CHAPTER 5

THE ARBITRATOR'S REMEDIAL POWERS

I.

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My modest efforts today concern postdischarge conduct and postdischarge evidence. When do arbitrators consider these questions and why? Is there any consistency or underlying thread in our treatment of these matters? Is there a rational and discernible general theory on the subject? If not, would the process and the parties be better off, at least in terms of predictability, if there were?

The issue arises in disciplinary proceedings, commonly those in which discharge has been imposed. Most of us have been schooled in the thought and have adopted the principle that in determining whether there was just cause for a discharge, the only relevant evidence by which the employer's decision should be judged are the facts in the possession of the decision maker at the time the discharge determination was made. In a recent case one arbitrator wrote that the basis for this rule seemed so obvious that he would not set out all the reasons supporting it.

Thus, most arbitrators routinely exclude evidence of predischarge conduct unearthed after the discharge even if it is of the same nature as the act for which the discharge occurred. Most arbitrators also refuse to consider, as a basis for the discharge, evidence of acts occurring after the discharge.

Yet, given the proper circumstances, many of us have little hesitancy in considering a "troubled" employee's attempts at rehabilitation, even though those attempts might not have begun until after the discharge. Some of us also consider less uplifting postdischarge conduct in certain circumstances, not as

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grounds for discharge, but when considering the proper penalty to be imposed.

Let me put these approaches in context with some examples. As far as I can tell, the first reference in the Labor Arbitration Reports to the above mentioned general rule (that the case stands or falls on what the employer knew at the time the decision to terminate was made) is in volume 1. In a 1946 case, *Forest Hill Foundry*,[1] Arbitrator Frank Brown held that an employer could not advance new reasons for discharge at arbitration. He so held, however, in the context of an agreement explicitly requiring that the employee be advised of "all reasons" for the discharge at the time it occurred. One of the deans of our profession, Ralph Seward, enunciated the same rule in an early *Bethlehem Steel*[2] case. There, too, however, the contract was explicit, requiring a "written statement of the reasons why the Management intended to discharge" the employee.

Since then the rule has generally been observed and recited as gospel, no matter what the contract said. Interestingly enough it has most often been preceded by such words as "usually," "generally," or "normally," in cases in which the arbitrator discussed and dealt with the exceptions rather than the rule itself. Therefore I suggest we turn to the exceptions. By examining them, we can refresh our recollections as to their scope and in the process obtain a better idea of what, if anything, is left of the general rule.

In a 1970 case, *Sunshine Specialty*,[3] an employee was fired for a belligerent attitude towards others and for poor production. After the discharge the company discovered that before dismissal he had struck the janitor, an older man. Keep in mind that the employee was not fired for that reason because the employer was completely unaware of the incident when the dismissal decision was made.

The general rule is that this incident, not advanced as the reason for the discharge, is not to be considered. However, Arbitrator William Levin did consider it. His opinion stated that the original charge was worthy of a two-week suspension at most. But, solely because of the newly discovered predischarge aggression, he refused to reinstate the employee. Because the dis-

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[1] 1 LA 156 (Brown, 1946).
[2] *Bethlehem Steel Corp.*, 29 LA 634 (Seward, 1957).
[3] 55 LA 1061 (Levin, 1970).

charge should have been a two-week suspension, he did award back pay from the date of the discharge to the date of the hearing (less two weeks); but because of the predischarge misconduct, that employee no longer had a job.

In a 1975 case, *American Air Filter*,[4] an employee was discharged for making off with some company scrap. He was fired because the company was not throwing that scrap away, but had intended to sell it. What the company did not know at the time of the discharge was that this employee had been taking scrap for a long time and, aided by members of his family, was selling it himself. In fact, a postdischarge investigation revealed that the employee, over the course of 15 months, had sold seven tons of scrap, a whole lot more than the company had sold in the same period.

The union sought to exclude the fruits of this postdischarge investigation as irrelevant. It argued, in accord with the general rule, that the company's action had to be judged by what it knew at the time of discharge and that it should not be allowed to bolster its case by information discovered later. While "troubled" that some of the company's strongest evidence had been developed after the discharge and thus could not have been considered when that action was taken, Arbitrator George Young relied on that evidence in concluding that discharge was appropriate. Indeed, he said that absent such evidence, he would have imposed discipline short of discharge, but the evidence had persuaded him that the discharge was justified.

Hill and Sinicropi, in their excellent work on *Evidence in Arbitration*,[5] cite this case as authority for the proposition that the rule against taking postdischarge evidence (here I assume they also mean evidence of predischarge conduct discovered after discharge) "does not prohibit management from investigating further in order to support action already taken." So far, so good. Citing another case, *San Gamo Electric*,[6] they go on to say, "So long as the postdischarge evidence does not add an entirely new basis for the dismissal, no infirmity exists in admitting and crediting this evidence."

In *San Gamo*, the company did a great deal of additional digging after discharging an employee for falsification of time

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[4]64 LA 899 (Young, 1975).

[5]Hill and Sinicropi, Evidence in Arbitration, 2nd ed. (Washington: BNA Books, 1987), 63.

[6]44 LA 593 (Sembower, 1965).

records. The union objected to the evidence the investigation had unearthed. Arbitrator John Sembower, after reviewing two or three earlier cases and quoting the ever-quotable Ralph Seward to the effect that employers might well increase their efforts after learning that the union was proceeding to arbitration, took the evidence, saying it was permissible if it didn't "add an entirely new ground for action or . . . [was used] to enlarge the penalty."

But let us look at that proposition more closely. Suppose the newly discovered evidence is not consistent with the "original theory of the case"; suppose it supports an entirely new charge. Is it excluded? The answer is, not necessarily. In *St. Johnsbury Trucking*,[7] Arbitrator Thomas Knowlton held that such evidence was admissible as a basis for the discharge because it was made known to the union as soon as it was discovered and had been discussed during the grievance procedure. Whitley McCoy, another dean of our profession, took a different approach in an earlier case. In *Pullman Standard*,[8] the company had fired an employee for engaging in a wildcat strike. It later discovered that he had also falsified his employment application some years before.

Again, the union argued that this later discovered evidence should be barred. Because it had been discussed in the grievance procedure, Arbitrator McCoy considered the accusation, not (and here's the twist) as an additional basis for the employee's discharge, but only in determining whether reinstatement should be granted. In other words, irrespective of the disposition of the charge of instigating a wildcat strike, he considered the fact of falsification in determining the appropriateness of the remedy, that is, whether the employee should be reinstated and, if so, under what terms. (Incidentally, two employees were involved in that case. Both had instigated a walkout. Both had falsified their employment applications. The falsity of one was discovered before the discharge and added as a basis for that action. The other, as I said, was discovered afterwards. McCoy sustained both discharges, saying as to the second, however, that he was considering falsification only as an aggravating factor in relation to possible reinstatement.)

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[7]74 LA 607 (Knowlton, 1980).
[8]47 LA 753 (McCoy, 1966).

Arbitrator McCoy took essentially the same approach in an earlier case. In *Pittsburgh Standard Conduit*,[9] he found, after a number of employees had engaged in a wildcat strike, that the company was not justified in discharging only committeemen. However, his reinstatement of those committeemen was without back pay because, subsequent to their discharge, they had engaged in "positive acts of leadership" on the picket line. In making this award, he relied on a 1947 decision of the Court of Appeals for the Seventh Circuit, *Vail Manufacturing Co.*,[10] in which the court affirmed a "course of conduct" conclusion of the National Labor Relations Board (NLRB), holding that a finding of the true motive for a firing could properly be based on employer conduct occurring after the discharge had taken place.

Note that in *Pullman Standard* and *Pittsburgh Conduit* Arbitrator McCoy gave identical treatment to predischarge conduct discovered after the discharge (the application falsification) and conduct engaged in after the discharge (the leadership acts on the picket line), saying that neither could be considered a basis for discharge, but could and should be considered in fashioning a remedy after the original charge had been decided.

I will come back to this approach and test it later, but first I will review some cases involving pure postdischarge conduct, conduct both good and bad. The fact is that we consider postdischarge conduct all the time. On some occasions we consider such conduct only to reject it, but we do consider it. One area of our consideration contains elements of controversy, but the consideration itself is not controversial at all.

Routinely we assess an employee's postdischarge conduct in determining the amount of back pay to be awarded upon reinstatement. We try to determine, when asked, whether the employee acted with ordinary diligence in seeking other employment and whether his conduct constituted a reasonable effort to mitigate damages. Parties often argue over the meaning of those words—"ordinary diligence" and "reasonable effort"—and what a discharged employee must demonstrate in order to meet those standards. They might even seek to persuade the arbitrator to adopt different standards. Most often, however,

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[9]33 LA 807 (McCoy, 1959).
[10]158 F.2d 664, 19 LRRM 2177 (7th Cir. 1947).

they do not dispute that such postdischarge conduct should be considered.

What if the inquiry reveals, not only that effort was lacking, but also that the employee's postdischarge conduct was dishonest, that the grievant lied either to the arbitrator or to the unemployment insurance system about those efforts? Would we consider that conduct in fashioning our award? The Court of Appeals for the Eighth Circuit had no hesitancy in doing so when called upon to enforce an NLRB order. In that case, *Alumbaugh Coal Corp.*,[11] the Board ordered reinstatement of an unlawfully discharged worker with full back pay even though he had lied to the state about interim earnings to obtain unemployment insurance benefits to which he would not have been entitled if he had told the truth. The court refused to enforce the Board's order, saying that the employee's untruthful testimony had abused the process. While the court upheld reinstatement of the employee because the employer had committed an unfair labor practice in discharging him, it limited back pay to the period preceding the employee's own unlawful activity.

Would we do the same? Perhaps some insight into the answer can be gleaned from looking at the reported arbitration cases. As many have observed, there is a risk in relying on reported cases for they comprise a small fraction of the total. Moreover, many of the decisions rendered by our most respected members, decisions we would like to have because of their source, are often unreported for one reason or another. But, as in most things, we go with what we have.

As previously mentioned, most of us have little hesitancy in considering postdischarge conduct when offered on the employee's behalf. Usually that evidence concerns rehabilitation efforts after a discharge for reasons related to alcohol or drug addiction. An attempt is made to prove that the offense (whether it is poor performance, tardiness, absenteeism, or violation of a rule against drinking) was the inevitable consequence of a disease; that the dereliction was neither willful nor volitional because the employee was not in control of the offending actions; and that subsequent recovery makes the grievant employable again and, in all probability, an asset rather than a liability.

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[11]635 F.2d 1380, 106 LRRM 2001 (8th Cir. 1980).

Consideration of two cases reveals the factors that arbitrators take into account in such matters. In *Bay Area Rapid Transit District (BART)*,[12] the parties had agreed on a referral program to assist employees with "marital, psychological, alcohol or drug problems." The contract also provided that "extreme cases . . . would permit" the discharge of employees without a hearing. Extreme cases were defined to include being under the influence of alcohol or being in possession of narcotics while on duty. A BART rule also prohibited the use of alcohol or narcotics by employees while on duty or while "subject to duty."

The grievant was a computer specialist with 11 years of service. She ran the computer that supervised all train activities. She also maintained the District's system for the prevention of rear-end collisions. One morning she reported for work "alert and clear-headed," but left for the restroom after 15 minutes and returned about 10 minutes later. This time she was barefoot and carrying her shoes in her hand. She appeared "very subdued and unaware of her surroundings" and, when asked why she was barefoot, just walked away. Shortly thereafter her supervisor found her in the lunchroom in a "disoriented state" holding a glass pipe and a metal bowl. She handed the pipe over when asked, indicated that she had used it, and was then escorted home. The following day she was suspended. Later analysis of the pipe and a small plastic bag found in her locker indicated the presence of cocaine.

At the District's internal disciplinary hearing, she conceded that she had been under the influence of a controlled substance on the day in question, but said she had taken it at home. It was also revealed that her 11-year record was devoid of discipline, but that she had been counseled about tardiness and unexplained disappearances from her work station in the last four months. Two weeks after that hearing, she entered an inpatient detoxification program, but was terminated a month later. At the arbitration hearing, which took place two months after the termination, she testified that her cocaine abuse was not long-standing but recent, that it was due to the presence of her brother who was living with her temporarily, that she had completed a 30-day inpatient program, was participating in several group meetings a week, had kicked her brother out and had cut

[12]92 LA 444 (Koven, 1989).

off all contact with him, and was in the process of overcoming her newly acquired habit.

BART argued that her conduct on the day in question was extremely serious and fully justified her discharge; that she had not only used narcotics on duty or just before it, but also had been incapable of performing her job. It further argued that her seeking rehabilitation after the incident was irrelevant to the issue of just cause and that the District was not aware of her problem before the suspension and should not, in such circumstances, be held responsible for not offering an opportunity for rehabilitation before terminating her. It also argued that reinstatement would send the wrong message to other employees.

In *Duquesne Light Co.*,[13] decided a week before the *BART* case, the grievant, a forklift operator with seven years of seniority, had had 15 oral and 4 written warnings for offenses of tardiness, failure to report, and poor attendance, plus a suspension of two days for sleeping on the job and a five-day suspension for poor overall attendance and performance. He left work one day with a nosebleed and did not return until five days later, including an intervening weekend.

In his absence his supervisors discussed his behavior, including what was characterized as a lackadaisical attitude and seeming indifference to direction or offers of assistance. It was decided after review that there was sufficient basis for a "for cause" drug test. That test, conducted on his return, was positive for marijuana and cocaine. As a result, the employee was indefinitely suspended. He thereafter sought employee assistance program (EAP) counseling and entered a treatment program. He, too, was terminated.

Two "troubled" employees: one with a clean record and twice as much seniority as the other whose record was far from clean. Yet, the former had clearly ingested drugs on the job on the day leading to her discharge, while the latter had not. As it turned out, the BART computer specialist was reinstated, albeit without back pay and subject to daily testing for a "substantial period of time," but the discharge of the Duquesne forklift operator was sustained.

I cite these cases not to quarrel with their results. As I have had occasion to comment in discussing a case of mine with which our

[13]92 LA 907 (Sergent, 1989).

panelist, Ken Cooper, is quite familiar, "you had to be there." My point is to isolate the factors considered in such cases: seniority, the employee's prior record, the nature of the job, the employer's action and involvement prior to the discharge, the employer's treatment of others in similar circumstances (an important consideration in the *BART* case), the nature of the addiction and its medical validity, the nexus between the addiction and the misconduct,[14] the quality of the evidence of rehabilitation, and the issue of what message reinstatement conveys.

As I read it, the *Duquesne* case went the way it did because the employee, whose record was described as "horrendous," had been offered assistance before and had refused it. That, of course, is a valid consideration. What I quarrel with in that case is that after all the evidence was considered, the arbitrator concluded that the grievant's postdischarge improvement did not give the arbitrator the "authority" (the authority, mind you) to overturn the discharge. Given our understanding of the meaning of just cause, that statement is plain wrong. We have the authority, not only to consider "post-discharge improvement" (to use that arbitrator's phrase), but also in proper circumstances, including the language of the agreement, to accept that evidence and act upon it.

When Gabriel Alexander considered postdischarge evidence and reinstated an employee suffering from alcoholism almost 30 years ago in the *Chrysler Motor Car* case,[15] it was not suggested that he did not have the authority to do so. Nor was that argument raised when Paul Prasow did the same in *Texaco*.[16] In deciding whether or not just cause has been proven, we do have the authority to examine and weigh the underlying cause for misconduct. We have that authority because the proven alcoholic or drug addict or employee plagued with mental illness suffers from a diagnosable and treatable disease medically differentiating him from others. The fact that those diseases are treatable makes all the difference. As Arvid Anderson has said, "the possibility of recovery from an illness," even when that recovery comes later, "is an element which should be considered in determining the appropriate remedy."

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[14]*See Department of Veterans Affairs*, 92 LA 793, 801–802 (Hockenberry, 1989), for the Merit Systems Protection Board's "nexus" criteria.

[15]40 LA 937 (Alexander, 1963).

[16]42 LA 408 (Prasow, 1963).

We may choose in a particular case to decline to exercise that authority. But, while we may differ as to what to do, we cannot lose sight of the fact that, when faced with proof of addiction or mental illness as the cause for misconduct, we have the authority, if not the duty, to consider postdischarge evidence and to decide, based on proof of rehabilitative treatment and its result, whether there is solid ground for reinstatement, either conditionally or otherwise.

Arbitral authority in this area was questioned, you may recall, in *Mobil Oil v. Oil Workers Local 8-831*.[17] There the submission asked whether Mobil on the date of discharge, "December 3, 1979," had just cause to terminate the grievant. The arbitrator considered evidence of an incapacitating mental disorder that Mobil had not been aware of on December 3, 1979, and decided that just cause did not then exist even though Mobil had acted in good faith at the time. Mobil claimed that the arbitrator had exceeded his authority and sought to vacate the award, contending that the arbitrator had no right to consider postdischarge medical evidence and, to coin a phrase, had dispensed his "own brand of industrial justice" in doing so. The court held otherwise, stating that the arbitrator had interpreted the word "cause" to mean "objective cause" and thus could consider any evidence bearing on that issue even if Mobil had not been aware of it when its decision was made.

So we should not, it seems to me, rest a determination to reject postdischarge evidence on our lack of authority to consider it or our lack of authority to rely on it in reversing a managerial decision. That language only aids the new breed of "labor litigators" and others who dispute the arbitrator's authority to do almost anything. If we intend to reject postdischarge evidence, if it is insubstantial, we should say that we have considered it and found it wanting.

A cautionary note on this subject is in order. As our colleague, Tim Bornstein, pointed out in his 1989 New York University Labor Conference paper, "A Second Look at Substance Abuse in Arbitration,"[18] we must be careful in our consideration of evidence concerning rehabilitation efforts and results. We owe that caution to both the employer and the employee. We cannot, as

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[17]679 F.2d 299, 110 LRRM 2620 (3rd Cir. 1982).

[18]Bornstein, *A Second Look at Substance Abuse in Arbitration*, 42nd Annual National Conference on Labor, New York University (New York: Matthew Bender, 1989), 10-1–10-17.

some arbitrators appear to have done, simply accept a grievant's self-diagnosis as proof of an explanatory cause or of rehabilitation. (Note, in contrast, Sam Kates' quick rejection of self-serving evidence in *Cuyahoga County*,[19] and Tom McDermott's similar reaction in *Shell Oil*.[20]) The evidence must be hard evidence—hard as to the diagnosis, hard as to the linkage between the diagnosis and the conduct, and hard as to recovery and rehabilitation. The proof must be sufficient to demonstrate that the employee's misconduct was the unavoidable consequence of alcoholism or drug addiction and that recovery from those afflictions is assured to the point where the risk of repetition of such conduct is slight. And, as Bornstein aptly points out, we cannot well evaluate such evidence unless we take the time to learn a great deal more about the etiology of the afflictions and the possibilities of recidivism than we are destined to learn from the occasional case or two.

Lest we stretch the expectations of the parties, we must be cautious when the defense to proven misconduct ranges beyond widely recognized maladies. To take an example, though there is still debate over the nature of alcoholism, the proper means of combating it, and the prospects of recovery, the prevailing medical opinion is that alcoholism is a treatable disease. As the proliferation of employee assistance programs attests, companies and unions think so too. While the evidence as to permanent recovery and recidivism is mixed, we have all come some distance in our understanding of the subject since it was discussed at the Academy in 1975[21] and Janet Spencer spoke of the "developing notion" of employer responsibility for the "troubled" employee in her landmark article in 1979.[22]

Yet, it is one thing to deal with the "troubled" employee, those suffering from alcoholism, drug addiction, or mental illness in the context of what we now know. (Even those cases can be difficult, as Elliot Goldstein's experience with voyeurism, in *General Telephone Co*,[23] and his inability to discover a test to deter-

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[19]90 LA 655 (Kates, 1987).

[20]90 LA 286 (McDermott, 1988).

[21]*Alcholism in Industry*, in Arbitration—1975, Proceedings of the 28th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1976), 93–137.

[22]Spencer, *The Developing Notion of Employer Responsibility for the Alcoholic, Drug-Addicted or Mentally Ill Employee: An Examination Under Federal and State Employment Statutes & Arbitration Decisions*, 53 St. John's L. Rev. 659 (1979).

[23]*General Tel. Co. of Ind.*, 90 LA 689 (Goldstein, 1988).

mine if a voyeur will commit such acts again can attest.) It is quite another thing to deal with what Dan Collins characterized at our 1988 Annual Meeting in Vancouver as the "distracted" employee, the employee with "marital, family, financial or legal problems,"[24] when the parties themselves have given little guidance in those areas. Generally, it is they, in the test pilot's phrase, who should be "pushing the envelope," not us. But sometimes what the parties do, often informally, guides us in what we should do. In giving meaning to today's concept of just cause, we can also take some comfort and guidance from federal and state legislation establishing a duty to accommodate the handicapped and physically disadvantaged. Yet, if we stray too far and presume to suggest, for example, that decades of aggression can be cured by postdischarge enrollment in a Dale Carnegie course on "How to Win Friends and Influence People," *Butterkrust Bakeries*[25] teaches us that we invite not only disbelief, but vacatur.

Some time ago, you will recall, I asked if we would do what the courts have done and cut off back pay or take other steps because of an employee's postdischarge conduct. I have not forgotten the question. I thought it sensible to discuss postdischarge evidence favorable to the employee before discussing unfavorable evidence, something our critics say we fail to consider. The fact is that we do deal with it. I already mentioned Whit McCoy's 1959 decision in *Pittsburgh Standard Conduit*,[26] the "positive acts of leadership" case. Let me list a few more. McCoy, Gabe Alexander, and Carl Schedler, sitting as a panel, decided some of the Southern Bell strike disciplinary cases in 1955. In one case,[27] a discharged striker committed a subsequent act of misconduct. The panel viewed the issue as whether he was a fit person to be reinstated to his job at the end of the strike and decided, based on both the pre- and postdischarge incidents, that he was not. Bill Simkin did the same thing in *Westinghouse*,[28] reasoning that an employee should rely on the grievance procedure and that his postdischarge actions had made the union's job more difficult.

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[24]Collins, *Just Cause and the Troubled Employee*, in Arbitration 1988: Emerging Issues for the 1990s, Proceedings of the 41st Annual Meeting, National Academy of Arbitrators, ed. Gladys W. Gruenberg (Washington: BNA Books, 1989), 21.

[25]78 LA 562 (Cocalis, 1982); *Butterkrust Bakeries v. Bakery Workers Local 361*, 726 F.2d 698, 115 LRRM 3172 (11th Cir. 1985).

[26]*Supra* note 9.

[27]*Southern Bell Tel. Co.*, 25 LA 270 (McCoy, Alexander, & Schedler, 1955).

[28]*Westinghouse Elec. Corp.*, 26 LA 836 (Simkin, 1956).

Clarence Updegraff, in *Link-Belt*,[29] reasoned that an employee availing himself of the grievance procedure had to conduct himself in a manner justifying his return and said that "conduct subsequent to a discharge which will in and of itself justify the discharge must inevitably operate to prevent reinstatement."

Our great and good friend Peter Seitz qualified his consideration of such evidence. In a 1961 case, *Publishers Association of New York*,[30] he said he would consider that evidence if the events could be characterized as a "single action," that is, subsequent conduct arising out of and, in effect, a continuation of the predischarge conduct. Arbitrator Joseph McKenna followed that same course in *Granite City Steel*,[31] where a discharged insubordinate employee thereafter encouraged a walkout and made threatening phone calls. In *Catholic Press Society*[32] John Gorsuch refused to sustain a discharge, but based a two-month suspension solely on postdischarge conduct when, on the day after his discharge, a union official called a typographers' chapel meeting during working hours.

Sam Kates considered this question and formulated other tests. He said, in *Columbus Show Case Co.*,[33] that postdischarge conduct was not relevant to a discharge but must be considered with regard to reinstatement or back pay when the actions relate to an employee's "fitness for employment . . . or bear . . . on plant morale, discipline, efficiency, and the like." In a later case, *Cadillac Plastics*,[34] he said there were two exceptions to the general rule—you remember the general rule—postdischarge evidence will not be considered—and those exceptions were (1) where the "subsequent occurrences are so closely related to the event or events leading to the discharge as, in substantial effect, to constitute an extension or continuation or integral part thereof" (the Seitz test), and (2) where conduct, in light of previous history, indicates that even if reinstated, the grievant "could not reasonably be expected to be of reasonable value as an employee."

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[29] 17 LA 224 (Updegraff, 1951).
[30] 36 LA 706 (Seitz, 1961).
[31] 53 LA 909 (McKenna, 1969).
[32] 40 LA 641 (Gorsuch, 1963).
[33] 44 LA 507, 514 (Kates, 1965).
[34] 58 LA 812, 814 (Kates, 1972).

In *Hill Refrigeration,*[35] Joan Parker, who had considered reducing a discharge penalty, refused to do so because the grievant had used abusive language during the grievance procedure, had shown no remorse, and, despite the union's request, had refused to apologize. In *Nabisco,*[36] a driver was terminated for falsifying time records. Three weeks later he wrote the company president and federal and state authorities, accusing the operations manager of dishonesty, cheating in a company contest, violating federal and state regulations, and possibly stealing a company car. Arbitrator Stanford Madden concluded that these activities not only had cast doubt on the employee's credibility as a witness, but also had irreparably damaged the employment relationship. He denied the grievance without ever determining whether the employee was guilty of the initial charge.

In *Continental Telephone of Virginia,*[37] it was found that the discharge was not sustainable on a conflict-of-interest charge, but the arbitrator refused reinstatement because of the discharged employee's attempt to influence and intimidate witnesses so that the arbitration would go "his way." And last in this survey is *Big Bear Stores,*[38] decided by Marshall Ross two years ago. In that case a clerk was discharged for failure to comply with an order transferring him to another store. After the discharge, but before the hearing, he went to the new store and walked about in a threatening manner. Subsequent to the hearing, after he had learned that the manager of his old store had been instrumental in his transfer, he returned to that store on two occasions. His behavior then caused the manager to seek and obtain a judicial order of protection.

Arbitrator Ross had ordered reinstatement before all this was revealed to him, but the employer refused to comply, presenting this evidence as tantamount to a new cause for discharge. Because the employer had an earlier opportunity to present the prehearing evidence, Arbitrator Ross considered that evidence only "to aid him in determining the issue of credibility and to determine the sufficiency of the new charge." After reviewing the facts, he found that the discharged employee's aggressive behavior, prehearing and posthearing, had made his further

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[35]69 LA 839 (Parker, 1977).
[36]80 LA 238 (Madden, 1983).
[37]86 LA 274 (Rothschild, 1985).
[38]90 LA 634 (Ross, 1988).

employment intolerable and ruled that the reinstatement order need not be obeyed.

As you can see, different arbitrators advance different justifications for considering what they all characterize as an exception to the general rule. There's the "single event" rationale, the "relevant to reinstatement" or "fitness for further employment" standard, and the concept of "irreparable damage." Whatever the test, postdischarge evidence is considered as long as it can be said to have an effect on the employee's position in the workplace.

The fact that the offender is no longer an employee may lead the logicians among us to question how the offender's conduct can be subject to scrutiny and judgment. The best answer to that seeming difficulty was formulated by John Day Larkin long ago when he said in *American Brake Shoe*:[39]

> Under the terms of the Agreement every discharged employee has the right of appeal to the grievance procedure. He still has enforceable rights. The company's action is not final and unreviewable. It is subject to appeal and review . . . . While the employee retains these rights, he has a continuing obligation to live up to the terms of the Agreement. This [the grievant] did not do.[40]

Is there an underlying thread in our treatment of these matters? Is there a discernible general theory? In my estimation there is. It has to do with the nature of the employment relationship, the rights and obligations flowing from that relationship, and fundamental fairness. One of our commentators today believes that we should not consider any postdischarge evidence. The other, the union representative, believes that we should consider such evidence only if it is favorable to the employee. My view differs.

An employee, it seems to me, may properly be held accountable for predischarge conduct despite its discovery after the discharge, and an employer need not be required to go through a second proceeding so that misconduct may be judged. An employee has no right to escape the consequences of predischarge misconduct simply because it is not discovered until later. Nor does an employee have an unqualified right to force a second proceeding. The key to deciding whether to take such evidence is or should be fair warning, elimination of the element

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[39]13 LA 294 (Larkin, 1949).
[40]*Id.* at 312.

of surprise. As long as the evidence is revealed when discovered and in sufficient time for the employee and the union to discuss it with the employer and to prepare a defense, the employer is entitled to present it, and the arbitrator is obligated to accept and consider it, whether that new evidence conforms to the original theory of the case or not. It makes little difference if that evidence is characterized as an additional ground for discharge or as a barrier to reinstatement because the ultimate effect, retaining or severing the employment relationship based on the standard of just cause, is the same.

The concept of fairness and employer/employee rights and obligations carries over to consideration of postdischarge conduct. As Larkin said, as long as employees have the right under the collective bargaining agreement to appeal the discharge, they have the obligation to conduct themselves consistent with their status as employees. If the grievant's conduct while in that status justifies severing the employment relationship, that consequence should flow.

Similarly, if that conduct clearly demonstrates that the employee's actions prior to discharge were nonvolitional and were the result of an overwhelming disorder the manifestations of which are not likely to be repeated, then fundamental fairness requires that this evidence be considered, particularly when it is accompanied by a record of employer neglect or inattention as discharge approached. As Gabe Alexander said long ago in *Chrysler Motor Car*,[41] when the severity of discipline is under review, it is by no means unusual to take into account "related subsequent events for either their mitigating or aggravating significance." That, as I understand the process, is a basic part of an arbitrator's job.

II.

JESSE SIMONS*

By implication the standard arbitration clause in collective bargaining agreements (CBA), and explicitly, the standard framing of the issue at the hearing, as well as the Supreme Court

[41]40 LA 937 (Alexander, 1963).

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decisions in *Warrior & Gulf*[1] and *Enterprise Wheel & Car Corp.*[2] vest in the arbitrator the authority to award a remedy for proven breach of the CBA.

This paper's goals are: First, to spur further examination of the scope and limits on that remedial authority. Second, to subject to critical review the traditional practice and views held by most Academy members regarding the limited remedial powers of arbitrators, and their definition of the universe circumscribed by those limitations. Third, to urge that it is time for us to review our position and adopt the following view: unless expressly prohibited in the CBA, and upon a finding of a contract breach which results in damages, to award full make-whole remedies, quite beyond those most of us routinely contemplate.

At last year's Annual Meeting we heard an excellent paper by Richard Bloch and Richard Mittenthal, aptly subtitled *Hearing the Sounds of Silence.*[3] Their paper strongly urged that when interpreting a contract, it was necessary, legitimate, and an arbitrator's obligation to also draw vital inferences from the many significant silences frequently found in the CBA. Perhaps the most significant of these silences is found in typical arbitration provisions, most of which do not expressly prescribe or proscribe the remedial authority of arbitrators when a contract breach has been found.

The Mittenthal/Bloch paper boldly asserts:

> Contract promises do exist and may be discovered by means other than strict interpretation of words and in circumstances where, in fact, there has been no specific assent by the parties.[4]

The "means" of discovering such promises are contingent on the arbitrator's willingness "to draw implications from a clause or the contract as a whole."[5]

Arbitrators, Bloch and Mittenthal state, are obligated to interpret and apply "contract silences" and, "when the promise is implied, . . . [to] find the bargain by assessing the import of the agreement, its unwritten assumptions and purposes."[6] The

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[1]*Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960).
[2]*Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).
[3]Mittenthal and Bloch, *Arbitral Implications: Hearing the Sounds of Silence*, in Arbitration 1989: The Arbitrator's Discretion During and After the Hearing, Proceedings of the 42nd Annual Meeting, National Academy of Arbitrators, ed. Gladys W. Gruenberg (Washington: BNA Books, 1990), 65.
[4]*Id.* at 68.
[5]*Id.* at 67.
[6]*Id.* at 65.

authors note that "the authority to decide a violation . . . includes the authority to remedy the violation,"[7] and "[t]he remedy power is implied to preserve the parties' bargain, to make the arbitration process meaningful."[8]

Thus, when confronted with proof of a contract breach and in the face of contractual silence regarding their remedial authority, arbitrators are justified in fashioning a make-whole remedy in accord with inferences fairly drawn from the CBA.

So far, so good. However, the authors give an emphatic "no" to the following two questions:

(1) Is not a full make-whole remedy for a breach of the just cause provision resulting in damages to employees precisely such an "implied promise"?

(2) Is not such remedy precisely "one of the unwritten assumptions and purposes" of the contract?

I found this emphatic "no" surprising because the authors are of the view that "the purpose of back pay is to make the . . . employees whole, and they cannot truly be made whole unless interest is paid on monies they have been improperly denied."[9] The authors note that generally arbitrators refuse to enlarge the make-whole remedy for breach of contract beyond certain self-imposed limits and generally go no further than reinstatement and back pay for breach of the typical discharge clause. Such course, they say, is followed because arbitrators "know that interest claims have for years generally been rejected in arbitration, that labor and management are fully aware of this history, and that nevertheless the parties have not changed their contract to provide for interest."[10] Our colleagues urge that this "seems to constitute acceptance of the customary 'make-whole' remedy"[11] by the parties.

Assertion by the authors of our "past practice"[12] (as distinct from the "past practice" of the parties) as grounds for its continuation even when, in their words, "reason and fairness seem to call for a larger remedy,"[13] in my view, is an anomaly of considerable proportions.

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[7] *Id.* at 78.
[8] *Id.*
[9] *Id.*
[10] *Id.* at 79.
[11] *Id.*
[12] Traditionally and under specific circumstances, arbitrators have held that a "past practice" of the parties can become a term of the CBA. There is no precedent to support the proposition that arbitral past practice shall be given the same treatment.
[13] *Supra* note 3, at 79.

This justification is not new. Ironically, the same rationale was criticized in U.S. District Court Judge James Youngdahl's 1966 article in the *Kentucky Law Journal.*[14] Noting the 1962 revision by the National Labor Relations Board (NLRB) of its previous long-standing policy by directing interest in addition to back pay, he dryly pointed out that arbitrators had not demonstrated the flexibility attributed to them in *Enterprise* in 1960. He stated: "The most common reason for denying interest is that it is unusual,"[15] quoting in support of this view a 1956 award of Sanford Kalish. Youngdahl aptly comments: "This unwillingness to plough new ground is characteristic of interest rejections. Typically the 'arbitrator finds no persuasive basis in arbitration practice or precedent to justify the granting of such a request.'"[16]

The fact that arbitrators, with a few notable exceptions, have not inferred from a typical contract's total silence regarding arbitral remedial authority, an implied promise, in the words of Mittenthal and Bloch, to make the "employee truly whole" seems inexplicable. Beyond precedent the authors do not present any explanation or justification for this narrow view of many of the Academy's founding fathers. This failure seriously undermines the validity of their appeal to past practice as justification for its continuance.

Thus, in their unwillingness to adopt the view that, if not expressly prohibited, there exists in every CBA an inferred bargain that a full make-whole remedy is required for a breach of any contract clause causing damage, the authors retreat from the vigor and challenge of their basic thesis. To that extent they lend weight to and perpetuate the traditional practice of our profession of awarding limited remedies for contract breach.

In considering the origins of this narrow view, I was struck by Arbitrator Edgar Jones' letter in the February 1990 issue of *The Chronicle.*[17] In it he wondered how it was possible that over past years arbitrators had reinstated employees without back pay although there was no proof of disciplinable misconduct. He concluded that some cynics had suggested the possibility that these awards were issued "so as not to further offend the sensibilities of employers already upset at being ordered to reinstate

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[14]Youngdahl, *Awarding Interest in Labor Arbitration Cases*, 54 Ky. L.J. 717 (1966).
[15]*Id.* at 721.
[16]*Id.*
[17]Jones, *Talk of the Town*, The Chronicle, February 1990, p. 3.

unwanted employees, yet to whom arbitrators hoped to remain acceptable." Have we, Jones asked, been "indulging in unduly empathic reactions of sympathy for the plight of the double-paying employer . . . ?"[18]

Such considerations may have influenced the thinking of a few arbitrators in the 1930s and 1940s when arbitration in the mass production industries was new and was observed critically by management. Perhaps excessive prudence or possibly timidity in the face of some employers' hostility to arbitral review of their actions was the cause.

There may be another explanation. Marcia Greenbaum, in her excellent study on remedies in arbitration,[19] has noted that a probable cause for arbitrators not awarding interest in addition to back pay in the late 1940s and 1950s was that interest rates were then three or four percent, and the back-pay period was usually 50 to 60 days. Thus, the interest amount could have been viewed as de minimis.

In reviewing the extensive commentary on the remedial powers of arbitrators, two were outstanding. Both contained quite different but profound and far-reaching conceptual theses. Ultimately and paradoxically, they reached similar conclusions. Archibald Cox, in a paper presented at the 1959 Academy Annual Meeting,[20] saw the arbitrator as necessarily and justifiably vested with broad remedial authority. The other was a 1973 article in the *California Law Review* by David Feller entitled "A General Theory of the Collective Bargaining Agreement."[21] Major elements of that article made up a 1982 article in the *Industrial Relations Law Journal* devoted solely to remedies in arbitration.

In his 1973 article Feller viewed the arbitrator's remedial powers as highly circumscribed, but in a value-free observation he noted that in practice some arbitrators, by the process of drawing inferences from the silences in the contract, have exercised the broad remedial powers Cox believed they had and should exercise. Both papers demonstrate great scholarship in

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[18]*Id.*

[19]Greenbaum, *Remedies*, in Labor and Employment Arbitration, ed. Tim Bornstein and Ann Gosline (New York: Matthew Bender, 1990), 42-1-32.

[20]Cox, *Reflections Upon Labor Arbitration in the Light of the Lincoln Mills Case*, in Arbitration and the Law, Proceedings of the 12th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1959), 24.

[21]Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Calif. L. Rev. 663 (1973); *see also* Feller, *The Remedy Power in Grievance Arbitration*, 5 Indus. Rel. L.J. 128 (1982).

the law, the bargaining process, the evolution of the CBA, and a degree of conceptual originality that is hard to match.

Cox noted that some arbitrators regularly based their awards on foundations other than the express language in the CBA, that such course was proper, and that some fashioned remedies for breach of the CBA without a shred of contract language to guide them. This occurred, he wrote, because the CBA contained many implied obligations, the causes for which were that there were too many people involved, too many problems, too many contingencies to permit the words of the CBA to be the exclusive source of rights and duties. He urged that the parties had to strike some kind of bargain because the costs of disagreement were too high. Due to the nature of the process they were pressured into contracting, although often each knew that the other placed different meaning on the words agreed upon. Frequently they decided to postpone the problem and take a gamble on the arbitrator's decision, if it became necessary.

This process led inevitably to the many silences, ambiguities, contradictions, and vague generalizations present in the CBA. Therefore, in interpreting the CBA, it is the arbitrator's task to determine what covenants were implied and to fashion remedies consistent with the intent of the parties, even when it is obvious that each party's intent was contrary to the other's.

Because the CBA contains either express or implicit rights and obligations, Cox concluded that it is akin to a commercial contract, and therefore it may be considered subject to the general precepts of contract law and jurisprudence. It is fair to conclude, as an extension of Cox's basic thesis, that the arbitrator has the power to award full make-whole remedies for damage caused by contract breach unless expressly prohibited.

I have no hard knowledge of the impact of Cox's paper on Academy members after 1959. It would seem, however, that it had little effect on the existing widespread but not universal tradition of rendering decisions based solely or predominantly on interpretation of the express language of the agreement, and of failing to provide full remedies for breach.

Most arbitrators apparently preferred the instruction of Emanuel Stein in the first paper solely devoted to arbitral remedial powers delivered at the 1960 NAA Annual Meeting.[22] While he thought that arbitrators "ought to be empowered to

[22]Stein, *Remedies in Labor Arbitration*, in Challenges to Arbitration, Proceedings of the 13th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1960), 39.

direct whatever [is] necessary to right the situation," his ultimate conclusion was hardly that. Though believing that the arbitrator should be empowered to deal with a situation as he finds it, he concluded that there was "no need for devising remedies in addition to those which have become well established."[23] This was before the *Trilogy*, but, as far as I know, the *Trilogy* did not change Stein's basic view or that of most arbitrators; they continued to award something less than a full make-whole remedy for contract breach.

A further illustration of the unwillingness of most members of our profession to alter the pattern are the following events. The NLRB in 1962 reviewed its 15 years of past practice since the 1947 enactment of the Taft-Hartley amendments, and instituted a new policy directing interest on back-pay awards for unlawful discharge. Why did our colleagues, then, not follow suit? What was their reasoning for not changing their views?

Similarly, why did we not follow the lead of the NLRB in 1979, when it again reviewed its past practice and directed, as an additional remedy for unlawful discharge, retroactive payment of pension fund contributions, plus interest, and reimbursement to employees for medical expenses that would have been covered by medical plans during the hiatus between discharge and reinstatement? It is significant that the Board's increase in the remedy for improper discharge was not grounded on any grand motivating principle, such as fairness, equity, or justice, though indeed the new policies had that result. The Board merely premised these changes on its "accumulated experience."

Feller's 1973 and 1982 articles also addressed the issue of the remedial powers of arbitrators. In his 1973 paper Feller held the following: The CBA is not a contract containing commitments but rather a set of agreed-upon rules. Under it the arbitrator determines whether the employer has properly administered the rules governing the employment relationship, not whether the employer or the union has breached a promise. If he finds that the employer has not properly administered those rules, he awards the remedy the parties have specified expressly in the rules, not damages for breach of contract. Nonetheless, quite surprisingly and in sharp reversal of his overall view, Feller then

[23] *Id.* at 49.

seems to accept the views expressed in this paper and those of Cox, by stating:

> The distinction between an award of damages for breach of a promise and an award specifying the conduct required by the collective agreement is obscured since on remedy questions . . . the agreement is often silent; arbitrators *must therefore frequently find the remedy by implication or from the practices of the parties. A remedy can be implied fairly easily if it is one commonly accepted in collective bargaining agreements which therefore can be assumed to have been contemplated unless specifically excluded.* Reinstatement with back pay of an employee discharged in violation of a [just cause] provision . . . is such a remedy. . . . [Similarly,] [a]n employee who is laid off or who is denied a promotion is routinely awarded the job he should have been given plus back pay, although agreements do not spell out that remedy. In so doing, however, *the arbitrator is not awarding damages but enforcing a remedial provision which he finds implicit in the agreement.*[24]

But for the above, Feller's basic conceptual view of the CBA, the functions of arbitration, the powers of the arbitrator, and his belief that the remedial powers of the arbitrator are narrow and limited would seem to constitute a most formidable challenge to my conceptual views as well as those of Cox. However, I believe that history has vindicated Cox's rather than Feller's views of the CBA and the role of the arbitrator.

In their 1989 paper Mittenthal and Bloch raised many of the same fundamental conceptual issues addressed by Cox and Feller. Like Cox they stressed the need and obligation of arbitrators to abjure fashioning awards primarily, if not exclusively, on a textual analysis of a disputed contract provision. By so arguing, they successfully rebutted Feller's primary conceptual contentions that the arbitrator is constrained to decide the dispute on the basis of the literal language in the CBA.

With the support of the federal courts, increasingly arbitrators have been adopting the Cox views. This is reflected in 15 recent decisions of arbitrators and the federal courts regarding remedial awards (appearing in an addendum to this paper), which go beyond the tradition of narrowly construing the remedial powers of arbitrators by fashioning awards to make fully whole employees or the union for damages caused by contract breaches. Most of these cases appear in *Remedies in Arbitration*, written by Marvin Hill and Anthony Sinicropi.[25]

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[24]Feller, *supra* note 21, at 786–87 (emphasis added).

[25]Hill and Sinicropi, Remedies in Arbitration, 2d ed. (Washington: BNA Books, 1987).

Although necessarily limited to published awards totaling only a small fraction of all awards rendered, this is a vital resource, and we are indebted to the authors for their comprehensive efforts. The fact that the Second, Third, Sixth, and Eighth Circuit Courts have confirmed awards containing remedies that go beyond limited make-whole for contract breach, and beyond reinstatement plus back pay for breach of the just cause clause, constitutes significant support for the views expressed here.

While there is much to learn from Cox, Feller, and Mittenthal and Bloch, the most authoritative statement of the arbitrator's remedial powers and limits thereon is found in the three Supreme Court decisions generally called the *Trilogy*. *Warrior & Gulf*[26] instructs us that the solution or award be generally in accord with the "variant needs and desires" of one or both of the parties, and that the arbitrator, when rendering the decision, is to "bring to bear considerations which are not expressed in the contract as criteria for judgment." This instruction is a far cry from that of some distinguished commentators, namely, that an award containing a remedy, to be legitimate, must be in accordance with the parties' expressly stated agreement.

Warrior & Gulf extended to arbitrators, when fashioning remedies, a wide range of sources on which to ground their judgment. It authorized use of personal judgment to bring to bear considerations not expressed in the CBA, including matters such as productivity, shop morale and tension, uninterrupted production, and providing solutions (for unforeseeable problems) generally in accord with the varied needs and desires of the parties.

In *Enterprise*, the Supreme Court expanded the preceding dicta and stated that the arbitrator is to:

> bring his informed judgment to bear in order to reach a *fair* solution of a problem. This is especially true when it comes to formulating remedies. There the need is for *flexibility* in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.[27]

In summary, it is my view that *Enterprise* and *Warrior & Gulf* taken together clearly accord arbitrators the authority to construe a provision that does not contain a defined remedy for a

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[26]*Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960).

[27]*Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423, 2425 (1960) (emphasis added).

breach as if it did, and to fashion a remedy by "flexible" use of considerations such as "fairness," "considerations which are not in the contract," "effects upon productivity and morale," and "uninterrupted production." Finally, as long as the remedy is make-whole and is premised on damage caused by a contract breach, an arbitrator, pursuant to the Court's dicta, can be confident that the courts will not overturn the award "because their interpretation of the contract is different from his."

In the *Trilogy* the Court held that arbitrators may award remedies to meet particular contingencies which the CBA drafters may never have thought of, provided that (1) they interpret the CBA, (2) they do not dispense their own brand of industrial justice, and (3) they draw the award's essence from the CBA, although arbitrators may look for guidance to many sources and may bring to bear considerations not expressed in the contract as criteria for judgment. When the words of the award manifest infidelity to this obligation, however, the courts have no choice but to refuse enforcement.

It seems both odd and curious that the Supreme Court chose the word "essence" when holding that arbitrators are to draw their remedies from the CBA. It is odd because "essence" is not a typical legal concept. It is curious because it was not then and to date has not been defined, probably because it defies precise definition, although "essence" is a critical word. Its choice, like most Supreme Court decisions which constitute enunciations of broad policy, was surely the result of careful deliberation.

It is incontestable that most of the provisions in the CBA are employer promises regarding terms and conditions of employment. Therefore, on a purely numerical basis it can be concluded that precisely those provisions are the heart and essence of the CBA. Why did the Court not hold, when it readily could have, that to be legitimate, a remedial award must be grounded in an express definition of the remedy for the breach contained in the violated clause? If it had, it would have sharply limited the scope of the arbitrator's remedial authority.

The question is rhetorical. The Court could not have done so because the arbitrator in *Enterprise* construed the no-discharge-without-just-cause provision as if it contained (which it did not) an express statement of the remedy for the employer's breach. Neither the provision nor the CBA expressly vested in the arbitrator the authority to reinstate, to compute the grievant's

damages for the contract breach, or to award a remedy making the grievant whole by means of back pay.

Similarly odd and curious is the Court's choice of the phrase requiring arbitrators, as a condition precedent to court enforcement of a remedy award, not to manifest "infidelity" to their obligation to draw the remedy from the essence of the CBA. It is odd because fidelity has an archaic flavor. It implies oaths to be faithful to higher authorities or ideas. When one considers that the Court might have used the more typical phrase "consistent with the express or clearly implied terms of the CBA" rather than fidelity, its very uniqueness assumes a higher level of import.

It seems reasonable to suggest that the Court with careful deliberation formulated a wide outer limit for the exercise of arbitral remedial authority, trusting to the discretion, good sense, and informed judgment of arbitrators. In 1987, 27 years later, in *Misco*[28] the Court reaffirmed this view. The conclusion follows that arbitrators who strictly hew to a simple philosophy of industrial justice, namely, that employees damaged by the employer's breach of contract are to be made whole, are acting consistently with the *Trilogy*.

A cardinal principle of jurisprudence is that for a contract breach a remedy is required. This is imprinted on the clay shards, unearthed by archeologists, of ancient laws governing the relatively simple promises made between countries, cities, buyers, and sellers, and is endorsed in the common law and given classic expression in *Hadley v. Baxendale*[29] and its progeny. Awarding remedies that make employees whole for breach of contractual promises reflects precisely the brand of industrial justice both parties implicitly agree should define the limits and form the basis for the arbitrator's remedial powers.

The Wagner Act and the Taft-Hartley Act state that the CBA is a contract binding on both parties. Thus, federal law and the federal courts, when addressing the CBA, both conceptually and in practice, have adopted some portions of contract law, and its time-honored and underlying jurisprudence. This includes the precept that for a contract breach a remedy is required, either one which was actually within the contemplation of the parties who negotiated and executed the contract, or one which must

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[28]*Paper Workers v. Misco, Inc.*, 484 U.S. 29, 126 LRRM 3113 (1987).
[29]157 Eng. Rep. 145 (1854).

have been considered by them even though not expressly stated. The parties who enter into contracts and the attorneys who represent them in court and in arbitration have for decades viewed the CBA as a binding contract containing enforceable promises, duties, and rights, breach of which entailing damage requires a make-whole remedy, even though the contract does not expressly so state. Apparently they have reached this conclusion although most have not read Cox or Bloch and Mittenthal.

Having spent some 20 years as a union representative and another 20 years representing management, I can testify that in the maritime, longshore, newspaper, garment, petroleum, and shipbuilding industries, the bargainers I knew viewed the CBA as a binding contract containing enforceable rights and obligations and an implicit promise that an employee was to be made whole for a contract breach which resulted in damage. It was so obvious that it was never discussed.

A substantiating fact is that some of the most sophisticated management bargainers have now obtained language beyond the typical clause directing arbitrators not to add to, subtract from, alter, or ignore any provision in the agreement. For example, some contracts expressly bar totally or narrowly circumscribe make-whole remedies awarded reinstated employees. Some employer-bargainers have persuaded unions to include in a definition of a substantive violation the requirement that management's action must be found to have been arbitrary or in bad faith, as a condition to awarding a remedy. Clauses that narrowly restrict the remedial authority of arbitrators are not in wide use but are not uncommon. In any event these provisions are tacit evidence of management's recognition of the basic thesis advanced here regarding the broad remedial authority of arbitrators.

Until 1987 the views expressed here did not guide me when fashioning remedies for proven breach by an employer of contractual promises in the CBA resulting in damages. For 17 years I directed limited make-whole remedies. But in 1987 a union argued for a make-whole remedy beyond reinstatement with back pay. The briefs, reply briefs, and the prior history of the dispute suggested a high probability that my decision would be subjected to judicial review. This prompted my review of the *Trilogy*, other court decisions, the Hill-Sinicropi volume, and the papers of distinguished commentators addressing arbitral

remedial authority. The seeds for this paper germinated in the course of my research.

I was convinced that my award's essence was drawn from the CBA and that its words manifested fidelity to that obligation. All but one of the remedies awarded were fashioned to make the grievant fully whole for the denial of benefits which he would otherwise have received but for the employer's breach of its contractual promises. Finally, and perhaps most important, my award was not grounded in my own "brand of industrial justice" but was solidly premised on the conceptual view that the CBA was in a number of ways like a commercial contract and that it had come to be so treated by statute and federal courts, at least to the extent of applying, in part, commercial contract jurisprudence to the CBA by viewing it as containing enforceable promises and rights, breach of which justified full make-whole compensation for damage incurred, even though the CBA did not expressly so provide.

Many may agree with the validity of the conceptual case made here for the position that arbitrators are vested with authority, unless expressly prohibited, to award full make-whole remedies for contract breach. To those who so agree, there may well remain the question: Why have we not exercised the remedial authority vested in us? Some may say, despite the issuance for 40 years of countless numbers of limited remedial awards for contract breaches causing damage, the CBA has not been changed to require a full remedy. Those few efforts to achieve this change have not been successful; therefore, history constitutes solid ground for not changing traditional arbitral practice and for not exercising the authority we possess to make awards providing full remedy for damages. This 40-year history, many say, conclusively indicates that the parties, for the most part, are content with the conventional arbitral remedial result; therefore change is unwarranted. This view has much merit and seemingly is irrefutable.

In answer to it, I urge that we clearly do have the authority to grant a full remedy for damage caused by contract breach. This in itself is reason for so awarding. A promise breached causing employee damage calls for a remedy commensurate with the damage. Adoption by arbitrators of this postulate requires no philosophical or moral justification. It requires no "private brand of industrial justice" (to use the words of the Supreme Court in *Enterprise*) as justification. The precept that breach of

covenants calls for remedy of damage is time-honored and well grounded in the ancient history of Western law and culture. The fact that the fallout or consequences of adoption of a course based on this postulate leads to arbitral remedial results possessing a greater degree of fairness, equity, and justice than our traditional past practice, certainly does not justify viewing it with suspicion or for rejecting it.

When breach of the just cause provision or any other contract clause has occurred causing damage, under a typical arbitration clause and under a typical joint framing of the issue at the hearing, it is sound practice for an arbitrator to render an award containing a full make-whole remedy, if not expressly proscribed. This, whenever it can be calculated, compensates the grievant or the union (or the employer, in those rare instances when it is the grieving party) for the damage incurred. In addition to awarding actual damage from the grievance date to the date of the award or the date of termination of the breach, whichever is later, there is to be added interest at the rate then used by the NLRB and, if applicable, the additional remedies listed below.

1. Reinstatement retroactive to the discharge date, or to some other date as the arbitrator shall determine, plus a sum equal to the earnings that would have been received during the full or limited back-pay period to the actual date of return to employment, minus earnings and unemployment insurance. Back pay is to include a sum equal to earnings at the premium rate that would have been worked based on prior records, and vacation and holiday pay that would have been paid but for the improper discharge. To all these sums is to be added interest at the rate then used by the NLRB in calculating interest on back pay.
2. Payment of a sum for medical expenses incurred during the back-pay period that would have been paid under the benefit provisions in the contract, and payment of a sum equal to the cash payments that would have been paid in the event of loss of life or limbs, plus interest at the rate then paid by the NLRB on back pay.
3. Payment of pension contributions that would have been paid to the appropriate fund during the back-pay period, plus interest at the rate the fund is then earning.
4. Directing that all time lost during the back-pay period be counted as time worked for all purposes.

Adoption by arbitrators, in whole or in part, of the practice of awarding the above comprehensive make-whole remedies places in a new light the vexing array of problems arising out of the contentious issue of the employee obligation to mitigate damages during the back-pay period by continuous good-faith efforts to obtain employment. Arbitrators who go this route may face increased concern with damage mitigation. They are well advised to focus carefully on the evidence and argument submitted so that a well-grounded and reasoned determination is made of earnings and unemployment insurance received during the back-pay period, to the end that instances of abuse and fraud are held to an irreducible minimum.

I am not unmindful that a wrongful discharge, with its accompanying abrupt cutting off of wages, can result in damage claims for loss of a refrigerator, auto, home, or cancellation of private insurance coverage, or even intangible and remote consequences. Without being maudlin there are also potential foreseeable consequences: family destruction, withdrawal of children from college, cessation of support to dependent relatives, even nervous breakdown or suicide. It would be prudent, I stress, to confine our discussion today to the four make-whole factors I have addressed above, and to leave for another day discussion of more remote claims for damages which are perhaps not so obivously foreseeable and perhaps not so obviously connected to the employment relationship and the CBA.

In closing, I emphasize that unless expressly proscribed, arbitral awards that provide full make-whole remedy as compensation for damage incurred because of contract breach are in accord with federal law, the views of the federal courts, and the standard framing of the issue. These awards constitute a sound construction of the CBA in accordance with traditional rulings embedded in contract law and jurisprudence. This practice will result in arbitral awards which are fair, pursuant to the criteria external to the CBA to be used when fashioning remedies, as enunciated in the *Trilogy*.

Addendum

Cases awarding nontraditional remedies:

1. *General Elec. Co.*, 39 LA 897 (Hilpert, 1962) (reinstated with full back pay and interest "at the legal rate").
2. *All States Trailer Co.*, 44 LA 104 (Leflar, 1965) (directed full back pay and 6% interest).

3. *Allied Chem. Corp.*, 47 LA 686 (Hilpert, 1966) (awarded interest on back pay).
4. *Sunshine Convalescent Hosp.*, 62 LA 276 (Leonard, 1974) (awarded interest).
5. *Markel Mfg. Co.*, 73 LA 1292 (Williams, 1975) (awarded interest on back pay).
6. *Teamsters Local 153 v. Falstaff Brewing Corp.*, 479 F. Supp. 862 (3d Cir. 1979) (sustained award of interest to make employee whole).
7. *Teamsters Local 115 v. DeSoto, Inc.*, 725 F.2d 931, 115 LRRM 2449 (3d Cir. 1984) (sustained award viewed by the court as "punitive").
8. *Electrical Workers (UE) Local 1139 v. Litton Microwave Cooking Prods.*, 728 F.2d 970, 115 LRRM 2633 (8th Cir. 1984) (sustained award of second paid vacation when employer required employees to take vacations at time not permitted by the collective bargaining agreement).
9. *Coppes, Inc.*, 80 LA 1058 (Kossoff, 1983) (added interest to admittedly late payment of vacation pay).
10. *Electrical Workers (IBEW) Local 1842 v. Cincinnati Elecs. Corp.*, 808 F.2d 1201, 124 LRRM 2473 (6th Cir. 1987) (sustained award directing payment to union of $3,000 "to deter temptation of employer to default in response to grievance").
11. *Sterling Colo. Beef Co.*, 86 LA 866 (Smith, 1986) (directed back pay, insurance for hiatus period, prorated vacation, and interest on all payments).
12. *Dutko Wall Sys.*, 89 LA 1215 (Weisinger, 1987) (directed retroactive contributions to benefit plan plus interest of 8%).
13. *Kaiser Permanente Medical Care Program*, 89 LA 841 (Alleyne, 1987) (awarded interest on back pay).
14. *Synergy Gas Co. v. Sasso*, 853 F.2d 59, 129 LRRM 2041 (2d Cir. 1988), *cert. denied*, 57 USLW 3412, 129 LRRM 3072 (1989) (sustained arbitration award, 91 LA 77 (Simons, 1987), requiring back pay, retroactive reimbursement of profit-sharing contributions, retroactive contribution to pension plan, all plus 16% interest, and payment to union of reasonable attorney's fees).
15. *Molders Local 20 v. Brooks Foundry, Inc.*, 892 F.2d 1283, 133 LRRM 2280 (6th Cir. 1990) (refused to enforce award of $13,000 to union to remedy breach of wage agreement concession).

III. A UNION VIEWPOINT

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I will have some comments in response to the fine papers of George Nicolau and Jesse Simons. First, I want to speak about a

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related topic that is very much on the minds of labor relations professionals in the 1990s—the problem of employee drug use and the growth of workplace drug testing. In particular, I will be arguing that we should recognize a right to rehabilitation for employees who test positive on a drug test or who are disciplined for misconduct caused by drug abuse or drug dependence.

Very soon drug and alcohol testing will be pervasive enough to create a whole new class of employees: those who have tested positive. This new class of employees has a difficult set of problems that are now laid, like an abandoned baby, at our doorstep. Labor relations professionals (and I am including labor arbitrators within that classification) are not the first, and certainly will not be the last, group in society that must face the facts of drug and alcohol abuse and addiction and start working towards realistic solutions.

The newer, more addictive, and dangerous drugs in particular have created new populations who need all kinds of help, and those needs are straining the resources of all manner of public and private institutions. Underfunded social welfare agencies are searching desperately to find services for families decimated by drug addiction. The criminal justice system is drowning in a torrent of drug cases, and hospitals are filling up with crippled "boarder" babies—drug-impaired infants abandoned on doorsteps by drug-addicted mothers.

With the advent of workplace drug testing—and perhaps alcohol testing as well—labor relations professionals, too, will face this new population of drug abusing and drug dependent workers falling out of the social order and into their laps. At Air Line Pilots Association (ALPA),[1] we have not seen many positive drug tests, probably because use and abuse of illegal substances is a rare malady among professional pilots. We expect that some increase in the numbers will result from universal mandatory random testing,[2] which commenced earlier this year.

The question is: How will we deal with employees who test positive on a drug or alcohol test? Will they be discharged as soon as the test results are confirmed? Will they comprise a whole new

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[1]ALPA represents 42,000 professional airline pilots at 47 airlines.

[2]The Federal Aviation Administration's interim final rule, *Procedures for Transportation Workplace Drug Testing Programs*, 49 C.F.R. Part 40, 53 Fed. Reg. 47002 (Nov. 21, 1988), obligated employers in the aviation industry to establish workplace antidrug programs according to specified procedures. The final rule, *Anti-Drug Program for Personnel Engaged in Specified Aviation Activities*, 14 C.F.R. Part 61, 53 Fed. Reg. 47024 (Nov. 21, 1988), sets forth the regulatory changes necessary to implement the antidrug programs.

category of the unemployed—the drug-test unemployed? Will we simply dump them at another's doorstep? Or will we offer treatment—employee assistance programs (EAPs) and rehabilitation, an effort to understand and resolve their problems?

I submit that it is our collective duty as members of this community to help these people and help solve their problems—which are, of course, our problems.

Rehabilitation is clearly the correct solution, in fact the only solution, that we have for the problems of alcohol and drug dependence. I believe we are compelled to establish a right to rehabilitation quickly and firmly in the common law of labor relations.

Let me pause here to say that some of you may have heard something similar at a Society of Professionals in Dispute Resolution (SPIDR) conference in Washington last October. Bob Savelson of ALPA's general counsel law firm, Cohen, Weiss & Simon, submitted an excellent paper at that conference calling for the recognition of a right to rehabilitation.[3] Although Bob's paper was most certainly his own work, he and I and others at ALPA—most notably Dr. Richard L. Masters, ALPA's Aeromedical Advisor—had discussed this concept in some depth, and we agreed on some basic principles set forth in the SPIDR paper, which are worth repeating here. I have added a few ideas and twists of my own, for which Mr. Savelson need not take responsibility.

Why should there be a right to rehabilitation? Why should we afford an employee who tests positive or who engages in drug-related misconduct a right to rehabilitation? There are at least several good reasons.

First, *addiction is a disease.* We are too far along in our medical understanding of drug and alcohol dependence to deny this plain fact. Those who would place all blame for addiction on the individual are either ignorant or irresponsible or both. The evidence is all around us. I remember reading in *The Washington Post* just a few weeks ago that scientists were edging closer to isolating the gene that causes a predisposition toward alcohol and drug dependence. Soon the gene will be identified, and we

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[3]Savelson, *Rehabilitation of Drug Users: The Ignored Step-Child of Drug Testing Public Policy,* speech delivered at the 17th International Conference, Society of Professionals in Dispute Resolution, October 19, 1989, Washington, D.C.

will learn a great deal more about the genetic basis for chemical dependency.

While science advances, however, we lag far behind. Most of us have come to the point where we recognize alcoholism as a disease, but we have a long way to go on the issue of drugs. Drugs, some arbitrators are quick to declare, are illegal. And the user knew that the first time that he chose to ingest an illegal substance. Following this line of reasoning, even if the employee becomes addicted, he gets no mercy and no chance for rehabilitation.

To be blunt, I submit that kind of thinking is obsolete and counterproductive. Addiction to alcohol or drugs is very bad, and the "legal-illegal" distinction is of little use to those who care to work on solutions to the problem, rather than merely assess blame and punishment. It is high time we recognize that drug abuse, similar to alcoholism, is an illness and nonvolitional by definition. In either case there is denial, and dependence, and probably a chemical and genetic etiology for the problem. Whether it involves alcohol or drugs, addiction is a disease and must be dealt with as such. In either case, rehabilitation is the correct response to the disease and should be offered to the patient.

Second, *a rehabilitation program promotes safety.* Rehabilitation is probably the surest and best-known method for beating the two greatest barriers to treatment—denial and fear of job loss. The opportunity for rehabilitation encourages alcohol and drug users to come forward and enter treatment, and permits them to be identified and removed from safety-sensitive positions pending return to sobriety and good health. Of course, it may be that the "carrot" of rehabilitation must be combined with the "stick" of threatened job loss for failure to complete the process and cooperate with monitoring after a return to work.

Third, *rehabilitation is good social policy.* In an age of shrinking public commitments and growing social needs, private institutions must take on more responsibility for the problems of drug and alcohol abuse. In many cases it is the employer that requires drug testing, and the employer should take responsibility for those who fail the test. In the airline industry, of course, drug testing is now mandated by the government for pilots, flight attendants, mechanics, and others in so-called safety-sensitive

positions. Mandatory alcohol testing is being proposed.[4] The drug-testing regulations deal at length with the testing procedures and require removal from the workplace of persons who test positive. While they do not dictate discharge, neither do they impose any duty to offer treatment or rehabilitation.

Employers in all industries will have to pick up the ball that others—including government agencies—have dropped, because employers are institutionally capable of doing so, and because they are institutionally responsible to the people they employ. We also should keep in mind that with each successful rehabilitation, we have one less user in the drug marketplace, one more productive worker, and perhaps a life and a family saved from ruin.

Fourth, *rehabilitation is good labor relations.* Unions and managements that cooperate on this issue may find much common ground as they work through the difficult problems of drug and alcohol rehabilitation. My personal experience is that cooperation and mutual trust developed in this arena do carry over to other areas of the labor-management relationship.

Fifth, *rehabilitation is cost-effective for the employer.* That is what the experts tell us. That is the experience of air carriers that supported the Human Intervention and Motivation Study, the ALPA-managed, federally funded model alcohol and drug program best known by the acronym HIMS. It is probably also cost-effective for the nation, in terms of productivity, tax dollars collected and spent, and the overall commitment of scarce national resources in the so-called war against drugs.

Finally, *rehabilitation works.* The ALPA HIMS program, initiated 15 years ago to address the problem of alcoholism and alcohol-related disabilities among airline pilots, operated with the cooperation and support of the FAA and the airlines. During the 10 years that ALPA maintained this unique, federally funded model program, less than 15 percent of the cases were self-referred; 85 percent were discovered by trained ALPA representatives or management or both. Over 900 pilots successfully completed the program and were recertified by FAA and

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[4]U.S. Department of Transportation, *Alcohol Abuse Prevention Program for the Transportation Industry; Advance Notice of Proposed Rulemaking,* 54 Fed. Reg. 46326 (Nov. 2, 1989). The Secretary of Transportation invited comment on proposed regulations concerning, inter alia, various methods of random testing of employees in the transportation industry to determine whether such employees are under the influence of alcohol.

returned to flying duty. The long-term success rate for rehabilitation of alcoholism cases was extremely high—between 90 and 95 percent.[5] There has been little experience with drugs, although a few pilot drug users have been rehabilitated and recertified by FAA.

The Association of Flight Attendants also sponsors a union-run EAP program, which reports handling 75 percent of all types of rehabilitation cases successfully. James Welch, Director of United Airlines' EAP from 1984 to 1987, claims that recovery rates for first-time patients in United's alcohol and drug rehabilitation programs were 92 percent for pilots and 82 percent for flight attendants.

Despite all of these good and strong reasons for recognizing a right to rehabilitation, many arbitrators decline to offer rehabilitation out of caution, out of a belief that the parties must take the lead in these matters. However, I believe that arbitrators should be taking the reins, that arbitrators may order rehabilitation opportunities pursuant to their established authority to perform two essential tasks: (1) to fashion remedies under the collective bargaining agreement, and (2) to mold and refine the concept of "just cause."

The vast breadth of an arbitrator's remedial authority has been affirmed time and again by the federal courts. Simons' paper made this point forcefully and well. But a few words from *Warrior & Gulf*[6] bear repeating. The Supreme Court expressly granted arbitrators authority to look beyond the express provisions of the contract, and to mold "a system of private law for all the problems which may arise and to provide for their solution." The Court also stated in *Enterprise Wheel*[7] that an arbitrator is to "bring his informed judgment to bear in order to reach a fair solution to the problem. This is especially true when it comes to formulating remedies." In the 1987 *Misco*[8] case the Supreme Court reaffirmed this view, quoting with emphasis those very words from *Enterprise Wheel.* So it is clear that an arbitrator has extraordinary authority to fashion remedies—even remedies

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[5]Report of the Executive Chairman for Aeromedical Resources and the Aeromedical Advisor to the ALPA Board of Directors, Nov. 1986.

[6]*Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416, 2419 (1960).

[7]*Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423, 2425 (1960).

[8]*Paperworkers v. Misco, Inc.*, 484 U.S. 29, 126 LRRM 3113, 3118 (1987).

that do not appear in the contract, and that may not have been contemplated by the parties.

The second source of arbitral authority to order rehabilitation lies in the concept of "just cause." Just cause is seldom defined by contract; rather, the parties expect an arbitrator to define it for them case by case. It is a child of the arbitral common law. Just cause embraces broad and ineffable notions of fairness and justice that defy confinement by mere words in a contractual grievance or arbitration clause. So by definition, or lack of definition, just cause is a malleable concept. Its content changes to reflect history, scientific advances, social developments, and everything else that changes our notions of fairness and justice.

In the 1990s the recent history is that drug addiction is a growing cancer on orderly society. Scientific advances tell us that drug addiction is a disease no less than alcoholism. And a massive social response is aiming to prevent new drug use through education and to treat those who fall prey to drugs, to offer rehabilitation.

So all the elements are before you. Arbitrators already possess the bases for recognizing a right to rehabilitation for the drug or alcohol abuser. That right need not be created out of thin air. Rather, it may be grounded in established notions of arbitral authority and, I believe, it is compelled by logic and circumstance.

How, then, do we define the right to rehabilitation? I propose that we recognize a right to rehabilitation for employees who test positive, or whose misconduct is caused by an addiction, subject to the following considerations:

First, *successful completion of an approved rehabilitation program* tailored to the case of that individual and the particular craft, together with necessary job requalification. Some programs may be minimal and others more extensive, depending on need and circumstances.

Second, *participation in aftercare or continuing care and a postrehabilitation monitoring process* for an appropriate period of time. Aside from governmental requirements, this process should be established by the professionals involved: medical doctors, treatment counselors, and EAP personnel. Monitoring might extend for as long as two years.

Third, *rehabilitation opportunities in the event of relapse* after requalification must be available. They should be available regardless of whether the individual comes forward, is referred

by peers or co-workers, or is picked up by a positive test. Experts tell us that the prognosis for successful rehabilitation of a relapse case is essentially the same regardless of how the case starts. Additional rehabilitation opportunities are consistent with the goal of assuring safety, because the chance of individuals coming forward or being successfully referred is increased.

Arbitrators should recognize a right to rehabilitation along these lines in all the contexts where the issue arises. The right should be recognized in an interest arbitration where the employer proposes automatic discharge for a positive drug or alcohol test, and where the union proposes that no positive test be regarded as a ground for discharge, as long as the employee completes a suitable rehabilitation and requalification program.

The right should also be used in the grievance and arbitration machinery, to overturn drug- and alcohol-related discharges where the employee has not been offered an opportunity for rehabilitation. A positive drug test, or misconduct caused by addiction, should not be found to constitute just cause for discharges where rehabilitation has not been offered. The remedy for such a wrongful discharge should be reinstatement subject to rehabilitation.

The 1990s have begun, and it is time we recognize that drug abuse, like alcoholism, is an illness and nonvolitional by definition. It is also time that we, the labor relations community, take more responsibility for one of our nation's great social problems. Rehabilitation is a solution we need and a solution that works; it is one we should start offering right now.

If you will bear with me another minute or two, I would like to offer one union advocate's response to the papers of Nicolau and Simons. I applaud Simons' argument for an extension of make-whole remedies. It seems easy enough for arbitrators to follow the lead of the NLRB on this issue and offer, routinely, a more realistic remedy to an employee who has suffered a wrongful discharge. I would go farther than Simons, and propose that arbitrators award a variety of consequential damages resulting from a wrongful employer action—for instance, redress for the loss of a house or a car. If the wrong causes damage, the damage ought to be compensated; that, I would think, is the proper meaning of the term, "make whole."

Finally, I would like to offer a few comments about Nicolau's fine review of the question whether arbitrators should consider evidence discovered after management discharges an employee.

First, I would second a point made forcefully in the paper—that arbitrators do have authority, and should not question their own authority, to hear and rule on the admissibility of evidence of every sort. The Supreme Court recognized that authority in *Misco,* by holding that an arbitrator may decide to exclude evidence of postdischarge events.

Certain federal courts have already attempted to limit arbitral authority; witness, for example, the so-called "public policy" cases, in which employers try to convince a federal court to dispense its own, inexpert brand of industrial justice. Any arbitral disinclination to exercise authority over the evidence presented only encourages those who would destroy the final and binding effect of grievance and arbitration procedures and replace them with endless litigation in federal court.

I must take exception, however, to certain conclusions drawn by Nicolau regarding the admission of evidence discovered after a discharge. Nicolau appears to advocate a nominally "even playing field," where postdischarge evidence unfavorable to the employee should be admitted as long as the employee and the union have notice and an opportunity to prepare a defense, and on the other hand, postdischarge evidence favorable to the employee should be admitted where there is evidence that an illness led to the misconduct in question and that the employee had entered rehabilitation. I agree with the latter, but not the former.

That set of evidentiary rules, although it may sound even-handed, would not "even out the playing field." Rather, I believe it would upset the balance in the employer's favor. This union advocate would insist on the exclusion of most postdischarge evidence that is unfavorable to the employee for several reasons.

First, the employer can always use evidence of further misconduct to justify further separate discipline or discharge action. I agree in general with Nicolau's statement that fundamental fairness—notice to the employee and the union and a chance to prepare a defense—is the key here. However, I note that ALPA contracts often require by express terms that management provide the employee advance, written notice of the precise charges that are the basis for the decision to discipline. When the contract spells out that procedural requirement, the evidentiary rules should not be bent to undermine it. But even where there is no express contractual restriction, I contend that an employer

should have all the evidence before deciding to discharge an employee.

Second, admitting postdischarge evidence of misconduct will encourage improvident disciplinary action. How many disciplinary actions are instituted in anger, in haste, without much thought or investigation or careful consideration? You know and I know the answer—lots of them. Our staff spends a fair amount of time drawing arbitrators' attention to faulty disciplinary decisions. It seems inevitable that managers will make more ill-considered decisions to discharge where they know they can get the evidence afterwards. Why not fire now and ask questions later? We should continue to give employers a good answer to that question—because an arbitrator will rescind the discipline.

Third, employers act first, causing damage to the employee. The playing field can never be even in a system where employees suffer the blow of a suspension without pay or termination before an arbitrator decides whether they are guilty of the charge, or whether the penalty is unduly severe.

A related point is that the remedy does not make the employee whole, even when the discharge is reversed. As Simons pointed out, arbitrators generally limit remedies to back pay, restoration of seniority, and resumption of contractual rights, hesitating in most cases to take a small step forward by awarding interest on back pay, and almost universally declining to order compensation for all lost benefits or for consequential damages. So the employer that initiates a faulty discharge takes the liberty of doing a certain amount of damage that it will never have to repair. Because they have such power to hurt, employers should be held to very strict procedural standards in a discharge case. Managers should perform a complete and thorough investigation in advance of a decision to discharge, and should be barred from introducing a new basis for discharge or new evidence collected after the decision to discipline has been made.

In conclusion, I urge the labor arbitration community to follow the wise counsel given me by two of the Academy's past presidents, Jean McKelvey and Jerry Barrett. From Jean, who first introduced me to the world of labor arbitration at Cornell, and from Jerry, who whipped me into shape from the bench while he was permanent arbitrator at Western Airlines and I presented numerous cases before him as advocate for the Western pilots, I learned this message, perhaps not *in haec verba,* but I got the point: Do the right thing. I urge members of the Acad-

emy and labor relations professionals assembled here to do the right thing and champion the right to rehabilitation.

IV. A MANAGEMENT VIEWPOINT

GEORGE J. MATKOV, JR.*

As indicated by the preceding speakers, the age-old arbitral rule requiring that the propriety of a discharge be judged with reference to the facts in the employer's possession at the time of the termination exists as only a distant and rarely observed reference point for many modern day arbitrators. In seeming indifference to the facts prompting employers' discharge decisions, these arbitrators have used employees' postdischarge reforms as a vehicle to reinstate justifiably discharged grievants. My discussion today will highlight some of the problems that attend this forgiveness of predischarge deficiencies because of postdischarge behavior, and urge the wholesale exclusion of evidence regarding postdischarge improvements in employee conduct.

Arguments Supporting the Exclusion of Postdischarge Conduct

The Inconsistent Rationale Employed in Admitting Postdischarge Conduct

A survey of the relevant cases reveals that, when overcome with compassion or pity for troubled or down-and-out grievants, arbitrators all too frequently disregard evidence that admittedly establishes the propriety of the discharge, and focus instead on postdischarge behavioral improvements or attempts at reform. This approach is troubling for several reasons.

First, the arbitrators who consider such evidence do not follow any consistent or logical approach in admitting or considering it. Instead, they employ a number of disparate rationales to admit evidence of postdischarge conduct. Most often, the evidence is admitted on the theory that, while not relevant to the "just cause"

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*Matkov, Salzman, Madoff & Gunn, Chicago, Illinois. The author wishes to thank Elizabeth M. McDowell, an associate with his firm, who worked with him in drafting this paper.

determination, it should be considered in analyzing the appropriateness of the penalty imposed on the grievant.[1]

On the other hand, some arbitrators have justified their admission of such evidence on the theory that the postdischarge behavior flowed directly from, was contemporaneous with, or had a direct bearing upon the termination and the events surrounding it.[2] Some arbitrators have considered such evidence on the ground that it may weigh upon the grievant's credibility.[3]

Other arbitrators have admitted postdischarge evidence by crafting an exception to the general exclusionary rule specifically for evidence relating to rehabilitation of alcohol or substance abusers.[4] Postdischarge conduct has also been considered on the ground that the arbitrator has a duty to provide viable solutions to the parties, or as a result of the arbitrator's sense of justice tempered with compassion for the grievant who recognizes his or her wrong.[5]

These inconsistent and ill-defined benchmarks for determining admissibility are difficult to reconcile and invite uneven and discriminatory application. They put the employer at an unfair disadvantage because, without the ability to determine whether and to what extent postdischarge evidence will be considered, the employer can never be certain whether its discharge decisions will pass arbitral muster.

Arbitrators' Indifference to Severity of Underlying Offenses and the Ease With Which Employees Can Obtain Reinstatement Through Postdischarge Behavior

Aside from problems stemming from the array of different theories employed by arbitrators to admit postdischarge evidence, arbitrators further complicate this area by paying little attention to the magnitude of the underlying offenses for which the employees were discharged. Moreover, these arbitrators

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[1]*E.g.*, *Ashland Petroleum Co.*, 90 LA 681 (Volz, 1988); *Continental Tel. Co. of Va.*, 86 LA 274 (Rothschild, 1985); *Pittsburgh Plate Glass Co.*, 49 LA 370 (Dworkin, 1967); *Texaco*, 42 LA 408 (Prasow, 1963); *Chrysler Corp.*, 40 LA 935 (Alexander, 1963); *Catholic Press Soc'y*, 40 LA 641 (Gorsuch, 1963); *Pittsburgh Standard Conduit Co.*, 33 LA 807 (McCoy, 1959).

[2]*E.g.*, *Cadillac Plastics Chem. Co.*, 58 LA 812 (Kates, 1972); *Granite City Steel Co.*, 53 LA 909 (McKenna, 1969); *Glass Container Mfrs. Inst.*, 53 LA 1266 (Dworkin, 1967); *Publishers Ass'n of New York City*, 36 LA 706 (Seitz, 1961).

[3]*E.g.*, *Nabisco Brands*, 80 LA 238 (Madden, 1983).

[4]*E.g.*, *Giant Eagle Mkts.*, 1975 ARB ¶8145 (Emerson, 1975); *Amoco Oil Co.*, 61 LA 10 (Cushman, 1973).

[5]*Butterkrust Bakeries*, 78 LA 562 (Cocalis, 1982); *Singer Co.*, 44 LA 1043 (Cahn, 1965).

often handle the grievants with "kid gloves" in judging the sufficiency of their postdischarge reforms. Such indifference to the severity of the misconduct and the ease with which discharged employees can exonerate themselves under the arbitrators' lax standards are vividly illustrated by the following cases.

In *Pittsburgh Plate Glass Co.*,[6] an employee was terminated for driving through his employer's plant along aisles lined with stacks of glass at 3:00 a.m. while intoxicated. Despite the admittedly serious nature of the offense, the arbitrator blithely reinstated the grievant because he was a young man, had been candid and forthright in admitting the foolhardy nature of his conduct, was repentant, and appeared to have learned his lesson.

Similarly, in *Butterkrust Bakeries*,[7] an employee was discharged after he slapped another worker in the face, threatened to "cut his guts out," and vowed that he was "going to get" the worker. Ignoring the gravity of these outbursts, the arbitrator put the grievant back to work, citing the grievant's recognition of the seriousness of his predicament, his clear desire to retain his job (his age was 50), the fact that his son had disappeared without a trace seven years earlier, *and* his enrollment in a Dale Carnegie course. No wonder the award was overturned on appeal.[8]

Arbitrators have also reinstated employees based upon postdischarge treatment for alcoholism and substance abuse, despite the outrageousness of their misconduct and the serious threat that these offenses pose to workplace and public safety. For example, in *Delta Airlines*,[9] Arbitrator Mark Kahn ruled that 30 days of after-the-fact rehabilitation was a significant factor justifying reinstatement of an airline pilot who had been terminated for violation of work and FAA rules prohibiting consumption of alcohol within eight hours of a flight and reporting to work under the influence of alcohol. In the eight hours before his flight was scheduled for takeoff, the pilot consumed three beers and two drinks on his own; three carafes of wine with a small group of others; and an undetermined amount of scotch before blacking out just hours before his flight.

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[6]*Supra* note 1.
[7]*Supra* note 5.
[8]*Butterkrust Bakeries v. Bakery Workers*, 726 F.2d 698, 115 LRRM 3172 (11th Cir. 1984).
[9]89 LA 408 (Kahn, 1987).

When the time came for takeoff, the pilot, supported by a second pilot, stumbled onto the plane and into the cockpit, all the time denying to the rest of the crew that he was drunk or otherwise incapacitated. After he flew the plane as first in command, he was given a blood test, which indicated that he was under the influence of alcohol. Arbitrator Kahn reinstated the grievant, however, on the bases that he should have been offered the option of entering Delta's rehabilitation program instead of being terminated; that the program had been administered unfairly; that the first and second officers who flew with him were only suspended; and that he pursued rehabilitation after his discharge with effective results. Not surprisingly, the award of reinstatement in *Delta* was subsequently overturned.[10]

Similarly, in *Northwest Airlines*,[11] Arbitrator Nicolau reinstated an airline pilot discharged for violating FAA and work rules that prohibited use of alcohol within 24 hours of the departure of his flight, on the basis of the pilot's postdischarge diagnosis of alcoholism and his positive progress in a rehabilitation program. Arbitrator Nicolau modified the discharge despite the fact that, during the 24-hour period preceding the flight, the grievant had consumed one and one-fourth pint-size bottles of vodka, two double vodkas, and a one-liter carafe of wine. Like the pilot in *Delta*, the pilot in *Northwest* proceeded to fly his plane, from Las Vegas to San Francisco, undaunted by his alcohol-induced impairments; when intercepted and tested at the end of his flight, he was found to be under the influence of alcohol.

Similarly, arbitrators in other cases involving discharges for substance abuse have casually reinstated grievants based upon their postdischarge submission to treatment.[12]

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[10]*Delta Air Lines v. Air Line Pilots Ass'n*, 686 F. Supp. 1573, 127 LRRM 2530 (N.D. Ga. 1987), *aff'd*, 861 F.2d 665, 130 LRRM 2014 (11th Cir. 1988), *cert. denied*, 58 USLW 3218, 132 LRRM 2623 (1989).

[11]89 LA 943 (Nicolau, 1984), *enforcement denied*, 633 F. Supp. 779, 122 LRRM 2311 (D.D.C., 1985), *enforcement granted*, 808 F.2d 76, 124 LRRM 2300 (D.C. Cir. 1987), *cert. denied*, 56 USLW 3790, 128 LRRM 2296 (1988).

[12]*E.g.*, *Bay Area Rapid Transit Dist.*, 92 LA 444 (Koven, 1989) (grievant reinstated after discharge for inability to perform job as a result of cocaine-induced stupor, based on postdischarge submission to treatment); *George A. Milton Can Co.*, 80-2 ARB ¶8560 (Handsaker, 1980) (employee's dismissal for admittedly excessive absenteeism overturned based on postdischarge enrollment in rehabilitation program); *Chrysler Corp.*, 40 LA 935 (Alexander, 1963) (grievant reinstated following discharge for reporting to work after consuming more than a pint of alcoholic concoction stronger than whiskey, based on subsequent rehabilitation and doctor's statements).

The Admission of Postdischarge Conduct Exceeds the Arbitrator's Authority

Apart from the inconsistent approaches that arbitrators use to admit evidence of postdischarge conduct and their failure to give proper weight to the gravity of the underlying offenses, the admission of postdischarge conduct is problematic in that the practice exceeds the arbitrators' authority. When arbitrators use employees' postdischarge actions as tools to overturn otherwise lawful terminations and exonerate grievants terminated in accordance with procedures and standards enunciated in the collective bargaining agreement, they tread outside the limits of their authority and undermine the employers' bargained-for right to discharge for cause.

As you all know, the scope of the arbitrators' authority is limited to the issue that is submitted for resolution. Arbitrators must confine their award to interpretation and application of the collective bargaining agreement, and the award must "draw its essence" from that agreement.[13] The legitimacy of the arbitration process hinges on the arbitrator's adherence to the parties' agreement; if the arbitrator strays from interpretation of the underlying contract and manifests an infidelity to this obligation, the award is unenforceable.[14]

Accordingly, because the issue in most discharge cases is confined to whether the discharge was for just cause, the arbitrator should be limited to determining whether, based upon the information available to the employer at the time of the termination, the discharge met that standard. Only where the contract or submission expressly grants clemency power to the arbitrator by authorizing consideration of postdischarge conduct, should the arbitrator admit and give weight to such evidence. In the absence of such express authorization, however, arbitrators improperly substitute their sense of equity for that of the employer and usurp the employer's power to discharge an employee when they refuse to uphold an otherwise proper discharge on the basis of circumstances that subsequently develop.

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[13]*Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 46 LRRM 2423, 2425 (1960); *Textile Workers Local 1386 v. American Thread Co.*, 291 F.2d 894, 896, 48 LRRM 2534, 2537 (4th Cir. 1961).

[14]*Id.*

Mitigation of Discharge Through Postdischarge Reform Bestows an Unfair Advantage Upon Employees

The mitigation of discharge penalties through postdischarge conduct is also troubling because it bestows an unfair advantage upon the discharged employee. Postdischarge conduct is totally within the employee's control; employers have no parallel method through which they can bolster their case following the discharge. One might argue that employers derive benefit from admission of postdischarge conduct because they can rely on such evidence when it happens to support the discharge decision. However, even in that setting, it is still unfair that the outcome of a case should be dependent upon whether the employee's behavior declined or improved after the discharge, especially where the employee is the only party with the ability to manipulate this determining factor.

Difficulty of Determining Whether Reform Is Genuine or Lasting

Allowing a grievant's reform to control the outcome of a termination case is also problematic because it is difficult to determine whether the grievant's recovery is genuine and lasting. Losing one's job is a powerful motivation to seek help or to don an angelic façade; it is not unlikely that, after the employee is reinstated and this all-powerful motivation is removed, a reversion to predischarge vices will occur.

Moreover, clergymen, counselors, or other individuals from whom references typically are obtained by the reformed miscreant may well have been reluctant to refuse requests from the dejected, unemployed grievant, even when the genuineness or permanency of the supposed rehabilitation is in doubt. Indeed, interjection of issues such as the sincerity and duration of the grievant's reform stray far from the central issue generally submitted to the arbitrator, namely, whether the employee was discharged for cause.

Undermining Deterrent Value of Discipline

In addition, by reinstating grievants who are admitted rule violators, arbitrators undermine the deterrent value of disciplinary measures by sending a message to grievants and their fellow workers that rules and discharge penalties will not be enforced and there is no need to comply with them. Instead, these

employees undoubtedly will come to believe that there is little reason to comply with work rules, since they need only obtain references or doctor's notes, or enter a treatment program, to get their jobs back if they are caught violating the rules.

Prolonging and Increasing the Cost of the Arbitration Process

In addition to the foregoing drawbacks, consideration of postdischarge evidence extends an already overburdened arbitration process. Assuming for the sake of argument that such evidence is relevant and does play a vital role in the arbitrator's decision, there appears to be no logical point at which to cut off admission of that evidence. For example, it would make no sense to consider conduct that transpired between the discharge and the hearing, while excluding developments after the commencement or conclusion of the hearing. Along these lines, many arbitrators have reopened the record to consider postdischarge evidence where it relates to the reasons for the discharge.[15]

At a time when the parties are seeking to expedite rather than prolong the arbitration process, this potential extension of the hearing is particularly troublesome. In addition, in recent years parties to the arbitration process have expressed concern over the increased cost of the process and in many instances have begun to avoid the process because of its excessive costs and delays. Interjection of postdischarge events bearing only tangential relevance to the just cause determination serves only to compound these problems.

Special Concerns Regarding Admission of Postdischarge Reform in Substance-Abuse Cases

One of the most troubling applications of the "kid glove" approach to rule offenders in arbitration occurs in the substance-abuse area. An overwhelming number of cases in which postdischarge conduct is used to overturn discharges involve substance abuse. Aside from the fact that arbitrators in these cases often fail to take into account the severity of the grievant's conduct and the safety risks involved, their amelioration of the right to terminate employees guilty of substance abuse under-

[15]*E.g.*, *Trailways Se. Lines*, 81 LA 365 (Gibson, 1983).

mines employers' efforts to maintain productivity and employee safety in the face of workplace substance-abuse problems. These consequences are especially troublesome at a time when workplace substance-abuse problems have reached epidemic proportions.

The Scope of Workplace Substance-Abuse Problems

The magnitude of these problems is vividly illustrated by a glance at some of the statistics regarding substance abuse in the workplace. According to the U.S. Chamber of Commerce, employees who use drugs are one third less productive and incur 300 percent higher medical costs than employees who do not use drugs. In addition, compared with employees who do not use drugs, those who do are late three times more often; are 2.5 times more likely to have absences of eight days or more; request early dismissal or time off 2.2 times more often; are 3.6 times more likely to injure themselves or others in workplace accidents; are five times more likely to be involved in off-the-job accidents; use three times more sick benefits; and are five times more likely to file workers' compensation claims.[16]

Further, it is estimated that 12 percent of America's 114 million workers are in trouble with alcohol, and that 7 percent are in trouble with other drugs. In the workplace alone, not including treatment costs, some $54.7 billion is lost annually due to alcohol abuse and alcoholism, and another $26 billion is lost annually as a consequence of other drug abuse. These workplace figures represent 71 percent of the country's total annual $113.6 billion loss to alcohol and other drug abuse.[17]

Reinstatement of Substance Abusers Undermines EAPs

Arbitrators do much to exacerbate these grave problems by reinstating employees who have violated workplace rules on substance abuse, are addicted to drugs or alcohol, are unable to properly perform their jobs, and pose a menace to workplace safety. This is especially true when the employer involved has developed a substance-abuse policy, complete with drug and alcohol testing and an employee assistance program (EAP). An

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[16]Corporate Initiatives for a Drug Free Workplace, 10 (Summer 1988) (available from the Public Affairs Department, Hoffmann-LaRoche, Inc., Nutley, N.J.).

[17]Facts About Employer Investment Programs (June 6, 1989) (available through the Employee Assistance Professionals Association, Arlington, Va.).

EAP typically relies for its success upon employees' coming forward and submitting to treatment voluntarily.

By reinstating employees who have not taken advantage of the EAP, arbitrators take away an important incentive, namely, retaining one's job, for employees to come forward and submit to treatment. If employees know they will have an opportunity to seek rehabilitation and will be allowed a second chance at their job if they are caught using drugs or alcohol, there is little reason for them to risk the negative consequences which may flow from submission to treatment before their substance abuse is detected.

In urging admission of postdischarge evidence in substance-abuse cases, unions often argue that alcoholics or substance abusers need to be confronted with a crisis situation before they will seek help for their problems and that they should be afforded special consideration because their afflictions are involuntary. However, these arguments ignore the reality that when a discharge can be overturned simply by entering a rehabilitation program, it no longer constitutes a "crisis" situation. In addition, grievants may come to depend on continued reinstatement each time their substance-abuse problems recur.[18]

Moreover, particularly where an EAP has been implemented, a balance should be struck between the needs of troubled employees and the employer's interests in maintaining a safe and productive environment, thereby placing at least a limited degree of responsibility on the employee. In addition, where the parties have negotiated an EAP and specific programs to address workplace substance abuse, arbitrators have no authority to disregard these express provisions and to impose other rules or policies they think are proper.

An EAP Should Fulfill the Employer's Rehabilitation Obligations

Assuming, *arguendo*, that there is an obligation to rehabilitate, an employer should be viewed as fulfilling this obligation by maintaining an EAP and should not be required to reinstate employees who choose to bypass this rehabilitative program.

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[18]While sensitive to the proscription advocated below in the section on prohibiting lay people from making psychological and medical determinations that are within the exclusive province of health professionals, it should be noted that medical experts generally agree that "enabling" or lenient conduct toward substance abusers does not foster, and actually impedes, abusers' efforts to overcome their addictions.

Such decisions make a mockery of programs upon which employers have spent inordinate amounts of money, time, and energy. In this regard it is estimated that American employers invest up to $798 million annually for employee assistance programs, and that the cost of treating workplace substance-abuse disorders is $22.9 billion annually.[19]

Given the resources expended on such programs, employees should not be allowed to flout and undermine them. Although reinstatement of substance abusers based upon evidence of rehabilitation may have been a viable and acceptable response to substance-abuse problems when employers did not have EAPs, its use is outmoded in the modern workplace, where submission to employer-sponsored therapy programs is an everyday occurrence.

Difficulty of Determining the Genuine and Lasting Nature of Postdischarge Reform

Where substance abuse is involved, perhaps more so than other misconduct, it is difficult to determine whether the employee's postdischarge "cure" is genuine or lasting. As noted above, employees who have just been discharged are likely to enter rehabilitation, not out of a sincere desire to rehabilitate themselves, but rather out of a more transitory urge to secure reinstatement, a motivation that will dissipate when they are reinstated. Further, depending upon the timing of the hearing, it is often premature to conclude that such recovery is lasting.

This conclusion is bolstered by statistics suggesting the low recovery rates for substance abusers. For example, in a study of employee assistance programs in 50 companies, it was found that only 53 percent of those persons referred to treatment for alcohol abuse had been abstinent from alcohol since their treatment.[20] In a second study of Navy military personnel, only 53 percent of those treated for alcohol and drug abuse reported no further incidents of substance abuse following their treatment.[21]

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[19]Facts About the Employee Assistance Program Response (May 10, 1989) (available through the Employee Assistance Professionals Association, Arlington, Va.).

[20]Gorski, unpublished study (Arlington, Va.: Employee Assistance Professionals Association, 1987).

[21]Caliber Associates, unpublished study (Arlington, Va.: Employee Assistance Professionals Association, 1989).

Moreover, arbitrators have no business making determinations regarding the psychological and medical issues that attend substance-abuse problems. Rather, these problems are within the exclusive province of the helping processes (such as EAPs) and should be dealt with by professionals who, unlike most arbitrators, are schooled in the field of rehabilitation and therapy for substance abusers. Arbitrators are similarly ill-equipped to reinstate grievants based on handicap-discrimination concerns. Instead, these issues should be dealt with by state and federal fair employment agencies, which are set up to administer and enforce laws protecting against handicap discrimination.

Decisions in Which Arbitrators Have Excluded Evidence of Postdischarge Conduct

In view of the foregoing concerns, I advocate the complete exclusion of postdischarge conduct in termination cases. I am not alone in this view, and applaud the arbitrators and judges in the cases below who, in recognition of the problems attending the admission and consideration of postdischarge reform, have refused to reinstate grievants on the basis of evidence relating to it.

For example, in *Butterkrust Bakeries v. Bakery Workers*,[22] the court overturned an arbitrator's decision, discussed earlier in this paper, ordering reinstatement of an employee discharged for fighting with and threatening another employee. This arbitration decision was based in part upon the grievant's completion of a Dale Carnegie course and was made after the arbitrator found that the employee had been discharged for just cause. The court stressed that, because the collective bargaining agreement did not empower the arbitrator to decide the propriety of the penalty imposed, he exceeded his authority by modifying the discharge. Instead, the court concluded, the arbitrator's authority over the parties ceased when he made a finding of just cause.

Expressing similar concerns, federal courts overturned Mark Kahn's decision in *Delta Airlines*,[23] discussed above. As noted earlier, the drunken pilot in *Delta* was reinstated in part because of his postdischarge rehabilitation. In *Delta Airlines v. Air Line*

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[22]*Supra* note 8.
[23]*Supra* note 9.

Pilots,[24] the district court refused to enforce the arbitrator's award, because it violated the public policy against allowing pilots to operate aircraft under the influence of alcohol. The court also concluded that the arbitrator was limited to determining whether Delta was justified in discharging the grievant for flying his airplane while drunk and was not authorized to decide whether, having been rehabilitated, the grievant should be rehired.

Relying on similar rationale, the Eleventh Circuit affirmed the district court's decision.[25] Citing its decision in *Butterkrust Bakeries*, the court concluded that the reinstatement violated public policy and that the arbitrator had exceeded his authority by considering the pilot's postdischarge reform. In this regard, the court reasoned:

> The arbitrator's responsibility is discharged upon his determination of the existence of just cause. If this finding has been made, the arbitrator is not authorized to employ "his own brand of industrial justice" and decide what post discharge good works would entitle the properly discharged employee to rehire. While the arbitrator (or independent member of a split panel) may be an actual or potentially excellent personnel expert, his opinion as to what employment opportunities one ought to have if he or she, after discharge, constructively addresses the problems that led to discharge, is not pertinent to arbitration duties. The arbitrator's effort to impose his views on that subject upon the parties to the arbitration amounts to his basing his decision upon "his own brand of industrial justice," which is forbidden.[26]

Several arbitrators have properly refused to reinstate grievants on the basis of their posttermination reforms. For example, in *General Telephone Co. of Indiana*,[27] Elliott Goldstein refused to reinstate an employee who had been discharged for repeated acts of voyeurism at customers' residences, despite the union's introduction of evidence on the purported success of his postdischarge therapy. In concluding that the discharge was for cause, the arbitrator noted that the grievant admittedly had engaged in numerous acts of voyeurism on company time, had used company vehicles to travel to his "peeping" stations, and had denied improper conduct when confronted by a company investigator.

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[24]686 F. Supp. 1573, 127 LRRM 2530 (N.D. Ga. 1987).
[25]*Delta Airlines v. Air Line Pilots Ass'n*, 861 F.2d 665, 130 LRRM 2014 (11th Cir. 1988).
[26]*Id.* at 669, 130 LRRM 2017.
[27]90 LA 689 (Goldstein, 1988).

Rejecting arguments that the grievant's rehabilitative efforts mandated modification of his discharge, Goldstein stressed that the reasons for the general rule excluding postdischarge conduct, including fairness to the employer and the difficulties of assessing the genuineness of a grievant's "seeing the light" at so late and convenient a time, were obvious. Emphasizing the direct and serious impact of the grievant's conduct upon the employer, including potential liability and criminal culpability, the arbitrator refused to consider the postdischarge conduct in the absence of contract language expressly authorizing him to do so.

Goldstein noted that even if he were to consider mitigation, a number of factors complicated a finding that the grievant had been rehabilitated. In particular, he noted that the disorder was a chronic condition not easily detectable by methods such as urine tests, and that no specific medical evidence had been offered demonstrating the grievant's degree of recovery or possible recidivism. In response to the argument that the employer could accommodate its concerns over a potential relapse by assigning the grievant to a nonpublic position and forcing him to enter an EAP, the arbitrator countered that such an award would exceed his authority and cautioned that he could not effect a transfer merely on the basis of his personal feelings that such action was appropriate or equitable.

Likewise, in *Duquesne Light Co.*,[28] the arbitrator refused to reinstate the grievant, who admittedly was guilty of drug abuse and misconduct at work, in light of his postdischarge attempts to correct his substance-abuse problem. The union argued that the arbitrator should consider the grievant's posttermination behavior because rehabilitation was not possible without an intervening crisis such as discharge; that rehabilitation was a desirable social and employment goal; and that the purpose of industrial discipline was to reform and not to punish.

In rejecting these arguments, Arbitrator Stanley H. Sergent stated that if he were to give the grievant one last chance after his discharge for drug-related misconduct, there would be no way to tell the employer that it had finally done enough to facilitate the employee's recovery and that it could proceed with the tasks of replacing the employee and obtaining the production it needed from his position. Even if the crisis of losing his job was necessary to stimulate the employee's recovery, the employer

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[28]92 LA 907 (Sergent, 1989).

had done its part by communicating that the grievant's conduct would not be tolerated. Moreover, the arbitrator concluded, by treating the grievant too leniently or issuing a decision holding that discharge was not necessarily final, he might actually interfere with the grievant's recovery process, part of which involved recognition of his shortcomings and acceptance of the consequences thereof.

Even if reinstatement were the best and most compassionate approach, the arbitrator found that he lacked the authority to reinstate the grievant or to order the employer to treat its employees with any greater compassion than was mandated by the collective bargaining agreement. He noted that industrial policy for dealing with such problems is best and most efficiently established through negotiations between management and labor, not by an arbitrator's ruling.

Similarly, in *Armstrong Furnace Co.*,[29] Arbitrator Vernon L. Stouffer refused to reinstate an employee discharged for absenteeism on the basis of his postdischarge acknowledgment that he was an alcoholic and his submission to treatment. In refusing to mitigate the discharge on this basis, the arbitrator stressed that the grievant had not sought rehabilitation prior to discharge; that it was premature to determine whether the grievant's rehabilitation would be successful or lasting; that the arbitrator's jurisdiction was limited to interpretation and application of the collective bargaining agreement; and that, in the absence of a contractual provision empowering him to grant amnesty from company rules regarding absenteeism, chronic alcoholism, or sickness, he had no authority to order reinstatement.

Moreover, Stouffer stressed that the employer should not be penalized for the fairness with which it treated the employee before the discharge, and quoting from an earlier case, stated:

> "If he has indeed, made a decisive break away from the grip of his earlier addiction—and there is no reason to question the Union's account of his subsequent progress—the Umpire cannot but be mindful of how doubly tragic will be the news that his transformation has come too late. Yet this is the posture in which the Umpire necessarily finds himself. For his inquiry into the validity of X's discharge is confined by the discharge article . . . to the question of whether or not 'such Employee was discharged or suspended, as the

[29] 63 LA 618 (Stouffer, 1974).

case may be, without just cause.' *Obviously, that question must be determined solely with reference to the events preceding the date of discharge.*'"[30]

Other arbitrators, sensitive to these same concerns, have also refused to set aside discharge decisions in the substance abuse context based upon postdischarge reformative efforts.[31]

Conclusion

In light of the problems inherent in the admission and consideration of postdischarge conduct to mitigate justifiable terminations, this evidence should be excluded in its entirety. As several of the arbitrators cited above have correctly observed, this evidence has no place in determining whether an employer's discharge decision was justified. Given the plethora of substance-abuse and other workplace problems that are "curable," consideration of evidence showing that grievants have been healed of their former afflictions threatens the viability of the right to discharge for cause and, in fact, promises to work significant deleterious effects on efforts to maintain a safe and productive workplace.

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[30]*Id.* at 620–21, quoting *Bethlehem Steel Co.*, 43 LA 1215 (Porter, 1964) (emphasis added).

[31]*Georgia Pac. Corp.*, 93 LA 754 (Ipavec, 1989) (arbitrator limited to facts assessed at time of discharge); *Shell Co.*, 90 LA 287 (McDermott, 1988) (grievant failed to utilize EAP, posed a threat to workplace safety, and was not likely to remain drug free); *Savannah Transit Auth.*, 86 LA 1277 (Williams, 1985) (employer not notified of employee's problem before termination and posttermination transformations were irrelevant to propriety of discharge decision); *Bemis Co.*, 81 LA 733 (Wright, 1983) (employee failed to submit to EAP before discharge and collective bargaining agreement did not authorize exculpation of employees through later evidence of alcoholism); *Lone Star Pennsuco*, 80 LA 875 (Kanzer, 1983) (rehire decision employer's prerogative, employee resisted pretermination encouragement to enter treatment program); *Eastern Airlines*, 74 LA 316 (Turkus, 1980) (reinstatement inconsistent with express limitations of EAP policy and outside of arbitrator's authority); *Cities Serv. Oil Co.*, 70-2 ARB ¶8642 (Oppenheim, 1970) (only grievant could cure his alcoholism and evidence failed to show that he could be salvaged by getting second chance).