

2017 UPLMC Annual Conference

## Arbitration Basics & Past Practice

Kathryn VanDagens, Arbitrator  
March 2, 2017

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### Labor Arbitration is a Substitute for Industrial Strife, not Litigation

“Arbitration is a stabilizing influence only as it serves as a vehicle for handling every and all disputes that arise under the agreement.”

► *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960)

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### Grievance procedure is the *quid pro quo* for the “no strike” clause

“Yet the agreement is to submit all grievances to arbitration, not merely those that a court may deem to be meritorious. There is no exception in the “no strike” clause, and none therefore should be read into the grievance clause, since one is the *quid pro quo* for the other.”

► *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960)



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### Roots of Arbitration

- ▶ Roosevelt sought to prevent interruptions in industrial production during WW II.
- ▶ War Labor Board had jurisdiction to resolve labor disputes through "mediation, voluntary arbitration," or arbitration "under the rules provided by the Board."

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### The Collective Bargaining Agreement



- ▶ "Not an ordinary contract...."
- ▶ In "the interpretation and enforcement of collective bargaining agreements, we think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve."
  - ▶ *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567 (1960).

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### The Arbitration Process

How to Prepare for Arbitration

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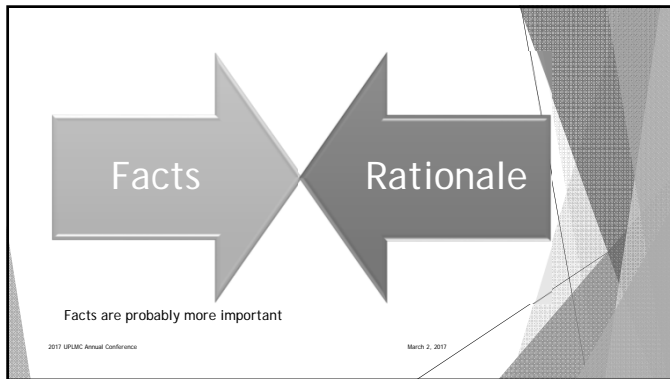
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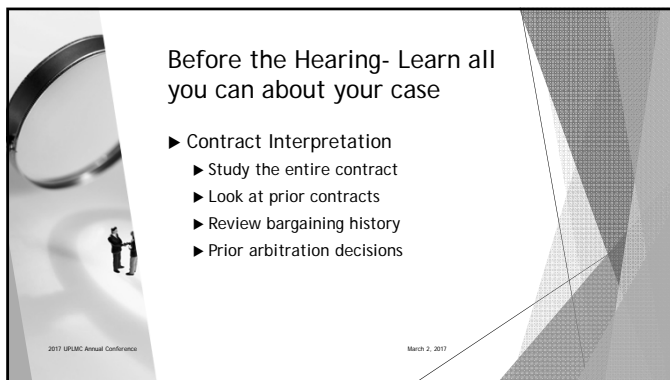
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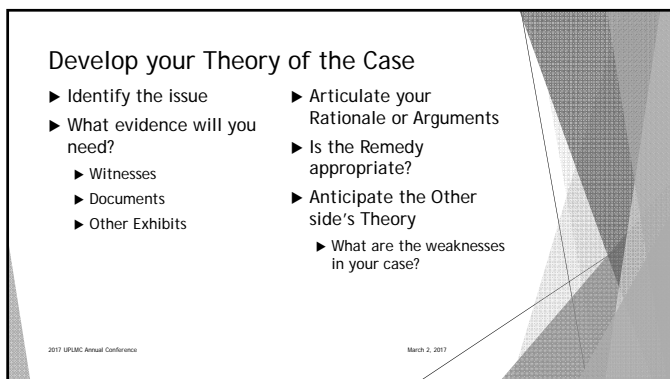
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### Is Settlement Possible?

- ▶ Explore the possibility of settlement with the advocate on the other side.
- ▶ If you can't settle, can you stipulate to
  - ▶ The Issue
  - ▶ The Exhibits
  - ▶ The Undisputed Facts

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### Prepare your Witnesses



- ▶ Review Direct Examination
- ▶ Anticipate Cross Examination

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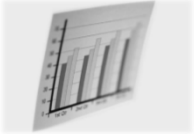
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### Prepare Your Exhibits

- ▶ Think outside the paper trail
- ▶ Photographs, Flow Charts, Diagrams, Time Lines, Drawings, etc.
- ▶ Bring enough copies



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### Will a Site Visit Assist?



- ▶ Will the arbitrator understand the case better if you visit the work site?
  - ▶ Make arrangements in advance
  - ▶ Do not try to speak to the arbitrator out of your opponent's earshot.

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### Obtaining Documents

- ▶ A party should not ambush its opponent by producing previously unseen documents at the arbitration hearing.
- ▶ Use language of collective bargaining agreement or general labor principles to obtain documents.



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### Discovery in Arbitration

"Sound collective bargaining requires frank and candid disclosure at the earliest opportunity of all the facts known to each party. There will undoubtedly be times when facts are not discovered, and therefore not disclosed, until after the grievance has been partially processed, and problem enough is created by those instances. There is not a scintilla of justification for the withholding of information by either party from and after the time it is discovered."

▶ *General Motors Corp.*, Umpire Dec No. F-97 (Alexander, 1950).

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### At the Hearing-Opening Statements

- ▶ The first of several times to tell your story.
- ▶ You can reserve your opening if the other side is going first, but should you?

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### Offer all Evidence Necessary to your Blueprint

- ▶ Make sure that every point you need to make will be covered by some part of the evidence offered.
- ▶ If a witness with relevant testimony is neither called nor explained, ask the arbitrator to draw an adverse inference.

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### Relaxed Rules of Evidence

- ▶ Although rules of evidence are relaxed in arbitration, they can still be helpful
  - ▶ For example, hearsay testimony is inherently less reliable than testimony from an eyewitness
- ▶ Arbitrators will consider these rules when weighing the strength of evidence presented

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Admissible may not be Probative

Even if the evidence is admissible, the arbitrator may not rely on it in making a decision

Argue in your closing why its not relevant, or why other evidence should be given greater weight.

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After the Evidence is in

- ▶ Closing Summation
  - ▶ Oral Closing
  - ▶ Written Brief
- ▶ Synthesize the evidence and your theory of the case

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Proving Your Case  
The Necessary Elements

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Elements of Just Cause

- ▶ Collective bargaining agreement may use "cause," "proper cause," or "just cause"
- ▶ Burden is on employer to demonstrate reason
  - ▶ Employee's ability to perform the work
  - ▶ Employee's conduct on the job,
  - ▶ or the Employer's legitimate business needs.
- ▶ Appropriateness of Penalty

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Abrams & Nolan: Toward a Theory of Just Cause

Just Cause for Discipline exists only when an Employee has failed to provide Satisfactory Work

Discipline must further one or more of Management's legitimate interests.

Concept of Just Cause reflects Union's interest in guaranteeing "fairness" in disciplinary situations

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The Prime Directive

- ▶ Standards of Contract Interpretation used by arbitrators are designed to determine the intent of the parties in adopting certain language to express their rights and obligations.
  - ▶ *The Common Law of the Workplace*, 71 (T. St. Antoine, 2<sup>nd</sup> ed. 2005)

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### Contract Ambiguity: the Parole Evidence Rule

- ▶ A contract is ambiguous if it reasonably susceptible to more than one meaning.
- ▶ Arbitrators disagree as to whether extrinsic evidence may be considered in order to determine whether a disputed clause is “ambiguous” or to determine whether it is, in fact, ambiguous

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### Past Practice: The Accepted Way of Doing Things

A uniform response	to a recurring situation
Past Practice	
over a substantial period of time, and	response is known to union and management.

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### Proving a Past Practice

Clarity and Consistency	Longevity and Repetition
Acceptability	Mutuality

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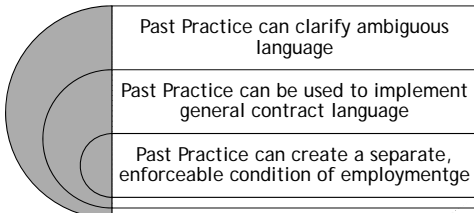
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### The Uses of Past Practice



- Past Practice can clarify ambiguous language
- Past Practice can be used to implement general contract language
- Past Practice can create a separate, enforceable condition of employment

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### The Presumption against forfeitures

- ▶ **Substantive Arbitrability:**
  - ▶ Although generally, the issue is to be resolved by the courts, an arbitrator may be authorized by the parties to resolve issues of substantive arbitrability.
  - ▶ Substantive arbitrability cannot be waived.
- ▶ **Procedural Arbitrability**
  - ▶ Issues of procedural arbitrability are for the arbitrator to decide, as they are generally resolved by the language of the collective bargaining agreement itself.
  - ▶ Procedural Arbitrability may be waived by failure to object, or other actions

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### Questions?



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