Arbitration Procedures

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Arbitration Procedures

Theodore J. St. Antoine

I am in the uncomfortable position of being the primary expositor on a subject that I think is very much a matter of discretion in most cases, that is, how an arbitrator handles a hearing. One of the common characteristics I have detected among arbitrators is their apparent certitude on a disputed issue, even though they may disagree violently with other experienced arbitrators. Some of them will say that whatever internal anguish or difficulty an arbitrator has in coming to a decision, he should never display that to the parties. I myself cannot accept that advice simply because I am a perennial worrier and never quite sure about anything; it would be pure fakery for me to exhibit any other attitude. I think that the surest way to get along with the parties is to be oneself and not try to emulate others.

Method of Designation

The way an arbitrator responds in dealing with the parties will depend to some extent upon the method of his designation. There are several different ways in which designation of an arbitrator can come about. Formal appointing agencies, the American Arbitration Association (AAA) or the Federal Mediation and Conciliation Service (FMCS), may make the designation. This means an arbitrator has gone through a sifting process, has been appointed to one of the panels, and the agency has offered a select number of names to parties requesting a list. That procedure involves discarding unacceptable arbitrators and listing preferences for others. If appointed by AAA, an arbitrator deals with the parties only through the Association; he has no direct contact with them by letter or telephone, only at the hearing itself. The setting of the time and place for the hearing and similar arrangements are made by AAA. If appointed by FMCS or contacted by a party or parties acting on their own, arrangements are handled by the arbitrator. If the parties
have gotten together and selected an arbitrator, he must be careful to maintain equality and deal with the parties jointly.

I prefer to deal with the parties in writing because conference calls are inconvenient, and if I call one party or the other, there can be some uneasiness. Occasionally the parties’ appointing letter will indicate that the arbitrator may use Mr. X or Ms. Y as contact. In that case, of course, the arbitrator is entitled to deal with that person individually. Usually the parties have not thought about these things. Therefore I think a letter sent to both parties indicating two or three available dates and asking them to list their preferences is the best way to proceed.

In writing to the parties (or talking to AAA) to suggest hearing dates available to you, do not give too many dates; I do not give more than two or three. Set a deadline by which the parties must respond, so as not to leave indefinite open dates and thus be unable to schedule anything else for them.

An arbitrator wants to avoid calling the parties individually. By sending a joint letter with both names and the addresses of both parties, the arbitrator accords equal treatment to the parties and has a written record of the communications. Some arbitrators have found it preferable to make a conference telephone call. In such cases it ought to be made clear that this telephone call is not for a discussion of the issues, because one or the other may try to discuss the merits of the case. The only topic for discussion is the date and place of the hearing.

Arbitrators differ with respect to a cutoff date for cancellations after which the parties are charged for the scheduled date. Full-time arbitrators invariably have a penalty clause, some of which are very elaborate. The usual format requires notification of cancellation within a certain number of days prior to the scheduled hearing or a certain percentage of the regular per diem charge is assessed. The majority of arbitrators do not charge a full rate. A full-time arbitrator can ordinarily put that day to use writing an opinion and award in another case. As a moonlighting arbitrator, I usually am so happy to find I have a free date that it does not occur to me to charge. Certainly a full-time professional should charge; that is only fair to him. If an arbitrator has been approached by parties on their own, there ought to be a statement in his first letter to them.

**Need for Impartiality**

The need for equality of treatment starts when an arbitrator is appointed and continues throughout the proceeding. It ought to be sym-
bolized by a whole set of little gestures which may not seem terribly important in and of themselves, but all of which together create the notion that the arbitrator is not a friend of either party in the handling of this case. I usually make a point not to come early to the hearing room. I like to have both parties there first so I am not found chatting amiably with one side when the other arrives. When I do arrive, I introduce myself and shake hands with all the principals around the room. If there is an audience, I do not circulate through the audience.

If, as it often happens at the outset of one’s career, there are friends present, I try to say hello first to a person who is not a friend. Needless to say, once the hearing starts, the counsel are addressed as Mr. or Ms.; do not use first names. I feel this is most necessary for somebody who on other occasions, as one of my closet friends, would be called by his first name. I think these little touches are important.

When the meal recess comes, I do not join a party for lunch or dinner, even though it means a lonely session at the table instead of a convivial get-together with an old chum. I express my regrets and go off by myself; that is the safest route. Very rarely, the two parties will say that they are not planning any caucuses at the lunch hour, are going to eat together, and ask the arbitrator to join them. There is no problem then, if nothing about the case is said to one or the other of the two groups. Surprisingly, even good friends sometimes try to take advantage in these situations.

It is extremely uncomfortable to walk into the hearing room and find only one party there, strenuously insisting that his witnesses are present and he is ready to begin. The case may have been scheduled three months ago and the other party called five minutes ago to say he cannot make it and wants a postponement. The party in attendance doesn’t want a postponement and is ready to go forward with the evidence.

Ex Parte Hearings

American Arbitration Association rules provide that the arbitrator can, in appropriate circumstances, hold an ex parte hearing. I strongly advise, if possible, not to do that. Try to persuade the moving party not to push on the request, and find some good reason the motion should not be granted. It would be troublesome to proceed and is likely to lead to a court suit. To proceed would be to negate one of the most significant functions of arbitration, which is to heal whatever wounds the grievance has caused and to maintain the relationship between the parties. Often the latter is far more important, and you have heard said again and again
that it is not important who wins or loses the particular case anyway. All of the differences between the parties will be exacerbated if an ex parte hearing occurs. Only under unusual circumstances in which, for example, the person present would be under the most serious inconvenience, or there is an extremely pressing time element, should an ex parte hearing be held. Make sure the evidence is placed on the record; do not accept some kind of motion for a default judgment. Make the party present enough evidence so as to get a sense of the facts, even if it is only coming from one side.

Although arbitrators ordinarily do not like to ask questions, at an ex parte hearing I think arbitrators must do so, to ensure that any obvious points that might have been made by the other side are at least reflected factually in the record in order not to wind up with a record that will lead to an easy subsequent court reversal. In a modest way, ask a few questions.

**Ground Rules**

I revert now to the usual two-party hearing. At the very outset I like to go over ground rules with the parties, if I have not dealt with them before. I discuss my notion of conducting a hearing but emphasize that the parties are ultimately the ones to be served. If they have any particular desires about procedure, I want to conform to them insofar as I find nothing unseemly or otherwise inappropriate about doing so. I make known my feelings about how we should proceed. I like an orderly hearing, but also a relatively relaxed and informal one. I do not generally favor technical objections, including hearsay objections; in almost any situation I will accept the evidence and later weigh it on credibility grounds. Ordinarily I will not rule it inadmissible. I want everyone to feel he has had his say. I hope that the participants will not be unduly repetitious, and I will entertain objections if a party seems to be piling up too much cumulative evidence. I will try to keep the parties from getting into personalities unnecessarily, and I will sustain objections to the harassment of witnesses. This simply gives a sense of the kind of proceeding that I expect to have.

I pass appearance lists down each side of the room, asking the parties, their counsel, and witnesses to give their names, titles, and addresses, and at the same time I ask them to designate who is to receive copies of the award and how many copies they wish to receive. I then ask whether or not the parties want to have their witnesses sworn. Parties vary, although employers tend to favor testimony under oath, especially
in disciplinary cases. If they defer to me, I will have the witnesses sworn, if it is at all likely there will be disputed questions of fact.

If the witnesses are to be sworn, I take it very seriously. I stand and face a standing witness, ask him to raise his right hand, and intone the oath. I do not run through it simply as chatter; I think it is important to treat it seriously. I do it individually. This reminder has greater impact on the testimony if each witness is sworn individually just before testifying, rather than as a group. I am willing to leave up in the air the issue of whether the swearing in of witnesses is done at all, but once the decision is made to do it, I do not want to cheapen it. Taking an oath is an important piece of business, and if it is going to be done, I want it done well.

Part of my philosophy is that I am at the parties’ disposal. They are the ones who are setting the ground rules, as long as the rules are not offensive to me. Arbitrators differ on this. There are some who, while they may say they seek to follow the parties’ wishes, take over the whole show after they are appointed and tell the parties how the hearing is to be conducted. Stylistically, I like to be a bit more deferential. I find I usually make most of the decisions anyway.

I tell the parties that I am going to maintain three strings of exhibits: a series of joint exhibits (J) which the parties agree upon, a union series (U), and an employer series (R). I try to collect the joint exhibits which the parties have agreed or can agree on before the record commences. If it is a hearing with a transcript, as soon as the hearing formally opens, I will repeat all the joint exhibits that have been introduced so they may be noted and numbered in the record.

I require nothing in advance of the hearing itself. The current tendency is not to ask for an advance stipulation of the issue and not to get it. Ordinarily the arbitrator will not even know the nature of the dispute. Sometimes because of the way the parties opt for a special expedited procedure there will be an indication that it is a disciplinary case. Very rarely does someone send the arbitrator a copy of a contract. Practically never is anything other than that sent ahead of time. I am naturally a procrastinating person, and I am not troubled by this. After all, 30 to 40 percent of the cases are not heard, and I hate to think of having read a contract and then not having the case go forward.

**Official Record**

Certain formalities of a hearing are often overdone; one is the matter of transcripts. In an ordinary discipline or discharge case in which there
is no complex legal theory involved, I think that transcripts are superfluous. They do not really add to what the arbitrator takes into account. They are unduly expensive not only because of the reporter's time in preparing the transcript but also because of the time that the parties and the arbitrator are going to spend going over that transcript, if in fact it is produced. In talking with people at conferences and elsewhere, I make this plea and try to alert the parties to what the vast majority of fellow arbitrators that I have talked with assure me is correct, that in the ordinary discipline or discharge case, the transcript is usually of little help and is simply an expensive luxury.

That is not true in complicated cases involving contract interpretation or complex job classification issues. In those cases a transcript can be extremely useful. In almost all cases the parties could arrange for a tape recording which is just about as helpful as a transcript and costs next to nothing. The quality of inexpensive cassette recorders has now been so improved that there is little trouble in a fairly sizable room in capturing all the testimony for forty-five minutes a side. It takes only ten seconds to flip the cassette over or replace it. This seems to me an excellent compromise solution to the problem of transcripts. I ask the parties in nearly all cases where there is not a transcript if I may use my own tape recorder, whether or not they are using one, and I find this extremely helpful. It means that I need not interrupt the witness to ask for matters to be repeated.

I take copious notes, and, incidentally, the notes are the official records of the proceeding, unless the parties have agreed on the preparation of an official transcript. However, the tape is available if necessary to refresh my recollection or to take care of a mass of figures. Occasionally it provides an exact comparison of the testimony of witnesses when they are clashing on crucial points, and often the significance of certain details in one piece of testimony does not become evident until the second witness has testified. I keep a running tally of the number of each tape side together with my notes so that it takes no more than a minute to locate an exact passage to recheck. I do not spend a whole day listening to tapes from beginning to end. That would be an unnecessary drain on the parties' time and my own. I use them simply for confirmation or amplification of what my notes said or clarification of a conflict in testimony. A number of arbitrators are now using this device. Naturally, if a party objects, I do not proceed. It is not required, however, for an arbitrator to give advance notice to the parties of his desire to use a recorder.

When the arbitrator does not know whether it is an ordinary discipline case or a very involved contract interpretation case, and therefore
cannot determine in advance whether a transcript would be helpful or not, the parties make that decision. I am always willing to express my view in a conference or to the parties in an informal setting that transcripts in simple cases are not very helpful and not worth the cost in time or trouble, but I would not do so in a given hearing. There I am the parties’ servant. If I walk in and a reporter is present, I say nothing, leave my tape recorder in its holder, and go on about my business. In the absence of an official reporter, the parties actually tell me if I can use my own tape recorder.

The parties usually do not have a conflict about whether or not there should be a transcript. If either party wants a transcript, there is a transcript, and if only one party wants a transcript, then that party pays. The AAA rules so provide. The parties frequently dispute over whether or not a recording should be made. My position is that if either party objects, there will not be any recording, including mine. I sometimes feel I am pandering to a silly superstition in treating recordings this way, because it is quite clear that under accepted arbitration procedures either party has a right to a transcript if it insists upon it and is willing to pay for it.

If only one party is willing to pay for a transcript, I take the position that my notes are the official record of that proceeding. If only the employer gets the transcript (which means the union does not agree to pay for it as well) and would like the transcript to be the official record, an arbitrator may respond by saying that he will get a copy of the transcript and make it available to the union, because if it is going to be the official record they have to have access to it. There is one other way that it is sometimes done, and that is for the company to let their copy be made available for the union’s examination and use in the company’s offices. That is a convenient way to work it out. My position is if the company merely wants the transcript for its own purposes, however, that is not the official record of the proceeding, but my notes are. My position is that the employer can make the transcript the official record if he is willing to make it available to the union and to me, but not if it is for his exclusive use and benefit. That is the distinction. AAA Rule 21 seems in accord.

I have never had a party ask to see my notes. I would have no objection to making them available. Other arbitrators might disagree. In speaking of the official record, I refer only to its use in the arbitration itself for briefing and decisional purposes.

My view that the arbitrator’s notes are the official record is shared by other arbitrators. The essence of my position is that nothing else can be the official record of an arbitral proceeding unless it is available to
me and all the parties. Once the employer gives me a copy, I am prepared, if the union wants, to let the union see it and use it in preparing a brief. If the employer wants a record either in tape or transcript form for his own purposes only, I do not regard that as the official record. We are probably exaggerating this as a practical point, because I have never had an employer ask for a transcript and not want me to have a copy.

In those situations where the union does not have practical, as distinguished from theoretical, access, I would insist that the transcript was not the official record of those proceedings. AAA Rule 21 states the arbitrator is to determine when and where the other party may inspect the transcript, if it is the official record. With regard to recordings, I am adamant that the official record is my notes. Tape recordings are simply too fallible and easily doctored.

In cases of enforcement or vacation of an award, parties may seek to get the arbitrator’s notes. Often an arbitrator does not just take down what a person said, but also makes notes alongside, including credibility determinations and judgments of what he considers important. He would not want the parties to have access to these notes.

Setting aside the question of how arrangements could be made for transcribing an arbitrator’s notes with appropriate deletions of extraneous material, I find it hard to see how those notes would not be subject to subpoena if one of the parties wanted to subpoena the official record of that proceeding. Any party that wants either to enforce or resist the award would be entitled to the whole official record. I do not know that it has ever come up. I have seen no cases on this question.

Most arbitrators would say that if no statement is made by the arbitrator as to his policy with regard to his notes being the official record, and no other statement is made by the parties, there is sound precedent to believe that the record is the arbitrator’s notes. However, it is not the making of the statement, it is the recording of the notes that makes them the official record. I want to repeat that whenever arbitrators have said their notes were the official record, as far as I know they have been thinking of the disposition of the arbitration case. They have not been thinking of whether or not it is the kind of public document that would be subject to subpoena in a subsequent court or agency proceeding. Perhaps better policy calls for preventing anyone from going behind the arbitrator’s decision to look at his notes and the scratchings he might have made along the margin. If the arbitrator’s notes were subject to subpoena, they should certainly pass through some kind of excising or laundering process. I do not know of a single arbitrator who
has been confronted with this problem. I do not think this is a matter of general concern.

**Sequestration of Witnesses**

One of the parties may ask for sequestration of witnesses. I always wince when that occurs because it suggests that arbitration is not going to serve one of its worthwhile therapeutic functions. Everybody in that room, most of whom have an intense interest in the case, is not now going to have a chance to hear the whole story come forth, to get a sense of what actually occurred, and maybe have his or her recollection jarred. Nonetheless, my inclination is to grant the request with any reasonable basis presented for the making of it. This is especially true in cases of discharge when there is likely to be eyewitness testimony, and there may be contradictions.

The issue will come up much less frequently in contract interpretation, job classification, or technical grievance. It arises when there is the possibility of conflicting eyewitness testimony, and I realize in those situations why a party may legitimately not want any witness aware of what others are saying or be influenced by their comments, so I grant that motion. If one party requests sequestration and the other party vigorously objects, I would ordinarily grant the request, with regrets.

There is a qualification which should be noted. The parties themselves are entitled to be present, including the individual grievant. The testimony of the individual grievant, perhaps the person discharged, obviously may be affected by what other witnesses say. Nonetheless, there is an overriding interest in the party grievant being present and being able to hear everything. Therefore, the grievant is an exception to the sequestration rule.

**Framing the Issue**

In the best prepared cases there will be a written submission agreed upon by the parties beforehand stating exactly what the issues are. It will be one or more short paragraphs presenting concisely the issue and in effect defining the arbitrator’s authority. That is the question the arbitrator must answer, and that is all.

In many cases the parties come to the hearing without having defined the issue. Some experienced, competent arbitrators would stop the proceedings until the parties had written out and agreed upon a statement of the issues. Perhaps I am less demanding or naturally pro-
crastinating and willing to let things develop, but I do not say anything about issues. I am prepared to let the proceedings unfold and listen to how the parties frame the issue. Each party may frame it a little differently or ultimately leave it to me to help articulate the issue.

At some point in the proceeding I like to make a brief statement of my own as to what I understand to be the real question between the parties and have their agreement. Sometimes I phrase it in terms of opposing arguments: I understand the parties' position; the union essentially is saying this; the company is saying essentially that; am I essentially right on this? That is my way of phrasing the issue and handling this troublesome problem, which some fine arbitrators say they simply will not allow to occur. Until they have the parties' written, signed submission, they feel that they do not have the authority as an arbitrator to dispose of it. I have never felt at the end of the hearing that I did not know the problem which was at the heart of the case.

**Opening Statements**

When an arbitrator receives notification of selection from an appointing agency, the matter at issue is not stated. I like opening statements. If there is anything that would be really helpful ahead of time, although I do not ask for it, it would be a prehearing statement or memorandum. I am not thinking of anything elaborate, but there is nothing that is more helpful, especially if we are dealing with something of any complexity, than to have a good statement in advance of the reception of any evidence as to just what the position of each party is. Ordinarily this is not hard to secure. Most people want to express their concerns. The only difficulty I have encountered is after the moving party makes the opening statement, the other party may ask to reserve its statement until the presentation of his side of the case. If I think there is some reason for that, I accept it, especially in discharge or disciplinary cases.

In a disciplinary case it is ordinarily assumed that the employer has the burden of proof and goes forward first. The union wants to find out exactly what the employer will set forth as the basis for the discipline or the discharge, and what the evidence is. The union then wants to deal with that in its opening statement. I am prepared to follow that procedure.

In other types of cases, such as a contract interpretation case, I want to hear both sides at the outset if at all possible because it aids me immensely in following the reasons and ruling upon any objections
that may come up in the course of the hearing. I like to get the two juxtaposed. I have as good a notion at that point as if they were to argue for hours about a written stipulation of just what the difference of position is and what the issue is in this case. I have it without forcing the parties to play games and try to reach a written submission that for whatever reason they have not done voluntarily on their own. That is my solution, and I really think in most cases it works well.

Assuming I do know the nature of the case, I have no established rule as to which party I ask to speak first. The hearing is not a highly stylized, structured setting. It is very important to understand that the arbitrator is simply formulating the issue that the parties have presented, even though they cannot agree on the wording of it. The arbitrator is not formulating his own issue between the parties; he is simply characterizing in his language the issue they have brought him. In the vast majority of cases I find this no problem whatsoever. However, there are competent, experienced arbitrators who insist that they have a written issue submitted to them, agreed upon by the parties, or else they will not go forward.

In the Northeast and the Midwest, where I tend to arbitrate, I have had only a few cases in which the parties have presented me with a stipulation of specific issues at the outset of the hearing. At most the stipulated issue may be whether the employer has violated article X of the labor agreement. In other parts of the country this may vary.

Ordinarily the applicable contract provision comes up in the stipulated issue or in the opening statement. Remember this is a telescoped process. It is also a free-floating process in which the arbitrator may ask the question, what does this case generally involve, to which the parties will probably answer that it is a disciplinary or job promotion case. If it is a discipline case, I ordinarily make some comment to the effect that I assume the company is ready to proceed first, and the company invariably says yes. If it is not a disciplinary case I ask if the union is prepared to open. In most cases which do not involve discipline, the union will go first. On the basis of who is to lead off, I ask if that party wishes to present an opening statement. A concise statement of what the problem is as one party sees it and then as the other party sees it follows.

In most discharge cases, the formulation of the issue is not important, and I do not mind waiting until the end of the company's case before hearing what the union has to say. The issue is usually simple, that is, was there just cause for the discipline.

If it is a more complicated case, however, there can be a battle over precisely what that issue is, or at least how it should be worded.
That is where I prefer not to sharpen the question too much if I feel that by letting each party state the issue I can get a sense of what it is and reformulate it, thus stating the issue as I see it. Almost invariably there is a quiet assent that that is the situation. I am then ready to proceed.

**Stipulation of Facts**

In an effort to shorten the hearing, I often give the parties a chance to enter into some factual stipulations to which both parties agree in order to save time used in putting people on to testify. Depending upon what I hear in that opening statement, I may say that there appears no dispute between the parties as to A, B, and C and ask if they are prepared to stipulate that. Ordinarily there will be no disagreement about certain facts such as dates and places, or the number of years an employee has worked. Often there will be no dispute about the time an employee was employed but considerable dispute as to precisely what that employee's seniority is. The arbitrator can easily avoid unnecessary and repetitious testimony by clearing the desk of undisputed facts at the outset.

I have never received anything argumentative directly from a party in advance of a hearing. Presumably any sort of prehearing brief would go through AAA, if it is one of their cases. My position is that before the arbitrator receives anything from anybody, the other party should be given the chance to respond. In terms of time, that might not be possible. I would be quite prepared to receive at the hearing a copy of the opening statement or a more elaborate version of it, on condition, of course, that the other side receive a copy too. I would not read beyond the line where I recognized a unilateral communication without notifying the other party and eliciting their response. I said at the outset that it is important to maintain always a posture of neutrality and impartiality and avoid anything that would give one side the feeling that the other was getting some undeserved benefit in the handling of the case.

**Burden of Proof**

There are some things that are important to keep in mind both as theoretical propositions and very practical points. Arbitrators will say again and again that the burden of proof does not mean much in arbitration, that all the arbitrator really wants to do is find out which side has the stronger case, what are the real facts, and what is the meaning of the contract. He is not interested in who has the burden of proof or what the quantity of that burden is, if that further issue comes up. In
the vast majority of cases, for all practical purposes, that is a sound statement. It does not make much difference about burden of proof if you are satisfied one way or the other way how the case should come out.

One of the things I have discovered to my chagrin and occasional anguish, however, is that there are cases in which I simply cannot decide which side has prevailed when I am finished. As long as I can avoid reaching that mental state, I do not need to go on to the next question that I now raise. I have not been able to avoid it, and I do not know many other arbitrators who will not confess to the same predicament from time to time. In such a situation the arbitrator has to rule one way or the other, and I do not know how one can deny that it depends upon who has the burden of persuasion. In the usual case it is the grieving party, who is moving for relief of remedy under the contract. It is that party which has the burden of prevailing by a preponderance of the evidence.

There is a well-accepted exception to this rule, that being cases of discipline and discharge in which it is usually felt that the employer has the burden of proof, on the theory the employer has within his knowledge a greater sense of the facts as to why he acted in disciplining the employee. I am not sure that is the only explanation for placing the burden of proof upon the employer in discipline cases. There are other situations in which the employer probably has a better sense of the facts. For example, whether a particular employee is qualified for a job and thus was entitled to get it on the basis of seniority is also a question on which the employer may well have readier access to the critical data. However, the classic arbitrator’s position is that the union has the burden of proof of persuading the arbitrator that the employer made a mistake in promoting someone else. Whatever the precise reasoning—it may be in part a feeling that the disciplined employee is subject to a serious hurt, especially in a discharge case—the traditional view is that the company ought to carry the burden of proof.

Moreover, while in the usual case the burden of proof must be sustained only by a preponderance of the evidence, that is, one finding is more likely than not 51–49, in the discipline or discharge case most arbitrators use a slightly different formulation. In cases where the reason for the discharge is the sort of reprehensible, immoral conduct that would amount to a criminal offense if tried in the courts, some arbitrators go so far as to say, and unions invariably argue for it, that there must be proof beyond a reasonable doubt, using the old criminal law standard.

After handling a number of these cases, I have come to the conclusion that I am prepared to uphold a discharge where I would not be
prepared to send the grievant to prison. This is a very pragmatic reaction, but it satisfies me that I am not using the beyond a reasonable doubt standard. On the other hand, I want something more than 51–49 before I uphold a discharge. I want something that I can call clear and convincing, if that is any help at all in defining a standard in between preponderance and beyond reasonable doubt.

I want to emphasize that arbitrators take different positions on this. One groups says beyond reasonable doubt, relying on the criminal law analogy; others are prepared to accept a preponderance of the evidence, emphasizing that these are civil cases. My hunch is that a majority of arbitrators want more than a preponderance in a discharge case at least, and maybe in any discipline case as well.

I do not think that all this is embroidery. I have tried enough cases in which I have concluded to myself that the company has satisfied me that probably the employee did this thing, but there was a lot of conflict. It was very, very close, so close that even though I thought it was probable, I did not think it was clear and convincing, and I did sustain the discharge. On the other hand, I have had cases in which I would not have sent the man to prison, where I would not have been able as a member of a jury to find him guilty; nonetheless I was prepared to sustain the discharge. At least it was clear and convincing.

There is another distinction to be made. A significant number of arbitrators only apply the stiffer standard of beyond a reasonable doubt when the conduct is morally reprehensible, when there is criminal-like activity alleged by reason that even though the man is not being sent to prison by a criminal court, the stain on his record in the employment field is going to be of exactly the same nature. His future chances of getting a job with a theft discharge sustained will be seriously impaired, and thus that stiffer standard is considered appropriate.

Rules of Evidence

The strict rules of evidence do not apply to arbitration. However, I find an increasing tendency for proceedings to become formalized. I am not sure that this is because of the presence of lawyers. Certainly lay people can be just as formalistic, sometimes even pettifoggingly so. I am inclined to think that it is in the nature of almost any kind of process whose initial flexibility may depend upon the fact that there are not any rules—if there are not any rules, there is no precedent. As time goes by, people get used to doing things in a more structured way. Many things that we have talked about today are fairly well accepted. There
are big battles about what precisely is the official record of the proceedings, because we do not have a precedent. As we set the precedent, people accept it and want to follow the rules. A process that began by having a good deal of play in the joints becomes a bit more rigid.

I am not unhappy about some of the movements in this direction, but I am unhappy about others. For example, it is still very hard for an arbitrator to convince a pair of representatives, if they are lawyers, not to heap hearsay objections even though I have indicated that there is almost no kind of hearsay objection that I am going to sustain unless a witness is right there, available to testify, and they try to give me his or her affidavit. I find that objectionable; why should not the witness testify? I am generally prepared to accept hearsay for the most part, even hearsay that is in the form of an affidavit. I may give it insignificant weight, and I am certainly not going to give it as much weight as I would a person who has testified and who is subject to cross-examination, but I will not rule it as inadmissible. I will sustain objections when testimony becomes unnecessarily repetitious or if there is unnecessary personal vilification or harassment of a witness. I try to avoid being any more definite or legalistic than I have to in rulings on objections. I tend to allow the parties to proceed a bit further. Then finally enough has been heard on that particular point. I try to maintain an informal air, even about rulings.

There is one troublesome area, and that is an attempt to introduce evidence that raises a serious question of relevancy. The threshold question is, does the proffered evidence have anything to do with the issue in the case. This is not evidence that is incompetent or to which objections may be raised that it be inadmissible because it is hearsay; the question is purely relevancy. One might say that to admit it is part of the general process of purging feelings, and that putting everything out on the table is one of the hallmarks of arbitration. Supposedly, there is a great therapeutic value in that process. It places the other side in a dilemma. Should the party take the time and trouble to refute the new evidence, which hypothetically has nothing to do with the case, or should he ignore it and run the risk the arbitrator will later consider it relevant? If I am completely satisfied that the evidence that is being offered does not bear in any way on the issue presented by this case, I shall not accept it.

Let me illustrate a troublesome, specific evidentiary problem. An employee has been fired. At the time of the firing, the employee was supplied with a written statement to the effect that he was discharged because of insubordination to Foreman X. The contract might have said that at the time of discharge there must be a written statement of reasons
supplied to the employee with a copy to the union, or there might not have been such a provision in the contract. At the hearing the employer tries to show that the employee had a very bad work record, habitual absenteeism and tardiness, and that these were the reasons discharge was thought to be the appropriate penalty.

Ordinarily one may think that the past record of an employee should always be pertinent in a decision dealing with the type of discipline imposed, but on the other hand, at the time the discharge was made—and let us assume also in subsequent grievance steps—the only thing that was talked about was the insubordination. The past record was never mentioned.

The union, of course, stoutly insists—and a good deal of arbitration precedent supports this position, at least when the contract says there must be a reason supplied at the time of discharge—that the only reasons that can be used at the arbitration hearing to justify discharge are those presented to the employee at the time of discharge. What happened in the past to buttress the penalty imposed cannot be introduced, otherwise the preceding grievance procedure would be undercut, and the union would be caught by surprise at arbitration. When it is quite clear that only one reason was assigned and especially when the contract requires that the reasons be supplied, I will not accept evidence with regard to the employee’s bad past record.

Needless to say, if the employee had a good record during twenty years of service with an unblemished disciplinary record and is now discharged, the union proffers that record of past performance to try to demonstrate that the discharge penalty is too stiff. At that point I take the position that the union can bring in the past record to contest the discharge, although I say that once the employee’s past record is raised by the union as a basis for knocking out the discharge, it opens up the past record; anything that was negative (and not subject to a contractual exclusion) can be used by the employer to try to offset the good portions of it. Usually a union makes a shrewd judgment in advance on whether or not to bring up the past record.

It is sensible for an employer to look at the total record of the employee. Arbitrators do not want to become enmeshed in a situation tying arbitration up with all the niceties of common-law pleading. The principal and final incident that really provoked the company was insubordination. It may well be that it is implicit in the employment relationship that every discipline imposed really reflects—in what is regarded as very good industrial relations philosophy—a kind of progressive discipline, which is based on the entire past record.
If I find there was an oral discussion at the time of discharge whereby the employee knew the company was considering all the past incidents, even though the only thing marked on the official notification was insubordination, I let the employer use those past incidents, giving such weight as I feel is appropriate, depending upon their seriousness, their similarity to the type of incident now involved, and the time when they occurred. Obviously something that occurred twenty years ago is going to be given little if any weight. I try to be a little flexible in this, but if I am convinced that right up until the hearing the union had no reason to know that anything was going to be relied upon except that one incident, I will regard other evidence as irrelevant and inadmissible.

In a very tightly written contract limiting me to the written statement, I do not want to tie myself up too much with common-law pleading technicalities. I try to see ultimately that the case is handled in a commonsense fashion to the best of my ability, that the outcome is one that the parties can understand, and that it neither suprises nor offends them. If the union and the employee were quite aware from the whole tenor of the discussion that this employee had had a whole series of things go wrong, and that this was part of the reason for the discharge, even though insubordination was the only thing written, my inclination is to ask to hear all the facts to see what I think of it.

Another qualification that most arbitrators will apply is not to allow anything in from the past record to help sustain the penalty unless it was made known at the time to the employee that this was a matter that management considered improper, and the employee would then have had a chance to grieve. I offended a company attorney and a union attorney within the space of two weeks with dissimilar rulings based on the distinction between an established system of progressive discipline and an on-the-spot discharge later buttressed with evidence of oral warnings. In a case where no notion of progressive discipline had ever been communicated because it had never been part of the policy between union and employer, I refused to admit a past record and confined the employer to the written reasons furnished to the employee. On the other hand, in another case in which an employee was marked one point for the first incident, two points for the second, and in geometric progression leading to discharge after a certain accumulation within a specified time despite the fact that the only thing that was fastened upon at the time of the discharge was the final culminating incident, I did accept evidence with regard to incidents in the past about which the employee had been warned orally and in writing and for which points had been imposed, because I regarded this as so much an accepted practice within the
company and well known and accepted by the union that it was an implied part of the final step.

In the first case, in which I said I would not accept the past record, the company went considerably further than the written statement. It went all the way through the grievance procedure on the basis of the final incident alone, as a matter of fact. In the opening statement, company counsel said that the only thing they needed to determine was whether or not the employee acted reasonably under the circumstances, and then to the surprise and outrage of the union, the employer tried to introduce evidence of past misdeeds toward the close of its case.

I have every reason to think that those past misdeeds, if the ground had been properly laid for them, would have been supportive of the discipline. I got a sense of what they were in passing upon the objection. I think they were matters that the employee was aware of, that he had had a chance to grieve, and that he was probably guilty. I know, if admitted, that they would have affected my thinking, but I was deeply troubled that at no point in the grievance procedure was this prior record mentioned. The union had no reason to take it into account in deciding on, or preparing for, arbitration. If one thinks about this, there is a question about the extent to which an arbitrator ought to help preserve the functioning of the informal process for the resolution of grievances, the grievance procedure itself. To the extent an arbitrator allows it to be bypassed, he is to that extent undermining it.

I take a much more relaxed attitude toward most new evidence, as long as I am satisfied that the other party is not being unfairly surprised and that it has a reasonable chance to respond. Unfortunately—and this undoubtedly undermines the grievance procedure a bit—I think it is beyond the realm of human nature to engage in quite as systematic an examination of the facts, giving a thorough thinking-through of the theory of the case, during the informal grievance sessions as when the case has been labeled for arbitration. It may indeed be only after the decision to go to arbitration has been made that a lawyer is ever involved.

It may be inconsistent with my theory of relevance, but I would permit the union to introduce evidence about the employee's age, marital status, unemployment, number of children, and other personal factors that are typically used in a discharge case after ruling the employee's past record inadmissible. As a practical matter, it has been so long accepted that the nature of a good employment record is automatically relevant to a disciplinary proceeding that I always let a union introduce it.
To anyone who wishes to pursue further the issues of procedural regularity, I commend R. W. Fleming's *The Labor Arbitration Process*.¹ He addresses this question of when to admit past misconduct, first in justifying the penalty (he is largely favorable toward that), second on the issue of the witness's credibility, and third on the question of guilt itself—whether it is more probable than not that since he has done this kind of thing in the past he has probably done it on this occasion. Consider a closely related situation of a man who has stolen goods every Friday night for the past two months and is charged with another Friday night theft, but he denies it. I would admit that evidence, but I do not know how much weight I would give it. If the man had been arrested for theft on the outside in an entirely different situation, I would not admit it. Arbitrators rely heavily on the particular facts of particular cases; they do not like sweeping rules.

**Intervention by Arbitrator**

I add a few words about the arbitrator's role in the handling of witnesses to show the sensitivities of the parties on this. Lawyers become incensed when an arbitrator intervenes in a case in a substantial way. The lawyer who gives a client a botched bit of representation, making the arbitrator feel he must intervene in the name of justice, is being shown up in front of his client, and the lawyer does not like that one whit. The opposing lawyer who grinned as he saw his adversary botch up his client's case is incensed that the arbitrator becomes an advocate for the other side. It is a terrible dilemma in some cases. The arbitrator should rely on his conscience and common sense, be as discreet as he can, and neither embarrass the parties nor inject himself to the point of dealing with issues that the parties have not raised. He should not open doors where there may be skeletons that both parties feel should be kept safely locked in. Especially when dealing with good lawyers, an arbitrator should not blunder into matters he thinks are obviously relevant but that the lawyers are not dealing with. They have their reasons, if they are good lawyers. Naturally, judgments have to be made about this.

If there is something that I think is truly important that is not being dealt with, I occasionally, during a recess, take the two lawyers aside and say that I do not understand why a certain contract provision does not have some bearing on this case and could they explain it to me. Sometimes they can do so, and it becomes perfectly understandable.

¹Champaign, University of Illinois (1965).
Sometimes one lawyer becomes angry for my having pointed it out and the other one pounces, emphasizing its significance and believing it will win the case for him. Unfortunately it does sometimes, so that is dangerous. The arbitrator has made an enemy. There is a constant tension between having them play the game as a sporting event and trying to do justice. On occasion I find that rather traumatic.

I urge strongly in writing an award, especially if modifying any kind of penalty in a discharge or discipline case, that the arbitrator read the contract concerning his authority, particularly with respect to remedies. For example, in a disciplinary case he should determine whether he is entitled to modify the employer's sanction, required to sustain it, or may set it aside in toto. At the close he should try to get both parties to give a brief oral summation of just what their points are, if there is any doubt at all. Alternatively, the arbitrator may sum up his understanding of the parties' positions, and ask them if it is correct. At least they will go away content, happy that they got their arguments across.

Although it is very difficult to generalize, I think I would take a more activist role if I think the grievant's union counsel is not doing a good job than in a contract interpretation case wherein it is not an individual who may be hurt. There is a device that may permit an arbitrator diplomatically to do a little more than otherwise could be done without causing offense. While trying to convey the notion that I am not raising a new issue or reaching into new areas but simply making sure that I understand what is testified to, I sometimes ask for clarification that I understand properly a certain point. I then ask a question that carries beyond the question that has previously been asked, but not so much so that it appears I am taking over the questioning. I do not want to do that for more than about two questions at a time. However, occasionally I am concerned there is going to be a serious miscarriage of justice. Employers and unions are often upset at this, but the arbitrator owes a responsibility to himself as well as to the process and the parties, and I do not want to be a collaborator in an injustice.

Obviously it affects the arbitrator if there is a great disparity in the quality of counsel or if a lawyer opposes a lay person. Needless to say, one party, usually the employer, is incensed that the money spent in order to have superior representation is being counterbalanced in any way by the arbitrator who is hired not to represent the other side but to serve as the impartial arbiter. Quite certainly, professional representatives will take umbrage at any public intervention, even when it is helpful.

The contract is usually introduced as an exhibit and becomes part of the record. For example, there is a grievance that something is contrary
to that contract. Frequently the sections allegedly violated will be specified, but it is generally accepted that unless there is a square stipulation to the contrary, the entire contract may be examined to shed light on the meaning of the cited sections. The problem I have is really more a matter of diplomacy than authority. Am I a bull in a china shop who is opening up matters that should have been kept in the closet? Am I embarrassing one of the parties to no good end? Those are matters of diplomacy and they must be worked out by feeling one’s way.

It is very easy to say that theoretically the arbitrator is a passive spectator who, at the end of the match, decides who wins. When an arbitrator sees something that he thinks can be corrected, there is a terrible itch to prevent injustice. It does not just concern the union and the company, for there is another party involved, the grievant. There is a much stronger case for intervention when there is an individual grievant than when there is a big contract problem that is more abstract.

**Role of Counsel**

Fortunately, I have never personally been involved in a case where there was any clash between the union and a grievant’s separate outside counsel. It has come up more in recent times, especially in minority cases with unfair representation claims in the background. That the union represents the grievant would be the classical response of the parties to collective bargaining agreements, and I believe that most arbitrators would agree. I like to think that some of the racial suspicions of a few years ago have been receding in industrial relations, and that there is not as much antagonism between minority members and their unions. Some of the steam behind the move for third-party representation has dissipated, but there was a time when academic commentators, not the parties in the field, were indeed trying to devise theories that would permit minorities to be represented by counsel of their own choosing at arbitrations.

I find most post-hearing briefs in the simpler, standard discipline cases a waste of effort. They extend the time and cost, and they do not affect the decision that I probably reached driving home following the hearing. Do remember to set dates for briefs and tell the parties when the award will be. Make sure both sides understand that, and end graciously. Thank them both for their help and professional presentations.

When an arbitrator is satisfied that union counsel has done a good job in representing a losing grievant, especially in a case that for any reason might later prove troublesome, he might specifically point out
that a fine presentation was made on behalf of the grievant, but not before the case is decided; that would be misread. If the discharge is sustained, it should be included in the opinion and award. If that sort of commendation is fair, it can be extremely helpful to counsel in mollifying the client, perhaps even preventing an unfair representation suit.

Consent Awards

Initially, I felt very strongly about the question of consent awards in which the parties jointly request the arbitrator to make a certain decision, but I have become a little more troubled about some of the practicalities of these situations. The toughest case of all is in dealing with an individual employee. The union can handle this in a variety of ways. It can go forward and say not one word to the arbitrator and simply present the case in such a way as to make clear to the arbitrator that it agrees with the company that the employee is guilty, that he ought to be discharged, but that for some political reason the union has to go to arbitration. Any clever counsel can manage the affair.

I have never had company and union approach me and simply say that they had to go through with the charade, at the same time making me aware of their feelings, and that they have no objection to the discharge being sustained. I have been approached by union and company in situations where they wanted an interpretation of the contract and there were political problems on both sides. They have asked me to write the interpretation per their suggestion on grounds that I can bear the brunt of criticism, that is what I am paid for, and that is how I would decide the case anyway.

At least in the last instance, I am now satisfied that if it is a totally honest and fair solution that they have agreed upon—the kind that I might have worked toward on my own—there is nothing to cause me not to make my award to conform. Remember: this is something that is not wrong, it is something I might have come to on my own. It is probably better, as a practical matter, than the decision I would have arrived at on my own because they worked it out themselves. The problem, of course, is that the parties are deceiving their stockholders and their members. What is the arbitrator's function, ultimately: to keep trouble stirred up or to resolve it?

I return to that basic question of what role should the arbitrator play. I am quite prepared to have persons argue that as a matter of personal honor and personal integrity—not a matter of the integrity of the arbitration process, but personal integrity—an arbitrator is not going
to put his name on an award he did not work out in his own mind, but I am now much more content with the notion of the agreed award under proper conditions.

Let me pose this question just a little differently. Suppose at the end of a case, after all the evidence is in, the arbitrator asks the two parties how the case should be decided and what should be the remedy. They both come up with the same answer. One might ask why the parties do not sign the contract and forget about an award. It sometimes happens, however, that while they both finally concluded what was the right answer, they do not want to carry that back to their constituencies. If one thinks this through and can justify their proposal, one can support it with reasons that make perfectly good sense. What exactly has the arbitrator done that is not a furtherance of the practicalities of the situation? He has ended a dispute and shaped a fair and sensible solution. Possibly he has caused problems for the chap who wants to run for president of the union or president of the company. Maybe he has done them an injustice.

The arbitrator's Code of Professional Responsibility justifies the consent award, with appropriate safeguards. It may be analogous to the tripartite hearing. In such a hearing, the two parties say they are really in accord and recommend that the arbitrator, as the deciding vote, go a certain way. They will then formally dissent from the portions of the award that go contrary to their interests. The arbitrator may think this is sound advice. It is exactly what he ought to do, but to the public you are the decisive vote.

There are no easy answers to these and some other procedural questions. For a new arbitrator, it is important to understand the issues involved so that conscious decisions may be made as these procedural questions arise.