



**PART XIII**  
**GLOSSARY OF**  
**LEGAL TERMS**



**AFFIDAVIT** - a written declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer an oath or affirmation. Sometimes used in arbitration but are subject to the same limitations as other forms of hearsay evidence. American Arbitration Association Rule 29 provides that arbitrators may receive and consider the evidence of witnesses by affidavit but should give it only such weight as they deem it entitled to after consideration of any objections made to its admission.

**AMICUS CURIAE (FRIEND OF THE COURT)** - in actions at law, it is persons or organizations, not parties to an action, but who request or are invited by the court to intervene or present their views.

**ARBITRARY AND CAPRICIOUS** - characterization of a decision or action taken by the Postal Service, arbitrator, or other agency meaning willful and unreasonable action without consideration or in disregard of facts or without determining principle.

**ARGUENDO** - for purposes of making an argument, certain facts or principles will be presumed as true, i.e. for the sake of argument.

**ASSAULT** - any willful attempt or threat to inflict injury upon the person of another, when coupled with the following elements:

1. an apparent present ability to do so, and,
2. any intentional display of force such as would give the victim reason to fear or expect immediately bodily harm.

An assault may be committed without actually touching, or striking, or doing bodily harm, to the person of another.

**BATTERY** - criminal battery is defined as the unlawful application of force to the person of another which includes the following elements:

1. the action or omission of a person (conduct)
2. mental state - i.e. intent to kill or injure, or criminal negligence, or perhaps the doing of an unlawful act; and,
3. the harmful result to the victim which may be either a bodily injury or an offensive touching.

The actual offer to use force to the injury of another person is "assault". The use of this force is a "battery", which by definition always includes an assault. Hence, the two terms are commonly combined in the term "assault and battery".

**BIFURCATION** - splitting the hearing, normally done to require arbitrator to address a threshold issue before considering the merits of the case.

**BONA FIDE** - in good faith, legally valid.

**BURDEN OF PROOF** - the necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties. In terms of arbitration procedure, it is the standard of proof which a party must establish in order to successfully convince the arbitrator that its grievance or defense to a grievance is meritorious. There are various standards, as to the burden of proof, which may be imposed upon a party depending upon the matter being arbitrated. These evidentiary standards include:

1. **Beyond Reasonable Doubt** - means fully satisfied, entirely convinced, satisfied to a moral certainty. In a criminal law case, the accused guilt must be established "beyond a reasonable doubt," which means that facts proven must, by virtue of their probative force, establish guilt.
2. **Clear and Convincing Proof** - that measure or degree of proof which will produce in the mind of the trier of the facts belief or conviction as to allegations sought to be established; it is intermediate in the level of proof required, being more than more preponderance, but not to the extent of such certainty as is required in "beyond a reasonable doubt" standard.
3. **Preponderance of the Evidence** - the quantum of proof used by many arbitrators. This test requires that the party bearing the burden of persuasion to convince the tribunal that, more likely than not, its version of the facts is correct. This test has been applied in a great many arbitral contexts, and appears to be the standard employed in the numerous cases where burden of proof is never mentioned.

It is difficult to generalize on the application of the doctrine of "burden of proof" in the field of arbitration. The burden of proof may depend upon the nature of the issue i.e. whether contract or discipline, or the specific contract provision.

In many cases, the arbitrator simply receives the facts and decides the issue without any express indication that he is thinking in terms of burden of proof. Many arbitrators appear to base their awards in favor of the party which has simply been most persuasive. The best course of action is to understand the arbitrator and how he or she typically deliberates upon a given issue. This is best accomplished by analyzing the previous awards of your arbitrator.

**CAVEAT** - a notice of warning to be aware of some significant issue or fact.

**CEASE AND DESIST ORDER** - an order by an arbitrator or court which prohibits a person or agency from acting. It is a type of injunction which may be permanent or temporary in nature.

**CIRCUMSTANTIAL EVIDENCE** - evidence of an indirect nature. It means that existence of principle facts is only inferred from circumstances. Arbitrators may rely upon circumstantial evidence when deciding a case. However, especially in discipline cases, Arbitrators generally hold that the use of circumstantial evidence does not eliminate the requirement that there must be clear and convincing proof to establish that the offense charged was committed by the employee.

**COLLATERAL ESTOPPEL** - the determination by an arbitrator that a question presented for hearing has been considered and ruled upon in a prior but different cause of action or grievance. Known as the Doctrine of Collateral Estoppel this doctrine may be relied upon by an arbitrator to rule a matter in arbitrable.

**CONSENT OR DIRECTED OPINION** - an award which is based upon the agreement of the parties to dispose of the grievance in a certain matter.

**CONTINUANCE** - in arbitration, the adjournment or postponement of a hearing to a subsequent day. Motion for continuance may be made by either party for good cause.

**CORROBORATION** - the act of strengthening or giving additional weight and credence to something already established.

**CORROBORATING EVIDENCE** - evidence supplementary to evidence already given and tending to strengthen and confirm it; additional evidence to the same point.

**DE MINIMIS** - (the deminimis rule) - that which is so small as to be deemed immaterial. In denying grievances, arbitrators sometimes apply the rule of de minimis non curat lex, under which trifling or immaterial matters will not be taken into account. Often in applying this principle, the arbitrator concludes that the action complained of is such a slight departure from what is generally required by the agreement that the action must be viewed either as a permissible exception or as not constituting an injury at all. De minimis concept sometimes applied, for example, in denying grievances protesting the performance by management personnel of small amounts of bargaining unit work where a unit employee was not readily available.

**DEMONSTRATIVE EVIDENCE** - that evidence addressed directly to the senses without intervention of a witnesses testimony. (Eg., a chart, graph or drawing)

**DE NOVA** - in the legal context, it usually is in reference to a new trial of the case. For example, in EEO cases, the EEOC may hold a hearing on the alleged complaint. If the complainant files a law suit in U.S. District Court, the entire case will be heard again or in other words, heard De Nova.

**DEPOSITION** - a formal legal device by which one party asks oral questions of the other party or of a witness for the other party. The person who is questioned (or deposed) is called the deponent. The deposition is conducted under oath outside of the courtroom, usually in one of the lawyer's offices. A transcript - word for word account - is made of the deposition.

**DISMISSAL WITH PREJUDICE** - dismissal made on the merits of the issue and preventing further or later proceedings on the same subject matter.

**DISMISSAL WITHOUT PREJUDICE** - dismissal not on the merits, which does not bar subsequent action (e.g. An appeal) on the same case.

**DISPARATE TREATMENT** - unequal treatment. Contention that there was disparate treatment or punishment frequently used as a defense to disciplinary action. In order for "disparate treatment" to be successfully utilized as a defense, must show that within past few years some employees charged with offenses, virtually the same as those charged against the present grievant, have suffered penalties less severe than those imposed on the grievant.

**DOCUMENTARY EVIDENCE** - evidence supplied by written instruments, inscriptions, documents of all kinds, as distinguished from "oral" evidence (e.g., settlement agreements, letters)

**DOUBLE JEOPARDY** - in arbitration this is the prohibition against being disciplined for the same infraction, misconduct or transaction. The prohibition against double jeopardy means that the Arbitrator may rule to sustain a grievance where he/she determines that the Postal Service has disciplined an employee more than once for the same offense. This principal stems from the reference to double jeopardy included in the constitution of the United States. (e.g., where employee is charged with excessive absenteeism, the Postal Service may not give a one-day suspension and then after serving the suspension remove the employee for the same occurrence of absenteeism that was the basis for the suspension)

**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION** - government body responsible for adjudicating claims of discrimination based on sex, race, national origin, handicap, and age. Has appellate jurisdiction over claims made pursuant to the Civil Rights Act and denied by the Postal Service.

**EXAMINATION** - purpose of witness examination is to elicit favorable information on the subject of the hearings. Strict observance of legal rules for examination of witnesses may not always be required in arbitration. However, a basic understanding of these rules is essential to producing a winning case. Rules of examination are more strictly followed in proceedings before the MSPB.

1. Direct Examination - the questioning of witnesses testifying on behalf of the questioner. Purpose is to elicit a verbal story of facts from the witness. Generally, advocates should not ask leading questions of a witness except those questions which merely identify the witness. Questions which elicit a simple "yes" or "no" are generally considered leading questions.
2. Cross Examination - union advocates questioning of witnesses testifying for the Postal Service is cross examination. Basic purpose is to contradict the employer's facts and, in discipline cases, allow the grievant's advocate the opportunity to question those who have testified for the employer. Leading questions permitted and may serve purpose of restricting witness's response to the desired answer.

3. Redirect Examination - used when direct testimony has been damaged under cross examination. The witness may be questioned again under redirect to clarify or dispute the employer's information elicited under cross examination.
4. Impeachment of Testimony - the process typically used on cross examination to show that the witness's testimony is contradicted by previous statements or by showing inadequate powers of observation and memory.
5. Objections - may be made to questions on cross-examination which go beyond the scope of proper cross-examination. Arbitrators generally allow great leeway on the examination of witnesses; however, appropriate objections may serve to alert the arbitrator that questions are approaching irrelevancy, are clouding the issues, or are vindictive in nature.

**EXCULPATE** - to prove innocence, to free blame or guilt or liability, to absolve or exonerate. (E.g. exculpating evidence is that which shows a persons innocence.)

**EX PARTE** - on one side, done on behalf of or on request of only one party. Pre-hearing exparte contacts are discouraged by the Code of Professional Responsibility for Arbitrators because one side may receive an unfair advantage. Copies of all correspondence and documents submitted to the arbitrator by a party should be provided to the opposing party.

**EXTENUATION** - to lessen or try to lessen the charge(s) by a partial excuse.

**HEARSAY** - evidence not proceeding fro the personal knowledge of the witness, but from the mere repetition of what he had heard others say. Evidence, oral or written, is hearsay when its probative value depends in whole or part on the competency and credibility of a person other than the person called as a witness. Evidence of a hearsay character is often presented at arbitration hearings. Arbitrators generally admit such evidence, but qualify its reception by informing the parties that it is admitted only "for what it is worth". (e.g., a newly elected national business agent, offers as evidence a letter to his predecessor from a Postal Service manager concerning an issue before the arbitrator; the arbitrator is likely to ignore the fact that the evidence is hearsay; if satisfied that the document is genuine, he will give it such weight as its relevancy dictates. On the other hand, hearsay testimony allegedly made by the "window clerks", though perhaps not excluded from the record by the arbitrator, probably will have no effect on his decision.)

**INTER ALIA** - means "among other things"

**INTEREST ARBITRATION** - interest arbitration involves settlement of terms of a contract between the parties as contrasted with grievance arbitration which concerns the violation or interpretation of an existing contract.

**INTERROGATORIES** - series of formal written questions used in pre-hearing or post-hearing examination of a party or witness.

**JURISDICTION** - may mean either the legal power, right and authority to hear and decide cases, or, the geographical area within which authority may be exercised.

**JUST CAUSE** - the standard by which it is determined that the employer has sufficient reason to remove an individual from employment. Basically synonymous with reasonable or proper cause.

**LACHES** - neglect to enforce ones rights at proper time or undue delay in asserting a right or claiming a privilege.

**MATERIALITY** - (material evidence) - evidence which has an effective influence or bearing on a question in issue which by itself or in connection with other evidence is necessary for determining the outcome of the case.

**MERIT SYSTEMS PROTECTION BOARD (MSPB)** - a three member administrative body created through the Civil Service Reform Act of 1978 with one of its primary responsibilities being the adjudication of appeals from employees of the Federal Government and the Postal Service. The Board has appellate jurisdiction over; removal or reduction-in-grade step increases; actions based-upon removal, suspension for more than 14 days, reduction-in-grade or pay, or furlough for 30 days for less; determinations relating to disability retirement, health insurance and annuities; and, actions involving reinstatement of preference eligible veterans. Employees covered by collective bargaining agreements must elect whether to file an appeal with the MSPB or to proceed with the negotiated grievance procedure, but not both. An election to grieve the matter does not prohibit an employee from requesting Board review of a decision involving discrimination. (Title 5, Code Fed. Regs.)



**MITIGATING CIRCUMSTANCES** - circumstances which do not constitute a justification or excuse of the offense in question, but which, in fairness and mercy may be considered as extenuating or reducing the degree of culpability. Arbitrators frequently base their modification of a discipline charge upon the doctrine of "mitigating circumstances". (Eg. Where grievant discharged on grounds of poor attendance, arbitrator may modify discipline to suspension where grievant's attendance problem due to alcoholism and grievant shows signs of overcoming his/her addiction)

**MITIGATION OF DAMAGES** - rule typically presented in arbitration on questions of back pay. It refers to the rule that a person suffering damages from another's wrongdoing must make reasonable attempts to minimize those damages. In terms of back pay, it refers to the rule established in the ELM that a grievant should make reasonable efforts to secure other employment during the period between his/hr wrongful discharge and reinstatement.

**MODIFICATION** - (modification of award) the term used to define an arbitration award which changes the basic demands of a grievance; an alteration which introduces new elements into the details, or cancels some of them, but leaves the general purpose and effect of the grievance intact. Falls between an award which is denied and one that is sustained.

**NATIONAL LABOR RELATIONS BOARD** - federal government body which administers the National Labor Relations Act. It has two principle functions; prevent and remedy unfair labor practices by the union or the employer; and, to conduct secret ballot elections to determine whether employees want to be represented by a union for collective bargaining.

**NEXUS** - is usually referred as the direct line between the alleged or proven criminal act and the continued performance of an employee. When employees have been convicted of some minor criminal offence such as assault, possession or sale of small quantities of drugs, etc., which are not job related and have been committed while in off-duty status, the Postal Service must establish the nexus between the act and the efficiency of the service.

**OFFICE OF WORKERS' COMPENSATION PROGRAMS** - federal agency which has administrative authority to decide whether the employee, or claimant acting on behalf of the employee, is entitled to benefits under the Federal Employees Compensation Act (FECA), an act which entitles Federal and Postal Service employees to a schedule of compensation for job-related death or injury.

**PAST PRACTICE** - refers to the prohibition against unilateral action where there is a "binding practice" of the parties which has become in effect an implied term of the agreement. Generally agreed that in the absence of a written agreement, a past practice, to be binding, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties.

**PLEADINGS** - written allegations and counter allegations made alternately by the parties to prove or disprove a point.

**PRECEDENT** - the weight attached to a previously decided arbitration award based on similar facts. Arbitrators are not bound by precedents. Their job is to give their best judgment as to the meaning of particular contract language. However, arbitrators do take note of rulings handed down by their fellow arbitrators, and in many cases the presentation of a well-reasoned precedent decision may significantly effect the outcome of the arbitration.

**PRIMA FACIE CASE** - consists of sufficient evidence from which a fact finder could reasonably conclude that he or she should rule in favor of a certain party unless the opposing party can overcome this favorable presumption. The standard which must be met in order to establish a prima facie case varies depending on the nature of the issue being addressed. For example, in a "disparate treatment" discrimination complaint before a court or the EEOC a prima facie case is met by the plaintiff when proof is shown that he or she was treated less favorably than a similarly situated individual of the opposite sex or another race. The employer may rebut the presumption of discrimination created when a "prima facie" case made out merely by articulating a legitimate business reason for his employment action. The plaintiff then has an opportunity to show that the employer's asserted reason is a mere pretext for discrimination.

**PRIMA FACIE EVIDENCE** - evidence which is on its face sufficient to establish a given fact which if uncontradicted is sufficient to sustain a judgment in favor of the issue which it supports.

**PROCEDURAL DUE PROCESS** - central meaning is that parties whose rights are to be affected are entitled to be heard and, in order that they may enjoy that right, they must be notified as to adverse action taken against them. Based on those safeguards to one's liberty and property mandated by the 14th Amendment of the U.S. Constitution, such as right to counsel, right to copy of transcript, right of confrontation; all of which are specifically provided for in the 6th Amendment.

**PRO FORMA** - made or carried out in a perfunctory manner or as a formality.

**PURVIEW** - limit or scope, as the “purview” of a statute. Eg. MSPB appeals are dismissed because the appellant is not a veteran or has not been employed continuously in the same or similar position for a year or more. The appeal is not within the “purview” of the presiding official’s authority.

**QUANTUM OF PROOF** - the amount of proof needed to establish a fact or prove a case. A preponderance of evidence is the quantum of proof required by an agency in adverse actions to be successful before the MSPB. (See **Burden of Proof**).

**REASONABLE CAUSE** - a standard which may serve as basis for discipline. Is such a state of facts as would lead a person of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that another is guilty of a crime. This is particularly relevant to cases of discipline based on the employees alleged criminal misconduct.

**RECALCITRANT** - term sometimes used by arbitrators in discipline cases to describe behavior where the grievant’s conduct is not responsive to progressive discipline.

**RECUSE** (recusation) (motion to rescue) - process by which an arbitrator is disqualified or disqualifies himself or herself from hearing a matter in arbitration. A motion to recuse should be made whenever it appears that the arbitrator has some interest which would interfere with his or her ability to be impartial.

**REMAND** - a procedural move where the arbitrator sends a particular question back to the parties for settlement or resolution. This frequently occurs where the arbitrator sustains a grievance, but then sends the question of an appropriate remedy back to the parties. In such cases the arbitrator normally retains jurisdiction over the case in the event the parties are unable to agree upon a remedy.

**RES JUDICATA** - rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. In arbitration, this rule is invoked to prohibit the re-arbitration of an issue which has been already decided by an arbitrator. (Eg., where arbitrator X rules that employee was removed for just cause, the union may not seek to re-arbitrate the question of whether employee was removed for just cause).

**RELEVANCY** - is evidence that bears on the specific case. In law it generally means the tendency of evidence to establish a material point or proposition which you are attempting to prove.

**STARE DECISIS** - doctrine that, when a court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same, regardless of whether the parties are the same. In arbitration under the National Agreement, the rule of stare decisis is not strictly followed at all levels. Typically, arbitrator's are required to follow the doctrine of stare decisis where an interpretive question has been previously decided at the national level. On the other hand, where the arbitrator is presiding over a disciplinary case, then he or she may choose to disregard preceding awards on a particular issue.

**STIPULATION** - in arbitration, typically refers to agreement between the parties not to contest certain facts.

**SUA SPONTE** - meaning voluntary and upon its own motion or will. (Eg. In MSPB hearings presiding officials may make their own motions regarding certain matters as provided for in the MSPB regulations).

**SUBPOENA DUCES TECUM** - legal process requiring one to appear as a witness, and bring specific books and records in his or her possession.

**SUBSTANTIVE DUE PROCESS** - broadly defined as the constitutional guarantee that no person be arbitrarily deprived of his life, liberty or property; the essence of substantive due process is protection from arbitrary and unreasonable action. Due process in arbitration, substantive or procedural, may take on a different context than due process of law in the courts.

**TIMELINESS** - usually refers to the question of whether a grievance or duty required by the National Agreement was acted upon within the appropriate time limits.

**UNTIMELINESS, DEFENSES TO** -

1. Waiver of untimeliness - refers to one party's consent to the filing of a grievance even though the other party's filing is untimely.
2. Continuation violation (continuing violation) - usually applies to the type of contract violation which is committed over a span of time. As to questions of timeliness, the last act of the offense or violation controls for purposes of commencing the period set for filing of grievances.

3. Ripeness - in relation to arbitration, the question of whether there is a substantial controversy or dispute of such immediacy that there is no other alternative to its resolution except arbitration. Lack of ripeness might be alleged where violation of National Agreement has not yet occurred in fact.
4. Excusable Neglect - a defense, where there is the untimely filing of a grievance caused by events which were beyond the control of the union so as to excuse the late filing.

**VACATING (vacating an award)** - in arbitration, the process where a court voids the decision of an arbitrator. Although the parties agree to binding arbitration, courts may be petitioned to vacate the award of an arbitrator. However, the power of the courts to vacate an award is extremely limited. The grounds for vacating an award may include: the award does not draw "its essence" from the bargaining agreement; the award is incomplete, ambiguous, or contradictory, making implementation impossible; the award is based on a non-fact; the arbitrator was biased or partial; the arbitrator refused to hear pertinent and material evidence.

**VOIR DIRE** - from french. Means "to speak the truth". Used in legal context to denote the preliminary examination which a court, administrative law judge, arbitrator or opposing party may make of one presented as a witness, where his or her competency, interest, etc., is objected to.

**WEINGARTEN RULE (rights)** - rule which states that employees have the right under the National Labor Relations Act to refuse to submit without union representation to an investigatory interview which the employee reasonable believes may result in disciplinary action. Rule stems from U.S. Supreme Court decision (NLRB v. J. Weingarten, Inc.) which upheld rule.