Chapter 3

JUST CAUSE: AN EVOLVING CONCEPT

I. Working at the Margins of Just Cause: The Never-Ending Dispute over Arbitral Discretion on the Discharge Penalty

Richard Mittenthal* and M. David Vaughn**

Introduction

"Just cause" is the most commonly used term in collective bargaining contracts. It is the standard for determining whether a particular disciplinary action was justified. All of us—management, labor, and arbitrator alike—believe we understand the concept. Even if there is no universal definition of "just cause," each of us believes, to borrow a phrase, "we know it when we see it." Applying this term to a set of facts is a large part of the arbitrator's trade.

Management has always demanded order in the workplace. In furtherance of that goal, it insists that there be rules with respect to employee conduct, and some form of discipline, up to and including discharge, for misconduct. Unions almost always accepted these themes, but insisted that such a system be fair both in principle and in application. The parties, accordingly, agreed to a verbal formula that would require management to show a valid reason (i.e., a cause) for imposing discipline and to show further that the penalty imposed was appropriate (i.e., just) given the nature of the offense and the surrounding circumstances, including the employee's years of service and disciplinary history. A "just cause" requirement thus became part of almost every collective bargaining agreement. Through application of this language, arbitrators determine not only the propriety of a given disciplinary action,

*Member and Past President, National Academy of Arbitrators, Novi, Michigan, and Longboat Key, Florida.

**Member, National Academy of Arbitrators, Clarksville, Maryland.

but also the standards of conduct that employers may require and how far, and in what manner, they may regulate employees' lives.

There are, as indicated, two distinct elements to "just cause." The first concerns guilt or innocence; the second, assuming guilt, concerns the propriety of the penalty. This paper addresses only the second element, particularly the discretion that arbitrators exercise in determining the "justness" of the penalty and the efforts made by the parties to limit such discretion and thus manipulate "just cause" to their own advantage. Our focus is on the discharge penalty.

The term "just cause"[1] has been embedded in most collective bargaining agreements for generations. Its continued use suggests that its meaning has not changed. But that simply is not so. The parties, in response to their special needs and problems, have negotiated new contract language to refine the "just cause" obligation and place limitations on arbitral discretion. At the same time, cultural and societal changes have had an impact on how the parties and arbitrators apply the "just cause" standard. Thus, the significance of this term has changed over the years and may well continue to change. But it is this very evolution, the elasticity of "just cause," that helps to explain why this contractual term has had such a long life.

The Fight to Shape "Just Cause"

Collective bargaining contracts only occasionally include a disciplinary structure calling for specific penalties for specific offenses. Such an arrangement has limited feasibility, given the complexities of the real world. Misconduct takes many different forms. The circumstances surrounding an act of misconduct have infinite variations; each wrongdoer has his or her own unique history. Unions hence resist any structure that is overly strict or inflexible. They want considerations of equity to play a large role. Management, on the other hand, is likely to seek consistency in approach and to reserve to itself a large measure of discretion in determining the penalty in any given case. That goal is seldom achieved through bargaining, so management often unilaterally

---

[1]The term includes "proper cause," "good cause," "sufficient cause," or merely "cause." Absent a contrary intent by a particular set of parties, it is generally accepted that these words all carry the same meaning as "just cause." Indeed, a "just cause" requirement for discipline has sometimes been inferred, even in the absence of explicit language.

announces rules of conduct and describes the major offenses that it believes merit discharge.

The relevant factors in discharge cases that reach arbitration are so numerous that each of the parties can usually present a respectable argument. The circumstances, for and against mitigation of the discharge penalty, sometimes appear equally balanced. The arbitrator's ruling may turn on the weight that he or she attaches to a grievant's years of service and prior disciplinary record. Such uncertainties mean that the standard of review embraced by the arbitrator under the "just cause" provision is often the critical consideration in how a case is decided.

The Earlier Standard

Employers wished to maximize the chances of a discharge, or any other penalty, being affirmed in arbitration. They argued that because a range of penalties is possible for a given offense, and because management has the insight and experience to know what is necessary, broad managerial discretion should be recognized in evaluating the discharge penalty. They urged that so long as management did not abuse its discretion, the penalty chosen should stand.

Unions resisted such a standard. They did not accept the notion of broad managerial discretion. They asked that arbitrators make a determination of "just cause" based on notions of fairness and equity and a realistic view of life in the workplace.

Many arbitrators, perhaps most,[2] in the 1940s and 1950s accepted the employer argument. Typical of this approach is the following statement by Arbitrator Whitley McCoy:

> Where an employee has violated a rule or engaged in conduct meriting disciplinary action, it is primarily the function of management to decide upon the proper penalty. If management acts in good faith upon a fair investigation and fixes a penalty not inconsistent with that imposed in other like cases, an arbitrator should not disturb it. The mere fact that management has imposed a somewhat different penalty or a somewhat more severe penalty than the arbitrator would have, if he had the decision to make originally, is no justification for changing it. The minds of equally reasonable men differ. A consideration which highly aggravates an offense in one man's eyes may be only slight aggravation to another. If an arbitrator could substitute his judgment and discretion for the judgment and discretion honestly exercised by

---

[2]We have not attempted to search *Labor Arbitration Reports* to determine the percentage of awards that reflect this view.

> management, then the functions of management would have been abdicated and unions would take every case to arbitration. The result would be as intolerable to employees as to management. *The only circumstances under which a penalty imposed by management can be rightfully set aside by an arbitrator are those where discrimination, unfairness, or capricious and arbitrary action are proved—in other words, where there has been an abuse of discretion.*[3] (Emphasis added)

Some industries have retained that standard, or variations on it.[4] Some advocates continue to advance the argument that managerial determination as to penalty should not be disturbed, absent arbitrariness or abuse.

The Present Standard

Other arbitrators spoke of their review power under the agreement in broader terms. They described the test not from the standpoint of whether there had been an "abuse of discretion" but rather whether the penalty was "unfair" or "arbitrary" or "capricious." And the latter words appear in time to have been encapsulated in the term "unreasonable." A compelling explanation of this standard is found in the following statement by Arbitrator Harry Platt:

> It is ordinarily the function of an Arbitrator in interpreting a contract provision which requires 'sufficient cause' as a condition precedent to discharge not only to determine whether the employee involved is guilty of wrongdoing and, if so, to confirm the employer's right to discipline where its exercise is essential to the objective of efficiency, but also to safeguard the interests of the discharged employee by making reasonably sure that the causes for discharge were just and equitable and such as would appeal to reasonable and fair-minded persons warranting discharge. To be sure, no standards exist to aid an arbitrator in finding a conclusive answer to such a question and, therefore, perhaps the best he can do is decide *what a reasonable man, mindful of the habits and customs of industrial life and of the standards of justice and fair dealing prevalent in the community, ought to have done under similar circumstances*

[3] *Stockholm Pipe Fittings Co.,* 1 LA 160, 162 (1945), where the submission specifically empowered the arbitrator to determine "what disposition" should be made of the dispute.

[4] The railroad industry generally applies both a "substantial evidence" test to determine whether "just cause" has been met and an "arbitrary, capricious or abusive" standard in evaluating penalties. The arbitration structure in that industry differs from most other arbitration in that charges are brought, evidence is then adduced, credibility determinations made, and the employee's guilt determined based on a hearing before a carrier official. In that structure, the board of arbitration sits as an appellate body to review the carrier's post-hearing decision.

and in that light to decide whether the conduct of the discharged employee was defensible and the disciplinary penalty just.[5] (Emphasis added)

The difference between the McCoy and Platt standards is substantial. The "reasonableness" test requires a different analysis and often a different result because it calls for a review of the penalty from the arbitrator's perspective rather than the employer's perspective. The arbitrator, under the Platt standard, is the "reasonable person" and his or her view of what is "unreasonable" will ordinarily trump the employer's view. The burden of proof on this issue has obviously been altered. Thus, a discharge that may in the past have been affirmed because there was no "abuse of discretion" by the employer might now be reversed as being, in the arbitrator's judgment, "unreasonable."

The parties, strictly speaking, are not asking for our personal sense of what is "reasonable." They are asking us to behave like the mythical "reasonable man," devoid of personal predilections, in reviewing the discharge penalty. This may seem to some as much too fine a distinction. But it is the kind of distinction out of which the "reasonableness" standard was born, the kind of distinction that promises to keep subjectivity to a minimum.

Moreover, once having adopted "unreasonableness" as the criterion, it was only a matter of time before the issue was expressed in terms of whether discharge was an overly "harsh" or "excessive" penalty. These words seem synonymous with "unreasonable" but clearly suggest the extent to which the arbitrator's personal judgment of the severity of the penalty has become the measuring stick in this kind of case. This highly subjective element has meant that our rulings in discharge cases are probably less predictable than they are in other areas of contract interpretation.

Notwithstanding the wide acceptance of the "reasonableness" standard, employers still possess discretion in choosing among the range of penalties appropriate for a given offense. Such discretion is wrongly undermined when an arbitrator sets aside a discharge solely on the basis of leniency (i.e., sympathy for the grievant's plight) without any justification based on stated mitigating circumstances.

---

[5] *Riley Stoker Corp.,* 7 LA 764, 767 (1947).

The Soft Side of "Reasonableness"

The "reasonableness" standard provides arbitrators with enormous discretion in reviewing a discharge penalty. So long as we offer an explanation for ruling that a discharge penalty was "unreasonable," an explanation not so absurd or extreme as to be considered beyond the bounds of reason, then it is unlikely that a court would find that we exceeded our authority. Reliance on a clean disciplinary record or many years of service would probably pass an external review. However, mere sympathy for a grievant's plight, without more, would probably not.

The "reasonableness" test, quoted earlier, assumes that the arbitrator is a "reasonable man," mindful of both the "habits and customs of [workplace life]" and the "standards of justice and fair dealing prevalent in the community." But there is no single set of such "habits and customs." Workplaces are very different.[6] How a steel company in Gary, Indiana, responds to misconduct may have little resemblance to how a supermarket grocery chain in Birmingham, Alabama, responds to the same misconduct. And notions of "justice and fair play" vary from one region to another; vary with the nature of the work performed; vary with the practices established within each plant, store, or office; and, to some extent, vary with the expectations of employees.

Ad hoc arbitrators who find themselves in a given industry or workplace for the very first time know nothing of the "habits and customs" of the parties presenting the case. The only way they can be educated would be through detailed evidence of past discipline imposed and prior grievance settlements. This kind of evidence, absent a claim of disparate treatment, is rarely introduced. Any attempt to do so would likely raise new and unanticipated issues that might well call for further investigation and additional testimony and argument.

Thus, arbitrators fall back on their own resources, their knowledge of the "habits and customs" of the workplaces with which they are familiar. They will, more often than not, assume that the

---

[6]In the federal sector, the substantive rules of law to be applied by arbitrators are, by law, the "efficiency of the service" standard and body of law developed by the Merit Systems Protection Board. This standard arguably gives more deference to management's decisional process and directs certain conclusions—such as nexus between off-duty misconduct and federal employment—which are open for debate in non-federal venues. Moreover, the penalties for some offenses may be set by statute, such as "unauthorized access" to tax-payer records by Internal Revenue Service employees or the "seven deadly sins" identified in the Homeland Security Labor Relations Statute.

"standards of justice and fair dealing" should be the same in Birmingham as they are in Gary. This is, of course, an oversimplification. But surely arbitrators carry their idea of "reasonableness" from one bargaining relationship to another. The result, over a long period, should be greater uniformity and perhaps predictability as well. We suspect, however, that because "reasonableness," like beauty, is seen through the eyes of the beholder, decisions more likely turn on the arbitrator's value system and his or her highly personal reaction to the facts and arguments of a given case. There is no effective means of eliminating the large "personal" factor in dealing with "reasonableness" issues.

Why the "Reasonableness" Test Prevailed

The "reasonableness" test was, in time, embraced by almost all arbitrators. "Abuse of discretion" is now rarely, if ever, raised in reviewing a discharge penalty. Why did arbitrators move, almost in lockstep, to this result? Why did arbitrators choose a larger role for themselves in the administration of "just cause"?

These questions have not been explored in the literature of arbitration. The answer may help to explain a good deal of the parties' collective bargaining action with respect to "just cause." We caution you to keep in mind that our answer is pure speculation, but speculation based on some observations about arbitral behavior as well as the ever-present influence of judicial behavior.

First, an essential part of a judge's function in the criminal courts is to impose a sentence on the guilty person. That sentence is based on the judge's personal view of the crime, the defendant, and the surrounding circumstances, subject of course to any limits imposed by statute or appellate review on the exercise of judicial discretion. Arbitrators, as "judges," instinctively saw a close review of the discharge penalty as part of our role. To accept management's chosen penalty on the ground that there was no "abuse of discretion" was to look at the discharge largely from the standpoint of management's knowledge and thinking. That appeared to be an abdication of our authority to hear and decide the dispute in its entirety. Had the parties intended that an arbitrator engage in such a limited review of the discharge penalty, they surely would have said so in their collective bargaining agreement. Absent such a limitation, it is hardly surprising that arbitrators were drawn to the traditional role of the judge in ensuring that the "punishment fit the crime" as well as the person responsible for "the crime."

Second, referring again to the criminal courts, there had been widespread acceptance of the idea that punishment should, in most cases, be rehabilitative rather than punitive. Hence, arbitrators derived the concept of "corrective discipline." It meant that, apart from the most serious misconduct, the appropriate employer response should be progressively harsher penalties, culminating in discharge, when the possibility of correction appears to have been exhausted. This notion of gradualism undermined, in some small but significant way, the "abuse of discretion" test.

Third, in the early post–World War II years, relatively few arbitrators depended on arbitration as the primary source of their income. Most arbitrators supported themselves as professors, lawyers, economists, respected community or religious leaders, and so on. As the number of full-time arbitrators grew in response to demand, more of us were bound to think of our acceptability. And "split decisions" sometimes seemed like an attractive and sensible way of dealing with the ambiguities and uncertainties present in many discharge cases. The "reasonableness" standard made such "split decisions" theoretically correct.

Finally, perhaps most important, the broader view of our authority in a "just cause" dispute made a "split decision" more accessible. Arbitrators could thereby find a grievant guilty but reject a discharge as an "excessive" penalty and thus reinstate without back pay or with partial back pay. Such an expansive view of "just cause" proved difficult to resist. Awards of this kind are sometimes appropriate, but when triggered essentially by an arbitrator's wish to enhance or preserve his or her acceptability, are bad for the arbitration process. Indeed, such behavior is a violation of the Code of Professional Responsibility. Article I, Section 2 of the Code states that ". . . compromise by an arbitrator for the sake of attempting to achieve personal acceptability is unprofessional." No doubt this dark side of the quest for acceptability occasionally surfaces.[7] We believe, however, that there are perfectly legitimate reasons for the vast majority of "split decisions."

[7]The parties plainly believe arbitrators are prone to such behavior. Why else would they write into their contracts a restriction against an arbitrator having more than one unresolved case before him or her at any time?

The Struggle Over Arbitral Discretion

The expansive view of "just cause" was of course acceptable to unions. And it came to be acceptable, for the most part, to employers as well. Arbitral review of discharges on the basis of whether the penalty was "too severe" or "too harsh" is an established part of today's arbitration process.

The greater discretion arbitrators possess under the "reasonableness" standard makes it more difficult for employers to have a discharge affirmed. However, management's response has not been to attack and eliminate the "just cause" language. What has happened instead is that each of the parties sought advantage in the application of "just cause" through changes at the margins of this provision. Management has tried to limit the arbitrator's discretion through its rule-making powers, through development of favorable practices, and through additional contract language. Unions have tried to preserve a larger arbitral discretion and to make discharge more difficult, not only by resisting or limiting management's initiatives, but also by imposing procedural requirements upon management through a broader interpretation of "just cause."

The battle to define these words and shape arbitral discretion—point, counterpoint—goes on, with each side seeking an edge at the arbitration table. And on occasion, surprisingly enough, the parties actually agree in their contract that discharge is an appropriate penalty for certain types of misconduct. That has been true for so-called "cardinal" offenses, such as drug-related misconduct, and also for the last of many absences under an attendance control program.

Some Examples

Let us look in detail at some examples of this collective bargaining behavior.

Progressive Discipline

This now-universal concept was advanced by unions and arbitrators to provide wrongdoers with a chance to rehabilitate themselves and correct their behavior. Employers accepted the concept, not only because rehabilitation made sense, but also because it created a procedure that, when followed, promised to limit arbi-

tral review of the discharge penalty. An employee who has been warned and later suspended for misconduct, including notice that the next offense will result in discharge, sets the stage for his or her own discharge by engaging in further misconduct. A union has a heavy burden in arguing that a discharge for a third, fourth, or fifth offense is "too harsh." By accepting "progressive discipline," employers not only have provided for the retention and rehabilitation of employees, but also have reduced the possibility of a discharge being set aside in arbitration, assuming, of course, that management faithfully applies "progressive discipline."

This development promises to help employees get a second chance, but also means that arbitrators to some extent have less discretion in dealing with a repeat offender. Unions consequently have sought to place certain restrictions on the "progressive discipline" test. They fear that past discipline will be held over an employee's head for years and that offenses committed long ago might be used to discharge an employee for a current offense. In response to this concern, unions often negotiate a provision that precludes management from considering any discipline imposed more than a specified period—one or two years—prior to the discharge action. Many employers have agreed to such a limitation; others have consented only with a provision that an employee's past record would be cleared if he or she had been discipline-free for a specified period of time.

The use of "progressive discipline" means that employees accumulate longer disciplinary histories before they can be discharged for other than so-called "capital" offenses. The presence of a one- or two-year limitation means shorter disciplinary histories. Although these ideas seem to conflict, both work to the employee's advantage by expanding the need for disciplinary steps prior to discharge and by reducing the period within which management must demonstrate the application of "progressive discipline."

Last Chance Agreements

Last chance agreements (LCAs) are another device the parties have developed to deal with discharge grievances. Under their terms, management agrees to reinstate an employee, subject to an understanding that should he or she be discharged again for alleged misconduct, the union can assert his or her innocence but if guilty, cannot challenge the propriety of the discharge pen-

alty.[8] The arbitrator is then limited to the question of innocence or guilt. Employers accept this bargain because it demonstrates their flexibility—their openness to persuasion—but also because it ensures that a later discharge for proven misconduct cannot be set aside. The arbitrator's discretion in such cases is severely limited. Unions presumably accept an LCA because it returns the offending employee to work and thus avoids the strong possibility that an arbitrator will affirm the discharge.

Back Pay—All or Nothing

Some agreements say, "If an employee has been discharged without just cause, he shall be reinstated with full back pay." This or a similar provision appears in many contracts. It is an ingenious way of influencing the arbitrator's exercise of discretion under the "reasonableness" standard. It is sometimes referred to as an "all or nothing" provision because it allows the arbitrator just two options. If there is "just cause," then the discharge must be affirmed; if the discharge penalty fails to satisfy the "reasonableness" standard, then there is no "just cause" and the employee must be reinstated with full back pay. No "split decision" is permitted. The guilty employee cannot be reinstated without back pay or with only partial back pay.

Management no doubt believes that such a clause increases the likelihood of an arbitrator's approving the discharge of a wrongdoer, particularly when the arbitration hearing does not occur until many months, or perhaps a year, later. Arbitrators have often been reluctant to grant a large amount of back pay to someone who has committed a serious offense but who has had a good record and is a long-service employee. Back pay in these circumstances seems like an unwarranted windfall. Hence, an arbitrator may resist reinstatement and affirm the discharge.

Unions accept such a provision because it avoids the all-too-common occurrence of an employee's being reinstated without back pay and thus suffering a suspension far greater than management would have imposed had it opted for a penalty less than discharge. Such an employee, although reinstated, experiences a significant loss of pay. Under an "all or nothing" clause, where

[8]This is the usual sense of an LCA but there are many variations, some of which would allow the union greater leeway if the employee is discharged again.

the ruling is that discharge is "too harsh" a penalty, the employee experiences no loss of pay.

This is a significant problem for arbitrators. Neither of the available choices may feel appropriate in a given case. But the "all or nothing" contract language limits the exercise of the equitable judgment that has always played an important role in discharge cases. There would be no problem if the parties brought the case to arbitration within a few months of the discharge. In today's world, however, speedy resolution of a grievance is the exception rather than the rule.

Rule Making—Tables of Offenses and Penalties

Employers attempt to use their rule-making authority to enhance their ability to prevail in arbitration. They list the penalties for each offense, apply those penalties consistently over the years, and then, when later challenged, rely on this practice to show that the penalty meted out was "reasonable." Suppose, for instance, that an employer has always discharged employees for workplace violence and that such penalties either have not been protested or have been affirmed by arbitrators. When a similar situation later arises, surely the employer will defend the discharge on the basis of this practice. Of course, the practice has not been agreed to by the union and, hence, the arbitrator has the authority to set aside the discharge as being "too harsh" under the facts of the case. But the stronger the practice, the more likely it is to be honored in arbitration.

Employers often underscore the seriousness with which they view a particular type of misconduct. They describe such behavior as sexual harassment, for example, as a "zero tolerance" offense and state that discharge will be imposed for a first offense. But any unilateral rule, however strongly stated, cannot substitute for proof of "just cause" and cannot diminish the arbitrator's role in determining whether discharge is a "reasonable" penalty. Only where the parties have specifically agreed to the discharge penalty for a particular offense is the arbitrator powerless to review the appropriateness of the discharge.

Sometimes parties do just that. They negotiate a "price list" with a specified penalty for each offense, even a set of penalties for repeated offenses. Under such a provision, an arbitrator has no choice but to accept the penalty prescribed, assuming the employee is indeed guilty. The benefit of a "price list" is certainty.

Everyone knows exactly what the consequences of an act of misconduct will be. The sole function of the arbitrator is to determine whether the employee is innocent or guilty of the charges brought against him or her. Even in the face of a list of "capital" offenses, arbitrators may seek to exercise their discretion and review the circumstances surrounding the offense where the contract language is less than certain in calling for discharge, for example, "these offenses will subject employees to discharge."

A Union Offensive

In recent years, a group of arbitration awards has developed specific criteria, largely procedural, to make the application of "just cause" more exacting. These criteria are arbitrator constructs, typically not expressed in the parties' contract but somehow seen as an inherent part of "just cause." The best known example of this development is Arbitrator C. Daugherty's checklist of "seven tests."[9] These "tests" ask such questions as:

- Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?
- Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
- Was the company's investigation conducted fairly and objectively?
- At the investigation, did the company "judge" obtain substantial and compelling evidence or proof that the employee was guilty as charged?

A negative answer to any of these questions would be grounds, according to Daugherty, for setting aside a discharge.

Many unions now rely on the "seven tests." And many employers, at an arbitration hearing, seek to show they have satisfied these "tests" and thus appear to validate the underlying concept. Arbitrators have understandably resisted this approach. In a penetrating and persuasive article on the use of the "seven tests," Arbitrator Jack Dunsford observes that Daugherty's views "misstate the posture of arbitral thinking," "generate a vague confusion about

[9] *See* Daugherty's awards in *Grief Bros. Cooperage Corp.*, 42 L.A. 555 (1964) and *Whirlpool Corp.*, 58 L.A. 421 (1972).

the meaning of due process, further complicated by the pretense that they simply reflect prevailing practice," and "threaten the [arbitration] process by superimposing artificial problems of the arbitrator's own making upon the real issues which are separating the parties." [10]And, perhaps most important, Dunsford argues that "the difficulty [with these tests] is that arbitration—whose strength and uniqueness lies in the personal responsibility of the decision-maker to the daily problems of flesh and blood human beings in the shop—may be transformed into an academic exercise, as tests and rules imported from extraneous sources begin to dominate the discretion and judgment of the arbitrator."[11] In short, the "seven tests" are an inappropriate and mischievous means of applying the "just cause" standard.

Discretion Trumped

When the parties agree on the appropriate penalty, there is no arbitral discretion. Labor and management occasionally do agree that discharge is a proper penalty for certain types of misconduct.

Drug offenses in the workplace are a good example. Both parties have a large interest in preserving safe working conditions. And the presence of drugs, including an employee at work under the influence of some proscribed drug, is so unacceptable that many contracts call for summary discharge for such conduct. If guilt of such a violation is determined, arbitrators must enforce the rule as written.

Absenteeism poses a more difficult problem for the parties. There are an infinite variety of absentee patterns. Some employees engage in casual absenteeism, reflecting a lack of responsibility toward their jobs; others are absent for long periods due to health or other critical problems; still others simply "game the system," taking as much time off as they can. Management typically considers the cause and frequency of the absences, excusing or not excusing them depending on the circumstances. There is

[10]*Arbitral Discretion: The Tests of Just Cause*, in Arbitration 1989: The Arbitrator's Discretion During and After the Hearing, Proceedings of the 42nd Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1990), at 25–50.

[11]Much of Arbitrator Daugherty's arbitration experience was gained in railroad industry arbitration where the evidentiary hearing is held on the property before a carrier-appointed hearing officer, and the arbitrator gets to review the results of the carrier-controlled investigatory hearing. The "seven tests" make more sense in that context than in the non-railroad environment in which Arbitrator Daugherty sought to apply them. *See supra* note 10.

a difficult balance to be struck between consistency and flexibility. This can be an administrative nightmare for unions and managements alike. Hence, it is not surprising that managements often develop attendance control plans that attempt to establish a rational relationship between excessive absence and discipline. And unions often, through negotiation or practice, become party to such plans although they frequently challenge the application of a fixed penalty structure, particularly at the discharge level.

The quest for certainty and the control of arbitral discretion achieves its peak with management's establishment of a no-fault program. Employees receive an "occurrence" for each absence until the number of "occurrences" reaches a point at which the disciplinary process begins. The program excuses only specified types of absences and seeks primarily to limit the disruptions caused by casual absenteeism. Unions seldom agree to a no-fault program, but challenge individual applications of the program, particularly at the discharge level. That is the case, even though an argument can be made that most such programs appear to be a violation of the "just cause" standard.

Let us explain. As earlier indicated, "just cause" contemplates two essential inquiries: (1) whether an employee was guilty of misconduct and (2) assuming guilt, whether the discipline imposed was a "reasonable" penalty under the circumstances of the case. A no-fault program precludes either inquiry. Under such a program the arbitrator is concerned with two entirely different questions: (1) whether an employee was absent and (2) if so, whether the absence was covered by any of the program's "exclusions." Should these questions be answered in management's favor, the arbitrator has no choice but to affirm the penalty prescribed in the program. The crucial inquiries under "just cause," that is, whether the absence was misconduct and, if so, whether the penalty was "reasonable, are removed from the arbitrator's reach. All that is left is a hollow mechanical function, a mere reading of the program's listed penalty for a numbered absence "occurrence." Thus, no-fault programs seem inconsistent with the contractual "just cause" standard.[12] In short, this kind of attendance control program makes the disciplinary process work far smoother than it otherwise would. Practical considerations regarding effective

[12]See, in this connection, R. Mittenthal & H. Block, *Arbitration and the Absent Employee,* in Arbitration 1984: Absenteeism, Recent Law, Panels, and Published Decisions, Proceedings of the 37th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1985), at 77–105.

administration of discipline may sometimes play as important a role as contract language itself.

We believe the various initiatives described here are not mere isolated responses to particular workplace problems, but constitute affirmative efforts to constrain the exercise of arbitral discretion in the review of management discharge decisions under a "reasonableness" standard.

A Special Problem

There are some logical conundrums in the application of "just cause," particularly with respect to the appropriate remedy. Consider, for instance, the back pay question that arises in a discharge case that does not reach the arbitrator until 18 months after the discharge occurred. Assume there was serious misconduct, but the arbitrator decided, due to significant mitigating circumstances, that discharge was too severe a penalty and that the grievant should be reinstated. But what should be done about the back pay?

There are two approaches. The "purists" among us would probably ask themselves how long a suspension could the employer reasonably have imposed had it chosen a penalty less than discharge. Suppose, at most, the suspension would have been 3 months. The purist would then reinstate with 15 months' back pay, even though the grievant, to repeat, was guilty of serious misconduct. This result places the employee where he or she would have been, but for the unreasonable and excessive penalty imposed. But it also "rewards" the employee with a windfall of many months of back pay, which turns the case around to make it appear as if the employer is the loser in most respects. This is not an appealing scenario.

The "pragmatists" among us would simply reinstate without back pay and treat the grievant's time off as a lengthy suspension. The grievant will get his or her job back, which, in most such cases, is what the union is primarily seeking to achieve. This avoids an employee windfall, but the grievant ends up with a suspension far longer than anything that could have been justified at the time the disciplinary action was taken. Unions could understandably view such a suspension as harsh and arbitrary. This approach also makes the length of the suspension a function of how long the parties took to get the case to arbitration.

Neither of these approaches is satisfactory. Arbitrators must choose one extreme or the other or perhaps some middle ground

that appeals to our rough sense of justice.[13] But even the middle ground is subject to the same kind of criticism as we have made against the extremes. Worse still, there is no effective means of rationalizing any of these back pay results. The parties' delay places us in a truly uncomfortable situation.

A more confident back pay award might be possible if the arbitrator had a full explanation for this extraordinary delay in bringing the dispute to the arbitration table. If the delay was the fault entirely of the employer, the "purist" approach would make sense. If the delay was attributable solely to the union, the "pragmatic" approach would make sense. However, in most cases, we suspect that both sides are at fault.[14] The difficulty, moreover, is that the parties almost never offer any explanation for such delay at the arbitration hearing. If the arbitrator were to raise the matter, there would no doubt be much "finger-pointing" and bad feeling. A new issue would have been introduced; more testimony would have to be taken; and the behavior of the parties' representatives in processing the grievance would be brought into question. No one is likely to profit from this kind of inquiry.

There is, however, a device for extricating ourselves from this dilemma and putting the burden on the parties without the need of a further hearing. Some years ago at an Academy meeting, Arbitrator Dallas Young offered the following solution.[15] He suggested that the arbitrator should remand the back pay question to the parties for settlement with the understanding that should they fail to agree, (1) they should send the arbitrator their "last best" proposals as to what, if any, back pay should be awarded; and (2) the arbitrator would choose what he believed to be the "more reasonable" proposal. Dallas Young had used this device with success and urged others to do the same.

We know, from baseball salary arbitration and other interest arbitration issues, that when an arbitrator is expected to choose between two proposed numbers, the parties will try to find a reasonable number. And when they do that, the high probability is that their numbers will be close enough to allow them to settle the matter themselves. Thus, Young's approach may serve to free arbi-

---

[13]Perhaps the arbitrator will provide the grievant with 9 months' back pay and impose, in effect, a 9-month rather than an 18-month suspension.

[14]This is not to ignore the arbitrator's occasional contributions to delay.

[15]See *My Use of the Final Offer Principle,* in Arbitration 1985: Law and Practice, Proceedings of the 38th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1985), at 240–42.

trators from having to make a decision that is usually sheer guesswork and to place the burden on the parties themselves. Even if the parties fail to settle, the arbitrator will then have a more manageable task in having to choose the more reasonable number. We commend this arbitral device for use by others.

Conclusion

At the risk of repeating some of what we have already said, a few concluding observations seem in order.

The "reasonableness" standard has provided arbitrators with a very large measure of discretion. Whether a discharge satisfies this standard will likely turn on an arbitrator's value system and his or her highly personal reaction to the facts and arguments in a given case. Arbitral review of the discharge penalty thus tends to be highly subjective. That has meant less predictable awards.

Part of the problem is that no two cases are alike. Small variations in the facts may produce a different result. More important, arbitrators may not appreciate that the parties, strictly speaking, are not asking for our personal sense of what is "reasonable." They are asking us to behave like the mythical "reasonable man," devoid of personal predilections, in evaluating the discharge penalty. This may seem to be too fine a distinction, but it is the kind of distinction out of which the "reasonableness" standard was born, the kind of distinction that promises to keep subjectivity to a minimum. Of course, the mythical "reasonable man" has no voice. He is an artificial construct, designed to encourage arbitrators to ask themselves how others among us would likely respond to the discharge penalty in a particular case. By doing so, arbitrators would be more likely to avoid the extremes and achieve a greater consistency in dealing with the discharge penalty.

Employers have sought to place limits on arbitral discretion precisely because of this subjectivity. Unions have resisted. What is remarkable is that, notwithstanding continuous efforts to restrain our discretion, the parties have not tampered with the term "just cause." That formula remains in place. Its longevity is attributable to the simplicity of the concept and the flexibility of its application. Its strength lies in its deference to the particular circumstances of the particular case. No one has seriously suggested a different standard. The fact that the "just cause" provision has withstood the changing fortunes of the parties and the passions of the moment suggests that arbitrators may, by and large, be exercising

their discretion wisely. By acting with restraint, we can effectively protect the "just cause" rubric.

There have been changes. Whatever evolution has occurred, however, has been generated largely by the parties through collective bargaining. In some relationships, restraints of varying degrees have been placed on arbitral discretion. And pertinent rules or practices have been modified or enlarged. All of this has triggered adjustments in arbitral decisionmaking. But notwithstanding an occasional tightening or loosening in the "just cause" standard, the essential impact of this provision has remained much the same over the past 50 years, with arbitrators continuing to follow long-established guideposts in evaluating the discharge penalty.

Experience tells us that the vast majority of arbitral awards fall within a fairly predictable range of outcomes. Neither side suffers too many surprise wins or losses even though, as noted earlier, there is less predictability in discharge cases. Neither side seems to believe that the "reasonableness" test has been skewed in favor of labor or management. To the extent that particular issues or particular workplaces require additional guidance, the collective bargaining process has provided that guidance. God bless the "just cause" provision and the "reasonableness" standard, which allow room for understandable disagreement and thus inevitably create the cases on which arbitration thrives.

II. Panel Discussion

Moderator: Susan Meredith, NAA Member, New Haven, Connecticut
Union: Kathy L. Krieger, James & Hoffman, PC, Washington, DC
Management: Burton Kainen, Kainen, Escalera & McHale, PC, Hartford, Connecticut
Neutrals: Bonnie G. Bogue, NAA Member, El Cerrito, California
Bruce Welling, NAA Member, London, Ontario

Meredith: Just cause is a concept that we all as arbitrators and advocates use every day. Today, we are asking you to consider what this concept means to arbitrators, to management, and to unions