CHAPTER 4

THE DISCIPLINE AND DISCHARGE CASE: TWO DEVIL'S ADVOCATES ON WHAT ARBITRATORS ARE DOING WRONG

I. A MANAGEMENT ADVOCATE'S VIEW

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As a management advocate, I was somewhat surprised at the invitation of the Academy to expound on the subject of what arbitrators are doing wrong in discharge and discipline cases. This is somewhat akin to inviting Lobo the Wolf to watch the sheep herd. My initial thought was, why didn't they ask me to speak on the subject of what arbitrators are doing right in discharge and discipline cases. Upon sober reflection, however, the answer was obvious. This would leave a two-and-one-quarter gap in the two-and-one-half hours allotted for this part of the program and would provide only one page in the published Proceedings.

The thought of offering criticism, constructive or otherwise, to this assembled heavenly host of arbitrators made me as nervous as a sports car owner surrounded by tall dogs. However, I determined to approach the task with the same spirit of fearlessness and reckless abandon as demonstrated by the Academy in assigning me today's topic for discussion.

I remarked to one of my arbitrator friends that this opportunity to serve as a management missionary made me feel a bit like John the Baptist. Exhibiting the universal knowledge and incisive commentary so characteristic of the arbitrator's profession, my arbitrator friend reminded me that John the Baptist was beheaded at the request of a prostitute. I told him that I hoped the Academy would be above that sort of thing.

In preparing my remarks, I struggled to come up with some erudite bit of philosophy that would capture the attention of the

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arbitral fraternity and serve as a continuing theme—something like Jimmy Carter's classic insight into the world of economics: "When a great many people are out of work, unemployment results." Then I remembered the story of the young student who was assigned to write a paper on Socrates and wrote, "He was a wise man and they killed him by making him drink poison."

Recognizing that erudition and a bent for gems of wisdom are birthmarks among the family of arbitrators, I determined to call upon the arbitrators to assist me in conveying my message. Actually, reading an entire volume of *Labor Arbitration Reports* proved to be most interesting. In a single volume one can find drama, pathos, adventure, comedy, and pure nonsense. The cases to which I will allude are reported in *Labor Arbitration Reports,* published by BNA. To protect the guilty, I will not give citations or case names. I would like to acknowledge that none of the quotations I will offer emanated from members of this Academy. I would like to, but I can't.

The Just-Cause Standard

The universal standard against which discharge and disciplinary action is measured is "just cause." The primary commission of the arbitrator in a discipline case is to determine whether the action taken by management was for just cause. Just cause is admittedly an elusive concept since the collective bargaining agreement rarely, if ever, defines what the parties consider to be just cause. In some instances, prescribed rules for employee conduct may give examples of certain offenses that constitute just cause for disciplinary action, but even these rules are subject to a determination of reasonableness by the arbitrator.

The lack of a precise definition for "just cause" does not, however, mean that the parties have committed the definition thereof to the arbitrator's whim. In recent years, published arbitration opinions reveal a disturbing tendency among some arbitrators to enmesh themselves in an intellectual exercise of semantics in applying the just-cause standard.

A good example of this is the case where an employee was disciplined for responding to a supervisor's direction by saying, "Go f—— yourself." The company contended that the use of such "profanity" toward the supervisor constituted insubordination. The arbitrator dealt with the situation as follows:

"Webster's Third International Dictionary, Unabridged, defines 'profane' as irreverance, a violation of sacred or religious things. Certainly, the four letter word used by the grievant is not profane.

"Some might argue that the four letter word used by the grievant is obscene. However, to be legally obscene, the language must appeal to a prurient interest in sex as that interest is defined by applying contemporary community standards, and must be in some significant way erotic. *City of Columbus* v. *Fraley,* 41 Ohio St. 2d 173 . . . (1975). As shown in *Cohen* v. *California,* 403 U.S. 15 . . . (1971); *Hess* v. *Indiana,* 414 U.S. 105 . . . (1973); . . . *Miller* v. *California,* 413 U.S. 15 . . . (1973), the four letter word used by the grievant is not obscene.

"Having determined that the expression used by the grievant was neither profane nor obscene, it should be noted that the speaking of boisterous, rude, and insulting words, even with the intent to annoy another, may not be prohibited or punished unless the words, by their very utterance, inflict injury or are likely to provoke the average person to an immediate retaliatory breach of the peace. [Citation of seven judicial decisions omitted.]"

The arbitrator concluded that the company did not have just cause to discipline the grievant.

I sent my mother a copy of this arbitrator's opinion, along with a demand for an apology for having washed my mouth out with soap for the use of much less expressive epithets.

A finding that the grievant's expression in this case was provoked, or that under the circumstances it might be labeled as shop talk, might understandably serve in mitigation. The blanket condemnation of such conduct by means of an inapposite application of the constitutional standards for obscenity is, however, fatuous. If the arbitrator's secretary responded to his direction in similar fashion, I doubt that he would rationalize such conduct in the same manner.

In another case the grievant responded to a foreman's admonition for sleeping on the job by saying to the foreman, "I'll take care of you." The foreman said, "Do you mean that as a threat?" The grievant answered, "You take it whichever way you want to."

Most of us who have worked in an industrial plant, or have been involved in labor relations, would have little trouble deciphering the grievant's offer to "take care of you." In the context of the situation, it is doubtful that the employee was expressing his desire to serve as a surrogate mother to the foreman. However, the arbitrator found the employee's statement to be a multiple-choice offer and hence not culpable. The arbitrator

reasoned as follows: "There is also the statement by the Grievant, 'I'll take care of you.' The very ambiguity of the statement prompted K—— to ask, 'Do you mean that as a threat?' The Grievant was alleged to have stated, 'You take it whichever way you want to.' Again, this statement is ambiguous, leaving it to K—— to interpret it 'whichever way' he wished."

In every labor contract that I have examined, the singular standard for disciplinary action is just cause. There is no indication that just cause means one thing when applied to a disciplinary action for absenteeism and another thing when applied to disciplinary action for theft. Yet in a significant number of cases arbitrators hold that in cases involving theft, the standard of just cause takes on a different meaning and is to be equated with the standard for criminal conviction—proof of guilt beyond a reasonable doubt.

In a criminal action at law, the accused, if found guilty, faces the prospect of incarceration, or fine, or both. The possible deprivation of individual freedom warrants the requirement that guilt be established beyond a reasonable doubt. In a civil action at law, the standard of proof is simply a preponderance of the evidence.

A labor arbitration cannot reasonably be equated with a criminal prosecution, and just cause should not be expanded by arbitral fiat to embrace the requirements attendant to criminal proceedings. Why should an employee charged with sleeping on the job be discharged on the basis of a lesser degree of proof than one who steals, where the same standard —just cause—is contractually agreed to be applicable to both situations?

The concept of just cause antedates the U.S. Supreme Court decision in *Miranda* v. *Arizona*[1] by many years, and when the decision in *Miranda* was issued, there was a notable absence of commentary in labor-management circles with respect to its impact on employer-employee relations. Imagine the surprise of the employer who requested some employees to open their lunch boxes at the end of the shift, found stolen company property in some employees' lunch boxes, discharged the guilty employees, and was ordered to reinstate them with full back pay. The arbitrator held that the duty of the employer to prove the

[1]384 U.S. 436 (1966).

guilt of the employees by criminal standards also carried with it the duty to read them their *Miranda* rights before asking them to open their lunch boxes. The mother of "just cause" would have trouble recognizing her offspring after such arbitral surgery.

Just cause was not intended to be a springboard from which arbitrators could introduce their own ideas for social and legal innovation into the work place. Arbitrator Lewis Tyree articulated a good guideline for arbitrators to follow in *Campbell Soup*[2] when he stated that in applying the concept of just cause, the arbitrator should be guided by "common sense, common knowledge of generally prevailing industry standards for employee deportment and common understanding."

Dissatisfaction With Impartial Arbitration

Six years ago all of the multi-employer labor contracts I negotiated provided for impartial arbitration as the final step of the grievance procedure. Today none of these contracts provides for impartial arbitration as the final step of the grievance procedure. The lack of common sense and consistency in arbitrators' decisions, together with the inordinate delay in securing the services of an arbitrator and in getting a decision, impelled the parties to establish their own joint arbitration boards composed of management and union representatives in the industries involved. Only in the case of a deadlock among the members of the industry board of arbitration are the services of an impartial arbitrator called for. This experiment in disputes resolution has been so successful that in six years it has not been necessary to utilize the services of an impartial arbitrator.

By and large, labor arbitration and professional arbitrators have served the parties well. However, based upon my own observations and the reluctance of labor and management to accept freely the services of many new arbitrators, confidence in the arbitration process is on the decline. In some measure, this decline in confidence is occasioned by the fact that plain and commonly understood concepts such as just cause have been bent out of shape by the predilection of some arbitrators for making the law of the shop rather than applying it.

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[2] 10 LA 207 (1948).

Appropriateness of Penalties

When an arbitrator determines that just cause for disciplinary action has been established, the inquiry turns to the appropriateness of the penalty meted out to the offending employee. Absent some clear proscription in the labor agreement, it is generally recognized that the power and authority to review the reasonableness of disciplinary penalties is inherent in the arbitrator's power finally to determine the dispute presented for arbitration.

I have always shunned members of the clergy as arbitrators in interest arbitration cases because I did not want an individual whose creed in life is "It is better to give than to receive" to decide what my client should give the union. Likewise, I have rejected members of the clergy as arbitrators in disciplinary cases because of their belief in the precept, "Forgive them, Lord, they know not what they do." Published arbitration opinions reveal an ever-increasing trend among arbitrators to invade the priesthood. Indeed, in divining the judgment to be meted out in disciplinary cases, they have assumed the role not only of clergymen but of trial judges and psychiatrists.

The original disciples of the War Labor Board approached the matter of rescinding disciplinary penalties assessed by management with caution and hesitation. Whitley P. McCoy expressed the view that "[t]he only circumstances under which a penalty imposed by management can rightfully be 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]

Harry Dworkin articulated the limited power and authority of the arbitrator to mitigate disciplinary penalties as follows:

> "Reasonable minds may honestly differ as to the discipline which may be warranted under the facts presented. Where the arbitrator determines that the discharge was warranted and justified, he would himself be guilty of capricious abuse of authority were he to modify the discipline . . . merely because his personal judgment might tend to a lesser form of penalty. While the arbitrator may modify or mitigate the penalty imposed as a disciplinary measure, such modification may only properly result from a prior determination that the company's conduct was unreasonable and a clear abuse of discre-

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[3]*Stockham Pipe Fitting Co.*, 1 LA 160, 162 (1945).

tion. Where the arbitrator finds that the employee was clearly at fault and that his conduct warranted disciplinary action by management, the measure of the penalty is a matter within the discretion of the company provided it is fairly applied and does not conflict with the terms of the contract."[4]

In far too many cases the arbitrators' opinions demonstrate that the touchstone for evaluating the appropriateness of disciplinary penalties is simply the subjective views and personal prejudices of the arbitrators. The arbitral laissez-faire approach to disciplinary cases is illustrated by the following sampling of recent opinions.

In one case a 21-year-old employee was discharged for selling marijuana in the company's plant during working hours, in violation of a company rule. The employee admitted his guilt. The arbitrator accepted the employee's confession and rendered his own brand of absolution with the following statement:

"While I agree with the Company that the actions of the Grievant were such that discharge was warranted, I believe that because of his relative youth, he should not be prevented from continuing his employment with the Company because of one serious error. I see the error as serious because I am in accord with the Company that it cannot condone the sale of marijuana on its premises. . . . I find they were justified in concluding that the Grievant did violate the Company rule and . . . I cannot fault them for discharging the Grievant. . . ."

Having determined that just cause for discharge did exist and that the penalty of discharge was warranted, there was no occasion for the arbitrator to rescind the discharge.

The self-assumed role of psychiatrist and social worker taken on by some arbitrators is evidenced by another recent published opinion. The employee had accumulated sufficient disciplinary demerits to place him at the last step of the progressive disciplinary scale where the penalty was discharge. The employee was admonished for being tardy and threatened to punch the foreman in the face. Discharge resulted. The arbitrator exhibited his Solomon-like wisdom as follows:

"The arbitrator's responsibility in a case like this is to determine whether there are any mitigations weighing against the supreme penalty of discharge. Frankly, they are hard to find in this instance. . . .

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[4]*Bauer Brothers Co.*, 23 LA 696 (1954).

> ". . . the union has made its investment in its earnest representations on his behalf in this proceeding. The real question is whether or not this investment can be salvaged in some way, and that is up to the Arbitrator. . . .
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> "Like many a young man 'not dry behind the ears', apparently he was trying to see how far he could go. . . .
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> "The Company undoubtedly has grounds for discharge . . . the union on the other hand has expended great effort and money on behalf of the Grievant. The ultimate question is whether an employee can be salvaged, and the Arbitrator approaches it solely from that standpoint."

The arbitrator ordered reinstatement and further directed that "[T]his Award and Opinion shall be read to the Grievant by a Union and Company representative in company" with each other with the understanding that any future misconduct shall be the basis for immediate discharge.

This opinion is far from unique. In a surprising number of recent cases arbitrators have reduced discharge penalties based upon the rationale that the role of the arbitrator is to determine whether the wayward grievant is a salvageable member of the work force. Just what expertise they bring to bear in this determination in the course of a one-day hearing is not readily apparent. I submit that if the arbitrator finds discharge is warranted, he should curb his bent to act as a Messiah, deny the grievance, and write finis to his opinion.

The next case to which I wish to allude deserves the arbitral award of merit for inventive lunacy. The grievant was discharged for picket-line misconduct during the course of a strike. The arbitrator concluded that "there is no doubt that B—— is guilty." Notwithstanding that the case was submitted to arbitration under the terms of the collective bargaining agreement and the arbitrator cited various provisions of the agreement, the arbitrator decreed: "There appears to have been an expired agreement when the alleged misconduct took place. Therefore, the misconduct should be judged in accordance with the law, not the contract."

Having freed himself from the bounds of the contract—contrary to the teachings of the U.S. Supreme Court relative to the source and limits of arbitral authority—this newly and self-appointed law judge proceeded to apply the doctrine of contributory negligence to mitigate the discharge penalty. The arbitrator even gave new meaning to the doctrine of contributory negligence in ruling that the company was guilty of contributory

negligence in keeping its plant open during the strike—and, ergo, the grievant escaped the discharge penalty. The arbitrator reasoned as follows:

> "Management . . . is guilty of 'contributory negligence' when it takes on the historical inevitability of violence in choosing to operate. It is a bit like the woman who dresses provocatively, struts in an inviting manner at 2 A.M. in a dubious neighborhood, and virtuously yells 'rape' when attacked.
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> "Although the Company has a legal right to keep the plant open, its decision to do so gives it some share of responsibility for creating an environment conducive to violence."

What a surprise awaits this arbitrator should he attack a provocatively dressed woman at 2 A.M. in a dubious neighborhood!

Arbitral Inventiveness

The surge of arbitral inventiveness with respect to remedial decrees bids to emasculate the last vestige of continuity and common understanding in the arbitration process. In the process, management and union representatives are being driven to distraction.

Take the case where a retail store discharged a cashier because of repeated complaints from customers concerning the employee's rudeness. The arbitrator concluded that the evidence supported the company's claim and that the employee was in fact incorrigible. "On the other hand," the arbitrator stated, the company's failure to give the union timely notice of written reprimands issued to the employee was a violation of procedural due process and, accordingly, "the dismissal cannot be regarded as one which was imposed for cause within the meaning of the Agreement." Having found that the employee was not discharged for just cause, the arbitrator reinstated the employee, right? Wrong!

The arbitrator opined that labor arbitration in the United States could benefit from a borrowing of concepts sometimes applied "by our friends across the Atlantic." This served to communicate to the parties that the arbitrator's knowledge extended to other parts of our planet and was the basis for a rather innovative remedy that the discharged employee be given four months' pay but no reinstatement.

Not surprisingly, the published opinion reveals that both the

union and the company filed applications for "Correction of the Award." The union contended that having found that the discharge was not for just cause, any fair reading of the collective bargaining agreement required reinstatement. The company contended that having found the grievant guilty of misconduct, having found the grievant's behavior to be "uncorrectable," and denying reinstatement, the arbitrator was constrained to conclude that the discharge was for just cause. The arbitrator dealt with the apparent incongruous posture of his remedial order by simply stating, "Arbitrators, like trial judges, have a large measure of discretion in devising remedies."

The idea that remedies to be applied in disciplinary cases are to be the product of the arbitrator's imagination and ideas of social justice should, in my opinion, be curbed.

In another recently reported case, the company discharged an employee for leading a wildcat strike in violation of the labor agreement. The arbitrator stated, "Based on these facts and this analysis . . . the company had just cause to discharge W—." This should have ended the case. But, alas, the womb of the arbitrator's fertile mind was impregnated and a new remedy was born.

Notwithstanding that just cause for discharge existed, the arbitrator "concluded that another remedy would best serve the interests of all parties." The arbitrator set an "arbitrary figure of 65" as indicating the number of men employed on each of the three shifts at the company's facility. He then resorted to his pocket calculator and found that taking 65 as the base figure, "a one day strike results in the loss of 195 man days, counting all three shifts." The arbitrator then concluded that the company had lost 585 man days due to the strike as of the date of hearing, and the following remedy was decreed: "We therefore propose to penalize W—— with one day of suspension for each man day lost or a total of 585 days with an additional 195 days for each additional day lost if the men do not go back to work that Sunday night."

Since the strike was in its third day at the time of hearing, the grievant's penalty could be increased daily if the strike continued. The arbitrator noted that the grievant could not complain about such an indeterminate penalty, stating: "It could be argued that the length of W——'s suspension depends in part on whether others take certain action over which he may have no control. Our answer to that is that one who deliberately starts a fire is liable for the consequences of his act, though the in-

tervention of the firemen may reduce the extent of liability."

Is there any limit to this arbitral mania? Perhaps not! I'd like to think that the following statement in another recent case concerning arbitral precedent is the product of erroneous sentence structure. In reviewing the penalty imposed in another case, the arbitrator noted: "The employer was ordered to place [the] employee on extended sick leave from the day of his 'quit' until his death by suicide six months later."

Some sage once said that "eloquence is saying all that should be said—not all that could be said." The written opinions of many arbitrators demonstrate a lack of acquaintance with this sage. In my research, I came across the following arbitrator's opinion which demonstrates the tortured and, to the parties, meaningless pyrotechnics sometimes indulged in by arbitrators in an apparent attempt to impress the parties with the arbitrator's breadth of knowledge. While this case was not a discharge or discipline case, I simply couldn't pass it by.

The issue posed in this case was whether the company had violated the labor contract in promoting a junior seniority employee. The contract provided that "if qualifications are equal, seniority will be the deciding factor." The arbitrator noted that while a literal interpretation of the contract would require that qualifications be absolutely equal, words are often not given their literal meaning. He explained his point as follows:

> ". . . The law is replete with instances over the centuries when certain contract language has been given more dimension than an entirely flat or literal reading would indicate. One need go no farther than that classic of classics in the law. The Rule in Shelley's case [serves as] an illustration.
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> "In that famous decision which has been copybook for centuries of law students, England's highest court was confronted by a construction of language in a bill whereby certain real estate was given 'to A and his heirs.'
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> "To the lawyers of the day this seemed to create a life estate in A who was to use the property and upon his death it was to be turned over to the heirs of the original grantor. Perhaps to the surprise of almost everyone at the time the high court ruled that this created an absolute conveyance to the first taker without any life estate remaining at all. The Arbitrator never expected to have occasion to refer to the rule in Shelley's case in an arbitration, but this seems to be an appropriate point."

Unlike the arbitrator, I do not think the Rule in Shelley's case was appropriate, nor do I think his learned dissertation on En-

glish law was meaningful or impressive to the parties. A concise, common-sense statement of the reason for the decision would have been far more meaningful to the parties. My law school professor had a difficult time explaining the Rule in Shelley's case to me, so I can imagine the trouble the union official had in explaining it to the membership.

Conclusion

What are arbitrators doing wrong in discharge and discipline cases? I rest my case on the aforementioned testimony of the arbitrators themselves.

Arbitrators should bear in mind that they are appointed, not anointed. As the U.S. Supreme Court stated in *Steelworkers* v. *Enterprise Wheel & Car Corp.*,[5] the arbitrator "does not sit to dispense his own brand of industrial justice."

The reprise of a currently popular country-western song says, "Maybe it's time we got back to the basics of love." I would suggest in discharge and discipline cases that the arbitrators should get back to the basics of common sense, common reasoning, and common understanding.

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[5]363 U.S. 593, 597 (1960).

II. A UNION ADVOCATE'S VIEW

BRUCE A. MILLER*

It is an honor to address this distinguished assembly. I am particularly pleased to share a platform with William Saxton, for whom I have the special respect generated by frequent and hard-fought battles with a worthy adversary.

We have been asked to criticize *vigorously* arbitrators in the handling of discharge and discipline cases. Having an egalitarian nature, I tried to share the pleasure of this rare opportunity. Before formulating my remarks, I met with some trade unionists who present cases without counsel. These observations are a synthesis of our common experiences.

An arbitration decision, of course, does not occur in a vacuum. It is largely true in the labor arena, as in other litigation, that facts win lawsuits. However, other factors are significant. Bill Saxton and I hope that our clients continue to believe that the style and competence of the advocate are important factors. And the applicable provisions of each agreement and past practices are certainly instructive.

With those caveats, let me grapple with the topic: the conduct of the arbitrator.

The Arbitrator's Conduct

In the interest of labor peace, we use arbitration as the final and binding dispute-resolution mechanism in the interpretation and enforcement of our contracts. The union gives up its right to strike, and management gives up its right to unilateral decision-making.

The arbitrator then, and not management, is intended by the parties to be the ultimate decision-maker. You are not and should not be restricted by prior management decisions. You are bound only by the agreement from which your jurisdiction is derived, the common law of the shop, and your own sense of fair play.

Discharge and discipline cases are inherently difficult. You are dealing with a person's livelihood and, therefore, his very life.

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In the best of times, a question dealing with continued employment is a hard one. In these times of high unemployment and the social consequences attendant to the loss of a job, a discharge case takes on even greater importance.

This reminder to arbitrators that discharge may be an economic death penalty, causing forfeiture of important rights as well as suffering to a grievant and his innocent family, is not a cliché to be ignored merely because of its familiarity. Rather, you should be increasingly sensitized to the effects of your decisions and resist the temptation to cynicism that is often the result of repetition of the same process.

An arbitrator owes the parties fairness and impartiality. His decisions are virtually unassailable in courts. The process must, therefore, gain the trust of the participants. An important move in that direction was the recent decision of the Federal Mediation and Conciliation Service to delist arbitrators who represent management or labor as advocates.

The American Arbitration Association has not yet taken that stand. The number of arbitrators who actively represent management in their business life is astounding. Their inclusion in AAA panels denies unions equal choice in selection because they must often be stricken as a matter of course. In my opinion, a serious question of impartiality and fairness is raised whenever the arbitrator is also an advocate. This question must be addressed and resolved.

Most of you have won the respect of both sides and have nothing to fear from rendering a decision that may offend either the union or management. Those arbitrators who have not yet been "accepted" may either consciously or subconsciously feel obligated to win that acceptance in a case by deferring to one side or the other. I recognize that the insecurity of an arbitrator may, as many times as not, work in my favor. It may be a fact of life. That temptation, however, should be conscientiously resisted by an arbitrator.

From hearing to decision, the appearance of fairness and reasoned impartiality is as important as the substance if we are to maintain the integrity and effectiveness of the arbitral system. From labor's perspective, it is particularly important that every grievant feels his hearing was conducted with probity. An atmosphere of frivolity or cynicism erodes confidence.

Standards of an Award

Similarly, at the time of an award, the way you do it is as important as what you do. Winners, losers, and decision-makers benefit by communication of the standards applied to the case. You can perceptibly increase the acceptability of your decisions by articulating those standards.

The standards comprise many factors, some of them peculiar to each case. Each plant represents its own microcosm of society, including values and mores that influence what conduct is acceptable and what is subject to discipline. However, there are certain guidelines for analysis of the just-cause standard which can be adhered to generally in any discipline case. I commend to you the criteria outlined by Arbitrator Carroll R. Daugherty in his oft-quoted set of questions to test the existence of just cause. Although I am certain you have heard those criteria many times, Arbitrator Daugherty's guidelines are worth repeating. In his words:[1]

> "A 'no' answer to any one or more of the following questions normally signifies that just and proper cause did not exist. In other words, such 'no' means that the employer's disciplinary decision contained one or more elements of arbitrary, capricious, unreasonable, and/or discriminatory action to such an extent that said decision constituted an abuse of managerial discretion warranting the arbitrator to substitute his judgment for that of the employer.
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> "1. Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?
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> "2. Was the company's rule or managerial order reasonably related to the orderly, efficient and safe operation of the company's business?
>
> "3. Did the company, before administering discipline to the employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
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> "4. Was the company's investigation conducted fairly and objectively?
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> "5. At the investigation did the 'judge' obtain substantial evidence or proof that the employee was guilty as charged?
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> "6. Has the company applied its rules, orders and penalties even-handedly and without discrimination to all employees?
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> "7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the

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[1] *Grief Brothers Cooperage Corp.*, 42 LA 555 (1964); *Combustion Engineering, Inc.*, 42 LA 806 (1964); *Enterprise Wire*, 46 LA 359 (1966).

employee's proven offense and (b) the record of the employee in his service with the company?"

These questions provide a model of due process for disciplinary and discharge cases. It is a framework into which most cases can fit. By applying these criteria systematically, an arbitrator avoids the temptation to leap to gut-reaction decisions, insures the fundamental fairness of his decision, and enhances the acceptability of his decision to both parties.

At the very least, an arbitrator must be accountable to the extent of providing internal consistency. The denial of a grievance without enunciation of the basis of the decision is not only devastating to the workers, but bewildering to the union facing similar future disputes. I often hear criticism, and have made it myself, that the opinion of an arbitrator seems to have no relationship to the ultimate award. What we ask is not more words, but more plain speaking.

Some arbitrators have a decision format. They recite the facts, the positions of the parties, and the analysis of the case. All too often the third part gets short shrift. It is sometimes a single paragraph. If the system is to maintain its integrity and usefulness, this will not do. The parties are entitled to know the thought process by which an arbitrator reaches his decision. We must be satisfied that he understood what the case was about and reached his conclusion by a rational process.

It is terribly disheartening to read an opinion and not know why I lost. (I am less disheartened when I win, but I do have the same concern.) You must convince us when we're wrong.

You must deal with all the issues thoroughly and carefully. You must not work backwards, deciding the case and then selecting evidence to support the decision without explaining why contrary evidence was rejected.

Mediation, Prejudgment, and Bias

In a discharge or discipline case, the parties may directly or indirectly ask you to attempt to mediate and settle the dispute without a hearing. This process should be resisted unless it is clearly welcomed by both parties. If mediation is undertaken, it is imperative that the arbitrator refrain from prejudging the case so that he is free to render a fair decision in the event the case

must be decided. If you feel you cannot both mediate and adjudicate, decline the invitation.

Arbitrators are not free from bias. They suffer from certain human characteristics common to us all, but it is intolerable if these biases affect the fundamental rights of workers. An example: Recently an experienced and well-respected arbitrator heard a discharge case. The employer's opening statement noted that the employee had only a few months' seniority, although he had passed the probationary period. The arbitrator turned to the union representative and asked why the case was going forward in view of the limited seniority. The arbitrator was unmoved by the union's protestations that seniority date had no bearing on whether the employee was guilty of the alleged misconduct. The union lost the grievance. Such bias is improper. Although an employee's long service may be cause for reducing a penalty, it is no excuse for refusing to hear the merits of the grievance. In any disciplinary case, the grievant must be found guilty of the misconduct before the question of penalty should even arise.

In a very real sense, the worker involved in a discharge or discipline case has fewer rights than an accused criminal. The employer, under recognized arbitral principles, has the burden to show just cause for its action only after the penalty has been meted out. Usually the employee is either out of a job or has lost time as a result of a disciplinary suspension. The employer has substantial psychological momentum before the case gets to arbitration because the arbitrator is called upon to reverse a company action, a *fait accompli.* An arbitrator must consciously neutralize that momentum by insisting scrupulously that the employer carry his burden.

Penalties and Remedies

The notion of corrective discipline merits attention. I believe the concept is, or should be, subsumed in the idea of just cause. While an employee owes to his employer the duty to present himself at work regularly and provide a day's work for his wages, the employer also owes a duty to his employee when misconduct is at issue. Before imposing harsh discipline, the employer must utilize corrective discipline. This principle has been called "progressive" because it includes increasingly harsher penalties for

recurring misconduct. The employer must counsel the employee and make a reasoned effort to help the employee improve his performance. Absent that, the arbitrator should find no just cause for any discipline. Arbitrators too often ignore this principle.

In order to maintain "acceptance," some arbitrators try to give something to everyone. This often results in rubber-stamp reinstatement without back pay. The United States Supreme Court has noted:

> "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he 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. . . ."[2]

If an arbitrator agrees that a penalty is too harsh, but misconduct by the employee warrants some discipline, he is frequently empowered to determine an appropriate penalty. In that situation, the arbitrator must, in fact, fashion a penalty. That obligation is too often honored in the breach. It is patently arbitrary and unreasonable to assume that the proper penalty exactly coincides with the length of time between the discipline and the arbitrator's award. The arbitrator should be accountable for his assessment of a penalty less than discharge. He should articulate reasons for it. You have been extremely lax in this area.

In a recent case the contract provided that if there was no just cause for discharge, the employee should be reinstated with full back pay. The arbitrator asked the union if it would waive the provision. The union refused. The arbitrator then sustained the discharge. The case did not warrant discharge, although a penalty might have been in order. (It is interesting to note that the company attorney, after the case and before the decision, congratulated me on a victory.) It was not proper for this arbitrator to impose a penalty expressly precluded by the contract to vindicate his own private sense of justice.

Another problem with an arbitrator's unreasoned remedy is highlighted by a case that recently came to my attention. The arbitrator reinstated the grievant without back pay and denied

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[2] *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

the employee the right to accumulate seniority during that period. That was a double penalty of dubious validity, and the error was compounded by an effectively lifelong penalty to the employee. Unless specifically provided by the contract, loss of seniority as a penalty in a disciplinary case has no justification. Would any arbitrator here consider a permanent reduction of the employee's wage by 10 cents an hour to be an appropriate penalty? Of course not.

I have reiterated the necessity that an arbitrator be thorough and careful in his threshold decision-making as to whether any discipline is warranted. This principle is no less important in fashioning a remedy, even that most sought-after award in a discharge case—reinstatement with full back pay. What does full back pay mean? If the employee has been vindicated, he is entitled to be made whole. He is entitled to be returned to his employment with all benefits as though continuously employed. But questions remain open. How is the back pay to be calculated? What, if any, interim earnings are properly deducted by the employer in calculating back pay?

Often the award granting reinstatement with back pay is not the end of the dispute. Either a second arbitration or court action may be necessary. Frequently no provision is made for repayment of unemployment compensation benefits received by the employee during the period of suspension. Of course the employee is not entitled to a windfall. On the other hand, arbitrators are not inclined to award the employee interest on his back pay or punitive damages for willful or wanton discharges. Arbitrators should consider expanding union remedies in order to discourage employer conduct that is willful and malicious. Such remedies are the quid pro quo for unnecessary employee suffering and humiliation for which an employee can never be made "whole."

As to the issue of unemployment compensation, it must be said that in order to fashion an adequate award, the arbitrator must know the applicable compensation law. In Michigan, if an employee, after receiving compensation benefits, obtains a back-pay award for the same period of time, the Michigan Employment Security Commission has the authority to, and will, seek repayment from the employee. The employer's compensation account will be credited with the refund. If the employer is permitted to deduct the unemployment compensation from the back pay due the employee, the worker is not made whole at all,

but ultimately penalized for obtaining benefits to which he is lawfully entitled in a situation wrongfully caused by the employer. If the arbitrator is not careful to define the scope of his back-pay award, extended litigation, added expense, and increased delay are the results—even when the worker's position has been vindicated.

What We Expect of an Arbitrator

From labor's perspective, all of these practical considerations can be summarized in a philosophical statement of expectation. We expect arbitrators to be sensitive to the human problems underlying the need for contract interpretation. When you fail, it is often in leaving such sensitivity, or any sense of injustice, from the labor relations equation. You ought to ask, in every case, Mr. Justice Holmes's famous question: "Is it fair?"

Our criticism, of course, is not a total indictment. Arbitration is an indispensable link in the chain of industrial peace. Any balanced view must acknowledge it to be a strong link. These criticisms are offered with a full acknowledgment of the fundamental importance of the role you play and with thanks for the continuing contribution each of you makes to the American labor scene.

Comment—

WILLIAM J. FALLON*

Please excuse Mr. Miller and Mr. Saxton for not drafting inspiring and uplifting papers. They were severely handicapped by their barren subject, "What Arbitrators Are Doing Wrong in Discipline and Discharge Cases." To their credit, they just about exhausted the subject and this audience in their kindly treatment of the usual laundry list of arbitrator faux pas, but of necessity they were forced to dwell on the macabre, the uncommon, and the unlikely. Things are generally and fortunately not what they appear to be from a perusal of their two papers.

Not only is this true in arbitration cases in the discharge and discipline area, it is also true with respect to my remarks—that

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is, although it may *seem* that I am responding overmuch to the points Mr. Miller raises, and giving short shrift to Mr. Saxton's presentation, this is not a function of any lack of neutrality on my part, but rather because I had the benefit of reviewing only Mr. Miller's remarks first!

Where We Agree

Let me begin my discussion by emphasizing several areas in which we are in complete agreement. With regard to the issue of advocates who are also arbitrators, I believe that no one up here or out there could seriously quarrel with Mr. Miller's position (unless they happen to be advocate-arbitrators).

I also have to agree with Mr. Miller that the arbitral practice of writing the opinion one way and the award the opposite way is an impropriety of which many of us are periodically guilty. In defense of arbitrators, however, I might say that sometimes what appears to represent the "giving-of-an-opinion-to-one-side-and-the-award-to-the-other" may actually be a misfired attempt to do something we *should* do. That is, we ought to, of course, give the award where it properly belongs, but we should gear the analysis, for educational purposes, to the losing party.

Likewise, in connection with his example of the employee who had only a few months' seniority, Mr. Miller makes a point well-taken when he urges us to avoid cynicism or even the appearance of cynicism. The comportment he referenced is truly inexcusable. Yet, I suppose that at least some of what passes for our cynicism is the result of our repeated exposure, in the course of conducting discharge and discipline hearings, to an excessive amount of extraneous argumentation relative to grievants' personal—and not employment-related—circumstances. We know these are hard times, and we are sympathetic (too sympathetic, many management advocates would argue) to the frequent reminder that discharge may be an economic death penalty. Thus, it is extremely difficult for us to reconcile our desire to give weight to pleas of grievants' family responsibilities and so forth, with our obligation to render an impartial assessment of whether the misconduct in question occurred and, if so, whether the discipline was appropriate. Our late departed and beloved brother, Father Leo Brown, kept a motto (taken from Leviticus) which cautions us directly on this dilemma. It reads: "You must not be guilty of unjust verdicts. You must

not be partial to the little man, nor overawed by the mighty."

Our judgments, therefore, must be rendered in terms of the contractual language, the facts of the situation, the state of the employee's record, and appropriate employment-related criteria. Advocates can help us preserve our sanity in this area by keeping emotional and nonrelevant material off the record where this is possible, and to a bare minimum where it is not.

The Question of Remedies

Mr. Miller also discusses at some length the various ramifications of different types of remedies, taking special note of the reinstatement-without-back-pay award. He is not alone; managements as well as unions seem more frequently to be heard to complain that reinstatement without back pay is becoming a knee-jerk reaction or, alternatively, another variation on the splitting-the-pie hedge. I, too, would like to concentrate some remarks around this issue. The just-cause provisions of contracts that apply in discharge and discipline cases represent one of the few opportunities we arbitrators have to exercise authority and ingenuity in fashioning remedies. I am reluctant to see us open ourselves to criticism that we neglect or abuse that authority.

With regard to reinstatement-without-back-pay awards, let me first say emphatically that I believe there are circumstances in close cases where this is a most appropriate remedy. Civil courts have followed, as we are all aware, an analogous procedure in those cases where the plaintiff's charge is sustained, but the defendant is assessed only nominal damages. This result is not necessarily anomalous where the plaintiff has not suffered serious harm, and the court has judged responsibility for the wrong to be somewhat joint between plaintiff and defendant. Thus, in arbitration, it seems to me that especially where the period of time between misconduct and award is relatively short, and if it were not for mitigating circumstances the discharge would be sustained, the arbitrator should not be criticized as a "compromiser" for effecting what amounts to a reasonable solution for all the parties involved.

However, I strongly believe that the degree of justice rendered to the grievant and to the language of the contract in such awards *varies inversely* with the amount of time that transpires between the commission of the misconduct and the issuance of

the award. Where four, eight, or even twelve or more months elapse before the hearing can be scheduled, it is hard to imagine what act of misbehavior an employee could have engaged in that would warrant the equivalent of a year's suspension, but *not* discharge!

Most of the limited studies done on this subject tend to suggest that in delayed-hearing cases where the award is reinstatement without back pay, the offense is often comparable factually to those that occur in expeditiously held hearings, where the misconduct is more likely to be viewed in terms of a suspension measured only in days or a few weeks—or a month or two of lost pay where this is the industry practice.[1]

Specific examples of this are not hard to find. Let me summarize briefly two cases that appeared side-by-side in one volume of Commerce Clearing House's *Labor Arbitration Awards:*

In the first case a ticket agent for a bus company was presented a valid bus ticket worth some $68 by a person who stated it must have been lost. The person was actually an undercover agent. Coincidentally, just a week before, management had reposted the procedure to be followed for lost and found tickets. Found tickets were to be turned over to a supervisor. The ticket agent neglected to comply with that procedure. A day or two later a fellow worker asked the ticket agent to loan him $55 so he might purchase a bus ticket for his son to come home from a distant city. The ticket agent yielded to a second plea for the loan, and he financed it by filling out a refund application to a fictitious person for the ticket given him by the undercover agent and a signed receipt for the value of the ticket.

The ticket agent was discharged for misappropriation of funds. The arbitrators found that the ticket agent-grievant had 28 years of impeccable service, did not refund the ticket for personal gain but to help a fellow employee, but was guilty of bad judgment in violating the lost-ticket policy. He was reinstated without back pay. Some 43 weeks intervened between the discharge and the award.[2]

The very next case reports that a salesman and a clerk were

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[1]John W. Teele, *But No Back Pay Is Awarded,* 19 Arb. J. 103 (1964). See also Dallas R. Jones, *Ramifications of Back-Pay Awards in Discharge Cases* in Arbitration and Social Change, Proceedings of the 22nd Annual Meeting, National Academy of Arbitrators, ed. Gerald G. Somers (Washington: BNA Books, 1970), 167–69.

[2]*Greyhound Lines, Inc. and Amalgamated Transit Union, Division 1238,* 77-1 ARB ¶8186 (1977), John Day Larkin, arbitrator.

discharged for falsifying company records to cover up a $20 shortage in their cash drawer. The applicable rule, in the collective bargaining agreement, states in Article VII, Seniority, Section 3: "Employment and seniority rights shall be terminated if an employee: . . . (i) falsifies information on his employment application or other records required by the employer." No one outside of corporate headquarters had authority to write off a customer credit without justification. The grievants did precisely that to cover a cash shortage and to protect a customer who had a valid receipt. The arbitrator found the conduct a serious error in judgment, but not for personal gain, and imposed a one-week suspension. About four and one-half months elapsed between the discharge and the award.[3]

While I would allow that the principles involved in these two cases are certainly not exact, and assuming that something short of discharge is appropriate, they are similar enough to warrant our asking whether the ticket agent's error of judgment was *43 times more grievous,* in some sense, than that of the salesman and clerk.

This example implies more graphically than any study could that, as a group, we are guilty of allowing inconsistencies in the differential impact of the reinstatement-without-back-pay remedy to appear, because there *is* substantial variation in the time it currently takes discharge cases to get to hearing.

What are the justifications for the reinstatement-without-back-pay remedy in delayed-hearing cases? One that has been argued is that it is appropriate when one does not wish to "reward" the employee for his misconduct, or where one might not wish the employee to feel he has "won a victory" over his supervisor or company management. This is attempted alchemy. It is a cop-out. One would expect that it would be the rare employee who would perceive "victory" and "reward" in, say, a partial-back-pay remedy that would leave him qualitatively and quantitatively less well off than he would have been but for his misconduct. I submit to you that broad principles should *not* be constructed in response to deviant cases.

It is also argued that employers are wrongly assessed a double penalty for having disciplined an employee in good faith when they are forced to bear the costs of a replacement as well as the

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[3] *W. W. Grainger, Inc. and Teamsters Local 886,* 77-1 ARB ¶8187 (1977), John C. Shearer, arbitrator.

back pay. Let's think about that for a moment. It is not unusual that there may be very substantial rationale for reducing a penalty. Discipline is often imposed at the frequently emotional moment of misconduct and thus before its propriety in terms of due process, mitigating circumstances, and other considerations is fully determined. Therefore, regardless of management's good-faith intent, once it is determined that the level of management's punishment *did not* fit the crime, it is imperative that the arbitrator's finding of appropriate discipline *does* fit the crime. If the employee alone is compelled to shoulder the full economic burden of even good-faith punishment in the delayed-hearing case, this would seem to represent overkill in the application of the sound industrial relations principle that the penalty should be corrective and progressive in nature—a principle, incidentally, that the founding fathers of this Academy established and the labor-management community has adopted.

So what do we do about the reinstatement cases in which "no back pay" will represent excessive punishment? I can think of two distinct avenues of approach to the problem.

One is for arbitrators to accept their responsibility by systematically severing the nature of the established misconduct from any consideration of length of time expired or money accumulated, and regarding the misconduct strictly in terms of what would have been appropriate and meaningful discipline to impose at the time of the incident, given the entire set of circumstances and the employment history of the grievant.

While this might have the salutary consequence of substantially reducing the number of reinstatement-without-back-pay awards on the "books," it raises problems where contract language prohibits the arbitrator from fashioning a remedy. Illustrative of this is the language referred to by Mr. Miller where the arbitrator is forced between a rock and a hard place in determining either reinstatement with full back pay or sustaining the discharge. This kind of black-and-white approach to discipline and discharge invites inequity and injustice, seems to me to promote claims of "victory" or "reward" more inevitably than not, and surely subverts the long-term interests of peaceful labor-management relations.

The other avenue of approach designed to increase the consistency of awards in the discharge process is to place responsibility for some over-due reforms under the aegis of the *parties.* There are several things they can do:

1. *Expedite hearings.* This is especially important, for obvious reasons, where the parties have limiting language regarding remedies in their contracts. Discipline and discharge cases should be heard within 90 days, and ideally within 60 days of the act of misconduct. Reaching arbitration early might involve omitting some levels of the internal grievance process, but the offsetting benefit for the potential expense of moving quickly to arbitration is that back-pay awards from the employer's perspective would be smaller, replacement costs lower, and in some cases tense situations might be diffused more quickly.

Expedited cases mean, of course, more work for advocates on both sides. It is my impression that more often than not arbitrators are forced to schedule discipline and discharge cases four or six or more months in advance, not only as a function of their own schedules, but of advocates' busy schedules. Increasing the supply of competent advocates will go a long way toward reducing the number of time- and justice-delayed hearings and toward easing the caseload back to those halcyon days when, we remember, it was one fourth of what it is today. Of course, the question of how to increase the supply of competent advocates is not easily answered.

One possibility is by encouraging young aspiring arbitrators, in those areas of the country where there is an oversupply of arbitrators, to direct their efforts to becoming advocates.

The impetus for increasing the supply of advocates must come from enlightened management and labor representatives willing to acknowledge and accept the fact that this means an increased financial outlay. In this era of the Proposition-13 mentality, such an undertaking will not be easy. Nevertheless, the pressure to provide greater numbers of able advocates must come from the parties themselves, not from the arbitrators. We are somewhat preoccupied ourselves with trying to bring more and better arbitrators on line.

In the interim, however, arbitrators themselves could give the process a little push by refusing to grant postponements in discharge and discipline cases where the plea is based solely on the advocate's busy schedule.

2. *Suggest appropriate remedies.* Almost as important as expedited hearings is the notion that the parties should take an active role in suggesting appropriate remedies. The parties have been extremely lax in this. In the course of hearings, advocates spend virtually all their time on proof or argumentation and none on

potential remedies. This is nonsense! That management may not want to even imply they might "lose" is not good and sufficient reason for eschewing responsibility in this area. Left on our own, as Mr. Miller notes, we arbitrators cannot avoid personal bias, or lack of complete information as to the local situation, in fashioning remedies. For example, the arbitrator may not know that reinstatement to *another* job is a viable and mutually acceptable alternative.

Serious effort on the part of the parties to suggest appropriate remedies can lead, I submit, to effective remedies that really do justice to all concerned. Left to our own devices, we have reached a certain level of curious inventiveness, as typified, for example, in awards of *no reinstatement, but back pay.* With the aid of the parties, who knows to what higher and more ingenious levels we might rise?

3. *Have consistent penalties for similar infractions within plants.* In addition, in all fairness it must be noted that if arbitrators across the profession are somewhat inconsistent in fashioning remedies in factually similar discipline and discharge cases, managements within plants remain inconsistent in issuing penalties for the same and similar kinds of infractions. Management advocates should scrupulously counsel company personnel people in this regard.

Issues of Credibility

I have just a few general comments left to make with respect to ways in which the parties could work together with us to enhance justice and reduce inconsistencies in the discharge and discipline cases. The most important of these has to do with issues of credibility which, I'm happy to say, do not occur only in the context of arbitration hearings. I heard recently of a minister who wound up his Sunday sermon by announcing that he had a very important lecture to deliver the following Sunday, in preparation for which he wanted all members of the congregation to read the seventeenth chapter of Mark. The next Sunday he climbed into the pulpit, and before he began he asked how many of the parishioners had done as he asked. Nearly every hand in the church went up. "Aha!" he said, shaking his finger at them, "you are just the people I want to talk to. There *is* no seventeenth chapter in Mark!"

Resolution of credibility issues with regard to evidence and/

or witness statements are often the most important aspect of a discharge or discipline case. While management, for good and established reasons, must assume the burden of whatever standard of proof is called for, the union *must* cooperate with the arbitrator by rebutting the position of management rather than adopting what Arbitrator Harold Davey has called a "show me" attitude.[4] Both sides have a solemn responsibility to present satisfactory and reliable proof in support of their respective positions.

Case Presentation

Another point goes to the form of case presentation. Bruce Miller says that he and Bill Saxton hope that their clients continue to believe that the style and competence of the advocate are important factors. I would undertake a hazardous journey anytime in order to testify in support of this contention. Since discharge and discipline cases frequently revolve around issues of proof rather than interpretation of standards or rules, the importance of thorough and complete presentation cannot be overemphasized. Moreover, "due process" in these cases requires that if the advocates do not elicit all the facts, the arbitrator must make the necessary inquiries so that a complete record may be ensured.

Finally, faulty presentation not only leaves the process vulnerable to inequitable results, it also can lead, as we have heard here, to the criticism that arbitrators make decisions on arguments that have not been made to them. When presentation is woefully inadequate, arbitrators are sometimes *forced* to support their findings with explanations drawn from the evidence that may not have been precisely argued by the parties—in the interest of equity. So long as this is supportive reasoning and not dispositive of the case, the parties have no cause to complain.

Conclusion

In closing, I want to comment that I have added my assessment of what is wrong with remedies in the grievance arbitration process in discharge and discipline cases to that of Messieurs

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[4]Harold W. Davey, *The Arbitrator Speaks on Discharge and Discipline,* 17 Arb. J. (1962).

Miller and Saxton because I strongly believe that the integrity of the process is reflected in the equity of the award. But I am also sure that we must be doing something right. If the wrongs of arbitrators in this area were a regular occurrence over the years, we would have seen a concerted and conscientious effort to restrict the arbitrator's discretion in just-cause situations. What has happened is an occasional limitation on that discretion by confining the arbitrator to finding the grievant guilty or not guilty of a particular offense, with a guilty finding mandating discharge. Also, as noted earlier, there is the infrequent provision calling for reinstatement with full back pay where a finding of no just cause is made. Both limitations can create difficulties for the arbitrator in balancing the equities in a given case.

I submit that these aberrations, though miniscule in number, deserve a second look by the parties; and if found to be of questionable merit, they should be expunged from the agreement and the arbitrator restored to his unfettered just-cause standard, with letters of apology sent to all arbitrators who were subjected to these unfair and improper restrictions.

While the subject is far from exhausted, all of you are—and I thank you for your kind attention.