Chapter 12

REVISITING THE ELEMENTS OF JUST CAUSE: THE CASE OF THE MISSING MONEY

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[Author's Note: The paper that follows was presented in abridged form at the Annual Meeting of the National Academy of Arbitrators in San Diego, California, on May 27, 2011. At the meeting, in considering a hypothetical dismissal case, advocates conducted the direct and cross-examination of an employee who had been terminated, and provided closing arguments. After the abbreviated "hearing," the panelists—arbitrators, members of airline system boards—and the audience decided the case. The presentation is supplemented in this volume with a description of what took place at the Annual Meeting, and by summarizing a statistical analysis of the audience survey[2] that was conducted.[3]]

One of the most challenging tasks for a labor arbitrator is to decide whether an employee fired for alleged misconduct did what is charged and is deserving of the punishment imposed. Today, we will tackle that challenge in "The Case of the Missing Money." Accompanying this paper, you will find an appendix with a one-page statement of the relevant facts. The facts are not in dispute.

At issue is the dismissal of Bill Smith, a 20-year-old soda delivery driver for the ABC Beverage Distribution Company. While on his

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[2]The statistical analysis was prepared by Rachel Winograd, a doctoral student in psychology at the University of Missouri at Columbia, and the author's daughter.

[3]A video recording of the San Diego session was made, which was subsequently produced as a DVD. It is available through the Academy's national office. To contact the office, go to www.naarb.org.

regular route, Mr. Smith found $400 in a bag on the floor of the restroom at the Sunnyhills country store. Mr. Smith did not report what he found until, at the end of the day, his supervisor asked about the missing money. Mr. Smith then handed it over. The next day, Mr. Smith was dismissed for "dishonesty." His union grieved, citing the just cause provision in the collective bargaining agreement. The dispute has been taken to arbitration.

Of course, there is more to the case than what I have just described. You will hear details from two fine attorneys who will offer persuasive arguments to support their respective positions. Representing the union is Ira (Buddy) Gottlieb from Bush Gottlieb in Los Angeles. Representing the company is Lindbergh Porter from Littler Mendelson in San Francisco. You also will meet Bill Smith, who will be examined by counsel.

A panel of distinguished Academy arbitrators is hearing the case: Jules Bloch from Toronto, ON; Edna Francis from Los Angeles, CA; Joan Gordon from Vancouver, BC; Kathy Miller from Ardmore, PA; and Lou Zigman from Los Angeles, CA.

Along with the arbitrators, a System Board of Adjustment from the airline industry will be deciding the case, lending a special perspective from the skies. On the union side of the System Board, we have Brett Durkin from the Association of Professional Flight Attendants at American Airlines; Terry Taylor from the Association of Flight Attendants at Alaska Airlines; and Maria Torre from the Association of Flight Attendants at United Airlines. The management side of the System Board includes Gerry Anderson from AirTran Airlines (soon to be Southwest); Stephanie Babish from American Eagle Airlines; and Mark Moscicki from American Airlines.

Biographies for our excellent panelists are available in the program materials. Before we go forward, a few comments will set the stage.

Discipline cases, generally, can be tough, but dismissals carry a special burden for an arbitrator. Quite literally, employment hangs in the balance, with all of its attendant financial, familial, and emotional impact. An arbitrator selected by parties to a collective bargaining agreement to hear such a case, and to issue a final and binding award, reads and applies the contractual direction of the parties. However, as we know, the directive typically is not very clear.

Most labor agreements state that an employee can be disciplined and discharged for "just cause," or for a variant of that expression.

Frequently used phrases include "for good cause," "for reasonable cause," "for sufficient cause" or, simply, "for cause." Public employees in the federal sector are subject to their own special test: "for such cause as will promote the efficiency of the service."

Sometimes, a collective bargaining agreement will contain language prescribing how the concept of "cause" should be applied to the facts at hand. For example, an agreement may identify misconduct of heightened concern, often called "major infractions" or "grounds for summary dismissal." In the labor relations community, these transgressions are known as "cardinal sins of the workplace." Here we find theft, sabotage, intoxication on the job, gross insubordination, and the like. For these offenses, as a matter of contract or established practice, a written rule prohibiting misconduct may not be needed, and principles of progressive, corrective discipline may not always be controlling.

Beyond these directives and limitations, labor agreements sometimes establish constraints on evidence, including prohibitions on referring to past discipline if it is more than a year or two old. There also may be limits on penalties, such as a ceiling on how much back pay can be awarded.

However, more often than not, the concept of "just cause" stands alone, as it does in this case. The phrase is remarkably vague, even though it is widely used in a field that prizes contractual clarity. The parties to labor agreements know the phrase is vague, and yet they still keep using it. Why? The vagueness of the phrase turns out to be a virtue. It permits labor practitioners to apply this flexible concept to varied factual situations. In this session, we will assess the extent to which labor practitioners have a shared vision, and where their vision departs.

In labor arbitration, one principle we share is that we determine whether there is "actual" cause for discipline. Unlike the non-union domain of employment law, an employee's dismissal under a labor agreement does not turn on whether an employer acted in good faith.[4] For labor arbitrators, an employer's sincere belief is not enough to uphold a dismissal if that belief turns out to be at odds with the actual, real facts.

By custom, the arbitration of disciplinary matters in labor cases reverses the usual burdens we find in civil litigation. The employer has the burden of going forward with the evidence and the ultimate burden of persuasion to explain and support its decision.

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[4]Compare, e.g., *Cotran v. Rollins Hudig Hall*, 17 Cal. 4th 93 (1998).

In civil litigation, the plaintiff-employee must shoulder both burdens in order to prevail. It is not the purpose of this session to fully explore why the convention in labor cases has developed this way. Briefly stated, labor agreements are structured so that an employee presumptively retains job security and workplace seniority by regularly showing up on time and by doing the work that is assigned. This presumption ends, in our parlance, if just cause is demonstrated.

When deciding a grievance contesting discipline, the classical analytical framework has several basic elements. Arbitrators may describe the elements with different words or different emphases, depending on the evidence presented, but one or more of these elements usually are applied.[5]

First, was there a reasonable rule or policy relied upon for the discipline, and was there notice and a warning of discipline for a violation of the rule or policy? As mentioned, some misconduct is so manifestly injurious to the employment relationship as to be self-evident, and thus may not require a written rule. For such misconduct, summary dismissal can be appropriate.

Second, did the employer fairly investigate the alleged misconduct? An arbitrator may question how the employer reached the decision, and whether the inquiry was adequate and in good faith. Some refer to this as a question of industrial due process. In the end, however, if there was a poor investigation or procedural deficiency, an arbitrator will decide if the shortcoming was prejudicial and materially affected the employee's case.

A third question is whether actual misconduct was demonstrated. In deciding this, issues might be posed about how to characterize the misconduct. Was the grievant stealing or borrowing; sleeping or dozing? Was the grievant insubordinate or just grumbling? Other questions will arise if there is doubt about a nexus to the workplace. Was the grievant on duty or off? Did the grievant's alleged private misconduct have an adverse impact on the employer's reputation and business? Questions about the quality of the evidence also might be present. Are witnesses credible? Is the employer relying on hearsay from an absent accuser, and nothing else?

Going beyond the issues of whether the factual charge is procedurally and substantively sound, arbitrators are asked to decide

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[5]See, generally, Dunsford, *Arbitral Discretion: The Tests of Just Cause*, in Proceedings of the 42nd Annual Meeting of the National Academy of Arbitrators 23 (1989).

if there is cause for the particular penalty that has been imposed. Countervailing and mitigating factors will be assessed, examples of which include employee seniority, progressive discipline, disparate treatment, lax enforcement, and proportionality, among others.

Ultimately, in deciding an appropriate remedy, if just cause has not been demonstrated, reinstatement is a preferred outcome for unions since they are seeking to vindicate a collective interest. Make-whole relief and a restoration of seniority also are standard remedies. Unlike employment litigation over wrongful terminations and discrimination claims, front pay for prospective economic loss is rarely awarded as an alternative to reinstatement.

The considerations that have been summarized vary from case to case, with this broad frame of reference being applied to determine the issue of just cause in each dispute. How will these considerations be applied to Bill Smith's dismissal?

You have the basic facts of the case in your program materials. You also have a survey form on which you will have a chance to rule on this case, as will the arbitrators and the System Board. In the interest of time, we will condense aspects of this proceeding so that we can hear from the advocates and Bill Smith.

We learn the following from the parties' opening statements. Mr. Smith is 20 years old and worked for ABC Beverage Distribution for a year, without incident. On the day at issue, Mr. Smith found $400 in a bag on the floor of a restroom at the Sunnyhills country store. The restroom is marked "Employees Only," but drivers are permitted to use it. After putting the bag with the money in his pocket, Mr. Smith continued with his duties by shelving sodas at that store and at others. Later, while on his route, Mr. Smith threw the bag away and put the money in his wallet. Mr. Smith did not inform anyone that he found the money, but he promptly turned it over when his supervisor asked him whether he found money during the day. The supervisor had been alerted about the loss by the customer. At the time he handed over the money, Mr. Smith admitted to his supervisor that he would have kept it had he not been asked. The next day, after the supervisor conferred with ABC's owner, Mr. Smith was fired for dishonesty. Six months before, ABC also fired an employee who had taken a bottle of champagne from the back of a store.

The testimony of the company's sole witness, the supervisor, spelled out a driver's basic duties and how a money pouch was used for collections from customers. He also described the

call from the Sunnyhills store, informing him about the missing money; what Mr. Smith said when he took the money from his wallet at the end of the day; and the previous firing of another driver for having taken a bottle of champagne. The supervisor explained that the company dismissed Mr. Smith for dishonesty because Mr. Smith had not reported what he found and had kept the money.

[At this point in the session, the union called Bill Smith as a witness. No rebuttal was offered by the company. The advocates provided closing arguments, and the case was submitted for deliberation and decision by the arbitrators, the System Board, and the audience.]

Postscript: The San Diego Session

Bill Smith's testimony was a highlight of the program, demonstrating that hearings with real witnesses can bring life to a bare, written statement of facts. At the San Diego meeting, "Bill Smith" became "Billie Smith." The role was played by Margaret R. Brogan. Besides the author, the only other person aware that she would be playing Billie Smith was union counsel Buddy Gottlieb. Buddy is this author's brother-in-law. Family bonds helped preserve the confidentiality of the arrangement, which heightened the impact of Ms. Brogan's participation.

When Billie (Margie) stepped forward to testify, she was immediately recognized by many. Together, Buddy and Billie prepared a fine example of a direct examination. They adopted an approach of acknowledging that a mistake had been made, while emphasizing Billie's simple good nature and the popular concept of "finders keepers." They differentiated between the earlier employee's theft of champagne and what Billie did—initially keeping the money but then immediately returning it when her supervisor asked about it, and promising to never make a similar error if given back her job.

On cross-examination, Lindbergh Porter utilized a classic "isn't it correct" technique that left little room for Billie to expand on explanations. Counsel established that Billie felt the money was hers after she found it, told no one about her discovery as she finished making her delivery at the store, tossed away the bag later on her route and put the money in her wallet, and only turned the money over when asked about it by her supervisor. Billie conceded, as she had to her supervisor, that she intended to keep the money unless asked about it.

The attorneys followed the witness examination with closing argument. Counsel for the company emphasized that Billie was dishonest because she had not reported finding the money to the store owner or to anyone else at the store, even though she was familiar with the people who worked there. Emphasizing that Billie's real intent had been to keep the money, counsel noted that she produced the money only when her supervisor inquired. And, even then, she admitted she would have kept the money had the inquiry not been made. Counsel for the company explained that the nature of the company's business requires it to place its trust in its drivers. Since Billie works on her own and handles cash for deliveries, Billie's continued employment would pose an intolerable risk. Despite Billie's youth and purported failure to know better, young people fight wars and carry out other civic responsibilities. They are expected to know that it is not right to find and keep money that obviously belongs to someone else. The company's exercise of discretion as to the severity of the discipline was not arbitrary or unreasonable, and the arbitrators should affirm Billie's dismissal as having been for just cause.

The union's counsel argued that Billie was young and not very experienced in the world of work. Counsel acknowledged that Billie made an error of judgment in not reporting what she found, but urged that she is not fundamentally dishonest. Counsel explained that Billie went into an area of the store that others, including persons who are not store employees, visit as well, and that she has had a good work record on the job. Most important, according to the union, Billie reported what she found as soon as she was asked, and did not seek to hide anything from her supervisor. Based on this course of events, the union argued that, if Billie's firing were upheld, her dismissal would send the wrong message to employees; namely, that it is better to stay silent and lie, rather than be truthful when a work-related question is asked. Based on these considerations, the union's counsel maintained that Billie's discharge would violate basic principles of fair discipline by imposing a penalty out of proportion to circumstances of the case. He concluded that Billie should be reinstated, with but minor discipline, if any.

Once closing arguments were presented, the arbitrators, the System Board members, and the audience were provided several minutes to deliberate. They also completed survey forms with demographic information and several decision options. The

survey forms provided the raw material for the statistical analysis discussed below. Two of the five arbitrators concluded that dismissal was justified, while the others determined that reinstatement was appropriate, but with varying sanctions: one believed that a 5-day suspension was in order, another a 30-day suspension, and a third ruled that no back pay should be given. The rationales offered by the arbitrators largely tracked the arguments of the parties. Although all agreed that Billie did not do what was right under the circumstances, they varied in the relative weight to be given to the company's interests and to the individual's. For those who decided on a penalty less than dismissal, Billie's pleasing personality and genuine manner, as drawn out during her examination, seemed to tip the scale in her favor.

The System Board members conferred during the deliberations period, but were unable to arrive at a majority decision. One company-side representative stated that an employer in this situation might provide an employee with an option to resign, rather than face dismissal, given the stigmatizing nature of the charge. For the union side, the absence of a rule on what to do with found property, and the employee's honesty in returning the money, were cited as considerations supporting reinstatement.

Postscript: Statistical Summary

Survey forms distributed at the session were filled out, in varying degrees of completeness, by 244 people in attendance. The overall numbers provided the following breakdown. About two-thirds identified themselves as arbitrators, and one-third as non-arbitrators. The respondents tended to have lengthy service in the field; 63 percent for over 20 years, with a mean of about 15 years. In terms of background, about 37 percent listed service as neutrals, 23 percent as representing labor, 20 percent for management, and 18 percent in more than one category. In addition, 62 percent stated that they are attorneys, and 38 percent said they are not. Of those in attendance, 135 indicated that they reside in the United States, and 20 stated they are from Canada.

Turning to the decisions rendered, responses were submitted by 243 individuals. The total figures are as follows:

Discipline	*No.*	*Percent*
Dismissal	81	33.89%
Reinstate without back pay	36	14.81%
Reinstate with 30-day suspension	29	11.93%
Reinstate with 5-day suspension	34	13.99%
Reinstate with 1-day suspension	7	2.88%
Reinstate with warning only	42	17.28%
No discipline	14	5.76%

In probing the disciplinary outcomes, the categories were divided into four groups: (1) dismissal, (2) reinstatement without back pay, (3) reinstate with a suspension, and (4) warning or no discipline. (The limited number of groupings for statistical analysis was due to the corresponding limited number of respondents for some of the decisions.)

Using the resulting figures, the statistical analysis found a significant correlation between those with a labor background and the decision rendered. Only 9 percent of the labor respondents approved dismissal, but 41 percent of management respondents would have upheld the company's action. Similarly, 41 percent of those with a labor connection favored reinstatement with a warning or no discipline, while only 20 percent with a management connection approved that outcome.

Statistical significance also was found in assessing the responses of arbitrators and non-arbitrators. For arbitrators, 39 percent favored dismissal, compared to 22 percent of non-arbitrators. In contrast, 33 percent of non-arbitrators would reinstate with either a warning or no discipline, while only 18 percent of arbitrators opted for that outcome. Interestingly, Canadian respondents were significantly more likely to rule in the middle of the disciplinary ladder, by favoring reinstatement without back pay or a suspension over approving dismissal, at one extreme, or minimal or no discipline at the other. This finding is tempered with a note of caution: many failed to indicate their country of residence when providing survey responses.

Appendix: The Case of the Missing Money—Facts

Based on pre-arbitration grievance discussions and documents, the following facts are undisputed.

Bill Smith, a 20-year-old driver for the ABC Beverage Distribution Company, was making a soda delivery to the small Sunnyhills country store one afternoon. The store was part of the regular route that he serviced. After bringing in sodas to load the shelves, he went to the restroom at the back of the store. The restroom had a sign that said "Employees Only," but delivery people were permitted to use it.

Inside the restroom, Bill found a small white paper bag on the floor. He looked in the bag and found a roll of bills that totaled $400. The bag contained the cash proceeds for the woman who ran the meat counter, a business concession separate from the store itself. Bill did not know the money was hers.

Bill put the bag and the money into his pocket, left the restroom, and returned to the store to finish putting sodas on the shelves. He did not tell anyone in the store about the money he found, or the bag. About a half hour later, he left the store and continued with several other deliveries. Along the way, he threw away the bag and put the money in his wallet. Bill also had a larger money pouch that he used when collecting payments from store owners for his deliveries.

Later that day, after returning to the company's warehouse with his truck, Bill was completing his paperwork at the end of his shift. While doing this, Bill's supervisor approached, said he had been called by a store, and asked if Bill found any money during the day. Bill said that he had, took the $400 from his wallet, and gave it to the supervisor. In explaining the circumstances with the supervisor, Bill said that he would have kept the money for himself if he had not been asked about finding it on his route.

After speaking with Bill, the supervisor conferred with the owner. The next day, Bill was fired for "dishonesty," as stated in the dismissal notice. In the notice, the company explained that it needed to employ drivers who could be trusted. Bill has worked for the company for one year. Until this incident, there had not been any problems with his work. Six months before Bill's dismissal, the company fired another delivery driver who took a bottle of champagne from the back of a supermarket storeroom.

Bill's union challenged the firing, claiming that the beverage company did not have "just cause" for termination, as required

by the company's bargaining agreement with the union. The company disagreed. Six months later, the case is being heard in arbitration. A bench decision is requested. Should Bill's firing be upheld? If not, what should be the remedy?