Handling Problems of Evidence

Arbitrators are not bound by legal rules of evidence in most arbitration proceedings. The exceptions are when a statue or special arbitration agreement so provides. Most arbitration cases are much more informal than courtroom procedures, and designedly so, inasmuch as arbitration grows out of collective bargaining and assumes a continuing relationship between the parties.

The purpose of arbitration is to seek out the facts in a case and to have decision rendered. The application of technical rules of evidence might make it appear that all the facts are not being taken into account. For these reasons, arbitrators are permitted (and sometimes required) to accept or listen to all evidence which a party believes to be pertinent. An arbitrary refusal to accept all relevant evidence is grounds for vacating an award. On the other hand arbitrators may rule in the hearing or in the decision against the propriety of certain evidence.

Arbitrators may not subpoena evidence nor may they compel the testimony of witnesses. (Again, arbitration under a statute or a special agreement may provide differently.) Normally such power is not necessary since the arbitration is voluntary and the parties usually will provide what the arbitrator wants and needs. A failure to produce relevant evidence would naturally be taken into account by the arbitrator, to the disadvantage of the party failing to respond.

Weight and credibility
It is, of course, up to the arbitrator to decide what weight will be given to a place of evidence and whether or to what extent a particular witness is believed. In making such a determination, arbitrators take into account these factors:

- whether or not statements "ring true"
- the conduct of the witness on the stand
- whether he or she speaks from first-hand knowledge or hearsay
- inconsistencies in the testimony
- the experience in the matter on which he or she is testifying
- past record of personality

Not one of these factors by itself is likely to sway an arbitrator but all of them taken together determine how much weight or credibility an arbitrator gives to evidence or witnesses.

KINDS OF EVIDENCE

Hearsay evidence
If witnesses testify as to what they did or saw, their testimony carries more weight than if they testified as to what somebody else told them.

Parole evidence
This pertains to word-of-mouth or verbal agreements. It is admissible only "for what it might be worth" which is usually little or nothing. It will not prevail against any written agreement. Sometimes the agreement will state specifically that verbal agreements that conflict with it are invalid.

Circumstantial evidence
Though not as strong as direct evidence, circumstantial evidence is acceptable and sometimes decisive in arbitration cases. The test is whether a preponderance of the evidence proves that a worker actually performed an alleged act.

SOME PROCEDURAL PROTECTIONS

Though most kinds of evidence are admissible in arbitration proceedings, regardless of the weight that will be attached to them by the arbitrator, other kinds of evidence are not admissible or have protections that accompany their use. In addition, there are certain procedures that by common-law rules must be followed in arbitration proceedings. The most important of these are discussed below.

Right to cross-examination
An arbitrator will not accept evidence if it is submitted only on condition that the other party not be allowed to see it. The parties not only have the right to see evidence (exhibits) but also to cross-examine witnesses making allegations. Even new data submitted in post-hearing briefs can be grounds for demanding a further hearing.

Certain exceptions are made to this general right, as in admitting heresay evidence or affidavits from persons not present at the hearing. However, this deviation from normal procedures frequently results in the discounting of the weight of the evidence by the arbitrator.

Withholding evidence until hearing
In order to prepare a defense or rebuttal, parties must be given copies of all exhibits. There is also a strong convention against withholding previously-known evidence until the hearing. At the very least the opposing party may claim time to consider such new evidence. In some cases deliberate delay in withholding evidence will seriously damage the case of the party doing so. Sometimes the contract will say that the parties must reveal in grievance negotiations any evidence available to them at that time. The only exception that is generally recognized is where evidence has only recently come to knowledge of one of the parties.

Improperly obtained evidence
Evidence obtained by illegal or unethical means, such as unauthorized locker searches of personal belongings, may be refused by arbitrators. Another example is entrapment, where a plan is pursued solely for the purpose of catching a person in a wrongful act.

Offers of compromise
Such offers made in negotiations maybe received by arbitrators, but if so, will usually be given little weight since they represent normal and desirable efforts to reach a settlement.

Outside testimony
Certain types of cases, such as incentive rate disputes, sometimes are helped by the testimony of outside persons.

Generally arbitrators try to restrict testimony of outsiders (especially "character witnesses") or get the agreement of the parties to *their* appearance. On the other hand, of course, testimony by doctors or other expert witnesses, who have knowledge of conditions of witnesses or plant operations may be critical in certain types of cases.

Inspection by arbitrator

If both parties consent, the arbitrator may make personal investigation of cases. The most common use is for plant inspections. Sometimes the arbitrator himself will press for evidence of this sort.

Source: Boaz Siegel, Proving Your Arbitration Case, BNA, 1961