Evidence in Arbitration

or

Evidence?! We Don’t Need No Stinkin’ Evidence!*

* Because we have the _______ (law, right, power, God) on our side.

As a Starting Point ...

PRO TIP #1

The one foolproof surefire way not to lose in arbitration:

DON’T GO!

If you settle, you have some control of outcome

If you go, you give up any control, no matter how good your case

Except in rare cases, there are only three possible outcomes
If you didn’t follow the first tip ...

Pro Tip #2

This is your second-best chance at not losing -

BE PREPARED

Pro Tip #3

BUY THIS BOOK

If you want to know more or just want a resource, buy this book (if you can find an affordable copy)
WHY DO I NEED IT?

Foundation of your case

Every witness and every document should have purpose

Build toward the conclusion you want arbitrator to reach

BUILDING YOUR CASE:

- Know and understand the elements of your case
- Know what evidence you will need to prove those elements: what happened, who was there, etc.
- Put it all together
  - Gather the evidence (documents, witnesses)
  - Understand the other side’s case
  - Tie it all to the CBA
WHAT IS IT?

Journalist’s Questions:


Different Types:

Direct

Circumstantial

Testimony

Documents

Physical

Demonstrative

WITNESS TESTIMONY

Provides foundation for objective evidence

Provides information about key events

Provides context
OTHER DIRECT EVIDENCE

Documents: • Business records, Pictures, Email

Physical • Work Product

Demonstrative • Charts, Site visits

CIRCUMSTANTIAL EVIDENCE:

Not direct

Evidence that supports an inference

Inference must be sufficiently strong that conclusion is more likely than not
HOW MUCH IS ENOUGH?

• “The weight of the evidence”
• Enough to prove critical elements
• Not so much that key points get lost
• One good witness is better than five mediocre ones
• It’s not who has most – it’s who has best

WHAT IS NOT EVIDENCE:

OPINION*
ALLEGATIONS
ASSUMPTIONS
IMPRESSIONS

* Except expert testimony
EVIDENCE MUST BE:

<table>
<thead>
<tr>
<th>Relevant</th>
<th>Credible</th>
<th>Admissible</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tends to prove material fact</td>
<td>Demeanor, Nature of Testimony, Witness's Interest</td>
<td>Evidence may be excluded for various reasons (privileged, improperly gathered, etc.)</td>
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</tbody>
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I could tell he was lying, his lips were moving.

HEARSAY

- Witness testimony not from personal knowledge
- Basically just repeating what they have heard
- Don’t rely on
- Even if arbitrator allows, will unlikely be given much weight
- Problematic because not subject to cross-examination
OTHER ISSUES
- Adverse witnesses
- Impact of available evidence not offered
- Admissions
- Presumptions
- Official notice
- Surprise evidence
- After-acquired evidence
- Post-discharge evidence
- Objections to evidence

ARBITRATION AND THE RULES OF EVIDENCE
- Purpose of rules is to help ensure reliability
- Generally don’t apply – not a court
- But some arbitrators more formal than others
- And some disputes require more formal approach
TRIVIA QUIZ #2

- If the facts are against you, argue the law
- If the law is against you, argue the facts
- If both the facts and the law are against you, pound the table and yell like hell