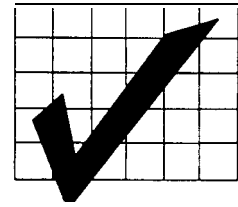

The TCU Rep's Checklist--
**PROOF & EVIDENCE IN
GRIEVANCE HANDLING**



The arbitration of claims is the Supreme Court of the labor-management relations process in the railroad industry. Under the Railway Labor Act the arbitrator's decision is final and binding on both parties.

Even though arbitration is the last step in the process, much of the outcome is determined at the first step--your initial handling of the claim or investigation.

The arbitration process begins the moment the carrier is presented with a claim, whether it be by you or one of the members you represent. You **must assume that every claim you file will have to be resolved by an arbitrator and make your evidence a part of the record while the claim is on the property.** The Union cannot wait to make its case or present its evidence at the arbitration hearing, as the arbitrator is not permitted to consider evidence not made a part of the record while the case is being handled on the property. Without sufficient evidence gathered on the property we cannot sustain our claims in arbitration.

Thankfully, arbitration proceedings are not courts of law; arbitrators do not insist on stringent, legalistic rules of evidence. The real danger for us as union representatives is that the arbitrator won't hear enough evidence to support our claim. This is especially true when the burden of proof is on the union.

Burden of proof is defined as the responsibility placed upon one party to prove to the arbitrator the truth of an allegation it has made. Stated at its most simple: "You said it, so you have to prove it." Therefore, the burden of proof falls on the moving party in the dispute.

Who is the moving party? In discipline cases, since the carrier contends that the employe has violated some standard of conduct, it has the burden of proof. It is the, carrier's obligation to prove that just cause existed for imposing the discipline. This reasoning is accepted by all arbitrators.

In all other grievances--rules violations--the union is the moving party and we must meet our burden of proof if we are to win these claims.

Each party has to prove the allegations it makes. But unless the moving party, the one with the burden of proof, is successful

in making a prima facie case, that is, "at first view" their position is verifiable, the opposing party has no obligation to present rebuttal evidence.

How much proof is necessary to prevail? Some allegations require a stronger body of evidence than others. Therefore, it is important to understand the quantum or amount of proof required by arbitrators.

Two examples of the amount of proof required by most arbitrators (referred to as standards of proof) are "preponderance of evidence" and "substantial evidence." Preponderance of evidence means that the arbitrator is more persuaded than not persuaded, Substantial *evidence* is defined as "evidence that a reasonable mind might accept as adequate to support a conclusion." (Third Division Awards Nos. 29139 and 29781)

There is an exception to the standards of burden of proof we have just discussed. In disciplinary cases where an employe is discharged for serious offenses involving moral turpitude or criminal conduct, such as stealing, possession of drugs and the like--cases where a permanent stigma will attach to the employe as a result of being discharged for the alleged conduct--most arbitrators hold the carrier to a more stringent burden of proof standard. In Award 22 of Public Law Board 2037, Referee Seidenberg explained the carriers' added burden as follows:

"The Board cannot be unmindful that conviction of such a morally repulsive offense can materially affect if not destroy an employe's reputation and livelihood. **There must be substantial and unequivocal, rather than tenuous and uncertain, evidence of guilt before a conviction of such an offense and repulsive charge can be allowed to stand.**" [Emphasis added]

How does one meet their burden of proof? With evidence that is developed while the claim is being handled on the property.

There are two types of evidence--direct evidence and circumstantial evidence.

Direct evidence is that which directly proves a fact or position. Examples include eye witness testimony, written reports, work orders, waybills, switch lists, tape recordings, time cards, and the like .

Circumstantial evidence is evidence from which a fact may be presumed or inferred. We must not assume that merely because evidence is circumstantial it has no value. Circumstantial evidence is very useful and sometimes it is the best evidence we can gather. For example, if no crew caller is on duty, but a train is placed in service and a crew shows up to work that train, you have circumstantial evidence that someone must have notified the crew to

report. Thus, from the facts that a train was placed in service and a crew showed up for work, an inference can be made that they were called to work, and if a TCU member didn't call them, somebody else did. Or, from the fact that a train was made up and departed a yard, an inference can be made that an air test and other checks of safety applications were performed, and if a TCU Carman was not permitted to make them, someone else must have. While direct evidence is preferable, sometimes circumstantial evidence is all we have available to us, particularly since carriers do not normally permit union representatives access to written documentation that would show who performed the work. The Board in Third Division Award 26435 explained the value of circumstantial evidence as follows:

"...Circumstantial evidence is not only appropriate but can be more probative than direct testimony where the direction and weight of the evidence all point inescapably to the conclusion...."

One additional type of evidence we should consider in presenting our case is past *practice*. A past practice is a prior course of action which is consistently made in response to a recurring situation. A past practice does not supersede unambiguous, clear agreement language. **If either party alleges a past practice, three elements must be proven before the practice will influence the arbitrator:**

1. There must be mutual intent of the parties.
2. There must be knowledge of and acquiescence to the practice as shown by the prior acts of the parties.
3. There must be evidence of joint participation in the prior course of conduct over a long period of time.

The Board, in Third Division Award 12964, described past practice as follows:

"It is the opinion of the Board that the long and continuous actions of the parties are controlling in this case. Indeed, they give us an indication of the parties' intent, which is manifestly more indicative than the words which they have written. We believe that the parties are now bound through acquiescence, to the conclusions which must be drawn from their actions. Clearly, they give us an accurate reflection of their intentions with regard to the agreement. Therefore, we believe that this past practice on the part of both the Carrier and the Organization demands that this claim be sustained."

Likewise, the Board, in Third Division Award 18323, explained it this way:

"Evidence of custom and past practice may be introduced to sanction assertions that clear language of the contract has been amended by mutual action or agreement of the parties to said contract."

The key words arbitrators consider are mutual intent, knowledge and acquiescence, and joint participation. These factors will be assessed in light of their consistent application over a long period of time. Therefore, one or two occasions would not be a past practice,

In order to prove or disprove past practice, the same kinds of evidence, direct or circumstantial, must be introduced. Statements and documentary evidence will aid you in your burden of proof where past practice is involved.

It's now time to discuss the nuts and bolts of evidence gathering. Consider a situation where the carrier removes work from your agreement and gives it to another craft or outsiders, What evidence can we gather to prove to an arbitrator that we have a contractual right to the work?

1. Statements by employees.
2. Prior statements in claim letters by carrier officers.
3. Direct evidence: (e.g. carrier instructions, lists, reports, job bulletins).

To prove our claim, we must also enter evidence that the other craft or contractor is performing the work. Here, reports or invoices by the contractor can be used.

What about the problem of carrier documents which are in the carrier's possession? Should we take them? No! We do not advise taking carrier documents as arbitrators recognize that the carrier's records are the carrier's property and more than one discipline case has been upheld in arbitration where a carrier has disciplined an employe for taking carrier records. For example, the Board in Third Division Award 27667, in just such a situation held:

"Throughout the record, Claimant admits that during his lunch break on the day in question... he pulled the car records maintained by the Carrier from the computer, copied them on the Carrier's machine...and later removed them from the property and used them to substantiate his grievance. The Board finds...that Claimant violated the Rules."

There is a very useful way of introducing evidence of documentation which we know exists but which we cannot get, and that is to advise the carrier, in writing, of the contents of the document and what it would prove. Identify the document, date, time, report number or invoice, whatever you can do to authenticate its existence. Then, request that the carrier produce the document for inspection. If the carrier refuses you have shifted the burden of proof to the carrier to show it does not exist.

The fact that you have entered this information in the record of claim handling on the property will allow an arbitrator to consider it. Also, there is a presumption that if the document would have supported the carrier's position, the carrier would have

produced it. Accordingly, since it was not produced, there is a likelihood that an arbitrator will conclude that the document would have supported your position.

The formulas for gathering evidence are simple. That is not to say getting the sufficient amount of the proper evidence is easy. However, all the great arguments in the world will not convince an arbitrator to sustain our claim unless we have sufficient evidence to meet our burden of proof

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Bargaining Trends Revealed in New Edition of *Basic Patterns in Union Contracts*

Contract negotiators can compare subject-by-subject data on a representative sample of bargaining contracts in the new 14th edition of *Basic Patterns in Union Contracts*, published recently by The Bureau of National Affairs, Inc. (BNA). The data on 400 contracts, culled from more than 4,000 agreements monitored by BNA, will help negotiators quickly and easily evaluate agreements, proposals, and counter-proposals.

The new reference book includes objective presentations revealing patterns in 19 contract topics: amendments and duration; discharge, discipline, and resignation; insurance; pensions; grievances and arbitration; income maintenance; hours and overtime; holidays; layoff, rehiring, and work sharing; leave of absence; management and union rights; seniority; strikes and lockouts; union security; vacations; wages; working conditions; safety and health; and discrimination. Issues of particular interest in the new edition include discipline/discharge policies; cost containment and comprehensive health insurance; and family leave, including maternity, paternity, adoption and child care.

Compiled by the editors of BNA's *Collective Bargaining Negotiations and Contracts*, the handbook spans a wide cross-section of contracts in both manufacturing and non-manufacturing industries and includes data on occupations, unions, employe populations, and geographic areas. Easy-to-scan charts highlight the text.

The new 14th Edition of *Basic Patterns in Union Contracts* (146 pp. Softcover/Order Code: 0895/\$35.00 plus tax, shipping and handling) may be purchased from BNA Books, P.O. Box 7814, Edison, NJ 088 18-78 14. Telephone orders: 1-800-960-1 220. Fax orders: 1-908-41 7-0482. A free catalogue of BNA books is available by calling the toll-free number listed above or sending an e-mail request on the Internet to "books@bna.com". BNA's home page, which includes an on-line catalogue of BNA books, can be found on the World Wide Web at "<http://www.bna.com>".

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