PROVING THE CASE

Proof in arbitration cases is generally a matter of common sense. There is no accepted standard of the "burden of proof" since it may differ depending on the nature of the issue, the contract language, or the habits and customs of the parties. Most arbitrators decide cases without ever stating who has the "burden of proof."

Normally, the party initiating the arbitration case will present the evidence or "go forward" first. However, sometimes this procedure will be reversed if the other party is in possession of the facts, as in a discharge case. This is supported by the usual objection to "proving a negative." A union can scarcely prove a member did not do something until it is known what he or she is alleged to have done.

Arbitrators normally will have an idea of who must prove what in a case and, as the case progresses, will decide how much proof they will need to be satisfied.

There are three (3) levels of degrees of proof that a party may be required to sustain. The loosest standard of proof is preponderance of the evidence. This gives the decision to the side which on balance carries a majority percentage of proofs by weight related to the bearing these have on crucial aspects of the dispute. The tightest standard of proof is beyond a reasonable doubt. Here, the side carrying the burden must establish proof-positive or fail in its cause. The third standard of proof is clear and convincing evidence which lies somewhere between the two.

In Discipline and Discharge Cases, the burden of proof and the amount of proof an arbitrator will require will depend on:

a. the contract language,

b. on the seriousness of the offense, and

c. how the parties have treated such offenses in the past.

Since discharge is the ultimate penalty, most arbitrators will make the company prove its case clearly, sometimes even "beyond a reasonable doubt." There are two points to be decided in discipline and discharge cases:

a. the proof of wrongdoing, and

b. the degree of penalty to be imposed if proof is established.

Sometimes the contract or the arbitration submission will give the arbitrator no leeway in assessing the penalty. They normally decide guilt and the penalty follows automatically. Normally, arbitrators like to have the latitude to determine a proper penalty or remedy.

In Contract Interpretation Cases, the proof depends largely on the contract language and on the case to which the language is being applied. For example:

a. If the contract provides for straight seniority, the burden of proof is obviously on the employers if they wish to by-pass senior workers.

b. If the contract provides for seniority and "sufficient" ability, the employer must show that the senior worker does not have the "sufficient" capabilities for the job.

c. If the contract provides for seniority provided ability is "equal," the burden shifts to the union to show that ability actually is equal.

Sometimes if the contract is silent or vague, arbitrators will shade their decisions for the union if seniority is being applied to demotions or layoffs and will apply a stricter standard if seniority is being applied to promotions.

EVIDENCE AND PROOF IN ARBITRATION CASES

(This material was taken from Problems in Arbitration, a Staff Training Program published by the Industrial Union Department of the AFL-CIO).

Evidence in Arbitration

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

Weight and Credibility

It is, of course, up to arbitrators to decide what weight they will give to a piece of evidence and whether or to what extent they believe a particular witness. In making such a determination, arbitrators take into account these factors:

a. whether or not statements "ring true"

b. the conduct of the witness on the stand

c. whether he or she speaks from first-hand knowledge or hearsay

d. the witnesses' experience in the matter on which he or she is testifying

e. inconsistencies in testimony

f. past record or personality

Not one of these factors by itself but all of them taken together determines how much weight or credibility an arbitrator gives to evidence or witness.

Kinds of Evidence

1. Hearsay evidence--If a witness testifies as to what he or she did or said, the testimony carries more weight than if he testified as to what somebody else said.

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

3. Circumstantial evidence--Though not as strong as direct evidence, circumstantial evidence is acceptable and sometimes decisive in arbitration cases. The test is whether or not such evidence proves "beyond a reasonable doubt" that a worker actually performed an alleged act.

Some Procedural Protections

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

1. Right to cross examination. An arbitrator will not accept evidence if it is submitted only on condition that the other party not be allowed to see it. The parties not only have the right to see evidence (exhibits) but also to cross-examine witnesses making allegations. Even

new data submitted in post-hearing briefs can be grounds for demanding further hearing.

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

2. Withholding evidence until hearing. In order to prepare a defense or rebuttal, parties must be given copies of all exhibits. There is also a strong convention against withholding previously known evidence until the hearing. At the very least, the opposing party may claim time to consider such new evidence.

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

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

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

6. Inspection by arbitrator. If both parties consent, the arbitrator may make personal investigations of cases. The most common use is for plant inspections.