ADVOCATES

ARTICLE 15
QUANTUM OF PROOF - PREPONDERANCE OF EVIDENCE

Needs

Basically this means the degree of proof necessary to persuade the arbitrator you are right. In contractual disputes the Union must meet this benchmark. It is understood the burden may shift after a prima facie showing or for some other evidentiary reason. What is important for you, is to understand what this term means and to be sure to educate the arbitrator as to your understanding. The best place to do this is in your opening statement. It is not improper or demeaning to tell the arbitrator the normal degree of proof in contractual disputes is a preponderance of evidence.

A review of arbitration cases indicates virtually all arbitrators accept this benchmark when the union carries the burden. Yet some resolve doubts in favor of management. In order to minimize these types of rulings the following documentation is offered to assist you in properly educating the arbitrator. Again, don’t assume the arbitrator fully understands this term and will properly apply it. Rather, take what time is necessary to ensure the appropriate degree of proof is utilized.

Various definitions exist for this phase. The following are offered:

- More likely than not
- More persuaded than not
- Evidentiary scales tip in favor of the union
- Probabilities inherent in both its theory of the case and the evidence and testimony supporting are stronger than the probabilities inherent in management’s case
- Quantity of evidence which produces a reasonable assurance of the existence of the ultimate fact
Legal definitions include; more likely than not; satisfied; convinced; and feeling of probability

Which side has presented the most evidence to support its position

**Attachments**

1. How Arbitration Works [excerpt]
2. Winning Arbitration Advocacy [excerpt]
3. How to Prepare and Present a Labor Arbitration Case [excerpt]
4. Evidence In Arbitration [excerpt]
5. Practice and Procedure in Labor Arbitration [excerpt]
6. National APWU case by Gamser; AB-E-2703, 5/21/76. The dispute is not relevant. The Arbitrator tells us on page 9, “Here the preponderance of evidence indicates that the stand-up workers were permitted about 12 minutes, since the time is customarily tolled in tenths of an hour on this work floor.”
7. National APWU case, Snow; H0C-3W-C-4833, 7/20/94. The dispute is not relevant to this paper. What is relevant is found on page 13 where the Arbitrator applies the appropriate degree of proof when he states, “A preponderance of the evidence submitted to the arbitrator, however, failed to demonstrate that the training program at the Manasota facility is reflective of the national standard.”
8. Labor Arbitrator Reports, Volume 106, CCAIR INC; pages 56-61. On page 60 the Arbitrator tells us, “The first of these is relatively simple. The only burden of proof applicable in contract-interpretation cases (as opposed to disciplinary cases) is the standard one of ‘preponderance of the evidence.’ By the nature of the case, it may be more difficult than usual to satisfy that burden because memories are less reliable than contemporaneous writings, but the burden itself remains the same.”
9. Regional APWU case, Hauck; E94C-1E-I-96052376, 12/6/97. The dispute is not relevant. However, on page 6 the Arbitrator opines, “Second, the burden of proof shall be placed upon the party proposing a change from the current language of the LMOU. That is, the Arbitrator shall require the party proposing
the change to show a problem exists that needs correction, and then persuade the Arbitrator by a preponderance of evidence that the proposed change is the proper method for resolving the identified problem.” Later, on page 14 he concludes, “Faced with the dilemma of the parties’ off-setting proofs and equally valid evidence, the Arbitrator resolves doubt in favor of the Union. The Arbitrator finds that the Union’s final proposal dated March 28, 1996 least disturbs the existing law of the shop. The arbitrator rules that the Service has not presented a preponderance of evidence in support of its proposed change to Item 6 of the 1990-1994 LMOU.”

10. Regional APWU case, Levak; E94C-1E-C-96089802, 3/20/98. The dispute is not relevant. On page 4 the Arbitrator says, “The Arbitrator concludes that the union has failed to prove by a preponderance of the evidence that the Postal Service violated the National Agreement.” Later on page 5, “First of all, the locks on the Grievant’s cabinet appeared, on their face, to be completely adequate and secure, and the Union never offered a physical demonstration of a break-in. Thus, there was no showing of a reasonable possibility that the loss was related to the fact that the cabinets were left in an unlocked room.”

11. Regional APWU case by Drucker; E90C-2A-C-93002008, 3/11/98. The dispute is not relevant. On page 9 the USPS reminds the Arbitrator, “the Union carries the burden of proof in this contract case and argues that the Union failed to prove a violation by a preponderance of the evidence.” On page 12 the Arbitrator concludes, “In view of the foregoing, the arbitrator finds that, assuming Grievant’s regular hours are those of the position into which she bid in May 1992, the Union has not made a prima facie case of violation of the ELM that would lead the arbitrator to require the USPS to prove lack of limited duty work.”

12. Regional APWU case by Shea, Jr.; A90C-1A-C-94040808, 2/3/98. The dispute is not relevant. However, the Arbitrator addresses the degree of proof needed on page 4, “The events regarding this matter were described in the varying testimony of the parties’ witnesses and in the documentary evidence offered by the parties. Based upon his review of that evidence, including his personal observation of the witnesses during their testimony, the Arbitrator determines that the preponderance of that evidence supports the following findings of fact.”

13. Regional APWU case by Plant; H94T-1H-C-97080161, 12/19/97. Dispute not relevant. Arbitrator states on page 5, “The Union has proved its case by a preponderance of the evidence which Management has failed to rebut
14. Regional APWU case by Holley, Jr., H94T-1H-C-97064757, 11/8/97. Dispute not relevant. Arbitrator concludes on page 12, “From this review, there is no evidence to support the crossing of occupational crafts and levels. The Union had showed through Mr. Nienow by the preponderance of the evidence that Mr. Carlo performed level 9 work and there was contract violation and since the Agency was unable to provide justification for its action via Article 7.2.B or 7.3.C, the Grievance must be sustained.”