

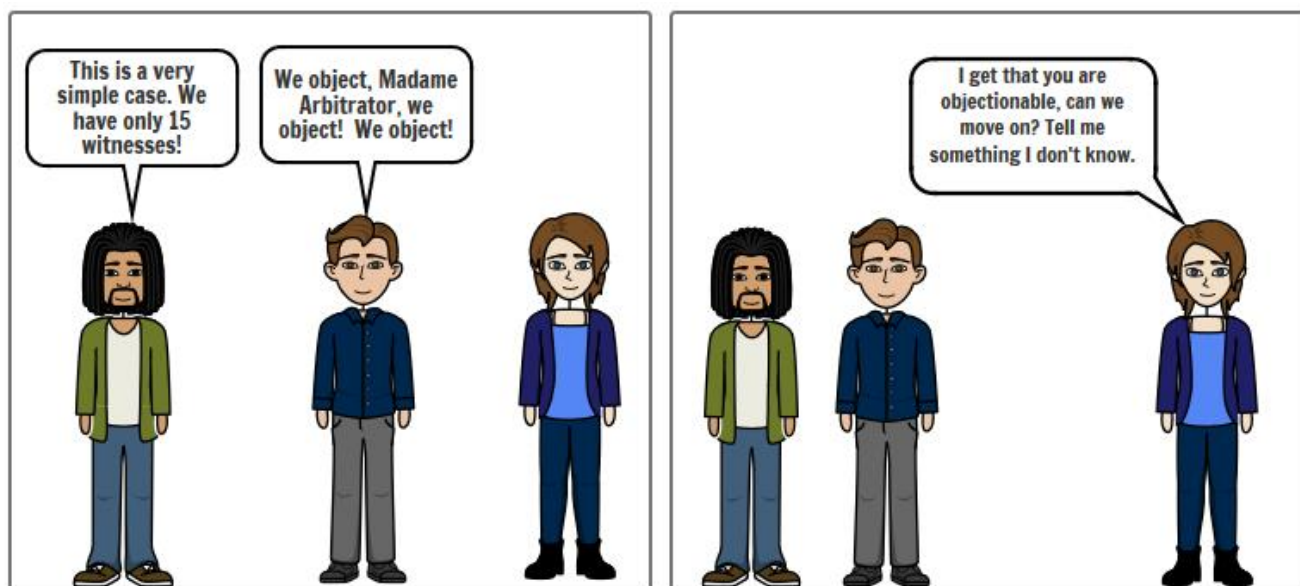
*Making the Arbitration Process Work for You:
Common Roadblocks and Some Solutions*

United Steelworkers International Union
District 9 Educational Conference
August 28-29, 2019, Florida

Arbitrator Michele Hoyman, Ph.D.
Associate Professor of Political Science
Campus Box #3265
University of North Carolina at Chapel Hill
Chapel Hill, NC 27599-3265

Contact: hoyma@unc.edu
Website: www.michelehoyma.com

Making the Arbitration Process Work for You: Common Roadblocks and Some Solutions



THANK YOU TO DANIEL DISTRICT 9 DIRECTOR . THRILLED TO BE HERE.

USWA IS NEAR AND DEAR TO ME BECAUSE OF 1978.

Some Arbitration Roadblocks and Solutions:

SUBTEXT IS HOW TO WIN THOSE HOPELESS CASES?

I. Roadblock: Multiple issues in a single case (this is a “who’s on first?” problem).

The arbitrator cannot go forward with hearing two cases at once. There are a few solutions:

- Discuss with the other side what is the *key* issue and exhibits you are going to bring up.
-
- One example : Arbitrability and substance.
- - Hear just the arbitrability on the scheduled case day, then adjourn and render a decision on arbitrability.
 - If the case is arbitrable, then the parties reconvene and hear the substantive case.
- The other alternative: to hear both cases that day and divide the decision into half. Only rule on substance if arbitrator decides it is arbitrable. This is cheaper/more efficient.

II. Roadblock: Surprises – something comes up that one side was not prepared for.

- Solution: discuss the case with the other side before the hearing to determine what issue will be raised and key witnesses and relevant documents.
 - Are there certain facts that both sides agree are not relevant?

Making the Arbitration Process Work for You: Common Roadblocks and Some Solutions

- Try to make the case as narrow as possible.
-
- Keep in mind the parties, particularly the union, is prohibited from raising things not raised in grievance chain (Steps I through IV).
- If a surprise comes up at the hearing, caucus quickly

- **III. Easy Cases :**

Facts are on your side.

Contract Language is on your side

Witnesses credibly testify and are viewed as credible by arbitrator.

Is your case hopeless?

- There is no such thing. Even if it is clear that the facts are not on your side or the contract language is not perfectly clear for your argument, you can win.
- **How? For example,**
 - Argue the penalty is too severe for the infraction.
 - Bring up a procedural violations. For example, if no investigation was held.
 - Claim extenuating circumstances. Admit the grievant messed up but there is a reason to explain the behavior.
 - Make a case for differential treatment.
 -
 - Prove that well-established past practice overrides clear contract language or clear rule.
 - Argue that the grievant is contrite and regrets his or her action. (Have grievant apologize).
 - Apology study of National Academy of Arbitrators.
 - Point out that grievant is very senior with an unblemished record.

- **IV. Importance of Credibility**

What is credibility? Demeanor, consistency with fact, with own testimony, and with others

Credibility is established by the testimony of a credible witness, not refuted by another more credible witness.

V. Roadblock: Prohibited/compromised communication before and during the hearing.

- Make sure all contact pre-hearing is joint. No ex parte contact is permissible.
- Any small talk before the hearing should not compromise the appearance of objectivity.

Making the Arbitration Process Work for You: Common Roadblocks and Some Solutions

- Remember almost any subject - like the weather or parking - may not be “neutral” depending on who you are talking to.
- the arbitrator should never have lunch with either party.

An Arbitrator’s Dos and Don’ts List for Parties at the Hearings

Do’s

- 1) Do speak slowly, clearly, and loudly. If the arbitrator can't hear you, she can't rule in your favor.
- 2) Do make sure all the witnesses speak loudly enough to be heard. Remember the court reporter cannot record a nod, they must be able to hear a “yes” or a “No”. Prepare your witnesses to answer calmly and respectfully, not in an angry or belligerent way.
- 3) Do make sure to cover the relevant terms of your contract. Introduce them via a witness.
- 4) Do make a list of key facts you need to establish in preparing your case.
- 5) Do explain in your opening statement what the facts are, which contract terms apply and why. Also set the stage by describing the work environment.

Don’ts

- 1) Don't assume the arbitrator knows the vocabulary or context of your workplace. He or she is an outsider. It is the parties’ job to educate the arbitrator with the jargon specific to the case.
- 2) Don't hesitate to take a break and caucus. This is important particularly before cross-examination.
- 3) Don't rush. You can even repeat certain things for emphasis.
- 4) Don't ask a question on cross examination that you don't already know the answer to. No fishing expeditions! EXAMPLE Who was last person to break this rule and what happened to him?
- 5) Don't argue with the arbitrator. After he or she makes a ruling on an objection, move on.
- 6) Refute the key arguments and facts presented by the other side. You have the opportunity to do this when cross-examining the other side's witnesses on re-direct of your own witnesses or in your closing statement.