

CHAPTER 3

ARBITRAL DISCRETION: THE TESTS OF JUST CAUSE

I.

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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.

3. Or another, one of my favorites, in which the arbitrator set aside a discharge of an employee who was found with company

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¹Saxton, *The Discipline and Discharge Case: Two Devil's Advocates on What 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.

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."² 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."³ 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 cause, or proper cause, or sufficient cause, or just cause, the particular version seldom being 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

²*Id.* at 64.

³*Id.* at 67.

for discipline in the industrial setting? And in that framework what are the attributes of justice?

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. 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

⁴*Riley Stoker Corp.*, 7 LA 764 (Platt, 1947).

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 its 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 to make up the idea of just cause, the hope of supplying a comprehensive 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 parties, 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

⁵Some of the principles and standards developed by arbitrators are set forth in Seward, *Grievance Arbitration—The Old Frontier*, in *Arbitration and the Expanding Role of Neutrals*, Proceedings of the 23rd Annual Meeting, National Academy of Arbitrators, eds. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1970), 153, 158. See also Robins, *Unfair Dismissal: Emerging Issues in the Use of Arbitration as a Dispute Resolution Alternative for the Nonunion Workforce*, 12 *Fordham Urb. L.J.* 437, 447-450 (particularly n. 48) (1984).

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 parties 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 pro-

fessor of labor economics and labor relations at Northwestern University. The tests were first published by him in the early 1960s as an appendage to an arbitration opinion,⁶ and were given their final formulation in another case in 1972.⁷ The latter version is attached as an addendum to this paper.

My thesis with regard to these tests may be stated briefly. If taken as an introduction to an academic discussion of just cause in the classroom, or a schematic for organizing a textbook or commentary,⁸ the seven tests may have some utility. But employed as agenda for resolving disputes in arbitration, the tests are in my judgment 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.

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

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

⁷*Whirlpool Corp.*, 58 LA 421 (Daugherty, 1972).

⁸See Koven & Smith, *Just Cause: The Seven Tests* (San Francisco: Coloracre Publications, 1985).

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 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 also 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.*,⁹ a case of Daugherty's

⁹*Supra* note 6.

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 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 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. His 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.¹⁰

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

¹⁰*Id.* at 557.

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 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.¹¹ 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

¹¹See, e.g., Hill, Jr., & Sinicropi, *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 Appropriate Remedy?* 1982 Lab. L.J. 783; *Maui Pineapple Co.*, 86 LA 907 (Tsukiyama, 1986).

presented to the company investigator must be "weighty and substantial."¹²

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.¹³

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

¹²In the earlier formulation in *Grief Bros.*, *supra* 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 *Whirlpool*, *supra* note 7, the same note drops "preponderant" but retains "conclusive or 'beyond a reasonable doubt.'" Does this suggest the "substantial" evidence should approach the standard of preponderance?

¹³*Supra* note 7 at p. 427.

¹⁴*Id.*

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. 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 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.

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.¹⁵ In the version of the tests used in that particu-

¹⁵Barreca, Miller & Zimny, *Labor Arbitrator Development: A Handbook* (Washington: BNA Books, 1983), 408.

lar 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 forth¹⁶

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 lesser 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."¹⁷

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 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 eminent good sense. As explained in an article by Donald S. McPherson tracing the development of the Seven Tests,¹⁸ the inspiration came out of

¹⁶*Id.* at 418.

¹⁷Arbitration Times, Spring 1988, at 2 (newspaper of the American Arbitration Association).

¹⁸McPherson, *The Evolving Concept of Just Cause: Carroll R. Daugherty and the Requirement of Disciplinary Due Process*, 38 Lab. L.J. 387 (1987).

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 parties 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

Whatever their virtues in the railroad industry, the indiscriminating 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

¹⁹National Railroad Adjustment Board, Third Division, Vol. 81, Award No. 8431, at 174, 178 (Daugherty, 1958).

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

²⁰Dunsford, *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: BNA Books, 1986), 1.

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.

The Limitations of Tests

My apprehensions regarding the use of tests such as Daugherty's are not fueled by any conviction that such an approach necessarily favors one side over another. It is difficult to judge whether management or labor would benefit more from the use of the tests. Daugherty stated that one of his objects was to protect innocent employees from arbitrary and discriminatory acts of management, and of course his Seven Tests build an obstacle course for supervisors and personnel managers on which they may trip and stumble. On the other hand, the heavy deference which Daugherty pays to managerial judgment in his tests frequently would be prejudicial to the interests of grievants.

The difficulty with the use of tests is not that they inevitably threaten impartiality. Rather, the difficulty is that a process whose strength and uniqueness lies in the personal responsiveness of the decision maker to the daily problems of flesh and blood human beings in the shop may be transformed into an academic exercise, as tests and rules imported from extraneous sources begin to dominate the discretion and judgment of the arbitrator.

Whenever it is proposed that tests or criteria ought to be developed to define just cause, the following question should be

asked: What is the purpose of such an enterprise? If the object is to mechanize the process of decision making for arbitrators, or to achieve efficiency and uniformity for the parties at the cost of overlooking the subtleties and contingencies of particular cases, great care must be exercised to avoid a debilitation of the process. If, on the other hand, the object is simply to deepen our understanding of the central concept around which so many decisions turn, that is a different matter. Obviously there is much to be said for a continuing effort to master the elements that make up the just cause standard.

One of the most ambitious attempts at creating a theory of just cause is the product of two members of this Academy, Roger Abrams and Dennis R. Nolan.²¹ They propose a fundamental understanding of the employment relationship as follows:

Just cause . . . embodies the idea that the employee is entitled to continued employment, provided he attends work regularly, obeys work rules, performs at some reasonable level of quality and quantity, and refrains from interfering with his employer's business by his activities on or off the job.²²

These basic elements of the definition are supplemented by a consideration of the distinctive interests of management and union implicated in the various applications to which the just cause concept may be put. For example, the authors maintain that for just cause to be present, management must have one of three legitimate objects in mind: (1) rehabilitation of an employee; (2) deterrence of similar conduct, or (3) protection of profitability, which is taken in a broad sense to refer to the employer's efficient operation of its business. On the other side, the authors locate the union's interests in the assurance of fairness to the employee in the disciplinary situation, which in effect means industrial due process, equal protection, and individualized treatment. In the theory as proposed, these varying interests of the two parties are considered reconcilable and congruent, offering to the arbitrator a basis upon which to "make sound judgments about the probable expectations of the parties."²³

While the theorizing of Abrams and Nolan is instructive and insightful, the authors themselves are quick to admit that "there

²¹Abrams & Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 Duke L.J. 594.

²²*Id.* at 601.

²³*Id.* at 600-601.

will never be a simple definition of 'just cause' nor even a consensus on its application to specific cases."²⁴ More importantly, they emphasize that the concept cannot be applied to a dispute without the exercise of arbitral judgment.

That is, of course, always the rub: the recognition of that unvarnished element of discretionary judgment that the arbitrator must often bring to bear in the particular case, when the rules from whatever source do not relieve the sharp and nagging uncertainty that surrounds a critical factor in a dispute. In order to perform the job honestly and effectively, the arbitrator is forced to go into uncharted terrain where rules do not reach. The problem may call for a difficult factual determination based on the credibility of witnesses, or a ruling regarding the fairness of procedures, or a choice between conflicting interpretations of contract language, or the assessment of the severity of a disciplinary penalty. In such circumstances it is conceivable that an arbitrator may wander off the reservation and render judgments that appear arbitrary and rootless. Indeed, the reason that tests or sets of criteria are sought is the hope of preventing these mistakes.

Yet here we encounter the dilemma. One of the reasons the parties originally choose a broad concept like just cause as the measure of limitation on managerial freedom to discipline is the desire to remain flexible enough to encompass the multitude of unforeseen situations that come up in industrial relations. They want to allow room for the decision maker to exercise discretion in response to the exact circumstances present in the case. But to the extent that a set of prescribed tests are devised to regulate the application of the just cause concept, the values represented by the opportunity to exercise close judgment begin to fade.

The parties are put to a choice. They can minimize the risk of unacceptable decisions by agreeing to strip the arbitrator of the judgment and discretion that almost invariably accompany the use of the just cause concept. From time to time management may opt to follow such a path, perhaps suggesting that the union agree to a provision like the following:

In discipline cases, the arbitrator shall be confined to a determination of whether the employee committed the misconduct for which the discipline was imposed; the arbitrator in no event shall have the

²⁴*Id.*

authority to inquire into the appropriateness or degree of discipline imposed.²⁵

The alternative is to take the chance of a poor decision in order to keep the process open to the value judgments that may prove necessary fairly to resolve closely contested cases. For the most part, it appears that the parties have been willing to leave the elucidation of what just cause means in a given situation to the judgment of the particular arbitrator they have chosen. On that subject, however, another voice is increasingly heard in the land to restrict the limits of arbitral discretion by still another set of tests.

Restrictive Judicial Tests

These other criteria for defining just cause are the product of a source external to the process itself, that is, the lower federal courts which undertake to review the disciplinary decisions of arbitrators. The tests announced in some of the judicial opinions are ominous signs as far as the finality of the award is concerned, since they are little more than the substitution of a court's interpretation of the contract for that of the arbitrator. The two *Warren* decisions issued by the First Circuit,²⁶ on which certiorari was denied, are recent examples of this judicial disposition to second-guess the arbitrator on the meaning and scope of the just cause clause.

In *Warren*, employees were discharged for violating a rule on possession, use, or sale of drugs on company premises. The contract provided that the company had the sole right to discharge for proper cause. Under the title "Causes of Discharge" work rules negotiated by both parties read, in part, as follows:

Violation of prescribed rules are cause for disciplinary action of varying degrees of severity.

Violations of the following rules are considered causes for discharge.

²⁵Phillips, *Their Own Brand of Industrial Justice: Arbitrators' Excesses in Discharge Cases*, 10 Emp. Rel. L.J. 48, 56 (1984).

²⁶*S.D. Warren Co. v. Paperworkers Local 1069*, 846 F.2d 827, 128 LRRM 2432 (1st Cir. 1988) (Warren II); *S.D. Warren Co. v. Paperworkers Local 1069*, 845 F.2d 3, 128 LRRM 2175 (1st Cir. 1988) (Warren I), *on remand from*, 126 LRRM 3360 (1987), *vacating* 815 F.2d 178, 125 LRRM 2086 (1st Cir. 1987), *rev'g* 632 F.Supp. 463, 122 LRRM 2186 (D. Me. 1986), *cert. denied*, 129 LRRM 3072 (1988).

- a) Possession, use or sale on Mill property of intoxicants, marijuana, narcotics or other drugs. . . .

At the arbitration hearings the company was able to establish that the accused employees had violated the work rule. Did that end the matter, as the company argued? The arbitrators who heard the two cases recognized that a question of contract construction was before them regarding whether the “proper cause” provision controlled the interpretation and application of the rule, or whether the negotiated rule represented the embodiment of an agreement by the parties that every instance of drug possession, use, or sale on the premises gave management the right to terminate an employee without regard to the circumstances. Each arbitrator concluded that the contract was ambiguous but ultimately held that the parties intended that the validity of a discharge under the rule would remain subject to the conventional just cause analysis. On review of the record, each arbitrator set aside the discharge in favor of a suspension. When the awards were contested in court, the First Circuit in two separate opinions announced that the arbitrators had exceeded their contractual authority.

The reason the arbitrators had exceeded their authority, according to the First Circuit, is that the contract was so plain in meaning that only one interpretation was possible. The arbitrators had not read the contract properly. Of course, given the standards for judicial review reaffirmed in *Misco*,²⁷ it is not at all clear why the awards should have been set aside even on the assumption that the arbitrators were wrong in their interpretation. *Misco* states that “a court should not reject an award on the ground that the arbitrator misread the contract.”²⁸ Moreover, as Reginald Alleyne has pointed out,²⁹ if the courts are so eager to apply the plain-meaning rule in reviewing the awards of arbitrators, they might consider what that rule means when applied to the words in the contract which say the award shall be “final and binding.” For present purposes the point to emphasize is that if the *Warren* cases accurately state the law, a new test has been devised to limit the judgment of the arbitrator in just cause cases.

²⁷*Paperworkers v. Misco*, 484 U.S. 29, 126 LRRM 3113 (1987).

²⁸*Id.*, 126 LRRM at 3117.

²⁹“Law and Arbitration” column, *The Chronicle*, newspaper of National Academy of Arbitrators (October 1988), at 3.

How shall we state the new test? One formulation might be as follows: When the just cause provision is accompanied by negotiated rules listing certain offenses as grounds for discharge, the contract as a matter of law must be interpreted to give management the freedom to decide on the severity of the penalty in the event of violation. Representatives of unions, no doubt, will be surprised to learn that by accepting proposed work rules they have conceded not only that involvement with drugs is generally a serious enough act to merit discharge but also that the circumstances surrounding an event are totally irrelevant and in every case management is free to determine unilaterally what the discipline shall be. Furthermore, the acceptance of this test produces the following anomaly. If arbitrators in *Warren*-type cases seek to perform their function, which is to bring informed judgment to bear on the meaning of the contract, they will provide grounds for the invalidation of their awards. Arbitrators may think the parties intended the just cause concept to monitor the application of work rules, but that is no longer of any moment. Only if arbitrators give the contract an interpretation which fits the anticipated opinion of the court will they be considered as adequately discharging their duty. Arbitrators, in effect, are asked to guess what a judge would say about the meaning of the contract, even though the parties in choosing arbitrators bargained for their judgment and not that of a court. Thus, while professing to follow the *Enterprise*³⁰ and *Misco* standards, the First Circuit has turned them inside out.

Courts have not hesitated to enunciate other tests as well to determine when arbitral discretion should be revoked in applying the just cause standard or its equivalent. Thus, it is said that an award will not be enforced if it is without rational support or unfounded in reason and fact; or if it is erroneously based on a crucial assumption that is not a fact.³¹ If one were so inclined, these judicial criteria could be examined in the light of the facts of the cases in which they were announced in order to develop more rules of law for the diligent arbitrator to follow in discipline cases.

³⁰*Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

³¹E.g., *Posadas de P.R. Assocs. v. Asociacion de Empleados de Casino de P.R.*, 821 F.2d 60, 63, 125 LRRM 3137 (1st Cir. 1987); *Mistletoe Express Serv. v. Motor Expressmen's Union*, 566 F.2d 692, 694, 96 LRRM 3320 (10th Cir. 1977); *Bettencourt v. Boston Edison Co.*, 560 F.2d 1045, 1050, 96 LRRM 2208 (1st Cir. 1977); *Amanda Bent Bolt Co. v. Automobile Workers Local 1549*, 451 F.2d 1277, 1280, 79 LRRM 2023 (6th Cir. 1971).

All these court-inspired tests seem to be based on the general premise that arbitrators in making their decisions do not have the latitude to be wrong, at least not so wrong as to boggle the judicial mind. One judge has commented that where just cause is concerned, a court should not uphold the reinstatement of an employee who has committed an offense which a court would conclude no rational employer would ever excuse.³² (The offense which the judge had in mind was theft.) Perhaps the most endearing formulation (although not in a just cause case) is the one which describes the unenforceable award as "based on palpably faulty reasoning to the point that no judge could conceivably have reached the same result."³³ The author of that statement seems not to have entertained the possibility that such a point cannot be imagined.

These judicial attempts to define the limits of arbitral discretion in discipline cases often bear a tone of frustration, perhaps understandable in view of the periodic arbitration award which turns out, in the words of Bernard D. Meltzer, to be just plain "goofy."³⁴ At the same time, they endorse a scope of review which seems incompatible with the admonition of the Supreme Court that when arbitrators are even arguably interpreting and applying the contract, a court is not to substitute its judgment. Perhaps in some decisions the court is unwilling to credit the claims of arbitrators that they are trying to interpret the contract. If so, the grounds of reversal should be these arbitrators have shown an infidelity to their obligation, a charge that is not satisfactorily established merely by showing that the reading of the contract appears erroneous or even irrational to a judge.

On the other hand, the source of the confusion over the proper authority of arbitrators in discipline cases may go deeper, both for reviewing courts and arbitrators themselves. Recently Judge Stephen R. Reinhardt described for us two views

³²*E.I. du Pont de Nemours & Co. v. Grasselli Employees Independent Ass'n of E. Chicago*, 790 F.2d 611, 620, 122 LRRM 2217 (7th Cir. 1986) (J. Easterbrook, concurring), *cert. denied*, 123 LRRM 2592 (1986).

³³*Safeway Stores v. Bakery & Confectionary Workers Local 111*, 390 F.2d 79, 82, 67 LRRM 2646 (5th Cir. 1968). This was aptly described as the "Lowest common denominator of federal judge" approach by Gottesman, *Judicial Review: As the Parties See It*, in *Labor Arbitration at the Quarter-Century Mark*, Proceedings of the 25th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1973), 183, 185.

³⁴Meltzer, *After the Arbitration Award: The Public Policy Defense*, in *Arbitration 1987: The Academy at Forty*, Proceedings of the 40th Annual Meeting, National Academy of Arbitrators, ed. Gladys W. Gruenberg (Washington: BNA Books, 1988), 39, 40.

of the arbitral process, one labelled the "formal" view emphasizing the contractual nature of the relationship between the parties, the other the "expertise" view stressing the problem-solving nature of industrial decision making.³⁵ Does this dichotomy, which Judge Reinhardt employed in analyzing the ways in which courts review the awards of arbitrators, also reflect the competing ways in which arbitrators see themselves? Is a claim being made under the banner of "expertise" that arbitrators have authority to shape the contract in any way that they deem best? It is one thing to talk about the discretionary judgment of arbitrators, and contrast this with tests or rules to govern their decision making. But what precisely do we mean by discretion, and in what areas may arbitrators legitimately employ their own judgment? These are questions of interest not only in considering the scope of judicial review, but also in setting norms for those within the profession to assure its integrity.

In the *Enterprise* case, Justice William O. Douglas noted that an arbitrator "does not sit to dispense his own brand of industrial justice. . . . his award is legitimate only so long as it draws its essence from the collective bargaining agreement."³⁶ In a paradoxical retort to that statement, Edgar A. Jones, Jr., has pointed out that actually that is all an arbitrator does dispense, "his own brand of industrial justice."³⁷ In particular reference to the disciplinary case where just cause is the standard, Jones added: "Where lies the 'essence' from which to deduce what is, and what is not, 'just cause' for the employer's disciplinary response?"³⁸

It is hardly to be doubted that in uttering his pronouncement Justice Douglas understood that there are elements of discretion and judgment exercised by every kind of decision maker including arbitrators. At the same time, Jones presumably does not believe that arbitrators are free to follow their own personal whims in deciding cases. The statements are reconcilable, however, by recognizing that the only discretion which arbitrators may properly exercise is derived from the necessities of the functions they perform in interpreting and applying the collec-

³⁵*Id.* at 25.

³⁶*Supra* note 30 at 599.

³⁷Jones, Jr., *His Own Brand of Industrial Justice: The Stalking Horse of Judicial Review of Labor Arbitration*, 30 U.C.L.A. L. Rev. 881 (1983).

³⁸*Id.* at 885.

tive bargaining agreement. The discretion is not plenary but is commensurate with the arbitral role.

Instead of looking for tests to make the performance of that function easier, our efforts might better be devoted to mapping out in greater detail the areas in which judgment and discretion are properly claimable by arbitrators, and the limits beyond which they ought not to go.

As one of the masters of this profession, Gabriel Alexander, said many years ago:

One cannot ignore the necessity of resolving disputes on the basis of judgment, or the elements of personality that affect human judgment. Although seldom invested with specific authority to exercise "discretion," arbitrators could not reach or express their judgments without exercising their will.³⁹

That is a comment which ought to be studied by courts faced with the temptation to second guess the awards of arbitrators. But on the same occasion, Alexander added a cautionary note that has a sobering relevance for arbitrators: "Justice demands that such exercise [of discretion] not be wholly unrestrained."⁴⁰

Addendum

*The Seven Tests of Carroll R. Daugherty for Learning Whether
Employer Had Just Cause for Disciplining an Employee,
as reproduced in Whirlpool Corp., 58 LA 421 (1972)*

Few if any union-management agreements contain a definition of "just cause." Nevertheless, over the years the opinions of arbitrators in innumerable discipline cases have developed a sort of "common law" definition thereof. This definition consists of a set of guidelines or criteria that are to be applied to the facts of any one case, and said criteria are set forth below in the form of seven Questions, with accompanying Notes of explanation.

A "no" answer to any one or more of said Questions normally signifies that just and proper cause did not exist. In other words, such "no" means that the employer's disciplinary decision contained one or more elements of arbitrary, capricious, unreasonable, or discriminatory action to such an extent that said decision constituted an abuse

³⁹Marshall, *Comment, Discretion in Arbitration, Arbitration and the Public Interest*, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators, eds. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1971), 84, 88.

⁴⁰*Id.*

of managerial discretion warranting the arbitrator to substitute his judgment for that of the employer.

The answers to the Questions in any particular case are to be found in the evidence presented to the arbitrator at the hearing thereon. Frequently, of course, the facts are such that the guidelines cannot be applied with precision. Moreover, occasionally, in some particular case an arbitrator may find one or more "no" answers so weak and the other, "yes" answers so strong that he may properly, without any "political" or spineless intent to "split the difference" between the opposing positions of the parties, find that the correct decision is to "chastise" both the company and the disciplined employee by decreasing but not nullifying the degree of discipline imposed by the company—e.g., by reinstating a discharged employee without back pay.

It should be understood that, under the statement of issue as to whether an employer had just cause for discipline in a case of this sort before an arbitrator, 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 in the first instance had forewarned the employee against the sort of conduct for which discipline was considered; whether the forewarning was reasonable; whether the employer, as a 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; whether the employer, in reaching his verdict and in deciding on the degree of discipline to be imposed, had acted in an even-handed, nondiscriminatory manner; and whether the degree of discipline imposed by the employer was reasonably related to the seriousness of the proven offense and to the employee's previous record. 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.

It should be clearly understood also that the criteria set forth below are to be applied to the employer's conduct in making his disciplinary decision *before* same has been processed through the grievance procedure to arbitration. Any question as to whether the employer has properly fulfilled the contractual requirements of said procedure is entirely separate from the question of whether he fulfilled the "common law" requirements of just cause before the discipline was "grieved."

Sometimes, although very rarely, a union-management agreement contains a provision limiting the scope of the arbitrator's inquiry into the question of just cause. For example, one such provision seen by this arbitrator says that "the only question the arbitrator is to determine shall be whether the employee is or is not guilty of the act or acts resulting in his discharge." Under the latter contractual statement an arbitrator might well have to confine his attention to Question No. 5 below—or at most to Questions Nos. 3, 4, and 5. But absent any such restriction in an agreement, a consideration of the evidence on all

seven Questions (and their accompanying Notes) is not only proper but necessary.

The above-mentioned Questions and Notes do not represent an effort to compress all the facts in a discharge case into a "formula." Labor and human relations circumstances vary widely from case to case, and no formula can be developed whereunder the facts can be fed into a "computer" that spews out the inevitably correct answer on a sheet of paper. There is no substitute for sound human judgment. The Questions and Notes do represent an effort to minimize an arbitrator's consideration of irrelevant facts and his possible human tendency to let himself be blown by the variable winds of sentiment on to an uncharted and unchartable sea of "equity."

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 give 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 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, its 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.

4. 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 perform 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 found guilty of the same offense must have been in reasonably 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 employee's bottle inside the plant is not so serious an offense as bringing in the bottle and repeatedly tipping 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. (c) 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 with 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 judgment 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 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 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 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.

II. A UNION VIEWPOINT

DONALD W. COHEN*

Friends, arbitrators, advocates, lend me your ears; I come to bury the Daugherty Doctrine, not to praise it. The evil that doctrines do lives after them; the good is oft interred with their bones; so be it with the Daugherty Doctrine. The noble Dunsford hath told you the Doctrine was overreaching: if it were so, it

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was a grievous fault; and grievously hath the Doctrine answered it. Here, under the leave of Dunsford and the rest, for Dunsford is an honorable man; so are they all, all honorable men, come I to speak in the Doctrine's funeral. It was my friend, faithful and just to me: but Dunsford said it was overreaching; and Dunsford is an honorable man. The Doctrine brought many standards home to arbitration, whose ransoms did the general coffers fill: did this in the Doctrine seem ambitious? When that the grievants have cried, the Doctrine hath wept: overreaching should be made of sterner stuff: yet Dunsford says the Doctrine is overreaching; and Dunsford is an honorable man. I speak not to disprove what Dunsford spoke, but here I am to speak what I do know. You all did love the Doctrine once, not without just cause: What just cause withholds you then to mourn for it? O judgment, thou art fled to brutish beasts, and men have lost their reason! Bear with me; mark you the name of Jacobellis, for it is one which has great impact upon the concept of just cause, one to which I will return at a later time.

Come I now to comment upon the observations of the learned Bruce Miller.¹ Miller it was, on the other side of the coin than that reflected by the witty Will Saxton, to whom Dunsford adverts. Miller it was, who said the questions posed by Daugherty provided a model of due process for disciplinary and discharge cases. Miller it was, who observed that "the employer has substantial psychological momentum before the case gets to arbitration because the arbitrator is called upon to reverse a company action, a fait accompli. An arbitrator must consciously neutralize that momentum by insisting scrupulously that the employer carry his burden."

Now and then comes there an arbitrator who ventures to define just cause. Such was Hyman Parker.² Parker ventured that:

In general, the "just cause" which will justify a discharge should be in connection with the work, and should reflect a willful disregard of the employer's interests. Thus, any conduct, action or inaction by an employee which arises out of, or is directly connected with the work, and which is inconsistent with an employee's obligations to his employer under his contract of hire, or union contract, might very well be determined to be "just cause."

¹Miller, *The Discipline and Discharge Case*, in *Decisional Thinking of Arbitrators and Judges*, Proceedings of the 33rd Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1980).

²*Employing Lithographers Ass'n of Detroit (Madison Co.)*, 21 LA 671, 673 (Parker, 1953).

Parker was on the right track to the extent that just cause is connected to an employee's impact upon the job, but to define the employee's actions as being just cause is ungrammatical at best. Clearly it is the employer's action which is at issue when we seek to define the phrase. Arbitrator Sam Harris came much closer when he said:³

Without attempting precisely to define "cause," it is the arbitrator's view that the true test under a contract of the type involved here is whether a reasonable man, taking into account all relevant circumstances, would find sufficient justification in the conduct of the employee to warrant discharge.

I like that; I like that a lot. Really, what is the Doctrine but an advisory opinion saying that, while you have to feel it in your bones, here are certain standards that can assist you in coming to your final decision? To a large degree then, I believe we find that disciplinary matters fall into the twilight zone of "uncabined arbitral discretion." "Uncabined," how I adore that term! It gives me a feel of the great outdoors, of not being circumscribed and, to a degree, the arbitrator must have that discretion. Thus, if Dunsford is correct, if the Doctrine does lock in an arbitrator to merely affirming or reversing *in toto* an employer's decision, then should not that portion be buried?

I do not dispute that the parties are free to place such restrictions as they may deem appropriate. However, one such restraint, which I advise against, is that the arbitrator has no discretion; that a finding that certain events have occurred strips the arbitrator of all further authority. If the parties specifically negotiate such language (and typically this is found with regard to participation in a wildcat strike), so be it.

If the constraint does not appear, however, remember that the arbitrator is not an appellate review court but is a judge in the first instance. The employer is not the prosecutor and judge but rather the police and prosecutor. The function of the judge is one which has been bargained by the parties. When the Supreme Court speaks of arbitrators being learned in the law of the shop, it implies the doing of equity. This is what keeps the process functioning, and this is what must never be forgotten. If the noble Dunsford's pronouncements on company rules are to be accepted, we will see a rapid diminution in the importance and

³*RCA Communications*, 29 LA 567, 571 (Harris, 1957).

use of the arbitral process. What need, when the rules have such finality? I would suggest, however, that there is always the essence of the underlying collective bargaining agreement which must be taken into consideration.

Consider the rationale of Arbitrator Sabo⁴ when he observed:

The word "cause" has been interpreted as meaning a "fair and legitimate reason" and not just any "reason." Some Arbitrators have equated "cause" with "Just Cause" or with "reasonable" and "sufficient" justification. In the final analysis, the concept of Just Cause had its start in Collective Bargaining Agreements negotiated by Labor and Management and has evolved over many years and untold Arbitrations to the point where today it is a highly developed theory of reasoning based on standards which must be precisely met by an Employer to sustain a Disciplinary Penalty up to and including Discharge by an Arbitrator.

Roberts' Dictionary of Industrial Relations has an apt description of just cause.⁵ The *Dictionary* explains: The term is commonly used in agreement provisions to safeguard workers from disciplinary action which is unjust, arbitrary, capricious or which lacks some reasonable foundation for its support. Disciplinary action may also be held to be lacking 'just cause' if the penalties bear no reasonable relationship to the degree of the alleged offense." The definition goes on to give specific examples and concludes with the Daugherty Doctrine.

Let us now trace the genesis of just cause. In the 1800s we saw the courts create the concept of employment at will. Thus, an employee could be fired for any reason or no reason. Collective bargaining agreements weren't even a twinkle in their father's eye, and employees were continuously at risk. During the early 1900s unions became more active and pressures began to build. The concept of workers' compensation arose. This was an effective medium to eliminate the need to define just cause in cases of industrial accidents. The next step was to define what was not just cause. The prime example was the Wagner Act. Now we had legislation which prohibited termination of employees on account of their protected, concerted activities. If an employee was fired for joining with fellow employees in a job-related action, this was a termination without just cause.

⁴*Rohr Indus.*, 78 LA 978, 981 (Sabo, 1982).

⁵Roberts, *Roberts' Dictionary of Industrial Relations*, 3d ed. (Washington: BNA Books, 1986), 331.

In the 60s there was born Title VII. Now we knew that it was not just cause to terminate an employee because of race, color, creed, or sex and, eventually, physical impairment. The statutes were designed to deal with those egregious acts of misconduct by an employer which were easily definable. They could not and should not be directed, however, to the gray areas which comprise the vast majority of managerial decisions. This portion in the unionized sector has been ceded to the arbitrators. They were confronted with the task of creating the parameters within which the disciplinary function could be tolerated by management and labor.

It is critical at this juncture that we understand the difference between a collective bargaining agreement and an arm's-length business transaction. With the latter each party takes its best position and is entitled to enforce it absolutely. Whatever blood is spilled is merely a byproduct of that format. Collective bargaining agreements, on the other hand, are plastic, movable, to accommodate the needs of the parties. They must live with each other.

The essence of collective bargaining is that employees not only have rights under the contract but also have rights in their jobs as such. Thus, an employee who has stood the test of time, who has served the employer for a number of years, has expectations beyond that of an employee with, say, less than a year or less than three years. The arbitrator must have the flexibility to take into account these job rights. An employee of six months who has attendance problems sends up a red flag. The arbitrator may have scant choice but to follow the company line. An employee with 20 years encountering attendance problems presents a different situation. There the arbitrator must and does have the flexibility to accommodate the job rights which have accrued.

Let me venture an observation from the viewpoint of labor as to what constitutes just cause, keeping in mind the ancient homily that once an arbitrator's nose is in the tent, we are going to be confronted with the entire beast. I would suggest that just cause encompasses both the procedural aspects of the case (i.e., something along the lines of the Daugherty standards) and the substantive aspects of the case (to wit, did the complained-of action constitute a basis for the discipline meted out?). They are: (1) Did the company observe procedural niceties? (2) Did the blighter do the dirty deed? (3) Is the offense of a grade warrant-

ing the discipline administered? Let this be known as the *Jacobellis* Doctrine!

Ah, yes, I almost forgot Jacobellis, the noblest citizen of them all. Actually, Mr. Jacobellis is only a vehicle for my plea for arbitral discretion. You see, he was the operator of a movie theatre in Ohio at a time when a film entitled *The Lovers* was being shown. For the curious among you, the flick depicted an unhappy marriage and the wife falling in love with a young archaeologist. They consummated that love in an explicit albeit fragmentary and fleeting love scene. Mr. Jacobellis was subsequently confronted with the unappetizing prospect of serving time on account of the showing of this movie, eventually prompting Justice Stewart to utter the immortal words which we oft quote without knowing the citation; said he, commenting upon hard-core just cause (or was it pornography?):

I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this is not that.⁶

Heeding Justice Stewart, let the arbitrators among us look into their own hearts, for there the meaning of just cause will they find.

III. A MANAGEMENT VIEWPOINT

ROBERT J. MIGNIN*

Over the past years, few issues have received greater attention from academics, arbitrators, and practitioners than establishing a proper definition for "just cause" in the labor arbitration context. The question can be summarized by asking what, if any, discretion should labor arbitrators exercise in evaluating whether a particular employer had "just cause" to discipline an employee.

Having reviewed numerous arbitration cases and various published works on the subject, I can only conclude that there is even less consensus now than there was 20 or 30 years ago as to the definition of just cause or the amount of discretion that can be

⁶*Jacobellis v. Ohio*, 378 U.S. 184 (1964).

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exercised by an arbitrator in reviewing disciplinary decisions of management. Most arbitrators who attempt to define just cause reach a conclusion very similar to that expressed by Justice Potter Stewart in the now famous Supreme Court case involving pornography and obscenity. In his concurrence, Justice Stewart declined to attempt a precise definition of obscenity but stated, "I know it when I see it."¹

A majority of arbitrators are equally unsure about a precise definition or test for just cause. As a result, they often simply rely on the concept of an "arbitrator's discretion" to rationalize and explain those decisions which overturn management's judgment. Some arbitrators have gone so far as to impose their own brand of industrial justice and workplace morality under the mistaken belief that they are empowered to do what is fair and right and to follow "the standards of justice and fair dealing prevalent within the community."²

What is just cause? How do you define it? How do you balance the right of an employer to manage and operate its business with the interest of unions or employees in receiving fair treatment? How broad is an arbitrator's discretion? According to John Dunsford, the seven tests established by Arbitrator Daugherty may be too restrictive in defining just cause because they place the arbitrator in a narrow reviewing role which limits exercise of decision-making authority. Dunsford also feels that recent decisions by appellate courts further restrict an arbitrator's discretion by requiring the arbitrator to adhere to the specific terms of a contract and negotiated work rules. Dunsford's thesis seems to be that just cause is a very broad concept that gives to arbitrators broad authority not only to exercise their independent judgment but also to exercise their discretion in an attempt to render awards that will not only satisfy all of the parties and meet expectations but bring about industrial peace and stability and also treat employees fairly. Those are very ambitious and admirable objectives!

I am compelled to strongly disagree, however, with the fundamental premise of Dunsford's comments. Indeed, I submit that the unbridled discretion sometimes exercised by arbitrators in discipline cases has tarnished management and labor relations by making the parties more suspicious and distrustful of each

¹*Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

²*Riley Stoker Corp.*, 7 LA 764 (Platt, 1947).

other as a result of awards which are compromising and inconsistent or plainly lacking in common sense. Furthermore, by continuously substituting their business judgment for that of management, arbitrators often render awards that lessen productivity, quality, and profitability and, in the end, negatively affect an employer's ability to compete and efficiently provide services.

The mistaken belief that a just cause clause somehow grants broad discretion is central to the decision-making process of most arbitrators and is certainly central to the analyses of many commentators. I submit that any analysis of just cause that is premised on the assumption that arbitrators have the discretion to substitute their judgment for that of management is wrong. An arbitrator has no discretion in reviewing management's discipline of employees. Contrary to the comments of Dunsford, the decision maker is management, not the arbitrator. It is the employer, not the arbitrator, who exercises discretion when deciding in the first instance whether an employee should be disciplined. It is the employer, not the arbitrator, who exercises discretion to determine what degree of discipline should be imposed. The arbitrator simply serves as a neutral third party who reviews an employer's exercise of discretion. An arbitrator, therefore, in reviewing the discipline of an employee, should only be analyzing whether the employer had good faith or legitimate business reasons to discipline an employee.

When they exercise their own discretion to overturn management's discipline of employees, arbitrators are applying their own universal standards of decency, justice, and fair treatment. They are imposing their own view of industrial justice in the workplace. Indeed, the greater the exercise of discretion, the more an arbitrator reaches a compromise decision in an attempt to appease the interests of all the parties. It is commonplace for arbitrators to overturn disciplinary penalties on the basis that the penalty did not meet a common standard of fairness or justice.

What's wrong with this approach? From a global, philosophical, moral, or even ethical approach, there may be nothing wrong with an arbitrator's attempts to insert a community standard of justice in formulating a test for just cause. The problem, however, is that universal standards of fairness, decency, and justice are defined by the personal views, experiences, and philosophy of arbitrators as well as their own perception of indus-

trial and community values and morals. By imposing these universal standards in a particular workplace, arbitrators are usurping the function of management and, in fact, are often disregarding problems unique to that particular workplace. By imposing broad community standards, arbitrators ignore competitive issues unique to a particular employer such as productivity, quality, service, and profitability.

Arbitrators must never forget to recognize that every employer is unique. Employers differ not only because of the type of industry and size but because of their particular operating philosophies, their own views of workplace ethics and morality, and their own business plans that outline strategies for becoming more competitive, profitable, efficient, service oriented, and quality conscious. The unrestricted right of employers to respond uniquely and creatively to the pressures of business, no matter how large or small the operation, is a right that is basic to the philosophy upon which our free market system is founded.

Of greatest concern, especially in the private sector, is the fact that those arbitrators who exercise broad discretion in discipline cases often disregard the employer's particular business plan and its need to survive and prosper in an ever-changing and very competitive world. We all recognize the tremendous upheaval that has taken place over the past 10 years in the labor environment and business climate in our country. All employers, public and private, large and small, service and manufacturing, have been and are continuing to be faced with significant demands for increasing productivity, reducing costs, improving quality, and increasing profitability. Now more than ever before, employers are concerned about issues such as—cost control and cost containment; reductions in force; quality circles; profit sharing; group incentives; economic education of employees; communication and employee involvement; guest and customer relations; just-in-time inventory control; participative management; training for new skills and new jobs; raising capital for investment in tools and machinery; combining, consolidating, and eliminating jobs; mergers, acquisitions and realignment of work forces; early retirement of employees; and Japanese method of management.

I have heard these issues and concerns raised, especially in cases involving outsourcing or contracting out, layoff, plant shutdown, transfer of work, job consolidation or merger,

acquisition or takeovers, as well as job biddings and recall disputes. It is equally important for arbitrators to recognize, however, that the same issues of profitability, productivity, quality, and service, as well as cost reduction and cost containment, are also the basis for an employer's decision to discipline or discharge an employee. These issues are more than just "buzz-words"; they are real issues and concerns that are confronting management in all sectors on a daily basis.

A few examples of disciplinary situations that simply cannot be considered under any type of universal standard of fairness and justice are set forth for illustrative purposes. The types of cases discussed below can be considered only in view of a particular employer's work environment and the particular employer's unique values, business judgment, and operating philosophy.

1. For most employers, *the theft of employer or employee property* is commonly accepted as cause for some sort of discipline. In a warehouse operation or in a health care setting, theft of any item, such as nuts and bolts or drugs or medication, even though the item may cost only pennies or nickels, may be cause for immediate termination—no questions asked! On the other hand, in a large factory, theft of a nail or pieces of scrap, or in an office environment, theft of time by not working or theft of employer property (such as note paper, paper clips, pens, and pencils), may not be of such magnitude as to require immediate termination but certainly would require progressive disciplinary penalties. Who is to decide what is fair or just?

2. *Use or abuse of drugs and alcohol* is another controversial issue which can be decided only on a case-by-case basis in view of the particular standards of the particular employer. There simply is no universal definition of fairness or justice that can be applied in these cases. Many health care employers, for example, have either a religious orientation or certainly a mission to heal and help the sick. These employers are sometimes much more willing to look at drug and alcohol problems with more compassion and treat these employees as handicapped and give them greater opportunities for rehabilitation. Certain other employers, however, especially in industries where employees are handling hazardous materials or using dangerous machinery or driving company vehicles or are engaged in public transportation, are less tolerant of drug or alcohol problems and are more willing to impose immediate termination for drug or alcohol use. The right answer is what the particular employer decides, based on

its business needs, not what an arbitrator may feel is right or fair or just.

3. *An employee's poor attitude, use of bad language, slow work, or generally uncooperative nature* also may be a cause for discipline. In the hospitality/service industry, where guest and customer relations are an important issue, employee attitude towards the job, demeanor and appearance, and the relationship with co-workers, customers, guests, and supervisors, is an extremely important and essential requirement for the job. In the manufacturing and industrial setting, however, employee attitude, ability to communicate, or overall demeanor is sometimes less important than technical skills and ability. Again, the employer makes the decision, not the arbitrator.

4. *Absenteeism and tardiness* is another important issue for employers. Employers with greater ability to transfer and substitute employees may have a more lenient absenteeism policy. Other employers may operate in a job market where it is hard to hire new employees. Still other employers who operate very lean and highly productive operations need the full efforts of every employee and can be less tolerant of absenteeism. Who is to say what is a proper policy or whether one or two occurrences will result in discipline or discharge? Isn't that up to the employer who must take into account the local labor market and the costs involved in discharging or hiring and training new employees? These are not decisions which are subject to an arbitrator's discretion.

5. *Off-the-premises misconduct*. Arbitrators carefully scrutinize any type of discipline for off-the-premises misconduct, whether for theft, driving while under the influence, use of drugs, sale of drugs, or other matters of moral turpitude. More and more, however, employers, especially in the hospitality and service industries where public image is important, are examining the impact of such employee behavior in the workplace, on co-workers, and on the employer's reputation. Who is to say what is a legitimate business interest for the employer to consider?

6. *Work performance and quality of work* are issues of increased importance in the workplace. As employers are forced to become more competitive and to redesign and redefine jobs, many employees (especially older, long-service employees who no longer have the technical skills to adapt to changes in the workplace), may be faced with discipline or termination. Is it fair in the interests of productivity and competition to penalize an

employee because of economic pressures and forces brought to bear in the workplace beyond the employee's control? Who is to say what is fair or just? Certainly not the arbitrator!

These are just a few examples of situations that I have seen over the past years where arbitrators have issued awards substituting their judgment for that of management. For every decision made by a particular employer, I have seen another employer with a different solution and a different approach to a business problem. What is significant about each of these situations is that they raise issues that are unique to particular employers, and can only be evaluated by those employers in the overall view of the competitive work environment.

American employers, both private and public, are on the threshold of even greater challenges and demands in the future years. The increased competition that we saw in the 1980s—the demand for greater productivity and quality, the demand for greater profitability, the cutbacks in government funding, the increased concern for health and safety of employees in the workplace, the increase in government regulation of the workplace, the pressure to increase service to customers and the public—all of these pressures are going to require greater *flexibility and creativity* by management not only to manage their operations correctly and efficiently but also to evaluate and reevaluate their employees. Each employer is different and this difference must be recognized by arbitrators. How management will involve its employees and how management will react to employees who do not want to become part of the new organizations are decisions that are uniquely vested in management.

Summary

The concept of an arbitrator's discretion in disciplinary cases has become a fundamental but unsound premise that has been passed from one commentator to another and from one arbitrator to another. It is a premise that is incorrect. In discipline cases I submit that it is not proper to examine or even discuss arbitral discretion because, in fact, arbitrators simply *do not have* any discretion.

There is no question that the just cause concept imposes some limitations upon management. Indeed, without these contract clauses, employers could terminate or discipline any employee at any time and for any reason without either notice or cause. The

fact that this concept imposes limitations on management's exercise of discretion does not, however, mean that this transfers to an arbitrator the right to exercise discretion and become a self-appointed decision maker. On the contrary, when management gives up the right to discipline employees "at will," it does not intend (and I cannot find any support for a contrary contention) to turn over to a third party the right to review de novo the appropriateness of a particular disciplinary penalty.

Employers who accept just cause clauses are simply agreeing that in disciplining employees they must have some legitimate or good-faith business reason for their actions. This is not a particularly difficult concept—nor is it a hard burden for an employer to meet. The arbitrator's role is very limited. The arbitrator is not the decision maker. The decision has already been made. The arbitrator is simply reviewing the facts to see whether the employer had a reason or "cause" to discipline an employee based upon what the employer has determined is inappropriate or unacceptable employee conduct in the workplace.

What is just cause? I submit that you cannot define just cause because just cause is not so much a universal standard as it is a procedure or process of review. In determining whether an employer has just cause to discipline an employee, an arbitrator needs only to look at the evidence offered by the employer as to the business reason for disciplining an employee. In determining whether an employer was acting in good faith or for good business reasons or both, an arbitrator will consider the contract, notice to the employee, work rules, the investigation, prior warnings, or past practice. All these factors may be taken into consideration to determine whether there was a good-faith business reason for disciplining an employee.

Assuming that management did have a good-faith business reason for disciplining an employee, the next question is whether the penalty was appropriate. Here the issues of just cause and due process are often confused. If a grievant admits having engaged in the particular misconduct, or if the proof is clear, there is very little judgment that an arbitrator needs to exercise in rendering a decision. If there is a dispute as to whether the grievant committed the misconduct or the degree of guilt, it is frequently necessary to analyze circumstantial evidence and the credibility of witnesses. Here the employer's investigative process may help an arbitrator evaluate the employer's decision-making process. Was the grievant con-

fronted with the misconduct? What was said by the grievant? Was there an investigation? What did witnesses say? Who was talked to? Was the grievant given a chance to answer the charges? Who was involved in the decision-making process? Why did the company not believe the grievant? If the investigation shows that the grievant engaged in misconduct for which the company had a good-faith business reason to impose discipline, then the employer's disciplinary decision should be upheld. If the employer's investigation fails to show that the grievant engaged in the misconduct charged, then the employer's disciplinary decision should be overturned.

Significantly, the determination of an appropriate penalty is a decision *uniquely vested* in the employer. Once arbitrators determine that an employer has cause to discipline, I submit that they may not substitute their judgment about the appropriate disciplinary penalty unless it is established that the employer acted arbitrarily, capriciously, or discriminatorily. Under this approach, no matter how unfair the discipline may seem to the arbitrators, no matter how sympathetic arbitrators may be for the older, or the long-service, or even the distracted or impaired employee, the penalty may not be disturbed even if the arbitrators would have done something different had they made the decision. It is important to recognize in all circumstances that management is in the best position to evaluate the needs of its own business and its own operations and the appropriateness of a particular penalty.

I am not suggesting that there should be no limitations on management in disciplining employees. I am suggesting, however, that whatever public policy or public interest is furthered by allowing arbitrators to exercise discretion in discipline cases is outweighed by the overall national interest of allowing employers to be competitive, productive, efficient, and to create a safe and healthful workplace. All of these are issues uniquely within the realm of management to evaluate. How a particular employer chooses to compete—to control costs and to educate, train and assimilate its employees—are decisions for management, and not an outside third party such as a labor arbitrator.

What is a proper test for determining just cause? Should arbitrators exercise discretion in discipline cases? I submit that there are no universal standards and that the discipline of employees is an issue that must be uniquely confronted by every employer in today's competitive environment. Employers must

be able to evaluate discipline in light of their own particular business needs and demands. This is the essence of competition. Issues of competition, productivity, quality, service, and even profitability should outweigh any interest or desire of an arbitrator to impose universal standards of fairness or justice. Yet this is exactly what has been done under the rationalization that arbitrators have discretion in discipline cases. Just cause, I submit, does not give arbitrators that type of discretion.
