CHAPTER 3

JUST CAUSE AND THE TROUBLED EMPLOYEE

I.

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Introduction

When our panel moderator, Professor Carlton Snow, suggested this topic to me, my interest was primed. I recalled that in a number of my own discharge cases, grievants' outside distractions and responsibilities had been advanced in excuse or mitigation, and that for the most part I had given little weight to them. The depth of this mind-set cannot be better illustrated than by my reaction to a matter I heard shortly after that conversation with Professor Snow: Two employees, who had been living together for some years and were working side by side, continued a home-generated argument about the foibles of their respective children. In anger and exasperation, one pushed the other, who fell into machinery and was injured, fortunately not seriously. The employer discharged the pusher for violation of a rigorously applied rule against fighting or horseplay in what was observably a dangerous workplace. Although the union argued that episodic violent behavior between persons in an intimate relationship should be treated differently than that between strangers, I sustained the discharge. Only after writing the opinion did it dawn on me that this was another instance in which I had been totally unpersuaded that an employee's personal distraction bore on the issue of discipline.

In 1979 Professor Janet Maleson Spencer published a ground-breaking article on employers' responsibilities to alcoholic, drug-addicted, and mentally ill employees, whom she

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characterized as "troubled employees."[1] That term is also used in the title of this paper, but with the addition of the word "distracted." It is not my intention to go over in detail the arbitral responses to problems related to alcohol, drugs, and mental illness that were so well covered by Spencer and later by Benjamin W. Wolkinson and David Barton,[2] Dorothy J. Cramer,[3] Michael Marmo,[4] and Marcia L. Greenbaum.[5] The last writer goes beyond those problems to "personal crisis situations," that is, "marital, family, financial, or legal problems."[6] Roughly, those are the situations on which I will focus.

My principal inquiry in this paper is whether arbitrators are taking, or should be taking such distractions of employees into account in judging the appropriateness of discipline or discharge under the just-cause standard. Stated another way, what, if anything, do arbitrators see as constituting just cause in such situations? A related, very basic question is whether arbitral responses to these situations, like arbitral responses to the problems of alcoholism, drug abuse, and mental illness, require a reformulation of the just-cause standard to posit some expanding notion of employer responsibility to employees.

The Historic Just-Cause Standard

Most collective bargaining agreements contain a simple substantive provision regarding discipline and discharge: that the employer must have "just" or similarly described "cause" for imposing either. While some agreements specify the types of misconduct or inadequacies that may be the basis for discipline or discharge, particularly for summary dismissal, they often do

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[1]Spencer, *The Developing Notions of Employer Responsibility for the Alcoholic, Drug-Addicted or Mentally Ill Employee: An Examination Under Federal and State Employment Statutes and Arbitration Decisions*, 53 St. John's L. Rev. 659 (1979). For an earlier discussion in the Academy, see *Alcoholism in Industry*, in Arbitration—1975, Proceedings of the 28th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1975), 93.

[2]Wolkinson and Barton, *Arbitration and the Rights of Mentally Handicapped Workers*, Monthly Lab. Rev. 41 (1980).

[3]Cramer, *Arbitration and Mental Illness: The Issues, the Rationale, and the Remedies*, 35 Arb. J. No. 3, 10 (1980).

[4]Marmo, *Arbitrators View Problem Employees: Discipline or Rehabilitation?*, 40 J. Contemp. L. 41 (1983).

[5]Greenbaum, *The "Disciplinatrator," the "Arbichiatrist," and the "Social Psychotrator": An Inquiry into How Arbitrators Deal With a Grievant's Personal Problems and the Extent to Which They Affect the Award*, 37 Arb. J. No. 4, 51 (1982).

[6]*Id.* at 54.

not purport to be exhaustive.[7] The same is true as to employers' disciplinary rules. To the extent that such rules are unilaterally promulgated, they are normally subject to arbitral tests of reasonableness, notice, and nondiscriminatory application. Thus, to a very great extent, management and labor have left to arbitrators' discretion the question of what constitutes misconduct or other justifying cause, and under what circumstances such cause permits the employer to administer a particular discipline or to dismiss.

Just cause is a broad and multifaceted concept. While it poses a single question—has the employee fallen decidedly short of what the job requires—particular applications of the concept range from misconduct to lack of ability. The scope of the concept has the effect of straining the meaning of words normally associated with it, such as "discipline." It is quite appropriate to speak of disciplining an employee for attacking a supervisor or fellow worker; it seems considerably less appropriate to speak of disciplining an employee for lack of ability. This problem should not, but occasionally does, confuse arbitrators and commentators. It should be recognized for what it is—semantic rather than substantive.

It is a large, but I hope not risky, generalization to say that while arbitrators typically look to a host of factors in making just-cause determinations (for example, the severity of the offense or inadequacy, or the employee's length of service), they observe several bedrock principles. First, misconduct or inadequacy, in order to be the basis for discipline or discharge, must be job related. It is important to note, however, that job-relatedness, since it involves measuring an infraction against the nature and needs of the business, is a variable and potentially expansive concept. Second, the employer's response must be nondiscriminatory. Third, any discipline imposed must be corrective rather than punitive. The last principle reflects the reasonable premise that while an employer has every right and reason to expect an employee to conform to the employer's business needs, the employer has no license simply to punish an employee. It reflects a belief that discipline of increasing severity will convey to an employee the message that he or she must, for job retention, change ways. Finally, the corrective discipline

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[7]*See* Elkouri and Elkouri, *How Arbitration Works*, 4th ed. (Washington: BNA Books, 1985), 650–653.

doctrine (sometimes referenced under the term "progressive discipline") seems to be predicated on the notion that "actions speak louder than words."[8]

The first two principles are not relevant for my purposes here; I will assume that whatever situations are discussed do not involve issues of non-job-relatedness or discrimination. The focus here is on job-related problems caused by events elsewhere. The third principle, that of corrective discipline, does have relevance and therefore deserves amplification.

This writer for more than 30 years, first as an advocate and more recently as a neutral, has understood the doctrine of corrective discipline to reflect a tacit compact between hired employee and hiring employer that the former would master and perform job responsibilities, and that the latter would use reasonable efforts to work with the employee to achieve those goals. Corollaries are that the employee is not incapacitated to perform those job responsibilities and that the employer has the capacity to provide meaningful assistance.

The Role of Culpability

Much of the terminology associated with just-cause determination has the ring of delinquency. Collective bargaining agreements refer, as a matter of course, to employee "discipline." Arbitration awards similarly address issues of employee "misconduct," and arbitrators on occasion even employ the hyperbole that discharge constitutes "industrial capital punishment." And the word "just" itself bears a connotation of moral righteousness. There is then some rhetorical impetus to focus just-cause issues through a moral prism. However, a corollary of that approach is that employees may not be "punished" unless their misbehavior is volitional. This last concept is fraught with definitional difficulty.

Most arbitrators will agree that while the question of volition sometimes bears on just-cause determination, volition is not a necessary condition for determination that there is just cause for discipline or discharge. The essential issue in every case is whether the employee can, in the largest sense, perform the job

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[8]Alexander, *Concepts of Industrial Discipline*, in Management Rights and the Arbitration Process, Proceedings of the 9th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1956), 76, 79–81.

for which he or she was hired. If the employee knowingly and intentionally refuses to perform, or is disabled from performing that job, the arbitrator's task is greatly simplified. However, if the employee, without any fault and for reasons quite beyond control, cannot be expected to do the job, most arbitrators, I believe, will at some point find that there is just cause for termination. That seems sensible because it is consistent with the nature of the individual employment contract in the context of a collective agreement. The employee performs services in return for certain collectively bargained-for benefits. Some benefits are explicitly set forth (wages, seniority, pensions), and others are often implied under the aegis of the just-cause clause (notice of the requirements of the job, provision of the means to perform it, nondisparate treatment). It necessarily follows that when the employee, for whatever reason other than the employer's action, cannot meet the requirements of the job, there is at some point just, that is, good or reasonable cause for termination.

While these observations may seem elementary, they are not universally accepted among arbitrators.[9] They are, however, basic premises for my effort to deal with just cause in the context of the troubled (distracted) employee.

Arbitral Treatment of Alcoholic, Drug-Addicted, or Mentally Ill Employees

The distracted employees who are of concern in this paper typically have experienced work-related problems because of overriding responsibilities or events elsewhere. Their problems range from chronic tardiness and absenteeism to insubordination, inattention, and poor job performance. Outside responsibilities that create their predicament range from care of family members (young children, disabled spouses) to marital discord and financial insecurity. A common factor is that distracted employees are in most cases largely blameless for the situation that has caused their inadequacy and are incapable alone of remedying that failing.

In modern perspective the cases of alcoholic, drug-addicted, and mentally ill employees have much in common with that of

[9]For a good discussion in the context of absenteeism, *see* Block and Mittenthal, *Arbitration and the Absent Employee*, in Arbitration 1984: Absenteeism, Recent Laws, Panels, and Published Decisions, Proceedings of the 37th Annual Meeting, National Academy of Arbitrators, ed. Walter J. Gershenfeld (Washington: BNA Books, 1984), 77, 90–94.

the distracted employee. When alcoholism and drug addiction are viewed as illnesses, they, and of course mental illness, cannot be attributed to employee fault. Furthermore, none of these disabilities can reasonably be expected to be removed by the employee acting alone.

As to both the distracted employee and the worker affected by alcoholism, drug addiction, or mental illness, the concept of corrective discipline has little, if any, meaning. If the problem is beyond the power of the employee standing alone to correct, the application of ever more severe discipline achieves nothing. On the contrary, it may add to the employee's anguish and despair. This seems particularly true as to the distracted employee who, because the problem is external, cannot even by a heroic act of will hope to resolve or ameliorate it. For example, there may be nothing that the single parent of an emotionally disturbed child can do alone to meet on-going job responsibilities and at the same time cope with the unpredictable behavior and demanding needs of that child.

Given the similarity from a just-cause standpoint among alcoholism, drug addiction, and mental illness, arbitrators may be expected to treat discharges similarly, whatever the bottom line. Nevertheless, this has not occurred. In her 1979 article, Professor Spencer reported that as to alcoholism the "modern" arbitral view is that in order to be discharged for conduct that normally constitutes just cause in the case of the nontroubled employee, the alcoholic employee first must be informed of the illness, be encouraged to seek treatment, and must refuse treatment or fail to make appropriate progress in such treatment. Professor Spencer reported a similar trend in decisions involving mental incompetency. However, she found that arbitrators are far less sympathetic to employees who engage in drug abuse.[10] Subsequent studies essentially have confirmed this pattern of arbitral treatment.[11]

Today a substantial body of arbitral authority exists for the view that the just-cause standard, in the context of alcoholism and mental illness, requires as a condition of discharge that afflicted employees be accorded, albeit at their own expense, a reasonable opportunity for professional rehabilitation.

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[10]Spencer, *supra* note 1, at 699–711.

[11]Greenbaum, *supra* note 5, at 63. She finds, though, that alcoholics receive less favorable treatment than the mentally ill.

A Sampling of Cases

Marcia L. Greenbaum has appropriately noted the difficulty of locating arbitration awards dealing with the distracted (in her terms "personal-crisis") employee.[12] Cases are not indexed under such headings or anything like them. Even when cases are located, there is little assurance that they represent all the relevant opinions in any reporter series. With that caveat, and with a caution as to the representativeness of published arbitration decisions,[13] I have set forth below the results of my survey of volumes 70 through 84 of the Labor Arbitration Reports published by The Bureau of National Affairs, as well as several cases from the Commerce Clearing House reporter series that the moderator and others called to my attention.

On the whole, the results of my survey are not surprising. There is no inclination in the decisions to treat a distraction, however serious, as a complete excuse for conduct that normally constitutes just cause for discharge, or as a barrier ultimately to termination. Every arbitrator who addressed the issue warned that the employer was entitled to refuse at some point to tolerate such behavior. There is also little inclination to treat sudden, short-term distractions, however much beyond an employee's control, as barriers to discharge where the offense is part of a larger pattern of unsatisfactory conduct unexplained by similar distractions.[14] In such cases credibility may also be a factor.[15] These results are entirely consistent with the historical application of the just-cause standard.

A typical case[16] involved an employee who, in the midst of a divorce, became upset on learning that her separated husband

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[12]*Id.* at 54.

[13]*See How Representative Are Published Decisions*, in Arbitration 1984, *supra* note 9, at 170.

[14]*General Elec. Co.*, 74 LA 290 (MacDonald, 1979) (child's illness, court appearance); *Midwest Body*, 73 LA 651 (Guenther, 1979) (family problems, "bills to pay"); *Knauf Fiber Glass*, 81 LA 332 (Abrams, 1983) (child taken to hospital emergency room; discharge reduced to disciplinary suspension with probation to demonstrate that she could meet "dual responsibilities"); *Safeway Stores*, 81 LA 656 (Wilmoth, 1983) (employee went to Hawaii to join injured naval spouse without seeking contractually available personal leave); *Mead Prods*, 87-1 ARB ¶8294 (power outage caused alarm clock not to function); *Budd Co.*, 86-2 ARB ¶8371 (Katz, 1986) (auto repair delayed); *Great Midwest Mining Corp.*, 82 LA 52 (Mikrut, 1984) (but discharge set aside for lack of due process); *Allied Roll Builders*, 71 LA 997 (Leahy, 1978) (child clogged toilet); *Lucky Stores*, 78 LA 233 (Darrow, 1982). *Cf. Sanchez Enter.*, 87-1 ARB ¶8046 (Statham, 1986) (snow; reinstatement without back pay).

[15]*Ludington News Co.*, 78 LA 1165 (Platt, 1982); *Carrier Air Conditioning Co.*, 72-1 ARB ¶8839 (Jacobs, 1972).

[16]*Entex, Inc.*, 78 LA 1323 (Milentz, 1982).

intended to stop by their home to pick up personal belongings. She sought consolation from a male co-worker whom she arranged to meet in a shopping center parking lot. During the course of their meeting, the husband appeared with a rifle, which during an ensuing scuffle was harmlessly discharged twice in close proximity to the employee. The co-worker was struck by the rifle butt and had to be hospitalized. The employee thereafter called in for absence due to an "upset stomach." On learning the facts, the company determined to treat the absence as one for "personal leave—no prior arrangements," which imposed more negative points under the absence control plan and carried the employee over the point score required for termination. In sustaining the discharge Arbitrator Charles M. Milentz stated:

> The testimony and the evidence does not support the Union's claim that Grievant, S___, was a satisfactory worker and did not have an attendance problem. . . .
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> . . . It is my opinion that the underlying and primary reason for absence of Grievant can be attributed to coping with a personal problem. In our situation, the cause for the upset stomach originated when Grievant decided to deal with her personal problem by leaving early and meeting C___, had she not done so, the parking lot incident would not have occurred and she would not have been absent. While dealing with her personal problem, she became exposed to the parking lot shooting which left her in an emotional state and with an upset stomach. Her physical condition after the shooting was such that she was unable to report for work, however, this condition is secondary and cannot be considered to nullify the *original* and *underlying* reason for absence. (emphasis in original)[17]

Even where the employee's distractions were substantial and multifaceted, the arbitrator held that they did not constitute a barrier to discharge when, prior to their onset, an unsatisfactory record existed.[18] In that case the employee had over a period of a year a consistently unsatisfactory tardiness record. Then one of her brothers murdered another, her husband left her with the care for their child and a 30-acre farm, and she became involved in a bitter custody battle. Her employer attempted to accommodate her problems by granting her paid time off, but at the same time warned her about the need to improve her attendance record. When she was unable to do so, she offered to resign, but

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[17]*Id.* at 1327.
[18]*Pacific Nw. Bell Tel. Co.*, 81 LA 297 (Gaunt, 1983).

her employer gave her a four-month "benefits leave for nerves." Shortly after resuming work, she was late twice returning from lunch and was given a final warning. About six weeks later she was 16 minutes late returning from shopping and lunching with her daughter; she testified that it had been necessary to take her child back to school and she had lost track of time. In sustaining the discharge Arbitrator Janet L. Gaunt observed:

> It is always hard to deny someone another chance; especially in this case where as of the time of the hearing Grievant appeared, with the love and support of a new husband, to have overcome a lot of her personal problems. As a result of a gift from that husband, she even wears a watch now and as she put it "is doing much better." Nevertheless, my scrutiny is limited to the situation when the Company made its decision. Therefore, I cannot in good conscience order her reinstatement. To do so would be most unfair to the vast majority of Company employees, who maintain satisfactory attendance records at the expense of personal convenience; and to the supervisors who made a reasonable effort to "rehabilitate" Grievant and finally tired of that effort. The grievance is therefore denied.[19]

The arbitral response was quite different, though, where the distraction was viewed as a mental illness. In one case[20] an employee had incurred numerous absences because of family illness, and his immediate supervisor suggested a leave. The supervisor thereafter reclassified the employee, who began to exhibit signs of nervousness and paranoia. On the point of tears the employee sought the assistance of the company president, claiming that the supervisor was adversely affecting his "entire life," including his marriage. Finally, in a very agitated state, the employee threatened "to deck" the supervisor. Arbitrator Eugenia B. Maxwell refused to sustain the resulting discharge and ordered the employee to be placed on indefinite suspension for a period not to exceed 12 months, provided that the employee at his own expense placed himself under the care of a psychiatrist. Arbitrator Maxwell ordered reinstatement without back pay if and when, within the 12-month period, the employee's psychiatrist could persuade a panel of mutually chosen psychiatrists that the employee "has learned to cope with his stress sufficiently so as to function in the Company's environment."[21]

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[19]*Id.* at 306.
[20]*Porvene Roll-A-Door*, 81 LA 1016 (Maxwell, 1983).
[21]*Id.* at 1020.

In a similar case Arbitrator Harry N. MacLean sustained a discharge, finding that while the underlying reason for the employee's absenteeism was "stress or stress related problems," the employer had done everything reasonably within its power to rehabilitate the employee without "any reasonable likelihood" that the employee's record would improve. Those efforts at rehabilitation included granting "unusual vacation requests," rearranging the employee's work schedule, counseling the employee, meeting with the employee's wife on "numerous occasions" to discuss what might be done, and recommending "a possible course of action for the grievant to seek [professional] help."[22]

Another recent decision[23] is in this same vein, that is, the distraction is regarded akin to mental illness, although the language of the award leaves doubt as to the principles at play. In that case the employee was a compulsive gambler. While that habit was disastrous financially, apparently it had no adverse workplace impact on the employee for six years except for one verbal warning for absences in January 1986. Suddenly, on February 5, 1986, the employee left home without notice to his family and wandered to Las Vegas, where he lost all his money. Although his wife did not know his whereabouts, she asked his employer to grant him an emergency vacation. That request was denied on the ground that the wife had no standing to make it. Five days later the employee returned home. Within several days thereafter he met with company officials and threw himself on the employer's "mercy," confessing that he had lied to cover up the fact that his January absences were also related to gambling. He was, however, terminated.

Arbitrator Harry Weisbrod found that it was "more likely than not [the employee] was mentally incapacitated when he left his home . . . and lost four days of work." Finding "extenuating circumstances," Arbitrator Weisbrod set aside the discharge. The arbitrator reasoned it was likely that the employee was mentally incapacitated. The evidence showed that he had accrued vacation time and a vacation had been requested by his wife, and that there was disparate treatment in that help had been given to alcoholics and drug abusers on request. While the grievant had not requested assistance, he probably was not

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[22]*Safeway Stores*, 80 LA 735, 740 (MacLean, 1983).
[23]*Phillips 66 Co.*, 87-1 ARB ¶8207 (Weisbrod, 1987).

aware of his problem until he "faced up to it" after his Las Vegas experience. Arbitrator Weisbrod concluded:

> Based on the preponderance of the evidence, it is the Arbitrator's findings that there are extenuating circumstances which should mitigate the severity of the penalty imposed by the Company. The Arbitrator has examined numerous decisions by Arbitrators reducing penalties for employees who "quit" when they were suffering from emotional disturbances. In most of these cases, the Grievants were made whole. In this case, however, the Arbitrator is not completely convinced that the Grievant was mentally incapacitated, but merely finds that because of the reasonable doubt as to his incapacity, he should be granted some leniency. Accordingly, the Arbitrator finds that the appropriate measure of punishment in this case should be reinstatement with no back wages or loss of seniority. It should be recognized, however, that further misconduct because of resumed gambling addiction could result in termination.[24]

I am inclined to view this decision, because of its reference to the employer's willingness to offer rehabilitation to other employees with alcohol and drug problems, as essentially contemplating that the grieving employee should be accorded an opportunity for professional rehabilitation before any new adverse action could be taken against him.

Arbitrator Sol M. Yarowsky has had to deal with a frontier issue that has significance for both the situation of mental illness and the distractions of concern.[25] In that case the grievant had major attendance and job performance problems which the evidence indicated were attributable to depression, antidepressant medicine, and a related marital problem. The employee had never made these problems known to the employer. The arbitrator thought, however, that the employee's obvious "alarming march to discharge" should have generated some inquiry by the employer as to the cause for that development. The arbitrator gave this conclusion substantial weight in his award, in which he ordered reinstatement with half back-pay, expressly using a theory of "comparative fault."[26]

I have had occasion to address this issue in an arbitration proceeding on slightly different facts within the context of mental illness. In that case an employee who had a manic-depressive illness was discharged for serious on-the-job aggression. The employee had never gone to the employer about his severe

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[24]*Id.* at 3867.
[25]*Midwest Grain Prods.*, 87-1 ARB ¶8052 (Yarowsky, 1986).
[26]*Id.* at 3211.

mental disorder, but the nature of his illness made it unrealistic to expect any approach by him to the employer.

I ordered the employee to be reinstated at such time that he could prove that he was fit to return to work. In reaching that conclusion, I relied entirely on the fact that the "tipping" event for the employee had been his discovery that the employer had launched a criminal investigation that focused on him.[27] Today I think I would be just as comfortable in reaching the same bottom line on the grounds that the employee, given the nature of his problem, could not reasonably have been expected to seek help, and that the series of aggressive incidents in which the employee suddenly engaged should have precipitated some management inquiry as to his stability.

Conclusions

There is nothing new or startling in the surveyed cases. Arbitrators are reluctant to excuse unsatisfactory conduct when they are convinced that it can be attributed to episodic distractions, where they see an earlier pattern of such conduct without such distractions, and where the normal requirements of corrective discipline have been met. Quite apart from the inevitable arbitral skepticism about claimed episodic excuses, there seems to be an arbitral attitude that bad luck at the very end of an unsatisfactory trial is a risk that the errant, but warned employee has assumed.

The arbitral reaction is quite different when the nature of the distraction is not only disabling but chronic. Whether or not arbitrators find that the distraction has caused a medically confirmed mental illness, they are inclined to believe that the distracted employee should have a meaningful opportunity to put his or her "life together." At the same time they recognize that this may not be possible to achieve and that at some point termination may validly take place.

The distracted worker is being treated much the same as the worker whose troubles are attributable to mental illness or alcoholism. In all these situations the traditional just-cause standard is being stretched to accommodate a right to a rehabilitation opportunity at the worker's expense. I see no cause for alarm in

[27]The decision apparently was unreported but was made part of the record in a federal court proceeding that culminated in *Mobil Oil Corp. v. Independent Oil Workers*, 679 F.2d 299 (3d Cir. 1986). The award was sustained without mention of the point I have referred to here.

this development; it is responsive to society's current concern with those handicaps over which workers and other citizens have no control.

However, as with any newly recognized right, those who have to accommodate it (in this case employers and unions), have a great interest in giving it definitional substance. As an arbitrator, I think the proper forum for efforts at definition is the bargaining table, particularly since the crux of any rehabilitation right is a leave from the workplace, a bargaining subject with which management and labor have had long experience. In 1983 Arbitrator Tia S. Denenberg made a similar suggestion regarding bargaining in alcohol and drug abuse cases.[28]

In closing I must candidly note that I did not attempt to fit into my survey results from two cases involving the ultimate distraction. In one a pressroom employee failed to give advance notice of his absence because, as he logically contended, he did not know how long he would be in jail for the child molestation offense for which he was awaiting sentence. He received a three-month sentence, which meant two months' unexcused absence since he had a month of vacation coming. The arbitrator took note of the employee's long service, his otherwise good record, and the "terrible emotional strain" he had been under while his crime was under investigation, and concluded that, because the employer had not demonstrated that it suffered any "direct harm" by the employee's absence, the employee was entitled to be reinstated without back pay.[29] In a similar vein another arbitrator reinstated without back pay a long-service employee who, he concluded, should have been granted a year's leave of absence to serve his prison sentence.[30] I leave entirely to the audience the significance, if any, to be accorded to these decisions.

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[28]Denenberg, *An Arbitrator's Perspective: The Arbitration of Employee Drug Abuse Cases*, in Arbitration—Promise and Performance, Proceedings of the 36th Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1983), 90.

[29]*Plain Dealer Publishing Co.*, 86-2 ARB ¶8362 (Abrams, 1986).

[30]*Rockwell Int'l*, 87-1 ARB ¶8204 (Morgan, 1987).

II. A MANAGEMENT VIEWPOINT

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SUSAN M. OLIVER**

Employees troubled by serious personal problems, alcohol or drug dependency, or mental or physical disabilities command an ever increasing number of the cases for labor arbitrators and the courts. Society is indeed changing. Increasingly, there is a loss of the extended family as a support system for employees. Many workers are geographically removed from their families and are concentrated in high cost, densely populated urban areas. Many employees face stress in balancing work and family responsibilities. The sad truth is that with the complexities and stresses of modern society, more and more employees find themselves unable to cope. Statistics graphically illustrate the extent of the problem. Federal experts estimate that between 10 percent and 23 percent of all U.S. workers use dangerous drugs on the job.[1] Approximately 25 percent of any large work force is in serious need of help for psychological or social problems.[2]

It is axiomatic that troubled employees are more likely to engage in misconduct or be unsatisfactory in their job performance. Generally, alcohol and drug abusers

- are one-third less productive,
- miss 10 times as many work days,
- are late three times more often,
- claim three times the normal level of sick leave,
- have two-and-one-half times as many absences of eight days or longer,
- are five times more likely to file workers compensation claims, and
- are three times more likely to injure themselves or someone else.[3]

Much of the current arbitral debate is focused on whether the traditional just-cause standard should apply in situations where the troubled employee has engaged in misconduct or substand-

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[1]National Institute on Drug Abuse, *Drugs in the Workplace* (1986).
[2]Wolkinson and Barton, *Arbitration and the Rights of Mentally Handicapped Workers*, Monthly Lab. Rev. (April 1980), 41.
[3]*Supra* note 1.

ard job performance. This is particularly evident in cases where the employee's serious personal problems (alcohol or drug dependency, or mental or physical disability) are asserted as the direct cause of misconduct or unsatisfactory job performance. Because of the alleged nexus between the employee's problem and the conduct which triggered the disciplinary action, employee advocates argue that the conduct should be excused or, alternatively, that the penalty imposed should be mitigated in recognition of the problem. American Airlines holds the view that the just-cause standard should not be compromised in such situations. We believe, however, that employers can and should provide assistance to employees troubled by such problems.

This paper explores current employer approaches in the airline industry to employees troubled by serious personal problems, alcohol or drug dependency, or mental or physical disabilities. Particular emphasis is focused on the specific approaches adopted by American Airlines. A representative sample of recent airline arbitration decisions is examined to determine the current state of arbitral law with regard to such employees within the airline industry.

The Just-Cause Standard

The concept of just cause is central to the resolution of arbitration cases protesting an employer's disciplinary action. The just-cause requirement is so well recognized that it is often found to be implicit in collective bargaining agreements, even where there is no explicit limitation on the employer's power to discipline.[4]

Just cause embodies the idea that an employee is entitled to continued employment, provided that the employee attends work regularly, obeys reasonable work rules, performs work at a reasonable level of quantity and quality, and does not interfere with the employer's business by either on or off the job misconduct.[5] Failure of an employee to meet these obligations justifies discipline.

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[4]*Alfred E. Lewis, Inc.*, 81 LA 621, 624 (Sabo, 1983); *Corn Belt Electric Coop.*, 79 LA 1045, 1049 (O'Grady, 1982); *Cameron Iron Works*, 25 LA 295, 300–301 (Boles, 1955).

[5]Abrams and Nolan, *Toward a Theory of Just Cause in Employee Discipline Cases*, Duke L. J. 594 (1985).

While just cause is not susceptible to precise definition, the following criteria are widely recognized as essential prerequisites for just-cause findings:

1. Was the employee adequately warned of the consequences of misconduct?
2. Was the company's rule or order reasonably related to efficient and safe operations?
3. Did management investigate before administering the discipline?
4. Was the investigation fair and objective?
5. Did the investigation produce substantial evidence of guilt?
6. Were the rules, orders, and penalties applied evenhandedly and without discrimination?
7. Was the penalty reasonably related to the seriousness of the offense and the past record?[6]

A "no" answer to any of the above questions normally signifies that the employer's disciplinary decision contained one or more elements of arbitrary, capricious, unreasonable, or discriminatory action.

In such circumstances, an arbitrator is likely to conclude that the employer's action constituted an abuse of discretion and was not taken for just cause.[7] The arbitral standard by which the propriety of an employer's disciplinary action is judged has been described as follows:

> Under the generally accepted rule, if management's original decision in the matter was not arbitrary, capricious or unreasonable, or based on mistake of fact, its decision should stand. Furthermore, the boundaries of reasonableness should not be so narrowly drawn that management's judgment must coincide exactly with the arbitrator's judgment. If the penalty imposed is within the bounds of what the arbitrator can accept as a range of reasonableness, it should not be disturbed.[8]

One of the most frequently cited decisions articulating the authority of an arbitrator to determine whether disciplinary action imposed by an employer was for just cause is the award in *Stockham Pipe Fittings Co.*, in which Arbitrator Whitley McCoy stated:

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[6]*Grief Brothers Cooperage Corp.*, 42 LA 555, 557–559 (Daugherty, 1964); *see also Moore's Seafood Products*, 50 LA 83, 88–90 (Daugherty, 1968).

[7]*Id.*

[8]*Trans World Airlines*, 41 LA 142, 144 (Beatty, 1963).

> 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 had the decision to make originally, is no justification for changing it. The minds of equally reasonable men differ. A consideration which would weigh heavily with one man will seem of less importance to another. A circumstance 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 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 abuse of discretion.[9]

Establishment of Just Cause

Progressive Discipline

The concept of progressive discipline is so engrained in American industrial jurisprudence that it hardly needs explanation or citation. While some employee offenses are serious enough to justify immediate discharge, most misconduct is such that a series of transgressions with opportunity for correction is needed before an employer may fairly justify an employee's termination. Traditional progressive discipline steps include verbal counseling, a written warning, one or more suspensions, and, ultimately, discharge.

Procedures at American Airlines

In early 1987 American Airlines launched a new approach to dealing with employees whose job performance or conduct becomes unacceptable, the Peak Performance Through Commitment Program (PPC). PPC works to correct rather than to

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[9]*Stockham Pipe Fittings Co.*, 1 LA 160, 162 (McCoy, 1945).

punish behavior or performance. The PPC process is a positive system which encourages the maximum contribution from every employee. As American's Chairman and President, Robert L. Crandall, emphasized at the outset of the program:

> There's nothing more important than making certain each employee feels respected and valued—that each feels a sense of confidence that we *are* listening to his or her ideas. Because that kind of attitude is the source of product quality—it translates into better service—which brings us more business and builds a stronger airline.

PPC is grounded in the philosophy that there should be continuous communication between supervisors and employees. For employees who meet or exceed expectations, communication provides positive reinforcement. For employees who exhibit problem performance or misconduct, supervisory communication is used to bring about needed change.

For those employees who do not respond to regular coaching and counseling, a series of written advisories is used:

A *First Advisory* is used when an employee fails to respond to earlier coaching and counseling efforts concerning problem performance or misconduct.

A *Second Advisory Session* is used when an employee continues to fail to respond to earlier warnings.

A *Career Decision Advisory* is appropriate for an employee whose problem performance or misconduct warrants termination. At that time the employee is provided a day off with pay, a "Career Decision Day," to consider future and continued employment with American. Three options are offered to the employee for consideration:

Option One—Under the first option, an employee makes a commitment in writing to meet all company standards and to continue employment with American. If an employee selects this option, the employee is given one more chance to succeed.

Option Two—An employee electing the second option agrees in writing not to pursue a grievance or any other claim against the company. In exchange, the company allows the employee to resign with the following transition benefits:

- health insurance benefits for 90 days with the premium paid by the company;
- a pass for the employee and eligible family members to return home, if desired;

- outplacement counseling by the company's local personnel office; and
- payment by the company of the first $500 of an employment agency fee that is used to secure other employment.

Option Three—Under the last option, an employee opts to have the company proceed with termination, with the employee retaining the ability to file a grievance protesting the company's action.[10]

Employees who elect Option One and return to work for American, but subsequently fail to live up to their signed Letter of Commitment, are issued a Final Advisory terminating their employment. The Final Advisory may be grieved by the employee.

Because PPC focuses on treating each employee as an adult to correct performance or misconduct in a fair and mature manner, disciplinary suspensions without pay, which were previously used as a means of correcting unsatisfactory performance or misconduct, are completely eliminated. However, employees who commit any serious act that warrants termination (such as theft or a violation of American's drug or alcohol rules) are subject to immediate termination for such misconduct and are not afforded the benefits of PPC.

Since its inception PPC has created a different climate at American. Based on our first year's experience under the program, it appears that PPC is causing a gradual philosophical change in the way supervisors and employees interact. The frequency and level of communication between supervisors and employees has been enhanced through PPC's emphasis on coaching and counseling. Preliminary reports suggest that this increased communication has enabled supervisors to identify employee problems earlier and to refer additional employees to American's Employee Assistance Program, when appropriate. Perhaps the most graphic evidence of PPC's success has been the reduction in the number of grievances filed. In our first year's experience under PPC, there has been a 16 percent reduction in grievance activity and a 42 percent reduction in the number of arbitrations. We will continue to monitor PPC's performance through employee focus groups and to make adjustments to the program, as needed.

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[10]American Airlines' Peak Performance Through Commitment Program is copyrighted and all rights are reserved.

Just Cause for the Troubled Employee

Whether traditional concepts of just cause should apply to troubled employees who engage in misconduct or unsatisfactory job performance does not suggest a simple answer. This is particularly true when employers have properly administered corrective action and have encouraged employees to seek help with their problems before corrective action is taken. Arbitrators hear a myriad of emotional appeals. Employees argue that they would not have engaged in the misconduct warranting discipline, but for their problem. Long-tenured employees assert that their tenure with the company should warrant reduction in the discipline imposed. Other employees argue that their successful treatment following termination justifies mitigation of the discharge penalty.

The troubled employee presents a dilemma for employers. While good employee relations requires an employer to be sympathetic to the illnesses and societal complexities that face employees, an employer also owes an obligation to customers, stockholders, and other employees, to conduct an efficient, fair, and productive business in order to maintain jobs and profitability.

Alcohol and Drug Abuse

Arbitral Handling

For many years arbitrators have struggled with the concept of just cause in cases where an underlying reason for the employee's misconduct is alcoholism or drug addiction. With the advent and expansion of drug testing as a means of combatting the serious problem of drug use in the workplace, arbitrators also have wrestled with issues more commonly litigated in criminal courts, such as reasonable suspicion, chain of custody, and toxicological evidence. While many arbitrators have been sympathetic to the plight of alcoholics, employees discharged for illicit drug use have generally fared far worse.

In their book, *Alcohol and Drugs: Issues in the Workplace*, Tia and Richard Denenberg outlined three distinct arbitral approaches to deciding discipline and discharge cases when alcoholism or

chemical dependency is asserted as a defense or in mitigation of a disciplinary penalty:[11]

1. *Traditional Corrective Discipline Model.* Arbitrators using this approach uphold discipline or discharge without regard to an employee's claimed alcoholism or chemical dependency as long as the employer has properly adhered to all pertinent disciplinary requirements.

2. *Therapeutic Model.* Under this model alcoholism or chemical dependency is viewed as an illness warranting opportunities to recover, including leaves of absence and rehabilitation. An employee's subsequent failure to refrain from misconduct or to correct performance deficiencies is not viewed as cause for discipline, but as a need for additional treatment.

3. *A Modified Corrective Discipline Model.* This approach takes a middle ground between the traditional corrective discipline and the therapeutic model. These arbitrators view alcoholism or chemical dependency as an illness, and routinely allow one "second chance" after there has been some opportunity for rehabilitation. However, should there be a subsequent failure to correct the behavior, the employee will be held fully accountable.

A review of recent airline arbitration decisions indicates that there is a divergence of opinion among arbitrators as to whether the alcoholic or chemically dependent employee who has engaged in misconduct or substandard work performance should be subject to the traditional just-cause standard. Airline arbitrators limit their approach to either the traditional corrective discipline[12] or the modified corrective discipline models.[13] The paucity of decisions based on the therapeutic model may reflect arbitrators' recognition that commercial air carriers have a statutory obligation to provide the safest possible transportation for the traveling public.[14]

Several points are evident from a review of these decisions. First, employees who are substance abusers and are disciplined or discharged for misconduct other than the use of alcohol or

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[11]Denenberg and Denenberg, Alcohol and Drugs: Issues in the Workplace (Washington: BNA Books, 1983), 3.

[12]Cases involving the traditional corrective discipline approach appear in Addendum A at the end of this paper.

[13]Cases involving the modified corrective discipline approach appear in Addendum B at the end of this paper.

[14]49 USC §1421(b).

drugs are less successful in defending against the discipline on the basis of their alcoholism or chemical dependency. The reason for this appears to be twofold: (1) arbitrators generally do not excuse or mitigate conduct not caused directly by the substance abuse problem, and (2) arbitrators are reluctant to issue awards which may undermine the effectiveness of carrier Employee Assistance Programs. Arbitrator Mark Kahn's reasoning is illustrative:

> If [the grievant] had been discharged solely for being under the influence of alcohol at work, and was now coping effectively with the disease, I could be persuaded . . . that reinstatement might be appropriate in light of grievant's good record during more than seven years of service. This is, however, a discharge for theft. Moreover, grievant's removal, for his own use, of company liquor miniatures from a locked storage cabinet was not a single impulsive act, but a series of thefts occurring over a considerable period until he was trapped by the videotape camera installed to identify the culprit.
>
> . . .
>
> The company is entitled to concern that alcoholism—or any kind of chemical dependence—must not serve to excuse conduct for which discharge is the normal and appropriate penalty. Were that to happen, in my view, alcoholics would have less incentive to utilize the EAP *before* committing intolerable (and perhaps dangerous) acts, and others might have less motivation for detecting and assisting alcoholics on a timely basis.[15]

Arbitrator Margery Gootnick was equally forceful in upholding a grievant's discharge for theft despite the grievant's admitted alcoholism:

> It is difficult to ignore the extraordinary emotional appeal of this grievance. The Chairman is aware that this discharge is a personal tragedy for the grievant, especially since he has made and is making a strenuous effort to overcome his alcoholism.
>
> Nevertheless, the company has a legitimate and necessary interest in consistency in the application of the company Rules of Conduct. Were this Chairman to return grievant to his employment, even with severe discipline short of discharge it would be a signal to other employees, especially those who have legitimate problems with alcoholism, that their alcoholism could potentially insulate them from discharge for violation of rule 1 (theft).[16]

Second, it is evident from the decisions that employees who fail to accept a carrier's offer of assistance prior to their discipline or discharge are less likely to have arbitrators treat their

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[15]*Eastern Air Lines and IAM*, 86 AAR 0094 (Kahn, 1986).
[16]*United Airlines and IAM Dist. 141*, 86 AAR 0113 (Gootnick, 1986).

alcoholism or chemical dependency as a mitigating factor. Arbitrator Arvid Anderson made this point in an award involving Northwest Airlines and the IAM:

> As for the grievant's present acknowledgment that he has had a problem with alcohol and drug abuse, the Board recognizes that it is a good thing that the grievant has realized the cause of his absenteeism and apparently successfully undergone rehabilitation. Recognition that drug and alcohol abuse is a serious problem is the first step needed for correction. However, the grievant's post-discharge admission of needing help to fight alcohol and drug abuse came too late for this Board to restore the grievant to employment. To reinstate the grievant now would be to send the wrong message to employees who engage in alcohol and drug abuse, namely, that they could continue such conduct even until discharged and then claim a right to reinstatement because they finally recognized their problem. Prior to discharge, the company did extend to the employee several opportunities to seek assistance under the company's Employee Assistance Program if he had a drug or alcohol problem, but the employee constantly declined such offer. An employer cannot be expected to be an indefinite insurer of employment regardless of an employee's conduct.[17]

Third, there is no unanimity among arbitrators as to how employees who report to work showing the signs of alcohol or other drug use should be treated. Excerpts from an award by Arbitrator Lawrence Seibel, involving a cabin crew member terminated for being intoxicated while on duty, illustrate the reasoning of arbitrators who adhere to a traditional corrective discipline model:

> While the System Board applauds the Grievant's efforts toward recovery and sympathizes with him, we are compelled to the conclusion that the company had just cause to terminate him. Our decision rests on the findings that the Grievant's conduct, in and of itself, is a dischargeable offense, and that even assuming the company had an obligation to consider mitigating circumstances and to provide the Grievant with assistance under the EAP, the company fulfilled its obligations on both counts.
>
> The company's per se right to terminate Flight Attendants for drinking or intoxication on duty, in flight, is a matter of common sense, is clear in the Articles of Conduct and is well established in prior decisions by the System Board of Adjustment. (Cites omitted)
>
> We agree and add that in the instant case the Grievant's conduct went beyond a technical infraction of this most important rule. His drinking while in flight and his intoxicated condition severely compromised the safety of the crew and passengers and undermined the

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[17]*Northwest Airlines and IAM, Dist. 143*, 87 AAR 0149 (Anderson, 1987).

> company's image. . . . More significantly, the Grievant would clearly have been completely incapable of responding in an emergency, clearly the most important aspect of his job. In fact, the Grievant's conduct represents such a stark and serious violation of company rules and safety standards, the reasonableness of which the Association does not dispute, it is difficult to imagine what mitigating circumstances could possibly alter the penalty.[18]

The use of alcohol or illicit drugs by employees has always been a matter of grave concern to the airline industry, given its statutory mandate to provide the safest possible transportation for the traveling public. In recent months, however, these issues have been raised to new heights as noted arbitrators have chosen not to apply the traditional just-cause standard and have ordered the reinstatement of employees at major airlines who have piloted commercial jets while under the influence of alcohol.

One arbitration case involved a first officer who was discharged for co-piloting a Northwest Airlines jet while under the influence of alcohol.[19] While finding that the offenses committed by the pilot were egregious, the arbitrator concluded that the pilot's actions were the "unavoidable consequence of the illness of alcoholism," which had subsequently been shown to be arrested and successfully treated. The arbitrator ordered the pilot's reinstatement, subject to requalification under the Federal Aviation Administration's (FAA) nonmonitoring procedure.[20] The award was subsequently appealed by Northwest.

On review by a federal district court, the judge overturned the arbitrator's decision, ruling that the arbitrator had exceeded his jurisdictional authority and had issued an award which was contrary to public policy.[21] The district court found that the effect of the System Board decision was to deny the airline's right to enforce its own carefully articulated rules regarding the use of alcohol. Judge Green's conclusion is set forth below:

> Under the terms of the collective bargaining agreement, the [System] Board has no authority to rewrite Northwest's safety rules, or set new policy. For the purposes of this dispute, all that matters is that Northwest promulgated a clear, concise and rational rule, and the Board chose not to enforce it.[22]

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[18]*United Airlines, Inc. and AFA*, 87 AAR 0136 (Seibel, 1987).
[19]*Northwest Airlines and ALPA*, 84 AAR 0298, 89 LA 943 (Nicolau, 1984).
[20]Federal Air Regulation, §67.13(d)(1)(i)(c).
[21]*Northwest Airlines v. ALPA*, 633 F. Supp. 779, 122 LRRM 2311 (D.D.C. 1985).
[22]*Id.* at 794.

Judge Green noted that the evidence of successful rehabilitation was irrelevant:

> [S]ubsequent treatment for alcoholism will not necessarily remedy the recklessness, and incredible disregard for his passengers' safety that he demonstrated in co-piloting the plane. . . . Under the circumstances, it was not unreasonable for Northwest to conclude . . . that character defects/judgments exhibited at the time of the violation are unlikely to be remedied by subsequent treatment for alcoholism.[23]

On appeal by the Air Line Pilots Association (ALPA), the Court of Appeals for the District of Columbia Circuit reversed the lower court's decision and upheld the arbitrator's reinstatement order.[24] Contrary to the lower court's opinion, the circuit court held that the safety issues presented in the arbitration hearing were presumptively arbitrable and found no violation of public policy in the arbitrator's decision. On the public policy question, the circuit court acknowledged that arbitration awards may be vacated on public policy grounds. However, in the instant case, the court found the public policy exception inapplicable since the FAA, the agency charged with responsibility for air safety, had recertified the grievant to fly. Subsequently, the U.S. Supreme Court denied Northwest's petition for review.[25]

Another case involving a Northwest pilot who was discharged for violating the airline's alcohol policies was recently decided by a system board chaired by Arbitrator Thomas F. Carey with a different result.[26] Arbitrator Carey upheld the airline's actions and sustained the pilot's discharge. The facts of these two cases are strikingly similar, except that in Arbitrator Carey's case, the pilot had no-showed for his flight following a layover and had not operated the aircraft while under the influence of alcohol.

In determining that the company's actions were proper, Arbitrator Carey specifically considered the prior award, but declined to consider that award binding precedent. Carey concluded that he would be acting beyond his jurisdictional authority to overturn the company's discharge decision based upon a proven violation of Northwest's 24-hour no-drinking rule. The

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[23]*Id.* at n. 10.
[24]*Northwest Airlines v. ALPA*, 808 F.2d 76, 124 LRRM 2300 (D.C. Cir. 1987).
[25]*Northwest Airlines v. ALPA*, 128 LRRM 2296 (1988).
[26]*Northwest Airlines and ALPA*, Northwest Pilot Sys. Bd. Case No. 87-16P (Carey, 1987).

rationale for Arbitrator Carey's decision upholding the pilot's discharge is set forth, in relevant part, below:

> While much of the analysis of [the previous] award as to the problems, programs and prognosis for rehabilitated alcoholic pilots can be endorsed by the Chairman of this Board, I respectfully must disagree on one essential and critical element. Specifically, I find no persuasive grounds within the contractual authority of this Board, given the existing announced and controlling rules then in effect, to hold the alcoholic pilot to a different standard than his non-alcoholic peers if a proven violation of the 24 hour drinking rule is persuasively established in the record. Given such a finding by this Board, there is neither a basis or need for this Board to address or comment on the "public policy" conclusion of the courts. That is a matter properly before the [U.S. Supreme] Court.[27]

Another arbitration case involved a pilot who was discharged for operating a Delta jet while under the influence of alcohol. Based on the record, the arbitrator ordered the pilot reinstated.[28] The arbitrator's decision to reinstate the pilot was predicated on a finding of disparate treatment and a determination that Delta had failed to communicate effectively certain unwritten aspects of its alcohol policy to its pilots.

Although finding the grievant's conduct in operating an aircraft while under the influence of alcohol to be "egregious," the arbitrator recognized the pilot's 19-year record of satisfactory service with the company and reinstated him without back pay or other benefits. Rehabilitation costs were assessed to the company on the same basis as if the pilot had not been discharged and had accepted the option of rehabilitation.

Delta thereafter filed suit, seeking to have the arbitrator's award overturned. On review by the federal district court, the judge vacated the arbitrator's decision finding it contrary to public policy.[29] Judge Evans explained the rationale for her decision as follows:

> After carefully examining the facts of this case as well as the above legal precedents, the court finds that enforcement of this award would violate clearly established public policy against allowing the pilots of airlines to operate aircraft under the influence of alcohol. That policy is "well defined and dominant" and codified in FAA regulations. The public safety implications of a situation such as the one that occurred when Captain Day piloted Delta Flight 437 are

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[27] *Id.* at pp. 23–24.
[28] *Delta Air Lines and ALPA*, 89 LA 408 (Kahn, 1987).
[29] *Delta Air Lines v. ALPA*, 686 F. Supp. 1573, 127 LRRM 2530 (N.D. Ga. 1987).

enormous. While in some sense it may be "unfair" that Captain Day was fired while other pilots who were intercepted before flying were allowed to try to rehabilitate before being discharged, Delta is perfectly correct in arguing that failure to discharge in this case could render ineffective the only real deterrent that an airline carrier can use to try and prevent its employees from operating aircraft under the influence of alcohol.

In fact, Delta indicated that this is the only time in Delta's history, to its knowledge, that an aircraft was actually flown by an intoxicated pilot. While in some sense it may not be Captain Day's "fault" that he flew the airplane while drunk, he did so, and allowing his reinstatement would give other aircraft pilots the message that, when they get into that kind of trouble, "the union could always fix it." The court cannot imagine a more egregious violation of the public policy against allowing pilots to fly while intoxicated.

The court is not suggesting that an airline pilot may not be reinstated under different circumstances, or that a discharged pilot cannot be rehabilitated and hired by another airline. However, the arbitrators in this case were not authorized to decide whether, having been rehabilitated, Captain Day should be rehired. Rather, the arbitrators' decision was limited to whether or not Delta was justified in discharging Day *at the time*, after he had flown an airplane while drunk, and before he had given the airline any indication that he was an alcoholic. The fact that Captain Day sought treatment for alcoholism after his discharge, and subsequently controlled his drinking, is quite simply irrelevant to the public policy implications of this case.[30]

An appeal of Judge Evans' decision has been filed by ALPA and is pending before the Eleventh Circuit.

American Airlines shares the concern of carriers, as well as industry trade associations such as the Air Transport Association and the Airline Industrial Relations Conference, in viewing arbitrators' decisions ordering the reinstatement of pilots who have flown passenger aircrafts while intoxicated as posing a serious threat to carrier efforts to safeguard the flying public. To permit intoxicated pilots to escape discharge for such egregious conduct renders meaningless the effectiveness of carrier disciplinary policies. It sends a message to all employees that even the most flagrant violation of a carrier's alcohol and drug rules may not result in discharge.

Moreover, such arbitration decisions destroy carriers' legitimate efforts to assure compliance with their statutory obligations to operate with the highest standards of safety in the interests of the traveling public through the establishment of

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[30]*Id.*, 127 LRRM at 2535–2536.

safety rules and standards which are higher than the Federal Aviation Administration minimum requirements. Notwithstanding the action of the U.S. Supreme Court in *Northwest v. ALPA*, we believe that affirmation of the industry's position on this matter by the Court is needed.[31]

To the extent that arbitrators overrule clearly enunciated carrier policies designed to protect the safety of the traveling public, arbitrators' awards will be increasingly subject to challenge in the courts. To do otherwise would leave air carriers in an untenable position. As the Supreme Court articulated in the *Trilogy* decisions in 1960:

> The question of interpretation of the agreement is for the arbitrator, and the courts "have no business overruling him because their interpretation of the contract is different from his." However, an award "is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."[32]

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[31]Although the Supreme Court elected not to grant review in the *Northwest* case, the Court addressed the public policy issue, albeit not in a Railway Labor Act context, in *Misco v. Paperworkers*, 56 USLW 4011, 126 LRRM 3113 (1987). There, the Court found that the Fifth Circuit had erred in setting aside an arbitrator's award reinstating an individual who had used marijuana in his position as an equipment operator, on the ground that the arbitration award was contrary to clear public policy. The Court held that a court's refusal to enforce an arbitrator's interpretation of a collective bargaining agreement is limited to situations in which the contract, as interpreted, would violate some explicit public policy that is well defined and dominant and can be determined by deference to laws and legal precedents, not from considerations of supposed public interests. Should the Eleventh Circuit uphold the lower court's decision in the *Delta* case, *supra* note 29, a division in the circuits will exist on the public policy issue, and the Supreme Court may again be requested to decide the question.

Clarification of the public policy issue for certain groups of airline employees is likely to result from the FAA's anti-drug rule-making initiative. On March 3, 1988, the Department of Transportation issued its Notice of Proposed Rule Making (NPRM), covering its Anti-Drug Program for Personnel Engaged in Specified Aviation Activities. The proposed rules are intended to ensure a drug-free aviation environment and to eliminate drug abuse in commercial aviation. Airline employees who perform sensitive safety and security-related functions are covered by the proposed rules. In addition to other requirements specified under its proposed rules, DOT has mandated the establishment of an employee assistance program as part of each carrier's anti-drug effort. Each carrier must afford employees some opportunity for rehabilitation. In certain cases the successfully rehabilitated employee must be retained or rehired. Comments were invited on three possible rehabilitation options. *See* NPRM, 14 CFR Parts 61, 63, 65, 121, and 135–Docket No. 25148, Notice No. 88-4, 88–91.

On the legislative front, the Senate approved on October 30, 1987, as part of the Passenger Protection Act, an anti-drug bill which mirrors, in large part, DOT's NPRM on the subject (S. 356 and S. 362). Like the DOT's proposed rules, the Senate bill applies to airline employees who perform sensitive safety and security-related functions. The bill mandates comprehensive drug testing, establishment of employee assistance programs, and opportunity for rehabilitation for employees who test positive for drugs. The Senate drug-testing bill is now in joint House-Senate conference.

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

In this area the role of a labor arbitrator does not properly extend to curing society's ills. Absent enabling language in the collective bargaining agreement, the jurisdictional authority of an arbitrator to determine just cause is appropriately limited to an assessment of whether factual evidence supports the carrier's action under disciplinary requirements of the agreement and company policy.

American's Philosophy

For many years American Airlines has maintained and strictly enforced rules of conduct governing alcohol and drug use. In enforcing its rules, American has tried to balance the troubled employee's need for assistance with the carrier's obligation to provide for the safety of its customers and other employees. Under American's rules employees are subject to discharge for:

1. reporting for or carrying on work while showing any signs of the use of intoxicants, or knowingly permitting another employee to do so;
2. possessing or drinking any intoxicants on company premises at any time, or drinking intoxicants in public while in uniform; or
3. possessing, dispensing, or using drugs, either on or off duty.[33]

Under these rules it is not required that employees be shown to be "under the influence" or "impaired" before they are subject to discharge. Any positive evidence of intoxicant or drug use proves a rule violation.[34]

Pursuant to American's alcohol and drug-testing policy, the company will direct urinalysis testing and will offer blood testing

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[33]These Rules are contained in American Airlines Regulation 135-1, Rules 25, 26, and 33.

[34]*See, e.g., American Airlines and TWU Local 514*, S-21-85 (Eaton, 1986) (urinalysis showing presence of drugs warranted discharge); *American Airlines and TWU Local 512*, M-476-80 (Luskin, 1980) (discharge upheld for drinking one half can of beer); *American Airlines and TWU Local 552*, SS-45-74 (Stark, 1974) ("Rule 26 means what it says and provides for no exceptions, either in terms of amount of alcohol consumed or the employee's prior record of service."); *American Airlines and TWU Local 552*, SS-44-75 (Turkus, 1975) (rule prohibiting drinking of intoxicant while on duty, regardless of amount, is rationally related to carrier's obligation to safeguard safety and well-being of passengers, crews, and aircraft: discharge upheld); *American Airlines and TWU Local 513*, 73 AAR 0357 (Goetz, 1973) ("the issue is not whether the grievant could be considered intoxicated under some legal standard. In the best interests of all parties concerned, rule 25 simply prohibits reporting for work 'while showing any signs of the use of intoxicants.'"); *American Airlines and TWU Local 512*, 83 AAR 0330 (Sinicropi, 1983) ("It is significant that this rule prohibits even the appearance of intoxication.").

in any circumstance supporting a basis for reasonable suspicion that the employee is in violation of the company's alcohol or drug rules.[35] Should an employee refuse to obey a supervisor's directive to submit to urinalysis testing or to cooperate with the company's investigation, such conduct constitutes an act of gross insubordination which subjects the employee to discharge.

Once the company's investigation of a suspected rule violation is completed, if the facts, including test results, substantiate that the employee was in violation of the company's alcohol and drug rules, the employee is discharged.

Admittedly, American's approach with employees who violate company rules and policies relating to alcohol and drugs is tough.[36] It is intended to be. It is our belief that our federal statutory mandate to operate with the highest degree of care for the safety of the traveling public, and our personal commitment to maintain the highest standards of employee productivity, reliability, and efficiency dictate that American strictly enforce such rules.[37] We believe that one of the most powerful weapons available to an employer in combatting alcohol and drug use is to make it unequivocally clear that substance abuse will not be tolerated.[38]

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[35]Under American's Alcohol and Drug Policy, reasonable suspicion may be based upon: (1) specific observations of the employee that indicate changed, unusual, or unexplained behavior or appearance, including the employee's involvement in an accident or injury that appears to result from lack of attention or coordination, gross negligence, or where the accident is otherwise inexplicable; or (2) any other circumstance supporting a basis for reasonable suspicion.

[36]The company's policy on alcohol and drugs is communicated to each of our contractors and vendors in prospective purchase orders and in a Contractor Notification Bulletin. Any variance from the company's policy by a contractor or vendor results in denial of access and, in the case of illegal drugs, notification of law enforcement authorities.

[37]An airline's obligations to consider passenger safety are imposed by federal law. Congress has directed the Administrator of the FAA to give full consideration to the duty resting upon air carriers to perform their services "with the highest degree of safety in the public interest." 49 U.S.C. §1421(b) (Supp. 1987). The courts have recognized this duty. *Air East v. National Transp. Safety Bd.*, 512 F.2d 1227 (3d Cir.), *cert. denied*, 423 U.S. 863 (1975); *United Air Lines v. Wiener*, 355 F.2d 379 (9th Cir.), *cert. dismissed sub nom. United Airlines v. United States*, 379 U.S. 951 (1964). Airline flight attendant crew members must meet rigorous safety qualifications and training established by the FAA. *See* 14 CFR 121.391 and 14 CFR 121.400, *et seq.* Failure of an airline to comply with the provisions of the Federal Aviation Act and regulations issued pursuant to the Act may result in both administrative and civil penalties against the carrier. *See Air East v. NTSB, supra*, and *In re Paris Air Crash*, 399 F. Supp. 732, 747-48 (C.D. Cal. 1975).

[38]The advantage of communicating a strong position on alcohol and drugs to employees was discussed by Sidney Cohen, M.D., a long time worker in the alcohol and drug field, in *Drugs in the Workplace*, J. Clinical Psychiatry (December 1984).

American's Employee Assistance Program

While American Airlines has chosen to enforce a policy of dismissing employees who violate company rules governing the use of alcohol and drugs, or other uncorrected work performance or attendance problems, American's employees are not without the opportunity for help in addressing their problems. American management fully embraces the philosophy that troubled employees should be retained and helped before their job performance or misconduct warrants discipline, their health and safety or the safety of others is affected, or their problem ultimately renders them unemployable.

To help troubled employees, American has instituted a comprehensive Employee Assistance Program (EAP). All 65,000 current employees, their dependents, and all retired employees are eligible for the program's services. The objectives of the EAP are to provide confidential help to employees, retirees, and their dependents through company EAP specialists who possess the background and experience necessary to assist individuals with their problems. EAP affords protection to employees who voluntarily seek EAP assistance and assures them that job security and career advancement will not be jeopardized by their involvement in the program.

With regard to assistance for alcoholism or chemical dependency, American has adopted the philosophy endorsed by many leaders in the field of alcohol and drug abuse treatment that a firm, but empathetic approach should be taken with employees suffering from alcohol and drug dependencies. Borrowing from the experts, we have taken a strong approach in several key areas.

First, in all cases of active chemical dependency or abuse, the recommendation of the company EAP representative must be followed. Should an employee elect not to follow the recommendations of the representative, the employee is placed on an unpaid medical leave of absence until the recommendations are followed. We have found that this approach not only promotes a safe airline operation, but also provides the necessary incentive for an employee to seek treatment.

Second, an employee is afforded one rehabilitation program per lifetime, reimbursable under the company's group health benefits plan. Our cap on one paid treatment, which may be inpatient, outpatient, or a combination of the two, does not

reduce access to the company-sponsored EAP or prevent substance abusers from obtaining treatment more than once. However, any costs incurred after the initial treatment, except detoxification, must be at the employee's expense.

Third, continuing after-care treatment must be a component of the employee's overall treatment plan. In cases of illegal drug dependency or abuse, a component of after-care treatment must include random drug screens conducted by the after-care facility. American's experience has demonstrated that the use of drug screens as a component of after-care assists the employee by providing an incentive to maintain sobriety. A recent study by the National Institute on Drug Abuse (NIDA) estimates that only 25 percent to 40 percent of the individuals entering treatment for cocaine addiction remain drug free for a year after their treatment.[39] American's results for cocaine users are far better, with 66 percent remaining drug free within this critical period.

Since American's EAP was initiated four years ago, the program has expanded beyond alcoholism and chemical dependency to include referral services and assistance to employees for other types of problems, including serious personal problems. Our experience has shown that in many cases employees who are referred to EAP for serious personal problems have an underlying alcohol or drug problem. Since denial is a common trait of persons with alcohol or drug dependencies, a comprehensive EAP allows such employees to seek help under the guise of some other reason.

Co-Existence of Discipline and Employee Assistance

From its inception American's EAP has been viewed as a clear-cut strategy that is distinct from other approaches, including discipline. It is our belief that the co-existence of various approaches is necessary to effectively solve employee problems. In this way voluntary referrals to EAP are encouraged, but the integrity of our disciplinary process is preserved. It is our philosophy that no one approach is the answer.

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[39]National Institute on Drug Abuse, Department of Health and Human Services, Publication No. (ADM) 84-1326 (1984). More recently the Haight-Ashbury group conducted a survey of cocaine treatment programs and reported a success rate of 30%. Results reported by Sidney Scholl, M.D., Central Region ALMACA Conference, St. Louis, Mo. (1985).

An employee's failure or refusal to use the voluntary services of the EAP is not cause for disciplinary action. Likewise, an employee's utilization of the EAP does not jeopardize an employee's job security or advancement opportunities at American. Assistance provided through the EAP is confidential. However, should an employee's job performance continue to be unsatisfactory, the employee is subject to formal correction for poor job performance. In the case of a violation of one of American's alcohol or drug rules, an employee is subject to immediate discharge. American makes it clear to its employees that participation in the EAP does not provide a sanctuary from the disciplinary process.

American's Conditional Reinstatement Policy

Pursuant to American's EAP, employees are afforded an opportunity to obtain help with their problems before their job performance or conduct warrants discipline. Under American's Conditional Reinstatement Policy, employees who violate the company's alcohol and drug rules and are discharged may be eligible for post-discharge assistance. The policy permits such employees a "second chance," provided that the employee enters and successfully completes an approved rehabilitation program, including necessary after-care treatment.

However, employees discharged for violating American's alcohol or drug rules are not required to pursue conditional reinstatement. Once discharged, they have the option of leaving the discharge action unchallenged, challenging the discharge through the applicable grievance procedure, or electing to be considered for conditional reinstatement. Employees discharged for engaging in dishonesty, dispensing drugs, or causing personal injuries to employees or customers, or damage to equipment or aircraft are not eligible. Employees returned to duty through conditional reinstatement are reinstated with no loss of seniority, but without back pay. Until they return to work, their status remains that of a terminated employee. The period from the date of termination until the employee returns to work is treated as a disciplinary suspension.

Employees who wish to be considered for conditional reinstatement must agree to comply with the following requirements as a prerequisite to their return to work:

1. Enter an approved rehabilitation program within 30 days of the incident causing the termination, successfully complete the program, and, thereafter, produce evidence to the company that an effective after-care program is being pursued.
2. Within 60 days of termination, sign the Conditional Reinstatement Agreement.
3. Withdraw all grievances and any other claims against American relating to the termination.
4. Once reinstated, participate in an approved after-care program for up to two years.
5. Maintain complete abstinence from alcohol and/or drugs except as authorized by the company's medical department, for the rest of their careers.
6. Agree to submit to any procedures necessary to confirm or deny noncompliance with the Conditional Reinstatement Agreement.
7. Sign an undated letter of resignation and agree that the company may date the letter as a result of any failure to comply with any of the conditions set forth in the Conditional Reinstatement Agreement either prior to or following reinstatement.[40]

Since the conditional reinstatement policy was instituted in 1983, 91 employees have regained their positions with the company pursuant to the policy. We are currently tracking all conditionally reinstated employees to measure relapse and turnover rates. All current indications are that the policy is working well and that the vast majority of these employees have gained a "new lease" on life.

Since the company's establishment of conditional reinstatement, only a handful of employees have elected to protest their discharge through the grievance process rather than opt for conditional reinstatement. Since 1983 only 8 percent of the employees discharged for violation of the alcohol or drug rules have taken their cases to arbitration. Of that group, the majority proceeded to arbitration only because the discharged employees

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[40]The letter of resignation, if subsequently dated based on an employee's failure to comply with the written conditions in the conditional reinstatement agreement, is not a proper subject for the grievance and arbitration process. *American Airlines and TWU Local 513*, 83 AAR 0444 (Rubin, 1983); *American Airlines and TWU Local 510*, 87 AAR 0221 (Rubin, 1987); *American Airlines and TWU Local 510*, Case No. M-266-87 (Bennett, 1988).

fell within an exception to eligibility for conditional reinstatement.

Given American's conditional reinstatement policy, some may question why American disagrees so strongly with arbitrators who reinstate proven alcohol and drug violators. We believe both positions are consistent. First, it is American's position that an employer, rather than an arbitrator, is the more appropriate party to balance the risk of reinstating a chemically dependent employee. It is the employer, rather than the arbitrator, who appears as a defendant on a civil complaint by a third party alleging wrongdoing by the employee. Second, reinstatement by an arbitrator of a chemically dependent employee who has violated a carrier's alcohol or drug rules is often without employer protections. By contrast, under our conditional reinstatement policy, American imposes a number of protective constraints on an employee's return to service which safeguard American's interests and obligations and protect the safety concerns of the traveling public and our other employees.

Disabling Problems and Just Cause

Personal and Mental Problems

Stress, physical abuse, financial problems, family or domestic pressures, marital discord, and mental illness are becoming issues for resolution in arbitration, where just cause for discipline or discharge must be decided. The following cases are illustrative:

A flight attendant is raped by an intruder while she is at a layover hotel. Prior to the rape, her attendance was poor, but not so unsatisfactory as to cause her discharge. After the rape, her attendance becomes progressively worse. She seeks professional help from a social worker and a psychologist, but does not inform the airline of the incident or request counseling through the EAP. The flight attendant is discharged for unsatisfactory attendance. During the grievance procedure, the incident is revealed and the flight attendant asks for reinstatement. The grievance is granted by the arbitrator.[41]

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[41]*Eastern Air Lines and TWU Local 553*, 87 AAR 0028 (Simons, 1987).

Another flight attendant is the victim of spousal abuse, necessitating a very traumatic and costly divorce. Financial problems and attendant family problems take their toll. The carrier offers EAP assistance. The flight attendant declines the offer, stating that she is getting help on her own. The flight attendant is subsequently discharged for unsatisfactory attendance. The grievance is denied by the arbitrator.[42]

A lead ramp serviceman goes through a difficult divorce which results in extensive legal expenses, alimony, and child support payments, which leave him little money on which to live. The loss of his children causes depression and a deterioration in his physical health. The grievant's supervisor recommends EAP, and the grievant seeks the assistance of a psychiatrist. Later the grievant steals two boxes of steaks from a caterer's truck and is discharged. The grievance is denied by the arbitrator.[43]

A flight attendant is physically assaulted and threatened with death during the robbery of her apartment. The two burglars are apprehended and she identifies them, causing their indictment. The flight attendant seeks the professional help of a psychologist and a psychiatrist. She is diagnosed as suffering from post-traumatic stress reaction, episodic in nature, arising out of the robbery. During the next two years, the flight attendant endures harassment from certain friends and family of her assailants. Shortly before her assailants' trial, she receives a note from a friend of one of her assailants, asking to meet with her prior to the trial. She receives the note as she is preparing to fly a trip sequence which concludes on July 4. On July 3, she falsely informs her co-workers that she has been reassigned and will not be working the concluding leg of the trip sequence. When she "no shows" for that trip, an investigation is conducted. The flight attendant claims that on the previous day, she was overcome by panic and fear at the thought of returning to her home base because of the note she received. The flight attendant is discharged for intentionally missing the trip and for falsifying the reason for the absence. During the arbitration affidavits from her treating physicians are introduced supporting her testimony. Facts evaluated during the arbitration suggest fabrication. The grievance is denied by the arbitrator.[44]

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[42]*American Airlines and APFA*, 86 AAR 0129 (Sinicropi, 1986); *Trans World Airlines and IFFA*, 84 AAR 0113 (T. Roberts, 1984).

[43]*United Airlines and IAM*, 86 AAR 0309 (R. Burns, 1986).

[44]*Trans World Airlines and IFFA*, 83 AAR 0097 (Simons, 1983).

Arbitral Handling of Cases

Those who reviewed the topic of serious personal and mental problems in the recent past have categorized the division of arbitral handling of such cases. One school of thought espouses a humanistic approach. These arbitrators hold that employees should not be held fully responsible for their actions if at the time of the offense they were under severe personal strain or pressure and the transgression was the outgrowth of that tension.[45] Other arbitrators practice a more traditional philosophy. Arbitrator Jean McKelvey has enunciated the philosophy of these traditionalists:

> Except for those few cases where the employee's seniority is exceptionally great or in which the employer has a rehabilitation program, I have taken the position that an employer is not a social agency and hence does not have to suffer the slings and arrows of outrageous misfortune in retaining the services of disturbed employees.[46]

Whether arbitrators are humanists or traditionalists, they take a common approach with respect to problems of mental illness, which are accorded more sympathetic treatment than those associated with personal crises.

Arbitrators Marcia Greenbaum and Daniel Collins concluded from their review of past arbitration decisions that, as compared with cases involving mental illness, arbitrators are less likely to disturb a discipline or discharge decision when the mitigating factors involve family, financial, or legal troubles.[47] Our review of numerous airline arbitration decisions rendered after 1983 confirms these findings. Discharge decisions in cases involving difficult divorces, serious financial problems, and traumatic family crises were generally upheld by the reviewing arbitrators, particularly when EAP assistance was available or timely offered.[48]

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[45]Greenbaum, *Effects of Grievant's Personal Problems on Award*, 37 Lab. Arb. J. 56 (1982).

[46]*Id.*

[47]*Id.* at 63; Collins, *Just Cause and the Troubled Employee*, Chap. 3 of this volume.

[48]*American Airlines and APFA*, *supra* note 42; *United Airlines and IAM*, *supra* note 43; *Trans World Airlines and IFFA*, *supra* note 42; *Pan American and TWU*, 86 AAR 0228 (Peterson, 1986) (fleet service clerk's severe financial problems did not justify job abandonment; company went considerably beyond its responsibility to aid grievant); *Eastern Air Lines and TWU Local 553*, 86 AAR 0203 (Kahn, 1986) (flight attendant's financial difficulties did not justify taking Air Shuttle fares and replacing cash taken with bad personal checks after having been counseled to the contrary); *Republic Airlines and ALEA*, 86 AAR 0171 (T. Roberts, 1985) (reservation agent's claims of spousal abuse and family difficulties were not consistent with circumstances surrounding falsification of sick leave benefits and abuse of travel privileges); *TWA and IFFA*, 85 AAR 0315 (T. Roberts, 1985) (flight

Cases in which mental illness was cited as a mitigating factor, however, were viewed more positively, particularly when the grievant's advocate produced sufficient evidence that the grievant's mental disorder was overwhelming and was the direct cause of the misconduct. In a 1983 case involving TWA and IFFA, Arbitrator Jesse Simons considered the standard and elements of proof necessary to establish mitigation based on mental or emotional illness:

> The Board is cognizant that mental and emotional illness indeed can be seriously crippling, causing radically different behavior from that previously typical of an individual. Such aberrant behavior can be episodic or continuing, or both. At times it can take forms of unlawful conduct; at times it can be the cause of disciplinable misconduct.
>
> Employees charged with and disciplined for misconduct, gross or otherwise, who successfully prove that the cause of such misconduct is a grave emotional or mental disorder, can rightfully seek exoneration on the grounds that their emotional or mental state was such that they cannot be held accountable or responsible for certain acts of omission or commission. There are many arbitration awards so holding, and the Undersigned Neutral Chairman on occasion has so found and concluded.
>
> However, for a finding to be made that an employee's grave misconduct had its roots in a mental or emotional disorder, that the misconduct charged was compelled, that the employee was in the grip of an overwhelming compulsion, and that the misconduct was not deliberate or willful, all necessarily require that clear proof be presented, not proof beyond a reasonable doubt, but proof as measured by the preponderance of the evidence.[49]

While Arbitrator Simons found that the evidence did not support a psychiatrist's opinion of disabling mental illness, his analysis has been followed in subsequent airline arbitrations wherein reinstatement was ordered.[50] While arbitrators who adhere to the above standard cannot be considered strict tradi-

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attendant's bitter divorce with child custody fight, causing physical health problems and anxiety neurosis, did not mitigate attempted theft of company property; no causal relationship established between personal problems and rule violation); *TWA and IFFA*, 85 AAR 0167 (Sands, 1985) (flight attendant's discharge for failing recurrent training was not mitigated by severe emotional distress caused by breakup of long-term relationship); *United Airlines and AFA*, 86 AAR 0100 (Holden, 1985) (flight attendant's false claims for funeral leave not related to earlier traumatic event (brother's death) and, thus, neither it, nor a subsequent diagnosis of chemical dependency can be accepted as mitigation to discharge; company repeatedly offered EAP assistance, but it was rejected by the grievant until it was too late).

[49]*TWA and IFFA*, 83 AAR 0097 (Simons, 1983).

[50]*TWA and IFFA*, 84 AAR 0115 (Bloch, 1984); *TWA and IFFA*, Case Nos. 81-1087 and 82-0382 (Simons, 1984).

tionalists, such a standard, if correctly applied by arbitrators, is a tough one for employee advocates to establish.

After concluding that the grievant's misconduct was directly caused by an underlying, overwhelming mental illness, some arbitrators reinstate the employee without back pay.[51] Most arbitrators, however, condition the employee's reinstatement on passage of a psychiatric evaluation,[52] or reinstate the employee to sick leave or medical leave of absence status, leaving the employee's return to the work force to be handled under the procedures applicable to such leaves of absence.[53]

Physical Disabilities

With regard to an employee's physical disability and just cause for discipline, there is a clear consensus among arbitrators about the extent to which the just-cause standard is applicable. Professor Benjamin Wolkinson's opinion reflects the majority view:

> It is generally accepted that dismissal is inappropriate unless the evidence indicates that the employee's physical disability prevents him or her from performing a job and/or exposes the worker or other employees to serious risk of physical harm or injury.[54]

Many airlines have removed terminations due to physical disability from the grievance procedure (and thus from the just-cause standard) by entrusting review of their medical officer's decision to a neutral third doctor, whose decision is final and binding. Some contracts limit the neutral doctor's review to determine the physical condition of the grievant, with the carrier's doctor making the ultimate determination as to whether the condition is disabling. Such decisions by the carrier are normally subject to arbitral review. Other contracts, however, entrust the entire case review to a neutral third doctor, including the decision as to whether the employee is medically fit to return to the work force and can safely perform the former job. Such decisions are normally final and binding on the parties.

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[51] *Western Airlines and AFA*, 86 AAR 0066 (T. Roberts, 1986) (traumatic family problems caused flight attendant emotional turmoil, depression, sleeplessness, crying outbursts, skin rashes, and a general inability to concentrate on her job; this, coupled with sudden death of grandfather and divorce of younger sister, so overwhelmed grievant that discharge for serious dependability problems (four no-shows in short period of time) was mitigated by such events; employee reinstated without back pay).

[52] *Eastern Air Lines and TWU Local 553*, *supra* note 41.

[53] *Supra* note 50.

[54] Wolkinson, *Arbitration and the Employment Rights of the Physically Disadvantaged*, 36 Arb. J. 24 (1981).

Another type of physical disability case which arises with cockpit crew members concerns the issue of whether a carrier has properly applied the labor agreement's physical fitness standards. In such cases traditional standards of contract interpretation are required to resolve the propriety of the carrier's disqualification action.[55]

The most recent and controversial cases in the area of physical disqualification have involved employees afflicted with Acquired Immune Deficiency Syndrome (AIDS). Two AIDS cases within the airline industry have been arbitrated, and each award ordered the employee's reinstatement.[56]

As stated earlier, American Airlines believes that employees must be held accountable for their actions. If disabling personal problems, mental, or emotional illness strike one of our employees, adequate contractual, EAP, and group health insurance benefits exist to allow a willing employee to seek help, make an adequate recovery, and safely return to work. Contractual or company-provided benefits at most airlines consist of long-term medical leaves of absence, paid sick leave or workers compensation benefits, short-term disability benefits, and optional long-term disability benefits, if the employee elects to purchase them. Most airline EAPs provide for assessment and referral services so that employees with serious personal or mental problems can obtain quality, professional medical help. At American Airlines payment for such medical services is made under a comprehensive group medical plan, fully paid by the company.

The Industry View

American's approach toward employees troubled by serious personal problems, alcohol or drug dependency, or mental or physical disabilities is consistent with the approach used by the airline industry. In preparation for this paper, a survey ques-

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[55]*American Airlines and APA*, 80 AAR 0429 (Abernethy, 1980) (arbitrator felt that physical examination language in contract was clear and unambiguous; standards for company physical examinations were those fixed in the federal aviation regulations (FARs) for maintaining a first class medical certificate with waivers, not an exemption); *American Airlines and APA*, 87 AAR 0192 (Rehmus, 1987) (on the merits arbitrator rejected employer's claim that carrier was required only to abide by specific guidelines of Section 67.13 of the FARs; arbitrator concluded that carrier was compelled to abide by special certificates issued under Section 67.19; arbitrator noted that agreement did not differentiate between Sections 67.13 and 67.19 and carrier had, for the most part, uniformly accepted special issuance certificates in the past).

[56]*American Airlines and APFA*, 86 AAR 0313 (Kahn, 1986); *United Airlines and AFA*, 85 AAR 0283 (Wagner, 1984).

tionnaire was sent to 13 member carriers of the Airline Industrial Relations Conference. Current carrier policies on the handling of troubled employees were solicited.

A review of the survey results shows that virtually all carriers believe that they have a responsibility to provide assistance to troubled employees irrespective of the nature or type of employee problem. The survey results indicate that the vast majority of carriers have instituted formalized employee assistance programs through which an employee can receive help with alcohol, drug, or personal problems.

For the most part participation in EAP does not protect an employee from discipline or affect the severity of the penalty imposed. This is particularly evident with alcohol or drug rule violations, where 85 percent of the carriers indicate that admission of alcohol or drug dependency following an alcohol or drug rule violation has no effect on the discipline imposed. Likewise, 77 percent of the carriers refuse to alter discipline based on the fact that the employee has previously admitted to alcohol or drug dependency and is, at the time of the misconduct, seeking assistance in resolving the problem.

However, when an employee undergoes rehabilitation following discipline or discharge and demonstrates successful treatment for the alcohol or drug dependency, 31 percent of the carriers afford some opportunity for conditional reinstatement. Only 7 percent of the carriers elect not to discipline an employee for a first alcohol or drug rule violation, and instead offer the employee EAP assistance and rehabilitation, as appropriate.

With regard to serious personal problems, the results demonstrate that carriers are more likely to consider personal problems as a mitigating factor in the issuance of discipline. Here 38 percent of the carriers indicate that an employee's admission that inappropriate behavior was caused by a serious personal problem acts as a mitigating factor in the issuance of discipline. If an employee previously acknowledged serious personal problems and sought assistance in the resolution of those problems, greater consideration is afforded in deciding discipline. Of the carriers surveyed 46 percent state that serious personal problems can be a mitigating factor, depending on the circumstances, if the employee previously admitted to problems and was seeking help at the time discipline was contemplated.

The marked difference in the manner in which alcohol and drug rule violations are treated, as compared with serious per-

sonal problems, suggests that carriers recognize the safety concerns presented when employees violate alcohol and drug rules.

With regard to work problems caused in whole or in part by mental or physical disabilities, the common approach taken by carriers is to provide EAP assistance where appropriate and to treat the problem as a medical rather than a disciplinary issue. All carriers endorse making reasonable and medically practicable accommodations to employees with mental or physical disabilities. Based on the circumstances, 89 percent of the carriers responded that an employee's admission and proof of a mental or physical disability may be a mitigating factor or may excuse the employee's misconduct altogether.

The survey results illustrate that carriers do provide assistance to troubled employees. The results prove that carriers may mitigate discipline in recognition of an employee's problem. The degree to which a carrier will mitigate discipline is a function of the type of problem and the degree to which it affects the carrier's safety responsibilities to the traveling public.

Given the fact that carriers do not issue discipline without fully considering all mitigating factors, it is inappropriate and counterproductive for an arbitrator to second guess the carrier when the disciplinary decision is supported by the facts and the penalty imposed is not discriminatory, unfair, arbitrary, or capricious.

Conclusion

The problem of substance abuse in the workplace is a national problem of immense proportion. The transportation industry is not immune to the effects of alcohol and drugs in the workplace. As the FAA outlined in its recent anti-drug rule-making initiative for the airline industry:

> The FAA, in its regulatory role, has no evidence to suggest that the aviation community differs significantly from the overall population in terms of drug use. The public expects, and is entitled to, a drug-free environment in those aviation activities that involve their personal safety. Allegations that certain air carrier crewmembers have used illegal drugs have raised questions about the overall degree of drug abuse in the industry and whether crewmembers are flying after having used drugs, and thus jeopardizing the personal safety of passengers and others.[57]

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[57]NPRM, *supra* note 31, at 6–7.

The recent regulatory and legislative initiatives support the belief that substance abuse must be fought aggressively.

While employers, public officials, and legislators are taking a tough stand on alcohol and drugs, initiatives designed to resolve substance abuse problems generally include an opportunity for rehabilitation. We believe the majority of employers are committed to using a coordinated approach in battling the substance abuse problem, including both disciplinary and rehabilitative approaches. Employers must, however, retain the right to strictly enforce company policies in the interest of public safety. In the transportation industry, where safety is a paramount concern, an employer's right to enforce company policies for the safety of the traveling public is of critical importance. Determination of the priorities between discipline and rehabilitation, when a substance abuser has violated company rules proscribing the use of alcohol or drugs, should remain the prerogative of the carrier. It is our belief that the traditional corrective discipline model is most appropriate.

The traditional corrective discipline model is also appropriate where the problems asserted in defense or in mitigation of employee discipline include personal crises rather than alcohol or drug dependency. By maintaining a progressive system of coaching, counseling, and correction (such as American's PPC program), employee problems can be detected early, and referrals can be made to EAP before the employee's job is in jeopardy and discipline is warranted. Basic fairness and principles of industrial due process require that all employees be subject to the same work-performance standards and rules of conduct, and that the enforcement of those standards and rules be uniform.

Consistent with the foregoing principles, an arbitrator is without the jurisdictional authority to hold a troubled employee to a different, more lenient, just-cause standard than that to which all other employees are held. As Arbitrator Carey emphasized in his decision upholding the discharge of a Northwest pilot for violation of the carrier's 24 hour no-drinking rule:

> I find no persuasive grounds within the contractual authority of this Board, . . . to hold the alcoholic pilot to a different standard than his non-alcoholic peers if a proven violation of the 24 hour drinking rule is persuasively established in the record.[58]

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[58]*Northwest and ALPA, supra* note 27.

With regard to problems of mental illness, we agree with the just-cause standard enunciated by Arbitrator Simons.[59] Employees who are able to prove successfully by clear and convincing evidence that they were not responsible for their actions and that their misconduct was not willful or deliberate are entitled to exoneration. In such cases the employee's reinstatement to the carrier should be conditioned on passage of a psychiatric examination that is acceptable to the carrier's medical department.

On the issue of work-related problems caused by physical disability, application of the traditional disciplinary process is inappropriate and ineffective. We favor resolving such questions through medical review procedures, including the opportunity for review by a neutral, third doctor.

Is American's approach to troubled employees working? We believe it is. The best results are achieved when a comprehensive approach, relying on corrective, employee assistance and rehabilitative systems, is used. The issues associated with troubled employees in the workplace are not likely to abate. However, more and more employers are affording the opportunity for assistance and rehabilitation in an effort to place these employees' lives back on track. Such policies benefit employers as well as employees. They provide a constructive solution to the dilemma (which otherwise confronts arbitrators) as to whether a different and often more lenient just-cause standard should be applied to troubled employees.

Addendum A

Cases involving the traditional corrective discipline approach:

American Airlines and TWU Local 502, 87 AAR 0277 (Schoonover, 1987) (Grievant's discharge for selling nonrevenue passes for personal gain is not mitigated by grievant's drug problem. Grievant had not disclosed problem, nor did he seek assistance of carrier's EAP prior to discharge.).

Trans World Airlines and IAM, 87 AAR 0274 (Nicolau, 1987) (Grievant's discharge for reporting to work intoxicated not mitigated by grievant's alcoholism where grievant had suffered relapses before and rehabilitative efforts had not proved fruitful.).

American Airlines and APFA, 87 AAR 0165 (Harkless, 1987) (Grievant's termination for sleeping on the job not mitigated by grievant's post-discharge claim of alcoholism.).

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[59] *Supra* note 49.

Northwest Airlines and IAM Dist. 143, 87 AAR 0148 (Abernethy, 1987) (Grievant's post-discharge admission to alcoholism insufficient to mitigate grievant's discharge for drinking on duty. Arbitrator concluded that his jurisdictional authority was limited by company's policy which stated that, "An employee's chemical dependency will be no defense to a proven violation of company rules.").

United Airlines and AFA, 87 AAR 0136 (Seibel, 1987) (Arbitrator refused to mitigate discharge penalty, given the fact that grievant's intoxication while working flight was so egregious and had such adverse effect on flight safety.).

Pan American and IBT, 87 AAR 0068 (Zumas, 1987) (Grievant's termination for theft not excused by grievant's alcoholism where no nexus between alcoholism and misconduct was shown.).

Alaska Airlines and IAM Lodge 2202, 87 AAR 0019 (Rehmus, 1986) (Mitigation based on grievant's alcoholism inappropriate since grievant had not made progress in rehabilitation.).

American Airlines and APFA, 87 AAR 0013 (Fox, 1986) (Grievant's post-discharge claim of alcoholism and satisfactory recovery from a drinking problem did not mitigate grievant's discharge for theft and reporting to work intoxicated. Arbitrator emphasized that carrier's EAP is not a refuge for rule violators.).

United Airlines and AFA, 86 AAR 0295 (Grant, 1986) (Grievant's claimed alcohol and drug dependency did not mitigate discharge for on-duty intoxication, particularly in light of grievant's role as first flight attendant and hazard created by her misconduct. Arbitrator also relied on company regulations which expressly stated that, "EAP cannot be used as a substitute for discipline.").

Pan American and TWU Local 505, 86 AAR 0270 (Bailer, 1985) (Grievant's termination for theft not mitigated by grievant's post-discharge claim of alcoholism.).

United Airlines and IAM Dist. 141, 86 AAR 0113 (Gootnick, 1986) (Grievant's admitted alcoholism and demonstrated progress toward recovery did not mitigate grievant's termination for theft. Arbitrator found theft premeditated and was not an impulsive act committed under the influence of alcohol.).

Eastern Air Lines and IAM Dist. 100, 86 AAR 0094 (Kahn, 1986) (Grievant's discharge for theft presented inappropriate case for mitigation based on grievant's alcoholism and subsequent progress toward recovery. Grievant's alcohol dependency did not preclude grievant from knowing difference between right and wrong.).

United Airlines and IAM Dist. 141, 85 AAR 0302 (Kagel, 1985) (Mitigation of discharge for continuing undependability based on grievant's alcoholism was inappropriate since grievant had been counseled several times regarding carrier's EAP without availing himself of the program.).

Transamerica Airlines and AFA, 85 AAR 0267 (Phipps, 1985) (Arbitrator is without jurisdictional authority to consider grievant's claimed alcoholism since clear violation of carrier's 18 hour no-drinking rule was shown.).

Ozark Airlines and ALPA, 85 AAR 0197 (Mikrut, 1985) (Arbitrator refused to mitigate grievant's discharge for violation of carrier's 24 hour no-drinking rule, noting that grievant failed to undergo rehabilitation when previously offered. Arbitrator stated carrier's establishment of EAP did not preclude carrier from taking disciplinary action.).

USAir and IAM Dist. 141, 85 AAR 0144 (Whiting, 1985) (Mitigation of grievant's discharge for excessive absenteeism based on grievant's claimed alcoholism is inappropriate since grievant had not sought help for his problem.).

Northwest Airlines and IAM Dist. 143, 85 AAR 0128 (Anderson, 1985) (Discharge for excessive absenteeism was not mitigated by grievant's continuing problem with alcoholism. Extended medical leaves of absence to deal with alcoholism could not be ignored by carrier for indefinite period of time.).

Eastern Air Lines and IAM Dist. 100, 85 AAR 0068 (Luskin, 1985) (Grievant's recovery from alcoholism did not mitigate grievant's discharge based upon arrest for first degree murder. Carrier was not obligated to retain employee who would be unavailable for a period of years while incarcerated.).

Pan American and TWU, 84 AAR 0257 (Carey, 1984) (Grievant's discharge for theft was not excused by grievant's alcoholism where evidence did not demonstrate that grievant's alcoholism caused him to be so out of control as to not be responsible for his actions. Arbitrator noted that carrier's EAP holds employees responsible for their actions irrespective of their problems.).

Republic Airlines and AFA, 84 AAR 0132 (Luskin, 1984) (Noting that the grievant had not sought help for her chemical dependency from any source prior to discharge for theft, arbitrator found insufficient ground to mitigate the penalty of discharge.).

Northwest Airlines and ALPA, 84 AAR 0057 (Anderson, 1982) (Discharge for violation of carrier's 24 hour no-drinking rule was inappropriate for mitigation given severity of offense, degree of intoxication, and fact that prior attempts at rehabilitation were unsuccessful.).

American Airlines and APFA, 84 AAR 0021 (Robins, 1984) (Discharge for conviction of voluntary manslaughter was not mitigated by grievant's alcoholism where grievant's rehabilitative efforts had not proven successful.).

Addendum B

Cases involving the modified corrective discipline approach:

Eastern Air Lines and IAM Dist. 100, 87 AAR 0289 (Luskin, 1987) (Grievant who drank in uniform during lunch break was reinstated under last chance agreement with 50 percent back pay in recognition of grievant's 18 years with carrier.).

Flying Tiger Line and IAM Dist. 141, 87 AAR 0058 (Van Wart, 1987) (Mitigation of discharge for repeated verbal misconduct is appropriate where grievant claimed alcoholism and personal problems from Agent Orange exposure in Vietnam. Arbitrator ordered grievant's reinstate-

ment, conditioned upon grievant's continued participation in treatment for 12 month period.).

Pan American and TWU Local 500, 86 AAR 0262 (Hays, 1985) (Grievant's discharge for unauthorized absence from work area was reduced to reinstatement without back pay in light of grievant's alcoholism, long, favorable work record, and availability of carrier's EAP. Reinstatement was conditioned upon successful completion of rehabilitation at grievant's expense.).

Eastern Air Lines and TWU Local 553, 86 AAR 0222 (Lane, 1986) (Arbitrator concluded that grievant's resignation was invalid since carrier should have counseled and assisted grievant, and granted grievant extended unpaid leave of absence to deal with severe alcohol abuse and period of mental stress. Finding resignation invalid, grievant was ordered reinstated based upon proof of abstinence from alcohol.).

Eastern Air Lines and IAM Dist. 100, 85 AAR 0246 (Blackwell, 1985) (Grievant's discharge for reporting to work while intoxicated was reduced to "last chance" reinstatement without back pay in light of grievant's admitted alcoholism and satisfactory recovery.).

Trans World Airlines and IFFA, 85 AAR 0220 (Sinicropi, 1985) (Grievant's discharge for reporting to work intoxicated deemed too severe in that grievant had not actually flown while intoxicated. Grievant's alcoholism was found to be a sufficient mitigating factor. Carrier reached unsubstantiated conclusion that grievant's termination may assist in grievant's rehabilitation. Grievant conditionally reinstated without back pay if grievant produced certification within 30 days that she was fit for duty.).

Eastern Air Lines and TWU Local 553, 84 AAR 0303 (Zumas, 1984) (Grievant who reported to work intoxicated reinstated without back pay upon successful completion of rehabilitation. Mitigation is appropriate in light of grievant's previous attempt at rehabilitation, long period of service, and unblemished work record.).

Ozark Airlines and AFA, 84 AAR 0277 (Moore, 1984) (Grievant reinstated without back pay where carrier failed in its obligation to determine employee's problem and make appropriate referral to carrier's EAP.).

Trans World Airlines and IFFA, 84 AAR 0115 (Bloch, 1984) (Grievant's discharge for using obscene and abusive language was too severe in light of grievant's deteriorating physical and mental condition which had resulted in drinking problem. Arbitrator determined that grievant was not fully responsible for his actions. Discharge was reduced to 30 day suspension with grievant reinstated to medical leave status.).

United Airlines and AFA, 84 AAR 0073 (Scearce, 1984) (While agreeing that grievant's record warranted termination, arbitrator found discharge for absenteeism too severe in light of grievant's claim of chemical dependency.).

III. A UNION VIEWPOINT

LINDA LAMPKIN*

Introduction

Professor Daniel G. Collins analyzes the appropriateness of changing the just-cause standard used by arbitrators in cases where the actions in question are taken by an employee who is troubled or distracted. This approach reflects what the American Federation of State, County and Municipal Employees (AFSCME), a labor union representing over 1.4 million employees, feels is a positive labor-management trend. His call for more definition at the bargaining table to help arbitrators deal with these sometimes gray issues is certainly a legitimate one, since arbitrators find it helpful to have a more formal basis for their awards than a reflection of society's changing standards.

Before dealing in detail with Professor Collins' paper, however, I must comment on the presentation preceding mine by the representatives from American Airlines. Throughout the 45-minute oral presentation and the 41 pages of written documentation, I found not one mention of a labor union, an employee representative, or any participation or consultation with the organizations that represent the workers of American Airlines. I find their conclusion—"an arbitrator is without the jurisdictional authority to hold a troubled employee to a different, more lenient, just-cause standard than that to which all other employees are held"—to be a troubling one. American Airlines seems to be able to soften its position a bit when the issue is mental illness, assuming that there is successful proof with "clear and convincing evidence" that an employee was "not truly responsible" and that the misconduct was not "willful or deliberate." Unfortunately, such a clear line of demarcation rarely exists and certainly guarantees work for arbitrators. Management has to deal with a wide range of psychiatric and arbitral opinions using this approach. American Airlines does not appear to recognize that the working conditions are negotiated in the airlines industry, and this unilateral approach seems to guarantee that much time and resources will be used to defend

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principled stands, rather than efforts to work together to help employees and improve work situations.

Rather than digress further, let me move to the purpose of this presentation—a union reaction to a proposition that arbitrators recognize that there may be mitigating circumstances in certain cases that should lead to a more lenient view of just cause. It seems to me that there are a number of factors which are contributing to this expansion of the definition of just cause. These include the changing demographics of the work force, the changing demands of the workplace, the changing view of management responsibility to employees, the growth of employee assistance programs, and the increased need for investment in workers.

Changes in the Work Force

Much has been written about the changes in demographics of the work force which will dramatically change the world of work. In the near future, the population and the work force will grow more slowly than at any other time since the 1930s. The pool of young workers will shrink and the median worker will be 39 years old in the year 2000, older than at any other time in the history of the United States. In 1985 about 30 percent of the work force were workers aged 16 to 24; that proportion will shrink to 16 percent by 2000.

Women will continue to join the labor force at a high rate and are expected to comprise 47 percent of the work force in the year 2000. Since 60 percent of all women will be working, there will be an increasing number of dual career families.

Minority populations will be the largest percentage of additions to the work force. The new entrants, many of whom are immigrants, may be less skilled and less understanding of the workplace, and more are likely to have educational deficiencies.

While the quantity and quality of new entrants to the work force is in decline, the so-called baby boomers are now turning 40. This means that they will not retire for 30 years, and they are reaching middle stages of their careers at the same time. Obviously, there will not be enough good jobs and promotions to accommodate all these workers, and many will face frustrating career plateaus.

These demographic shifts mean that the workplace and employers will have to respond to the changing needs of new

workers if the work force is to be employed most productively. Management will have to adapt its methods and approach to the work force to deal more effectively with them. In a world where qualified, entry-level workers are at a premium, but where there is a need to give current workers career-advancement opportunities, employers may have to modify some of their rigid principles to retain needed skills.

Changing Demands of the Workplace

When Bob Dylan sang, "the times, they are a-changing," over 20 years ago, the rapid pace of change we are currently experiencing had barely begun. Now it seems to accelerate daily. The only thing we know for sure is that all of us who hold any kind of job are going to have to change the way we do that job. No one can graduate from high school and expect to hold the same job for 30 or 40 years. Each worker will be trained and retrained throughout his or her entire work life. There have been major changes in the culture of large organizations. Mergers and takeovers have changed the corporate world, while Reagan-era cutbacks in federal funding to states and cities have drastically affected the public sector. These are only two examples. Who would have predicted 20 years ago that there would be no "Ma Bell" or that the family farm would become obsolete?

The adaptations that these changes in the workplace require, along with the demands of the work itself, will generate pressure and create stress. In order to keep good employees in a world where labor is no longer a disposable commodity, management must change some long-held ideas about its responsibility and its commitment to employees.

Employer's Expanding Responsibility to Employees

Professor Collins reviews three principles that deal with the concept of just cause when applied to a troubled employee. The first is that the misconduct or inadequacy be job related. Psychiatrist Douglas LaBier has done some very interesting research in his book *Modern Madness: The Emotional Fallout of Success.*[1] His

[1]LaBier, Modern Madness: The Emotional Fallout of Success (Reading, MA: Addison-Wesley, 1986).

analysis indicates that the job itself may be the cause of the job-related problem.

For example, workers in the public sector are often given overwhelming amounts of work because of cutbacks in staffing, receive conflicting directions from the executive and legislative branches, and have far too few resources. The problems they are attempting to solve—drug addiction, crime, child abuse—are major and appear to be unsolvable. The job itself has become impossible to do. Continuing to fire employees who "burn out" will not be a productive use of management resources in this kind of situation, which is more and more common. Attempts to restructure the job or to make some sense out of the work environment might get the job done with much less human toll. It no longer seems adequate merely to review whether an employee's performance meets the employer's standards without a look at the context of the workplace and work requirements.

The second principle is that the action be nondiscriminatory. The definition of what constitutes discrimination is constantly evolving. For example, very different attitudes have been taken by management about the problems of alcoholism and drug abuse. In the past, actions by the employee under the influence of alcohol would receive only a reprimand, while those same actions would warrant dismissal if the employee was under the influence of drugs. I suggest that we are now entering a time of change as the work force ages. Managers, union representatives, and arbitrators who were familiar with the use of alcohol are being replaced with baby boomers who have had more experience with the use of drugs. As the decision makers change their attitudes, the definition of discrimination is also changing.

The third principle is that the punishment should be corrective, not punitive, according to Professor Collins. If the reason for an employee's insubordination, inattention, or poor performance is a pending child custody suit or a credit problem, progressive discipline is not likely to help. Defined rules on tardiness and absenteeism may make it easier for an employer to take action against a troubled employee, but a suspension won't help. When the symptom is inadequate job performance on the job, the employer must be able to measure that performance with more precision, which is difficult in many jobs. However, all the discipline in the world will do little to correct the situation, if the cause is not unwillingness to do the job but inability caused by factors beyond an employee's control.

The principles that have guided arbitrators in their decisions tend to break down with the issues presented by troubled employees. Solutions to the problems will not be found in terminations and suspensions.

Evidence that change is occurring is plentiful. Many joint labor-management committees have been set up to deal with issues that management would not discuss before, such as wellness programs, child care, and career advancement. The phenomenal growth of employee assistance programs acknowledges the fact that management is assuming more responsibility for its employees, both at the workplace and outside.

Growth of Employee Assistance Programs

Surveys show that employee assistance programs (EAPs) are a fast growing benefit that most employers feel are worth the time, money, and effort. Morale increases, absenteeism is reduced, productivity improves, and disciplinary actions decline, according to a recent Coopers and Lybrand survey of corporations with such programs.[2] These results are what management wants—results that are hard to achieve with discipline. EAPs have been around for 40 years, but they have received more attention in recent years for several reasons. Labor unions have become more active in expanding EAP services to their members and in guaranteeing responsiveness and confidentiality. The focus of these programs is shifting from alcohol and drug abuse to a wider range of problems, such as personal finance, health care, legal matters, child or spouse abuse, job stress, child care, and general family concerns. The reason for the shift is clear: The need is there and it makes economic sense for employers to try to keep their current employees. The increased use of these programs has greatly expanded the employer-employee relationship.

Often the role of EAPs is to stop the process of progressive discipline before it reaches its inevitable result of termination, since the imposition of reprimands and suspensions has no impact on the cause of the problem. To be of the most benefit to employees, and therefore to employers, union input and involvement are essential in EAPs. Involvement of AFSCME in many programs across the country has led to improved confi-

[2]1988 Daily Lab. Rep. (BNA), No. 6: A-1.

dentiality, better coordination of benefits with the health and welfare program, more flexible leave provisions, and improved training for stewards and supervisors.

It may cost employers to pay attention to non-work-related problems, but it will also make more effective use of their money and resources. In the instances where the work itself causes the problem, more input into the work site by employees can be instrumental in helping the current troubled employee as well as all those hired in the future.

The demographics of the work force are forcing employers to value more highly their relationship with employees and to consider it as long term. Any long-term relationship has rocky times—marital, family, or work.

Of course, referral to an EAP is not a magic answer. Solutions to these problems take time, and sometimes the answer may be a leave of absence, not a discharge. In the current labor market an employer often may not be able to replace an employee in three or six months. This period of time may be enough to get an employee through a problem. As employees become more valuable, employers must be willing to invest more in their employees if they want to attract the most qualified and to retain them.

Conclusion

These are tense times in the workplace. Social pressures are at unprecedented levels because of two-worker families, the need to care for parents, divorce, single-parent families, and workers with widely varying skills and abilities. The workplace is rapidly changing because of technology and downsizing; workers feel there is little control over their environment, where unilateral top-down decision making is the norm. At the same time that management talks about quality circles and worker participation, the push is on for drug testing, lie detector tests, key stroke monitoring, and other controlling and limiting measures. An increasing number of jobs are structured so that they just can't be done, such as child welfare workers, mental health aides alone in a ward with 20 patients, corrections officers faced with massive overcrowding of inmates.

These problems need to be addressed. Robert Reich, the Harvard economist who wrote *The Next American Frontier*,[3] has

[3]Reich, *The Next American Frontier* (New York: Times Books, 1983), 280.

said, "The manager's new job is as coordinator—to create an environment in which workers can see the possibilities for innovation, creativity, and flexibility. Labor is no longer simply a cost of doing business. It is our most important resource." If the United States is to respond to the need for better use of human resources, management must start to change its attitudes.

Arbitrators are reluctant to excuse conduct which breaks the rules. However, before the need for arbitrators' interpretations arises forcing them to deal with these issues, management should stop the process. An analysis of why an employee has a problem, and a determination of whether it is job related and whether a referral to an EAP would be useful should be standard operating procedure. Until management consistently makes this evalution, arbitrators will be put in the position of modifying the concept of just cause.

The evolution now appears to be toward the right to a rehabilitation opportunity. More and more it should be clear to employers that it makes good economic sense to develop a new approach. The workers employers have now are probably better than those they can hire in the future, and these workplace issues must be rethought in a new context—a world with a shortage of good workers. From AFSCME's point of view, we look forward to this new era.