Stewards and Advocate Training

"Just Cause"

Question that need to be Answered

There are obvious questions which need to be understood in order for an advocate to successfully defend against discipline. What follows are some of those questions.

Please remember volumes have been written about just cause. The term is more subjective than objective. Nevertheless, proper understanding of applicable concepts and strategies will undoubtedly aid the aggressive advocate. The following questions will be explored in this part.

In general

What does just cause mean?

What does just cause mean to the players?

To the employee
To the employer
To the union
To the arbitrator

Does the degree of discipline matter to the arbitrator?

Does **the quantum of proof** change with the severity?

Do you stress the impact the discipline has on the employee? And, if so how?

What should the advocate do, and how should be done?

What concepts should I be aware of?

What are my best strategies and how do I apply them?

JUST CAUSE CONCEPTS

- Procedural protections may protect the guilty but more importantly, they protect the innocent.
- In discipline th6 employer starts with the upper hand as the arbitrators must overturn an action already taken by management.
- If arbitrators are taxed with conducting a fair hearing, and they are, then they must have flexibility in fashioning remedies. Normally the parties are not seeking the last best offer.
- Discipline normally must be corrective rather than progressive. However, is there a difference? See page 7 for the answer
- The quantum of proof should be a significant one. Therefore the standard would be clear and convincing at a minimum and beyond a reasonable doubt on issues dealing with moral turpitude. (See pages 10 & 11 in this part)
- Mitigating and extenuating factors are normally considered by arbitrators. Therefore the *Douglas Factors* apply. The key is making this argument without telling the arbitrator these factors are automatically binding on the parties. (See pages 12 & 13 in this part)
- Certain arbitrators take an active role during the arbitration proceedings - they assert it is their role. See page 8.
- It is the employer who is on trial when the issue is framed, "Did the employer have just cause to issue the discipline?"

Progressive Versus Corrective

If an employee is given minimal discipline for minor misconduct and corrects the conduct the discipline has served its corrective purpose. However, what happens if the initial discipline is still alive based on the two (2) year rule of Article 16.10 and the employee commits a different act of minor misconduct. Management many times will argue the act forces the next progressive step of discipline. To accept this single track of discipline negates the corrective language of Article 16.1 and creates the three strikes and you are out philosophy.

Arbitrators will look to the Collective Bargaining Agreement or practice of the parties to determine whether or not to apply progressive discipline. The union should argue discipline must be corrective. Progressive discipline only applies to similar acts of misconduct where a live past record exists. It therefore becomes vitally important for the advocate to make this marked distinction in front of the arbitrator.

ARBITRATORS ROLE

Most competent advocates do not want a 'talking' arbitrator. Yet, many arbitrators will ask questions beyond clarification, and occasionally request evidence. When asked why they do this, the response is their ,view of what part they play in the proceedings. They tell us it is important to maintain a sense of fairness, keep the playing field level, and as a trier of fact be sure they have sufficient information and evidence to make informed decisions.

Arbitrators attempt to teach us the adage, "you can't win a bad case but you can lose a good one". If their purpose is to correctly enforce the contract, their involvement must reach a level to ensure they do. Accepting this, whether we like it or not, leads to the obvious need to properly educate the arbitrator in order to minimize the 'talking'. Comprehensive openings, written when possible, help ensure this. Letting the arbitrator know up front your theory of the case also helps. And, perhaps most importantly, sticking to your theory allows you to present your case with minimum interruption.

CHALLENGES

The advocate must have technical ability, knowledge, and experience.

The advocate must have full control of the case and know when to settle.

The advocate must develop a theory of the case and keep it in mind through all phases of arbitration. Should also anticipate what management's theory will be and react accordingly.

The advocate must be able to read both the arbitrator and management's counsel.

Always give an opening statement

The advocate must educate the arbitrator on all critical aspects of the case as soon as possible. This might well entail lengthy openings.

At a minimum the advocate should have either a written opening or closing.

Procedural arguments should be argued first and separately, but not made into threshold issues.

Framing the issue should include at a minimum the just cause standard and right for the arbitrator to fashion a remedy. Keep it short and uncomplicated.

Progressive discipline is different than corrective discipline. To allow a merger of these terms benefits the employer and hurts the employee. It also allows the arbitrator to apply a lower quantum of proof.

QUANTUM OF PROOF

Arbitrators are all over the board on what is needed. Some argue the least burden, preponderance of evidence, is enough for any degree of discipline. Others say clear and convincing evidence is required for serious discipline. A minority believe the criminal standard, beyond a reasonable doubt, applies to serious discipline involving charges of moral turpitude, examples - theft and child molestation. Finally there are some arbitrators who profess no standard per se, but rather argue, 'I just have to be convinced." (Seitz, NAA 1983) In 1966 one arbitrator took the definition to a different plane, "...think in terms of variable degrees of caution, so long as it is recognized these degrees are metaphorical and not mathematical."

There are few arbitrators who apply a higher standard of proof when dealing with minor discipline. In fact, some appear astounded when the parties arbitrate Letters of Warning. Most arbitrators are reluctant publicly or privately to tell you what standard applies to the varying degrees of discipline.

What follows are a simple definition and suggestions on how to argue for a higher standard regardless of discipline.

West Coast Tripartite Commission (NAA -1 962)

- Preponderance - more persuaded than not
- Clear and convincing - pretty certain
- Beyond a reasonable doubt - completely convinced

The advocate must always address the standard needed and explain why. The standard must always give the grievant the benefit **of** substantial doubts and be corrective in nature.

The arbitrator' needs to understand the ongoing ramifications of discipline, within the Postal Service. Minor discipline inevitably leads to major discipline. The brutalization of serious discipline impacts the grievant on all fronts. Financially and emotionally the impact is substantial and long lasting. Compensatory and punitive damages are not available to balance or overcome close or bizarre calls by management. In today's job market equivalent work is hard to come by. The actual costs of time on the street because of discipline should be pointed out and compared to civil sanctions. As Arbitrator Hilpert suggested regardless of the 'verbal formulas for the requisite degree of proof' arbitrators may profess to require, the fact is that 'most of us - consciously or unconsciously - require the highest degree of proof in discharge cases where the involved employee action ... also constitutes a crime.'

The union will normally argue the degree of proof must be significant. But to what does this apply? Are we saying the same degree of proof is required for a Letter of Warning as a Notice of Removal? **And,** if so, are we saying it for the right reasons? Said differently, should a Letter of Warning for absenteeism be held to the same standard as a Notice of Removal for theft? Few would answer the last question with a yes. It is important to point out to the arbitrator the track record of the Postal Service is to flood the system with minor discipline so as to build a progressive single track of past elements. Therefore a higher standard of proof should be utilized in the beginning.

Douglas Factors

In 1981 a seminal case (Douglas, et al v. Veterans Administration, et al) the Merit Systems Protection Board took on its legal and historical right to modify or reduce a penalty imposed on an employee by the Agency. It concluded the right to do so and set forth various considerations which would be utilized in invoking this right. These modifiers are currently referred to as the Douglas Factors. Below are a listing of those factors.

FACTOR 1:

The nature and seriousness of the offense and its relation to the employee's duties, position and responsibilities, including whether the offense was intentional, technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated.

FACTOR 2:

The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of position.

FACTOR 3:

The employee's past disciplinary record

FACTOR 4:

The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers and dependability.

FACTOR 5:

The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisor's confidence in the employee's ability to perform assigned duties.

FACTOR6:

Consistency of the penalty with those imposed upon other employees for the same or similar offenses.

FACTOR 7:

Consistency of the penalty iivith the applicable agency table of penalties.

FACTOR 8:

The notoriety of the offense or its impact upon the reputation of the agency.

FACTOR 9:

The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question.

FACTOR 10:

Potential for employee's rehabilitation

FACTOR 11:

Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in this matter.

FACTOR 12:

The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

The Board recognizes not all of these factors will apply to any given case. Also, the factors may weigh against the employee and be viewed as aggravating circumstances.

Board will use these factors to balance appropriate discipline

Board believes the clear and ultimate burden is upon the agency to convince the Board its actions were proper as the amount of discipline issued was originally determined and made by the agency.

DAUGHERTY – PAST or PRESENT

Elsewhere in this part is a listing of Arbitrator Daugherty's seven (7) tests of just cause. (Attachment #1) These tests have in their simplest form stood the test of time. Even now you can read volumes about them or rent a video which explains them to you. Triple A (AAA) continues to utilize them in its training manual (see attachment #2). Why then is there a growing trend by arbitrators to not only ignore them but also to criticize them? Included as attachment #3 is a presentation made by John E. Dunsford, past president of the National Academy of Arbitrators. Although saying these tests favor neither side, he spends most of the Article saying these tests have been misapplied, overused, and are not particularly helpful to arbitrators. In sum, he believes arbitral discretion is the best test.

A thorough review of these tests does leave 'the advocate with some apprehension. Yet, are we not better served with a more objective measure than arbitral discretion? This advocate thinks so. And, the Postal Service utilizes the following listing of tests in giving guidance to the handling of discipline (EL-921). Similar questions are also found many times on the Request for Discipline form.

1. Is there a rule?
2. Is the rule a reasonable one?
3. Is the rule consistently and equitably enforced?
4. Was a thorough investigation completed?
5. Was the severity of the discipline reasonably related to the infraction itself and in line with that usually administered, as well as to the seriousness of the employee's past record? Was the disciplinary action
6. taken in a timely manner?

You will note in all these variations of Daugherty's propriety of discipline no mention is specifically made of the merits. Said differently, these tests basically go to procedure rather than whether or not the

employee did it. These protections coupled with due process (covered in another part) give a strong shield to the working person. This added to the potential for the charges not being proven or the discipline being too severe give the advocate good tools in representing our members when discipline is issued.

Please remember, when applying these tests a no answer normally means the discipline should be set aside. However, even if the arbitrator is hesitant to totally dump the discipline, you should argue this failure constitutes serious mitigation.

The UAW as a proponent of the Seven Tests has concluded, 'Overall, the Seven Tests are a very effective and uniform way of determining whether or not the employer has fulfilled its obligation under the 'just cause' standard. Remember, it is when employers learn to adhere to due process and equity that we can ensure fairness in the workplace.

For the best, most thorough and comprehensive discussion of the Seven Tests, the UAW Arbitration Department recommends *Just Cause: The Seven Tests,* by Arbitrator Adolph M. Koven, published by SNA. As previously discussed, the UAW Arbitration Department highly recommends the use of the ***SEVEN TESTS*** by arbitrators when determining just cause in discipline and/or discharge cases.' For the full text of this excellent presentation see attachment 4.

ARBITRATOR'S VIEWS OF JUST CAUSE

PRINCIPLES IN DISCIPLINE-AND DISCHARGE

(Read this presentation and then answer questions at the end **of it)**

No other area of the grievance procedure polarizes the respective parties concept of who was right and who was wrong, and it is this concept of right versus wrong which permeates throughout any case involving discharge and discipline. The principles or rules applicable in discharge or discipline cases are not difficult. They are mere guidelines to be followed by the arbitrator. Often a rule or principle is discarded in one case, and yet, applied in another, even though the facts in both may, at first, seem to call for its application. It must also be recognized that each rule or principle is subject to a number of exceptions which, depending upon the facts of the particular case, will dictate which rule or exception is to be applied.

In any discipline case, there are two competing interests which must be reconciled -- the employee's and the company's. In a discharge case, the employee has suffered what has often been called the capital punishment of the industrial community. Once an employee is fired, the fact of his discharge becomes a permanent part of his record. Thus, it can have serious and oft-times harsh consequences on the employee's future, as well as his family, when the employee seeks a job elsewhere. It can literally follow him throughout his employment life.

On the other hand, the company, too, has an interest to protect. Simply stated, it is in business to make a profit. Toward that end, the company has a right to maintain discipline and efficiency and to direct the working forces. As an adjunct to these rights it can unilaterally impose rules and regulations upon its employees. The only limitation on the company in this regard is that the rule must (1) not be in conflict with the provisions of the labor agreement, (2) be communicated to the employees, and (3) be reasonable. On the first point, if the rule does conflict with the agreement, it should not be enforced and the discipline administered for its violation should not stand. With regard to the second requirement that

the rule be communicated to the employees, here is a simple example where a general principle is subject to an exception. A Company is engaged in the processing of expensive caviar. A list of company rules is posted throughout the plant; however, the rules are silent on the questions of stealing caviar and smoking cigarettes. Along comes Joe, an employee, who decides to have -- you guessed it - caviar for lunch. With a handful of caviar in one hand and a cigarette in the other, Joe proceeds to his private hiding place. He is grabbed, red-handed, by his supervisor and subsequently discharged for stealing and smoking. The union argues that the discharge should not stand because the rules did not prohibit stealing or smoking cigarettes. Two questions are presented: (1) does the company lose because it failed to communicate to the employees that stealing was prohibited, and (2) does it lose because it failed to communicate to employees that smoking was prohibited? I think most of us would agree that when it comes to stealing, it is an offense so widely recognized as a violation of a company's interest that employees need not be forewarned. The very nature of the violation would dictate that discipline is warranted. As stated by Arbitrator Markowitz in Buffalo Forge Company (52 LA 1 203, 1 969), 'theft is intrinsically so serious an offense that management cannot be required to run the risk of its repetition.' So the general principle that the rule must be communicated to the employee would not be applicable here, because the nature of the offense would allow for an exception. This is probably not true with regard to smoking. Here the failure to communicate the rule would preclude the imposition of discipline.

I have already discussed the first two principles for determining the propriety of a rule - that it not be in conflict with the agreement and that it generally be communicated to the employee. The third requirement is that the rule is reasonable. A simple test is applied here - a rule is reasonable if (1) it reasonably relates to the performance of the job, and (2) if the rule has been applied in a consistent manner in the past. If smoking were listed in the plant rules, an argument could be made that tobacco diminishes the quality of the caviar, and thus the rule is job related. The second question of consistent application will be discussed later.

Right now, let's turn to an examination of the labor agreement itself.

The overwhelming number of labor agreements today contain a provision allowing the company to discharge or discipline an employee for "just cause", "just and sufficient cause", "proper cause" or just plain, ordinary cause. There is little, if any, difference in these terms. Their purpose is to limit and restrict a company from disciplining or discharging an employee for mere whim or caprice., However, there are agreements which do not contain such a limitation on the company's prerogative. In such instances, arbitrators have consistently held that just cause, or similar terms, are implied from the agreement itself. Imagine what would happen if a just cause provision was not implied from the agreement. Absent a just cause provision, a company would be free to fire an employee for any reason. If there could be a discharge without cause, the company could lay-off without cause. It could thereafter recall, transfer, promote or demote without cause. Thus, the company would reduce to annulity (not provided for] the most fundamental provision of a labor agreement -- the security of the worker at his job. Thus, even absent a cause provision, an arbitrator will imply one from the labor agreement. In the regard, see Cameron Iron Works, 25 LA 295, 301.

Some agreements that do contain a cause provision also specify the types of misconduct for which an employee can be disciplined or discharged. What is the result if, for example, a provision in the contract says that employees shall not be discharged except for just cause, then proceeds to list gross insubordination, fighting, and reporting for work under the influence of alcohol as just cause for discipline or discharge. Absent from this provision is any mention of theft. Arbitrators have generally concluded that the enumerated references for disciplinary conduct are merely illustrative and not exclusive, and therefore, other acts of misconduct could form the basis for discipline. So there is no misunderstanding, the arbitrator is not amending or adding to the contract but, rather, giving meaning to the just cause provision.

Having discussed the principles applicable to Plant rules and just cause generally, I would like to move on to a discussion of the rules to be considered by arbitrators in determining the outcome of a disciplinary grievance. These rules will be discussed in reference to simple fact situations which, of course, the arbitrator is never lucky enough to have bef ore him.

An employee winds up and belts his superior during working hours and on the plant premises.

I think all of you would agree that based on these facts alone, a company could properly discharge the employee. However, lets suppose for some inexplicable reason the union proceeds to arbitrate this grievance. The first item to be concerned with is the burden of proof - A generally accepted rule, absent contract language to the contrary, is that the company has the burden of proving the wrong. However, the quantum or amount of proof required to show the wrong doing is the subject of some disagreement. In some cases 'proof beyond a reasonable doubt' is necessary, whereas in other cases arbitrators have required proof by a 'preponderance of the evidence' or by 'clear and convincing evidence". I think it is safe to say that arbitrators generally will require a high burden -- of 'proof beyond a reasonable doubt' - when the alleged misconduct constitutes an act which is also punishable under criminal law.

However, where the act would not , also constitute criminal misconduct, arbitrators have required a lesser standard, such as preponderance of the evidence. Still other arbitrators have used another test - "is the employee guilty, and if so, is the act he committed serious enough to justify discharge". Southern Bell--Telephone and Telegraph. Whatever standard of proof is used, it is clear that management must present enough evidence to clearly show that a wrong was committed and that the grievant committed the wrong.

In the example given of an employee belting his supervisor, one must also look at the severity of the offense. Basically, offenses fall into two categories; the first, those which by their nature are so serious they would justify immediate discharge without attempts at correction through prior warnings or corrective discipline. The second category of the offenses are those of a less serious nature, such as absences and tardies and minor acts of insubordination. These offenses would not necessarily call for discharge on the first occurrence, and the more acceptable approach would be another form of discipline such as a warning letter of a short suspension. This is known as progressive or corrective discipline. There is a real split of authority on the use of progressive discipline if it

is not set forth or provided for in the agreement. One arbitrator held that an employer may adopt progressive discipline for certain offenses; another arbitrator has said that a company need not adopt such a provision. Still others have imposed progressive discipline upon an employer even though there is nothing in the agreement which requires it, nor was there a past practice of the company in utilizing a progressive discipline concept. See 56 LA 884, 887. A recent case out of our 10th Circuit Court of Appeals may indicate that an arbitrator exceeds his authority by imposing corrective or progressive discipline when not provided for in a contract and where there has been no past practice of allowing it. The case I'm referring to is Mistletoe Express Service v. Motor Expressmen's Union. There, a provision in the contract stated that employees may be discharged for just cause and one of the reasons specified was the failure to settle bills and funds collected for the company within 24 hours. The grievant clearly violated this provision and the company discharged him for it. The arbitrator, in ruling that some form of discipline was appropriate, nevertheless refused to uphold the discharge, stating that "progressive discipline was not pursued during the handling of the grievance". The Court ruled that in the appropriate case where there is a past practice or custom, the arbitrator could construe the just cause provision to include a progressive discipline requirement, even though not incorporated into the agreement. Thus, the arbitrator could conclude that although grievant's conduct was proper cause for discipline, it was not cause for discharge. The Court stated, however, that the absence of a provision in the contract and the absence of a past practice or custom precluded the arbitrator from substituting his views of industrial relationships for the provisions of the contract. In other words, the arbitrator was told not to re-write the agreement.

Returning now to our first example, the severity of the offense is obvious. The contract, custom or practice would then dictate whether or not a penalty less than discharge would be appropriate. Since most of us have already decided that the grievant should be hanged, let's provide for some additional facts which might help him win his job back.

II. Here the employee belts his supervisor after the supervisor insults his family lineage.

Here the case becomes less clear because of the issue of provocation. Although it has generally been recognized that words alone are not justification for an assault on the person who spoke them, a number of exceptions to this rule have been cited by arbitrators in refusing to uphold the discharge of an employee. Racial slurs have been found just provocation for fighting, and the affected employee has been reinstated with back pay to his former position of employment. Provocation was also found where one employee told another employee that he had been 'brown-nosing' his supervisor, and where an employee, who had an affair with a grievant's wife, was hit when he told the grievant, 'hi, sucker'. In another case, a fight was justified when one employee called another a 'Jesus freak'.

On the issue of provocation, it is important to view the totality of the circumstances in which a statement was made -- for example, was it made in jest or in the heat of an argument where both were insulting one another. Other factors to be considered in fighting cases are whether or not an object was used or a closed fist, the injury sustained by the supervisor or other employee, whether or not it was an exchange of blows or a single punch. So in our example, if the grievant beat the supervisor unmercifully and caused serious injury, even though there may have been provocation, the severity of the attack might call for severe discipline.

III. Continuing with our factual analysis, here we have an employee who belts his supervisor after the supervisor insults his family lineage, and the employee has been with the company for 15 years.

It is a standing rule of arbitration that an arbitrator can consider the past record of the employee. If a grievant's long record of employment is a good one, it can be considered in mitigation of the discipline. In one case, an arbitrator weighed an admitted gambling violation by the grievant against his long, good record with the company and determined that the employee should be reinstated to his employment. In another case (65 LA 1271), an arbitrator considered [1 5 years] 9 months and 1 5 days of perfect service to the employer as one factor in mitigation of the discharge.

If the employee's record is a bad one, an arbitrator can refuse to reduce the discipline for that reason alone. Suppose our grievant's personnel file indicates adverse notations for which grievant was not notified? Arbitrators will usually reject such entries as evidence of a poor record. However, if the grievant had notice of a prior infraction and failed to grieve it when it occurred, an arbitrator could accept this prior infraction as evidence of a poor record.

IV Now let's add another factor to our situation. Here we have an employee who belts his supervisor after the supervisor insults his family lineage. The employee has been with the company for 1 5 years, and during that time there have been a number of instances of fighting where employees have either not been disciplines, or the extent of discipline has been limited to a written warning or short disciplinary suspension.

Where an employee has violated a rule, and the custom and past practice of the employer is to impose no discipline whatever, arbitrators have consistently refused to uphold discipline administered for the rule's violation on the basis of lax enforcement of the rule. The grievant need only show that the employer had knowledge of prior violations by other employees but imposed no discipline to discourage future conduct. Once that is shown, the company is deemed to have waived its right to impose discipline in this instance. This reasoning is based on the concept that the employer's failure to discipline for the same infraction condones or sanctions its repeated violation.

How does an employer correct this problem? It must place all employees on notice that henceforth a violation of this rule will result in discipline up to and including discharge. In this regard, at least one arbitrator has held that the arbitration of a discharge case places employees on notice that this form of conduct will no longer be tolerated. Thereafter, once employees are on notice of this change in policy, an employer should then be able to discipline an employee for violation of the rule.

Lax enforcement is somewhat different from the concept of unequal

or discriminatory treatment. Here, we are speaking of a concept which requires not only enforcement of the rule in question, but also that the discipline imposed for its violation be applied in a consistent manner. In other words, where employees have engaged in the same form of misconduct, the discipline imposed should be reasonably consistent. One exception is a wild-cat strike situation. There an employer has been allowed to selectively discipline employees based upon their involvement or instigation of the strike. If this exception were not recognized, the result would indeed be interesting. Imagine if you will, a situation where an entire work force goes out on strike. The employer is shut down; he is unable to produce his product. Applying this discriminatory treatment concept, the employer would have two choices - none and none. He could fire all of his employees and shut down, or he could fire none of his employees and remain shut down. Thus, there is a major exception to this rule against discriminatory treatment. Where there is a reasonable basis for varying the penalty imposed, no discrimination will be found. A reasonable basis might be the degree of fault of the wrong doer, or prior warnings received by the grievant for similar acts of misconduct, or aggravating circumstances such as degree of force used in a fight situation and the injuries sustained.

Thus, in conclusion of the matter of discriminatory treatment, variations of penalties in and of itself do not necessarily mean that the company acted in a discriminatory manner. Discriminatory treatment can be found only where similar facts and circumstances existed in the past, but the discipline was different from that imposed in the grievance under consideration. Absent those circumstances, an arbitrator should not be constrained to find that one employee deserves discharge, whereas another employee deserves a lesser form of discipline.

V. Continuing with this soon to be released docu-drama, another consideration is now added. The employee belts the supervisor after the supervisor insults his family lineage. The employee has been with the company for many years, and during that employment there have been other similar instances under similar circumstances resulting in varying degrees of discipline. The employee is then taken to the personnel office. Our labor relations

> expert asks the supervisor what occurred and is told that the employee hit him. The employee is neither asked his side of the story, nor allowed to speak. By the way, during this meeting the supervisor denies that there was any provocation.

This aspect of the case presents for consideration first a concept known as industrial due process. In recent years, arbitrators have imposed upon the employer notions of fairness in investigating matters concerning discharge and discipline. Increasingly, arbitrators have reversed disciplinary or discharge penalties, or substantially reduced the penalty imposed because of the company's failure to conduct a fair and thorough investigation.

There are basically two requirements necessary for a fair and thorough investigation. The first is the right of an employee to know, with reasonable certainty, the offense for which he is being charged. Here there is an obligation on the part of the employer to state the reason for the discipline. The failure to do so invariably causes the discipline to be set aside. The employer should be. extremely careful in this regard, because arbitrators have also ruled that the discipline must stand or fall based upon the reasons given at the time the discipline is imposed. This should be reason enough for the employer to conduct a thorough investigation before announcing the reasons for discipline of the employee. The second requirement is the employee's right to be heard prior to the imposition of discipline. The underlying basis for this requirement is best summarized in Aerosol Technigues, Inc. 66-2 ARB Para. 8400, wherein the Arbitrator stated:

> 'There is an inherent unfairness in discharging employees first and then determining whether they deserve it. The action, once taken, loads the scales with the desire to justify.'

In the factual example stated above, discharge was imposed before the employee was allowed to give his side of the story. Due process issues arise in other situations as well. In (Gillman Paper Co.., 61 LA 416, the grievant was called to the personnel office where a letter of

termination had already been prepared. In United Telephone Comgany of Florida 61 LA 443, the facts which formed the basis for the discipline were never disputed by the grievant or the union. Thus, the company argued that an investigation was not necessary. Nevertheless, Arbitrator Murphy found it was not only what the grievant did that was important, but the reasons why he did it, since those reasons could minimize the gravity of what he did and thus bear directly upon the question of the discipline to be imposed.

The opportunity to be heard is, as one arbitrator characterized the employee's day in court. Arbitrators have ruled that the employer has a responsibility to consider any and all facts, from whatever source, that could have an influence on the extent of the discipline. If the employer gives consideration to only one side of the story, the investigatory process is so tainted as to amount to no investigation at all. Closely related to the requirement of a fair and thorough investigation is the right of an employee to have his union representative present if the employees requests it, and if the employee reasonably believes that the meeting will result in some form of discipline. This was the holding in the 1975 Supreme Court decision in NLRB v. Weingarten. This.; holding was applied in a recent arbitration case of Combustion Engineering, Inc., 67 LA 349, a case involving the discharge of an employee. The arbitrator found that there was no just cause for the discharge for the sole reason that the employee was denied his request to have a union representative present. The employee was ordered reinstated with full back pay and without loss of benefits.

Returning to our fact situation, I think you can see the effect of a failure to conduct a fair and thorough investigation. If the grievant had been allowed to defend himself, the labor relations person may have, at least, weighed grievant's story and possibly concluded that discharge was not warranted because of provocation, or because of other factors involved in the case.

Which leads us to the question of who to believe, the supervisor or the grievant. The determination of the credibility of the given witness is perhaps the most difficult area of all when considering discharge and discipline cases. All too often, the determination of the witnesses

credibility will dictate the outcome of the grievance. An arbitrator, probably like most people, must often rely on impression and gut reaction in determining the credibility of a witness. Often it is an indefinable feeling about a certain witness which causes the arbitrator to reject his testimony. Perhaps the witness' testimony was too perfect, too supportive, or too similar to the grievant's or the supervisor's. Perhaps it was the witness' body movement in reaction to cross-examination, or perhaps it was the monotone delivery of his testimony that raised serious questions about the person's veracity as a witness. No arbitrator is equipped with a divining rod or crystal ball to help in determining credibility questions. His human frailties are not unlike those of others. However, the parties, by appointing him as an impartial arbitrator, empowered him, and indeed required of him, to determine the reliability of witnesses. The best that the ;arbitrator can hope for is that his credibility findings are correct. He cari only be secure in knowing that his attempts at reconciling inconsistent testimony were made after careful and thorough review of his notes, ii-npressions, and, when available, a transcript of the proceedings.

In conclusion, it is suggested that each of the parties examine its case in light of the totality of the circumstances surrounding the discharge or other discipline. While at first your case may appear unbeatable, upon closer examination there may be pitfalls which can only lead to defeat. Perhaps the best way to prepare for a discipline case is to place yourself in the position of the opposing party and argue his cause. Look at the rule which has been violated and determine for yourself if it is reasonable. Look to the contract and see if the rule conflicts with it. Consider the custom and practice of the company in disciplining employees for the same violation and under similar circumstances. Look at the facts and see if there are matters in mitigation and see if the investigation was fair and thorough. Finally, look to your witnesses and evaluate for yourself the impression that a witness will leave with the arbitrator. After evaluating these facts and applying the principles discussed above, only then can a determination be made if the grievance should be brought to arbitration for final determination.

Thank you.

(Questions on next page]

1. Arbitrator believes there are seven (7) fixed principles (rules) which apply in every discipline and discharge case.

True. False.

2. Employer has right to impose rules unilaterally so long as they meet certain Criteria

True False

3. Rule is reasonable if it relates to performance **of** job and is applied consistently.

True False,

4 The severity of the misconduct will determine whether or not progressive or corrective discipline should be considered.

True False.

5. If progressive discipline is not specifically mentioned in the contract, the arbitrator may not impose it.

True False.

6. Mitigation/extenuation are not enough alone to overturn a removal for serious misconduct.

True False,

7. Realizing credibility is not an exact science, the arbitrator is empowered to rely upon impression and gut reaction.

True. False

SOURCES

1971 through 1994 Collective Bargaining Agreements

41st Annual Meeting N.A.A.

42nd Annual Meeting N.A.A.

Winning Arbitration Advocacy – Hill, JR., Sincropi, & Evenson

Roberts' Dictionary of Industrial Relations, 3rd Edition

Fairweather's - Practice and Procedure in Labor Arbitration

Due Process/Just Cause Handout - Tunstall & Corriveau

Classics of the Courtroom - Volume XIII

Federal Merit Systems Reporter

Arbitration Views & News, UAW

THE QUESTIONS

1. *Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?*

Note 1: Said forewarning or foreknowledge may properly have been given orally by management or in writing through the medium of typed sheets or booklets of shop rules and of penalties for violation thereof.

Note 2: There must have been actual oral or written communication of the rules and penalties to the employee.

Note 3: A finding of lack of such communication does not in all cases require a 'no' answer to Question No. 1. This is because certain offenses such as insubordination, coming to work intoxicated, drinking intoxicating beverages on the job, or theft of the property of the company or of fellow employees are so serious that any employee in the industrial society may properly be expected to know already that such conduct is offensive and heavily punishable.

Note 4: Absent any contractual prohibition or restriction, the company has the right unilaterally to promulgate reasonable rules and given reasonable orders; and same need not have been negotiated with the union.

2. Was the company's rule or managerial [sic] reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?

Note 1: Because considerable thought and judgment have usually been given to the development and promulgation of written Company rules, the rules must almost always be held reasonable in the terms of the employer's business needs and Usually in terms of the employee's performance capacities. But managerial orders often given on the spur of the moment, may be another matter. They may be reasonable in terms of the company's business needs, at least in the

short run, but unreasonable in terms of the employee's capacity to obey. Example: A foreman orders an employee to operate a high-speed band saw known to be unsafe and dangerous.

Note 2: If an employee believes that a company rule or order is unreasonable, he must nevertheless obey same (in which case he may file a grievance thereover) unless he sincerely feels that to obey the rule or order would seriously and immediately jeopardize his personal safety and/or integrity. Given a firm finding to the latter effect, the employee may properly be said to have had justification for his disobedience.

3. Did the company, *before* administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

Note 1: This Question (and No. 4) constitutes the employee's 'day in court" principle. An employee has the right to know with reasonable precision the offense with which he is being charged and to defend his behavior.

Note 2: The company's investigation must normally be made ***before*** its disciplinary decision is made. If the company fails to do so, it's failure may not normally be excused on the ground that the employee will get his day in court through the grievance procedure after the exaction of discipline. By that time there has usually been too much hardening of positions. In a very real sense the company is obligated to conduct itself like a trial court.

Note 3: There may of course be circumstances under which management must react immediately to the employee's behavior. In such cases the normally proper action is to suspend the employee pending investigation, with the understanding that (a) the final disciplinary decision will be made after the investigation and (b) if the employee is found innocent after the investigation, he will be restored to his job with full pay for time lost.

3. Was the company's investigation conducted fairly and objectively?

Note 1: At said investigation the management official may be both prosecutor and judge, but he may not also be a witness against the employee.

Note 2: It is essential for some higher, detached management official to assume and conscientiously per-form the judicial role, giving the commonly accepted meaning to that term in his attitude and conduct.

Note 3: In some disputes between an employee and a management person there are not witnesses to an incident other than the two immediate participants. In such cases it is particularly important that the management 'judge' question the management participant rigorously and thoroughly just as an actual third party would.

Note 4: The company's investigation should include an inquiry into possible justification for the employee's alleged rule violation.

Note 5: At his hearing the management 'judge' should actively search out witnesses and evidence, not just passively take what participants or 'volunteer' witnesses tell him.

5. At the investigation did the company 'judge' obtain substantial and compelling evidence or proof that the employee was guilty as charged?

Note 1: It is not required that the evidence be fully conclusive or "beyond all reasonable doubt." But the evidence must be truly weighty and substantial and not flimsy or superficial.

Note 2: When the testimony of opposing witnesses at the arbitration appeals hearing is irreconcilably in conflict, an arbitrator seldom has any means for resolving the contradictions. His task is then-to determine whether the management 'judge' originally had reasonable grounds for believing the evidence presented to him by his own people instead of that given by the accused employee and his witnesses. Such grounds may include a decision as to which side had the weightier reasons for falsification.

6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

Note 1: A 'no' answer to this question requires a finding of discrimination and warrants negation or modification of the discipline imposed.

Note 2: If the company has been lax in enforcing its rules and orders and decides henceforth to apply them rigorously, the company may avoid a finding of discrimination by telling all employees beforehand of its intent to enforce hereafter all rules as written.

Note 3: For an arbitral finding of discrimination against a particular grievant to be justified, he and other employees fund guilty of the same offense must have been in reasonabl)t comparable circumstances.

Note 4: The comparability standard considers three main items--the degree of seriousness in the offense, the nature of the employees' employment records, and the kind of offense. (a) Many industrial

offenses, e.g., in-plant drinking and insubordination, are found in varying degree. Thus, taking a single nip of gin from some other employees bottle inside the plant is not serious an offense as bringing in the bottle and repeatedly tippling from it in the locker room. Again, making a small, snide remark to and against a foreman is considerably less offensive than cussing him out with foul language, followed by a fist in the face. (b) Even if two or more employees have been found guilty of identical degrees of a particular offense, the,, employer may properly impose different degrees of discipline on them, provided their records have been significantly different. The man having a poor record in terms of previous discipline for a given offense may rightly, i.e., without true discrimination, be given a considerably heavier punishment than the man whose record has been relatively unblemished in respect to the same kind of violation. The words "same kind of violation,' just above, have importance. It is difficult to find discrimination between two employees found guilty of totally different sorts (not degrees) of offenses. For example, poor work performance or failure to call in absences have little comparability with insubordination or theft.

7. **Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his- service to the company?**

Note 1 : A trivial proven offense as such does not merit harsh discipline unless the employee has properly been found guilty of the same or other offenses a number of times in the past. (There is no rule as to what number of previous offenses constitutes a 'good,' and 'fair,' or a 'bad' record. Reasonable judgement thereon must be used.)

Note 2: An employee's record of previous offenses may never be used to discover whether he was guilty of the immediate or latest one. The only proper use of his record is to help determine the severity of discipline once he has properly been found guilty of the immediate offense.

Note 3: Given the same proven offense for two or more employees, their respective records provide the only proper basis for "discriminating" among them in the administration of discipline for said offense. Thus, if employee A's record is significantly better than those of employees B, C, and D, the company may properly give a lighter punishment than it gives the others for the same offense,-; and this does not constitute true

discrimination.

Note 4: Suppose that the record of the arbitration hearing establishes firm "yes" answers to all the first six questions. Suppose further that the proven offense of the accused employee was a very serious one, such as drunkenness on the job; but the employee's record had been previously unblemished over a long, continuous period of employment with the company. Should the company be held arbitrary and unreasonable if it decided to discharge such an employee? The answer depends of course on all the circumstances. But, as one of the country's oldest arbitration agencies, the National Railroad Adjustment Board, has pointed out repeatedly in innumerable decisions on discharge cases, leniency is the prerogative of the employee rather than of the arbitrator; and the latter is not supposed to substitute his judgment in this area for that of the company unless there is compelling evidence that the company abused its discretion. This is the rule, even though the arbitrator, if he had been the original 'trial judge,' might have imposed a lesser penalty. In general, the penalty of dismissal for a really serious first offense does not in itself warrant a finding of company unreasonableness.'

'Grief Bros. Coperage **Corp** **42** LA **555** **(Daugherty** 1964).

1. If there is a 'no' answer to any of the seven questions, normally there is no cause for discipline.

2. Arbitrators are entitled to substitute their judgment for management's only if there is an abuse of managerial discretion.

3. A full and fair investigation must normally be made before a disciplinary decision is made, since the subsequent use of the grievance procedure will not suffice to give the employee his 'day in court.'

4. At the investigation the "judge" for the company must obtain substantial evidence that the employee is guilty.

ARBITRATION 1989 THE ARBITRATOR'S DISCR ---TION DURING AND AFTER THE HEARING
PROCEEDINGS OF THE IFORTY-SECOND
ANNUAL MEE--.TING
NATIONAL ACADEMY OF ARBITRATORS

ARBITRAL DISCRETION
THE TESTS OF JUST CAUSE

JOHN E. DUNSFORD

Ten years ago at the Dearborn meeting of the Academy, a reckless program chairman invited two lawyers to play devil's advocates and tell the arbitrators what they were doing wrong in discipline and discharge cases. The results confirmed the truth of an old adage: Be careful what you ask for, you might get it. One of the speakers, William M. Saxton, went on a fishing expedition for prize specimens in the published opinions.[1] He came back with a good catch of 'howlers':

1 - For example, the arbitrator who found a company did not have just cause to discipline a grievant for using the 'F" word to tell a supervisor what he could do with himself. The rationale was that the charge of profanity did not meet the definition of Webster's Third International Dictionary, Unabridged, since the four letter word does not violate sacred things.

2. Or the case in which no culpability was found of a grievant who, on being discovered sleeping, told the foreman, 'I'll take care of you." When the foreman asked 'Do you mean that as a threat'? Grievant said, "You take it whichever way you want to.' The arbitrator concluded the remark wasn't threatening because, after all, the choice was left to the foreman as to what the grievant meant.

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[1]Saxton, *The Discipline and Discharge Case: Two Devil's Advocates on "at Arbitrators Are Doing Wrong,* in Arbitration of Subcontracting and Wage Incentive Disputes, Proceedings of the 32nd Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1980), 63.

3. Or another, one of my favorites, in which the arbitrator set aside a discharge of an employee who was found with company property in his lunch box at the end of a shift. The arbitrator found that the discharge was invalid for failure of the company to read the grievant his Miranda rights before ordering him to open the lunch box.

In all these cases the arbitrators were working under the conventional standard in collective bargaining Agreements that requires 'just cause' for a company to discipline. Their application of that standard was, to say the least, eccentric. Acknowledging the imprecision and elusiveness of the concept, the Dearborn speaker pointed out that this did not mean that the parties "committed the definition to the arbitrator's whim." Far less was it intended as a springboard for the launching of the arbitrator's pet ideas for innovation in the workplace.

Despite the sardonic glee with which Saxton tackled his assignment (a compliment to his zeal as an advocate), the examples which he cited were generally thought to be aberrant, at least among experienced professional arbitrators. Members of the Academy defended themselves by repeating the remark of the Chicago politician: 'Half the lies they are spreading about us are not even true." The speaker warned, however, that labor and management were reticent to choose new arbitrators because of a decline in confidence and 'the fact that plain and commonly understood concepts such as just cause have been bent out of shape." Perhaps the complaints of the devil's advocates were exaggerated, but the robust criticism was a sharp reminder of the potential for abuse in the spaciousness of the just cause standard.

It is commonplace in articles and books on labor arbitration to comment that the meaning of just cause is rarely defined in the contract. Standing as a major restriction on the freedom of management in imposing discipline on employees, the concept is variously expressed by a requirement that the company have just cause, or proper cause, or sufficient cause, or just cause, the particular version seldom being

2 id. at 64.

3 Id. at 67.

thought significant in assessing the precise degree of restriction. The simplest definition of the term is tautological, namely, that the company must show that it had some cause for the discipline, and the cause relied on must be just. But this, admittedly, only restates the question if it does not beg it. For how does one determine what is properly a cause for discipline in the industrial setting? And in that framework what are the attributes of justices?

Stated in this broad fashion, these questions apparently did not bother the early arbitrators. The concept of just cause appears to have emerged by spontaneous generation as soon as unions were in a position to negotiate for the security of the job. And arbitrators hit the ground running in their application of the concept, grappling with it in individual cases without any discernible need to discourse on its essential meaning. One looks in vain among the proceedings in the early years of the Academy to find a formal discussion of the phrase, though one may assume the members put their heads together in the corridor to swap stories about interesting cases they had heard. Occasionally, a thoughtful arbitrator would pause in the flow of an opinion to venture a general definition. One of those early comments was dropped by Harry Platt in a case in 1947, explaining how an arbitrator goes about deciding what is sufficient cause:

> To be sure, no standards exist to aid an arbitrator in finding a conclusive answer to such a question and, therefore, perhaps the best he can do is to decide what reasonable men, mindful of the habits and customs of industrial life and of the standards of justice and fair dealing prevalent in the community, ought to have done under similar circumstances and in that light to decide whether the conduct of the discharged employee was defensible and the disciplinary penalty just.[4]

Except for some tinkering to render it gender neutral, this definition by Platt may be as good as anything that has been offered in the intervening years.

One may speculate as to why the lack of a set of criteria to define just cause was not seen as a serious disadvantage by the early arbitrators.

[4] *Riley Stoker Corp.*, 7 LA lplatt, 1947)

Was it because they were too intrigued with the challenge of breaking down each separate disciplinary problem into its component parts to worry about a deeper, more philosophical view? Or was it because, being practical men and women struggling to understand the individualized relationships within a shop, they intuited that the broad notion of just cause was defined only through many discrete judgments made in response to the exigencies of the situations before them?

This is not to ignore the fact that general principles and rules reflecting the preferred view on this or that facet of discipline began to emerge in arbitral decisions as time went on.[5] For example, the principle developed that an employee should obey an order from supervision and file his grievance later, subject to certain safety exceptions. The requirement of corrective discipline began to surface in the opinions, depending on the nature of the industrial offense for which discipline was imposed. Consistency in the application of discipline within a plant was recognized as a factor in evaluating it justness. These few examples are mentioned to illustrate the point that the idea of just cause began to translate into a set of rules and principles responsive to recurring problems.

Yet for some people the continuing open-endedness of the concept remains a frustration. Their instinct is to develop more exact criteria for a definition of just cause, a goal which is understandable. Theoretically at least, just cause is so expansive a notion that fears are inevitably aroused about an uncabined arbitral discretion. If considered in the abstract, the prospect of unprincipled decision making is highly unsettling both to the parties and their representatives, particularly lawyers who value few things more than predictability. Moreover, for the purpose of training newcomers who need an introduction to the elements that go into make up the idea of just cause, the hope of supplying a comprehensive

5
Some of the principles and standards developed by arbitrators are set forth in Seward, *Grievance Arbiftdon-77?e Old Fronder,* in Arbitration and the Expanding Role of Neuvals, proceedings of the 23rd Annual Meeting. National Academy of Arbitrators, eds. Gerald G. Somers and Barbara D. Dennis (Washington :BNA Books, 1970), 1 53, 1 58. *See also Robbins, Unfair Di@;missal., Emerging Issues in t@e Use of Arbitration as a Dispate Resolutfon Aftemative for the Nonunion Workforce, 1* 2 Fordham Urb. L.J. 437, 447-450 (particularly n. 48)(1984).

and detailed definition of the phrase can be exciting. To put things in a proper perspective, however, one should recognize that fears regarding an unbridled freedom of the arbitrator in the discipline case can be exaggerated.

In the first place, and surprising to some, the issue of whether a given type of employee conduct is in nature objectionable in the industrial setting is seldom in dispute. When asked to recall cases in which they had to decide whether the very character of an act brought it within the legitimate boundaries of managerial discipline, most arbitrators will have trouble producing any examples. Work rules, either unilaterally promulgated by management or agreed to by the par-ties, tend to remove such questions from the table. And where work rules are missing, the parties are seldom at loggerheads over the basic obligations of an employee. Instead, the real disputes arise over whether those obligations have been breached.

Occasionally, to be sure, it will happen that the parties disagree regarding the activities which may represent cause for discipline. The subject of off-duty misconduct comes to mind as offering instances of this type. But these are the rare cases. Usually the dispute centers on such things as the factual determination of whether the grievants did the acts with which they are charged, the quantum of proof which is required, the significance of the failure to follow customary procedures, whether the punishment imposed is commensurate with the seriousness of the offense.

There are still other factors which serve to diminish the putative sweep of the arbitrator's power to expand the meaning of just cause. External law may impose limits to the application of discipline (for example, discharge for excessive garnishments on single indebtedness), and the parties are likely to advise the arbitrator of such matters. There may be past practices affecting the subject under review at hearing, or prior awards which the par-ties themselves expect to be honored if they are found to apply. These channel, and thus confine, the decision maker's thinking. In addition, and permeating the entire picture, the professional reputation of the arbitrator is at stake. To remain active in the process, she or he must meet the expectations of the parties in the

decision to be rendered. The urgent need by the arbitrator to retain acceptability exerts a gravitational pull toward the exercise of judgment which is appropriate and conventional in the disciplinary setting.

Still, despite these built-in limitations on an arbitrator's conduct, the impulse persists in some quarters to translate the disciplinary concept into a set of tests or prescribed rules. This impulse can be detected in operation both internally within the profession of arbitration, and externally from the courts. What are the merits of proposals to systematize the criteria for just cause? Should there be tests established for defining the meaning of the term? Is the world of industrial discipline at loose ends?

The Seven Tests

Perhaps the most widely known attempt to reduce just cause to precise criteria is the checklist of seven tests devised by the late Carroll R. Daugherty, a member of this Academy and a professor of labor economics and labor relations at Northwestern University. The tests were first published by him in the early 1 960s as an appendage to an arbitration opinion,' and were given their final formulation in another case in 1 972.' The latter version is attached as an addendum to this paper.

My thesis with regard to these tests may be stated brief ly. If taken as an introduction to an academic discussion of just cause in the classroom, or a schematic for organizing a textbook or commentary," the seven tests may have some utility. But employed as agenda for resolving disputes in arbitration, the tests are in my judgement misleading in substance and distracting in application. Worse yet, they assume controversial positions with regard to the role of the arbitrator without frankly addressing the value judgments they embody.

6Grief 8ros. Cooperage ***Corp.,*** **42** LA **555** (Daugherty, **1964).**

'? Wbirlpool Corp., 58 LA 421 (Daugherty, 1972).

'See Koven & Smith, Just Cause: The Seven Tests (San Francisco: Coloracre Publications 1985).

In launching this broadside against the Daugherty tests as they are offered as a guide for deciding arbitration cases, I am in an embarrassing position. Daugherty was undeniably an established arbitrator, whose writings in industrial relations are substantial and respected. This estimable man had a career of distinction serving in the Roosevelt administration as the chief economist at the Bureau of Labor Statistics and at the Wage and Hour Administration. He also directed the Wage Stabilization Division of the National War Labor Board. His recent death makes my criticism the more unseemly as one recalls the proverb: "It doesn't take a very brave dog to bark at a dead lion.' I trust my evaluation of the efficacy of the Seven Tests is received in the spirit in which it is offered, which is one of respectful though vigorous dissent.

The tests are presented in the form of seven questions, a negative answer to any one of which is normally supposed to indicate that just cause does not exist for the discipline. Daugherty recognized that his guidelines would not apply with precision in every case. However, by the time he refined them into their ultimate expression, he contemplated the possibility that occasionally a strong 'yes' to one question might overwhelm a weak 'no' to another, producing a decision in which both the company and the grievant would properly be taken to task for their deficiencies. From such refinements one is left undecided whether to emphasize the flexibility of the guidelines or to assume that they can be administered rather rigidly if only the correct weight is assigned to each answer. This tension is never dissipated.

In the final preface to his final expression of the tests, Daugherty cautions that it is impossible to develop a formula in which facts can be fed into a computer to produce a correct answer in a mechanical fashion. At the same time he proceeds to give instructions on those questions, by number, which can be omitted if the contract limits the scope of the arbitrator's inquiry, and emphasizes that without such restrictions in a given case it is not only proper but necessary to consider the evidence on all seven questions and their accompanying notes.

In their substance many of the Seven Tests are unexceptional. They highlight such things as the obligation to give notice to employees of conduct which is forbidden; the need for work rules which are related to

the orderly, efficient, and safe operation of the business; the requirement of evenhandedness in administering discipline; and the necessity for a proper proportionality between offense and **penalty.**

A jarring note is sounded, however, in connection with the subject of managerial investigation of an alleged offense prior to imposing discipline. In effect, through three of his seven questions, Daugherty lays it down that in order for just cause to be found for discipline the company must have conducted a fair and objective investigation prior to any discipline being imposed, through an official unconnected with the events in arbitration, where substantial and compelling evidence of guilt is obtained. It must be understood that in Daugherty's views these criteria are imposed by the arbitrator, separate and apart from any contractual requirements.

These requirements have often been uncritically repeated by both practitioners and arbitrators, in stating what just cause requires. While these tests concededly embody sound personnel policy in the administration of a disciplinary system and are admirable standards which many parties voluntarily follow, the proposition that an arbitral consensus dictates that their absence normally requires the invalidation of discipline is hard to justify either in practice or principle, at least in the private sector.

A good example of the tests in application is provided by the decision in ***Grief Bros. Cooperage Corp.,***[1] a case of Daugherty's often cited for its embodiment of the Seven Tests. In that instance the grievant was a machine operator whose job required him to cap fiber drums with metal tops that he tapped on with a wooden mallet. Prior to the episode in dispute, the grievant had an unfavorable work record with several oral warnings and two suspensions. At the time in arbitration the foreman observed that two of the metal tops on the fiber drum had been damaged by unduly hard blows from the wooden mallet. The foreman also observed the grievant damage a drum by kicking it. The foreman fired the employee on the spot and later, in an altercation in the office, manhandled him. Although Arbitrator Daugherty admitted that the poor work record

[1] *Supra* note 6.

of the employee otherwise supported discharge under the principles of progressive discipline, he reinstated the grievant because there was no pre-discharge investigation in accordance with his Seven Tests. Is comment in support of this result reads as follows:

> [E]ven though the 'no' answers to Questions 3, 4, and 5 might appear to have been made on technical grounds, said answers have great weight in any discipline case. Every accused employee in an industrial democracy has the right to 'due process of law' and the right to be heard before discipline is administered. These rights are precious to all free men and are not lightly or hastily to be disregarded or denied. The Arbitrator is fully mindful of the Company's need for, equity in, and right to require careful, safe, efficient performance by its employees. But before the Company can discipline an employee for failure to meet said requirement, the Company must take the pains to establish such failure. Maybe X-was guilty as hell; maybe also there are many gangsters who go free because of legal technicalities. And this is doubtless unfortunate. But Company and government prosecutors must understand that the legal technicalities exist also to protect the innocent from unjust, unwarranted punishment. Society is willing to let the presumably guilty go free on technical grounds in order that free, innocent men can be secure from arbitrary, capricious action."[11]

Disregarding the dubious equation of industrial relations and the criminal law, it should first be emphasized that the present criticism is not directed at the right of Daugherty to interpret just cause-to impose the investigatory requirements he describes in Questions 3, 4, and 5. His judgment is what the parties bargained for, and his judgment is what they got. Even in that connection, however, one should note the incongruity of the remedy provided by Daugherty in the ***Grief case:*** reinstatement without back pay. After declaring that it violates due process to discipline before a formal investigation and a prior hearing, the arbitrator permits de facto the imposition of a four month suspension.

But, to repeat, the argument here is not with Daugherty's exercise of judgment in that particular case but rather the clear suggestion that the tests which he follows are part of the 'common law' of arbitration, that is, the product of the opinions of arbitrators generally. Even a

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[11] *Id.* at 557

cursory survey of the literature and published cases reveals that arbitrators differ radically on the issue of whether a failure to accord a complete and fair investigation and hearing prior to the arbitration requires an invalidation of discipline under the just cause standard." In fact, a substantial number of reputable arbitrators approach such problems by measuring the significance of the claim of procedural deficiency (even those based on the terms of the contract, much less those derived from the so-called 'common law" of arbitration) against the harm done to the interests of the grievant by the omission. It may be debatable what is the better view of the matter in applying the just cause concept. What is not debatable is that the Seven Tests misstate the posture of arbitral thinking.

The dedication of three of the seven tests for just cause to the subject of the method and manner of the company's pre-disciplinary investigation may seem odd, since these questions are not directed to the merits of a case but rather to the way in which the company handled it in the early stages. The mystery deepens as one examines the notes which Daugherty appended to these three questions. These notes are not always reported when the seven basic tests are quoted. But in them Daugherty explains that he thinks of the company investigation as the employee's "day in court,' with the managerial person in charge of the investigation serving as a combination of judge and prosecutor. (This means, of course, that this person should not be a witness against the employee.) Further, since Daugherty conceives of the investigation as equivalent to the proceedings in a trial court, he also insists in one of his notes that the evidence presented to the company investigator must be weighty and substantial.'"

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See, e.g., Hill, Jr., & Sincropi, Remedies in Arbitration (Washington :BNA Books, 1981), 91-96. ('There is no uniform solution or preferred remedy when a procedural violation is found in a discipline or discharge case.'); Hogler, *Employee Discipline and Due Process Rights: Is There an Aopropriate Remedy?* 1982 Lab. L.J. 783; *Maui P@neapple Co., 86* LA 907 (Tsukiyama, 1986).

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In the earlier formulation in *Grief Bros., supta note* 6, Daugherty specifically states that the evidence required before the company 'judge' need not be 'preponderant, conclusive or 'beyond reasonable doubt." In the final formulation in *VVbirlpool, supra* note 7, the same note drops 'preponderant' but retains 'conclusive or 'beyond a reasonable doubt." Does thissugges-t the 'substantial' evidence should approach the standard of preponderance?

Inasmuch as the company investigation serves the purpose of giving an employee his or her day in court, what is the function of the arbitrator in the Daugherty world view? He is quite specific in his answer **to** that question, in his comments introducing the Seven Tests in their final formulation:

> It should be understood that, under the statement of issue as to whether an employer had just cause for discipline...it is the employer and not the disciplined employee who is 'on trial' before the arbitrator. The arbitrator's hearing is an appeals proceeding designed to learn...Whether the employer, as sort of trial court, had conducted, before making his decision, a full and fair inquiry into the employee's alleged 'crime'; whether from the inquiry said trial court had obtained substantial evidence of the employee's guilt. In short, an arbitrator tries' the employer to discover whether the latter's own 'trial' and treatment of the employee was proper. The arbitrator rarely has the means for conducting, at a time long after the alleged offense was committed, a brand new trial of the employee."

With the full picture of the Daugherty design of the arbitral process before us, it becomes quite clear why he concludes that a -"no" answer to any of the questions posed by his Seven Tests normally requires setting aside the discipline. Since the arbitrator is sitting as an appellate court, he merely has to decide if the 'trial court,' that is, management, has followed the proper procedures. That explains, too, why the standard for reviewing the discipline is whether it contained (quoting Daugherty) one or more elements of arbitrary, capricious, unreasonable or discriminatory action to such an extent that said decision constituted an abuse of managerial discretion warranting the arbitrator to substitute his judgment for that of the employer. [14]

What on its face, then purports to be a set of conventional tests for applying the just cause standard, actually masks a distinctive view of the arbitral function quite different from that experienced by most of the members of this Academy. In the context of the Seven Tests, the arbitrator is not expected to be a fact finder but instead simply reviews what management has already determined to be the facts.

13Supra note 7 **at p. 427**

14/ct.

Since arbitrators are one step removed from the level at which the operational decisions about discipline are concluded, they can only review what management has done to determine that it has not abused its discretion. Finally, arbitrators cannot substitute their judgment for that of management, since such an intrusion would disrupt the structured arrangement between the 'trial' court and the appellate body.

These views, I venture to say, will strike most arbitrators in the private sector as peculiar and misbegotten. They know that an important and often excruciatingly difficult part of the arbitral function is to determine the facts. Furthermore, in reviewing managerial judgments they do not usually feel limited merely to deciding whether there has been an abuse of discretion. It comes as a surprise, then, to learn that the Department of Education and Training of the American Arbitration Association (AAA) includes the Seven Tests in its Discipline Workshop Manual for the education of new advocates and arbitrators. While it is true that a full statement of Daugherty's philosophy of arbitration is not included in the AAA Manual, the tests as reported there still convey the following propositions:

1. If there is a "no" answer to any of the seven questions, normally there is no cause for discipline.

2. Arbitrators are entitled to substitute their judgment management's for only if there is an abuse of managerial discretion.

3. A full and fair investigation must normally be made before a disciplinary decision is made, since the subsequent use of the grievance procedure will not suffice to give the employee his 'day in court.'

4. At the investigation the 'judge' for the company must obtain substantial evidence that the employee is guilty.

These propositions are offered to the neophyte as a reliable guide for deciding if management had just cause for its action. Every one of them, I submit is highly controversial.

It is also remarkable that the arbitrator training handbook of the Section of Labor and Employment Law of the American Bar Association reproduces as a "model' or 'instructional aid' one of Daugherty's opinions with the Seven Tests and accompanying notes attached. In the version of the tests used in that particular case, Daugherty discusses as a hypothetical case a long-term employee with an unblemished record who is discharged for drunkenness on the job. The question is asked: 'Should the company be held arbitrary and unreasonable if it decided to discharge such an employee?' His answer is, in part, as follows:

> [L]eniency is the prerogative of the employer rather than of the arbitrator; and the latter is not supposed to substitute his judgment in this area for that of the company unless there is compelling evidence that the company abused its discretion. This is the rule, even though an arbitrator, if he had been the original trial judge might have imposed a lesser penalty. Actually, the arbitrator may be said in an important sense to act as an appellate tribunal whose function is to discover whether the decision of the trial tribunal (the employer) was within the bounds of reasonableness above set forth....'[16]

Few people will quarrel with the assertion that 'leniency is the prerogative of the employer rather than of the arbitrator." But it may be doubted that the comments of Daugherty in this context adequately address the underlying considerations involved in determining whether management has just cause for discharge as opposed to some letter form of discipline. Indeed, reading remarks such as these, one wonders that the Seven Tests have been called 'the most practical and incisive criteria for employee discipline and discharge."'

One explanation for the uncritical acceptance of the Seven Tests is that few people bother to read the full explanation by Daugherty of what his tests are supposed to accomplish. Nor does anyone take the time to investigate the assertion that the tests are merely the compilation of what

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lsbarreca, Miller & Zimny, Labor Arbitrator Development: A Handbook (Washington: BNA Books, 1983), 408.

"*Id.* At 418.

"17 Arbitration Times, Spring 1 988, at 2 (newspaper of the American Arbitration Association).

arbitrators through the years have developed as a 'common law.' That is certainly inaccurate with respect to the subjects of Questions 3, 4, and 5.

Perhaps the greatest reason that the tests have been blindly endorsed is that most people do not appreciate the professional background out of which Daugherty developed them. Indeed, if one limits them to the environment in which they were conceived and nurtured, the tests make environment good sense. As explained in an article by Donald S. McPherson tracing the development of the Seven Tests," [18] the inspiration came out of Daugherty's experience as a referee on the National Railroad Adjustment Board. The tests were a product of his deep concern about the due process rights of employees working on the railroad, which he may also have believed were rooted in constitutional requirements applicable to the railroad industry.

As a referee Daugherty did not hear witnesses testify about the events surrounding the discipline. The grievant did not appear before him. Instead, he heard representatives of the par-ties argue over the meaning of facts uncovered earlier by the investigation of management and presented to a division of the Adjustment Board. The nature of his work consisted of reviewing, as an appellate court would, what others had done in imposing discipline. With such a limited function, the importance of an insistence upon procedural safeguards, such as a full investigation, becomes obvious. Yet it is interesting to note that, even before the Third Division of the National Railroad Adjustment Board in 1958 when Daugherty for the first time set forth the substance of his tests in deciding a case, a dissenting opinion by the railroad employer members sharply criticized his setting aside a discharge on a narrow technical point. The dissenting members of the Division objected that 'the conduct **of** hearings and appeals in disciplinary proceedings does not require adherence to all the attributes of hearings and appeals of criminal cases, nor of civil liberty cases, in the Courts."[19]

lsMcPherson, *The Evolving Concept of Just Cause: Carro# R. Daugherty and the Requirement of Disciplinary Due Process,* 38 Lab. L.J. 387 (1987).

"National Railroad Adjustment Board, Third Division, Vol. 81, Award No. 8431, at 174, 178 (Daugherty, 1958).

Whatever their virtues in the railroad industry, the undiscriminating transfer of these tests to the private sector, where hearings before an arbitrator are de novo and an almost infinite variety of grievance arrangements are found, is inappropriate. Designed for an arbitration system different from the one in which they are now employed, the tests generate a vague confusion about the meaning of due process further compounded by the pretense that they simply reflect prevailing practice.

There is another criticism of the Seven Tests which, in the final analysis, may be the most serious of all. At least in the manner in which Daugherty employed them, they not only produce an opinion in format which is as convoluted as a Rube Goldberg invention but also threaten to distort the process by superimposing artificial problems of the arbitrator's own making upon the real issues which are separating the parties.

The classic form of a Daugherty opinion is a short statement of the facts, followed by a plunge into a discussion seriatim of the seven numbered questions, either assuming the reader knows the questions or will consult an attached copy of them (with comments) at the foot of the opinion. Though Daugherty maintained (erroneously, I believe) that the tests are products of the 'common law" development of the definition of just cause by other arbitrators, the inner structure of his opinions actually has more of the flavor of a civil law approach. The pattern of the common law is to decide only that which is unavoidable to resolve a dispute, moving inductively from one case to another, with principles evolving as circumstances require. In contrast, the Daugherty format carries with it a complex of problems from outside the relationship, and then seeks to resolve them with the principles contained in the statement of the Seven Tests.

Thus, the appendix setting forth the Seven Tests in a Daugherty opinion serves as a kind of code against which the decision maker measures the events revealed by the case. A reader must move from the numbered answers in the opinion to the numbered questions of the appendix. The sensation is similar to assembling a packaged bicycle by following the instruction sheet. In form, the disjointed opinion has little cohesion.

Putting aside the aesthetics of the matter, the striking danger for arbitrators attempting to follow this format is that they may neglect to focus on the issues of central concern to the parties in the hot pursuit of questions which were not raised. The premise of the Daugherty tests seems to be that an arbitrator knows better than the parties what is troubling them (or should be troubling them) and is going to resolve those problems whether the parties want it or not.

On another occasion I have **expressed my** reservations about allowing the full logic of the adversary system to dominate arbitration. [20] That does not mean we should neglect its virtues. If there is one thing which an adversary system does superbly, it is to identify and particularize the issue or issues dividing the parties. The advantages of such an achievement are that the true interests of those involved in the case are illuminated, the dispute is reduced to its narrowest and sharpest dimensions, and the energies of everyone concerned, can be concentrated on a proper resolution.

After all, the disputants know better than anyone else what constitutes their disagreement. (They may not always be able to articulate their differences effectively, but with assistance and patience they will normally be led to be able to convey them.) When an arbitrator comes to a hearing with a predetermined list of questions to be answered, the basic purpose of the hearing is defeated. The hearing is not designed to answer questions which the arbitrator thinks ought to be answered; the hearing is held to allow the arbitrator-to hear the questions which the parties want answered. To the degree that arbitrators become absorbed in satisfying the needs of some prefabricated tests, they run the risk of not paying sufficient attention to the issues that truly matter to the parties.

2'Dunsford, *The Presidential Address: The Adversary System in Arbitration,* in Arbitration 1985: Law and Practice, Proceedings of the 38th Annual Meeting, National Academy of Arbitrators, ed. Walter J.Gershenfeld (Washington: SNA Books, 1986), I.