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“I’ll Take it for What it is Worth” -- The Use of Hearsay Evidence by Labor Arbitrators: A Primer and Modest Proposal¹

Marvin F. Hill, Jr. and Tammy M. Westhoff

I. INTRODUCTION

One of the most difficult evidentiary problems facing any trier of fact, and especially arbitrators (many of whom are not attorneys), concerns the disposition of hearsay evidence. In the judicial forum hearsay will be excluded in civil and criminal cases unless some exception can be found.² While labor arbitrators are not constrained by the rules of evidence followed by the courts (at least in the private sector), an arbitrator will invariably discount many types of hearsay consistent with conducting a fair and adequate hearing.³ At other times an arbitrator will credit hearsay and take it into the record giving it weight comparable to that of an eyewitness’ testimony. More often than not, arbitrators admit hearsay with the

1. Copyright, Marvin F. Hill, Jr. and Tammy M. Westhoff. All rights reserved. This article is an expanded analysis of “Hearsay Evidence and Other Exclusionary Rules,” in Hill & Sinicropi, *Evidence in Arbitration* (BNA Books, 1991), 131-153.

2. FED. R. EVID. 802, states: “Hearsay is not admissible except as provided by these rules. . . .”

3. See, e.g., Warner and Swasey Co., 65 Lab. Arb. Rep. (BNA) 709 (Walter, 1975)(suspension reversed where charge based on report of employee not present at hearing); Pipe Coupling Manufactures, Inc., 68-1 Lab. Arb. Awards (CCH) ¶8088 (McDermott, 1967)(suspension of employee rescinded where no evidence other than hearsay advanced; vagueness and inconclusiveness of such evidence requires that it be supported by other evidence); Chippewa Valley Bd. of Educ., 62 Lab. Arb. Rep. (BNA) 409 (McCormick, 1974)(hearsay admitted where evidence corroborates other evidence on record); United Parcel Serv., Inc., 74-2 Lab. Arb. Awards (CCH) ¶8541 (King, 1974)(hearsay normally admitted, though effect restricted); Bamberger’s, 59 Lab. Arb. Rep. (BNA) 879, 882 (Glushien, 1972)(“Some kinds of hearsay no doubt are more compelling than others and carry a certain degree of probability. But in all or substantially all cases which the arbitrator can envisage, there must be apart from the hearsay a core of competent, reliable and credible evidence which the hearsay corroborates.”).

accompanying declaration: "I'll take it for what it is worth."⁴ Rarely do the parties know what it's worth, at least not at the hearing.

Under what circumstances should an arbitrator take into the record and credit hearsay evidence? Are there times that an arbitrator should exclude hearsay? If so, when? Is it the better rule that arbitrators should take all evidence into the record, even "gross hearsay," giving it such weight as it deserves? If an arbitrator admits the evidence "for what it's worth," is there an obligation to inform the parties in the opinion and award what it's worth? Is this always possible? Is it desirable in the arbitral forum given its emphasis on informality?

This article considers these and other selected problems dealing with hearsay evidence that are likely to be encountered in the arbitral forum.⁵ It is our thesis that arbitrators do and should credit some (but not all) forms of hearsay evidence, but that the arbitral process is not served by admitting all evidence and "taking it for what it is worth." Further, we believe when an advocate's case against a grievant consists entirely of hearsay evidence, and there is no reliable substitute for cross examination or "equivalent circumstantial guarantees of trustworthiness," the grievant should prevail. Only in the rarest of cases will management prevail when its evidence consists entirely of hearsay evidence.

II. A USER'S DEFINITION OF HEARSAY

"Hearsay" may be defined as a "statement," other than one made by the declarant while testifying at the hearing, that is offered in evidence to prove "the truth of the matter asserted."⁶ Under this definition hearsay may be in oral or written form, or in the form of conduct when the conduct of the individual is intended as an assertion.⁷

Hearsay as a Three-Part Process. Three distinct elements are present in hearsay evidence: (1) a "statement" or an "assertion" or "assertive conduct" that is, (2) made or done by someone other than a testifying witness which is, (3) offered in

4. See, e.g., Wisconsin Dept. of Health & Social Svcs., 84 Lab. Arb. Rep. (BNA) 219, 222 (1985, Imes)(discussed *infra*), stating: "[I]t [hearsay] is generally accepted 'for what it is worth' since hearsay evidence may have some probative value."

5. For an exhaustive review of the subject, the advocate is advised to consult either MCCORMICK ON EVIDENCE (Edward Cleary ed., 2d ed. 1972), or 5 WIGMORE ON EVIDENCE, §1361 (3d ed. 1940). Another excellent treatment is: Michael H. Graham, "Stickperson Hearsay": A Simplified Approach to Understanding the Rule Against Hearsay, 1982 U. Ill. L. Rev. 887 (1982). An especially good "nutshell" text is by Irving Younger, *An Irreverent Introduction to Hearsay* (1977 A.B.A. SEC. LIT. 3).

6. See, FED. R. EVID. 801(c).

7. Graham writes that "The common law definition of hearsay is 'testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion [matters directly expressed and matters necessarily expressed by implication] to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.'" Graham, *supra* note 5, at 888, citing MCCORMICK ON EVIDENCE §246, at 584 (Edward Cleary ed., 2d ed. 1972). A succinct statement of the rule is "a statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as *evidence of any fact stated*." Graham, *supra* note 5, at 888 n.3, citing CROSS ON EVIDENCE 1-2, 6-7 (5th ed. 1979) (emphasis in original). Professor Irving Younger defines hearsay as evidence that "depends for its probative value upon the credibility of someone who cannot be cross-examined. . . ." Younger, *supra* note 5, at 3.

evidence to prove the truth of the matter asserted. *The elements are stated in the conjunctive.* It matters not whether the out-of-court declarant is present and/or testifies at the hearing. The definition applies to all "statements"⁸ which are not made under oath at the hearing and are not subject to contemporaneous cross-examination before the trier of fact.

III. COMMON PROBLEMS ENCOUNTERED IN THE ARBITRAL FORUM: A PRIMER FOR ADVOCATES AND ARBITRATORS

The following examples are offered as illustrations of problems likely to surface in a labor arbitration:

1. *Absent accusers (an introduction).* Reporting services cite numerous cases where absent accusers "testify" in arbitration⁹ and administrative¹⁰ proceedings. For

8. FED. R. EVID. 801(a) defines a "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion."

9. Besides the cases discussed in this article, see *Floyd Valley Packing Co.*, 86 Lab. Arb. Rep. (BNA) 1246 (Hoffmeister, 1986)(written statement of orthopedic surgeon); *St. Charles Grain Elevator Co.*, 84 Lab. Arb. Rep. (BNA) 1129 (Fox, 1985)(written statement of absent security guard); *Ambassador Convalescent Center, Inc.*, 83 Lab. Arb. Rep. (BNA) 44 (Lipson, 1984) (statement of patient, deceased at the time of the hearing, that grievant was "the one who hit me" admitted as exception to hearsay rule); *PEPCO*, 83 Lab. Arb. Rep. (BNA) 449, 452 (Kaplan, 1984) (admitting child's testimony through mother); *Georgia Power Co.*, 76 Lab. Arb. Rep. (BNA) 761, 768 (Foster, 1981) (written contemporaneous memoranda of statements by co-workers reporting that grievant made threats); *Los Angeles Transit Lines*, 25 Lab. Arb. Rep. (BNA) 740 (Hildebrand, 1955) (reports of professional spotters admitted); *Babcock & Wilcox Co.*, 75 Lab. Arb. Rep. (BNA) 12 (Duff, 1980) (medical reports admitted to establish schizophrenic illness of grievant). *But see* *Utility Trailer Mfg.*, 83 Lab. Arb. Rep. (BNA) 680 (Richman, 1984) (rejecting testimony of non-appearing police officer that substance was a controlled substance); *Bamberger's*, 59 Lab. Arb. Rep. (BNA) 879, 882 (Glushien, 1972)(excluding testimony of undercover agent not present at hearing).

In *Metropolitan Council Transit Operations*, 106 Lab. Arb. Rep. (BNA) 68 (1996), Arbitrator Joseph L. Daly accredited an absent accuser's testimony when the company demonstrated a valid concern for the accuser's safety. *Id.* at 72. In this sexual harassment case the complaining witness had her tires slashed, had harassing mail and phone calls, and had men following her and threatening her death if she didn't "keep [her] mouth shut." *Id.* at 71. Arbitrator Daly refused to subpoena the complaining witness, and accepted her affidavit as reliable evidence. The Arbitrator stated that he was cognizant of the fact that hearsay evidence in arbitration will invariably be discounted to facilitate conducting a fair and adequate hearing. However, Arbitrator Daly asserted that it is generally accepted that hearsay evidence can have probative value, and it is the Arbitrator's responsibility to use his expertise to properly evaluate it. Daly concluded that the rule against hearsay is "not a rule against common sense" and chose to accredit the witness' testimony considering the grievant admitted that he made some of the harassing remarks, and the complainant had been a credible witness in two prior sexual harassment arbitrations. *Id.* at 73.

Situations exist where management refuses to identify the accuser. Arbitrator Matthew Franckiewicz in *Sena-Kean Manor*, 104 Lab. Arb. Rep. (BNA) 369, 374 (1995), observed that when the company refuses to identify the accuser to the grievant, it becomes impossible for him to bring forth facts questioning the veracity of the accusation, such as a history of prior false accusations or a personal malice toward the grievant. In his words:

[A]n employee's [typical] response to an accusation is not that the accuser has fabricated it, but instead that the accuser has misunderstood the situation, or has left out important details. Unless an employee is adequately apprised of the

example, in *Asarco, Inc.*,¹¹ one of management's witnesses testified he had been told by two co-workers they had observed the grievant smoking marijuana while at work. In *Lane v. Town of Dover*¹² a dismissed police officer testified he was advised by at least one town official the mayor was slandering him, and the city attorney told them "it would be for the betterment of the town to get rid of me and not to tell people that I was fired for my temper."¹³ A common example in theft cases is where a witness testifies a co-worker "told me that he saw the grievant take company property."¹⁴

In the theft case example, the witness's testimony as to what the co-worker said is clearly hearsay if offered to establish any of the following: (1) that a theft took place, (2) that the grievant was responsible, or (3) that the theft was in any respect as stated by the witness. The absent co-worker, who is the "out-of-court declarant,"¹⁵ has made a statement that the grievant has taken company property. Moreover, it appears that the company is offering the testimony to "prove the truth of the matter asserted," or as evidence of the fact stated -- that the grievant in fact stole the property. Consequently, the statement of the witness is hearsay and thus is highly suspect evidence. This conclusion is also applicable in the first example above where a witness testified that he was told by others that they observed the grievant smoking marijuana. *Even if the co-workers who observed the grievant are present at the hearing*, the "statement" is coming from a non-testifying witness who was not placed under oath before a trier of fact, and, accordingly, it is hearsay if offered to prove the truth of the matter asserted (i.e., that the grievant was smoking marijuana).

There are numerous reasons why out-of-court statements of non-testifying witnesses are suspect and subject to exclusion. A proceeding where the key player is unseen and inaudible behind the scenes makes for a very imprecise and incomplete scenario.¹⁶ For instance, there may be serious problems with the *perceptions* of the absent co-workers. How good was their eyesight, and how close were they to the grievant when they observed the alleged conduct? Did they actually observe what

specific incident to which she is to respond, it is impossible for her to complete the picture with such additional facts, and can only issue a general denial, which quite likely will be viewed as of dubious credibility. *Id.* at 374.

The Arbitrator conceded that cases exist where an accuser's name should not be divulged, such as a valid fear for the accuser's safety. However, when the accusation is simply that the grievant was inconsiderate or indifferent towards patients, the accuser's name should be divulged. *Id.*

10. For an outrageous example, see *Reguero v. Teacher Standards and Practices Comm'n*, 789 P.2d 11, 101 Ore. 27 (Ct.App.Ore. 1989), where the court sustained a denial of a teacher's application for reinstatement of a teaching certificate based only on hearsay, reasoning that "the hearsay evidence of the students' statements is of a type commonly relied on by reasonably prudent persons in conducting their serious affairs, and it was properly admitted."

11. 81-1 Lab. Arb. Awards (CCH) ¶8153 (Williams, 1980).

12. *Lane v. Town of Dover, Okl.*, 761 F.Supp. 768, 772 (W.D.Okla. 1991), *aff'd*, 951 F.2d 291 (10th Cir. 1991).

13. *Id.*

14. See, e.g., *Associated Cleaning Consultants*, 94 Lab. Arb. Rep. (BNA) 1246 (Lubow, 1990) (hearsay statement when co-worker testified that she overheard a patient in the employer's nursing home state that the grievant had taken money from the patient).

15. Under the federal rules a "declarant" is simply defined as "a person who makes a statement." FED. R. EVID. 801(b).

16. See, U.S. Dept. of Treasury, 82 Lab. Arb. Rep. (BNA) 1209, 1212 (Kaplan, 1984) (where the arbitrator explained if the absent witness were available the concerns presented at the hearing may be clarified).

is alleged at the hearing? How good was their recollection when they spoke to the testifying witness? Was it perhaps someone else and not the grievant whom the co-employees observed? Thus, problems of recordation and recollection (memory) arise.

There are other potential problems with absent co-workers' statements. The credibility of the out-of-court statements depends on whether the absent co-worker had any reason to lie about the grievant. The absent co-workers statements may not be credible because of prior contacts with the grievant. The grievant may be able to establish a bias or prejudice on the part of the co-worker. Further, the veracity and sincerity of persons making out-of-hearing statements may be questionable, making the ability to cross-examine the accuser essential. For example, in *Duke University*,¹⁷ a female computer operator who had terminated a long-term affair with the grievant (a shift supervisor at a computer center) after he became her supervisor accused him of sexual harassment, but refused to testify at the hearing. In refusing to credit the hearsay statement of the absent accuser, the arbitrator stated that if what the witness reported is untrue, she is the tragic victim of her unjust accusations; if true, she has done the University a grave injustice by refusing to testify.¹⁸ The Arbitrator appropriately concluded that the failure of the accuser (and other employees) to testify deprived the grievant of a fair hearing, and "deprives the arbitrator of an opportunity to see, hear and evaluate the demeanor of the accusers."¹⁹ The arbitrator correctly refused to judge by the adage 'where there is smoke there is fire.'²⁰ In his words, "[t]here is no substitute for the real thing."²¹

Finally, the validity of the co-workers' assertions also depends on how good they were at reporting the facts to others; i.e., their communication skills. The co-workers' account of the incident may have consciously or unconsciously produced disparity between the picture that the in-court witness has given and what actually happened. The language used by the out-of-court declarant may not have accurately conveyed the true facts to the testifying witness, thus giving rise to problems of articulateness. For example, in *Springfield Township Police Dept.*,²² the grievant was suspended after his police lieutenant learned through two dispatchers that he was making racial comments. A dispatcher's report asserted the patrolman said he did not want to be included in the Chief's "nigger family."²³ The police lieutenant testimony was based upon the information told him by the dispatchers,

17. 100 Lab. Arb. Rep. (BNA) 316 (Hooper, 1993).

18. *Id.* at 319.

19. *Id.*

20. *Id.*

21. *Id.* The arbitrator did note that one piece of hearsay evidence was admitted -- the grievant's admission to others of "horseplay" with female employees. In his words:

An admission of an accused made to another and repeated by the hearer is an exception to the general rule [against hearsay]. The principal [sic] rationale for excluding hearsay is that the accused is denied an opportunity to cross-examine the person making the statement. That obviously does not apply in the case of the accused; he can hardly complain that he has no opportunity to cross-examine himself. Therefore [A]'s admissions about hugging and kissing female employees is accepted the same as direct evidence.

Id. at 320.

22. 106 Lab. Arb. Rep. (BNA) 670 (Strasshofer, 1996).

23. *Id.* at 671.

who were not available at the hearing.²⁴ At the hearing it was discovered that the dispatchers, who allegedly heard the statement from the grievant, could not remember the specific time during a four-hour shift that the grievant made the statement, and their reports of the incident were recorded six days after the incident pursuant to the lieutenant's request. Arbitrator Strasshofer concluded the information was double hearsay and, as such, unreliable evidence.²⁵

In summary, the inherent problems with the evidence offered by absent witnesses concerns its reliability.²⁶ The absent co-workers' statements were not made under oath before a trier of fact, nor are they available for cross-examination to test for the presence of the problems illustrated above: perception, memory, veracity, and communication. In the examples cited, reliance on the co-workers' testimony would deprive the grievant of the chance to test whether his accusers were lying, misremembering, or just reporting ineptly. This lack of opportunity for cross-examination is the primary justification for the exclusion of hearsay. Applying this rationale, Arbitrator John Flagler, in *Weyerhaeuser Co.*,²⁷ reflecting the better view, stated: "Absent opportunity for cross-examination the Arbitrator cannot possibly gauge [Weyerhaeuser's] accuracy of perception of exactly what was said by whom in the disputed discussion of union status and wage rates. Neither can I assess the quality of his recollection, his truthfulness, or his ability to intelligently convey what he might have thought happened."²⁸

2. *Affidavits and/or other statements by absent witnesses.* An affidavit or other statement by an absent declarant -- even if witnessed by the late Joseph Cardinal Bernardin of the Archdiocese of Chicago and sealed from St. Peter's Basilica by Pope John Paul II himself, *if offered to prove the truth of the matter asserted therein*, is hearsay and highly suspect evidence. The most-often cited reason for excluding this evidence is the absence of the opportunity to cross-examine the out-of-court affiant. Arbitrator Morris Glushien, in refusing to credit the out-of-court statement of an undercover agent as recounted by the employer's manager, aptly stated his concerns with crediting statements from witnesses who were unavailable to testify:

For the sum total of what we have is merely a bare hearsay account to [the security manager] by a man [the out-of-court declarant] who -- whatever his reasons -- refused to appear at the hearing to face the man he accuses

24. *Id.*

25. *Id.* at 672.

26. Graham explains it this way:

When a witness testifies in court, four risks must be considered in evaluating the trustworthiness of the witness' testimony. These risks are: (1) perception (the witness' ability to observe what actually occurred), (2) recollection and recollection (the witness' memory of the event), (3) narration (ambiguity in the witness' description of the event), and (4) sincerity (the possibility of fabrication). To protect against these four risks, the law provides that a witness may testify at trial only as to matters within his personal knowledge (1) under oath or affirmation, (2) in person, so that the trier of fact may observe the witness' demeanor, and (3) subject to contemporaneous cross-examination.

Graham, *supra* note 5, at 890-91.

27. 85-1 Lab. Arb. Awards (CCH) ¶8102 (1984).

28. *Id.* at 3416.

and to expose himself, his veracity and the circumstances surrounding the alleged transaction to the rigors and trials of cross-examination.²⁹

In a footnote the arbitrator also noted:

Without his [the undercover agent's] testimony we do not know whether, for example, there may have been entrapment; whether he himself may have triggered the episode by acting as an *agent provocateur*; or whether there were other surrounding circumstances bearing upon [the agent's] involvement, if any, and the degree of his guilt.³⁰

Arbitrator Edwin Teple likewise expressed a concern for the right to cross-examine the absent witness and, also, to scrutinize the witness while testifying:

a written statement cannot be relied upon to establish the entire truth of the matter, and in a hearing cannot be given the same weight as oral testimony in the course of which the Arbitrator may observe the witness and which is subject to cross examination during which any uncertainties are subject to further inquiry.³¹

If hearsay evidence of this type has any utility, it is usually of a corroborative nature.³² Some arbitrators, while recognizing the hearsay nature of written statements of witness, have admitted them for purposes other than to show the "truth of the matter asserted." In *St. Charles Grain Elevator Co.*,³³ Arbitrator Mildred Fox, Jr., admitted the written statements of a non-testifying security guard, not to prove commission of the act in question -- that an employee fired a shotgun blast at the company's administrative building -- but for the purpose of showing that the guard

29. Bamberger's, 59 Lab. Arb. Rep. (BNA) 879, 882 (1972).

30. *Id.* at n.6.

31. Akron Gen. Med. Center, 77-2 Lab. Arb. Awards (CCH) ¶8336 at 4445 (Teple, 1977). See also Budd Co., 75 Lab. Arb. Rep. (BNA) 281, 283 (Sergent, 1980); Dayton Pepsi Cola Bottling Co., 75 Lab. Arb. Rep. (BNA) 154, 167 (Keenan, 1980) ("[U]nsworn statements of pharmacist Reichert and owner Baker are not relied upon, since, as it developed, the matters contained in each statement were too important to deprive the opposing party of its right to cross-examination."); Crestwood Hospitals, Inc., 86-1 Lab. Arb. Awards (CCH) ¶8084 at 3369 (Concepcion, 1985) ("The declaration [of a patient against the grievant] cannot bear any weight without testimony from the person to whom the declaration is attributed.").

32. See, e.g., Bricklayers v. Finishers, 87 Lab. Arb. Rep. (BNA) 1252, 1254 (Lesnick, 1985) (corroborated affidavits, although losing some credibility, sufficiently proved case. . . Even if hearsay is admissible, the Umpire needs at least one present witness with first hand testimony to further probe when generalized assertions are disputed); Georgia Power Co., 76 Lab. Arb. Rep. (BNA) 761 (Foster, 1981); Utility Trailer Mfg., 83 Lab. Arb. Rep. (BNA) 680, 684 (Richman, 1984); Berberich Delivery Co., Inc., 79 Lab. Arb. Rep. (BNA) 277 (Kubie, 1982); Chippewa Valley Bd. of Educ., 62 Lab. Arb. Rep. (BNA) 409 (McCormick, 1974) (hearsay statement of physician admitted where evidence corroborates other evidence in record).

33. 84 Lab. Arb. Rep. (BNA) 1129 (Fox, 1985).

made the statements in connection with the incident.³⁴ Arbitrator Fox stated that the reliability of the statement is suspect because at the time the affidavit was made the guard was not under oath, not subject to cross-examination as to the truth of the statement and was not confronted by the parties or the Arbitrator. Fox concluded that the most important requirement for testing the credibility of the witness and the truth of his or her statement is cross-examination, which is not possible when the guard was not present to testify.³⁵

Similarly, in a case involving the introduction of an inspector's report, the Merit System Protection Board (MSPB) ruled that it will consider hearsay evidence subject to the following factors: (1) whether the out-of-court statements are in affidavit form; (2) whether the declarant was a credible disinterested witness to the events; (3) the reasons given for the failure to obtain sworn statements; and (4) other corroborating evidence in the record.³⁶ The Board found, however, that the inspector's report, which constituted the agency's only evidence against the grievant, was not sufficiently probative to support the agency's removal action by the requisite preponderance of evidence standard.

The advocate that wants to prove his case by the use of affidavits only has a tough row to hoe. Illustrative is *Buckeye Steel Castings Co.*,³⁷ a decision reported by Arbitrator Jonas B. Katz. An employee was suspended for leaving his post early. The only evidence the employer submitted was a written report of a foreman who no longer worked for the company. The report read that the grievant left his station early at the end of his shift without permission. Stating that the evidence of the company is hearsay, the arbitrator had little difficulty ruling in favor of the grievant.³⁸

Also illustrative is *Grace Industries*,³⁹ where the company attempted to submit into evidence an affidavit of a discharged employee's supervisor after the close of the hearing. The grievant, a part-time employee, was discharged for not calling to see if she was needed at work.⁴⁰ At the discharge hearing, the company's only evidence was the employee handbook.⁴¹ The company did not call any witnesses or explain the absence of the accusing supervisor, but attempted to submit the supervisor's affidavit following the hearing.⁴² Arbitrator Ildiko Knott stated that at the hearing the company did not attempt to explain the supervisor's absence or mention the existence of an affidavit. Knott explained that it is unfair to admit the affidavit of the supervisor after the hearing because the Union lacked the crucial ability to subject the supervisor to cross-examination; testing for truthfulness,

34. *Id.* The guard did not testify at the hearing due to his physical and emotional condition as set forth in his doctor's letter. He did state that he did not come forward to volunteer the evidence he had because he was scared of the grievant.

35. *Id.*

36. *McDonald v. United States Postal Serv.*, 20 MSPR 587, 589 (1984), citing *Borninkhof v. Department of Justice*, 5 MSPB 150, 156-57 (1980).

37. 105 Lab. Arb. Rep. (BNA) 581 (Katz, 1995).

38. *Id.* at 582-583.

39. 102 Lab. Arb. Rep. (BNA) 119 (Knott, 1993).

40. *Id.* at 120.

41. *Id.* at 122. The Employer attempted to admit a memorandum from the accusing supervisor, but did not pursue its introduction after the Union objected to the hearsay nature of the memo. *Id.*

42. *Id.*

consistency, recollection bias, and other indicia of credibility.⁴³ Had the issue of an affidavit been raised pre-hearing, the parties could have responded to the request and the Arbitrator could have judged the arguments of the parties. As such, Arbitrator Knott declined to admit the affidavit.⁴⁴

In examining the above examples concerning admitting and crediting hearsay evidence the thoughts of Arbitrator Lionel Goulet in *Rohr Industries*⁴⁵ is noteworthy. In that case the only evidence offered to prove the grievant possessed, used and sold controlled substances were the written and tape-recorded statements of three employees who made themselves 'unavailable' to testify.⁴⁶ In discounting the testimony the arbitrator had this to say regarding the rules of evidence and the function of a labor arbitrator:

The Rules of Evidence were devised during centuries of trials to prevent irrelevant, immaterial, or non-probative matter going to the jury to be considered in its determination. They have little need to be considered by the judge in a bench trial, or by a labor arbitrator. As the advocates for both sides in a labor arbitration often are not lawyers, the arbitrator must give them wide latitude in making their cases. So this arbitrator, like many others, will permit almost anything presented at the hearing to be admitted 'for what it is worth.' There is no altruism in this; an arbitrator who adopts more restrictive standards runs a higher risk of being overturned by a reviewing court.

That being said, it is still incumbent on the arbitrator to sift through all the evidence that was admitted to determine just what, if anything, the evidence is worth. By applying the rules of evidence, the arbitrator makes evidentiary rulings and determinations in his deliberations, opinion, and award.

In many cases very little weight is given to hearsay evidence, and it is exceedingly unlikely that an arbitrator will render a decision supported by hearsay alone. Here, this arbitrator heard testimony from B attacking the voluntariness of his statements. The arbitrator has had no opportunity to observe witnesses S and G during direct and cross-examination, so as to be in a position to evaluate their credibility. So their statements are of little probative value.⁴⁷

Undercover Reports. Should special consideration be given reports by undercover operatives? Should it matter whether the agent is a regular employee or has been supplied to management from an outside firm? Arbitrator Daniel Gallagher, in *Tarmac Virginia*,⁴⁸ reflected the better view by holding that, *by itself*,

43. *Id.* at 122-123.

44. *Id.*

45. 93 Lab. Arb. Rep. (BNA) 145 (Goulet, 1989).

46. *Id.* at 156.

47. *Id.* at 156-157 (citations omitted).

48. 95 Lab. Arb. Rep. (BNA) 813 (Gallagher, 1990). The grievance involved a concrete company which, suspecting drug use and sales at its plant employed the services of a private security agency to conduct an investigation. An undercover agent worked in the company for two months and was terminated after his operative's cover had been exposed. *Id.* at 814. The undercover operative was not present at the hearing because his whereabouts were unknown by the company, and he was the subject of harassment and threats. *Id.* at 819. The president of the security company that employed the

a private investigator's report of in-plant drug usage was insufficient to sustain a dismissal. The arbitrator's reasoning is instructive and reflective of the better view of admissibility of undercover reports:

The use of undercover investigative reports through spotters or agents disguised as co-workers appears to be an accepted method for the detection of more clandestine violations of plant rules. The use of undercover agents (private or public safety officers) is also a particularly common practice in situations involving allegations of drug use or distribution on company premises, which are in violation of plant rules and external law.... There exists considerable arbitral case precedent which supports the willingness of arbitrators to uphold disciplinary and termination actions by employers on the basis of the reports and testimony of undercover investigators . . . In all such cases where the investigative reports have carried sole or considerable weight, the investigators have come forth at the hearing and presented, what was viewed by the arbitrator, as reliable and credible testimony concerning the nature of the investigation and findings . . . Such investigative reports, when entered as evidence, have also been subject to the rigors of cross-examination from which the strength of the investigative technique and credibility of the investigators have been given little or no weight in circumstances where the arbitrator has found the testimony of the investigator as lacking in credibility. In the instant case, the company's case is lacking a central and crucial element, that is, the presence and testimony of the undercover agent . . . Absent the presence of [the undercover operative], the investigative report represents unsworn and hearsay evidence which can be given little, if any, weight.⁴⁹

The lesson from the reported decisions is clear: If the advocate's case in chief is based only on hearsay evidence, he is almost certainly to lose⁵⁰ (but not always).⁵¹ When the *only* testimony is that of the grievant and the uncorroborated testimony of an undercover operative, the arbitrator must make a credibility determination

undercover operative testified to the operative's certification and qualifications. *Id.* at 815.

49. *Id.* at 818-19 (citations omitted). See also, Maurey Mfg. Co., 95 Lab. Arb. Rep. (BNA) 148 (Goldstein, 1990) (noting that statements purportedly implicating grievant lacked foundation, were hearsay, or were obtained under duress).

50. See A.R.A. Mfg. Co. and Allied Ind. Workers of America, Amalgamated Local 310, 83 Lab. Arb. Rep. (BNA) 580 (Canestraight, 1984) sustaining the grievance where the undercover operative did testify that he witnessed the grievant smoking marijuana, but grievant flatly denied the allegation. Because the employer made no attempt to corroborate the report by either direct or circumstantial evidence, the testimony of the grievant is superior to that of the uncorroborated testimony of the agent. (crediting Arbitrator Feldman in Pettibone Ohio Corp. 72 Lab. Arb. Rep. (BNA) 1144 (1979)).

51. See, e.g., Snapper Power Equipment, Div. of Fuqua Industr., Inc., 89 Lab. Arb. Rep. (BNA) 501 (Weston, 1987) (crediting a signed, witness statement of co-worker describing on-going dispute and fight with grievant, including grievant's assault, as only evidence against grievant; arbitrator reasons that co-worker unavailable due to inability of sheriff to serve subpoena, three management witnesses testified that document contained co-worker's statement as given and signed within two days of incident, statement more probative of material fact for which it was offered than any other physical evidence reasonably procurable, and Rule 29 of AAA provides for receipt of affidavit).

between the two.⁵² If the employer makes no attempt to corroborate the testimony of the undercover operative or has a witness available and fails to call him or her, a presumption arises that the testimony of the witness would be adverse to the employer. In such a case, the grievant will be deemed the more credible party.

The employer may attempt to produce affidavits from undercover operatives in order to preserve the reporter's anonymity. Affidavits, however, are generally rife with hearsay. An affidavit from a witness who can testify and does not should be viewed with skepticism. As such, his out-of-court statements should be excluded and given little, if any, weight. The exception to giving affidavits little weight may be doctor's letters, where arbitrators routinely admit them notwithstanding hearsay concerns. As stated by one arbitrator, "communications from busy doctors are rarely tested by traditional hearsay rules in labor arbitration proceedings."⁵³ However, a contrary opinion is held by Arbitrator Elliot Goldstein, who stated in *General Telephone Co. of Indiana, Inc.*,⁵⁴ that the absence of the doctor at the arbitration hearing "makes it impossible to form a definitive judgment as to how much grievant's condition may affect his ability to work or whether in fact his condition is completely under control."⁵⁵ As such, if the advocate's case is primarily dependent on what a doctor says,⁵⁶ our advice is to produce the doctor.

Where arbitrators have admitted the hearsay statements of non-testifying witnesses they have cited the differences between the judicial system and the arbitral forum. Thus, in admitting the report of a security officer who was unavailable to testify at the hearing, Arbitrator Ernest Marlatt reasoned:

I think, however, that the arbitrator who tries to fit the hearing within the concepts designed for the law courts does a disservice to the parties. Rules of evidence were developed over the years on the implied assumption that the jury in a court consists of people who are not particularly bright, and

52. Southern California Permanente Med. Group, 92 Lab. Arb. Rep. (BNA) 41 (1989) (Richman, 1989).

53. Gel, Inc., 96 Lab. Arb. Rep. (BNA) 649, 651 n.4 (Ellmann, 1991). See also, Phillip Morris U.S.A., 99 Lab. Arb. Rep. (BNA) 1016 (Volz, 1991) (crediting letter from medical director of clinic).

54. 90 Lab. Arb. Rep. (BNA) 689 (Goldstein, 1990). The grievant, who engaged in frequent acts of voyeurism, did not seek medical assistance until after his discharge even though the Employer provided an Assistance Program.

55. *Id.* Considering the growing trend to consider post-discharge treatment in making an award, the grievant merely presented letters from his treating doctor stating the grievant is ready to be assimilated back into the work force. No specific medical evidence was offered and a blanket return to work statement is insufficient medical evidence that the grievant is cured and will not engage in future acts of voyeurism. *Id.*

56. When is an advocate's case primarily based on what a doctor says? A recurring example is where the grievant is accused of engaging in physical activities inconsistent with his work-imposed medical restrictions. If the employer's argument is that the grievant was dishonest in his dealings with the company regarding his representations of a work-related injury, and the company has independent evidence that the grievant was engaging in physical activity inconsistent with his claims (usually on film), a doctor's testimony that the conduct of the grievant is inconsistent with the grievant's representations is imperative, if not dispositive of the issue.

Another example would be where the employer claims that the grievant is unfit to perform a certain task because of some medical infirmity at issue in the case. A medical expert in occupational medicine must be called to outline with specificity the grievant's medical condition (if the parties are disputing his condition).

who might be less impressed by the high-blown testimony of an expert than they would by a good-old-boy who confides in them... Arbitrators, by training, are presumably better qualified to evaluate the weight of hearsay evidence and put it somewhere on the spectrum between "strongly persuasive" and "vicious gossip." It stands to reason that the more the arbitrator can learn about the facts, the more likely his award will result in a fair and just decision. For this reason, the arbitrator ought not totally to exclude any offered evidence unless it is clearly irrelevant or immaterial to any genuine issue in the case. It should be kept in mind that parties to an arbitration, unlike the litigants in court, do not have the power to subpoena witnesses to appear and testify at the hearing. The parties have to make do with the evidence they can dig up for themselves, and the arbitrator is supposed to fill in the gaps with common sense and good judgment. This is presumably why they have picked him to resolve their dispute, and he would hardly repay their confidence if he prevented either party, through legalistic nit-picking, from getting the facts out on the table.

I am very conscious of the fact, which the Union stresses in its brief, that it has been deprived of the opportunity to cross-examine [the security officer] and thereby perhaps to impeach his very serious accusations against the grievant. All that a fair and conscientious arbitrator can do under these circumstances is to scrutinize the hearsay evidence very closely, and to give it little or no weight if there is any indication that the evidence is untruthful, misleading or biased.⁵⁷

Still other arbitrators have indicated that if the statement or affidavit pertains to a purely factual matter about which there can be no real argument (as opposed to a matter of real significance to the case), it should be admitted and credited. On this issue Arbitrator Emanuel Stein said the following:

I wouldn't take the affidavit at all if it is a matter of real significance to the case. For example, I have refused to take depositions from company agents who ride buses to find out whether the drivers are cheating the company on fares. I have insisted that if the company is going to rest its actions upon a report made by a so-called "spotter" that they produce him, even though the consequence would be to destroy his usefulness to the company. So, too, in department stores, where it is alleged that a professional shopper had detected a sales girl failing to ring up a sale on the cash register.

If, however, the statement or affidavit pertains to a purely factual matter over which there could be no real argument-- for example, if a doctor should testify that he examined a person on such and such a date and made such and such a finding--I would think that this is not the kind of matter that should require the doctor to appear because I think the

57. Baker Marine Corp., 77 Lab. Arb. Rep. (BNA) 721, 723 (Marlatt, 1981).

likelihood of his being upset on cross-examination would be substantially zero.⁵⁸

The Use of "Spotters" as Undercover Operatives. A typical scenario in arbitration may involve an employee working for a transit company who is observed by six different company spotters violating fare box regulations on several occasions. The alleged violation of company policy consists of making change for passengers for whom no fares were deposited in the box. Because management does not want to disclose the identity of the spotters (the investigators were not shown to be unavailable), the *only* evidence to support the charge is the written reports of the spotters. The issue for arbitration is whether the written report without the spotter's testimony is sufficient evidence to sustain the dismissal?⁵⁹

With respect to the special problem that spotters cause, Arbitrator Robben Fleming had suggested that arrangements should be made to permit counsel for the parties to confront and examine anonymous witnesses in the presence of the arbitrator.⁶⁰ Some arbitrators have put a shield between the undercover spotter and the parties so that the spotter could be examined from behind the shield. A conference telephone call is a second-best alternative. While there is debate on the weight an arbitrator should accord a report by an undercover investigator who is not present at the hearing to testify,⁶¹ the better rule is to accept the report into the record and inform the company that, without the opportunity for cross-examination, it will be accorded little weight. If management insists on preserving the anonymity of its spotters, thus precluding cross-examination by the grievant, the evidence should receive little, if any, weight. As noted by Arbitrator Wayne Howard, if the employer wants to protect a spotter, it should include such a provision in the collective bargaining agreement.⁶²

3. *The Special Case of Customer Complaints.* A particularly difficult area for both advocates and arbitrators is that of customer complaints. These cases arise where "customers" (either retail customers, students, parents, or even co-employees) write letters regarding the conduct of an employee. Management, in turn, acts on the statements and attempts to have them introduced and credited by the arbitrator.⁶³

58. *Procedural Problems in the Conduct of Arbitration Hearings: a Discussion*, LABOR ARBITRATION: PERSPECTIVES AND PROBLEMS, PROCEEDINGS OF THE 17TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, (BNA Books, 1964).

59. See, *Kozlowski v. Unemployment Compensation Board of Review*, 155 A.2d 373 (Pa. Super. 1959) ("There is no doubt that the evidence of these slips is hearsay and that the rights of this claimant were prejudiced by a denial of his right to confront his accusers and cross-examine them. The law is now well settled that findings of fact based on incompetent testimony properly objected to, at the proper time, cannot stand.")

60. Fleming, *Some Problems of Evidence Before the Labor Arbitrator*, 60 MICH. L. REV. 133, 150 (1961).

61. See *Arbitration 1982: Conduct of the Hearing*, Proceedings of the 35th Annual Meeting, National Academy of Arbitrators, 111-16 (BNA Books, 1983). See also the discussion of Arbitrator George Hildebrand in *Los Angeles Transit Lines*, 25 Lab. Arb. Rep. (BNA) 740, 744-46 (1955) (accepting professional spotters' reports even though not present at arbitration hearing).

62. *Arbitration 1982: Conduct of the Hearing*, *supra* note 61 at 116.

63. See *City of Berkeley*, 88 Lab. Arb. Rep. (BNA) 603 (Staudohar, 1987). Two citizens entering the Animal Control Shelter wrote letters to the Assistant City Manager complaining about the grievant's negative statements concerning her supervisor's job performance and sexual behavior. When the

The weight an arbitrator is likely to accord the out-of-court statements⁶⁴ depends upon the reason management wants the statement admitted.⁶⁵ If management is introducing the statements for any reason other than the truth of the matter asserted they are not hearsay. Thus, management could offer the complaints to show why they took action against the grievant. Or they could ask for admission on the basis that they believed the content of the statements. That is, if the statement is not offered to prove the "truth of the matter asserted," it is not hearsay.⁶⁶

The problem for management is that in order to take action against the grievant, eventually they will have to prove that the grievant did what the company is alleging. If what management is alleging is the same as stated in the out-of-court statements, we believe that the better rule is that some witness(s) will have to be called to testify under oath. As such, management is advised to call some witnesses and admit the remainder of the out-of-court statements for corroboration purposes.

What is clear is that if management does not call any witnesses, and base their case *only* on the customer complaints, management is likely to lose its case.⁶⁷ Concedingly, this may be a harsh result, especially where management has promised anonymity for what it feels is good cause. However, the better rule recognizes that customer complaints involve a situation where cross examination is critical. As stated by one court: "[O]nly through cross examination can the credibility of the declarant or letter writer be tested as to accuracy, bias, motive, prejudice, self-interest, ability to recall, and ability to remember."⁶⁸

grievant was confronted by the Assistant City Manager, she denied making the statements and allegedly called the complaining customer and harassed her. Although the customers did not testify at the hearing, the Arbitrator accepted their affidavits as credible evidence, especially when corroborated by the grievant's co-worker who stated that the grievant has said the remarks that she is accused of making.

64. With exceptions, the statements probably will be admitted into the record, so the only question is what weight the arbitrator will give them.

65. A recent survey highlights the feelings of arbitrators regarding customer complaints, at least in the situation where the customers were unavailable to testify. The American Arbitration Association reported that 65 percent of responding arbitrators (n=1,025) would admit customer complaints, but only as proving the reason for discharge. Twenty-seven percent indicated they would admit the letters without limitation, while 7.9 percent said they would deny admission of the letters.

The fact pattern was drafted as follows: "As the basis for its termination of an employee, the employer introduces three letters of complaint received from customers over a 6-month period. The union object[s] to introduction, stating that letters cannot be cross-examined. The employer, a hotel, says the witnesses wrote from their homes in California, Texas and Canada and cannot be brought to the hearing; further, the letters are admissible as 'normal business records' and must be credited since all witnesses 'spontaneously' reported similar performance by the employee." Small & Sprehe, *Report of American Arbitration Association Survey of Labor Arbitrators*, 1984 Daily Lab. Representative. (BNA) 234:E-17.

66. See, e.g., *Hardie v. Cotter and Co.*, 849 F.2d 1097 (8th Cir. 1988)(admitting portions of discharged employee's personnel file containing customer complaints against hearsay objection; appellate court notes that the documents were not admitted to prove the truth of the material contained therein, but to demonstrate the state of mind of personnel making the dismissal decision).

67. See, e.g., *Industrial Claims Office v. Flower Stop Marketing Corp.*, 782 P.2d 13 (Colo., 1989)(rejecting argument that anonymous complaints concerning a claimant's driving can constitute substantial evidence supporting the denial of unemployment compensation benefits); *Wiggins v. Taco Bell Corp.*, 1994 WL 411643 (Minn. Ct. App. 1994)(hearsay admissible in unemployment compensation hearings, noting that hostess's testimony, an out-of-court declaration made to a shift supervisor, corroborated by phone records).

68. *Minnesota Mining & Mfg. Co. v. Nishika*, 885 S.W.2d 603, 632 (Ct. App. Tex. 1994).

The above rule is amply demonstrated in *Anchorage Hilton Hotel*,⁶⁹ where a hotel employee was discharged after a guest complained about the employee's conduct. At the arbitration hearing, the employer's only evidence to support the discharge was the customer's oral complaint that the hotel memorialized. Arbitrator Robert Landau stated that the hotel intended to prove it had a reasonable belief, supported by substantial evidence, that the event occurred. The arbitrator concluded that insufficient evidence of employee misconduct existed to support the discharge where the *only* witnesses to the alleged misconduct was the grievant and the hotel guest, and the guest was neither present at the hearing nor supplied an affidavit. Similarly, in concluding that a customer's complaint was insufficient to invoke discipline when the customer was interviewed but did not testify at the hearing, Arbitrator Mario Chiesa ruled hearsay alone was insufficient to sustain discipline:

I have always had a practice, as have other arbitrators, of refusing to uphold any discharge or discipline which has as a sole basis hearsay evidence. This is not to say that hearsay evidence is always excluded. That's not the case at all. Sometimes hearsay is corroborated by other evidence, or it is cumulative, and certainly to that degree it must be considered. Furthermore, the fact that statements were made and complaints filed may in and of itself be probative of the ultimate question.⁷⁰

Are there *any* circumstances where customer complaints alone are sufficient to support disciplinary action? As far as National Academy Arbitrators are concerned, we doubt it, but there are some parallels in the industrial sector. For instance, second-hand hearsay evidence (customer complaints about an employee's behavior) that are reasonably probative of contested facts may be credited where uniquely reliable. Further, management's case is strengthened to the extent that the complaints corroborate each other and are itemized with specific detail.⁷¹ The motivation of the complaining individuals is also important.⁷² As such, the quality and corroboration of hearsay evidence can assist management in a case based primarily on hearsay.

69. 102 Lab. Arb. Rep. (BNA) 55 (Landau, 1993). The guest reported that despite a "Do Not Disturb" sign on the door, the grievant knocked on the door early while the guest was still in bed with her husband. Later, the guest claimed she entered the hallway to get towels from the grievant who brushed past her, collected the dirty towels, proceeded to the telephone next to the guest's sleeping husband and punched in the telephone code to indicating the room was clean.

70. See, Oakland County Rd. Comm'n and Michigan Council, 25 AFSCME, AFL-CIO, AAA No. 54 39 0273 85 (Chiesa, 1986) (*quoted in* City of Pontiac, 92 Lab. Arb. Rep. (BNA) 780 (Roumell, 1989).

71. Vero Beach, FL and Int'l Bthd. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 769, 86 Lab. Arb. Rep. (BNA) 1301 (1986). Grievant's one-day suspension was sustained based on at least five nearly identical reports from citizens concerning grievant's reckless driving. Citizens reports were hearsay, but were so consistent with each other, were unsolicited and made after grievant had been consistently warned and counseled about reckless driving. *Id.* The hearsay reports become worthy of consideration when surrounding circumstances lend credence to the testimony. *Id.*

72. See, e.g., *Holton v. Gnan Trucking, Inc.*, 379 N.W.2d 571 (Minn. Ct. App. 1985) and *Posch v. St. Otto's Home*, 561 N.W.2d 564 (Minn. Ct. App. 1997).

As an example of crediting quality hearsay evidence, in *Cub Foods, Inc.*⁷³ Arbitrator Thomas Gallagher sustained the discharge of an eight-year employee based upon complaints by customers who did not testify at the arbitration hearing, where there was nothing within the customers' complaints to raise doubt about their veracity or reliability. The customers' complaints were that the grievant made inappropriate remarks to them in the company's grocery store. The Arbitrator found it significant that the grievant's conduct represented a continuation of behavior for which he had previously been suspended in 1981 and 1988.⁷⁴ Most important, the grievant's description of his own conduct was consistent with the customers' complaints, but his stated motivation for making the comments was friendliness. In choosing to credit the customers' complaints, the arbitrator concluded that conflicts concerning the motivation for the employee's remarks require analysis of the circumstances surrounding the remarks, including past behavior of the grievant.

Consistent with notions of due process, arbitrators have held that at a minimum, management must confront the grievant with the accusation *before* the decision to discipline is made. In this regard arbitrators have been particularly sensitive to arguments that management, in determining whether discharge is appropriate, must base its decision on first-hand knowledge and not on the hearsay statements of "absent accusers."⁷⁵ One arbitrator, in reversing a discharge on due process grounds, reasoned that on the date the grievant was discharged, the company had "made no attempt to ascertain the truthfulness or accuracy of the hearsay statements" contained in a customer complaint.⁷⁶ Arbitrator Harry Graham ruled that to discharge an employee only on the basis of a security officer's report, without attempting to get a first-hand account of the incident from eyewitnesses (including the grievant), was a "slipshod practice of the highest order."⁷⁷

73. 95 Lab. Arb. Rep. (BNA) 771 (1990) (Gallagher, Arb.).

74. *Id.* The Arbitrator concluded the grievant was made aware of his inappropriate behavior during suspension discussions, and was made aware of what the Employer considered appropriate behavior towards customers. The grievant failed to conform to these standards. *Id.*

75. Knoxville Transit Division of ATC Management Corp., K-Trans, 94 Lab. Arb. Rep. (BNA) 649 (Cantor, 1990). Grievance disputing placement of passenger's telephone complaint in bus driver's personnel file is sustained to the extent that the employer must place in the grievant's personnel file the original customer complaint containing the grievant's explanation of the incident. The customer complaint is hearsay, and the employer was using it against the employee in accusing her of having a bad attitude. The arbitrator concluded that if discipline can be taken against an employee based on his or her personnel record, the employee's due process rights requires ensuring the completeness and accuracy of the complaints, and having her explanation of the incident included within the file. The arbitrator stated that although management has a right to keep records, management is limited by the employee's right to know what the record contains and the employee's right to due process in the future use of the record. *Id.*

76. Southwest Airlines, 80 Lab. Arb. Rep. (BNA) 628, 630 (King, 1983). In *Chernak v. Southwest Airlines Co.*, 778 F.2d 578, 120 LRRM 3483 (10th Cir. 1985), the court of appeals sustained an arbitrator's award holding that because an employee's discharge was based upon a hearsay statement (a letter of complaint), the airline had not properly established just cause for the termination until the arbitration hearing where a witness to the incident testified. The arbitrator sustained the dismissal but awarded back pay from the time of the incident prompting discharge to the date of the award.

77. Mt. Sinai Hosp., 78 Lab. Arb. Rep. (BNA) 937, 940 (Graham, 1982). See also McCartney's, Inc., 85-1 Lab. Arb. Awards (CCH) ¶8207 at 3871 (Nelson, 1985) ("[D]oes the failure to give the grievant an opportunity to explain, to present his side of the case, *before* the decision to discharge is made, so contaminate the decision as to preclude a finding that it was for just cause? At least where, as here, there is no crisis, no emergency, no urgency we think it does.

In taking the principles of due process one step further, in *Trinity Industries, Inc., v. United Steelworkers of America, AFL-CIO-CLC*⁷⁸ the federal court for the Northern District of Texas enforced an arbitrator's award ordering reinstatement of two employees who refused to submit to a drug test. In *Trinity* management received a confidential tip from an hourly employee that the grievants were using marijuana. The employees refused a urinalysis test. The arbitrator concluded the employees were denied due process because they were not allowed to confront their accuser nor were they told of the basis for the decision to seek the drug test. In the arbitrator's words: "Without knowledge of the charge, e.g., the evidence that led [management] to order the drug test, they had no opportunity to consider their options rationally. Armed with the evidence, they might have chosen to take the test."⁷⁹ The court rejected the employer's argument the award should be overturned because the collective bargaining agreement contained no due process requirement and, thus, the award did not draw its essence from the contract. The Texas court correctly applied the appropriate standard of review (outlined in the famous Trilogy decisions)⁸⁰ by stating that "federal courts may not second guess an arbitrator's interpretation of a collective bargaining agreement."⁸¹ This includes the arbitrator's rulings with respect to his views on hearsay and the admissibility of evidence.

4. *Depositions.* How should an arbitrator treat depositions or transcripts of other hearings when offered to prove the truth of the matter asserted in the documents? A true deposition where both parties have the opportunity to cross-examine the person being deposed may be admitted and credited for the truth of the matter asserted even though it is technically hearsay evidence. Similarly, transcripts of hearings in other proceedings where the parties were present *and* had the opportunity to present evidence and cross-examine witnesses -- hearings before some industrial accident commissions -- may be credited notwithstanding hearsay concerns. A different result may be warranted where a party is offering into evidence a stenographic transcript of a conversation between management and the grievant where a union representative is not present when the transcript was taken or, if present, was not allowed the opportunity to cross-examine the grievant. If a union representative is present and allowed to examine witnesses, the transcript is similar to a deposition and should be credited by an arbitrator (if satisfied that the stenographer did not make transcription errors) even though one party may object to its introduction on hearsay grounds.

5. *The silent declarant (or the person who never complains).* The absence of testimony may itself have hearsay implications depending upon whether the out-of-court declarant's nonverbal conduct is intended as an assertion. For example, at an arbitration hearing, the union attempts to prove that the grievant was an

A just cause proviso, standing alone, demands that certain minimal essentials of due process be observed. One at least of those minimum essentials is that the accused have an opportunity before sentence is carried out, to be heard in his own defense." (emphasis in original).

78. 891 F.Supp 342 (N.D. Tex. 1995).

79. *Id.* at 345.

80. *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

81. *Trinity Indus.*, 891 F. Supp. at 345.

efficient and competent employee, and offers the testimony of a fellow employee who states that "no employee had ever complained about the grievant's work." In this example, according weight to the absence of statements by an out-of-court declarant involves risks similar to those of accepting statements of out-of-court witnesses. The employees whose non-complaints or assertions are offered are in the same position as the out-of-court co-workers were in our first sub-section, "absent accusers." In both cases the evidence is clearly offered to prove the truth of the matter asserted. The union, in the silent declarant case, is offering nonstatements to establish, first, that the noncomplaining employees believed that the grievant was a good lathe operator, and, second, that they believed so because the grievant was in fact a good operator. This type of evidence is suspect (but, at times, may be highly probative).⁸² Although the noncomplaining employees may have believed the grievant was competent, the belief may have been carelessly formed or not based on first-hand information. Moreover, the employees may actually have believed that the grievant was a poor worker but, for whatever reason, did not complain to management. It is for these reasons that the practitioner should recognize that assertions by "silent declarants" may be suspect hearsay and thus accorded little weight by an arbitrator. However, as the next sub-section illustrates, there are exceptions to the above rule.

6. *The silent grievant.* As discussed above, the silent declarant presents hearsay problems. This is especially true when the silent declarant is the grievant. A common scenario frequently noted by management at arbitration hearings concerns the conduct of the grievant just after being accused of misconduct. In this scenario, when confronted with damaging evidence by management, the grievant simply remains silent. At the hearing the employer points to the grievant's silence in the face of the accusations and argues that it is an implied admission of guilt. It is the arbitrator's responsibility to assess the implications of the grievant's silence.

Unless public policy considerations would dictate otherwise, admission of guilt by a party-opponent should not be excluded by a trier of fact.⁸³ The reason for this exception is that if a person's statement is offered against him, he cannot validly complain that he had no opportunity to cross-examine himself. Similarly, an admission of guilt is inferred from the silence of the grievant when confronted with misconduct.⁸⁴ As in the above example, the grievant's silence in the face of an

82. See, e.g., *Town of Shrewsbury v. Comm'r of the Dep't. of Environmental Protection*, 38 Mass. App. Ct. 946, 648 N.E.2d 1287 (Mass. App. Ct. 1995), involving citizen complaints about odors coming from a treatment plant. Evidence that complaints stopped *after* the plant was closed is highly probative that the odors were in fact emitted from the plant.

83. The federal rules simply declare that admissions are not hearsay. FED. R. EVID 801(d)(2)(A). Public policy considerations favoring exclusion of the admission would include relevance and prejudice.

84. See *Berberich Delivery Co, Inc.*, 79 Lab. Arb. Rep. (BNA) 277 (1982) (Kubie, Arb.). The Employer who contracted with newspaper delivery company terminated the grievant when he was arrested but not found guilty of burglarizing the home of a customer who had informed the delivery company he was out of town. The employer confronted the grievant who at no time denied the arrest or participation in the activities in question. In sustaining the grievant's discharge, the arbitrator concluded that even though the employer's knowledge of the arrest and the grievant's activities was acquired through the police and another participant in the burglary and thereby hearsay, they were strongly corroborated and further supported by the grievant's failure to testify in his own defense at the hearing. *Id.*

accusation to which one would normally respond is offered as an implied admission of the correctness of the charge.⁸⁵ While the accusation itself is not offered in a hearsay capacity, the absence of a response is technically hearsay unless it is considered an actual or adoptive admission.⁸⁶

If the silence of the grievant is deemed an express or adoptive admission (we think it is), it is not considered hearsay under the federal rules, and accordingly may be given appropriate weight by a trier of fact. Even if the nonverbal conduct is not considered an admission, an arbitrator is likely to give it some weight. However, we conclude that the better rule is that nonverbal conduct should not be dispositive with respect to the guilt or innocence of the grievant.⁸⁷

A good rule of thumb for advocates that will always lead to the right answer is offered by Professor Younger: "Anything the other side ever said or did will be admissible so long as it has something to do with the case."⁸⁸ An application of this approach is illustrated in the next section.

7. *Reporting events as hearsay.* An individual's conduct with respect to an event, when offered for the truth of the matter asserted, may be hearsay evidence. For example, assume that the grievant was discharged for sexual harassment of a co-worker. At the hearing, the employer introduces the testimony of the personnel director that the co-worker had reported the incident to management. In addition, the employer introduces the supervisor's written report of the incident. The union, citing the hearsay rule, objects and requests the arbitrator to exclude the testimony of the personnel director as well as the supervisor's written report.⁸⁹

The above example illustrates the importance of issue identification in resolving hearsay problems. If the co-worker's conduct (reporting the incident) is offered to prove the truth of the matter at issue (that the grievant sexually harassed the co-worker) the testimony is clearly hearsay.⁹⁰ Likewise, if the written report is offered as evidence that an act of sexual harassment took place, hearsay concerns are present. However, if the evidence is offered to prove some other issue, such as that the supervisor made a report, or that the co-worker *believed* that sexual harassment took place (state of mind), then the evidence is not hearsay. In the latter case the practitioner must take care to establish that the state of mind of the co-worker is

85. See United States Department of Treas., 82 Lab. Arb. Rep. (BNA) 1209 (1984) (Kaplan, Arb.) (discussing that in the private sector the Fifth Amendment has no general application; thus an employee can invoke the privilege, but the arbitrator will simply consider the employer's charge as unrefuted).

86. FED. R. EVID. 801(d)(2)(A), (B). The Federal Rules of Evidence permit silence as an adoptive admission if (1) the party heard and understood the statement; (2) party must have been physically and mentally capable of denying the statement; and (3) a reasonable person would have denied the accusation under the same circumstances. FED. R. EVID. 801(d)(2)(B).

87. See, e.g., Berberich Delivery Co., 79 Lab. Arb. Rep. (BNA) 277 (Kubie, 1982); Mine Workers Dist. 29, 77-2 Lab. Arb. Awards (CCH) ¶8573; Watauga Indus., 78 Lab. Arb. Rep. (BNA) 697, 701 (Galambos, 1982) ("The lack of objection by any one of the four when confronted that they were observed smoking marijuana and fired is unnatural, if they had not been smoking it. The normal and intuitive reaction would have been to deny it if it had not occurred."); (Rimer, 1977)(refusal to deny guilt not tantamount to admission of guilt).

88. Younger, *supra* note 5, at 24.

89. Fisher Foods, 80 Lab. Arb. Rep. (BNA) 133 (Abrams, 1983).

90. Cf. Central Chevrolet Co., 86-1 Lab. Arb. Awards (CCH) ¶8012 (Nolan, 1985)(sustaining discharge for falsely reporting act of sexual harassment).

relevant to a material issue in the case. If irrelevant, there is the danger that a party-opponent will attempt to bypass hearsay problems of written reports of incidents by merely asserting the evidence is introduced to establish the state of mind of the person testifying.

Management may attempt to have the report made part of the record by simply introducing it, not for the truth of the matter asserted, but as evidence of what prompted its action. Some arbitrators would regard it as a spotter's reports and would hold that the report is actual evidence upon which management acted and, thus as part of the *res gestae*, i.e., "the things done." As such, the contents of the report are admissible evidence and become necessary in the determination of whether management had just cause to discipline the grievant.

For example, in *City of Chicago*,⁹¹ the grievant, an investigator for Chicago Police Department's Office of Professional Standards (OPS), was ordered to undergo a psychological examination and subsequently placed on involuntary medical leave. The union argued the employer was basing its decision largely on hearsay reports. The grievant's supervisor, who recommended the grievant be evaluated, had only personally witnessed one incident regarding inappropriate behavior. The remaining evidence was based on memos from various employees and supervisors. Arbitrator Goldstein concluded It was the results and recommendations of the expert conducting the psychological evaluation, not the hearsay reports, that resulted in the grievant being placed on medical leave. Arbitrator Goldstein reasoned that the hearsay reports, while insufficient to place the grievant on medical leave, were sufficient evidence to subject the grievant to a psychological evaluation to determine his fitness for duty. The Arbitrator stated:

In sum, then, I believe the hearsay reports were sufficient to support reasonable cause for the recommendation and order to undergo a professional psychological exam. To require "better" evidence at that point in the process is not required by any contract provision. Absent such a requirement, Management has the right, in a quasi-military organization especially, to rely on information that would not be appropriate or sufficient to support discipline or discharge, for the limited purpose of determining reasonable cause for ordering a professional evaluation of possible medical or psychological problems. To hold otherwise would be to endanger the public or an employee, when the duties and authority of sworn personnel or OPS investigators are considered.⁹²

Other arbitrators take the view that there is a problem with admitting evidence not for its truth but for some other reasons. The parties might not have an idea of what the arbitrator means when he says, "I'm taking this not for the truth of the matter asserted, but as evidence of why management acted," especially where the arbitrator learns the contents of the objectionable report. In this case the better

91. 96 Lab. Arb. Rep. (BNA) 876 (Goldstein, 1990).

92. *Id.* at 885-886, n.3.

course may simply be to obtain a stipulation from the union as to the incident that prompted management to act.

When reports are offered, however, the advocate must take care that the person making the report is credible. Thus, in *Soule Steel Co.*,⁹³ the Arbitrator was not impressed with the witness. In his words:

Independent of the legal ground, the Arbitrator was not impressed with the testimony of investigator Smith. It was clear that she was merely reading into the record what she had admitted was editorial version of statements made 'to the computer' by a number of investigators, including her. The report obviously fails to meet the test of either a document created by the witness at a point in time when an event occurred so that it is 'present recollection refreshed' or, if it fails to refresh recollection, that it is 'past recollection recorded.' The investigators' report is an editorialized compilation of not only the statement of the witness, but of hearsay statements of other witnesses. It is hearsay multiplied by conclusions, to the second power.⁹⁴

8. *Breathalizers and other mechanical tests.* Not infrequently, arbitrators will be confronted with evidence generated by machines or some other testing device. Common examples include: time clocks; audiograms; breathalyzer tests; polygraph machines; blood-alcohol concentration (BAC) tests; and Enzyme Multiplied Immunoassay Test (EMIT) (used to detect drugs in urine). Questions arise as to whether the results of such tests should be excluded as hearsay evidence.

Although technically hearsay (the machine, testing mechanism, or record of such, is making a "statement" and the statement is being offered to demonstrate the truth of what is asserted), evidence of this type is not subject to the traditional problems that characterize hearsay evidence. Machines lack a conscious motivation to tell falsehoods, and because the workings of machines can be explained by witnesses who are subject to cross-examination, there appears to be little problem with allowing such evidence into the record (at least with respect to hearsay concerns). In admitting such evidence, however, the arbitrator must be satisfied that the party relying upon the results of such tests has fully established the accuracy of the tests and the procedures customarily followed in administering them. In other words, it must be shown that the machine or test has a scientific basis and that the operator correctly used the machine or correctly administered the test on the day in question. The polygraph, for example, does not have a recognized basis in science and has not been accepted in most jurisdictions.⁹⁵ Chain of custody issues may also

93. 85 Lab. Arb. Rep. (BNA) 336 (Richman, 1985).

94. *Id.* at 342.

95. Employee Polygraph Protection Act, 29 U.S.C. secs. 2001-2009 (1997). The Act, applicable to most private employers, prohibits most uses of polygraphs in employment. It does allow testing of employees reasonably suspected of involvements causing economic loss or injury to the employer's business. *Id.* See *Soroka v. Dayton Hudson Corp.*, 862 P.2d 148 (Cal. 1993) (prohibiting Target Stores from giving security officer applicants a psychological evaluation testing emotional stability before hiring because they could not demonstrate a compelling interest worthy of invading an applicant's privacy). The polygraph presents a great example of why it is useful to ascertain why the evidence is

emerge when blood samples or other laboratory samples have been secured.⁹⁶ Generally, however, chain of custody issues is not a problem for the practitioner since arbitrators are willing to accept in evidence "for the truth of the matter asserted" the report of an independent testing laboratory without requiring the appearance of the laboratory technician at the hearing.

The analysis above is amply demonstrated in *Jim Walter Resources, Inc.*,⁹⁷ where the grievant was discharged after twice testing positive for marijuana, and challenged the results of the drug test as inadmissible hearsay. Although the company failed to bring a representative of the drug-testing service to testify at the arbitration hearing, Arbitrator Nicholas admitted into evidence the results of the drug test. Relevant in the arbitrator's analysis was the fact this was the grievant's second positive drug test, and the grievant failed to challenge the accuracy of the results of the first test. Further, the results of the drug test were completely confidential as between the employer and the grievant. Moreover, the grievant could have offered expert testimony challenging the accuracy of the results. Thus, in concluding that the result of the grievant's drug test was admissible evidence, the arbitrator determined the employee was given a fair and reasonable hearing and opportunity to defend the charges made against him.

Like court decisions, there are aberrations. In *Gulf Coast Industrial Workers Union v. Exxon Co.*,⁹⁸ the Fifth Circuit vacated an arbitration decision finding no just cause for the dismissal of an employee who refused to take a drug test. Management's test request was based on test results showing that material found in the grievant's car was marijuana. At the hearing the employer sought admission of the test results showing a positive finding for marijuana (the Substance Analysis Report, or SAR) as a business record. However, the arbitrator informed management that it (the business record) did not have to be established because it was already in evidence. In his decision the arbitrator ruled for the grievant, reasoning that management did not establish the substance found in the grievant's car was marijuana. He held the SAR did not establish the substance was marijuana because the report was hearsay and did not even have the status of a business record. According to the court, "the arbitrator then spent five pages of his decision in a diatribe on the unreliability of hearsay."⁹⁹ Citing Section 10 of the Federal Arbitration Act,¹⁰⁰ the court vacated the award for failure to consider evidence presented and for misleading the employer into believing the report had been admitted as a business record. To avoid such problems, the advocate is advised to

being offered. Suppose an employee is asked to submit to a polygraph test. He submits to the test and the results are inconclusive. Arbitrators should have no problem with admitting such evidence, not to show that the grievant was lying or telling the truth but, rather, for the limited purpose of showing that the grievant cooperated in an investigation.

96. See, e.g., Holliston Mills, 60 Lab. Arb. Rep. (BNA) 1030 (Simon, 1973).

97. 90 Lab. Arb. Rep. (BNA) 367 (Nicholas, 1987).

98. 70 F.3d 847 (5th Cir. 1995).

99. *Id.* at 849.

100. Section 10 of the Federal Arbitration Act provides that a district court may vacate an arbitrator award where --

the arbitrators were guilty of misconduct in . . . refusing to hear evidence pertinent and material to the controversy; or any other misbehavior by which the rights of any party have been prejudiced. 9 U.S.C.A. §10.

ensure that that the proper foundation is established for the admissibility of business records and documents.

9. *Business records and hearsay objections.* Entries in business books or computerized entries may be offered in various situations, although in most cases the entry is offered to prove the truth of some matter at issue. For example, an employer may introduce a time card to prove that the grievant punched out early, a phone bill to prove that a call was made, or a standardized report utilized for employee errors.¹⁰¹ In such cases the evidence is clearly hearsay, although evidence of this type is usually "great hearsay" and courts and legislatures have recognized an exception for regularly kept business records.¹⁰² Arbitrator Geraldine Randall, in *Alameda-Contra Costa Transit District*,¹⁰³ outlined the business-record exception to the hearsay rule as follows:

Evidence of a writing made as a record of an act, condition, of event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

- (a) The writing was made in the regular course of a business;
- (b) The writing was made at or near the time of the act, condition, or event;
- (c) The custodian or other qualified witness testifies to its identity and the mode of preparation; and
- (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.¹⁰⁴

As noted by Arbitrator Randall, the business-record exception is based on the recognition that records made and relied upon in the regular course of a business may be regarded as trustworthy without verification by all persons who contribute to them.¹⁰⁵ In general, (1) a writing, (2) contemporaneously made in the regular

101. See *Menasco Aerosystems Division*, 100 Lab. Arb. Rep. (BNA) 1061 (White, 1993)(co-worker's statement to grievant that he had received about 15 error reports and was still working with three final warnings is inadmissible as hearsay, but grievant's error reports are admissible under "business records" exception to hearsay rule).

102. FED R. EVID. 803(6). Besides the cases discussed in this section, see *Soule Steel Co.*, 85 Lab. Arb. Rep. (BNA) 336, 342 (Richman, 1985)("Independent of the legal ground, the Arbitrator was not impressed with the testimony of investigator Smith. It was clear that she was merely reading into the record what she had admitted was editorial version of statements made 'to the computer' by a number of investigators, including her. The report obviously fails to meet the test of either a document created by the witness at a point in time when an event occurred so that it is 'present recollection refreshed' or, if it fails to refresh recollection, that it is 'past recollection recorded.' The investigators' report is an editorialized compilation of not only the statement of the witness, but of hearsay statements of other witnesses. It is hearsay multiplied by conclusions, to the second power.").

103. 80-1 Lab. Arb. Awards (CCH) ¶8060 (1979). The arbitrator, applying the above criteria, concluded that the result of a blood-alcohol test performed at a hospital by a medical technologist was within the business-record exception. *Id.*

104. *Id.* at 3272-73, citing §1271 of the California Evidence Code.

105. *Id.* at 3273. See also, *City of Pontiac*, 92 Lab. Arb. Rep. (BNA) 780 Roumell, 1989) (admitting letters of grievant's drug and alcohol therapist which indicated grievant did not attend therapy sessions required by the "Last Chance Agreement" the grievant signed in order to keep his employment; although therapist did not testify at hearing, letter held reliable as the employer's human-relations coordinator telephoned the therapist and confirmed the contents of the letter, and had a long working

course of a business, (3) by a person with personal knowledge of the entrant (or based on the reports of others who themselves possessed knowledge of the event), will be admissible (4) as long as the record is sufficiently authenticated (i.e., it must be shown to the genuine).

It does not necessarily follow that, simply because the above criteria have been met by the party seeking to introduce the record, everything in the record must be admitted into evidence. It may be that information contained in the record is not relevant to the issue before the trier of fact, or the record may include information that is not based on the entrant's own observation or on observation by others whose business duty it was to transmit the information to the entrant. Either situation adds another level of hearsay to the report and, thus, necessitates a separate exception in order to justify admission.¹⁰⁶ The trier of fact must evaluate the risks of perception, recordation and recollection, narration, and sincerity when determining the trustworthiness of these statements.

For example, a police report may be made in the ordinary course of business near the time that the event occurred, but if it contains statements made by an out-of-court declarant, the portion containing these statements is subject to a hearsay objection. The federal rules address this problem by concluding that "hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."¹⁰⁷ Moreover, a police report otherwise admissible as an official¹⁰⁸ or business record¹⁰⁹ becomes inadmissible when made with the intent to prosecute.¹¹⁰ As such, even though information is relevant and trustworthy to the trier of fact does not ensure it will be admissible.

10. *The spontaneous declarant.* Certain "self-serving" testimony may withstand hearsay objections as an "excited utterance," one of the *res gestae* exceptions.¹¹¹ The theory for allowing an exception for excited utterances is that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection. For this reason, a person who makes spontaneous declarations while under the stress of an excited event will not have the time to fabricate the facts surrounding the event. Although this exception has been criticized on the ground that excitement impairs accuracy of observation as well as conscious fabrication, the

relationship with the therapist on employee assistant plans).

106. See, e.g., *Hartford Division Emhart Indust. v. Amalgamated Local 376, U.A.W.*, 461 A.2d 422, (Conn. 1983).

107. FED. R. EVID. 805.

108. FED. R. EVID. 803(8).

109. FED. R. EVID. 803(6).

110. FED. R. EVID. 803(6). See *Baker Marine Corp.*, 77 Lab. Arb. Rep. (BNA) 721 (Marlatt, 1981) (noting that the report of company's security guard incriminating the grievant of drug use is not admissible as an official record or business-entry hearsay exception because it was made with the intent to prosecute.)

111. The Federal Rules do not recognize a separate *res gestae* exception, rather they recognize selected individual exceptions which have traditionally been classified as *res gestae* exceptions. See FED. R. EVID. 803(1) (present sense impression); 803(2) (excited utterance); and 803(3) (then existing mental, emotional, or physical condition) (see *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285 (1892) (evidence that a person expressed intent to do an event as relevant to whether the event took place)).

exception finds judicial and arbitral support.¹¹² Professor Younger has offered the following guideline on how one recognizes an excited utterance: "If it hearsay is offered and it begins with 'My God,' and ends with an exclamation point, it is an excited utterance."¹¹³

Arbitrators have followed suit. Thus, in *Faribault State Hospital*,¹¹⁴ Arbitrator Nathan Lipson credited, under the *res gestae* exception, statements made by a grievant to a co-worker during an apparent emergency at a state mental health institution. The grievant was discharged for "intended maliciousness and cruelty" to a patient. In holding that the testimony of the grievant's co-workers was covered by the *res gestae* exception (the grievant was subsequently killed after his discharge), the arbitrator stated that the admissibility of such statements is permitted under the federal rules on the theory that statements made contemporaneously with a crucial event, or when the declarant is excited, are likely to be true. Likewise, Arbitrator Sharon Imes, in *Wisconsin Department of Health & Social Services*,¹¹⁵ admitted and considered the out-of-court statement of a resident-patient that "the grievant had hit him." Management elected not to have the patient testify at the hearing after determining that it would be stressful and harmful to the well-being of the resident who made the charge. Management relied upon hearsay testimony and circumstantial evidence (the resident had informed another nurse that the grievant had hit him and showed her a red mark in the shoulder area), and made the argument that the patient's statements should be considered credible under the excited utterance exception. In determining the admissibility of the patient's statements, the arbitrator's analysis of the hearsay issue is especially noteworthy:

Many of the reasons for excluding hearsay in court, such as an inability to confront the declarant and to cross-examine such declarations, are valid for why hearsay should be excluded in the arbitration hearing. However, because the arbitration process is generally less formal and is intended to provide a format for resolving disputes in a less technically legal manner, it is generally accepted "for what it is worth" since hearsay evidence may have some probative value. In accepting it, however, the arbitrator is expected to have the expertise and experience to properly evaluate the evidence and to accord it the appropriate weight dependent upon the corroborating support for the evidence and the circumstances surrounding it.¹¹⁶

With respect to the excited utterance exception, the arbitrator had this to say:

112. See, e.g., *Report of the Chicago Area Tripartite Committee*, PROBLEMS OF PROOF IN ARBITRATION, PROCEEDINGS OF THE 19TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, 90 (BNA Books, 1967).

113. Younger, *supra* note 5, at 33.

114. 68 Lab. Arb. Rep. (BNA) 713 (1977).

115. 84 Lab. Arb. Rep. (BNA) 219 (1985).

116. *Id.* at 222.

It is also difficult to conclude that the statement of the resident who made the allegation has complete credibility. The employer argues that it is credible because it was made at a time when the resident did not have time to stop and think and fabricate a story. . . . In several state cases, where hearsay testimony has been admissible in court as credible statements, the statements have all met the criteria of having been made as the result of a "startling" event and while the declarant was "under the stress of excitement caused by the event. . . ." "The underlying basis for this exception is the [sic] people instinctively tell the truth, but when they have time to stop and think, they may lie." In the matter under consideration, it cannot be concluded that the resident's statement was made "under the stress of excitement."¹¹⁷

Focusing on the resident's mental state immediately after the incident and immediately prior to the report of alleged abuse, the arbitrator pointed out that when the shift supervisor entered the ward where the alleged incident took place, the resident who made the charge asked the supervisor if she was going to pick up a newspaper for him. In the words of the arbitrator:

During this time, not only did the resident have time to report the incident, if it had occurred, to not just one but to two individuals, but he had time to think about what he wanted to say. . . . [H]is actions demonstrated that there was no longer a spontaneity which could be attributed to his statements.¹¹⁸

11. *Statements that have independent legal significance.* The hearsay rule does not exclude testimony, although self serving, as to what contracting parties said with respect to the making or the terms of an oral agreement since the presence or absence of the words are part of the issue in the case. The statements themselves have independent legal significance apart from the non-testifying declarant's belief in the truth or accuracy of the statements.

12. *Prior statements by a witness.* Arbitrators are frequently confronted with evidence consisting of prior out-of-court statements made by a person now available for cross-examination. If it the witness admits having made the prior statement and that it was true, the witness adopts the statement and there should be no hearsay problem.¹¹⁹ A problem does exist, however, if it the witness denies having made the statement or admits having made it, but denies its truth. The argument in favor of treating these statements as hearsay is that the conditions of oath, cross-examination, and demeanor observation did not prevail at the time that the earlier statements were made and cannot be supplied by latter cross-examination. While the bulk of case law has been against using prior inconsistent statements as substantive evidence,¹²⁰

117. *Id.* at 223-24 (footnotes omitted).

118. *Id.* at 224.

119. FED. R. EVID. 801 (d)(2)(A)

120. *See*, Advisory Committee Note, FED. R. EVID. 801(d)(1). For a prior inconsistent statement to be admitted as substantive evidence rather than impeachment, it must be made under oath at a prior hearing and the declarant must testify at trial subject to cross-examination.

the better rule may call for a contrary result. After all, the witness is now available for cross-examination. In any event, the prior inconsistent statements of a witness are admissible for the purpose of determining credibility.

13. *Conversations between parties.* A common scenario involves a witness who takes the stand and testifies that he talked to the grievant just last week and the grievant told him that he engaged in the conduct charged by management. If the witness' statement is offered to prove the truth of management's charge, it is hearsay under the traditional definition. If the simple rule is utilized that anything the other side ever said or did will be admissible so long as it is relevant (the so-called admissions exception), the statement should be admitted and credited. Simply stated, the out-of-court declarant, the grievant, can take the stand and deny having made the statement. The grievant should not have a valid complaint that he had no opportunity to cross-examine himself. More important, he also has the opportunity to cross-examine the witness making the allegation. Accordingly, hearsay concerns are absent.¹²¹

An illustration is provided in *Carnes v. United Parcel Service*.¹²² Carnes, a UPS employee, was unloading at a Venture Store, and a Venture employee (Mace) asked him if he could get him a UPS jacket like his own. Carnes allegedly told the Venture Store employee that, "If you can give me a blow job as good as Pam [also a Venture employee], I'll get you a coat." The Venture employee (Mace) told another employee (Nelson) about the statement who, in turn, told Pam, who subsequently called the UPS customer complaint line to voice a complaint. Carnes' manager called him in and Carnes admitted making the statement. He was fired. Testimony by Mace as to what Carnes told him is hearsay. Although hearsay, there should be little problem with Mace's testimony regarding the grievant because of his attendance at the proceeding. A larger concern involves Pam's testimony that another employee (Nelson) told her what Carnes said. If offered to prove the truth of the statement, it is hearsay. If offered to prove that he believed it, and this is why he told Pam, it is not hearsay. Thus, the grievant's presence at the hearing is irrelevant in determining whether the statement is admissible.

Another example of an arbitrator crediting a witness' account of a conversation between parties is *Troy City School District*,¹²³ a decision reported by Arbitrator William Heekin. Management's witness took the stand and testified to a telephone conversation between herself and the grievant. The witness testified that the grievant began speaking about her upcoming suspension hearing, indicated she could not afford to lose her job, and concluded by stating that she was "not beyond killing."¹²⁴ The context of the statement, "I'm not beyond killing" was understood to be directed toward any employee who would testify against her regarding a then upcoming disciplinary proceeding. The school district continued to present five witnesses who

121. The federal rules simply declare that an "admission" -- a statement made or an act done by a party which is or which amounts to a prior acknowledgment that some fact is not as he now claims it to be -- is not hearsay. FED. R. EVID. 801(d)(2). Whether one concludes that it is hearsay, but is admissible as an admission or, alternatively, it is not hearsay under Rule 801(d)(2), the result is the same: The evidence comes in and, if it is relevant, should be credited.

122. 51 F.3d 112 (8th Cir. 1995).

123. 107 Lab. Arb. Rep. (BNA) 981 (Heekin, 1996.)

124. *Id.* at 983.

testified to instances where the grievant allegedly made threatening remarks. The arbitrator found that the testifying co-worker had no reason to falsify testimony, did not demonstrate any tendency to overreact, and gave a detailed account of what the grievant stated on this occasion.¹²⁵ The Arbitrator concluded the grievant uttered threatening language during her phone conversation with her co-worker, which was an offense warranting immediate discharge.

14. *Fabrication or destruction of evidence.* An individual who *attempts* to fabricate or destroy evidence is making an implied statement that he is guilty. If evidence of this conduct is introduced at the hearing for the purpose of proving the truth of the matter alleged, it will likely be subjected to a hearsay objection. However, because the conduct is an admission, the hearsay rule should not preclude its admission at a hearing.¹²⁶

Similarly, in the rare case where the grievant successfully coerces a witness not to testify, the grievant's conduct is admissible and any right of cross examination is waived. Such a waiver is, *a fortiori*, a waiver of any hearsay objection.¹²⁷ Clearly, a grievant who causes a witness to be unavailable at a hearing for the purpose of preventing his testimony should not be heard to complain that his right to confront the witness via cross examination has been violated. No policy reason (or scintillum of common sense) would warrant any other conclusion.

IV. CONCLUSION AND A "MODEST" PROPOSAL FOR ARBITRATORS

Cross examination has been described as "the greatest legal engine ever invented for the discovery of truth."¹²⁸ As described by the Fifth Circuit: "the right of cross examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.' It is, indeed, 'an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.'"¹²⁹

In the judicial system the rule against admitting hearsay evidence "envisions testimonial evidence given under the ideal conditions of a witness under oath, in the personal presence of the trier of fact, and subject to cross examination."¹³⁰ To the extent the hearsay rule excludes unreliable evidence, the integrity of the fact-finding process is enhanced.

Should the same considerations be accorded the arbitration process? Does the accuracy of the fact-finding process and its corresponding search for truth engender

125. *Id.*

126. *See, e.g.,* Brooks Foundry, 75 Lab. Arb. Rep. (BNA) 642 (Daniel, 1980)(flushing marijuana down toilet).

127. *Cf. United States v. Baldo*, 618 F.2d 624 (10th Cir. 1979), *cert. denied*, 449 U.S. 840 (1980)(holding waiver of sixth amendment right of confrontation and waiver of hearsay objection where defendant coerced witness into silence by threatening the witness' life).

128. JOHN J. WIGMORE, EVIDENCE § 1367 (3d ed. 1940). The other engine, of course, is sequestering of witnesses.

129. *Smith v. Estelle*, 569 F.2d 944, 946 (5th Cir. 1978)(quoting *Chambers v. Mississippi*, 410 U.S. 284 (1973)).

130. *United States v. Thevis*, 665 F.2d 616, 632 (5th Cir. 1982).

similar considerations that arbitrators should adopt? Or should an arbitration be treated like an unemployment compensation hearing where hearsay is readily admissible?

Virtually every hearing will contain problems concerning the introduction and consideration of hearsay evidence. Notwithstanding its stated purpose of flexibility and informality, the senior author can remember few arbitration hearings where a party did *not* advance a hearsay objection. In some cases the objecting party did not say the words "hearsay," but the substance of the objection was the same: "Mr. Arbitrator, I object because so-and-so is not available for cross examination." How should the arbitrator respond? While there are no hard and fast rules followed by arbitrators when hearsay is introduced at hearings, in arriving at some balance between a grievant's confrontational rights and the arbitral system's so-called "informality" and need for the evidence, advocates and arbitrators should be cognizant of the following:

1. The historic exclusion of hearsay evidence has been based on the absence of the sanction of an oath and the common-sense notion of justice that the party against whom evidence is offered should have an opportunity to cross-examine the actual speaker to whom the statement is attributed.¹³¹ Yet hearsay objections only apply to out-of-court statements ("shorthand for anything other than what this witness says from this witness chair in front of this [arbitrator] right now")¹³² offered to prove the truth of what was said. This important distinction has been noted by *American Jurist* as follows:

The hearsay rule, however, does not operate, even apart from its exceptions, to render inadmissible every statement repeated by a witness as made by another person. It does not exclude evidence offered to prove the fact that a statement was made or a conversation was had, rather than the truth of what was said. Where the mere fact that a statement was made or a conversation was had is independently relevant, regardless of its truth or falsity, such evidence is admissible as a verbal act.¹³³

Professor Younger suggests that if the advocate has trouble following this format, the following may prove efficient: "In your left hand . . . hold the out-of-court statement. In your right hand hold what is being offered to prove. Compare the two. If it they are the same, it is hearsay. If it they are not the same, it is not hearsay."¹³⁴

The point is this: If the evidence is *not* being offered to prove the truth of the matter asserted, it will be admitted, subject, of course, to other objections that may be advanced in the arbitral forum. With few exceptions, any advocate worth his or

131. EDMUND M. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 112 (1956). Morgan reports that from the 1400s to as late as 1670, jurors could properly rely upon what they had learned by inquiry outside the presence of the court. Thus, the incapacity of jurors to evaluate evidence was never a reason for rejecting hearsay given by judges and commentators at the time that the rule was being formulated. *Id.* at 108-09.

132. Younger, *supra* note 5, at 6.

133. 29 Am. Jur. 2d., 5497 at 555.

134. Younger, *supra* note 5, at 7.

her salt will be able to have the objected-to evidence admitted before the arbitrator. The rationale generally offered is that the evidence is not being offered for "the truth of the matter asserted" but, rather, (1) management believed it, or (2) it is offered to show why management acted. Thus, the ultimate issue in arbitration generally is *not* admissibility of evidence, but the *weight* it is accorded.

2. The mere determination that evidence is hearsay does *not* ensure that it will *not* be credited by a neutral. While recognizing the inherent weaknesses in hearsay evidence, some arbitrators nevertheless feel there are good reasons for accepting hearsay evidence. As noted by one arbitrator, "frequently, hearsay is the only evidence available in the work place setting, and the automatic exclusion of same could result in an incomplete record and a failure to accomplish a just result."¹³⁵ In this regard, there is nothing to prevent an arbitrator from "taking for what it is worth" testimony or exhibits that 30 employees (not present at the hearing) complained about the behavior of the grievant. In this situation what competent management will do (well before the hearing) is to inform the grievant that complaints have been received and that the grievant should (1) deal with the *perception* that there is some infirmity in his behavior, or (2) deal with the *reality* that there is an infirmity in the employee's behavior. If the grievant is made aware of the complaint and management's belief that there is at least some validity to them, chances are that the arbitrator will admit and credit the complaints.

An attempt to fit an arbitration hearing within the concepts and rules of evidence designed by the courts may do a disservice to the parties.¹³⁶ As stated by Arbitrator Ernest Marlatt:

"Arbitrators by training, are presumably better qualified to evaluate the weight of hearsay evidence and put it somewhere in the spectrum between 'strongly persuasive' and 'vicious gossip.' It stands to reason that the more an arbitrator can learn about the facts, the more likely his award will result in a fair and just decision. For this reason the arbitrator ought not totally to exclude any offered evidence unless it is clearly irrelevant or immaterial to any genuine issue in the case."¹³⁷

A second reason offered for crediting hearsay statements is that parties to an arbitration hearing do not have the ability to subpoena witnesses and must utilize the witnesses and evidence they can conjure up on their own accord. The arbitrator must be able to fill in any gaps with his own good judgment, and hearsay evidence is frequently that filler.

Moreover, under certain fact situations it may not be unreasonable for an arbitrator to conclude that such hearsay testimony is "great hearsay" and should be

135. See, e.g., *Ambassador Convalescent Center, Inc.*, 83 Lab. Arb. Rep. (BNA) 44, 46 (Lipson, 1984); *Union Oil Co. of Calif.*, 99 Lab. Arb. Rep. (BNA) 1137 (McKay, 1992)(ruling that police reports were hearsay, but relying on them in sustaining a dismissal).

136. *Baker Marine Corp.*, 77 Lab. Arb. Rep. (BNA) 721 (Marlatt, 1981).

137. *Id.* at 723.

considered when rendering an award.¹³⁸ Thus, in *Apollo Merchandisers Corp.*,¹³⁹ Arbitrator George Roumell ruled that customer complaints, although hearsay, were nevertheless entitled to some consideration when they corroborated the testimony of witnesses who were present at the hearing. While this situation may not be an exceptional case,¹⁴⁰ the practitioner is still cautioned to take care in ascertaining which evidence is hearsay so that, at a minimum, the arbitrator may be reminded to proceed with caution.

3. Similarly, even though evidence (otherwise classified as hearsay) comes within a recognized exception to the hearsay rule, there is no guarantee such evidence will be admitted or, if it admitted, will be credited by an arbitrator. The exceptions cited provide only that the evidence is not inadmissible under the hearsay rule. The evidence may still be excluded for lack of relevancy or even for some overriding policy reason. As aptly stated by Arbitrator Ted Jones:

“The exception provides only that the evidence, qualified for admission under the hearsay exception, is not inadmissible under the hearsay rule. It must still make its way past other exclusionary objections based, for instance, on the need to qualify as relevant, material, credible, the best evidence available, or as not barred by some testimonial privilege.”¹⁴¹

On the other hand, it is possible that an opposing party will fail to object to what would otherwise be hearsay evidence, in which case objections to competency are deemed waived and the evidence is entitled to its “full and natural probative effect.”¹⁴² However, as noted by Arbitrator Howard Bard, whether received over objection or not, the evidence is “received subject to any inherent weaknesses,” and if the evidence is hearsay it is admitted subject to its natural limited probative value.¹⁴³ As such, even if the opposing party does not object to the hearsay evidence, the arbitrator can reject or disregard the evidence as not credible.

4. In discussing the rationale why formal rules of evidence are not followed in arbitration hearings, Arbitrator George Bowles made the following observation:

No doubt the reason that the parties and the Arbitrator are not limited by the formal rules of evidence in an arbitration is the belief that rigid conformity to strict rules of evidence would tend to make the proceeding too technical and unreasonably restrict the parties from offering proofs that

138. See, e.g., *Cub Foods* (1990) (noting that although customer complaint was hearsay, when sufficiently corroborated by other complaints and the grievant's own admittance of events, hearsay will be admitted and given value according to its “apparent intrinsic worth when weighed with all the evidence. . .”).

139. 70 Lab. Arb. Rep. (BNA) 614 (1978).

140. See, e.g., *Millcreek Township School Dist. v. Millcreek Educ. Ass'n*, 112 LRRM 2881 (Pa. Commw. Ct. 1981) (eight written statements admitted, but given little weight).

141. Edgar A. Jones, *Evidentiary Concepts in Labor Arbitration: Some Modern Variations on Ancient Legal Themes*, 13 UCLA L. REV. 1241, 1278 (1966).

142. *Stevens v. Minneapolis Fire Dep't Relief Ass'n*, 17 N.W.2d 642, 645 (Minn. 1945).

143. *City of Minneapolis*, 106 Lab. Arb. Rep. (BNA) 564, 572 (Bard, 1996).

enable the Arbitrator to more fully grasp the labor relations situation, properly evaluate the problem, and render a just award.¹⁴⁴

Although the rules of evidence are not strictly followed, the arbitrator is nevertheless charged with providing a fair and adequate hearing.¹⁴⁵ Thus, when confronted with hearsay, the arbitrator can generally be expected to follow the suggestion of the West Coast Tripartite Committee:

Unless corroborated by truth-tending circumstances in the environment in which it was uttered, it (hearsay) is unreliable evidence and should be received with mounting skepticism of its probative value as it becomes more remote and filtered. If it a witness can testify at the hearing and does not, his statements outside the hearing should be given no weight, indeed, should even be excluded if it there appears to be no therapeutic, nonevidentiary reason to admit it.¹⁴⁶

5. To the extent that the arbitrator admits the "testimony" of an out-of-court declarant, a party should be accorded the opportunity to attack the credibility of the non-testifying witness. How can this be accomplished?

At the 33rd Annual Meeting of the National Academy of Arbitrators in 1980, the West Coast Panel (Howard Block, Chair) discussed the thinking of judges and arbitrators regarding the evaluation of testimony.¹⁴⁷ The Panel submitted that while there is no simple formula for separating one version from another when dealing with the conflicting perceptions of the same event: "All we can do is what judges have done for centuries past, namely, analyze the evidence and argument carefully, apply established guidelines, and then reach a decision recognizing fully that, like physicians and even football coaches, we may be wrong."¹⁴⁸

Perhaps the best characterization of the problems of evidence and credibility issues was stated at the nineteenth Meeting of the Academy by the West Coast Area Tripartite Committee: "There is only *one* reliable guide to credibility, and that is there are *no* reliable guides to credibility."¹⁴⁹ The committee nevertheless listed a number of factors that arbitrators and advocates should be cognizant of in assessing the credibility of a witness:

- (1) His demeanor while testifying and the manner in which he testifies;
- (2) The character of his testimony;

144. Bower Roller Bearing Co., 22 Lab. Arb. Rep. (BNA) 320, 323 (1954).

145. See, *Code of Professional Responsibility for Arbitrators of Labor Management Disputes, National Academy of Arbitrators, American Arbitration Association, and Federal Mediation and Conciliation Service*, Part 5, Section a (1) at 19 ("An arbitrator must provide a fair and adequate hearing which assures that both parties have a sufficient opportunity to present their respective evidence and argument.")

146. West Coast Tripartite Committee Report, *Problems in Proof in Arbitration*, Proceedings of the 19th Annual Meeting National Academy of Arbitrators 189 (1967).

147. West Coast Panel Report, *Decisional Thinking of Arbitrators and Judges*, Proceedings of the 33rd Annual Meeting National Academy of Arbitrators 121 (1981).

148. Id. at 123 (footnote omitted).

149. *West Coast Tripartite Committee Report* at 207.

- (3) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies;
- (4) The extent of his opportunity to perceive any matter about which he testifies;
- (5) His character for honesty or veracity or their opposites;
- (6) The existence or nonexistence of a bias, interest, or other motive;
- (7) A statement previously made by him that is consistent with his statement at the hearing;
- (8) A statement made by him that is inconsistent with any part of his testimony at the hearing;
- (9) The existence or nonexistence of any fact testified to by him;
- (10) His attitude toward the action in which he testifies or toward the giving of the testimony;
- (11) His admission of untruthfulness.¹⁵⁰

These factors may properly be considered even when a witness is not present. Any out-of-court testimony that does not square with any of the above criteria is less credible than would otherwise be the case.

6. Finally, even when the arbitrator credits hearsay evidence, it is reasonably clear that the party adversely affected will have little, if any, subsequent recourse in the courts.¹⁵¹ For example, in *Instrument Workers v. Minneapolis-Honeywell Regulator Co.*,¹⁵² a federal district court rejected a claim by the union that an award sustaining a discharge should be set aside. The union did not argue that the hearsay evidence admitted by the arbitrator was inadmissible, but rather argued that in the present case there was "too much of it." Finding that the arbitrator had evidence on which to make his award, the court went on to state:

Although the rules of evidence exclude hearsay in a trial at law, the exclusion is not because hearsay is entirely without probative value. It has been said with some justice that the characterization of evidence as hearsay is in reality simply a criticism of the weight that should be given to it. In an arbitration the parties have submitted the matter to persons whose judgment they trust, and it is for the arbitrators to determine the weight and credibility of evidence of evidence presented to them without restrictions as to the rules of admissibility which would apply in a court of law.¹⁵³

150. *Id.* at 207-08.

151. *See supra* note 80.

152. 54 LRRM (BNA) 2661 (E.D. Pa. 1963).

153. 54 LRRM at 2661. *See TRY-United Greenfield Div. v. NLRB*, 716 F.2d 1391, 1394 (11th Cir. 1983), where the court of appeals held that an Administrative Law Judge's refusal to allow five employees to testify that other employees had told them that a statement had been made did not deny TRY-United a full and fair hearing. While recognizing that administrative tribunals are not bound by the strict rules of evidence governing jury trials, the court pointed out that "this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence."

In the end, what can be said regarding hearsay and how arbitrators should rule on hearsay objections?

The rule against hearsay is not a rule against common sense, and when the evidence is clearly reliable, albeit hearsay, a trier of fact can be expected to admit and credit the evidence. The federal circuit, sustaining the use by the Merit System Protection Board (MSPB) of an unsigned police report as evidence of the grievant's attempt to sell cocaine, stated the principle this way: "it is well established that hearsay evidence may be substantial evidence in an administrative proceeding *if there are circumstances which give it credibility and probative value to a reasonable mind.*"¹⁵⁴ The court noted that case law is clear: "administrative decisions based on hearsay must be evaluated on a case-by-case basis to determine if the hearsay is inherently truthful and more credible than the evidence offered against it. Therefore, hearsay has been held to be substantial evidence in some cases and not in others."¹⁵⁵ As pointed out by Younger, it may be silly to think of a rule that says that hearsay is inadmissible when in reality hearsay is admitted 90 percent of the time under many exceptions.¹⁵⁶

Should arbitrators adopt the same focus? Unlike the rules followed in many administrative proceedings, we believe that the better rule in labor arbitration is this: if the party having the burden of proof can, but does not, produce direct evidence of the facts on which it relies to support the dismissal (either eyewitness or documentary evidence), hearsay evidence, although admissible, is not sufficient to support a discipline case. While both administrative agencies and arbitrators have great leeway about *admitting* hearsay, arbitrators should be cautious in not crossing the "loose bounds" that have been established by institutional practice, especially in dismissal cases.

Furthermore, we believe that the arbitration system is *not* well served by a rule that allows everything into the record. Arbitrators who do this send ambiguous signals to the advocates. If everything is admitted, does this mean that the advocate must make an objection for the record and is required to address the admissibility issue at closing or in a post-hearing brief, even though the evidence is clearly unreliable? If the advocate is protecting the record for a subsequent court appeal (often done in a public sector hearing), he or she will be compelled to make objections. Does this enhance the process? We think the parties are better served by arbitrators who give the advocate *some* indication what the evidence is worth at the hearing, at least in those situations where a party objects to the evidence. Arbitration should *not* be like a baseball game where advocates throw out pitches and wait for the arbitrator to call balls and strikes without ever being told what the strike zone is. Thus, when a party introduces the unsigned, out-of-court writing of "so-and-so" who used to work at the plant but, for whatever reason, is now unavailable, arbitrators should declare the paper "worthless" and not let it into the record "for what it's worth." Similarly, when management introduces the signed complaints of 12 parents regarding the conduct of a school teacher to corroborate the in-court testimony of four other parents, all of whom are telling the same story, we

154. *Sanders v. United Postal Service*, 801 F.2d 1328, 1331 (Fed. Cir. 1986)(emphasis ours).

155. *Id.* at 1331.

156. Younger, *supra* note 5, at 19.

see no infirmity in the arbitrator declaring that the out-of-court statements do not carry the same weight as the in-court parents' statements, but the evidence is probative and worthy of serious consideration. In response to an objection, the declaration should be made at the hearing.¹⁵⁷

157. "Have I said too much? There is nothing more I can think of to say to you." EVA PERON, "*Don't Cry for Me Argentina*," from *EVITA* (music by Andrew Lloyd Weber, lyrics by Tim Rice 1976).

