right to fire him, then left the premises. After going out to look for work, he found he could not get another job. On April 15th, he showed up in the Union Hall and said he wanted to have the discharge arbitrated. The Business Agent went to the employer the next day. The boss said it was too late to discuss it and would not take it up.

6. The Union objects to the elimination of one man from a work crew.

PAST PRACTICE

The notion of past practice or custom is used for various purposes and is often misunderstood. The widely recognized and read book Elkouri & Elkouri, *How Arbitration Works* (6th Edition) at page 605, sets forth and discusses three different uses of the term past practice.

- "To establish rights." The law has long recognized that no collective bargaining agreement is likely to be able to fence in or to encompass everything that the parties have agreed to and therefore, even if there is nothing expressly written into the collective agreement about a right (e.g., wash up time at the end of the shift) there may have been a right established by the conduct of the parties. In law this is called an implied contract. The idea is that a right has been established because the parties have done something for a long time, consistently and openly which has created a continuing obligation to allow that practice to go on.

- "Interpretation of language." In this usage of the term of custom and past practice, instead of establishing a right which is not referenced any place in the contract, we are urging that the way in which the parties have done things in the past gives meaning to a term which is in the contract, but may be ambiguous or may be subject to more than one interpretation.

- "Modify expressed contractual provisions." This usage is very rare, but essentially it says that the parties have expressly agreed that they will not enforce a contract provision or instead conduct their relations between them in another fashion. This is the least used meaning of the term past practice or custom.

It is important to understand these uses of past practice because sometimes questions are raised as to whether a past practice or the attempt to establish a past practice is substantively arbitrable. Whether it is, as discussed above, is a function of various kinds of provisions in your collective bargaining agreement. However, the use of past practice as an aid to establish the meaning or interpretation of existing language will always be allowed by an arbitrator and has absolutely nothing to do with arbitrability.

PREPARATION FOR THE PRE-ARBITRATION GRIEVANCE PROCESS

Write it down! **No one remembers everything, no matter how vivid something is when you first hear it. The hearing may be weeks or months later.**

<u>Where do you start?</u>

- Talk with the Steward and the Grievant
- Talk with witnesses
- Review documents you have and identify those you do not have

<u>How do you talk to them?</u>

- You don't; you listen. Plenty of time to ask questions after they tell you what they said and did.
- Open ended questions.
    - Tell me what happened.
    - What was said in the conversation?
    - What happened next? [Do not ask, "Is that all?"]
- Make sure they are reciting the words of witnesses/management rather than their interpretation of what was said - be a skeptical listener.
- Be sure to get them to tell you what management said.

- Only after you get them to tell their story do you go back and ask narrow questions. This is to clarify and validate.
    - "Did he say you were 15 minutes late?"
    - "When you entered the room, Sam was already there?"

<u>Further investigation.</u>

- Other related arbitrations
- Other related grievance settlements
- In a discipline case, learn about prior discipline for similar events.
- If a contract interpretation case, you may want to check old contracts for language changes and investigate negotiating history.
- Ask about "practices" which may give meaning to language

<u>Now ready for grievance meeting with Management.</u>

- Two goals
    - Understand Company's position and all of the facts it relies upon.
    - Present your side of the grievance in a persuasive manner.
- In a discipline case, get Company to explain the basis for the discipline first.
    - Do not settle for understanding the conclusion–Sam violated Rule 15.
    - Get <u>all of the facts</u> the Company relies upon to reach that conclusion.
    - Then explain your version of the facts.
        - Where you agree on facts–admit it.
        - If you have knowledge of an adverse fact that the Company has not identified or relied upon–keep your mouth shut about it.
    - If there has been any wrongdoing by the employee, argue that the level of discipline is too harsh.
    - **Remember: Write everything down–especially what the Company says. If you cannot do that and conduct the meeting, take someone with you whose role it is to take notes.**

<u>What if you need additional information from the company?</u>

- Ask in writing
- Be as specific as you can but, also, get "all other documents which relate to..."
- Set a deadline for receipt
- Follow up; don't let it drop
- When you get documents keep a clean copy of them as you received them without writing or highlighting on them.
    - Only yellow highlighters do not show up on copies

What if you don't get what you need and you "know"it exists?

- Follow through: your credibility goes down if you do not insist that management do what you asked.
- Charge at NLRB.
- Open records request under state law if a public employer or record you need is held by public entity (government).
- Get through arbitrator after picked, or ask arbitrator at hearing to exclude employer evidence on a subject about which you made a written document request.
- Confirm to management in writing that they have "no documents which relate to..."

What if the employer requests information from you?

- Know the law about what you have to provide and what you do not.
- Be aware of union-member privilege.

PREPARATION FOR THE ARBITRATION HEARING

If our goal is to persuade, then we need to develop a "theme" or a "theory" of the case. It is a brief statement which explains why all of the evidence points to you prevailing. It is the "story" that you are going to tell the arbitrator with both your witnesses and arguments. It is what makes all the evidence hang together so that the more plausible conclusion is in your favor.

Put another way, it is why you think the union is right.

Identify the issues.

- An issue is a question the arbitrator may need to answer to resolve the case.
- Every case has at least two ultimate issues.
    - Disciplinary case–Did the Company have just cause to discipline the Grievant?

      OR
    - Contract case–Did the Company violate Article 15 of the collective bargaining agreement?

      AND, IN EITHER TYPE OF CASE
    - What is the appropriate remedy?
- Plus, there are almost always other issues that must be decided before the ultimate issues can be determined.
    - These are generally disputes over what happened.

  - But they may be things you need to prove even if the Company has not raised them.
    - For example, describing how language was negotiated into the contract.
- Use the other grievances or arbitration decisions you found in your investigation to help decide the issues in the case.
- Look to outside sources like Elkouri & Elkouri, *How Arbitration Works*, to help decide the issues you want the arbitrator to resolve. For example, what standards do arbitrators apply to determine "just cause?"

<u>Outline the issues.</u>

- Write each issue on a separate piece of paper.
- On each page write down the witnesses who have information about that issue and a summary of what each has.

  - These are "facts" for preparation purposes even if the Company and you have different version of the "facts."
- On each page identify each document that relates to that issue and why.
- As you do this you may find that there is something you want to tell the arbitrator but you have not yet identified the person or document that will do so. This is how you find and fill holes in your case.

<u>Now develop the theme of the case.</u>

- Look at your outline of issues and the facts related to each and identify the 3 or 4 best and 3 or 4 worst facts.
- Three best
  - Grievant has 20 years of service with no prior discipline.
  - Right before the event, Grievant had a child killed in an accident and spouse file for divorce.
  - Supervisor has history of being a hot-head.
- Three worst
  - During an argument with the supervisor over whether the grievant was late returning from lunch, the Grievant called her a "goddamn bitch."
  - When the supervisor sent him home for that statement, he told her, "You'll pay for this."
  - The Company has a uniform practice of terminating any employee that engages in workplace violence.
- Build your theme around the ultimate issues and these facts.
  - Theme should be no longer than a couple of sentences.
  - Write it down.

EXERCISE: Assume there is no dispute about any of the 6 facts above except that the Grievant denies making any statement like "You'll pay for this." The Grievant was fired. Write your theme of the case.

Keep an open mind. The process of identifying issues and then developing your theme is a flexible one. Sometimes, as you do the theme you will find that you would prefer to have a slightly different one and you suspect that there may be facts to support it. In that case, write the better one and then look for the facts. If you find them, great. If you do not, do the best with what you have. This can happen even if you have done everything described earlier in this paper, but it is less likely to.

<u>The purpose of doing all of this is to help you identify the **important or critical issues**.</u>

- Not every issue is important. Not every factual dispute is relevant to the case.
- **You must stay focused on the critical issues!** These are the ones that are essential to proving your theme.
- From this point forward in the process-- preparing witnesses, writing your opening statement, preparing direct and cross examination and writing your closing statement-- focus on the theme.
- This does not mean you ignore other issues or facts. It means you do not let yourself get distracted by them in presenting your case.
- There are other things you will have to do. In order for the arbitrator to fully understand your theme and agree with it, he/she may need to:
  - "See" the place
  - "Know" the work process
  - Understand how language came to be
  - Understand how it has worked
  - "Know" the people
  - Develop a sense of fairness related to these circumstances
  - In a discharge case, above all else, the arbitrator must believe the grievant is a good industrial citizen, even if he made a mistake. The arbitrator must believe that if he puts the grievant back to work, he will be able to function effectively in the work environment.

<u>Now have to decide how you will prove your theme. What is "proof?"</u>

- That which makes the existence or nonexistence of a fact more or less likely. Proof is evidence.
- It is what witnesses know (saw, heard, or did) and relate to the arbitrator. It is documents.
- It is <u>not</u> you, the advocate. What you say does not prove anything. What you say <u>asserts</u> something but it does not <u>prove</u> or <u>demonstrate</u> anything. Only witnesses and documents prove things.

Making sure your witnesses are at the hearing.

- If you need members of the bargaining unit, make arrangements with the company to have them released form work.
- If the company refuses, they can be subpoenaed.
- Third parties can be subpoenaed.
  - Send the subpoenas to the arbitrator for signature in sufficient time to get them back and personally served on the witness. [See attachment for form.]
  - There is almost always a witness fee that goes along with a subpoena. If you have a friendly witness that just needs to get off work, do not worry about it. But if the person does not want to testify, give them a check for the witness fee (and maybe milage expense) with the subpoena.
- If the Company told you a witness would be present and that person does not show up, tell the arbitrator that you relied upon the representations of the company and now you want the company to be ordered to produce the witness.

- If you subpoena a witness and that person does not show up, you should have written out and be prepared to describe to the arbitrator what it is you believe the witness would have testified to so that you can ask the arbitrator to accept your representation as a "proffer" of testimony that would have been given by the witness. If the arbitrator refuses to accept your proffer, you may have to ask for a continuance to enforce the subpoena.

Witness preparation.

The goal is to prepare the witness so that he/she can tell the arbitrator the facts he/she knows in a way that is believable. To do so the witness has to be sure of his/her knowledge and not be scared of the process. Here is how to do that.

- Go over with the witness what you think he/she knows from your earlier interviews and possible written statements.
- Ask if there is anything the company might ask the witness that you should know about.
- Explain how their facts fit into your theme.
- Explain what an arbitration is and how it works.
- Explain what questions they will be expected to answer from you.
  - Two ways to deal with identifying possible questions.
    - Have questions written out and tell them what you have written.
    - Describe to them the things they know that you want the arbitrator to hear.

- Explain what cross examination is and what types of questions they may get on cross.
- Teach them how to be a witness. [See next page.]
- Ask if they have any questions.

You must appear positive about the case and competent so that witnesses is comfortable and confident in you. In order to minimize the natural anxiety that goes with being a witness, tell the witness–more than once–"Nobody knows what you know better than you do."

GENERAL INSTRUCTIONS FOR WITNESSES

1. **TELL THE TRUTH**

2. **STICK TO FACTS.** Testify only to what you said, saw, heard, tasted, smelled, or felt. DO NOT EXAGGERATE. DO NOT GIVE OPINIONS OR CONCLUSIONS.

3. **DO NOT GUESS.** If you do not know the answer, say you do not know. In some situations it is understandable that you do not know the answer to a questions, but do not say "I do not know" or "I can't remember" simply because the question is one you do not want to answer.

4. **BE SURE YOU UNDERSTAND THE QUESTION BEFORE YOU TRY TO GIVE AN ANSWER.** If you do not understand the question, ask the lawyer if he/she would please repeat it.

5. **WATCH OUT IF THE LAWYER ASKS A QUESTION USING ONE OF YOUR EARLIER ANSWERS.** Questions that begin with phrases like "Earlier you said" or "During direct examination you testified" may be efforts to get you to agree with the lawyer's words, not yours. Listen carefully and if the lawyer has not described what you said accurately, say so.

6. **TAKE YOUR TIME.** Give the question the thought required to understand it and to give a clear answer; then give the answer.

7. **BE CAREFUL OF LEADING QUESTIONS.** A lawyer questioning you on behalf of the Company has a right to ask you leading questions. A leading question is a question that suggests an answer. For example: "During that conversation, you said that Bill had left the plant floor 10 minutes before the accident, didn't you?" They are almost always yes or no questions. There are only 4 possible correct answers to a yes or no question: "yes," "no," "I do not know" or "I do not remember." There is no such answer as "Yes, but . . ." or "No, but . . ."

8. **ANSWER THE QUESTION THAT IS ASKED AND THEN STOP TALKING.** Answer the questions fully but do not volunteer information. This is especially true when questioned by the Company's lawyer.

9. **DO NOT LOOK TO ME FOR HELP WHEN YOU ARE TESTIFYING.** I will make objections to questions when they are appropriate, but otherwise you should answer the question.

10. **IF I OBJECT TO A QUESTION, STOP TALKING AND LISTEN TO ME.** If the objection is sustained, do not answer the question.

11. **BEWARE OF QUESTIONS INVOLVING DISTANCE, TIME AND DATES.** If you make an estimate, say it's an estimate. If you estimate, use the smallest time frame or measurement that you are sure of and no smaller. If you can't estimate, DON'T. Beware of absolute terms in questions such as "always" and "never" and avoid using those terms in answers.

12. **BE COURTEOUS; KEEP COOL**. Do not argue with the lawyer who is questioning you, and do not lose your temper. Answer questions "Yes, sir" and "No, Sir" and, address the arbitrator as “Mr./Madam Arbitrator.” Avoid joking and wisecracks - arbitrations are serious business. Your lawyer will argue the case. A witness needs to state the facts. Remember, the arbitrator may draw conclusions from your actions or statements before or after you have testified.

13. **DOCUMENTS.** If asked a question about a document that you have in front of you, READ the document before answering the question. Do not agree with what a document says unless you know of your own knowledge that it is correct. Documents can be wrong just like people can be wrong.

14. **IT’S OK THAT WE SPOKE ABOUT YOUR TESTIMONY.** If asked whether you have talked to your lawyer or anyone else concerning the case, admit it freely - such conversations are perfectly proper.

15. **DO NOT TRAP YOURSELF.** For example, the opposing attorney may ask you to state all the reasons given by you for leaving a job. After you have given your answer, he/she may ask you if you have mentioned all your reasons. Unless you are certain that you have mentioned then all, the safest and most honest response is, "That is all I can remember at this time."

16. **CORRECT MISTAKES**. If you make a mistake in your testimony, go ahead and correct yourself.

17. **REMEMBER, YOU KNOW WHAT YOU KNOW BETTER THAN ANYONE IN THE WORLD AND IF YOU STICK TO WHAT YOU KNOW YOU WILL BE FINE.**

The Opening Statement

- Use an outline. If you write it out, you will be reading a speech rather than speaking from your heart. A possible outline is:
  - Theme
  - Facts in chronological or other logical order,
  - Weak points,
  - Union's position
  - Relief you want
- Under each topic in the outline, use short key points, or a checklist. An example:
  - Background–worked for 10 years, no prior discipline, got special certification
- Get the arbitrator's attention in the first 30 seconds.
  - Start with your theme
- Tell a story
  - Think about how you would explain the case to your partner or your kid. Then, build drama into the story.
  - Set the scene and paint a picture.
  - Choose a point of view.
  - Use simple words and colorful language.
  - Try repetition of strong phrases.
- Give facts, not conclusions. You are not supposed to argue conclusions on opening statement. Instead, give specific facts that support your argument.
  - "He drank 5 beers in an hour. He staggered. He slurred his speech. His eyes were bloodshot." Don't just say, "He was drunk."
- Refer to the specific contract provisions.
  - Be sure to explain why the specific contract provisions at issue support your position.
- Start strong; end strong.
  - Start with your best points.
  - Address the other side's position in the middle of your opening by discussing facts that answer the points.
- Sometimes use a time-line, chart, photo, blow-ups of key contract language or exhibits. A picture is worth a thousand words.
- Ask for the relief you want.
  - Make clear to the arbitrator what relief you want.
- **Practice, practice, practice, practice**.

Prepare a statement of the ultimate issue.

- An objective question.
  - “Was the Grievant terminated for just cause?”

    - “Did the layoff that occurred on September 15, 2004 violate the collective bargaining agreement?”
        - Initially, avoid identifying only a particular article or section of the agreement. Your argument may rely on more than one section. If there is no dispute except over some particular language, then it is OK to limit the issue to that language.
    - Always include an issue dealing with the remedy.
        - “If so [or not], what is the proper remedy?”

- Don’t ever feel that you have to agree with management; if you don’t understand, simply say so and that you are sticking with your framing of the issue. Don’t be afraid to stipulate to management issue if it is fair and neutral.

Preparing questions for your witnesses–Direct Examination

- Let the witness shine.
    - Let the witness talk -- you should not be testifying.
    - Be a director, not an actor.
- Think about having the witness use a time-line or chart.
    - Depends on whether the witness will be more comfortable with or without such a prop.
- Listen to the witness' answers. Be interested!!
- Organize the examination. Write out your questions or at least an outline of them.
    - Start by asking questions about the witness' background, including job history, awards, special knowledge, to help the arbitrator to get to know your witness.
        - This also lets the witness get over the initial anxiety.
    - Organize the examination logically, e.g. in chronological order or by incident.
    - Use "headline" transitions ["Now I’d like to ask you about..."] as you move from topic to topic. This focuses the witness and makes the questioning easier to follow.
    - Bring up obvious weaknesses to undercut later cross-examination.
    - Follow the rule of first and last questions. They should deal with the most important facts or issues. Put the less dramatic or bad stuff in the middle.
- Use open ended questions.
    - 5 Ws -- who, what, where, when, why
- Use words like "first," "next," and "last" to focus the questions. “When was the first time you complained?" "When was the next time?”
- Use language from your theme.
- Don't use leading questions.
- You can ask a witness a “why” question about their own actions, but they will not know why someone else did something.

EXAMPLES:

Ask: What did the foreman do?
Not: Did the foreman shove the grievant?

Ask: What did you hear?
Not: Did the foreman call the grievant a no good, lazy, stupid person?

If an important issue is left out, you can call up or suggest a subject.

Ask: Did they mention the subject of the supply room? What was said in that regard?
Not: Did grievant refuse to clean the supply room?

- Redirect Examination. After Company is done you can ask more questions.
  - The questions should be limited to questions raised on cross-examination.
  - The questions should still be open-ended, not leading.
  - Only ask questions necessary to clarify important points raised on cross.

Using Exhibits

- Get exhibits into evidence through a stipulation.
  - The easiest way to get an exhibit into evidence is asking the other side to agree to its admission. It is always worth trying. It is best to do this before the hearing. Usually, the contract and grievance papers can come in through stipulation as a joint exhibit.
- Offering exhibits into evidence through a witness.
  - Exhibits must be "authenticated" before being offered into evidence. That means you need a witness who knows from personal experience what the exhibit is. For example:
    - The exhibit was written by the witness.
    - The exhibit was addressed to and received by the witness.
    - The witness is the custodian of the exhibit.
    - The exhibit has distinctive characteristics recognized by the witness.
  - Mark it for identification.
    - Mark it ahead of time if you can.
    - Always refer to the exhibit by the number or letter with which you have marked it. An exhibit always keeps its number or letter even if it is not admitted into evidence.
  - Give it to the arbitrator and the other side.
    - Have four copies of each exhibit at the hearing. Give a copy of the exhibit to the arbitrator and to the other side. Keep a copy for yourself, and save one for the witness.

- Authenticate the exhibit.
  - Give a copy of the exhibit to the witness. Prepare your witness to answer the following questions:
    - What is this document?
    - Who prepared it?
    - When was it prepared?
    - Is this an accurate copy of it?
    - Is this your signature? [Optional. Use when witness wrote it.]
    - How did your receive it? [Optional. Use when witness received it.]
    - Where is it kept? [Optional. Use when witness is custodian.]
- Offer the exhibit into evidence. After the witness authenticates the exhibit, offer it. "I offer Union exhibit A into evidence."

EXAMPLE:

______Q: What is your job at the mine?
A: I'm a clerk

Q: What do you do?
A: I maintain and make entries in records

Q: What kind of records?
A: Time cards; amounts of production, that sort of thing

Q: I'm putting a document in front of you entitled as Union Exhibit 1. Do you know what it is?
A: It's an example of the time cards I fill out and keep on a daily basis.

Q: Can you identify this particular one?
A: It's the time card for Johnny Begay on April 15, 2005.

Q: I offer Union Exhibit 1 into evidence.

- Have an exhibit chart.
- The chart should have four columns: 1) the number or letter of the exhibit; 2) description of exhibit; 3) whether the exhibit is offered; and 4) whether the exhibit is admitted.

Preparing questions for the Company's witnesses--Cross-Examination

This is the hardest part of doing a hearing. Remember, witnesses do not breakdown and admit that they have lied.

- Before the hearing, identify whether the witness has information that you want the arbitrator to hear.
    - Clear inconsistencies in the facts.
    - Bias, prejudice, or special interest.
    - Undeniable facts that are part of your theme.
    - Lack of opportunity or ability to accurately perceive something.
    - Bad memory - can remember lots of details but not the important ones or can't remember anything but the important things.
    - Criminal record.
  - If there is none, you may not do any cross.
  - If there is something, then prepare short, leading questions to walk the witness to the point you want.
  - One fact per question.
  - Always end by suggesting the answer.
  - After you get what you want, stop and move to the next topic, if any.
- Never ask “Why?” during cross.
- Only rarely ask a question you do not know the answer to, that is, how that witness will answer the question.
  - If you do not know how the witness will answer, identify all the possible answers and decide whether any of them will hurt you case. If the answer is no, then you can ask anyway.
- Do not argue with the witness.
  - If you get answer that you do not like and have no way to impeach the witness, just move on. All arguing does is reinforce the bad answer.

<u>EXAMPLES</u>

Q: Evaluating employees is important, right?
A: Yes.

Q: Evaluation tells an employee how to improve, correct?
A: Yes.

Q: To help the employee improve, the evaluation needs to be done regularly, doesn’t it?
A: Yes.

Q: Jane Smith has worked for you for more than 10 years, hasn’t she?
A: Yes.

Q: You have never evaluated Jane Smith, isn't that right?
A: No, I haven’t.

Assume the immediate supervisor who observed and reported the conduct that lead to the discipline made notes about the event that do not include an act on which the Company relied in making its decision to discipline.

Q: You heard your boss testify that one of the reasons Mr. Baker was fired was because he made a threatening statement during his argument with Ms. Smith, didn't you?
A: Yes.

Q: You witnesses that argument, didn't you?
A: Yes.

Q: You have received training about how to be a supervisor, haven't you?
A: Yes.

Q: During that training you were taught to make notes about an incident of employee misconduct, weren't you? [*Note: even if you do not know the answer to this question you can ask it because either answer is good for your case. If he was trained you ask the next set of questions. If he was not trained, you have informed the arbitrator of that fact.*]
A: Yes.

Q: Your training taught you the importance of being thorough and complete in those notes, didn't it? [*Another question that is no lose.*]
A: Yes.

Q: You made notes about the argument you witnessed, didn't you?
A: Yes.

Q: When you made the notes you tried your best to be thorough and complete, didn't you?
A: Yes.

Q: Exhibit B is a copy of those notes, isn't it?
A: Yes.

Q: There is no reference to Mr. Baker making any threatening statements in those notes, is there?
A: No, there isn't.

THEN STOP. DO NOT ASK ANY MORE QUESTIONS ABOUT THIS!!!!!

- Impeachment with a prior inconsistent statement.
  - Don't do this impeachment unless:
    - There is an important and clear difference between the current testimony and the prior statement, and
    - You want the prior statement to be considered true, not the current testimony.
  - Lock in prior testimony.
  - Point to inconsistent statement.

EXAMPLE

Q: On direct examination you said that Mr. Baker was 25 minutes late on May 15, didn’t you?
A: Yes.

Q: You wrote a statement for your boss about the events of May 15, didn’t you?
A: Yes.

Q: You wrote that statement on May 15, within a few hours of the events, correct?
A: Yes.

Q: You knew that your boss would rely on the information in that statement, correct?
A: Yes.

Q: You understood the importance of being accurate in what you wrote, didn’t you?
A: Yes.

Q: Exhibit B is that statement, isn’t it?
A: Yes.

Q: On the top of the second page of that statement, you wrote: “Sam Baker was about 2 minutes late today,” didn’t you?
A: Yes.

THEN STOP. DO NOT ASK ANY MORE QUESTIONS ABOUT THIS!!!!!

- Even if you did not prepare cross for a witness, what the witness says during direct may need cross examination.
- The same rules apply, but now you have to identify inconsistencies within the testimony or with exhibits as they happen.
- If you cannot do that, then let the witness go.
- Do not give witness a chance to restate things he/she said on direct.

Prepare your closing argument.

- This is the story you will tell the arbitrator after all the evidence is in.
- It is your opportunity to really argue the case.
- Pull the whole case together into a coherent message about what happened and why the union should win.
- Tell the arbitrator what happened during the hearing and emphasize the facts most helpful to the union. Minimize, but do not ignore, facts helpful to management.
- Explain why the union should win.
    - It is not enough to tell what happened. You have to state clearly the reasons the union should win. One simple way to structure your closing argument is to give the reasons why the union should win and then list all the facts to support each argument.
    - Go back to your theme and weave it into your closing. This helps to show the consistency of your position.
    - Talk about the credibility of witnesses and why they should be believed or not believed.
    - Use your exhibits. You put them into evidence for a reason, point out that reason.
    - Deal with the arguments from the other side without being defensive.
    - Only say what you believe. Your credibility is always the key to success.
    - Be sure to ask for and explain the relief you want.
    - When you speak first, reserve some time to reply to the other side's argument.
- Prepare an outline in advance.
    - Put each point you think you want to make at the top of a piece of paper.
    - Put what you think the evidence will be concerning that point on that page.

THE ARBITRATION HEARING

The conduct of a hearing is pretty much in the discretion of the arbitrator. And you have to be willing to treat the arbitrator somewhat like a judge in the sense of being respectful and realizing that someone has to make decisions and that you may not like all of these decisions.

Always take your time in whatever you do in a hearing. Whether it is in responding to the arbitrator, responding to company advocate, or asking questions of your own witness.

There are two questions that every arbitrator will ask at the start of a hearing. First, he

will ask for a stipulation that the issue is properly before him for decision on the merits. Second, he will ask for a stipulation as to the issue for decision.

While it is always better to have an issue agreed to with your opponent, do not get stampeded into agreeing to an issue unless you are sure you understand and believe it is actually what you want the arbitrator to decide. If you and your opponent are unable to agree to a statement of the issue then you should say to the arbitrator that he must resolve the grievance which is being put before him.

The arbitrator will likely ask whether you have any preference on the swearing in of witnesses, and you should always discuss this possibility with witnesses because they are from time to time people who will not take an oath to tell the truth, in which case they will have to prepared to "affirm" to the arbitrator that they understand that the obligation which they have to tell the truth and they will comply with it.

From time to time there are other issues which you need or want to raise with the arbitrator. One of those which may arise is related to whether a transcript of a hearing is to be provided to the arbitrator. In resolving this, first look to the language in the collective bargaining agreement. In most cases there is no reference to transcript. Our position normally is that the union has the right to see anything and everything which is to be put before the arbitrator and that while you had nothing to do with the determination to have a court reporter in the hearing you would object to the transcript being given to the arbitrator or any portion of the transcript being quoted in a brief, unless you are provided access to that transcript for the purposes of preparing your post hearing brief. You should further take the position that your local union does not have the funds to pay for the transcript and that you expect to have access to it for the purpose of preparing a brief without any charge, and failing that, the arbitrator should not receive it in any respect because it is a denial of fundamental fairness for anything to be put before the arbitrator that is not provided to other party.

There is a doctrine called sequestration of witnesses, which holds that no witness should be allow to hear the testimony of other witnesses lest that person's testimony be influenced by what has already been said in testimony by other witnesses. Because of that, arbitrators regularly exclude from the hearing room prospective witnesses and arbitrators regularly instruct all witnesses that they are not to discuss their testimony with any other prospective witness until the hearing is finally closed. We always argue against sequestration because arbitration is an extension of collective bargaining and collective bargaining belongs to the entire bargaining unit and therefore every member of the bargaining unit should be allowed to be present to see that fair play is being accorded to everyone. That argument does not often win. NOTE: Sequestration does not apply to the Grievant. Also, each side is allowed one advisory witness.

The arbitrator will ask the parties for an opening statement and the issue of who gives

the opening statement first, as well as who presents witnesses first, is determined by the nature of the case. The basic rule is that whoever wants the arbitrator to enter an order has the burden of persuading him to do so and therefore goes first, whether it is with respect to opening statements or the presentation of witnesses. In disciplinary cases, the company goes first, because it wants the arbitrator to enter an order that it has just cause for the disciplinary action which it has taken. In a contract interpretation case, it is the union that proceeds first because it wants to persuade the arbitrator that the company has violated the collective bargaining agreement and it wants the contract enforced. It is possible to reserve the opening statement until the beginning of the party's case. In a discipline case, that means you can wait until the company has presented all of its evidence before you make your opening. We do not recommend this. You want the arbitrator to have a context in which to evaluate the evidence and he cannot do that if you do not give him/her the theme of your case by means of your opening.

After completion of the opening statements, the party going first will call its first witness. The order of presentation which is repeated for each witness is direct examination by the advocate of the party who calls that witness; cross examination by the advocate for the other party and redirect examination by the party who called that person. This much you can always expect to occur. Most arbitrators allow additional questions by both sides as long as the questions are not redundant and as long it is not taking an unreasonable amount of time.

<u>Objections to testimony.</u>

The purpose of objections are to keep the hearing focused on reliable evidence. Most objections are not going to be well received by arbitrators and their attitude generally is that he/she will receive the evidence noting your objection and giving it such weight as appears to be appropriate in the scheme of things. In deciding whether a particular question is objectionable, perhaps the single most important thing you should keep in mind is whether the kind of evidence which is being elicited by the question will really help the arbitrator make a decision. The other principle reason to be concerned about evidence is the extent to which it will hurt you.

There a number of objections. Law students and lawyers spend a whole semester studying the law of evidence trying to understand what is and is not reliable evidence. Arbitrators generally understand that non-lawyer advocates may not fully understand the nature of these objections. Even so, you may want to make an objection simply to make the point that you do not believe the evidence is particularly reliable for some reason. There are a number of objections which you may want to make if you think that the testimony which is about to be elicited will really hurt you. Many times, objections are not made, even though one could be, because the testimony about to be elicited is either irrelevant or something which you really can't challenge anyway and there is no sense emphasizing it. Among the

kinds of objections which you may want to be familiar with and may want to make from time to time are the following:

1. "No foundation." This objection means that the person has no first hand knowledge about what they are about to testify to.

2. "Speculation." This means that the testimony which is about to be elicited would be a little more than a guess and we are interested in facts, not guesses.

3. "Leading questions." Leading questions are proper only during cross examination. If the Company's lawyer is asking leading questions of his/her own witness, you can object. However, do not do so when the information is not in dispute or is just general background. When the question is about an important, disputed point, then object.

4. "Relevance." We want facts that help the arbitrator resolve the issue at hand. If you want to limit the evidence which the company can present, ask yourself the question of whether knowing the answer might help the arbitrator resolve any of the issues before him. If not, make a relevancy objection.

5. "Cumulative" or "Asked and Answered." What this really means is that we are wasting time if we keep going over and over the same thing. We assume that the arbitrator is smart enough to understand what is said the first time and that he or she was awake and was thus paying attention the first time the question was asked and answered.

6. "Badgering/Argumentative." While cross examination can be pointed and hard, it should not get personal, sarcastic or overly argumentative.

7. "Non-responsive." This is an objection you can make to company witness' answer to your questions. What this means is that a question is asked about a particular subject matter and the answer does not deal with what was asked. What you are seeking is a direction from the arbitrator that the witness answer your question, not make some speech in support of his/her case.

8. "Hearsay." This is far and away the most complex of any objection which can be made. Hearsay is a statement made other by the declarant while testifying as a witness. What is behind this objection is that people are entitled to be able to ask cross examination questions about what was said and what was done. When one person relates what another person said, you (and indeed the company) are being denied the opportunity to ask questions of the other person who is the one actually making the statements, rather than the person

simply re-counting the statements of another. As a practical matter in arbitration, arbitrators pay little attention to hearsay objections, because they understand that nature of hearsay evidence, and because nobody really understands how to handle hearsay objections.

After all witnesses have testified for both sides and after the party who has the responsibility to persuade the arbitrator about something has its opportunity to call rebuttal witnesses, it is then time to close or end the hearing. This can be done in one of two ways: a post hearing brief, or a closing argument.

If doing a closing:

- Take a break before giving your closing.
  - Go through your prepared sheets and see if need to add (or remove) any topics.
  - Add or change the evidence that actually came out for each point.
  - Then put the sheets in the order you want to make the points.

If doing a brief:

- Use your sheets as the outline of the brief.

When to do a closing argument.

- Most discipline cases that have not gone more than one day or do not have complicated legal issues within them, for example, claims of illegal discrimination.
- Contract interpretation cases are usually briefed.

IN THE MATTER OF AN ARBITRATION BETWEEN

_________ LOCAL UNION NO. ___	)	
	)	
Union	)	
	)	FMCS No. 021018-50406-7 [if one]
and	)	
	)	Re: [description of grievance]
____________	)	Grievance No. ______ [if one]
	)	
Company	)	

SUBPOENA

To: [Name and address of witness]

You are hereby commanded to appear to testify before Arbitrator____________________ at [location of the hearing], on the ___ day of ______, 200_, at the hour of [starting time of the hearing].

____ [Arbitrator’s name]