

PRELIMINARY MATTERS

Often the parties will arrange a pre-arbitration conference with the arbitrator to work out case presentation and hearing details without taking up the time of the witnesses at the hearing itself. In any event, before case presentations begin, it is wise (and may well be required by the arbitrator) to identify the issue(s) submit stipulated agreements; and determine a) how much time will be needed; b) how many witnesses are anticipated; c) whether or not witnesses will be sworn in and/or sequestered; d) will an on-site visit or walk-through be scheduled; e) will transcripts be made; and f) whether there will be closing statements at the hearing or post hearing briefs.

FRAMING THE ISSUE

In its simplest form, an arbitration consists of two basic questions asked of the arbitrator: 1. Did the employer violate the collective bargaining agreement; and, if so, 2. What is the appropriate remedy? Questions put to the arbitrator are the issues to be decided.

At the beginning of the hearing or in a pre-arbitration conference, the arbitrator will normally ask the parties if they are prepared to stipulate to the issue(s). If the parties have not come to agreement on the issues, the job will fall to the arbitrator who will, as part of the award, determine the issue(s).

Even if the advocates are unable to agree or stipulate to the exact wording of the issue or issues, they should prepare and submit to the arbitrator their respective versions of the issue statement and agree to ask the arbitrator to fashion the exact statement as part of his/her award.

If done well, framing the issue helps to focus the arbitrator's attention and establish clearly what needs to be proven and what evidence will be relevant, material and dispositive. If done badly, it can distract, or, if it is made a part of an advance stipulation, it may unfavorably restrict the arbitrator and prejudice the case.

In the absence of any submissions by the parties, the arbitrator will most likely draw upon the grievance record.

Some considerable care and caution is therefore necessary when framing the issue. From a union standpoint, it should be neither so broad a claim that the contract and evidence cannot support it, nor so narrowly drawn that the union is tied to a very limited piece of language. For example, it would be better to claim an individual has been wronged on a given date, time, and place than to assert that senior employees have been systematically discriminated against.

On the other hand, management usually prefers the narrowly drawn issue which asks: "Did the Company violate Article VIII Section 1 subparagraph (c) in assigning Bill Jones the job of elevator operator on April 8, 2003?" This turns the issue on a very narrow portion of the agreement, and restricts the union from using the whole contract to sustain its claim.

The parties should also clarify their wish that the arbitrator include the question of remedy as a part of the issue. This can be handled by insisting that the question "If so what should be the remedy?" – be added following the statement of the main issue.

EXERCISE:

FRAMING THE ISSUE

Pick the preferable issue from the Union's (U), the Company's (C), and the Arbitrator's (A) point of view in the following examples:

EXAMPLE 1: Under a contract calling for "discipline only for just cause"

- _____ Did the company unjustly discipline Tom Jones?
- _____ Was Tom Jones unjustly discharged on April 8, 2003?
- _____ May an employee refuse an order?
- _____ Can the company discipline for insubordination? Was Tom Jones discharged for just cause?
- _____ Was Tom Jones discharged for just cause on April 8, 2003, based on the evidence and reasons given at that time?

EXAMPLE 2: Under a contract requiring the assignment of overtime on an equalized basis

- _____ Has the company violated the equalized overtime provision?
- _____ Did the company properly assign overtime to Sam Smith on June 20, 2003?
- _____ Does the low man on overtime always have first right to weekend overtime?
- _____ Did the company violate the agreement when it failed to call Ralph Green for overtime on June 19, 2003?
- _____ What must the company do to properly assign overtime?

EXAMPLE 3: Under a contract which requires the company to promote "the senior man, provided he is able to perform the work"

- _____ Was the company's promotion of John Brown rather than Ben Franklin in good faith?
- _____ Did the company properly deny Ben Franklin the promotion to Mechanic III?
- _____ Is Ben Franklin able to perform the work of Mechanic III?
- _____ Did the company violate the agreement when it awarded the position of Mechanic III to John Brown rather than to Ben Franklin?
- _____ Must, the senior employee be promoted over the junior employee in all cases?
- _____ Has the company been fair to Ben Franklin?

[CLEAR Source: Allan J. Harrison, *Preparing and Presenting Your Arbitration Cases*, Institute of Labor and Industrial Relations, University of Illinois Urbana-Champaign, June 1978.]

Fact Stipulation

At the beginning of the hearing or in a Pre-arbitration conference, the arbitrator may well ask the parties if they are prepared to submit any agreement on the facts.

Facts that the parties stipulate do not need to be verified at the hearing by witnesses or exhibits.

Stipulating to the facts that are clearly not in dispute is encouraged, whenever feasible, for it expedites the arbitration hearing by reducing the number of witnesses and enables the parties to settle down quickly to the crux of the dispute. The parties may either prepare a stipulation in advance or may enter into one at the hearing.

Stipulations may include the known facts of the case, relevant documents on file and uncontroverted past practices. Caution should be exercised in stipulating to the facts in discipline and discharge cases, however, since such cases usually turn on questions of fact rather than contract interpretation.

Some grievances are very fact intensive, and the Arbitrator will be sifting through the conflicting evidence to determine which facts, if any, can reasonably be established, which testimony is credible, and what actually happened. In other cases, the dispute is fundamentally over the varying interpretation of ambiguous contract language. The facts in such cases may be readily agreed upon.

In either case, it is important for the parties to distinguish between fact and opinion, and not to confuse this distinction with the difference between true and false.

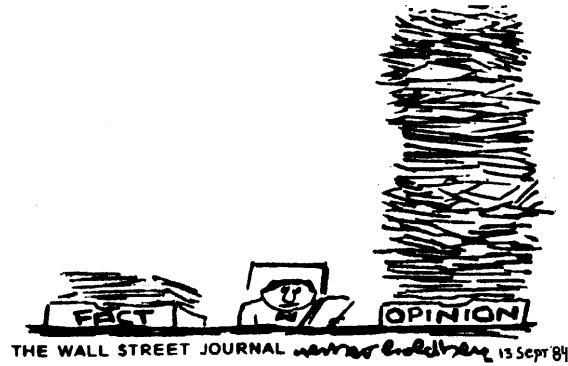
Opinions are essentially conclusions based on facts. Different conclusions can arise from looking at the same set of facts. Often, opinions hide or obscure facts. Worse, since the mind is not able to grasp an opinion in a vacuum, expression of an opinion, unsupported by facts, can subconsciously cause the person who hears it to imagine likely facts that would support that opinion. For all these reasons opinions alone are unreliable in an investigation and considered inadmissible as evidence.

For the most part, witnesses are called on to testify only to facts. Opposing advocates may legitimately object to witnesses who give opinions instead.

The exception to this rule occurs in the case of “expert” witnesses. An expert witness is called on exclusively to express an expert opinion. Before their opinion is given, however, the advocate calling the witness must establish by direct examination a “foundation” for the arbitrator that establishes the witness’ expertise (credentials, resume, experience, etc.).

It is essential that the advocates clearly understand the difference between fact and opinion.

EXERCISE:



Mark each of the following statements with an F if it's a fact or an O if it's an opinion. For the purposes of the exercise, you may assume that all the statements are true.

Example: F He's worked for the company for 18 years.

O He's a good worker.

- | | |
|--|---|
| 1. ___ He signed in at 3:00pm. | 11. ___ She had spilled gravy all over the table. |
| 2. ___ He was dressed funny. | 12. ___ She didn't clean it up for two days. |
| 3. ___ He wasn't sick that day. | 13. ___ She is a slob. |
| 4. ___ He likes her. | 14. ___ He told me to sit down. |
| 5. ___ The boss is a jerk. | 15. ___ He had an angry expression on his face. |
| 6. ___ He told me she was in the office. | 16. ___ He is a trouble-maker. |
| 7. ___ She wasn't there. | 17. ___ The notice was not there. |
| 8. ___ He was lying. | 18. ___ At ten o'clock I went to bed. |
| 9. ___ Her desk was a mess. | 19. ___ I stayed up late. |
| 10. ___ She is a good cook. | 20. ___ The table is large enough for 10 people. |

For each statement you marked as an opinion suggest one factual statement that would justify the stated opinion.

CASE PRESENTATION

The Opening Statement.

Opening statements are brief generalized statements to introduce the case to the Arbitrator. This is especially helpful in that it enables the Arbitrator to quickly grasp what the dispute is about from your perspective. Prepare your opening statement with care since it is your first step in getting the Arbitrator to think in your terms. Write it out first so that it will be brief, concise and direct. If you decide to submit a written copy to the Arbitrator for reference, courtesy demands that you also provide a copy to your adversary as well. Do not, however, use the written copy as a substitute for your oral, presentation.

An opening statement is not evidence and anything asserted in that statement should subsequently be proven. Neither is it the time to argue or make conclusionary statements. Save these for your closing argument and summation.

The opening statement should be prepared with utmost care, because it lays the groundwork for the testimony of witnesses and helps the arbitrator understand the relevance of oral and written evidence. An opening statement should include the following elements:

- A statement of the issues to be decided
- An explanation of the facts (circumstances surrounding the grievance)
- The gist of the main argument is your case ("We intend. to prove that . . .")
- The relevant contract provisions you believe are controlling
- The remedy you are requesting

Give the Arbitrator time to absorb, write down and understand your description of the facts and the contractual provisions you believe are controlling since he or she is likely to be unfamiliar with your contract and the normal work practice involved. You may even wish to highlight the relevant contractual provisions by reading them aloud.

The question of the appropriate remedy, if the arbitrator should find that a violation of the agreement did in fact take place, deserves careful attention at the outset. A request for relief should be specific. This does not necessarily mean that if back pay is demanded, for instance, it is essential for the complaining party to have computed an exact dollar-and-cents amount. But it does mean that the arbitrator's authority to grant appropriate relief under the contract should not be in doubt.

Because of the importance of the opening statement, some parties prefer to present it to the arbitrator in writing, with a copy given to the other side. They believe that it may be advantageous to make the initial statement a matter of permanent record. It is recommended, however, that the opening statement be made orally even when it is prepared in written form, for an oral presentation adds emphasis and gives persuasive force to one's position.

Presenting Documents.

Documentary evidence is often an essential part of a labor arbitration case. Most important is the collective bargaining agreement itself, or the sections that have some bearing on the grievance. Documentary evidence may also include such material as records of settled grievances, jointly signed memoranda of understanding, correspondence, official minutes of contract negotiation meetings, personnel records, medical reports and wage data.

There are essentially five steps to be taken in order to get an exhibit admitted into evidence.

1. Have the exhibit marked for identification and present the original to the arbitrator.
2. Present a copy of the exhibit to the opposing advocate.
3. Show the exhibit to the witness or present the witness with a copy of the exhibit.

4. Ask the witness sufficient questions to lay a foundation for admission of the exhibit.
5. Offer the exhibit in evidence or make a motion that the exhibit be admitted into evidence.

There normally should be four copies of each exhibit:

- ① for the arbitrator
- ② for the management advocate
- ③ for the witness(es)
- ④ for the union advocate

It is usually best to leave exhibits unmarked until the hearing is in progress.. There may be one or more exhibits that the advocate feels are marginal and that may never be used. If exhibits are premarked but not offered in evidence, there will be an obvious gap in the numbering sequence. Furthermore, the order in which the advocate offers exhibits sometimes varies from the preparation stage to the actual hearing (e.g., one witness testifies before another because of a scheduling problem), and, if exhibits are premarked, they will be entered into the record out of numerical order or will have to be remarked.

Joint exhibits are used for evidence that is produced by both parties or that is accepted by both parties as their own. The applicable labor agreement is typically a joint exhibit and is commonly marked Joint Exhibit 1. Minutes of grievance meetings that have previously been distributed to and/or signed by both parties are often designated as joint exhibits. The willingness of a party to have an exhibit marked as a joint exhibit usually means that the party has no objection to its introduction even though the other party may have produced it. an opportunity to object to the introduction of an exhibit before it becomes part of the record.

In many instances, key words, phrases and sections of written documents may be underlined or otherwise marked to focus the arbitrator's attention on the essential features of the case. Properly presented, documentary evidence can be most persuasive; it merits more than casual handling.

Examining Witnesses.

Each party should depend on the *direct examination* of his own witnesses for presentation of facts. After a witness is identified and qualified as an authority on the facts to which he or she will testify, the witness should be permitted to tell the story largely without interruption. Although leading questions may be permitted in arbitration, testimony is more effective when the witness relates facts in his or her own language and from his or her own knowledge. This does not mean, however, that questions from the advocate may not be useful in emphasizing points already made or in returning a witness to the main line of the testimony.

Cross-Examining Witnesses.

Every witness is subject to cross examination. Among the purposes of such cross-examination are:

- disclosure of facts the witnesses may not have related in direct testimony;
- correction of misstatements;
- placing of facts in their true perspective;
- reconciling apparent contradictions; and
- attacking the reliability and credibility of witnesses.

In planning cross-examination, the objective to be achieved should be kept in mind. Each witness may therefore be approached in a different manner, and there may be occasions when cross-examination will be waived.

Objections

The purposes of raising objections are to exclude information, to prevent prejudice, to modify the form or manner of questioning taking place, to change momentum, or to instruct or calm the witness.

A party has every right to object to evidence he considers irrelevant, as the arbitrator should not be burdened with a mass of material which has no bearing on the case. However, objecting for the sake of objecting may have an adverse effect and give the arbitrator the impression that you simply fear having the other side heard.

B. Examples of commonly raised objections

1. Object because the question is ambiguous
2. Object because the question is compound
3. Object because the question has been asked and answered
4. Object because the question is argumentative
5. Object because of a leading question
6. Object because the question misquotes the witness
7. Object because the question calls for a conclusion which the witness is not qualified to make
8. Object because the question assumes facts not in evidence
9. Object because the question calls for speculation
10. Object because of hearsay
11. Object because counsel is badgering the witness
12. Object because the witness is testifying to things about which he/she has no direct knowledge
13. Object because the witness is expressing an opinion
14. Object because the witness is testifying as to what someone else thought
15. Object because the witness is not competent or qualified to answer
16. Object because it is immaterial
17. Object because it is irrelevant
18. Object because the answer is not responsive to the question
19. Object because the document speaks for itself

The Perils of Cross Examination

by Richard I. Bloch Arbitrator, Washington, D.C.

Many cases, particularly those involving fact disputes and disciplinary actions, require of the advocates the ability to cross examine. Admittedly, it's great fun at times and enables the would-be Perry Mason to display his or her adversarial skills. To be sure, there are advantages to a carefully thought-out, judiciously-exercised cross examination. But there are more perils than there are values, and the effective representative must carefully keep these in mind.

Good cross examination can serve several purposes. First, it can obviously uncover 'holes' in testimony. To the extent the witness has overlooked an important area on direct examination, or has mis-stated facts, or has simply lied, careful cross examination can reveal these things. Moreover, in many instances it's just plain therapeutic, and a couple of strong verbal jabs might well be ultimately satisfying to the opposing party, even in a losing cause.

There are tremendous pitfalls to cross examination, however, so much that the cautious representative will wish to observe the following rules:

1. Never cross examine a witness that hasn't said anything to hurt you on direct examination. If you have no quarrel with what has been said, simply indicate that and let the witness go. This is particularly true when, as is often the case, the other party's witness will have actually helped you. If, by a stroke of luck they have intentionally or unintentionally said something you like, don't give them the ability to withdraw if under pressure. Simply refer to it later in closing argument. Recall the incident of the employee discharged for allegedly biting off his fellow employee's ear. Management called its first eyewitness and asked "Joe, did you see Bill bite Sam's ear off?" Joe replied, "No." Flabbergasted, the company representative repeated the question "Did you see Bill bite Sam's ear off?" Again, came the answer "No."

The company man sat down, shoulders sagging. The Union representative delighted, of course, but couldn't leave well enough alone. Rising to his feet, he said "Tell us again, Joe, what did you see?" At that, Joe brightened up, looked the Union man straight in the eye and said "I saw him spit it out."

2. Never cross examine a witness if his testimony has hurt you and you have no assurances that you can put a dent in the story. All you do is give the witness the chance to pound the story into the arbitrator's head once more. You could have objected if the other side asked their own witness to repeat the whole story once again, but you can't object, when it's your question.
3. Never ask a question on cross examination when you don't know the answer. A fishing expedition will simply enable the witness to reiterate his story and will indicate to the arbitrator that your case may be lacking in support.
4. Never rely on cross examination to win your case. The only witnesses who break down and confess on the stand hired out long ago as extras in the movies. If you can't prove your case with your witnesses and your evidence, don't expect the other sides' to do it for you. A related point — it is not enough to later argue that the other witness has stretched the truth. Be prepared to prove it.
5. Whenever possible, ascertain which witnesses will be testifying and try to predict the direction of their testimony. Indeed, it is perfectly reasonable to attempt to inquire in advance from the other side as to what the content of their witnesses' testimony will be. In any event, try to plan well in advance the areas of cross examination before attempting it at the hearing.

For years, Ohio State's Woody Hayes disdained the forward pass since three things could happen and two of them were bad. Similarly, cross examination presents many more so, than any other element of your case. As a final suggestion; when in doubt -don't.

Closing Statement.

After each side has presented their case, the arbitrator will give each party equal opportunity to argue why their position should prevail. This can be done either through oral argument at the close of the hearing, post-hearing briefs or both. This is the occasion to summarize the factual situation and emphasize again the issue and the decision the arbitrator is asked to make. Whether you make a closing statement or write a post-hearing brief, the purpose is the same.

A closing statement or brief should accomplish the following:

- Summarize the relevant facts from your point of view
- Argue that your interpretation of the contract and version of the facts are correct
- Refute your opponent's contractual interpretation and rendition of events
- State the remedy requested

Since arbitration is a relatively informal procedure, arbitrators have sometimes permitted the parties to present arguments during the course of the hearing. This, however, does not diminish the importance of the summary as it is your last opportunity to convince the arbitrator of the validity of your position. Thus, to make your closing argument most effective you must constantly be aware of your objective. Everything you say and how you say it should be designed to have an effect on the arbitrator's line of reasoning. Also, at this time you should present any citations or awards that are relevant to your case. (To expedite the rendering of the award, copies of the awards cited may be submitted.)

It is important to avoid anything in your closing arguments that might open up discussion on any weak points of your case. If the Employer has overlooked some loopholes, don't remind them that the loophole remains unplugged.

As arbitration is a somewhat informal proceeding, arguments may be permitted to some extent during all phases of the hearing. There may be times, however, when the arbitrator will require parties to concentrate on presenting evidence and put off all arguments until the summary. In either event, this will be the last chance to convince the arbitrator so hammer home the issue as you have framed it, state all arguments fully, and refute the major arguments of the other side.

Here are some useful tips for presenting the closing argument:

1. Be direct.
2. Develop your argument logically.
3. Be lucid and cogent. Be sure that the arbitrator will not misunderstand your contentions.
4. Emphasize the significant aspects of your case.
5. If appropriate, bolster or illustrate your argument with common experience or well-known facts. Use only meaningful and proper examples or analogies to support your argument.
6. Do not enlarge upon the testimony of any witness. The arbitrator will quickly discern the difference between what you are now claiming and what the witness actually said.
7. If there has been a contradictory testimony, admit it, but then explain why the arbitrator should accept your witness's version as the correct, one.
8. If necessary, repeat certain important portions of your argument.
9. Anticipate your opposing party's arguments.

Post-Hearing Procedure.

After both sides have had equal opportunity to present all their evidence, the arbitrator declares the hearing closed. Under AAA Rules, he has 30 days from that time within which to render his award, unless the collective bargaining agreement requires some other time limit. If parties want to file written post-hearing briefs, transcripts of records or other data, time limits are set and hearings remain open until those documents are received. As usual, exchange of post-hearing material takes place through the Tribunal Administrator; *the parties do not communicate directly with the arbitrator except when both sides are present.*