

Arbitration: Nuts and Bolts

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The Case of the Two Levers

By Noah Barish¹

1) Overview (Day 1):

For the last four years, the Janet has been employed by a private-sector manufacturing company in Oregon as a production worker. Her performance had been generally good, but she received a written warning two years ago for yelling at another coworker and also received a written warning and then a 1-day suspension for attendance/tardiness issues within the last year.

The company has just terminated her from her position as a press operator because it found that she had operated the press unsafely. The press is manipulated by two levers that are spaced apart by over a foot. The operator has to push down on both levers at the same time—one with each hand -- in order to make the press work. The purpose of this design is to make sure an operator does not have either hand near the pinch point of the press when it is in motion. Janet had tied the right-side lever to a nearby handrail, allowing her to operate the press with just the left-side lever.

During an investigation meeting with the Company, the factory manager showed Janet a surveillance video of her operating the press one-handed. He then gave Janet a long and stern lecture about her unsafe working habits, criticized her for being an erratic employee who has bad judgment, and told her that she was being fired effective immediately. He asked her if she had anything to say for herself. In shock at what was happening, she got up, told him in a loud voice that the company was bad to its employees anyway, and said that she quit. Janet was not accompanied by a shop steward and didn't ask for one to be with her. The Company did not provide her with any written termination letter.

The collective bargaining agreement contains a standard just cause provision, a non-discrimination provision, and a provision stating that the Company shall ensure a safe and healthy working environment for all employees.

The Union has asked you to meet with the grievant and, if warranted, file a grievance.

¹ Based on a case example presented by the Labor Arbitration Institute Conference Reporter, February 25, 2016.

2) Information from Grievant (Day 10):

When meeting with Janet, you learn the following. Just four days ago she had started a new position on the floor operating the large press. Previously she had worked in another part of the building that involved using hand tools, not heavy machinery. She bid into the press operator job. Because her line supervisor was out sick the day she began the new position, she was started on the press with only five minutes of training from a fellow union member on how it operated. No one ever explained to her the exact purpose of the dual-lever control, although she knew that the press was obviously dangerous.

At first she operated the press with both hands, as intended. But within two days her right arm was hurting her badly. On the third day the pain was unbearable. She had a previous injury in her right arm and had been diagnosed with carpal tunnel syndrome. She told her co-worker about her arm hurting, but didn't tell the line or factory supervisors. The morning she was fired, she had put a brace on her right arm, which was visible to her supervisors when she came into work at the beginning of her shift. She then went to the press and tied the right-side lever to the handrail so she wouldn't have to manipulate it with her right arm. That day, the same day she was fired, she was able to operate the machine fine with her left hand. There were no safety incidents and she didn't damage any product with the machine.

Janet had some problems with attendance during the past year because she had been caring for an elderly parent who sometimes needed emergency medical attention, or whom she sometimes had to stay up much of the night to care for. She didn't tell her supervisor the reason why she was late because she didn't want to share her personal issues. She didn't ask the union to grieve the written warning and the 1-day suspension. About 6 months ago her parent had been placed in a live-in care facility and Janet's attendance problems stopped.

Janet explains that the previous incident several years earlier where she received a written reprimand for yelling at a co-worker was not her fault. A male co-worker had made a joke about how she couldn't handle the heavy "man's work" in the factory, and in a loud voice she told him to go "f%@ off". Even though the other co-worker had said several similar things to her in the past, she didn't want to grieve the discipline because it was just a reprimand and she didn't want to get the reputation that she was snitching on another union member.

Since she had been fired, she had not looked for other work but was considering applying for unemployment. Her salary was \$40,000 per year, with benefits, and there were no jobs that she was qualified for that earned even close to that. Even though she said she quit at the end of the meeting, that was just because the manager said she was being fired, and she was angry at how he didn't even want to hear her explanation before making his decision. After thinking it over for a few days, she was sure that she wanted her job back.

3) Information from Others in the Bargaining Unit (Day 30):

After speaking with the shop steward, you learn the following. Janet's co-workers all knew that she suffered from carpal tunnel in her right arm, since it sometimes affected her previous work. In fact, word had gotten to the shop steward the day before Janet had been fired. On his way out of the building after his shift that night, he told one of the supervisors that they should probably talk to Janet about the ergonomics at the press because it wasn't set up right and it was hurting her.

Janet is just one of two women on the factory floor, along with 21 men. The plant hires mostly men, and the other woman at the plant works with the smaller hand tools just like Janet used to. Janet is a capable worker and tries hard to fit in with the guys. She was excited about bidding into the new position as press operator, especially since it came with a pretty significant pay increase.

The press where Janet was assigned to work is very dangerous. The steward heard that about 10 years ago someone in the factory had lost a finger using a similar machine that did not have this safety feature, but that was well before Janet started working at the plant. The company gives a safety training every year by making employees watch a video and sign off on a safety policy. There usually is more in-depth training when someone starts on a new machine, but the trainer was sick when Janet began and it fell through the cracks.

The company's safety rules don't specifically prohibit employees from modifying machinery, but everyone knows it's not a good idea to mess with a large machine that has built-in safety features.

In the past five years two other employees have been disciplined for safety issues. One had two minor accidents six months apart and was terminated. The other employee received a 1-day suspension for a handful of minor safety infractions including horseplay using an air compressor hose and not wearing appropriate safety equipment.

4) Employer Responses to Union's Grievance and Information Request at Fact-Finding Meeting (Day 60):

The company's investigation was limited to a review of the factory surveillance footage from that day and a review of Janet's personnel file, including her recent signed acknowledgement of reading and understanding the company's safety policy.

No other members have ever been disciplined for modifying factory equipment in an unsafe way.

The decision to terminate Janet was made by the company manager for violation of the safety policy and violation of an unwritten but well-known rule in the factory that safety features of dangerous equipment cannot be modified.

In the fact-finding meeting, the company explains that Janet's behavior was dangerous and intentional because she purposefully disabled the safety feature of the press. The company says that it takes safety very seriously, as shown by its prior discipline of the worker who had two minor accidents and its 1-day suspension of the employee who acted unsafely. The company is sorry about Janet's arm being hurt, but insists that Janet should have come to the company and asked for an accommodation or gone home sick if she couldn't perform the work, not take things into her own hands and disable the safety feature of the machine.

5) Employer Proposed Settlement (Day 240):

Eight months after Janet was dismissed, Janet is now working a part-time low-wage job as a restaurant server, after having received six months of unemployment insurance. She estimates that she received \$12,000 in unemployment and \$3,000 in wages since she was terminated. A week before the arbitration hearing, the union receives a settlement offer as follows:

- Reinstatement with no back pay
- Return to work on a last-chance agreement for future safety violations and “other acts of poor judgment”
- Terms of the settlement are confidential
- Employee releases all past claims of any kind against the Company
- Settlement is non-precedential

Classic 7 Tests of Just Cause

1. **Notice:** Did management adequately warn the employee of the consequences of the conduct?
2. **Reasonable Rule:** Was management's rule reasonably related to efficient and safe operations?
3. **Investigation:** Did management investigate before administering discipline?
4. **Fair Investigation:** Was the investigation fair and objective?
5. **Proof:** Did the investigation produce substantial evidence or proof of guilt?
6. **Equal Treatment:** Were the rules and penalties applied evenhandedly and without discrimination?
7. **Penalty:** Was the penalty reasonably related to the seriousness of the offense and the employee's past records?



Modern Simplified Just Cause Standard

1. **Due Process:** Was there due process? (notice, full and fair investigation)
2. **Proof:** Did the employee do it?
3. **Penalty:** What is the reasonable range of discipline?

Theory

A **theory** is a one-paragraph description of the key factual, legal, and emotional aspects of your case.

A good theory is:

- Emotionally compelling
- Deals with both good and bad facts
- Based on experience and common sense
- Addresses the important aspects of the law or contract language

Theme

A **theme** is a word, phrase or simple sentence that captures the dominant emotion and/or reality of your case.

A good theme is:

- Short
- Catchy
- Forceful
- Emotional

Top 10 List - Arbitration Mistakes

10. Choose any old arbitrator—they are all the same anyway.
9. Wait until the week before to think about settlement—what's the rush?
8. Don't try to figure out what the Employer's theory of the case is—I'll learn it at hearing, right?
7. Don't prepare any exhibits for hearing—the grievant will just testify, right?
6. Don't actually practice the grievant's testimony or prepare the grievant for cross examination—after all, we talked about what hearing would be like.
5. Don't prepare a statement of the issue (contract cases)—the arbitrator will just figure it out at the end.
4. Don't worry about arbitrability—we got this far, didn't we?
3. Don't object to any employer exhibits—the arbitrator won't care about them anyway.
2. Ask lots of questions you don't know the answer to—this is as good a time to find the answers as any.
1. Try and get the Employer's witnesses to just agree that they are biased against the grievant—they are, so they will just tell the truth.

ARBITRATION: PUTTING IT ALL TOGETHER

Courtesy of

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A. Start Preparing Early.

Start early. As the Union's advocate, you'll be on the spot from start to finish. You need to know and understand the case as well as possible, and better than anyone does when its first assigned to you. You'll also need to prepare the grievant and your other witnesses. There are several time-consuming, interdependent steps. And unexpected twists, turns and delays are the norm.

You should also start early because in preparing it, you will also further investigate and scrutinize the case. You might discover that the decision to arbitrate was made on a mistaken premise, and should be reconsidered. The earlier that this kind of revelation comes to light, the better. Among other considerations, cancelling a hearing on short notice can cost thousands of dollars. Arbitrators' policies vary widely, but they commonly require at least 30 days notice to cancel or postpone a hearing without a fee, and many require more than 30 days.

B. Discipline Or Contract Case?

In discipline cases, the employer is the moving party, presents its case first, and bears the burden of proof. After the union presents its case, the employer also gets a chance to present evidence rebutting the union's case.

In all *other* cases – where we're claiming that something other than discipline violated the contract – the roles are reversed. The union is considered the moving party, the union goes first, and the union has the burden of proof. And after the employer presents its case, the union gets the rebuttal opportunity.

C. Flash Forward Checklist

Assume the hearing is tomorrow. Aside from knowing the case well and knowing who is going first, what do you need to be ready?

1. A viable, road-tested "theory of the case";
2. A grievant who is prepared to testify, who knows and understands the case theory, and has hopefully bought into it;
3. The other union witnesses you need to prove the union's case; who also need to be available and prepared to testify;
4. A minimum of 4 union exhibits notebooks, each containing full sets of the exhibits you plan to present at the outset of the hearing (one set for the arbitrator, one for the employer representative, one for you; and one for use by witnesses);
5. A personal hearing notebook for your use during the hearing, organized to give

you ready access to any of the following that apply, and any other papers you want to have access to during the hearing

- a. A list of the things you want to raise at the outset of the hearing, such as a proposed issue statement; notes on employer exhibits you intend to object to and why; fact stipulations you might want to propose; moving to sequester witnesses, etc.
- b. For the grievant and each of the other union witnesses, a written outline of the testimony you plan to elicit from them;
- c. Your opening statement;
- d. A list of admissions you plan to elicit from management witnesses on cross examination, to refer to when you are crossing or preparing to; and
- e. Sets of your *possible* union exhibits – exhibits that you don't plan to present at the outset and are not sure you will use, but want to have ready in case the need arises – at least four copies of each one.

D. Theory of the Case

The theory of the case is a brief, cohesive statement of why you should win based on applying relevant contract principles to the facts of the case.

A theory may be suggested when you first get the case. The steward may firmly believe, for example, that it was disparate treatment for the employer to fire grievant for violating the XYZ policy, because other employees who violated the policy were only reprimanded.

Or in a contract case, the organizer may believe the employer violated the contract by stopping the grievant's vacation accrual during her leave of absence because there's nothing in the contract that says it can do that.

But any theory that's suggested up front is just a starting point. You have to keep an open mind. Developing a viable theory of the case requires you to carefully scrutinize and evaluate facts of the case and consider alternatives.

You should be considering, testing, evaluating and refining your case theory – and alternatives to it – all along as you prepare.

E. Focus On Evidence

Also throughout your preparation, you need to focus on evidence: witness testimony, recordings or documents that establish or reflect relevant facts.

In evaluating case theories, ask yourself what facts have been, can be, or might be established through witness testimony and/or recordings or other reliable documents?

Consider what evidence you might be able to gather that would establish or bolster the likelihood of facts that are consistent with your case theory? or undermine the employer's case?

Hearsay evidence is admissible in arbitration, but is less convincing than direct evidence. Thus, if you plan to have a witness testify about the terms of another union contract – a contract other than the one under which the case arose – you'll want to present a copy of it as an exhibit. The testimony will be stronger with the exhibit supporting and confirming it.

Might there be relevant medical records you could get? Emails? Memos or other correspondence? Security videos? Payroll records? News media reports available on the internet? Aerial photography from Google Earth?

Note, however, that “character evidence” – witness testimony about what a nice person the grievant is, for example – is generally *not* going to be helpful.

Note also that rulings on unemployment eligibility are deemed inadmissible as evidence by statute, and thus are not properly admitted as evidence in arbitration, either.

F. Nuts And Bolts Prep Tasks

1. Obtain A Panel of Arbitrators

Request a panel from the agency specified in your contract's grievance procedure (the FMCS, ERB, or the AAA). The forms are available on line, and the requests can be submitted online to the FMCS, by email to ERB and the AAA, or by fax to any of the three. Panels can be requested unilaterally; however, choosing some of the options offered by the FMCS and ERB require that the parties have agreed to them.

2. Thoroughly Review And Analyze the Documents

Immerse yourself in the file. It is the written historical record of the case to date. One approach is to create a chronological (“chron”) memo:

- a. Take the file apart or have it copied, so that you start with have a pile of separate *1-sided* documents;
- b. Identify the date of each document, and put them in chronological order with the oldest documents on top, and the most recent at the bottom;

- c. Review each document and write short chron entry on each consisting of the document's date, what it is, and a summary of its content. For example:

12-13-11 [Memo to FM from CD:] Need meeting with you re: performance issue that "may result in Level 4 or more serious corrective action, including termination"; propose 12-19, 12-20 or 12-21-11 @ 3:00 p.m. at plant office.

- d. Make notes in the chronology about the questions that occur to you that you want to ask the grievant, the steward, and/or the employer; about documents you want to request from any of them, and other follow up issues.
- e. Review the chronology and consider whether the facts that they reflect seem consistent with the theories of the case you are considering, and what other kinds of evidence might be available to support or refute them.

3. Call or Meet With Grievant

- a. Introduce yourself, discuss case status and process;
- b. Get grievant's basic story and answers to your questions;
- c. Ask grievant for documents, records releases, and proposed witnesses;
- d. Establish rapport and confidence;
- e. Hearing date limitations;
- f. Discuss candor, full disclosure, need for responsiveness and follow-through;
- g. Unemployment status;
- h. Talking among witnesses;
- I. Document set.

4. Information Request To Employer

- a. Grievant's personnel file;

- b. Ask for everything, but be reasonable;
- c. Investigative reports, witness statements, policies;
- d. Avoid duplication;
- e. Offer to discuss objections;
- f. Confidentiality issues?
- g. Propose a reasonable deadline (and calendar it);
- h. Note that you'll likely need to make further requests.

5. Select Arbitrator From Panel

- a. Rank the arbitrators and write list in "striking order;"
- b. Coin-toss: loser goes first (winner makes final choice);
- c. Notify arbitrator and request dates

6. Further Investigate, Gather Documents

- a. Follow up with grievant on information and documents;
- b. Call, interview, and evaluate proposed witnesses;
- c. Union data;
- d. The internet (Weather? Google Earth?)

7. Meet with Grievant

- a. Hard questions;
- b. Case theory, strengths and weaknesses;
- c. Discrimination, whistleblowing, retaliation issues;
- d. Prior discipline;
- e. The Hearing Process

- (1) Step-by-Step;
 - (2) The technical and *other* issues;
 - (3) Direct examination - open ended questions;
 - (4) Cross examination - leading questions;
 - (5) Admissions;
 - (6) Listening, waiting, responsiveness;
 - (7) Demeanor, eye contact.
- f. Range of outcomes;
 - g. Finality.
 - h. Acceptance of responsibility, remorse/contrition;
 - I. Talking among witnesses.

8. Interview Possible Witnesses

- a. Candor, full disclosure;
- b. Get grievant's basic story and answers to your questions;
- c. Ask grievant for documents, records releases, and proposed witnesses;
- d. Willingness to testify;
- e. Hearing date limitations;
- e. Process
 - (1) Subpoena;
 - (2) Direct examination - open ended questions;
 - (3) Cross examination - leading questions;
 - (4) Admissions;

- (5) Listening, waiting, responsiveness;
- (6) Demeanor, eye contact.

9. Scheduling Hearing

- a. Check grievant and witness availability;
- b. Plan for final pre-hearing preparation time;
- c. Calendar postponement, cancellation dates;
- d. Subpoena or otherwise schedule witnesses as necessary.

10. Hearing Location /Logistics

- a. Adequate conference room and break out rooms;
- b. Water, coffee, refreshments;

11. Employer Fails or Refuses to Provide Information

- a. Phone call and confirming email reminder;
 - (1) New deadline;
 - (2) Intent to ask for ruling by the arbitrator.
- b. Letter to arbitrator asking for phone conference;
 - (1) Outline problem;
 - (2) Forward prior correspondence;
 - (3) Request order requiring production.
- c. Phone conference.

12. Analyze everything

- a. Closely review and analyze the additional information and documents you've gathered and update your chron;

- b. Adjust or change case theory as needed;
- c. Identify and reconcile inconsistencies;
- d. Outline testimony needed from grievant and each of the other witnesses to support case theory and rebut employer's case;
- e. Identify the documents needed as exhibits;
- f. Identify admissions to elicit from employer management witnesses;
- g. Identify the admissions grievant and/or witnesses must make.

13. Prepare Exhibits

- a. Identify your "for sure" exhibits, (those that need to be in, either because they are central to the story or your case);
- b. Identify any "possible" exhibits that you *may* want to introduce at hearing, such as potential impeachment exhibits;
- c. Coordinate and/or stipulate with employer representative re: numbering of common "for sure" exhibits to avoid duplication, if possible;
- d. Assemble notebooks of non-duplicative "for sure" Union exhibits;
 - (1) 3-ring binders with number tabs;
 - (2) Full sets for arbitrator, witness chair, employer representative, and you;
 - (3) Footers with exhibit and page numbers;
 - (4) Exhibit lists.
- e. Prepare sets of un-numbered *possible* exhibits.
- f. Master Exhibit List

14. Prepare Outline of Grievant Testimony

- a. Going first?;
- b. Facts needed, open-ended questions;

- c. Exhibit testimony needed;
- d. Acceptance of responsibility;
- e. Remorse/contrition;
- f. Objectives;
- g. Anticipated cross questions, hazards.

15. Prepare Outlines of Other Witnesses' Testimony

- a. Going first?;
- b. Facts needed, open-ended questions;
- c. Exhibit testimony needed;
- d. Anticipated cross questions, hazards.

16. Prepare Grievant to Testify

- a. Case theory
- b. Review outline, exhibits, process issues
- c. Practice

17. Prepare Other Witnesses to Testify

- a. Case theory
- b. Review outline, exhibits, process issues
- c. Practice

18. Preliminary Matters List

- a. Issue Statement;
- b. Exhibit objections;
- c. Sequestering witnesses;
- d. Arbitrability;

- e. Retention of remedy jurisdiction;
- f. Fact stipulations
- g. Logistical issues

19. Cross Exam Admissions list

20. Opening Statement

21. Closing argument

G. The Hearing

1. Off-record discussion of preliminary matters;
2. Review employer exhibits;
3. On-record: Get preliminary matters rulings and stipulations *in*;
4. Moving party Opening Statement;
5. Non-moving party Opening Statement? (Pros and Cons);
6. Moving party witness #1 direct;
7. Note-taking in prep for cross;
8. Introduction of Exhibits
9. Prep for cross;
10. Referring to Exhibits;
11. Moving party rests;
12. Non-Moving party case;
13. Moving party rebuttal?
14. Moving party rebuttal?
15. Closing Argument and Briefing Options

16. Post-hearing debriefing notes