PART VIII
RULES OF EVIDENCE

EVIDENCE AND PROOF

▼ Evidence is intended to prove; therefore it is offered as proof.

▼ Burden and quantum of proof.

- Burden of proof.

  ➜ Producing (going forward).

  - Discipline case.
  - Contract case.

  ➜ Persuading.

  - Can shift during the hearing.

    ✔ A claim is made or a position is taken.

    ✔ An affirmative defense is raised.

- Quantum of Proof.

Preponderance (More persuaded than not) "Greater Weight" "More Probable"	Clear and Convincing	To a Moral Certainty	Beyond Reasonable Doubt

RULES OF EVIDENCE

- Formal rules were developed to prevent juries from receiving the type of evidence that would normally be unreliable and, therefore, would tend to influence them improperly.

- Labor arbitrators are guided by formal rules of evidence, but ordinarily do not apply them strictly.

- Even though these the formal rules of evidence may not always be applied strictly by an arbitrator, an advocate should, nonetheless, have a working knowledge of them.

- The principles established by these rules are useful when making an argument about how much weight the arbitrator should give to evidence that has already been accepted, for evaluating the value of the evidence that you may offer, and for forming the basis of an objection to evidence being offered by the opposing advocate.

Objectionable Evidence

→ **Irrelevant (Immaterial)** - Evidence being offered that is unrelated to any issue of consequence, or has no bearing on the final outcome of the arbitration. Not germane to the issue. In labor arbitration the arbitrator may often admit it into evidence "for what it's worth."

→ **Hearsay** - A statement, either oral or written, that occurred outside of the hearing room, was not made by the witness who is testifying, and is now being offered in the hearing in an effort to prove that what was asserted in this previous outside statement is true.

- Because the person who made the statement is not the one who is testifying the truth of the assertion cannot be tested by cross examination. Also, the arbitrator is denied the opportunity to assess the credibility of the person who allegedly made the statement because that person, the declarant, is not at the hearing and cannot be observed as they testify.

- However, it is not unusual for hearsay evidence, and, as noted above, for irrelevant evidence, to be admitted by the arbitrator "for what its worth", or "subject to a determination of weight."

➜ **Non-Hearsay** - Even though testimony or a document may fit the general definition of hearsay, if it is not offered to prove the truth of what was asserted in that statement or document, then, technically, it is not hearsay.

Exceptions to the Hearsay Rule

➜ **Admission Against Interest** - An assertion that essentially works against the interest of the person who made the statement.

➜ **Business or Public Records** - Records generated in the normal course of business or administrative functions.

➜ **Past Record for Recollection** - A written record of a statement which was constructed soon after that original statement was made and which is then used to refresh a witnesses' incomplete recollection.

➜ **State of Mind** - A statement that appears to fit the general definition of hearsay, but in this case is being offered only to demonstrate some aspect of the speaker's emotions or state of mind, and that also has some relevance to the dispute. Like "non-hearsay" the statement is not being offered to prove the truth of what was stated.

➜ **Prior Inconsistent Statement** - If a witness in a hearing testifies in a manner that is inconsistent with what another person may have heard that witness say at some previous time, then the person who heard the previous inconsistent statement may testify as to what they heard.

➜ **Prior Testimony** - An official court transcript or legal deposition may be admitted if there was an opportunity for that particular declarant to be cross-examined when the record was made. Such prior testimony would ordinarily be used to challenge the credibility of the witness.

Offers of Compromise and Settlement

▼ Almost all arbitrators will enforce this rule which exists to prevent an advocate from using previous offers of settlement against the interests of the other party in arbitration.

▼ Arbitrators are interested in encouraging to the greatest extent possible settlements prior to arbitration. This settlement principle would be severely damaged if statements made during the exploration of possible dispute settlement or compromise were permitted to be entered into evidence.

Beyond the Scope of Direct

➜ This formal rule exists in order to prevent an advocate from asking a question on cross-examination about a matter that was not raised during the direct examination. Do not expect this rule to be strictly enforced by labor arbitrators. They are interested in receiving in a simple and straightforward manner all of the information necessary for them to make an informed decision rather than in enforcing overly technical rules of evidence.

➜ **Opinion Testimony** - The opinion of a witness who has no special training or experience has little value to an arbitrator who is always more interested in hearing facts and not opinions. However, if as a result of specialized training or experience, a witness could be considered an expert, then their testimony may be useful and admissible if it is relevant to an advocate's argument. Common sense dictates that opinions or estimates about time of day, visibility, distances, etc. commonly do not require the witness to be an expert.

➜ **Best Evidence** - The best evidence is always considered to be the original document, not a copy or a summary. However, labor arbitrations often deal almost exclusively with copies, not originals. This is an expected occurrence and ordinarily presents no problems. However, if there is an issue relating to a possible inaccuracy or irregularity in a copy of a document or in a summary of a number of documents, then the original .document, if available, should be provided by the advocate who is offering the evidence.

➜ **Parol Evidence** - Technically, this is not so much a rule of evidence as a rule of contract construction. When contract language is clear and unambiguous arbitrators are not particularly interested in a witness telling them what the language means or was intended to mean. After all, that is what arbitrators are expected to do in their awards.

- However, if the controlling language does contain some ambiguous or unclear language, then collateral evidence (discussions during negotiations, past practice, previous grievance settlements, etc.)may be admitted and given some weight if they will assist the arbitrator in clarifying the ambiguous language.

➜ **Privileged Communication** - In most legal proceedings, and also in labor arbitration, communication'(both spoken and written) between certain people can be considered to be privileged. This means that these particular people cannot be forced to disclose the information that passed between them.

- This privilege traditionally applies to physician - patient, lawyer - client, husband -wife, and priest - penitent. In labor arbitration a union advocate should argue vigorously that such privilege also applies to union officials and union members.

- Most arbitrators would be reluctant to force testimony from a union steward or a grievant who has been asked about conversations that took place between the steward and the grievant during the investigation and processing of a grievance.

- Such forced disclosure would have a chilling effect on the representational rights and obligations that fall to a steward under the National Labor Relations Act. Be aware that if either the steward or grievant has shared this confidential information with a third party, then any such privilege is usually considered to be waived.

HOW TO PREPARE AND PRESENT A LABOR ARBITRATION CASE

Strategy and Tactics for Advocates

Charles S. Laughran

RULES OF EVIDENCE

- As explained in the foreword to this book and in several earlier chapters, the degree of formality with which labor arbitration hearings are conducted varies enormously from one hearing to another. Some hearings are extremely informal with the advocates mixing fact and argument, interspersing witnesses' testimony with advocate's commentary, and appearing more like a debate than an evidentiary hearing.

- At the other end of the spectrum are hearings conducted with such formality that they might be mistaken for civil trials conducted before a judge in a courtroom. Of course, there are various shades of formality between these two extremes.

- Nowhere is the spread in degrees of formalism more apparent than in the application of the rules of evidence. When both advocates and the arbitrator are non-lawyers, evidentiary rules are usually applied sporadically, if at all. When the advocates and the arbitrator are lawyers, hearings are often fife with objections based on rules of evidence.

- One of the major difficulties in writing a book to assist advocates in preparing and presenting a labor arbitration case is selecting the most appropriate degree of formalism that is likely to prevail in the broad range of cases.

- In this chapter , the author has elected to assume that the advocate is likely, at some point in his or her experience with labor arbitration, to encounter a hearing in which the rules of evidence are rather rigidly applied. Consequently, the material in this chapter regarding rules of evidence goes into more detail and evidentiary technicalities than would be encountered in the typical labor arbitration hearing.

- The rationale is that if the advocate is able to handle a formal hearing, he or she will be able to perform that much better in an informal one. Moreover, the increasing use of lawyers to present labor arbitration cases in recent years indicates that, in general, hearings are becoming more and more technical.

- Therefore, advocates who become competent in knowing and applying rules of evidence will be better prepared to cope with the increasing legalism with which labor arbitration proceedings are being conducted.

- All advocates, lay and lawyer alike, should keep in mind that having a command of the rules of evidence does not mean that they must necessarily be used. Many arbitrators who are very knowledgeable in the rules of evidence dislike and discourage their frequent use in labor arbitration. They realize that a great number of these rules were created to protect juries from hearing testimony that might prejudice or unduly influence them.

- When the trier of fact (i.e., the person who is responsible for making decisions on disputes over issues of fact) is a judge or an arbitrator, the protections afforded by application of the rules of evidence are not as necessary as when a jury determines the factual findings.

- Strict application of rules of evidence often keeps legitimate and useful information from being introduced. For this reason labor arbitration. and other forms of arbitration, lean heavily in the direction of informality and minimal application of the rules of evidence.

- The successful advocate is one who is sensitive to the orientation of the arbitrator with respect to rules of evidence and other hearing formalities. Taking into account the arbitrator's background (i.e., legal versus nonlegal); information received from other advocates about the arbitrator's style, and the arbitrator's actions during the early part of the hearing (and, in particular, the way in which initial objections are handled).

- The thoughtful advocate should be able to assess early in the proceedings the arbitrator"s general philosophy and practice with regard to enforcing the rules of evidence. These perceptions and assessments should guide the advocate for the balance of the hearing.

SUBSTANTIVE ADMISSIBILITY

Rationale Underlying Substantive Rules of Evidence

- Generally speaking, the rules of evidence that are intended to block evidence regardless of the form of the question, that is, substantive inadmissibility, are based on policies or rationales that are designed to keep out evidence that is inherently unreliable or to preclude evidence that, if permitted to be introduced, would interfere with efficient and beneficial means of carrying out collective bargaining, business, and legal affairs, that is, policy reasons.

- An example of a rule based on the first rationale is the hearsay rule. It is designed to preclude evidence that is thought to be unreliable, that is, testimony of a witness relating what someone else said outside the hearing room. The underlying notion, albeit frequently criticized, is that a second-hand report of a statement of a person who is not present in the hearing and not subject to being examined about the truth of the statement is unreliable.

- The second rationale for substantive inadmissibility is that the inadmissibility is that the admission of such evidence would have an adverse impact on the way unions and employers deal with one another, the way people lead their daily lives, the way in which business and/or other activities of the employer's enterprise are conducted, and/or the process by which positive and important activities in our society are carried out.

- For example, certain private communications between particular individuals are considered private, or privileged, and are not subject to inquiry in a hearing. Communications between a doctor and a patient are considered privileged, as are communications between a lawyer and the lawyer's client in anticipation of, or in the course of, litigation.

- The reasons for these rules are relatively simple. If a patient cannot communicate freely and openly with a doctor without fear of having the conservation publicly disclosed in a hearing, it would impede the free flow of information between them and likely reduce the effectiveness of medical treatment rendered by physicians to patients.

- Moreover, the subjects discussed in such communications are apt to be of such a personal and sensitive nature that they should not, out of respect to individuals' privacy, be divulged to others.

- The rule applying to communications between lawyers and their clients during, or in anticipation of, litigation is designed to remove any inhibitions to these parties exploring a wide range of legal defenses, attacks, and other strategies. For these policy reasons such communications are not admissible in evidence, unless the persons they are designed to protect (e.g., the doctor and the patient) waive such protection and privilege.

Rules of Evidence Based on Substantive Admissibility

Relevancy

Statement of the Rule

- Evidence is admissible only when it will tend to make the existence of a fact that is of some consequence in the case more or less probable than it would be without the evidence.[1]

Rationale

- Hearings should not be burdened by evidence that either does not have anything to do with the case or that fails to prove a fact that bears on some issue in the case. Irrelevant evidence is not only unrelated to any issue in the case, but may also be prejudicial to one side or the other. For this added reason the evidence may be inadmissible.

➜ **Example A**: [In a case involving seniority rights under a labor contract between XYZ Corporation and the Meatcutters Union]

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[1] *Whether the fact to be proved bears on an issue in the case is really a question of "materiality." Although traditional rules of evidence distinguished between relevancy and materiality, the most recent formulation of the Federal Rules of Evidence combine the two concepts into one rule. Federal Rules of Evidence. Rule 401. 28 U.S.C.*

EA: Ms. Jones, when you were the director of industrial relations for ABC Corporation, did you utilize plant seniority or department seniority in effectuating layoffs under your contract with the Boilermakers Union?

UA: Objection. It's irrelevant. Those layoffs were under a different contract with a different union and have no bearing on the case before us.

A: Objection sustained.

- The arbitrator sustained the objection because what ABC Corporation and the Meatcutters Union did under a separate labor agreement will not normally have any influence on what the language means in the labor agreement between XYZ Corporation and the Boilermakers Union. The word "normally" is emphasized because there are some circumstances in which such an agreement might be relevant.

- If the language in both agreements is identical and if the employer advocate can show that both parties intended to have their seniority provision applied in the same way as under tile ABC/Meatcutter contract, an arbitrator would be inclined to admit the evidence and to give it significant weight. Absent such supporting evidence, however, an objection to that type of evidence will be sustained on the grounds that it is irrelevant.

→ **Example B**: [In a case involving discharge for an employee's insubordination toward her supervisor]

EA: Mr. Tompkins [employer's personnel manager), would you please review for the arbitrator the record of absenteeism of Ms. Phillips [the discharged employee] during the last six months prior to her discharge?

UA: Objection on grounds of relevancy. Ms. Phillips was discharged solely for insubordination. Nothing in the discharge notice referred to absenteeism.

A: The objection is sustained.

- A common error made by novice employer advocates in discharge cases is to try to show that the employee is a bad person, and to attempt to introduce evidence of almost any type of prior misconduct or rule infractions by the employee, no matter how remote from the real reason for the discharge.

- When the discharge is for a specific rule violation, for example, insubordination toward a supervisor, it is usually not relevant that the employee had a history of excessive absenteeism. The absenteeism may very well have been grounds for independent disciplinary action, but if that action was not taken or if the employer did not (prior to the discharge for insubordination) make some link between the two distinct types of misconduct, the grievant's record of absenteeism will be irrelevant and an objection on that basis sustained.

Discussion

Lenient Application

- Labor arbitrators are generally very lenient with respect to applying the rule of relevancy. There is good reason for this. This rule was designed to prevent juries from hearing evidence that was possibly prejudicial unless it clearly bore on an issue in the case. Arbitrators are much less likely to be influenced by potentially prejudicial evidence than are juries, and, when the evidence is marginally relevant (i.e. it might have some connection to the case, although one that is not immediately apparent), arbitrators are much more likely to admit evidence than are judges in civil or criminal trials.

- As with judges, however, arbitrators faced with borderline relevant evidence must weigh the possible harm of such evidence against the potential benefit it might add. Because arbitrators are much less susceptible to prejudicial influence, the harm caused by admitting possibly irrelevant evidence is usually less than the disadvantage of excluding evidence that may have a bearing on the outcome of a case.

- When marginally relevant evidence is admitted, arbitrators commonly qualify the admission with the phrase, "Admitted subject to weight" or "I'll admit it for whatever it's worth," meaning that although the evidence may be introduced, it is not likely to be given full consideration by the arbitrator.

- In contract interpretation cases relevancy issues sometimes arise when one or both of the parties attempts to introduce evidence of what their negotiators intended the language to mean. A troublesome issue arises when the evidence of intent consists of what the negotiators thought the words meant, rather than what was actually said or agreed on in the course of negotiations. The opportunity for mischief in allowing such evidence is patent.

- Anyone can testify that they understood certain words and phrases to have a particular meaning when the agreement was reached. There is virtually no way to disprove such thoughts. If, however, the testimony is about what was said during the negotiations of such language, the other party can respond. Notwithstanding the potential for abuse, arbitrators frequently permit such testimony of one or both parties' intentions or understandings during labor negotiations, recognizing that they will give little or no weight to that testimony when deciding the case.

- Even arbitrators who are very accommodating with respect to allowing marginally relevant evidence into cases have some limits. This is true if it appears that the production of such evidence will consume a considerable amount of time in the hearing. An advocate who attempts to introduce marginally relevant evidence (to which an objection has been made by the opposing side) may increase the chances of admission if he or she assures the arbitrator that the time needed to produce the evidence is short.

- For example, "Mr. Arbitrator, I have just a couple of questions of the witness on this point. I can assure you this testimony will not unduly delay the hearing." The advocate who makes such assurances is well advised not to disappoint the arbitrator.

Linking Up

→ In some instances the relevancy of one witness's testimony depends on other evidence. For example, the testimony of a maintenance mechanic about the functioning of a door in a case of discharge for theft might appear to be irrelevant, unless it is shown that the article alleged to have been stolen (a computer) could not have been removed through the door in question without an alarm sounding.

→ At the time the witness begins his or her testimony, the connection between that testimony and the issue in the case may not be apparent, causing the other side to object on grounds of relevancy.

→ One way to show the relevancy is to explain to the arbitrator just how the proffered evidence relates to the issue in the case (e.g., the door in question is the only one from which the grievant could have exited the facility, and, if a computer had been removed by the grievant, movement of the door would have sounded an alarm).

➜ The advocate offering the evidence may not, however, wish to lay out the whole theory of his or her case early in the hearing. To do so may tip off the opposing side, enabling them to change their approach to the case. Thus, the advocate offering the challenged testimony may have to beg the indulgence of the arbitrator by promising that subsequent evidence will make the relevancy obvious.

➜ For example, "Madam Arbitrator, we will link up this testimony with other evidence shortly in order to establish the clear relevancy of this line of questioning. We ask that you give us a little leeway at this point." Most arbitrators will be sympathetic with this approach, provided the testimony does not require a great deal of time and that the linking evidence comes into the case not too long after the disputed testimony.

Opinion Testimony

Statement of the Rule

▲ Unless a witness has been qualified as having special expertise in a particular subject, he or she will not be permitted to give testimony as to his or her opinion about a subject in the case.

Rational

▲ The purpose of evidence is to prove facts that will enable an arbitrator to make a decision. An opinion is not a fact, and, therefore, many opinions are not useful in deciding a case.

▲ When, however, proof that a fact may be more or less probable can reasonably be based on the opinion of a person with special knowledge, skill, education, and/or experience in a subject closely related to the fact to be proven, such opinion testimony is admissible.

➜ **Example A.** [In a case involving the promotion by an employer of a junior lathe operator to a tool and die maker that is challenged by a more senior lathe operator]

EA: Mr. Ruggles [Plant Manager], in making your decision to promote Ms. Junior over Mr. Senior, what was your opinion of Ms. Junior's qualifications to do the tool and die making work relative to Mr. Senior's qualifications?

UA: Objection. The question calls for an opinion.

A: Mr. Ruggles, what experience do you have performing tool or in directly supervising tool and die work?

W: I have no specific experience in that regard.

A: Objection sustained.

▲ The arbitrator in this case disallowed the testimony of the plant manager because the question called for an opinion about a technical matter, that is, tool and die work performance requirements, without any showing that the witness had the knowledge or experience to evaluate such requirements.

▲ Since the plant manager was not knowledgeable about the technical requirements of the job in question, it is likely that he relied on some other facts in order to make his decision. If he did, they could be brought out in another way without relying on opinion testimony. The following example shows how this might be done in an unobjectionable manner.

➔ **Example A - 1.**

EA: Mr. Ruggles, in deciding to promote Ms. Junior over Mr. Senior, what factors did you take into consideration?

W: I considered the relative qualifications of each person, the seniority of each employee, their respective employment records including safety, attendance, and discipline, and the number of excellent performance ratings each one had received in the last five years.

EA: With respect to their relative qualifications, what information did you rely on?

W: I spoke to each of their supervisors about the quality and quantity of their work. I examined production records to gauge their productivity and percentage of off-standard work. I also reviewed their training records and their performance on tests administered by our training department.

EA: Based on that information, what conclusion did you reach?

W: I concluded that Ms. Junior was more qualified to perform the work of a tool and die maker than was Mr. Senior.

➜ **Example B**. [In a case involving the request of an employee to return to her former position following a work-incurred injury, wherein an employer-appointed physician is testifying about the employee's physical abilities]

EA: Dr. Welbing, based on all the information at your disposal that you have described, do you have an opinion as to whether Ms. Hurt can safely resume the position of a forklift operator in the plant?

UA: Objection. There is no showing that Dr. Welbing is qualified to render an opinion about the capabilities of Ms. Hurt's knee, since he is not an orthopedic specialist.

EA: Mr. Arbitrator, Dr. Welbing has previously testified that in addition to examining Ms. Hurt's knee and examining current X rays of her knee, he discussed her condition with Dr. Philip Joint, who performed the surgery on Ms. Hurt's knee.

A. Objection overruled. Doctor, you may answer the question.

▲ Although the objection was overruled, the example points out the importance of ensuring that the expert really has the knowledge and experience in the area specifically related to the matter on which the opinion testimony is being given.

▲ A mechanical engineer may not have had any actual experience with the type of machinery about which he is asked to render an opinion. A professor of chemistry may have conducted extensive research and written a large number of books and articles in scholarly journals, but if the scholarship is not in the area in which the opinion is being given, it is subject to attack.

▲ Example C. [In a case involving the suspension of an employee for unsafe operation of a mobile crane]

UA: Mr. Smith, as you were observing the operation of the crane by Ms. Whooping, what is your opinion as to how far away the boom was from the side of the building?

EA: Objection. Calls for an opinion.

UA: Madam Arbitrator, this question merely calls for the witness to estimate a distance. The witness has already testified that he could see the crane and the building very clearly from where he was standing. This type of estimate is within the competence of most persons and is not objectionable opinion testimony.

A. Objection overruled.

▲ It is generally held that opinions, or, more appropriately, estimates, as to such matters as time of day, distances, visibility conditions, and so on, are within the competence of most persons, and testimony about them does not require a showing of any special expertise. Of course, the opposing advocate is free to challenge the estimating capability of the witness through cross-examination (e.g., "Mr. Witness, could you give us your estimate of the length and width of the room in which you and I are now sitting?").

Discussion

▲ The rule concerning opinion testimony is sometimes explained on the basis that someone other than an expert witness cannot render an Opinion about an issue to be decided in the case. While this explanation is essentially accurate, the reason it is not permitted is not that the opinion, as rendered by a nonexpert, but rather because it is an opinion that is reserved for the arbitrator alone to decide, that is, it is the ultimate question.

▲ Thus, in a discharge case an expert witness (no matter how learned) may not give an opinion as to whether or not the grievant was discharged for good cause. That is the sole province of the arbitrator. Nevertheless, an expert may render an opinion concerning a matter that is a threshold issue to the one that the arbitrator must decide.

▲ For example, an employee who is a truck driver is discharged for driving under the influence of alcohol, an expert (e.g., an operator of a breath analysis machine) may testify as to the blood-alcohol content of the driver and render an opinion as to whether the driver was under the influence of alcohol at the time he was driving.

▲ Nevertheless, the issue to be decided by the arbitrator is whether the discharge was for just cause. Neither an expert nor a layperson can render an opinion as to whether or not there wits just cause, although the expert's opinion as to whether the discharged employee was under the influence of alcohol will help the arbitrator to determine whether there was or was not just cause.

Best Evidence Rule

Statement of Rule

➤ In order to prove the terms of a document, the document itself (usually the original, not a copy) must be produced unless it can be shown that the original is not available.

Rationale

➤ The actual document is the only truly reliable evidence of what a document proves. Summaries, recapitulations, or copies are subject to interpretation and alteration, which may not reflect the true meaning of the original document.

➜ **Example.** [In a case in which the employer is attempting to show a practice of employees of punching time clocks as much as twenty to thirty minutes prior to the beginning of their scheduled shifts]

EA: Ms. Smith, can you please identify the document that has been marked as Employer Exhibit 3?

W: Yes, it is a computer printout of entries on time cards of all employees in Department A for a two-year period, showing the times when they punched the time clock before starting work and after finishing their work for the day.

EA: We offer Employer Exhibit 3.

UA: Objection, inadmissible on the basis of the best evidence rule. The actual documents on which start and stop times were recorded are the time cards themselves. This computer printout is merely a transcription and is subject to error on the part of the data entry clerk in reading the time card accurately and in transferring the information into the computer. If the advocate for the company wishes to prove what the start and stop times were for the period in question, she could introduce the actual time cards.

EA: Mr. Arbitrator, the time cards have been destroyed in accordance with the employer"s document destruction policy. The computer printouts are the only evidence available. They are accurate records, and the advocate for the union may cross-examine our witness to verify the manner in which the computer records were prepared.

A. Objection overruled. Employer Exhibit 3 is admitted.

Discussion

- The best evidence rule is seldom raised in labor arbitration hearings. Because copies of documents are so commonly used and are generally accurate, copies are routinely accepted as originals without objection.

- Occasionally, the rule will be raised with regard to summaries and computer records as in the above example. Unless it can be shown, however, that the records were not prepared by a competent person in the normal course of business, any objection is likely to be overruled.

- Even if there is some question as to the regularity of preparation of such summaries or records, or a question as to whether the source document is or is not available, the secondary document or record is likely to be admitted. If, however, the advocate opposing the introduction of the document can show some error or irregularity in the summary or computer record, it may be possible to keep the document from being admitted into evidence.

Parol Evidence Rule

Statement of Rule

- Evidence of a written or oral agreement outside the contract itself to prove the meaning or interpretation of that contract is not admissible. The meaning is to be drawn from the words of the contract itself.

Rationale

When parties enter into a contract, they are expected to incorporate their entire agreement into the contract document. Collateral evidence as to the meaning and intent of the contract should not be admitted to alter the terms of the contract as written.

➜ **Example**. [In a case involving a dispute over the reimbursement employees are to receive for the purchase of safety shoes, where the contract specifies a maximum reimbursement of $100 per year].

UA: Mr. Rubersole, did you have a discussion with Mr. Honcho, the plant manager, about how much you could spend for safety shoes each year?

W: Yes.

UA: When was that discussion?

W: It was at our annual union-management meeting in January.

UA: What did he say about how much you could spend?

EA: Objection, parol evidence rule. The question calls for testimony that would vary the specific terms of a written contract.

A: I will permit the witness to answer, but I must advise the union advocate that I will be very skeptical of the evidence unless there is some showing that Mr. Honcho had the authority and intent to modify the labor agreement. The objection is overruled.

W: He said that if safety shoes from the approved vendor cost more than $ 100, he would see that the company made up the difference.

Discussion

❒ Strictly speaking, the parol evidence rule is not a rule of evidence, but a rule of contract construction. It is used to determine the way in which written contracts are to be interpreted. In its proper application it should not be used to exclude evidence, but should be applied by the arbitrator to decide whether the offered evidence would influence the meaning and interpretation of the contract.

Parol Evidence Frequently Admitted

- Parol evidence is, in fact, quite commonly introduced in labor arbitration hearings. Evidence of past practice, discussions between union and management representatives when agreements were reached, side letters of understanding, and previous grievance settlements are all routinely admitted to prove what specific agreements mean, notwithstanding the fact that they arguably constitute parol evidence.

- The key point that should be kept in mind is that such evidence will be admitted and given weight by an arbitrator if there is some ambiguity in the language of the contract. If the language is clear on its face and not reasonably subject to an interpretation other than what the words say, such parol evidence, although admitted, will not normally be accorded much weight.

- Relating back to the example above, suppose the language of the agreement read, "Unless otherwise provided by practices within a department or special agreement, employees shall be entitled to a maximum annual allowance of $ 100 per year for the purpose of purchasing safety shoes."

- There the words "'unless otherwise provided by special agreement" could conceivably include permission by the plant manager to an employee to spend more, and evidence of the employee's conversation with the plant manager could not only be admitted, but might also be seriously considered by the arbitrator depending on the circumstances of the conversation (e.g., whether said in passing, in exchange for a concession, in jest, coupled with the words "I promise," etc.).

- If however, the contract provision read, "The annual safety shoe allowance is $100," it could hardly be said that an ambiguity existed, and application of the parol evidence rule would normally apply and little or no weight would be given to the conversation at the meeting. As indicated earlier, however it is applied, the parol evidence rule should be employed for construing the contract language and rendering a decision, not for the purpose of excluding the evidence completely.

Foreclosing Parol Evidence in Advance

- One way in which contract negotiators can protect against collateral discussions, letters of understanding, and past practices being brought into evidence to modify the clear meaning of labor contract language is to incorporate a "zipper clause" into their labor agreements. This type of clause provides that the written agreement is to be considered as the entire agreement between the parties, and nothing outside that written document should be used to modify it in any way.

Such a Clause Typically Reads as Follows:

➜ This labor agreement contains the complete and exclusive agreement between the parties on all issues of collective bargaining. Nothing outside this contract document shall be used to modify, expand, or limit the terms of the agreement.

➜ Parties should not casually enter into such agreements because they can preclude reliance on past practices and customs that can benefit either side in any particular case.

Privileged Communications

Statement of the Rule

- Oral and written communications between certain parties who have a confidential relationship are inadmissible and therefore protected from unwanted disclosure in the hearing, provided such confidentiality has not been otherwise voluntarily disclosed or otherwise waived.

Rationale

- Rules of evidence developed for trials established protections against the introduction of evidence of confidential communications between certain parties. Rules applied in labor arbitration have more or less followed suit. To allow such communications to be open to examination in a hearing would have the effect of inhibiting open communications in such confidential relationships. For this reason confidential communications between certain persons are considered privileged and are therefore inadmissible.

- The most common relationships covered under this rule in trial settings are as follows:

  ➜ Doctor-Patient
  ➜ Psychotherapist-Patient
  ➜ Lawyer-Client
  ➜ Husband-Wife
  ➜ Clergy person-Religious Adherent (sometimes "penitent")

➜ **Example.** [Case involving an employee being discharged for fraudently claiming an industrial injury]

EA: Mr, Payne, prior to filing your claim for workers' compensation, did you visit a Dr. Wellbing, who was your personal physician?

W: Yes, I did.

EA: When was that?

W: About a year ago, last June.

EA: What did you tell Dr. Wellbing?

UA: Objection, Madam Arbitrator, that was a privileged communication.

A. Objection sustained.

Discussion

- With the exception of the doctor-patient and lawyer-client privileges the traditional confidential relationships that come under the rule of privileged communications found in the courts (i.e., those listed above under "rationale") are seldom encountered in labor arbitration.

- There are, however, some additional categories of confidential communications not found in legal proceedings that can raise serious evidentiary issues in labor arbitration hearings. For example, are communications between union representatives and union members in private discussions subject to the privilege? The same question applies to such discussions among employer representatives. Likewise, discussions by negotiators from one side or the other with a mediator in the course of labor contract negotiations raise issues of privilege.

- While there are no firmly established rules governing these types of communications, it would seem that when the same policy reasons (i.e., the importance of free and open communications) exist in a labor management context for maintaining confidentiality of a relationship as exist in traditional legal forums, the privilege should apply in labor arbitration.

- Thus, where a union representative must represent a union member much as a lawyer would represent a client, the privilege should apply. Similarly, the importance of union and employer representatives being able to explore freely and without fear of disclosure alternative bargaining strategies in their respective caucuses is reason enough for extending the privilege against unwanted disclosure in an arbitration hearing.

- This rationale also applies to discussions between union or employer negotiators with a mediator. In fact, the Federal Mediation and Conciliation Service (FMCS) has a rule that its mediators are not permitted to disclose any information acquired in the course of their mediation work or to testify on behalf of any party without the approval t)l' the director of the FMCS.[2]

- The opportunity to claim a privilege may be lost if any one of the parties to a confidential communication reveals the substance of the communication to one or more other parties. In so doing, that party is considered to have waived the privilege by disregarding the confidential communication.

- Thus, a grievant who reveals to an employer representative that she had previously admitted to her union representative that she had been untruthful about the reasons for not reporting to work as scheduled may not later claim a privilege if asked what she told her union representative about the reason for her being absent from work. Telling another of the substance of a confidential communication constitutes a waiver of the privilege.

- It must always be remembered that for a privilege to be effective it must be claimed. Thus, if a witness is asked to reveal the substance of a conversation with his or her physician and no objection is registered, the question must be answered. Failure to register an objection to a question cal ling for revelation of a privileged communication constitutes a waiver of the privilege.

- The privileged communications objection is designed to protect the persons who participated in the communication. If those persons choose to reveal the communication and have it admitted into evidence, the opposing side may not object to such admission on the basis of privilege.

- For example, if an employee testifies about her conversations with her physician, the employer advocate does not have a valid objection to the admission of that testimony. The employer is not protected by the privilege, and therefore may not claim it to exclude evidence.

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[2]29 C.F.R. § 1401.2(b) (1979).

Offers of Compromise and Settlement

Statement of the Rule

- Evidence that one of the parties in a labor arbitration has made an Offer of compromise as a means to achieve a settlement of the case is inadmissible.

Rationale

- Settlements of disputes are to be encouraged. If evidence of unsuccessful attempts to settle cases were to be admissible in arbitration cases, it would seriously inhibit attempts to reach settlements.

➔ **Example**. [In a case involving a grievance over the right of an employer to unilaterally change work schedules]

UA: Following the fourth-step grievance meeting on this grievance, did the company offer to reinstate the previous work schedule if you would drop the grievance?

EA: Objection. Calls for testimony concerning an alleged offer of settlement.

A: Objection sustained.

Discussion

- Perhaps no rule of evidence in legal proceedings or labor arbitration is so firmly entrenched and uniformly enforced than the rule prohibiting the admission of evidence of offers of settlement. In fact, even if the other side does not register an objection, many arbitrators will interrupt the testimony and refuse to hear it. This is based on the universally held premise that voluntary settlements of disputes should be encouraged to the greatest extent possible.

- In virtually every case the party that receives the settlement offer is the one that seeks to have the offer entered into the record (in order to show that the other party does not have a strong position or it would not have offered to compromise it). An interesting variation exists when the party making the offer of settlement seeks to have evidence of the offer entered into the record.

- When this occurs (and it is extremely rare), it is usually because the offering party wishes to show that it was reasonable and that it made a reasonable offer to settle the case short of the arbitration hearing. While there is no clear precedent controlling such an issue based on the policy underlying the rule (i.e., to encourage the free exploration of settlements without fear of such exploration being raised in the arbitration hearing), it would seem that regardless of which side attempts to enter into evidence the offer of settlement, it should be ruled inadmissible.

Beyond the Scope of Direct Examination

Statement of the Rule

➤ Interrogation of a witness on cross-examination about matters not covered in the direct examination are subject to objection.

Rational

➤ Witnesses are prepared to testify about certain matters. They should not be required to testify about other matters on cross-examination (when I leading questions can be asked) for which they are not prepared to testify. If the cross-examining advocate needed to ask questions of this witness to prove his or her own case, the advocate should have arranged to call that person as his or her own witness.

➜ **Example.** [In a case involving a grievance over a work assignment given to an employee in a department other than the one in which the work is normally assigned. The union shop steward is testifying on cross-examination.]

EA: Mr. Stuart, isn't it true that the union proposed in the last labor contract negotiations to include in the labor agreement language that would have prevented the company from making the very type of assignment that was made in this case and that the company refused to agree to the language proposed by the union?

UA: Objection. There was no testimony by Mr. Stuart concerning labor contract negotiations. This question goes beyond the scope of direct.

A. Sustained. If you wish to inquire into such matters, you may call Mr. Stuart as your own witness.

Discussion

➤ The scope of direct rule is one that may have a place in court proceedings, but in the opinion of the author it is misplaced in labor arbitration. The purpose of labor arbitration is to get to the facts in the simplest and most forthright manner possible. To go through the formality of excusing a witness from answering a question on direct, only to be able to recall the witness as the advocate's own and ask the very same question appears to place form over substance.

➤ The rationale is that because the witness can be asked leading questions on cross-examination, he or she should not be required during cross-examination to answer such questions unless they were the subject of the direct examination. This rationale overlooks the ability of the inquiring advocate to call the witness as an adverse witness and utilize leading questions. With that option it makes no difference whether the witness is being interrogated on direct or cross-examination.

Hearsay Rule

Statement of the Rule

◘ Evidence of an oral or written statement made outside the hearing by anyone other than the witness who is testifying that is offered to prove the truth of the matters asserted in the statement is inadmissible.

Rationale

➔ Reports of statements by persons other than the witness made outside the hearing are considered to be unreliable. The person who made the statement (the declarant) is not testifying in the hearing and is not subject to cross-examination.

➔ In addition, and perhaps most important, the arbitrator is not able to observe and hear the declarant nor make an assessment of the declarant's credibility. All the arbitrator has to go on is the second-hand report of what was said by the absent declarant. For all of these reasons arbitrators are justifiably cautious in accepting a secondhand account of what was allegedly said outside the hearing.

➔ Example A. [In a case involving the discharge of an employee/grievant (Mr. Jenks) for theft, where the witness is a coworker of a third employee, Ms. Hamilton (declarant), who allegedly saw the grievant leave work on the day in question]

EA: Did you speak with Ms. Hamilton later that day?

W: Yes.

EA: Did she tell you she saw Mr. Jenks put something in his duffel bag just before he left the store?

UA: Objection. The question calls for hearsay testimony.

A: Mr. Employer Advocate. do you intend to call Ms. Hamilton as a witness?

EA: No, Madam Arbitrator, Ms. Hamilton unfortunately no longer works for the employer and is unavailable to testify.

A: I agree that the question calls for hearsay. Nevertheless, I will permit the question subject to weight.

➜ **Example B**. [In the same factual case as above, where the employer is attempting to introduce the affidavit of Ms. Hamilton to prove that Mr. Jenks took goods belonging to the employer]

EA: Madam Arbitrator, we wish to offer in evidence the affidavit of Ms. Hamilton, a former employee in the children's clothing department of the employer's store, who observed Mr. Jenks leaving the store on the day in question. This is a three-page affidavit signed and sworn before a notary public of this state. We offer this affidavit as Employer Exhibit 6.

UA: We object, Madam Arbitrator, the affidavit is clearly hearsay. Ms. Hamilton is not a witness in this arbitration. I do not have the opportunity to cross-examine Ms. Hamilton, and you, Madam Arbitrator, do not have the opportunity to observe the demeanor of the declarant and evaluate her credibility.

UA: If the employer was able to have Ms. Hamilton provide an affidavit, it certainly could have her testify here today so that we all might hear her version of what occurred in her own words. We strongly object to the admission of this affidavit.

A: My general practice is to preclude affidavits unless the offering advocate can show that it was not possible to produce the witness to testify in the hearing. Can you make such a showing?

EA: Madam Arbitrator, on two separate occasions we requested Ms. Hamilton to appear at this hearing to testify, but she declined to do so.

A: Did you seek a subpoena to require Ms. Hamilton to appear?

EA: No, we did not.

A: I am not persuaded. You could have subpoenaed her but did not. The objection to the proffered affidavit is sustained.

Discussion

- No rule of evidence, as it applies in arbitration or in the courts, presents so many difficulties in application and is so riddled with exceptions as the hearsay rule. Designed to exclude unreliable testimony, when applied in its strict sense it serves little more than to keep out valuable or at least potentially valuable evidence. Fortunately for labor arbitration advocates, it is seldom applied in its strict sense to completely exclude evidence.

Admitting "For What It's Worth"

- The practice followed by a majority of labor arbitrators is to permit most types of hearsay evidence but to condition its admission on the basis that it will not be given the weight or credence it would if it were direct evidence. The arbitrator will, as in the first example just above, state that the evidence will be admitted "subject to weight" or "for whatever it is worth."

- This means that the arbitrator will consider the circumstances under which the statement was made, the credibility of the witness who is testifying about the hearsay statement, how trustworthy the hearsay statement appears to be, and whether there is corroborating evidence.

Written Hearsay

- Written hearsay, often in the form of an affidavit or written statement, as in example B, is often no more or less unreliable than an oral account of the declarant's statement, but arbitrators are generally more reluctant to admit such written statements than they are to admit the same information in the form of oral testimony. The reasons are fairly obvious.

- First, the normal weaknesses of hearsay are present: the declarant is not in the hearing, cannot be cross-examined, and cannot be evaluated by the arbitrator with respect to credibility. Second, even a witness giving hearsay testimony can be questioned about the circumstances under which the hearsay was communicated. In the first example given above, the witness could have at least been questioned about the way in which the message from Ms. Hamilton was conveyed to the witness and what the witness knows about the reliability of Ms. Hamilton.

- In the second example-of written hearsay in the form of an affidavit-there is usually no one present who can relate the circumstances under which the affidavit was obtained, except perhaps the advocate offering the document, to test or attack the veracity, accuracy of perception, and powers of recollection of the declarant.

- All that is available is a document, which, of course, cannot respond to questions. Consequently, most arbitrators are inclined to exclude written hearsay, such as that in the form of affidavits or written statements, when the declarant is not present to testify.[3]

Reliability of Hearsay

- Many types of hearsay evidence are quite reliable. Testimony by persons who have no interest in the case in the outcome of concerning statements by an out-of-hearing declarant are often very reliable.

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[3]Beverly Enterprises d/b/a Metro Care & Rehabilitation Center and Food & Commercial Workers, Local 653, 100 LA 522 (Berquist, 1993). J & L Specialty Products Corp. and Steelworkers, 94 LA 600 (Duda, 1990); Armstrong Cork Co., 53 LA 1112 (Williams, 1969). However, Rule 29 of the Rules of the American Arbitration Association provides that, "The Arbitrator may receive and consider the evidence of witnesses by affidavit, giving it only such weight as seems proper after consideration of any objections to its admission." (See Appendix A).

- Likewise, a statement made outside the hearing when the declarant has no personal interest at stake the case may be quite reliable, particularly if the witness who is relating the hearsay statement appears to be perceptive and unbiased and possesses a good recollection on other matters about which he or she is testifying.

- Also, when the hearsay statement is consistent with one or more other pieces of evidence in the case, there is more reason for admitting and crediting the hearsay evidence.

- If, as discussed above, hearsay evidence is generally admitted in labor arbitration hearings, one may question how necessary it is for the labor arbitration advocate to understand the hearsay rule and its exceptions.

- The answer is that it is quite necessary. There are several reasons as listed below:

- First, if there is no understanding of the hearsay rule, the advocate may not register an objection to hearsay, allowing it to be admitted with no limitations or realization that hearsay testimony is being given.

- Second, an advocate who is attempting to have his or her witness give hearsay testimony may be faced with an objection from the other side. The arbitrator may admit such testimony, subject to diminished credibility or weight unless the offering advocate can demonstrate that the evidence is not truly hearsay evidence because it comes within one or more of the many exceptions to the hearsay rule. For this reason considerable attention will be devoted in the following pages to discussing the exceptions to the hearsay rule.

Non-Hearsay Versus Exceptions to the Hearsay Rule

- The definition of hearsay evidence is an oral or written statement made outside the hearing by someone other than the presently testifying witness and offered to prove the truth of the matter(s) asserted in the statement. Most lay persons, many lawyers, some labor arbitrators, and even a few judges usually focus on the first part of the definition (i.e., the statement was made outside of the hearing) and overlook the second part (i.e., the statement is offered to prove the truth of the subject matter of the statement).

- Thus, if a witness testifies about something he heard another person say (e.g., "I'm sick and tired of this job"), but the purpose of the statement is to show the state of mind of the declarant (e.g., that he is frustrated) rather than the truth of the words (i.e., that the declarant was actually intending to quit), the testimony is not truly hearsay even though it is a statement made outside the hearing by someone other than the witness.

- The reason is that it is not being offered to prove the truth of the matters asserted therein (i.e., an intention to quit), but rather what the declarant was thinking and believing at the time the statement was made.

Non-Hearsay Versus Exceptions to the Hearsay Rule

- Similarly, if a witness testifies that a declarant said, "You're crazy" to his supervisor, it is not really hearsay because the statement is not offered to prove the truth of the matter asserted (i.e., that the supervisor was really crazy), but rather the employee's disagreement or exasperation with his or her supervisor.

- Such examples of non-hearsay are commonly referred to, even by many lawyers, as exceptions to the hearsay rule, whereas they are not really hearsay evidence at all. While distinctions between non-hearsay and exceptions to the hearsay rule are of particular interest to judges and law professors, they need not particularly concern labor arbitration advocates.

- The difference between an out of hearing statement that is admissible because it is non-hearsay (not offered to prove the truth of the matters asserted) or an exception to the hearsay rule makes little difference-either way, the testimony or written document is admissible.

- The following section discusses exceptions to the hearsay rule. Included among these exceptions will be types of non-hearsay that do not fall within the exclusionary hearsay rule because they are not offered to prove the truth of the statements.

- If an advocate argues to an arbitrator that particular testimony is admissible, notwithstanding its apparent hearsay character, it will most likely make no difference whether the advocate asserts that the statement is admissible because it is not really hearsay or because it is an exception to the hearsay rule.

- The arbitrator is not likely to know the distinction, or if he or she does, it is one that is not likely to make any difference with regard to the decision to admit the evidence. Whichever it is, the evidence should be admitted for its full value, and not simply subject to weight.

Exceptions to the Hearsay Rule

Declaration or Admission Against Interest

Statement of the Exception to the Rule

- A statement by an out-of-hearing declarant that is contrary to the interests of the declarant (including one of the parties in the case with which the declarant is allied) is admissible as, an exception to the hearsay rule.

Rationale

- The normal unreliability of an out-of-hearing statement is diminished substantially when the identity of the declarant and the content of the hearsay statement are contrary to the interests of the declarant (i.e., they are unlikely to have been motivated by a desire to influence the case and are more likely to be truthful).

→ **Example.** [In a case involving the discharge of an employee, Mr. Jones, for excessive absenteeism and for misrepresenting the reasons for being absent from work; a coworker is testifying]

EA: Did Mr. Jones tell you where he was on July 5?

W: Yes.

EA: What did he say?

W: He said he was fishing in Canada with several friends.

UA: Objection, move to strike the answer on the basis that it was hearsay.

EA: Mr. Arbitrator, this testimony comes within an exception to the hearsay rule. It is an admission against interest by the grievant, Mr. Jones. In addition, Mr. Jones is here as a witness and is capable of refuting the testimony if that is possible.

A: Objection overruled. You may answer the question.

Discussion

- The reliability of hearsay is based not only on the integrity and recollection of the witness, it is influenced as well by the identity and circumstances of the declarant. When a statement is made by someone under circumstances in which no reasonable person would have a motive to make such a statement, the hearsay statement is thought to be sufficiently reliable to be admitted into evidence. Whether or not this is true in the real world, for purposes of applying the rules of evidence, it is an important exception to the hearsay rule.

Spontaneous or Excited Utterance

Statement of the Exception to the Rule

- When a hearsay statement is made by a declarant under circumstances of surprise and/or excitement such that the statement appears to be spontaneous or uncontrolled, the statement is admissible.

Rationale

- The trustworthiness of an out-of-hearing statement is greatly enhanced when circumstances surrounding the making of the statement indicate that the declarant did not premeditate or plan the statement, resulting in a spontaneous, and presumably candid, declaration.

→ **Example**. [In a case in which a machine operator files a grievance protesting a reprimand he received from his supervisor, Mr. Boss, for unsafe operation of a cutting machine, which caused an accident]

UA: At the time when the cutting machine went off the track, causing the accident, did you hear your supervisor, Mr. Boss, say anything?

W: Yes.

UA: What did he say?

EA: Objection, calls for hearsay.

UA: Mr. Arbitrator, while Mr. Boss's statement might otherwise be considered hearsay, the circumstances here indicate that it was made under stressful and unexpected circumstances. It therefore is an exception to the hearsay rule under the spontaneous declaration exception.

A: I'll allow the question. The witness may answer.

W: He said, "There goes that damn machine again."

Discussion

- The theory of this exception is that someone who is in an unpredictable situation and who, in a condition of surprise or stress, utters a spontaneous statement is likely to be telling the truth, and therefore the resulting statement should be admitted into evidence despite the fact that it is hearsay. The rationale is that persons who speak off the cuff or under conditions that indicate they did not calculate the effect of their words are likely to be telling the truth.

Past Recollection Recorded

Statement of the Exception to the Rule

- Testimony concerning a hearsay statement about which the witness does not have a current and complete recollection, but about which a written record or memorandum was made about the time the statement was uttered that would refresh the witness's recollection, may be admitted.

Rationale

- The reliability of hearsay is significantly increased when the witness who is providing the hearsay testimony made a written record at the time of or soon after the occurrence of the out-of-hearing statement.

- **Example.** [In a case of suspension of an employee, Ms. Hazel Nutt, for leaving work early without authorization]

  UA: Ms. Smith, do you recall what Hazel Nutt said to you at approximately 3:00 P.M. on the day in question?

  W: Well, she told me that she had to leave work early that day.

  UA: Did she say why she was leaving?

  W: Yes, she did say something about that, but I don't remember just what she said.

  UA: Do you have anything that would refresh your recollection?

  W: Yes, I made a short note in a log book that I kept at my desk.

UA: I'm showing you a log book from your department. Based on the note on page 18, can you tell us what Hazel said to you?

EA: Objection, calls for hearsay.

UA: Mr. Arbitrator, this is admissible under the past recollection recorded exception to the hearsay rule.

A: Ms. Smith, when did you make that note?

W: Within a few minutes after she spoke with me.

A: [To the witness] You may answer the question posed by the union advocate.

Discussion

- The past recollection recorded exception to the hearsay rule is rather artificial. If a witness has his or her recollection refreshed by examining a document at the hearing, what is to prevent the witness from viewing the document in advance of the hearing and simply testifying based on the refreshed recollection without any reference to the document that enabled the recollection?

- In most labor arbitration cases that is exactly what occurs. The advocate who is preparing the witness shows the document to the witness (or the witness produces the document), and the advocate uses it in preparing the witness to testify.

- An anomaly resulting from strict application of this rule of evidence is that the document that is used to refresh the witness's recollection is normally not admissible in evidence, even though the testimony that is refreshed by that document is admissible. In most labor arbitration cases, however, both the testimony and the document will be admitted by the arbitrator.

- The advocate who invokes the past recollection recorded exception to the hearsay rule will be at an advantage in having the arbitrator give full credence to the document as well as the testimony.

Business and Public Records

Statement of the Exception to the Rule

- Evidence in the form of a business or public record that is kept in the normal course of business or the administration of the public agency is admissible even though it would otherwise be objectionable as hearsay evidence.

Rationale

▼ Where business or public entities maintain records, reports, and so on as part of their normal functioning, such records or other documents are unlikely to be subject to fabrication, manipulation, tampering, or other actions that are intended to make such documents untruthful. For this reason they are usually reliable and therefore admissible.

➜ **Example.** [In a case involving the suspension of a truck driver because of an excessive number of motor vehicle violations]

EA: Have you obtained the driving record of Mr. Mack from the state department of motor vehicles?
W: Yes.

EA: How did you obtain it?

W: I mailed a written request to that agency and asked for a copy of Mr. Mack's driving record that would reflect any citations received by him within the last three years. It was mailed to me, and I received it on August 9 of this year.

EA: What did it indicate?

UA: Objection, this calls for hearsay evidence. The union cannot cross-examine the highway patrol officers who allegedly issued the tickets referred to nor can it question the employees of the department of motor vehicles who maintain the records.

EA: Madam Arbitrator, this evidence falls within the business and public records exception to the hearsay rule. These records are maintained in the normal course of business of that department.

A. Objection overruled.

Discussion

▼ Documents, and particularly records of businesses and public agencies, are seldom thought of as hearsay evidence. Nevertheless, they constitute statements, albeit written statements, made outside the hearing that are offered to prove the truth of the matters asserted, for example, that the truck driver grievant had an excessive number of traffic citations, Which violated the employer's rules concerning safe driving.

▼ There are few labor arbitration cases in which an arbitrator would not admit such documents, provided the records or other documents are shown to be authentic. When there is a question as to the authenticity or whether the records are kept in the normal course of business, the custodian or keeper of the records may need to be called as a witness.

▼ More often, however, the appearance of the record on its face and testimony about how it was obtained will reflect its authenticity and will be sufficient to support admission into evidence.

State of Mind

Statement of the Exception to the Rule

▶ Evidence of an oral or written statement that was made outside the hearing and that is offered for the purpose of showing the state of mind of the declarant (rather than the truth of the matters asserted in the in statement) is not actually hearsay evidence and is therefore admissible.

Rationale

▶ Evidence reflecting a declarant's state of mind at the time that an mt-of-hearing statement was made is admissible because it is not offered to prove the truth of the matters asserted. Consequently, it is not actually hearsay and is therefore admissible.

→ **Example**: [In a grievance by an employee, Mr. Jones, protesting that he was not assigned overtime by his supervisor, overtime to which he contends he was entitled]

UA: What did your supervisor say when you overheard him speaking-An-the men's room at lunchtime that day?

EA: Objection. The question asks for hearsay testimony.

UA: Mr. Arbitrator, the witness is being asked to state what he heard his supervisor say. We are offering his testimony on this point not for the purpose of proving the truth of what the supervisor said, but merely to show the supervisor's state of mind at that time.

A: I will permit the witness to answer the question, but I will consider the answer solely for the purpose of reflecting the declarant's state of mind at the time the statement was made. The witness may answer the question.

W: I heard him say, "Jones isn't worth a damn, I won't give him the overtime no matter what the contract says."

Discussion

The distinction between the state of mind of the declarant and the assertion of the truth of the matters contained in the hearsay statement is indeed a fine one. Once the arbitrator has heard the statement, it is difficult to conceive that he or she will be able to limit the meaning or interpretation of the statement to one narrow concept, that is, what was in the mind of the person who made the original statement. Nevertheless, this is the rationale behind the state of mind exception to the hearsay rule, and it is helpful for advocates to understand it.

Prior Testimony

Statement of the Exception to the Rule

➤ Testimony that was given in a prior hearing, trial, or deposition is admissible when the circumstances surrounding the taking of the testimony and the opportunity to cross-examine the declarant were such as to render the hearsay statements reasonably reliable.

Rationale

➤ When a person testifies in an adversary proceeding, particularly under oath and when a verbatim recording has been made, the statements are likely to be reliable, particularly when the same or similar parties and issues were involved and when there was an opportunity for the witness to be cross-examined by a competent advocate.

➜ **Example.** [In an arbitration where the grievant was discharged for falsification of an employment application, the grievant had previously filed an unemployment compensation claim, which resulted in an unemployment hearing prior to the arbitration hearing.

In the unemployment hearing, the grievant's supervisor had testified about the reason for the discharge. The grievant's union representative is testifying.]

UA: Did you attend the unemployment compensation hearing concerning Mr. Wax?

W: Yes, I did.

UA: Did you obtain a copy of the transcript of that hearing?

W: Yes, I did.

UA: In that hearing did Mr. Wax's supervisor say what his reason was for the discharge?

EA: Objection, this question calls for hearsay.

UA: We can produce the transcript of the hearing to substantiate the witness's testimony. While admittedly hearsay, it comes within the hearsay exception of recorded testimony and is therefore admissible.

A: I will overrule the objection and permit the witness to answer.

W: Mr. Wax supervisor said that he discharged Wax because he had a bad attitude.

Discussion

➤ In most adversary hearings and in all trials, witnesses are sworn to tell the truth. When the testimony of a witness has been given in such a proceeding and when a record of that testimony has been kept, evidence in the form of testimony or a transcript containing such prior testimony will be admitted.

➤ Even if it does not prove the truth of the matters asserted e.g., that an employee was fired for a bad attitude), it may be used to attack the credibility of the declarant (e.g., that the supervisor fired an employee for reasons other than those used to justify the discharge in arbitration, i.e., on a pretext).

Statements Having Independent Legal Significance

Statement of the Exception to the Rule

✖ Testimony or documentary evidence of statements made outside the hearing that have a legal significance irrespective of the truth of the matters contained in the statement are admissible.

✖ In a labor arbitration , context statements made by parties to a labor agreement leading up to their agreement are generally admissible for the purpose of proving the meaning of language in that agreement. Because they have such independent legal significance, they are not truly hearsay, inasmuch as they not offered to prove the truth of the matters asserted.[4]

Rationale

✖ This exception is based on the notion that certain words have legal consequences, that is, they create legal rights and obligations. Because a labor agreement is considered to embody the intentions of the parties expressed in the making of that agreement, the discussions have independent legal significance and are therefore admissible.

➜ **Example**. [In a case in which the union and employer contest whether the seniority clause modified in recent negotiations was intended to change the way employees were recalled from layoff)

UA: Mr. Green, did you participate in labor negotiations as a union representative in the last contract negotiations?

W: Yes.

UA: Were you in attendance on July 30 when Section 17 was finally agreed on.

W: Yes.

UA: What, if anything, did the employer's spokesman, Mr. Blue, say that day about the wording changes being made in Section 17?

EA: Objection. Calls for hearsay testimony.

UA: Madam Arbitrator, this testimony is admissible. Mr. Blue's statements have an independent legal significance and are not precluded by the hearsay rule.

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[4]Lilly, *An Introduction to the Law of Evidence,* (West Publishing, 1987) p. 190; Hill and Sinicropi, Evidence in Arbitration. (BNA Books, 1987) p.148.

A: Objection overruled. The witness may answer.

W: He said, "Don't worry about this change in wording. This is simply to clarify the meaning of this section, not to change the layoff procedures."

Discussion

✖ Most labor arbitrators will give short shrift to any objections concerning statements made at the bargaining table that will shed light on the meaning of disputed or ambiguous contract language. Unless the language of an agreement is absolutely clear on its face and not subject to multiple meanings (and completely clear language is relatively rare in labor contracts), such evidence is usually instructive as to the parties' intentions concerning the language. Moreover, unless the negotiations in which the statements were made occurred a long time prior to the hearing, the other side would normally have ample opportunity to rebut the claimed hearsay evidence.

Prior Inconsistent Statement

Statement of the Exception to the Rule

◆ When a witness provides testimony that a declarant made a statement outside the hearing that is inconsistent with a statement or position taken in the case by the declarant (or a party with which the declarant is Allied), the hearsay testimony is admissible.

Rationale

◆ As with the state of mind exception discussed above, evidence of a prior inconsistent statement made by a witness or a principal party in the case is often non-hearsay in that it is used to impeach the declarant and may or may not be used to prove the truth of the matters asserted.

➜ **Example**. [In a case involving the denial of a requested transfer of a grievant from one department to another when the supervisor in charge has testified in the arbitration that it was because he believed the grievant was unqualified to do the work in the other department]

UA: Mr. Stuart, as the union representative for the grievant, did you attend the second-step hearing of this grievance?

W: Yes, I did.

UA: Was Mr. Boss present?

W: Yes

UA: What did Mr. Boss say was the reason for denying the grievant the opportunity to transfer into a new department.

EA: Objection, calls for hearsay.

UA: Mr. Arbitrator, we submit that this evidence will show that Mr. Boss took a position and made a statement that were contrary to that which he has testified to today, and it therefore falls within the prior inconsistent statement exception to the hearsay rule.

A: Objection overruled. I believe the exception applies. Additionally, Mr. Boss is present in the hearing room and will have an opportunity to refute the evidence if that is appropriate.

W: He said, "Peters is not loyal to the company."

Discussion

◆ Whether inconsistent statements made outside the arbitration hearing are justified as an exception to the hearsay rule or as non-hearsay for the purpose of impeachment, such inconsistent statements are admissible. Moreover, the subject of the prior inconsistent statement need not even concern a matter involved in the case. As long as it shows the declarant to be inconsistent (and presumably untruthful), it is relevant to the case and therefore admissible.

Other Hearsay Exceptions

➜ The exceptions discussed above are the principal exceptions to the hearsay rule that have been traditionally accepted by the courts and to some degree in labor arbitration. There are some others that are less frequently recognized but in many cases no less significant to labor arbitration advocates. These will be reviewed in a more summary fashion.

Present Sense Impression

➜ When a declarant describes his or her observation or impression about a condition at or soon after an operative event or condition, the statement repeated by a witness in a hearing may be admitted as an exception to the hearsay rule. For example, a witness testifies that she overheard her supervisor state during the morning coffee break, "I'm sick of this place." This exception is somewhat similar to the spontaneous or excited utterance, although the element of surprise is not required.

Present Physical Condition

➜ When the hearsay testimony consists of a statement made by a person who is describing his or her physical condition at the time of the statement, the testimony relating such a statement is admissible as an exception to the hearsay rule. For example, an employee who testifies that a coworker said, "I have a splitting headache," before the coworker went home early has given admissible evidence under this exception to the hearsay rule.

Surveys and Polls

➜ Evidence of the results of an opinion survey or poll is a result of statements made to poll takers and is ostensibly hearsay but is admissible as an exception. In some cases the evidence may be considered under another label, such a state of mind or present sense impression, but may also be admitted for its own sake.

Concluding Note Concerning Hearsay Exceptions

➜ It bears repeating that hearsay evidence is usually admissible in labor arbitration, provided the evidence is relevant. Advocates need not normally rely on exceptions to the hearsay rule for the purpose of having evidence entered into the record, but such exceptions can be helpful in persuading the arbitrator that the alleged evidence is either not hearsay (because it is not offered to prove the truth of the matters asserted, but for some other purpose, such as the state of mind of the declarant) or is clearly admissible under the hearsay rule because it constitutes an exception.

➜ The main purpose of arguing the exceptions to the hearsay rule is to have the arbitrator accept the evidence and give full weight to its significance, rather than to have it admitted for whatever weight it deserves. Nevertheless, advocates should not be overly concerned if they do not fully understand or feel comfortable with the hearsay rule and/or its exceptions. Lack of understanding or facility with the hearsay rule is seldom a serious liability in labor arbitration. It is one that is often shared with the arbitrator.