

National Academy of Arbitrators

**The  
Common Law  
of the  
Workplace**

**The Views of Arbitrators**

**Second Edition**

**Theodore J. St. Antoine**

*Editor*



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## DEDICATION

To the management and union representatives  
and the labor arbitrators of North America  
who together have created  
the world's leading system of industrial jurisprudence



## SPECIAL DEDICATION, SECOND EDITION

To the memories of Tim Heinsz and Carlton Snow,  
who did so much in the time given them  
and who would have done so much more



## PREFACE TO SECOND EDITION

The authors and editors of this work believe we achieved the major goals we set ourselves when we produced the first edition six years ago. We saw value in providing a brief, reliable summary of the leading arbitral principles developed over the first half century of the National Academy of Arbitrators. We especially hoped that less-experienced arbitrators and advocates would profit from the lessons of the past—not that they would feel bound by any rigid body of established rules but that they could build on the accumulated experience of the profession in meeting the new and different problems they now face.

The response to our first edition has been rewarding. Even veteran arbitrators and advocates tell us they have learned from its pages. And talks with the newcomers to the field indicate that most have used our text much as we intended, as a point of departure and not as a terminus of analysis, in dealing with the particular cases before them.

Even in the short space of the last decade or so, significant changes have occurred. Ethics in arbitration has received more attention. External law has become accepted, even if sometimes uneasily, as grist for the arbitrator's mill. Drug use and violence in the workplace are increasing problems. These and other developments are duly noted in our new edition. We of course have also updated citations to court and arbitration decisions and secondary authorities throughout the volume.

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*Note:* Throughout this volume, the *Proceedings of the Annual Meetings of the National Academy of Arbitrators* are cited as "NAA," preceded by the meeting number and followed by the page number. (A list of the *Proceedings* volumes and their titles is provided following Chapter 10.) In each chapter, authorities cited repeatedly are referred to only by authors' surnames after the first reference, for example, "Elkouri, at —" for *Elkouri and Elkouri: How Arbitration Works, Sixth Edition*.

Lastly, we have responded to the one major criticism of the first edition by adding an Index.<sup>1</sup>

Yet perhaps continuity rather than change is the larger theme of this work. All conscientious arbitrators remain loyal to the concept that the contracting parties' intent, as best we can discern it, lies at the very heart of our endeavors. Our strongest desire is to have this volume assist its readers in fulfilling that intent. Like the first edition, however, this revision in no way constitutes an official set of positions of the National Academy of Arbitrators.

We close with a personal word. Since the first edition, two of our authors—Timothy Heinsz and Carlton Snow—died suddenly at tragically early ages. In addition we lost two of our most esteemed senior colleagues, Anthony Sinicropi and Arthur Stark, who were members of the Presidential Advisory Group. We miss all four deeply.

Theodore J. St. Antoine\*  
Chair, Common Law Project

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<sup>1</sup>For her work on the Index, we are indebted to Jacquelin F. Drucker, Member, National Academy of Arbitrators, New York, New York.

\*Member, National Academy of Arbitrators, Ann Arbor, Michigan; Professor Emeritus of Law, University of Michigan.

## PREFACE TO FIRST EDITION

The grievance and arbitration system may well be collective bargaining's foremost contribution to the American workplace. To the employee it means freedom from arbitrary treatment. To the employer it means a peaceful resolution of disputes that could otherwise lead to work stoppages and lost production. The labor arbitrators of the United States and Canada find much satisfaction in the role they have played in this process.

In 1997 the National Academy of Arbitrators celebrated its fiftieth anniversary. In part to commemorate that occasion, and in part to further its ongoing educational efforts, the Academy decided to produce a volume that would attempt to sum up some of the leading arbitral principles developed over the last half century.

Labor and employment arbitration is expanding into new areas. Statutory claims and individual employee rights are two striking examples. Inexperienced arbitrators are entering the field. There is a need to pass on the lessons that have been learned in traditional union-management arbitration, both to benefit the newcomers and to prevent an erosion of standards that could tarnish the reputation of the whole profession.

Many veteran arbitrators rarely publish their decisions, and too often media attention focuses on the bizarre or sensational case rather than the basic and routine. Good encyclopedic treatments of arbitration exist, but a crisp, authoritative overview of the subject would seem more immediately useful to the fledgling arbitrator or advocate.

We are definitely *not* trying to set forth definitive rules. A large segment of arbitral decisionmaking depends on the contractual relationship of particular parties, and the judgment of the particular arbitrator they have selected to resolve their specific dispute. Indeed, this is so true that some persons, quite understandably, have doubted the wisdom of a project like the present one. Nonetheless, many of us believe that the experience of the past half century has yielded some generally accepted approaches toward commonly encountered problems,

or at least some widely recognized alternative ways of thinking about them. We feel this is knowledge worth sharing. When reasonable differences of opinion exist among reputable arbitrators, we shall do our best to point those out.

On a personal note, I can remember how comforting it was for me as a novice arbitrator to hear some of the giants of an earlier generation explain their divergent philosophies. It was liberating to realize there was a range of respectable positions on many issues—and also reassuring to learn in advance where the minefields lay.

For reader comprehension, we have divided the material into short black-letter statements, usually followed by more extensive commentary. This does not mean that extra weight should be given to the items in boldface. The individual authors chose how to organize their own chapters and no collective judgments were made that certain matter should be highlighted as more central or better accepted than the rest.

Despite the value we think readers will find in this outline of the “common law of the workplace,” as seen in the decisions and writings of numerous arbitrators, it is vital to emphasize what the volume is not. As the Board of Governors of the National Academy of Arbitrators has formally declared, the views expressed are in no way an “official” pronouncement of the Academy. They most definitely are binding on no one. They should be treated as no different in kind from the ideas espoused in the articles in the Academy’s annual *Proceedings*. It would be a sorry perversion of our purposes, for example, if any party tried to have a court overturn an arbitration award just because its rationale was contrary to something contained in these pages.

Having said that, the 16 authors and editors who are responsible for this volume would like to acknowledge with gratitude all the help and support we have received from various Academy members. The planning and execution of the project engaged the attention of four Academy presidents [Arnold Zack, J.F.W. (Ted) Weatherill, George Nicolau, and Milton Rubin] during their terms. Eight former presidents went over at least one chapter each with a fine-tooth comb, and were not hesitant with their comments and suggestions. Selected portions of early drafts dealing with some of the most controversial issues were placed before the entire membership attending three different general meetings as well as some

regional meetings of the Academy. The resulting criticisms—and there were many—have been carefully considered. So, while neither official nor binding in any respect, this volume is presented with the hope it will reflect and enhance the best traditions of the arbitration profession.

Theodore J. St. Antoine  
Chair, Common Law Project





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Practice and Procedure

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## § 1.1. Scope of Chapter

**This chapter deals with the procedural or “mechanical” aspects of a grievance arbitration under a collective bargaining agreement in its prehearing, hearing, and posthearing stages. Substantive aspects are dealt with in the succeeding chapters.**

### **Comment:**

Most collective bargaining agreements do not contain extensive provisions concerning how arbitration cases are to be “tried.” Instead, statutes, court decisions, parties’ practice, and tradition as established by arbitrators themselves in practice and, less often, in decisions, provide the basis for this chapter.

*Caveat:* If a collective bargaining agreement has provisions as to how arbitration proceedings are to be conducted—either specifically or by reference to rules of procedure such as those established by the American Arbitration Association (AAA)—then those provisions prevail over the general guidelines set forth herein.

In addition, arbitrators have their own way of handling cases, some based on personal preferences and some influenced by geographic regional differences. Local inquiry may be helpful in learning in what way each arbitrator may conduct a case.

## § 1.2. Ethical Obligations of Labor Arbitrators

**Ethical obligations of labor arbitrators are set forth in the *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes of the National Academy of Arbitrators, American Arbitration Association, and Federal Mediation and Conciliation Service (2003).***

### **Comment:**

The obligations are enforceable by each of these organizations against an arbitrator but, unless the violations also provide legal grounds for vacation of awards, do not affect an

arbitration award rendered by the arbitrator. They have also been adopted by many state arbitration agencies and provide fairly uniform standards of behavior that parties can expect from labor arbitrators.

### **§ 1.3. Collective Bargaining Arbitration Distinguished From Other Forms of Arbitration**

**Collective bargaining arbitration arises out of collective bargaining agreements that contain provisions for arbitration. Legally and by custom and practice it is a distinct field from other forms of arbitration—those arising out of employment, commercial, or construction agreements, to mention a few.**

While many of the procedures of the various kinds of arbitration overlap, a key constant in collective bargaining arbitration is that the relationship between the parties is a continuous one. Labor arbitration is likened to a substitute for a strike or lockout in providing an adjudicative forum for the parties' disputes about their relationship. Many collective bargaining practices are in recognition of this ongoing association. Other forms of arbitration are looked upon as substitutes for litigation, which usually does not involve an ongoing relationship.

## **I. PREHEARING PROCEDURE**

### **§ 1.4. Contact With the Arbitrator**

**Generally, unless given permission by the opposing party, neither party should have any discussions concerning the case with the arbitrator outside the presence of the other party. However, direct-appointment cases and non-AAA agency appointments allow one party to contact and inform the arbitrator about the appointment, to seek dates for the hearing, and to provide any other necessary clerical information to the arbitrator.**

**Comment:**

Copies of any correspondence to the arbitrator should be sent to the opposing party, just as any response from the arbitrator must be addressed to both parties. Such correspondence may be by regular mail, e-mail, or fax.

**§ 1.5. Description of the Case Furnished to the Arbitrator**

**Except for a generic description of the case, such as “discharge” or “contract interpretation,” no information as to the nature of the case is typically communicated by the parties to the arbitrator in a routine case lasting one day or less. The parties may mutually choose to supply the arbitrator with more information, such as the grievance papers and the agreement, prior to the hearing. The arbitrator may also request such information.**

**Comment:**

The parties should advise the arbitrator in advance of unusual circumstances. Examples are time estimates if the hearing will take more than one day, the necessity of an immediate decision, or noncustomary compensation arrangements, such as a provision that the loser pays all of the arbitrator’s fee. Otherwise, the arbitrator will expect to handle a typical day-long grievance hearing.

**§ 1.6. American Arbitration Association Cases**

**Unless different arrangements are made with the AAA by the parties, or by the arbitrator, cases administered by the AAA under its rules are handled through that organization without direct communication between the parties and the arbitrator.**

**Comment:**

When the AAA is the administrative body, the parties may mutually choose in the interests of time to allow the arbitrator to administer the case like a direct-appointment

case, with the AAA retaining administration of the financial aspects.

The parties and the arbitrator will need to communicate directly with each other in cases where the appointing body is the Federal Mediation and Conciliation Service or a labor relations agency in most states, since they do not have sufficient staff to provide arrangement services to the parties and the arbitrator.

## § 1.7. Confirmation Letters

**Confirmation letters from the parties, their counsel, or the arbitrator are customary to set forth the time, dates, and place of the hearing.**

### **Comment:**

When such letters are sent by the arbitrator to the parties, they can serve as statutory notice of the hearing where state law provides that the arbitrator may set the time and date of the hearing. They may also set forth other arrangements, such as who is responsible for engaging a court reporter or securing a hearing location.

## § 1.8. Arbitrator's Terms of Employment

**The confirmation letter or some other correspondence may set forth the terms and conditions of the arbitrator's employment.**

### **Comment:**

These letters may set forth rates of compensation, terms and conditions for payment on short-notice cancellation, whether awards will be transmitted by ordinary mail, indemnification in the event of postaward litigation, and other pertinent information. If there are noncustomary compensation arrangements, such as having an individual employee responsible for paying some or all of the arbitrator's fee, the arbitrator may ask for deposits from both parties prior to performing services and may refuse to proceed without them.



## § 1.9. Arbitrators' Duty to Disclose

**Labor arbitrators have an ongoing duty to disclose current or past economic or close personal relationships with parties or—when known—with witnesses, or other factors that could cause persons with knowledge of the relationship to reasonably question the arbitrator's impartiality. There is no expectation that there will be a disclosure of past neutral labor arbitration appointments or decisions.**

### **Comment:**

In labor arbitration the parties are expected to understand that the arbitrator will have had past contacts with one or both of them or their counsel in earlier arbitration appointments, so that generally no specific disclosure of these relationships is made, contrary to practices in other forms of arbitration. It is assumed that such contacts are taken into account in the mutual selection of the arbitrator. Nonetheless, labor arbitrators have a duty to make disclosures if requested or if extraordinary circumstances arise either because of past economic relationships or because of events that occur during the course of the hearing. *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes*, discussed in § 1.2, above, at section 2.B.

## § 1.10. Prehearing Conferences

**Cases that might become exceedingly long or raise unusual issues, such as extensive document subpoenas or deposition questions, may be expedited by a prehearing conference with the arbitrator in person or by telephone conference call, involving the representatives of all parties.**

### **Comment:**

The arbitrator may be able to assist the parties in streamlining the case and controlling the length of the hearing by dealing in advance with questions concerning the scope of subpoenas and the delivery of documents. The arbitrator can

also provide oversight in those instances where depositions are permissible.

### **§ 1.11. Prehearing Briefs or Submissions**

**In practice there usually is no exchange of prehearing briefs or submissions. Parties can mutually agree to do so on an ad hoc basis or their agreement may so provide.**

### **§ 1.12. Transcripts**

**Verbatim transcripts of hearings are preferred by many arbitrators and parties while other arbitrators and parties do not believe them to be necessary. Below are listed some, but not all, of the principal pro and con reasons concerning transcripts.**

**Reasons why transcripts are preferred:**

**An arbitration proceeding is a search for the truth to resolve the issue presented. Transcripts allow, and require, counsel to argue the case from the record and the arbitrator to decide the case from the record, not from notes or recollections.**

**Transcripts provide any reviewing court or agency with the record of the proceeding, aiding the parties to withstand collateral attacks on the award in suits for unfair representation, for example, and direct attacks on the finality of the award in cases before the National Labor Relations Board (NLRB), Federal Labor Relations Authority, or courts. Or, when the award should be set aside, a record provides a dispassionate basis on which to make such a judgment.**

**Transcripts lend dignity to the proceedings, contributing to orderliness and often confirming the legitimacy of the process where there is an appropriate reason for a third party to examine it, such as in a related discrimination lawsuit.**

**Even experienced arbitrators may miss determinative testimony, not knowing it to be crucial when it first comes in and thus failing to record it in their notes.**

**Concerns as to time needed for transcript preparation are being relieved as “real time” and other forms of computerized court reporting have become more pervasive.**

**The benefits of transcripts become even more apparent if the case is a multiday one or one involving complex statutory issues or technical issues about which experts may testify.**

**Comment:**

If one party requests a transcript and the other party declines to pay one-half the expense, the original will be provided to the arbitrator and access by the nonpaying party may be denied or limited to examination in the arbitrator's office or at some other location. Arbitrators allowing the nonpaying party to examine the transcript may not allow it to make a copy.

**Reasons why transcripts are not considered necessary:**

**A decision can be reached faster if there is no delay waiting for the preparation of the transcript.**

**Transcripts are expensive and there is a substantial cost saving when a court reporter is not engaged.**

**Experienced arbitrators are used to taking comprehensive notes which will be adequate for the preparation of the opinion and decision.**

**If a record is desired, an inexpensive electronic recording device may be used by the arbitrator.**

**Comment:**

Typically, electronic recording of a proceeding by one party or the grievant is not allowed over an objection, to avoid potential manipulation of the tape in the event of subsequent proceedings. That still leaves the possibility of a recording by the arbitrator, to which the parties rarely object. If that is done and others also tape record the proceedings, the arbitrator may declare that the arbitrator's tape is the official record of the proceedings.

### **§ 1.13. Depositions and Other Discovery Devices**

**Unless mutually agreed to, prehearing discovery tools as found in civil litigation—such as prehearing depositions, written interrogatories, and requests for admissions—are generally not allowed in labor arbitration. Depositions may be allowed, however, to preserve testimony that would otherwise be unavailable at the hearing.**

#### **Comment:**

Examples of allowable prehearing depositions may include the testimony of persons unable to attend because of illness or because they are outside the reach of a subpoena. Some state arbitration statutes expressly allow depositions to preserve such evidence. Depositions may be presented by written transcription or videotape as state law allows or the parties stipulate.

Requests for information may be appropriate and enforceable under the National Labor Relations Act.

In some instances devices imported from court litigation—such as motions *in limine*, which seek to define what evidence is admissible in advance of the hearing—have been proposed by one or the other party and have been approved by arbitrators.

### **§ 1.14. Subpoenas**

**Arbitrators, the AAA under its rules, and, in some jurisdictions, attorneys can sign subpoenas for persons and things to demand their presence at the arbitration hearing.**

#### **Comment:**

Some arbitrators either request that the party seeking the subpoena provide copies to the other party to the case as a condition of signing the subpoena or provide notices to the other party that they have done so.

Preparing and serving the subpoena is the responsibility of the party that sought it.

The authority of an arbitrator to control what is required by a subpoena is technically limited to signing it; enforcement is for the courts. As a practical matter, questions of the proper scope of a subpoena do come before an arbitrator in the first instance. If subpoenaed material is not turned over by a party, or if a subpoenaed witness controlled by a party—such as a supervisor or management official—does not appear, the other party can either enforce the subpoena in court or ask the arbitrator to draw adverse inferences against the offending party.

The better practice is for parties to seek subpoenas and serve them in sufficient time so that subpoenaed material can be turned over well in advance of the hearing to avoid delay once the hearing begins.

### **§ 1.15.    Presentation of Case on Stipulations and Briefs**

**By agreement the parties may stipulate to pertinent facts and exhibits and then submit the case on written briefs without a hearing.**

#### **Comment:**

In these instances the parties dispense with a hearing by submitting a joint statement of facts and exhibits, including the collective agreement, and then written arguments on an agreed schedule. The arbitrator is free to correspond with all the parties to ask questions if he or she does not understand any aspect of the stipulations, or the arbitrator may order a hearing to hear and view witnesses or to examine exhibits.

### **§ 1.16.    Requests for Postponement**

**Requests for postponement of the hearing, when not mutually agreed to, are submitted to the arbitrator for decision.**

**Comment:**

The determination whether to grant or deny postponement is for the arbitrator, usually decided on written submission of the reason for seeking the postponement and the written opposition thereto. Submission of the question may also be by conference call.

State statutes may provide that unreasonable denial of a request for postponement may be grounds for overturning an arbitration award.

In deciding the issue, the arbitrator judges the legitimacy and timeliness of the request, including any perception that the requesting party is stalling or otherwise seeking to avoid a hearing. Once vested with the legal authority by mutual appointment of the parties, the arbitrator may consider it an obligation to move the case forward to hearing and conclusion.

## II. THE HEARING

### § 1.17. Introduction

**How an arbitrator conducts a hearing involves personal choices and preferences adapted to the particular circumstances of each case. What follow are general guidelines, rather than hard and fast rules, set forth to give at least some reasonable expectations of what may occur in a given situation.**

### § 1.18. Agreement Provisions

**Unless waived by a party expressly or by conduct, any procedural provisions in the parties' collective bargaining agreement, or state or federal statutes or agency rules adopted by reference in the agreement, must be followed by the parties and the arbitrator.**

**Comment:**

As with prehearing procedures, most agreements are silent on how hearings are to be conducted and what evidence is admissible. Some agreements will incorporate by reference

state arbitration statutes, the Federal Arbitration Act, or agency rules such as the Labor Arbitration Rules of the AAA. To a lesser or greater extent these sources do provide guidance on matters of procedure and evidence. For example, the AAA rules allow the admission of sworn declarations into evidence. State statutes may deal with the admissibility of hearsay, etc. Technically, most private sector arbitrations in industries affecting commerce are governed by federal law but state law procedural provisions may nonetheless apply.

### **§ 1.19. Limitations on Evidence**

**Some agreements specifically prohibit the introduction of evidence by a party that has not provided that same information at a prior step of the grievance procedure. In those instances, the arbitrator is bound to follow the agreement and bar the presentation of such evidence irrespective of its probative worth.**

#### **Comment:**

Such provisions are intended to provide full disclosure in earlier steps of the grievance procedure to promote the settlement of the grievance without the time and expense of arbitration. This is consistent with the notion that the arbitrator should hear the case the parties considered in the grievance procedure. Problems arise, however, in determining whether the evidence that is offered was not presented in some form during the grievance procedure, or was in fact newly discovered after the final step of the grievance procedure. In the latter situation the discovering party could seek to avoid objection to introduction of such evidence by furnishing its newly discovered information to the opposing party prior to the hearing.

### **§ 1.20. Statement of the Issue**

**The statement of the issue, along with the agreement, defines the jurisdiction of the arbitrator.**

#### **Comment:**

The issue should specifically state what the parties want the arbitrator to decide. A decision that answers questions not

fairly posed in the statement of the issue can be vacated in later court proceedings for going beyond the arbitrator's authority to bind the parties by the award.

### **§ 1.21. Formulation of the Issue**

**The statement of the issue results from a stipulation of the parties, formulation by the arbitrator, a court decision, or operation of the collective bargaining agreement.**

#### **Comment:**

Typically the parties will stipulate, at least orally, to the issue to be decided by the arbitrator. Barring that, they may by stipulation give the arbitrator the authority to determine the issue from their respectively stated positions after the presentation of the case. Some parties are more relaxed about this and customarily allow the arbitrator to determine the questions to be decided. In some instances the agreement may specify the issue, or a court or administrative agency may formulate the issue to be decided.

The process of defining the issue may involve a joint discussion with the arbitrator. But if no agreement is reached, the arbitration proceeds at the risk of a posthearing attack on the grounds that the resulting award exceeded the jurisdiction of the arbitrator. Some arbitrators insist they have the inherent authority to formulate the issue in the absence of the parties' agreement, since otherwise one party would have the power to block the arbitration.

It is better if the statement of the issue does not seem to assume the truth of one party's position, such as "Was X's discharge for hitting Y a violation of the agreement?" when the underlying factual issue is whether such an assault occurred.

### **§ 1.22. Decision on the Merits, Not Money Damages**

**The parties will typically agree that the computation of damages or other specific questions concerning remedy will be remanded to them, depending on the outcome on the merits, with the arbitrator retaining jurisdiction to decide such issues**



**in the event the parties cannot agree. An arbitrator with any question about his or her authority in this regard should ask the parties to define it at the beginning of the hearing.**

**Comment:**

Some arbitrators believe there should be an express agreement concerning their authority to remand such issues to the parties. Others believe that they have the implied authority to remand and that the parties expect the arbitrator to frame the remedy or return the matter to them. If there are doubts about the parties' willingness to proceed this way, however, the matter should be settled at the outset of the hearing so that the necessary evidence is presented to enable the arbitrator to determine the remedy.

The purpose of limiting the initial hearing to the central dispute between the parties is to efficiently present the evidence regarding the issue on which the parties cannot agree. And experience has taught that usually the parties are able to resolve computational remedy issues without third-party arbitration once there is a decision on the merits.

**§ 1.23. Ex Parte Hearings**

**In rare instances one party will not appear or participate in a properly noticed hearing. Whether the arbitration should proceed in the absence of a party depends on what the parties' agreement provides, what any applicable statute permits, and what the arbitrator considers appropriate under all the circumstances. If the hearing does go forward, the appearing party must present evidence to support its claim. No award will be made by default simply because the other party failed to appear.**

**Comment:**

By agreement or by agency rules, if applicable, an ex parte hearing may proceed if the other side has received appropriate notice of the time, date, and place of hearing from the arbitrator. Requirements of notice are stated in rule or statute if not specified in the agreement. A statute may also provide the

authority to proceed *ex parte* either without or after court order. When a party has participated in the selection of the arbitrator or otherwise moved to arrange for arbitration, that party may be bound by an adverse decision even if it does not appear at the hearing. Nonetheless, some arbitrators are reluctant to proceed *ex parte* unless the appearing party will be prejudiced or witnesses inconvenienced. Many arbitrators will seek to contact the absent party to confirm that it received notice of the hearing and to ascertain whether there is any reasonable excuse for the failure to appear.

There have been instances where a party that has failed to appear at a hearing obtains an *ex parte* court order purporting to block the arbitration case from going forward. If such an order is not served on the arbitrator prior to the arbitration's commencement, the subsequent award will not be vacated.

## **§ 1.24. Substantive Arbitrability**

**Substantive arbitrability refers to whether an issue is properly the subject of an arbitration agreement; that is, whether a party has agreed to be bound by an arbitration decision concerning the subject matter of the case.**

### **Comment:**

Whether a matter is substantively arbitrable is for the courts unless the parties stipulate that the arbitrator is to make that determination. Absent such an agreement, substantive arbitrability may be reserved by one party for court decision even after the arbitrator's award. *See also* Chapter 2, § 2.23, below.

## **§ 1.25. Procedural Arbitrability**

**Procedural arbitrability refers to whether the parties' contractual prerequisites for arbitration have been met. These issues are generally decided by the arbitrator.**

### **Comment:**

Issues of procedural arbitrability—whether, for example, the grievance was timely filed, properly worded, processed in

accordance with the parties' agreement, or met other procedural requirements—is for the arbitrator to decide after presentation of evidence and arguments as in the case on the merits. Procedural arbitrability questions should be heard at the outset of the hearing. *See also* Chapter 2, § 2.24, below.

### **§ 1.26. Bifurcation of Arbitrability and the Merits**

**Unless the agreement provides otherwise, the question of arbitrability and the merits will usually be heard in one proceeding.**

#### **Comment:**

In the absence of a contrary agreement, the decision whether the hearing is to be bifurcated is for the arbitrator. A major reason for disallowing bifurcation is to take advantage of the parties' presence with their witnesses and to avoid unduly prolonging the hearing process. The arbitrator can still rule first on the arbitrability question, which may obviate the need for a decision on the merits.

### **§ 1.27. Stipulations of Facts and Exhibits**

**Prior to presenting testimony, the parties may be invited to stipulate to facts and to the admissibility of exhibits.**

#### **Comment:**

To avoid wasting time the arbitrator may encourage the parties to enter into as many stipulations as possible. While not required it is good practice to stipulate to factual matters and to the admissibility of exhibits as to which there is no dispute.

### **§ 1.28. Persons Entitled to Be Present**

**An arbitration is not a proceeding open to the public, even in public agency cases, unless so stipulated by the parties. Persons who are strangers to the proceedings, and the media, will not be allowed**

**to be present when there is an objection to their presence by either party.**

**Comment:**

Arbitrations have traditionally been treated as private proceedings, often involving personnel actions, and are considered confidential except as to those who need to know about them. Exceptions can be made in individual cases by agreement of the parties, or in certain types of public agency cases by statute or ordinance. Family members and union and management personnel will often be allowed to be present even if they otherwise have nothing to do with the presentation of the case.

Because information of a personal nature may come out in a hearing, requests may be made for, or arbitrators may impose on their own, orders to those present to preserve the confidentiality of what has been disclosed at the hearing. An arbitrator would appear to have the authority to impose penalties for breaches of such orders on a proper showing.

**§ 1.29. Counsel for the Grievant**

**An arbitration case arises under an agreement between the union and the employer. It is the union that represents the individual grievant and, unless stipulated otherwise, the latter has no independent right to be represented or to present evidence. Accordingly, either party may object to the presence of an attorney representing an individual grievant. The attorney may then be asked to leave the proceedings, or to remain silent and not participate, unless such counsel is acting as co-counsel to the union.**

**Comment:**

Such a right to exclude should be exercised with caution for there may be practical and legal reasons to allow the presence, or in some cases even the participation, of an individual grievant's counsel. In other instances a party may name an individual grievant's counsel as co-counsel with the party's own representative. Since the other party cannot control who

its opposition's counsel is, the lawyer for the individual would then be allowed to stay.

Instances when the parties may agree to the presence of or participation by the individual grievant's counsel can include promotion cases or others that affect an individual's status where there is an actual or potential lawsuit on such grounds as race, sex, or age discrimination, or violation by the union of its duty of fair representation.

### **§ 1.30. Right of Representation**

**A party is entitled to representation by counsel of its choice, who may or may not be an attorney, unless the agreement bars attorneys from representing a party.**

#### **Comment:**

State statutes may sometimes prohibit any agreement barring the use of attorneys as representatives. State case law may also attempt to limit representation to state-licensed lawyers.

When more than one counsel represents a party, the arbitrator may limit representation to one counsel per witness to prevent the witness or opposing counsel from being "ganged up on" and to maintain an orderly hearing.

### **§ 1.31. Absence of Individual Grievant**

**The union is entitled to proceed without the presence of the individual grievant but does so at the risk of a claim of violation of the union's duty of fair representation.**

#### **Comment:**

The arbitrator may ask about the grievant's absence and inquire whether the union has made diligent attempts to advise the grievant of the proceedings. If the union does not feel a recess will ensure the grievant's presence it should describe its efforts to secure the grievant's presence for the record.

Arbitrators may vary in how they respond when a grievant does not appear and the union maintains it is surprised by

the nonappearance and cannot proceed without the grievant. A recess may not be granted, if objected to, if reasonable efforts to get the grievant to attend have not been successful. A recess may be granted if further efforts may result in the grievant's attendance. But the arbitrator may condition the recess on payment by the party seeking the recess of the costs of reconvening the hearing, including arbitrator fees and witness and counsel travel costs. Other conditions may include a provision that the grievance will be dismissed with prejudice if the grievant, having been given the date, time, and place of the resumed hearing, still fails to appear.

### **§ 1.32. Sequestration of Witnesses**

**If either party asks, prior to the taking of testimony, that witnesses not be present when other witnesses testify, such a motion will normally be granted. The grievant, a representative of the union, and a representative of the employer, in addition to counsel, will be allowed to remain during the testimony even if they will be witnesses.**

#### **Comment:**

The purpose of sequestration is to seek to ensure that the testimony of each witness is not influenced by that of other witnesses. If a party calls as a witness someone who has remained in the hearing room after a sequestration order, that person may testify but the arbitrator will note that the witness did remain while the testimony of others was taken. The opposing party may appropriately argue that the arbitrator should give less weight to that testimony than to witnesses who testified without hearing the testimony of others.

### **§ 1.33. Order of Presentation**

**Regardless of the burden of proof in a given case, experience has taught that it may be more efficient for the employer to proceed first in certain situations. These include discharge and discipline, promotion, demotion, and transfer cases where the employer can efficiently explain the actions that**

have given rise to the grievance and thus avoid irrelevant testimony resulting from the union's "guessing" or "hoping" why such employer decisions were made. In most other contract interpretation cases it is customary for the union as moving party to proceed first. There could be exceptions, such as, for example, contracting-out cases where management has all the pertinent records.

**Comment:**

The order of presentation does not change the burden of proof; if the burden falls on the union, it remains with it even when the employer proceeds first.

### **§ 1.34. Opening Statements**

**Prior to the presentation of its case, each party may choose to make an opening statement that outlines the nature and scope of the evidence to be presented and why such evidence is relevant to proving its case. The party that proceeds second may reserve its opening statement until the presentation of its case or may give its opening statement after the opposing party finishes. Opening statements are not evidence.**

**Comment:**

Opening statements should be carefully thought out, and not be unduly argumentative, in order to accomplish their purpose to succinctly apprise the arbitrator of the party's theory of the case and what evidence that party intends to use to prove its case. It is helpful to the arbitrator to have opening statements from both sides prior to hearing evidence, especially in the more complicated cases. That enables the arbitrator to better understand the testimony and to rule more surely on any objections to the evidence.

Too often counsel will make major assertions in the opening statement that the evidence fails to prove. Such misassertions may affect the confidence with which the arbitrator may view the party's case, even if the arbitrator is not supposed

to consider counsel's conduct or presentation in making the decision.

### **§ 1.35. Swearing of Witnesses**

**While some arbitrators will automatically swear all witnesses or have them affirm to tell the truth, either at the outset of the hearing or as each is called to testify, others will ask whether any party chooses to have the witnesses sworn before doing so.**

#### **Comment:**

There are still some jurisdictions where the arbitrator has not been given the legal authority to administer oaths so that technically a witness who violates the oath might not be subject to a perjury charge. The administration of an oath or affirmation nonetheless adds dignity to the proceedings. In such jurisdictions a court reporter might have the authority to administer oaths and could swear in the witnesses.

### **§ 1.36. Adverse Witnesses**

**Any person may be called as an adverse witness by any party and be cross-examined. However, many arbitrators will not apply this rule to let the grievant be called as the first witness by an employer in a discharge or discipline case. Other arbitrators do not invoke such a prohibition.**

#### **Comment:**

When a party seeks to call an adverse witness, it does so for one or more of the following reasons: The witness may have the best knowledge of what has occurred. In a credibility case the party calling the witness may be attempting to "nail jelly to the tree" by having the witness's version of what occurred on record before the rest of the evidence comes out. That prevents the witness from altering his or her testimony to fit the evidence produced before the witness is called to testify. Or the party may be attempting to find out what, if anything, about the factual situation the witness does not contest so that



the calling party can shorten its own case by producing only evidence of contested matters.

Many arbitrators do not allow a grievant in a discharge or discipline case to be called as an adverse witness by an employer, stating that the burden of proof rests with the employer and concluding that it is unfair if the employer is allowed to call the grievant to testify as part of its case. These arbitrators believe that the employer, which took the disciplinary action, must produce evidence of the reasons for its action independent of the grievant's testimony. In some instances the parties themselves have developed in their arbitrations over the years a rule that it is inappropriate to proceed in a discipline case by calling the grievant as the employer's first witness. If the union does not plan to call the grievant as a witness as part of its case, many of the arbitrators who do not ordinarily allow the grievant to be called by the employer will allow the company to call the grievant as an adverse witness at the end of its case. What is important for some arbitrators is balancing the arbitrator's need for the facts, when the grievant may be the sole source of what was done and why, against the possible unfairness of allowing the employer to build its case using the grievant's testimony, when the employer itself took the disciplinary action in the first place.

Arbitrators who do allow the grievant to be called as the employer's first witness assert that the quantity and quality of evidence do not depend upon its source, noting that the burden of proof in such cases still remains with the employer in a discharge or discipline case, at least where the employer has specified the grounds of discipline beforehand, so that the employer cannot build a case against the grievant solely by his or her own testimony.

There is no correlative "rule" forbidding a union from calling an employer witness as an adverse witness as part of the union's case-in-chief when the union bears the burden of proof.

### **§ 1.37. Bargaining Unit Members as Employer Witnesses**

**Bargaining unit members may be called as witnesses by an employer even if their presence at the hearing is compelled by subpoena.**

**Comment:**

Unless barred by the parties' agreement or mutually recognized practice, bargaining unit members may be called to testify by the employer and are not necessarily adverse witnesses. Their "adversity" must be established by the employer, who must request in such instances that they be considered adverse to allow their cross-examination.

Claims that such subpoenaed witnesses might face intra-union discipline for testifying against the interests of a fellow union member does not relieve them from testifying truthfully.

Apparently a diminishing minority of arbitrators bar an employer from calling any bargaining unit members as witnesses.

**§ 1.38. Telephonic Testimony**

**The taking of testimony over the telephone will normally be granted on motion made for good cause shown, such as the unavailability of the witness at the locale of the hearing, the witness's being beyond the reach of a subpoena, or other good reason.**

**Comment:**

An arbitrator may deny a request for telephone testimony if persuaded that observation of the witness's demeanor is important in assessing the witness's credibility.

In taking such telephonic testimony it is necessary to prove the identity of the witness if challenged as well as whether the witness is alone when he or she testifies and what documents, if any, the witness has at hand.

It is not good practice to attempt to take the telephone testimony of a key witness subject to lengthy examination or of a witness who must testify in detail about documents, given the limitations of the medium and increased possibilities of misunderstanding about how the testimony relates to the documentary evidence. Since videotelephone conferencing is becoming more readily available, these difficulties may be lessened.

**§ 1.39. Confrontation of Witnesses**

**Former rulings that employers could keep the identity of certain witnesses, such as undercover spotters or shoppers, confidential by withholding their appearance at a hearing have generally been superseded and it is now commonly required that all witnesses must testify and be subject to cross-examination.**

**Comment:**

In rare instances, good cause for concealing the identity of a witness from the grievant, such as by taking testimony from behind a screen, may be established to the satisfaction of the arbitrator, particularly when there is fear of physical retaliation. In such situations counsel should be entitled to be present.

**§ 1.40. Manner of Examination**

**Witnesses are to be treated with courtesy, taking into account their dignity as individuals. They are not to be subjected to argumentative or demeaning conduct by counsel nor is their prior testimony to be misrepresented in cross-examination.**

**Comment:**

Tactics of counsel in badgering or belittling a witness to impress their own client, to rattle the witness, or for other extraneous effect is contrary to good practice. Such behavior can also lose the respect of the arbitrator.

Asking the same question of the witness numerous times will be halted as being “asked and answered,” either by objection from the opposing party or by admonition from the arbitrator.

While the arbitrator may bend over backwards to avoid penalizing a client for the conduct of its counsel such tactics cannot help but leave the impression that they were adopted to cover up weaknesses, not to add anything that counsel seeks to prove. They risk eroding confidence in the party’s case.

### **§ 1.41. Counsel's Right to an Answer**

**Witnesses are expected to answer nonobjectionable questions directly and then they may explain the answer. To questions that require direct answers, the typically appropriate answers are “yes,” “no,” “I don’t know,” “I don’t remember,” or “I don’t understand the question,” as the case may be. The witness then may explain his or her answer, provided the explanation is in response to the question.**

#### **Comment:**

Counsel is entitled to have the arbitrator instruct the witness to answer a properly posed question directly, if the arbitrator has not already done so on his or her own motion.

### **§ 1.42. Scope of Cross-Examination and Redirect Examination**

**Arbitrators should not be rigid with respect to the scope of cross-examination or redirect examination.**

#### **Comment:**

To the extent that a skilled and well-prepared presentation builds a “confidence factor” into how an arbitrator may feel about a party’s presentation of a case, counsel should present a case in as succinct and polished a manner as possible. However, since one of the few grounds for vacating an arbitrator’s award is failure to admit relevant evidence, relevant evidence should be allowed even if presented out of order. Unlike courts, arbitrators will rarely limit the scope of cross-examination or redirect examination to what was covered in the preceding direct examination or cross-examination.

### **§ 1.43. Examination by Arbitrator**

**Arbitrators vary in the degree to which they will independently examine witnesses.**

**Comment:**

Depending on the personality and philosophy of the arbitrator and the circumstances of a particular case, there are distinct variations in practice as to the degree of involvement of the arbitrator in the examination of witnesses, ranging from very passive to highly active.

There is a risk the case will run away from the passive arbitrator, with the parties chasing up and down blind alleyways, prolonging and obfuscating the proceedings. The active arbitrator risks taking the case away from the parties, appearing to one side or the other as becoming counsel for their adversary.

In the end, the arbitrator does have an obligation to try to reach a decision that is as close to the truth as possible, and if the arbitrator lacks necessary information, to try to find it. This search is typically not done by the arbitrator's calling witnesses or asking for the production of documents (although in extreme cases either may occur) but usually involves questioning a witness after counsel has finished. The arbitrator who perceives the point to be sensitive may preview the line of questioning off the record to counsel for their mutual input and discussion.

Most arbitrators would not take offense at counsel's pointing out that the arbitrator's questioning of a witness is premature or unnecessary, if it is, and that counsel will be getting to that subject with this witness or with another.

**§ 1.44. Conduct of Counsel Toward Opposing Counsel**

**Counsel, whether or not a member of the bar, is expected to act in a professionally dignified manner in dealing with opposing counsel.**

**Comment:**

For the same reasons noted in foregoing sections, inappropriate treatment of opposing counsel (rudeness, disrespect, obstruction, and other incivilities), designed to impress counsel's own client rather than advance the presentation of the case in a professional manner, may ultimately be seriously detrimental to the client.

### **§ 1.45. Nonappearance of Subpoenaed Witnesses**

**An arbitrator has no control over the appearance of witnesses other than to sign subpoenas compelling their presence at the request of a party. The latter is responsible for furnishing the subpoena form to the arbitrator and for serving it on the witness after it is signed, as well as for enforcing it in court if necessary.**

#### **Comment:**

The remedy for the party is to compel the presence of the subpoenaed witness at a continued hearing by court order, which is to be enforced by the court through contempt proceedings if the order is not obeyed.

As noted above, if the witness is within the control of a party, an alternative method of “enforcing” a subpoena is to ask the arbitrator to draw adverse inferences against the party that did not bring the witness after it is proven a subpoena was properly served.

### **§ 1.46. Examination by Party-Appointed Members of Board of Arbitration**

**Party-appointed arbitrators can ask questions of witnesses after examination by counsel but should limit such questioning to clarification rather than repetitious examination.**

#### **Comment:**

Party arbitrators in labor arbitration cases, except by stipulation of the parties, are not considered to be neutral arbitrators. The neutral arbitrator chairs the hearing and may rule on objections to questions from party arbitrators to the same degree as with questions of counsel.

### **§ 1.47. Counsel or Party-Appointed Arbitration Board Member as a Witness**

**Counsel for a party or party-appointed members of a tripartite arbitration board may properly**

**be witnesses when they have relevant testimony to present, even if they testify in a narrative form, as long as they are subject to cross-examination.**

**Comment:**

The better practice is to have a colleague examine counsel if counsel's testimony is required. This permits the more customary and orderly question-and-answer format, as well as objections and rulings on them before rather than after testimony has been given.

In some states lawyers may be barred from serving as both counsel and witness under professional ethical rules without a knowing waiver by the client. These rules generally are not applied in arbitration, with arbitrators asserting that such issues are for the state bar association to deal with.

Some persons believe there can be serious practical problems in having a party-appointed arbitrator testify, particularly when that testimony involves a crucial credibility question in the case.

### **III. OBJECTIONS AND ADMISSIBILITY OF EVIDENCE**

#### **§ 1.48. Overview**

Although it is stated that arbitrators are not technically bound by the rules of evidence, to the extent that such rules deal with reliability, privilege, or relevance, they are in fact observed by most arbitrators. The overriding purpose of a hearing, irrespective of such other benefits as providing a "therapeutic opportunity" for the parties to deal with their own relationship, is to seek the truth of the matters in controversy. The purpose of most evidentiary rules is to ensure that the evidence presented is both reliable and relevant.

**Comment:**

The following observations are general; specific rulings will undoubtedly be dependent on the substantive nature of

the case. An evidentiary rule followed by an arbitrator in one case may not necessarily be followed by the same arbitrator in another case, depending on the circumstances.

### **§ 1.49. “Range of Admissibility”—What Arbitrators Will Allow Into Evidence**

**(1) Some arbitrators conclude that unless evidence is reliable, relevant, and competent, it should not be admitted, thereby carrying out a purpose of arbitration to obtain pertinent facts on which to base a fair and proper decision with as unconfused a record as possible.**

**(2) Others, believing that the arbitration process should not be held to any strictures concerning evidentiary rules, and that parties should not be constrained by technicalities that might impair that view of industrial justice, will allow virtually any offered evidence to be placed before them for “whatever weight it deserves.”**

#### **Comment:**

Admitting evidence only after it withstands tests as to reliability, relevance, and competence is viewed by some as too strict, especially in light of the concept that arbitration proceedings are not subject to the strictures of the rules of evidence. Holders of this view also maintain that experienced arbitrators can sort the wheat from the chaff and through this sifting process determine which evidence is reliable enough to be considered in making the decision required.

On the other hand, admitting objected-to testimony or evidence solely on the basis that it has been offered subject to “whatever weight it deserves” provides no guidance to the parties as to what is or is not relevant, prolongs hearings by requiring counterevidence to what may eventually be viewed as “weightless” evidence, and thus renders the process inefficient and uneconomical.

Occasionally, arbitrators adhering to the views listed in (1) above may admit evidence that a party insists should be before them but that does not meet the tests of reliability, relevance, etc. They admit such evidence to expedite the presentation, but in so doing they inform the parties that that



evidence will be given little, if any, weight so that the parties will spend no more time on that point.

### **§ 1.50.      Objections to Questions, Answers,                  or Documents**

**Objections do not have to be in any particular form provided they get across the purpose of the objection and are made in a timely way.**

#### **Comment:**

Counsel are not held to any particular formalism regarding the wording of an objection but it should be made before an answer is begun and express what is objected to. If the answer has begun, a motion to strike should be made after the witness concludes the answer to avoid disruption of the proceedings. Objections must be made when the objection fairly arises or they may be considered as having been made too late.

In some instances, such as relevance objections, the arbitrator may not rule immediately if the case has not been developed to the point where a proper judgment can be made, but should make a ruling at some point before a decision in the case. However, if it is clear that the objection has no merit, it should be overruled immediately.

Some arbitrators prefer that no argument be made concerning an objection beyond a one- or two-word description of the grounds for or against it, unless the arbitrator asks for argument.

### **§ 1.51.      Standing Objections**

**Standing objections are appropriate.**

#### **Comment:**

If there is an overruled objection to a particular line of testimony it is customary to ask for a standing objection to avoid unnecessary repetition of objections, argument, and rulings. The arbitrator should state that a continuing objection will be noted.

## § 1.52. Arbitrator's Objections

**The degree to which arbitrators rule out proffered evidence without an objection varies from arbitrator to arbitrator and case to case.**

### **Comment:**

Arbitrators' participation in the proceedings varies with their personalities and their views regarding the process. Some are more intrusive than others, but most will, at least to some degree, insert themselves into the proceedings when they believe that fairness requires such intrusion. The arbitrator must not seek, however, to run either party's case.

### **Illustrations:**

1. On cross-examination the examiner in a question twists the testimony of the witness to include claimed testimony that was never given. If no objection is forthcoming, to protect the witness and the process, the arbitrator may require rephrasing of the question on the grounds that the question did not fairly reflect the prior testimony.

2. If it becomes clear during the course of a disciplinary case that the grievant has criminal charges pending arising out of the same facts as the arbitration, the arbitrator may halt the proceedings to inquire whether or not there was a knowing waiver of the grievant's right against self-incrimination, in view of the impact testimony in the arbitration case might have on the criminal case.

## § 1.53. Authenticity of Documents

**Normally long, formalized foundations for the authenticity of documents are unnecessary, but if a document is fairly challenged, its authenticity must be established by the party offering the document in evidence.**

### **Comment:**

In most instances formal foundations for the authenticity of documents are dispensed with unless the opposing party

asserts there is a particular need to authenticate them, such as suspected forgery or other similar reason.

### **§ 1.54. “Best Evidence Rule”**

**A document itself is considered the best evidence of its contents and is preferred to testimony concerning the contents of the document, but failure to present the document itself will not bar testimony concerning it.**

#### **Comment:**

Unlike the result under formal evidence rules, oral testimony about the contents of an unproduced document is admissible in arbitration. To avoid unnecessary controversy, however, and to get at the truth if the contents are strongly contested, the arbitrator should require the production of the document itself if it is in existence and within the control of a party.

### **§ 1.55. Refreshing Recollection by Use of Documents**

**Any document can be shown to a witness to refresh the witness’s recollection when the witness cannot recall or denies something, but the use of a document for that purpose does not necessarily make it admissible into evidence on that basis alone.**

#### **Comment:**

The document may come into evidence on its own merits when independently moved into evidence.

### **§ 1.56. Leading Questions**

**Leading questions that suggest an answer to the witness on direct examination are objectionable on matters that are materially in dispute.**

#### **Comment:**

Leading questions on material points are objectionable, for they substitute the question for the testimony of the witness

and suggest the desired answer to the witness. On these points witnesses should be asked such questions as, "What did you see happen next?", not a question that suggests the answer to the witness such as, "Then you saw the grievant hit the victim?"

Leading questions on uncontroverted or background matters on direct examination are not only nonobjectionable but a preferred means of bringing testimony to the point where nonleading questions are required to deal with matters that are material to the controversy.

### **§ 1.57. Hearsay in General**

**By statute and by tradition hearsay evidence is admitted into evidence "subject to weight."**

#### **Comment:**

Hearsay evidence, testimony about what the witness heard from another that is introduced to prove the truth of what was heard, is less reliable than direct testimony from the speaker about an event. Nonetheless, to avoid the technicalities as to whether evidence is inadmissible hearsay or hearsay subject to an evidentiary exception that would deem it reliable and thus admissible in a court proceeding, arbitration statutes and long arbitral practice authorize the admissibility of hearsay, subject to the arbitrator's determination as to how close the hearsay should come to being accorded the weight of direct evidence in a given case.

Because of the lesser reliability of hearsay, objections or at least oral notations by counsel are appropriate to "flag" hearsay evidence for the arbitrator.

### **§ 1.58. Naked Hearsay Documents and Sworn Declarations**

A distinction is drawn between the situations where there is at least a witness, who may be cross-examined, giving the hearsay evidence and where there is a "naked hearsay" document that is not subject to cross-examination. The latter may be ruled inadmissible absent special exceptions. Unless allowed by agreement, statute, or applicable

**agency rule, sworn declarations or affidavits may not be considered competent evidence by many arbitrators, if the other party objects, since the declarant is not available for cross-examination.**

**Comment:**

Naked hearsay documents include physicians' notes about employees, customers' written complaints, statements by non-appearing supervisors and employees and the like. Sworn declarations, under agency rules such as those of the AAA, are to be admitted into evidence "subject to weight," as discussed above. No guidance is provided by the AAA as to what "weight" is to be ascribed to such declarations. That requires the opposing party to challenge by its own evidence or counterdeclarations what that party perceives might be the "weight" ascribed to the initial declaration.

Some arbitrators, on their own, or on the basis of the parties' practice or acquiescence, will admit "subject to weight" such relatively routine items as doctors' statements concerning an employee's absence because of illness, whether sworn or not, or other documents such as police reports. Rules against admissibility do not apply to documents that are deemed intrinsically reliable, such as records kept in the normal course of business.

Arbitration awards may be vacated by courts for not providing the opportunity to cross-examine witnesses, and such documents—as opposed even to hearsay witnesses—cannot be cross-examined. *E.g.*, California Civil Procedure Code §§ 1282.2, 1286(b), (e).

**§ 1.59. Hearsay as Only Evidence to Support Claim**

**Some arbitrators have held that un rebutted hearsay evidence alone is sufficient to establish a claim.**

**Comment:**

Other arbitrators conclude that if hearsay is the *only* type of evidence presented, the evidence will not have enough weight to support a claim or affirmative defense.

## **§ 1.60. Opinion Evidence: Experts**

**Evidence of opinion, as opposed to fact, is admissible as reliable when it is within the competence of the witness to assert the opinion.**

### **Comment:**

Laymen can assert opinions about those matters that they could be trusted to make, such as determining that someone was angry, upset, or emotional. However, if an opinion requires technical knowledge or experience, only an expert witness with specific scientific, technical, or professional training or experience is entitled to give such an opinion.

A foundation showing such expertise, subject to cross-examination, must be laid to allow an expert opinion into evidence and a party should ask that the witness be deemed an expert before eliciting opinions.

The subject matter of expertise must be of a generally recognized subject matter and the experts should have hands-on knowledge of what they opine about. The more exotic the subject matter the more difficult it is to qualify the expert. A witness who simply researches a question that a layman could research—even if in an area of that witness' experience—without adding particularized knowledge to the fruits of the research, will not be considered an expert for opinion purposes.

## **§1.61. Arbitral Notice**

**An arbitrator can take notice of matters that are generally known or knowable and about which there is no dispute.**

### **Comment:**

Either at the request of a party or on arbitrators' own motions, such matters as the contents of statutes, regulations, maps, texts, or other generally known matters that are not subject to dispute may be referred to as if they were authenticated and formally introduced into evidence.

## **§ 1.62. Testimony About Contracts or the Law**

**Conclusions of what the law is or what the legal or contractual effect of certain facts may be are not**

**admissible evidence even if delivered by an “expert” in the law generally or contracts in particular.**

**Comment:**

Such conclusions are for the arbitrator to draw even if the arbitrator is not legally trained. In arbitration this view carries over to opinions, even from experts in the field of collective bargaining, about the meaning of provisions in a labor contract. Such provisions are said “to speak for themselves.”

An exception to the foregoing would be the opinion of a qualified expert concerning the law of a foreign jurisdiction.

The inadmissibility of expert testimony on the law or the meaning of a contract as a matter of evidence does not prevent a party from citing legal authorities in briefs or other argumentation.

**§ 1.63.      Opinion Testimony and Hypothetical Questions**

**Many, but not all, arbitrators consider a lay witness too uninformed to allow admission of his or her opinion as to the specific issues to be decided in the case, while an expert witness could answer to a properly framed hypothetical question concerning such issues.**

**Comment:**

A properly framed hypothetical question is one that accurately tracks the substantive evidence of the case, asking the expert witness to assume the truth of the facts asserted in the question when giving the answer. Arbitrators later weigh the answer in part against what they ultimately find the facts in the case to be.

**§ 1.64.      Speculation**

**With the exception of hypothetical questions posed to experts, questions asking a witness to speculate on what he or she would do under other circumstances or in future instances are generally inadmissible as being both unreliable and irrelevant.**

**Comment:**

In some instances an objected-to question calling for speculation by a lay witness can be reframed by asking the witness for testimony as to facts rather than opinion.

**§ 1.65. Lie Detectors, Repressed Memory, DNA, and Other “Scientific Evidence”**

**Although not bound by court decisions, arbitrators may look to judicial rulings for guidance concerning cutting-edge scientific evidence.**

**Comment:**

In the typical situation the courts have had a much more extensive opportunity to determine whether such evidence is reliable enough to be considered competent evidence and what weight should be given to it.

**§ 1.66. “Privilege”**

**Even if evidence is both relevant and trustworthy, it may be inadmissible if it falls within a “privilege.” A privilege is the capacity of a party to prevent the introduction of certain evidence on the grounds that societal ends will be better served by excluding that particular kind of evidence, notwithstanding its probative value. Arbitrators may recognize legally created or recognized privileges and consequently draw no adverse inferences from their assertion. Arbitrators recognize that mediators cannot be called to testify about negotiations they participated in. Some state statutes shield journalists from revealing their sources.**

**Comment:**

Privileges such as those against self-incrimination, or disclosure of lawyer-client, priest-penitent, doctor-patient, husband-wife, and, increasingly, patient-psychiatric counselor communications are recognized in law as being matters that



cannot be disclosed without the knowing waiver of the individual involved. The policy behind these privileges is, in the case of self-incrimination, that the state must prove a crime without the involuntary participation of the defendant, or, in the others, that there is a greater societal good in encouraging or protecting the confidentiality of the listed communications than in forcing their disclosure by involuntary testimony. There are exceptions in statutes to such privileges, such as with respect to patient-counselor, where communications of threats to others are not protected.

Although not recognized in law, some arbitrators recognize a union-member privilege to prevent disclosure of statements made in grievance investigation or processing; other arbitrators do not consider such communications as privileged.

One type of “privilege” that may be cited protects the “work product” of an attorney. Routine types of investigations or statements obtained by an employer’s officials—such as human resource personnel—will usually not be so protected, even if a lawyer has been consulted. The determination will turn, however, on the facts of each case in which privilege is claimed.

The mediators’ privilege is granted so that the parties will communicate freely with them. Requiring mediators to reveal what occurred during negotiations would chill that process. State statutes and case law need to be consulted regarding journalists’ privileges to avoid testifying.

## **§ 1.67. Waiver of Privilege**

**Privileges can be waived only by those who possess the privilege, and the waiver must be knowing rather than inadvertent.**

### **Comment:**

A person potentially indictable for a crime may testify and thus waive the self-incrimination privilege. Similarly, if a client willingly testifies about a conversation with an attorney, the attorney-client privilege is waived.

Once there is a knowing waiver of a privilege, the privilege is waived for all purposes and to all relevant questions that would otherwise be privileged, even if the direct testimony

concerns only part of the privileged communication. Witnesses cannot pick and choose that which they wish to disclose and seek to shield other relevant information based on privilege.

### **§ 1.68. Potential Self-Incrimination Waiver in Arbitration**

**Some arbitrators, when they detect that a grievant may be inadvertently waiving the self-incrimination privilege, may suggest that the grievant consult with an attorney before testifying in the arbitration hearing.**

#### **Illustration:**

A nonlawyer union representative calls the grievant to testify in a theft case. The arbitrator on his or her own motion may inquire whether the grievant has consulted with an attorney about the impact of testifying as a waiver of the grievant's self-incrimination privilege on potential or actual criminal charges in the case, and may grant a recess for the grievant to seek an attorney's advice.

### **§ 1.69. Grievance as Waiver of Privilege**

**The nature of a grievance itself may act as a waiver of a privilege.**

#### **Comment:**

A grievance that calls into play a determination concerning the medical condition of the grievant may amount to a waiver of the doctor-patient privilege and may compel the disclosure by the grievant-patient of all medical records.

### **§ 1.70. Privacy Rights of Noninvolved Individuals**

**State or federal statutes may bar disclosure of employer records concerning third parties, such as their health or disciplinary records, to avoid unnecessarily invading the privacy of individuals who are not direct parties to the arbitration.**

**Comment:**

This problem can often arise when a union seeks information concerning alleged disparity of disciplinary treatment for similar offenses, or when it wants patients' medical records that are pertinent to an employee's discipline or to other issues in the health care industry.

Even if the employer demonstrates that a statute requires nondisclosure of such records the relevant information may be extracted with redaction of names after an in camera inspection of the originals by the arbitrator, if necessary, to check the accuracy of the information. The information thus sanitized can then be disclosed.

Under statutes applicable in law enforcement and other fields, special proceedings may be required before information concerning noninvolved individuals may be utilized.

**§ 1.71. "Privacy Rights" of Employees**

**There are lessened rights of privacy of individuals in the workplace.**

**Comment:**

Unless employer conduct is barred by specific statute, employees, their effects (including their cars in company parking lots) and the contents of their workplace computers (including e-mails and history of Web sites viewed) will have less privacy protection in the workplace than in society generally. Constitutional constraints on state authorities do not generally spill over to the private employer. Even if the employer is required to have "cause" to search an individual, the standard for searching is less stringent than what is applicable in criminal law. Further, in many instances an employee as a condition of employment may have agreed in advance to a personal, locker, and /or computer search.

State or local law or the Federal Constitution may place more constraints on a public employer than on a private employer with respect to actions that may be considered invasion of an employee's privacy.

Outside of such obvious basic privacy rights as not having cameras placed in bathroom stalls, an employee who is subject to supervision is subject to surveillance in the performance

of employment duties. However, if evidence of employment misconduct is obtained from public agencies that have violated the employee's constitutional rights, that evidence may be "suppressed" by an arbitrator just as it would have been by a court. Other arbitrators may not bar evidence offered by a private employer just because a public agency has violated the stricter standards applicable to it.

### **§ 1.72. Sexual Proclivity**

**Under some statutes, questions concerning a witness's sexual proclivity or prior sexual behavior may be barred.**

### **§ 1.73. Journalist Shield Laws**

**In some states journalists may not be required to disclose their sources of information.**

#### **Comment:**

Such "shield laws," where specifically applicable, bar questioning of the journalist as to the source and nature of information used by the journalist in a publication or broadcast, even if relevant to the proceedings.

### **§ 1.74. Trade Secrets**

**A company is entitled to keep trade secrets confidential to avoid disclosure to a competitor.**

#### **Comment:**

The determination of whether the sought-after information is in fact a true trade secret is made initially by the arbitrator, who can examine the material in camera, if necessary, to make that determination. The parties, with the aid of the arbitrator, may devise means to introduce relevant information that will not result in the disclosure of trade secrets susceptible of being communicated to third parties.

**§ 1.75. Stolen Documents**

**Claims that documents have been stolen or otherwise should not have been disclosed to the party seeking to place them into evidence may not necessarily bar their admissibility.**

**Comment:**

If the opposing party can demonstrate that the offering party or someone acting for it in fact purloined a document or “hacked” information from a computer the arbitrator may deem that document or information inadmissible so that a party cannot profit from its own misconduct. If material is not stolen, such as computer files to which the offering party had legitimate access, the material may be considered admissible even if it was distributed, or was made available, by mistake.

**§ 1.76. Material Obtained in Violation of Statute**

**Material obtained in violation of statute is barred from evidence.**

**Comment:**

Information obtained in violation of a statute, such as by tape recording a conversation without notification or permission or by using a polygraph (even if the latter is deemed reliable), may be inadmissible even if relevant in view of the policy of the jurisdiction that is reflected in the statute protecting the privacy of the individual involved.

**§ 1.77. Settlement Discussions**

**Evidence of the terms of an offered but unaccepted settlement is inadmissible to encourage a party to act frankly in seeking to settle a dispute without fear that any failed efforts at settlement may act as an admission by the party offering such terms.**

**Comment:**

Similarly, mutually accepted settlements that are expressly stated to be without prejudice or without precedent for future cases are barred from evidence as a means of encouraging settlement of disputes and compliance with the settlement terms.

**§ 1.78. Relevance**

**Evidence is relevant if it tends to support a party's case or tends to impeach the testimony of a witness.**

**Comment:**

A party offering evidence must be prepared to set forth its reasons for doing so when reasonably challenged by the opposing party or asked by the arbitrator to show how that evidence will support the party's case or impeach the witness.

In some instances the explanation of why a line of inquiry is relevant may be discussed outside the presence of the witness so that the discussion will not taint the witness's testimony.

**§ 1.79. Impeachment**

**A witness may be impeached by evidence that seeks to establish that the witness should not be believed.**

**Comment:**

Evidence used to impeach does not necessarily have to be related to the case before the arbitrator, provided it has some discernible bearing on the credibility of the witness.

**§ 1.80. Character Evidence**

**Evidence of character by reputation, as opposed to evidence by specific prior acts, is not generally considered relevant to establish that the grievant or a witness engaged in certain conduct in a specific instance.**

**Comment:**

Impeachment by reference to prior specific acts, as opposed to general reputation, is allowed by many arbitrators. The more related such acts are to issues in the case, such as events occurring at work, the proximity of the event to the time involved, and the ease of establishing that they occurred are all factors that will be taken into account in weighing the relevance of such offered evidence.

Many arbitrators criticize the admission of such incidents into evidence in discharge and discipline cases on the grounds that the arbitrator may conclude the grievant is guilty of the act charged not because of specific proof of it, but because of proof of the prior incidents.

Others are wary of the admissibility of such claimed prior specific acts because they may be contested, requiring a time-consuming and potentially unfruitful “arbitration within an arbitration.”

**§ 1.81. Uncharged Misconduct**

**Prior acts that have not been charged as the grounds for the current discipline or discharge, even if, independently, they have been grounds for past discipline, are generally not considered relevant.**

**Comment:**

As will also be discussed below, acts occurring or discovered after the discipline or discharge, which do not constitute admissions, are generally considered irrelevant to the specific discipline in issue. There are exceptions to this rule, especially on the question of remedy.

Prior discipline is nearly always relevant when the arbitrator reviews the reasonableness of the penalty. This is said to be true by a number of arbitrators regardless of whether or not the disciplinary notice in question mentioned prior offenses. In many instances the parties' contract will deal with these questions, such as by providing for progressive discipline or the expunging of past discipline from an employee's record after a specified period of time. *See also* Chapter 6, §§ 6.7, 6.13, below.

## **§ 1.82. Unchallenged Prior Discipline**

**Prior documented discipline that has been properly cited to support the current discipline may be admitted as part of the grievant's past record without requiring or allowing independent evidence of aggravation or mitigation concerning it.**

### **Comment:**

Many arbitrators are of the opinion that discipline that could have been but was not grieved at the time it was imposed, or that was the subject of a grievance that was dropped, is a matter of record since it exists in the grievant's file, and therefore further evidence concerning it is irrelevant. The basis for this position is twofold—to underline the finality of the ungrieved discipline and to avoid contested evidence on matters that are already final.

Other arbitrators may be less strict on this issue, allowing the grievant to give some explanation in mitigation on the grounds that it is economically impractical to grieve and arbitrate each potentially grievable disciplinary action. This course of proceeding invites counterevidence from the employer that may increase the time and expense of the hearing by the possibility of an arbitration within an arbitration concerning the finalized prior discipline.

## **§ 1.83. After-Acquired Evidence of Predisciplinary Misconduct**

**Evidence claimed to have been discovered after disciplinary action has been taken may not be considered admissible by arbitrators as the grounds for new or additional discipline in the same case, but may be admissible, if relevant, as support for the originally charged discipline.**

### **Comment:**

Some arbitrators state that after-acquired evidence may be used by the employer in a subsequent case to support a brand new set of charges, but they do not allow the employer in the current case to add new incidents as grounds for new



or different discipline from that which was originally charged and which the union was originally on notice it had to meet. Some collective bargaining agreements and some arbitrators limit the employer to the use of evidence available at the time the discipline was imposed, or at least to that available and presented during the course of the grievance procedure. Arbitrators admitting after-acquired evidence may take steps to prevent the union from being prejudiced by surprise, such as by allowing the union extra time to prepare a rebuttal.

### **§ 1.84. Evidence of Grievant's Postdiscipline Conduct**

**Arbitrators are split on whether evidence of the grievant's postdiscipline conduct is relevant and admissible either with respect to the taking of disciplinary action or with respect to the degree of discipline that has been imposed, or as a rehabilitative factor.**

#### **Comment:**

Evidence of the grievant's postdiscipline conduct may be sought to be introduced by the employer if it is in aggravation of the grievant's offenses, such as threats to supervisors after discipline, while the union might seek to introduce evidence in mitigation, such as postdiscipline alcohol or drug rehabilitation. Some arbitrators will not admit such evidence on the grounds that the relevant facts are limited to those in possession of the employer at the time discipline occurred. Others will allow such evidence either as corroboration or explanation of the discipline or rehabilitation. *See generally* Nicolau, George, *The Arbitrator's Remedial Powers: Pt. I*, in 43 NAA 73 (1991). *See also* Chapter 6, §§ 6.11, 6.29, below.

### **§ 1.85. Prior Discipline Expunged From Grievant's Personnel Records**

**Some agreements provide that prior discipline is "washed out" by the passage of a specified period of time, and arbitrators will not admit such expunged discipline into evidence in the face of such contract provisions.**

**Comment:**

An exception to the foregoing may occur if the union seeks to show that the grievant has had a long record of good service, thereby “opening the door” to the admission of evidence of the expunged discipline in rebuttal.

**§ 1.86. Cumulative Evidence**

**Repetitious evidence, even if otherwise admissible, may be barred because its repetition unnecessarily prolongs the proceedings.**

**Comment:**

Since witnesses have prepared and may be anxious to testify, a common method of dealing with their cumulative testimony is to stipulate that if called to testify their testimony would be the same as prior witnesses on direct and cross-examination.

**§1.87. Evidence of External Law and Public Policy**

**Unless mandated by a collective bargaining provision, external law is typically not introduced into collective bargaining arbitration proceedings.**

**Comment:**

While this topic has been extensively debated among scholars of labor arbitration, many arbitrators do not apply the law in a typical arbitration case unless external law is referred to in the collective bargaining agreement. Such references have been found in antidiscrimination clauses, in clauses requiring just cause for discipline, or in provisions referring to specific statutes. Particularly difficult problems arise when there is a direct conflict between external law and the agreement as written, as for example between the Fair Labor Standards Act and the agreement’s overtime provisions.

Claims that agreement provisions should not be applied because they contravene public policy are viewed similarly,

with the added problem of defining whether or not the application of the agreement in fact is contrary to a well-known and articulated policy. Such issues arise in cases where a union seeks reinstatement of employees in circumstances where the alleged offenses are particularly inimical to the type of employment involved. Examples are aircraft pilots accused of intoxication prior to flight, drug cases in safety-sensitive positions, or claims of abuse in patient-care settings. See §§ 2.14, 6.12–6.20, 10.5 below.

### § 1.88. Parol Evidence

**Most arbitrators will not disallow evidence concerning the formation or application of a contract provision on the grounds that its words “speak for themselves.”**

#### **Comment:**

Most arbitrators recognize that while they may ultimately interpret an agreement based on the ordinary meaning of the words used, the parties may have given their own, distinctive meaning to the terms in negotiating them or in their application of the provision since its inception. No advance showing that the provision in question is “ambiguous” is required to admit such bargaining or practice evidence even if the arbitrator may ultimately decide that the evidence presented is unconvincing that the words used have some specialized meaning for the parties. See, e.g., Chief Justice Traynor, in *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.*, 442 P.2d 641 (Cal. 1968). See also § 2.5, below.

### § 1.89. Evidence of “Intent”

**If the arbitrator believes, as most do, that the meaning of contract provisions is to be established by objective evidence, then testimony as to the “intent” of one party that was not communicated to the other party is not relevant to establish its meaning.**

#### **Comment:**

Testimony as to uncommunicated intent is commonly offered but has no relevance to establish what both sides agreed

to, since there is no way by which such uncommunicated intent can bind the side that had not learned of it prior to the agreement's execution.

Uncommunicated statements of what one side may have said about a proposal may be admitted by some arbitrators as corroboration, but not as direct evidence, of properly admitted testimony of communicated expressions of intent.

### **Illustration:**

Credible testimony of what was said by union representatives at a contract ratification meeting about the meaning of a new provision may corroborate, but not substitute for, testimony about what they told employer negotiators before agreement was reached.

## **§ 1.90. “Res Judicata”—The Effect of Other Proceedings**

**Typically, the results of proceedings in other forums do not preclude an independent determination by arbitrators of the issues even if the arbitrators allow the admission into evidence of the results of such proceedings.**

### **Comment:**

Since the parties have chosen arbitration as the means of resolving their dispute, it is a process independent of such other proceedings as unemployment or workers' compensation hearings, criminal trials (even if a conviction occurs), and NLRB or court litigation, even if the decisions in those proceedings arise out of actions related to the issue of the arbitration.

Some arbitrators receive evidence of guilty pleas as admissions by the grievant of all of the elements of the crime; others will temper the impact of such pleas when there is testimony that the plea was entered as part of a bargain for a minimal sentence, that the grievant could not afford the defense of contesting the criminal charge, or the like. Arbitrators are also split as to whether a plea of *nolo contendere* is tantamount to a plea of guilty, some decisions turning on state law characterizations of such a plea.

### **§ 1.91. Admission Into Evidence of Prior Arbitration Decisions**

**Prior arbitration decisions that a party urges have previously determined the issue before the arbitrator are admissible as evidence to be considered by the arbitrator as to whether and to what degree those decisions have in fact decided the issue.**

#### **Comment:**

Views differ on the degree to which prior decisions are controlling. If a decision has interpreted a contract provision prior to its renewal without change in a subsequent agreement it is considered as binding on the parties as part of what they intended by continuing the same language. If the decision was rendered during the current term of the agreement, deference will probably be paid to the prior decision on the grounds that the parties should not be forced to litigate the same issue over and over again when they have adopted final and binding arbitration as their method of determining their disputes. But if arbitrators, after hearing the evidence, truly believe the prior decision on the same issue during the contract term was wrongly decided, they may choose not to follow it.

Arbitration decisions involving other parties that are presented to the arbitrator as persuasive authority are not truly evidence but are rather part of argument. *See also* Chapter 2, § 2.15, below.

### **§ 1.92. Nature of Burden of Proof**

**When the agreement is silent, the arbitrator is free to establish the “burden of proof”—the amount of unrebutted competent evidence that a party is responsible to present in order to establish the claim in its favor. The burden is generally on the shoulders of the party that makes the claim: the party “that asserts must prove.”**

#### **Comment:**

Often an arbitrator will not explicitly state whether a specific burden of proof has been carried, but instead will

conclude that the evidence shows an event did or did not happen and explain why that conclusion was reached. Many arbitrators declare they pay little if any heed to burden-of-proof analysis in deciding cases, but simply conclude at the end that one side or the other has been the more convincing. *See also* Chapter 6, § 6.9, below.

### **§ 1.93. Formulation of the Necessary Amount of Proof**

**Formulation of burden-of-proof requirements presents a way of thinking about how a case is proven. The party bearing the burden of proof, generally the employer in discipline and discharge cases and the union in contract interpretation cases, must present enough competent evidence to persuade the arbitrator as to its claim. That burden of proof is often said to be by the preponderance of evidence in contract interpretation cases and either clear and convincing evidence or, less often, evidence beyond a reasonable doubt in discipline and discharge cases.**

#### **Comment:**

There is no precise way to measure the amount of evidence required, the preponderance of evidence being the smallest amount of evidence needed to carry the burden (“51% to 49%”) and beyond a reasonable doubt the most (“a moral certainty”). The latter is required by a diminishing minority of arbitrators who equate the consequences of a discipline or discharge case, at least one involving an offense of a criminal nature such as theft, with a criminal proceeding. They thus adopt the burden of proof imposed on the prosecution in the latter. Many arbitrators appear to require employers to establish their discipline or discharge cases by clear and convincing evidence, a higher standard than a preponderance of the evidence presented. Further, however, some arbitrators do apply a preponderance of the evidence standard in discipline or discharge cases.

In a discipline case the employer best knows why it penalized an employee, often with grave repercussions for the individual. For these reasons the burden of proof in such cases

traditionally has been placed on the employer. In a contract interpretation case, the union is ordinarily seeking to show that the employer violated the agreement by some action it took; the union then has the burden of proof. If the employer were trying to establish that the union had breached a no-strike clause, however, the burden would be on the employer. *See also* Chapter 6, § 6.10, below.

### **§ 1.94. Shifting the Burden of Proof— Affirmative Defenses**

**If the party bearing the initial burden of proof carries that burden, the burden of proof is then said to shift to the responding party to establish an affirmative defense, such as self-defense or discrimination, usually by at least the preponderance of the evidence.**

#### **Comment:**

If an affirmative defense is so established, the burden then shifts back to the original party to overcome it with additional relevant proof seeking to overcome the affirmative defense.

## **IV. CONCLUDING THE HEARING, ARGUMENT, AND ISSUANCE OF AWARD**

### **§ 1.95. Rebuttal and Surrebutal**

**Rebuttal and surrebutal are meant to provide an opportunity to present evidence to deal with material that has been presented that is new and different from that presented in the parties' case-in-chief. In practice, fairly wide latitude is given with respect to what is allowed in rebuttal and surrebutal.**

#### **Comment:**

Rebuttal and surrebutal should not be a rehash of what was presented earlier in the case.

### **§ 1.96. Leaving the Record Open Upon Conclusion of the Hearing**

**Occasionally during the course of the hearing some matter arises that requires further checking or verification, such as examination of underlying records when a summary has been presented and vouched for by a witness. The arbitrator may “leave the record open” to allow such verification.**

#### **Comment:**

In such instances, rather than having the hearing continued to a later date, the record is left open so that the party that wishes to verify the information can do so. If a material discrepancy is found between the witness's assertions and the underlying records the party can ask the arbitrator to set the continued hearing. If no such discrepancy is found, the record closes.

### **§ 1.97. Leaving the Record Open for Deposition**

**In some instances a witness whose testimony was not thought necessary until the hearing was held may not be immediately available. If the parties agree the record can remain open until a deposition of that witness is taken and transcribed or the parties stipulate to what the witness's testimony would be. Barring such agreement, the arbitrator may reconvene the hearing to take the testimony.**

#### **Comment:**

This practice can eliminate some delay by not requiring the reconvening of the hearing to take a single witness's testimony. Some arbitrators would receive a deposition even over objection rather than reconvene the hearing if they thought a hearing unnecessary or too burdensome.



**§ 1.98. Summation**

**A case can be concluded by submitting the case for decision to the arbitrator without argument, by oral argument, or by written brief.**

**Comment:**

The first alternative, without argument, is used when both parties determine that there is no necessity to present anything further to the arbitrator prior to decision.

In some instances one or both parties may wish to present both oral and written closing arguments. Some arbitrators may refuse to allow both on the grounds that by doing so it ill-utilizes time and involves unnecessary repetition.

**§ 1.99. Oral Argument**

**Both parties present their arguments in the presence of the other and the arbitrator, with allowance for rebuttal and, if the arbitrator allows, surrebutal.**

**Comment:**

Occasionally, one party argues orally and the other later files a written brief. This is unusual because it is generally thought to give an undue advantage to the second party.

**§ 1.100. Written Argument**

**When written briefs are used, they are typically filed simultaneously. Less often, the party with the burden of proof files an opening brief, the other party responds, and the first party then files a closing brief.**

**Comment:**

The parties typically establish a timetable for the filing of their briefs which they can alter by stipulation.

Any problems caused by a party seeking more time to file a brief or failing to file one on time are resolved by the

arbitrator after the allegedly offending party has been given an opportunity to respond. In a few instances, especially where delay may prejudice the other party, arbitrators have ruled that failure to file a brief on time waives the opportunity to file and the arbitrator then decides the case without the late brief.

### **§ 1.101. Contents of Argument**

**Whether written or oral, the argument of a party should fairly summarize the evidence in a manner calculated to convince the arbitrator.**

#### **Comment:**

A somewhat common problem arises when a party puts forward an argument containing or alluding to evidence that was not presented at the hearing. In such an instance, even if there is an agreement not to file reply briefs, the other party should call the arbitrator's attention to the offending material and move to strike it from the brief. The arbitrator should rule on the motion either before rendering the decision or in the decision itself.

### **§ 1.102. Citations of Arbitration Awards in Argument**

**While the doctrine of stare decisis is not followed in most arbitrations, the decisions of other arbitrators are often cited in argument. The citing party should realize that these decisions are for persuasive purposes only, except in the rare instances, as noted above, where the decisions arise out of the same agreement and the same factual situation, or in certain industries where the parties have agreed on the precedential effect of prior awards.**

#### **Comment:**

Care should be taken to cite decisions that are truly on point and will be persuasive. Unnecessary or overzealous citation of authority will not be convincing and if cases are miscited

they may be used as persuasive authority against the party citing them.

The arbitrator may ask the parties to attach to their briefs copies of any cited decisions that are not readily available in printed reports if they have not been presented at the hearing.

### **§ 1.103. Citation of Legal Authority**

**The parties should fully cite statutes and court and agency decisions on which they rely when dealing with issues involving public law.**

#### **Comment:**

Parties should not expect that the arbitrator will conduct independent research for applicable authority.

As with prior arbitration awards, as a courtesy, counsel may attach to their briefs copies of the most important relied-upon authorities.

### **§ 1.104. Bench Decisions**

**On the arbitrator's own motion, or at the request of a party, the arbitrator may give a bench decision if satisfied that the parties' interests will be served by so doing.**

#### **Comment:**

Unless required by the parties' agreement or joint submission, whether the arbitrator will issue a bench award is within the arbitrator's own discretion. Any such decision will normally be confirmed in writing. An arbitrator contemplating a bench award may so advise the parties' representatives off the record before making the formal announcement of the award.

#### **Illustration:**

In a discharge case the arbitrator is convinced at the close of the evidence that even if some form of disciplinary suspension might be for just cause, discharge is not. The arbitrator may order the grievant reinstated to alleviate

the grievant's personal uncertainty and economic condition, advise the grievant personally of any conditions of reinstatement, including warnings concerning future conduct, and toll the running of back pay liability, if any, pending an award on what remaining discipline may be appropriate. An arbitrator may also reserve the right to study the record (perhaps only the arbitrator's notes or tape and the exhibits) before announcing the decision, for example, by fax, e-mail or telephone the next day, or even later on the day of the hearing with the parties standing by in the meantime.

### **§ 1.105. Reopening the Hearing**

**A party with newly discovered evidence that it could not reasonably have discovered prior to the close of the hearing may move to reopen the hearing before the decision is rendered. In some circumstances, arbitrators may reopen the hearing on their own motion.**

#### **Comment:**

The arbitrator, after considering the response of the opposing party, may reopen the hearing if the proffered new evidence is relevant and material in light of the evidence already submitted.

For the hearing to be reopened the moving party is required to prove that the evidence it wishes to offer is both newly discovered and could not reasonably have been discovered prior to the close of the hearing.

At times the arbitrator, on reviewing the record and the arguments of the parties, may believe that certain items—such as agreement provisions neither side referred to—might be controlling or important to the pending decision. In such circumstances, rather than deciding the case without consideration of the parties' views on the issue, the arbitrator may reopen the hearing for further argument in writing, or in person if the parties prefer, on the issue of concern to the arbitrator.

## **§ 1.106. Opinion and Decision of the Arbitrator**

**The decision of the arbitrator will be in writing, resolving all outstanding issues between the parties presented in the case, and normally accompanied by an opinion setting forth the facts relied upon and the basis for reaching the decision.**

### **Comment:**

If the parties have agreed that the question of damages will be decided in a subsequent proceeding, if necessary (see above), the decision will remand to the parties the computation of such damages, and perhaps the question of any defenses to damages, such as mitigation. The arbitrator will retain jurisdiction to decide any remaining disputes.

In other cases the arbitrator may find it appropriate to retain jurisdiction over the interpretation or application of the decision, depending on such circumstances as the complexity of the award, the relations between the parties, and unpredictable future contingencies. The better practice is to obtain permission to retain jurisdiction from the parties at the outset of the hearing if a possible resolution of the issue being arbitrated could involve retaining jurisdiction.

Failure of the arbitrator to render an opinion in support of a decision is not fatal to the legal effect of the decision. In labor-management relations, however, an opinion is the normal expectation since it provides guidance to the parties in their future relationship.

## **§1.107. Arbitrators' Remedial Authority**

**Unless constrained by the collective bargaining agreement or arbitration submission, arbitrators have wide latitude in formulating remedies.**

### **Comment:**

Remedies granted by arbitrators vary based on the circumstances of each case in an effort to place the parties in the position they would have been in had the agreement not been

breached. Particular conditions such as rehabilitation, physical examinations, or “last chance” provisions may be imposed on employees who are reinstated. In reinstatement cases, damages are typically limited to lost wages and benefits, with deductions for outside earnings at like jobs and—in some cases—unemployment insurance awards. Prior resistance to awarding interest in back pay awards is diminishing. Deductions from back pay awards may be made if the employee failed to make reasonable efforts to secure like employment after termination but before reinstatement. See Chapter 10 below.

### **§ 1.108. Timeliness of the Award**

**If bound by agreement or agency rule, the arbitrator is required to render the decision in the time allowed, unless the parties extend that time by stipulation.**

#### **Comment:**

A party cannot complain that a decision was rendered in an untimely fashion if the complaint is made *after* the decision is issued. Prior thereto a party can seek by court or agency action to oust the arbitrator of jurisdiction for not rendering a decision in the time allowed.

If no time limit is applicable the parties are entitled to a decision within a “reasonable time,” which depends on the circumstances of each case. Undue delay on the part of the arbitrator after inquiry by one or both parties may call for court action or sanctions from appointing agencies or arbitrator professional associations.

Many arbitrators welcome inquiries about when a decision may be expected, without prejudice to parties who make the inquiry, provided the inquiry is also communicated to the other party. In some instances such inquiries alert the arbitrator to the fact that the decision is due, which may have been overlooked because of clerical oversight.

### **§ 1.109. Loser-Pays Provisions**

**Some agreements provide that the loser of an arbitration case must pay the fees and expenses of**

**the arbitration and in such instances the arbitrator must make a determination as to which party is the loser.**

**Comment:**

In some cases there is no clear-cut winner or loser, so the arbitrator may apportion the fees or split them as the decision warrants.

If a transcript is taken, arrangements may be made for the parties to pay the court reporter's fees equally with the parties to settle up after the arbitrator decides which party is the loser.

**§ 1.110. Postaward Jurisdiction—Doctrine of Functus Officio**

**Once the arbitrator has rendered his or her decision, the arbitrator's jurisdiction ends unless the parties have agreed to retained jurisdiction or the arbitrator has properly retained it.**

**Comment:**

Outside of some state statutes that allow a short period of time to correct computational errors only, the arbitrator has no authority to reconsider or change an award. *See generally* Dunsford, John E., *The Case for Retention of Remedial Jurisdiction in Labor Arbitration Awards*, 31 Ga. L. Rev. 201 (1996). Several federal courts of appeals, however, have remanded cases to arbitrators with directions to clarify or perfect their awards. *See, e.g., Steelworkers Local 4839 v. New Idea Farms*, 917 F.2d 964, 968 (6th Cir. 1990). Section 20 of the Revised Uniform Arbitration Act also authorizes an arbitrator to "clarify" an award. It is widely accepted that an arbitrator may properly retain jurisdiction to resolve remedial problems that may arise in complying with the award.

**§ 1.111. Record of Proceedings**

**There is no obligation on the part of the arbitrator to maintain a record of the proceedings but if a record is maintained the arbitrator should not turn**

**it over to third parties without permission of the parties to the arbitration, unless required by law.**

**Comment:**

In many jurisdictions an arbitrator enjoys quasi-judicial immunity and is entitled to shield the decisional process from disclosure, so that notes of the proceedings and those used in the preparation of the decision do not have to be divulged in court proceedings or otherwise.

## **§ 1.112. Publication of Award**

**An arbitrator who seeks to publish an award must secure the parties' permission to submit it for publication.**

**Comment:**

Arbitrators may seek such permission in their engagement letter, at the hearing or at the time the award is issued. If consent is obtained at the hearing the parties should be told they have the right to revoke consent within 30 days of the issuance of the award. If consent is sought when the award is issued the arbitrator may state in writing that failure to respond within 30 days will constitute implied consent. *See generally Code of Professional Responsibility for Arbitrators of Labor-Management Disputes* (2003), discussed at § 1.2 above, at section 2.C.1.c. Some arbitrators believe that the proceeding is private to the parties involved, so that they are free to have the decision published, if they wish, without the arbitrator's involvement. These arbitrators will not seek permission for publication. Others believe that a body of easily consulted arbitral decisions is important to the development of collective bargaining and that most significant decisions should be published.

The AAA will publish summaries of certain types of awards unless the parties or the arbitrator objects. An advocate who wishes to rely on such a decision for argument or arbitrator selection should secure the entire decision rather than rely solely on such a summary.



### **§ 1.113. The Arbitrator and Postaward Litigation**

**The arbitrator is not a party to any postaward litigation to vacate or confirm an award and is not subject to subpoena or discovery proceedings seeking to inquire into the arbitrator's decisional process.**

#### **Comment:**

Some arbitrators may provide on appointment that the parties will be jointly and severally liable for the arbitrators' fees and legal costs, including their attorneys' fees, if either party or an individual grievant enmeshes the arbitrator in postaward litigation.

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# Chapter 2

## Contract Interpretation

*Carlton J. Snow\**

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## Introduction

Labor arbitration is a matter of contract. It is the role of parties to a collective bargaining agreement to determine the value of their exchange and, then, the role of arbitrators to interpret the labor contract consistent with the parties' negotiated preferences. Arbitrators generally refrain from evaluating the prudence of a particular contractual term or inquiring into bargaining power imbalances and issues of justice. It is the role of arbitrators to use standards of contract interpretation to understand the meaning of the parties' contractual goals and to render a decision in keeping with the parties' intent.

The process of contract interpretation gives meaning to expressions in a collective bargaining agreement. Approaches to the process of interpretation vary among arbitrators. Arbitrators, for example, differ in their views on the "plain meaning rule." Some believe that an ambiguity must be found in a contractual expression in order to apply anything other than the usual and ordinary meaning of words in an agreement. Other arbitrators subscribe to the view that words have no absolute meaning and can only be understood in context. This approach requires an arbitrator to permit parties to present extrinsic evidence in order to help pour content into the terms of an agreement. Several standards of interpretation have gained wide acceptance among arbitrators, and the purpose of this chapter is to state the rules and briefly comment on them.

## I. INTENT AND LANGUAGE

### § 2.1. Not Ordinary Contracts

**Collective bargaining agreements are not ordinary contracts.**

#### **Comment:**

Standards of contract interpretation used by arbitrators generally have been borrowed from Anglo-American common law and have been adapted to a collective bargaining context. Part of the adaptation is a recognition of the special need

for flexibility. The need flows from the fact that a collective bargaining agreement is not an ordinary commercial bargain but “an effort to erect a system of industrial self-government.” *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580, 46 LRRM 2416 (1960). Scholars recognize, however, that collective bargaining agreements “do belong within the contract family” and that “principles developed to govern contractual relations generally should be useful in defining the rights and duties created by collective agreements.” Summers, Clyde, *Collective Agreements and the Law of Contracts*, 78 Yale L.J. 525, 537 (1969).

The fact remains that there are significant differences between “ordinary” contracts and collective bargaining agreements that require flexible canons of contract interpretation. Most arbitrators agree that rules of interpretation should be applied within the context of arbitral experience as well as the circumstances of a specific case. See, e.g., *Warrior & Gulf*, above, at 582 (arbitrators are chosen because of parties’ confidence in their knowledge of the “common law of the shop,” for example, in defining broad terms such as “just cause” or “equitable compensation”).

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Robins, Eva, *The Law of the Shop*, in *Labor Arbitration: A Practical Guide for Advocates*, eds. Zimny, Max, Dolson, William F. & Barreca, Christopher A. (1990), 229.

St. Antoine, Theodore J., *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, in 30 NAA 29 (1978).

Westbrook, James E., *A Comparison of the Interpretation of Statutes and Collective Bargaining Agreements*, Mo. L. Rev. 283 (1995).

## § 2.2. The Prime Directive: Intent of the Parties

**Standards of contract interpretation used by arbitrators are designed to determine the intent of parties in adopting certain language to express their rights and obligations.**

### Comment:

Parties rarely hold precisely the same understanding of a contractual term. As a consequence, standards of contract interpretation have arisen and are designed to discern the parties' mutual intent as nearly as reasonably possible. Arbitrators also often confront circumstances not contemplated by the parties at the time of contract formation. Arbitrators customarily rely on three sources of principles as guides to determine contractual intent. They are (1) standards of contract interpretation, (2) the concept of past practice, and (3) the principle of reasonableness. Such interpretive guidelines are frequently used in conjunction with each other.

Standards of contract interpretation originate in many places, for example, prior arbitral awards, judicial decisions, or industry practices. Common sense policies provide another source of interpretive standards. Arbitrators, for example, have tended to rely on an objective theory of interpretation instead of using a subjective approach to understanding contractual language. The objective test is that which a reasonable person in similar circumstances would believe disputed contractual language to mean. The objective theory of interpretation is rooted in a common sense policy that contract interpretation ought to be based on objectively verifiable information and not on a party's subjective intention that cannot be objectively examined. Using an objective approach to standards of contract interpretation lends doctrinal stability to principles on which arbitrators rely. *See generally* Fuller, Lon L., *The Principles of Social Order* (1981), at 67; Garrett, Sylvester, *Contract Interpretation: I. The Interpretive Process: Myths and Reality*, in 38 NAA 121 (1986); Perillo, Joseph M., *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 Fordham L. Rev. 427 (2000).

The objective theory does not always yield the most satisfactory results. The obvious example is when the two parties have the same subjective intent regarding a contractual term but the “reasonable person” would read it differently. A more subjective analysis is adopted by the Restatement (Second) of Contracts (1981) § 201(2) & cmt. d, at 83, 85. Under this approach, when parties attach different meanings to the terms of an agreement, the party prevails that can show it had no reason to know of the other party’s meaning and the other did have reason to know of the first party’s meaning. *See also* 5 Kniffen, Margaret N., Corbin on Contracts, rev. ed., ed. Perillo, Joseph M. (1988) §§ 24.5, 24.6. The emphasis here is on discerning the most likely actual intent of the party that acted more reasonably. The logic of this theory would result in a finding of no agreement if neither party could make the necessary showing. However, the possibility that that kind of result could be reached would require some modification of the subjective approach in many collective bargaining contexts. There the reality is that neither party had a specific intent about how the agreement would apply to an unanticipated situation but both parties expect the arbitrator to provide the answer as part of the continuing process of collective negotiation. To fulfill this expectation, arbitrators may use a mixture of objective and subjective analysis as the circumstances warrant.

### **§ 2.3. The Role of Ambiguity; “Plain Meaning” Rule**

**Arbitrators differ about the role of ambiguity in contract interpretation cases and about the extent to which seemingly clear and unambiguous language is subject to interpretation.**

#### **Comment:**

Some arbitrators follow the so-called “Elkouri” rule: if words “are plain and clear, conveying a distinct idea, there is no occasion to resort to interpretation, and their meaning is to be derived entirely from the nature of the language used.” Ruben, Alan Miles, ed., Elkouri & Elkouri, *How Arbitration Works*, 6th ed. (2003), at 434 [hereinafter Elkouri]. As one arbitrator using this approach concluded, “if the contract is



clear, logic and equity will be cast aside, regardless of the result.” See *Safeway Stores*, 85 LA 472, 475 (J. Scott Tharp 1985). Followers of this approach believe that the literal wording of the agreement itself provides the most reliable basis for determining the parties’ intent.

Other arbitrators use an approach championed by Professor Arthur Corbin and believe that language, on its own, generally does not convey one unambiguous meaning without reference to the context in which the language arose. The spirit of this approach is described in Restatement (Second) of Contracts (1981) § 202, cmt. a, at 87, with the observation that uses of rules in aid of contract interpretation “do not depend upon any determination that there is an ambiguity, but are used in determining what meanings are reasonably possible as well as in choosing among possible meanings.” Arbitrators who use extrinsic evidence without proof of ambiguity do so on the theory that the presence or absence of ambiguous meaning in the agreement can only be established in light of all relevant information. Those who believe that “[i]f the relevant language is clear and unambiguous, the arbitrator should apply it without recourse to other indications of intent,” are suggesting that the plain meaning of a contractual provision can be gained from studying the words of the contract alone. See Nolan, Dennis R., *Labor and Employment Arbitration* (1998), at 305. Rejecting the “plain meaning” rule, other arbitrators follow the approach of Chief Justice Traynor of the California Supreme Court who observed that “the meaning of a writing ‘... can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words.’” *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 643 (Cal. 1968). This approach recognizes the reality that the collective bargaining process often produces compromise contract language.

Arbitrators who use Justice Traynor’s approach point to such authorities as Professor Arthur Corbin in support of the notion that it may not be possible for language, on its own, to convey one unambiguous meaning without reference to the context in which the language was used. See Corbin, Arthur, *The Interpretation of Words and the Parol Evidence Rule*, 50 Cornell L.Q. 161, 171–72 (1965). Hence, extrinsic evidence about context becomes essential to discovering meaning. It is probably accepted by most arbitrators that at least some

information concerning the circumstances of the agreement may be necessary to give words meaning. Rarely can meaning be discerned without lifting one's eyes from the four corners of a contract, although some arbitrators believe it is possible.

Arbitrators who require ambiguity in order to use evidence outside the "four corners" of a labor contract believe that this approach lends stability and predictability to the parties' agreement. Those who reject the "plain meaning" rule and follow the views of Professor Corbin reason that relying on evidence of the total transaction provides more data about the actual intent of the parties. Either approach, however, asserts fidelity to the intent of the parties. Ambiguity, as a tool of contract interpretation, may disadvantage the drafting party, as an arbitrator may choose the interpretation that most benefits the party not responsible for creating the ambiguous term.

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Snow, Carlton J., *Contract Interpretation*, 55 Fordham L. Rev. 681 (1987).

## § 2.4. When Is a Contract Ambiguous?

**A contract is ambiguous if it is reasonably susceptible to more than one meaning.**

### Comment:

When language of an agreement is ambiguous, arbitrators admit extrinsic evidence to help clarify contractual intent. Such information may include the parties' bargaining history, past practice, industry standards, and a course of dealing unique to these parties. Arbitrators use such extrinsic evidence to clarify or explain a latent or hidden contractual ambiguity with regard to syntax, grammatical structure, or omissions.

Some arbitrators use extrinsic material to test whether apparently unambiguous language is susceptible to multiple interpretations. *See generally* LaRocco, John B., *Ambiguities in Labor Contracts: Where Do They Come From?* 59 Disp. Resol. J. 38 (Feb.–Apr. 2004).

Extrinsic evidence is used by most arbitrators to explain the meaning of contractual language if it is relevant to proving a meaning of which the language of the agreement is susceptible. Many arbitrators would not use such evidence to contradict the surface meaning of contractual provisions, but others willingly would use evidence of the transactional history of an agreement to interpret the surface meaning of the contractual language. They reason that extrinsic evidence is always admissible for the purpose of interpretation on the theory that all language is infected with ambiguity.

## § 2.5. Parol Evidence Rule

**Under the “parol evidence rule,” a written instrument that is intended to be the parties’ final and complete (“integrated”) agreement cannot be varied by any prior statements or agreements, oral or written, or by any contemporaneous oral statements or agreements.**

### Comment:

The purpose of the so-called parol evidence rule is to define or limit the subject matter to be interpreted. The rationale is that earlier negotiations or even prior agreements have been superseded by the final integrated instrument. The primary function of the rule is therefore exclusionary rather than interpretive. There is increasing authority for applying the rule to oral as well as written integrations. The parol evidence rule is subject to several major exceptions. Evidence of prior or contemporaneous dealings may thus be admitted to show (1) the absence of a true agreement; (2) fraud or mistake in the formation of the agreement; (3) the meaning of the writing; (4) the existence of a genuine side agreement; and (5) the modification or replacement of the agreement by a subsequent agreement. Restatement (Second) of Contracts (1981) §§ 213-17; 6 Corbin, Arthur L., Corbin on Contracts, interim ed. (2002)

§§ 573 et seq. The parol evidence rule should not be intimidating. Almost any credible extrinsic evidence that would help to validate, invalidate, or interpret the agreement can be admitted under one or other exception.

## REFERENCES

Corbin, Arthur L., *The Parol Evidence Rule*, 53 Yale L.J. 603 (1944).  
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Linzer, Peter, *The Comfort of Certainty: Plain Meaning and the Parol Evidence Rule*, 71 Fordham L. Rev. 799 (2002).

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## § 2.6. Ordinary and Popular Meaning of Words

**When interpreting agreements, arbitrators use the ordinary and popular meaning of words, unless there is an indication that the parties intended a special meaning. When an agreement uses technical terms, however, arbitrators give preference to the technical or trade usage, unless there is evidence that the parties intended a nontechnical meaning.**

### Comment:

Although not usually dispositive, dictionaries may be consulted by arbitrators when determining the ordinary and popular meaning of words. Decisions of courts, administrative agencies, and arbitrators, as well as the totality of circumstances, may provide assistance in determining the meaning of terms in collective bargaining agreements. Context is crucial because, for example, a technical term such as "deadheading" in the transportation industry would refer to empty trucks or buses returning to a terminal, but the term could have quite a different meaning in popular usage, such as being passed over for promotion. Arbitrators rely on a presumption that parties negotiated their agreement with a knowledge of arbitral jurisprudence and that they expect an arbitrator to apply

commonly accepted arbitral principles when interpreting their agreement.

## REFERENCES

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Feller, David E., *The Coming End of Arbitration's Golden Age*, in 29 NAA 97 (1976).

### § 2.7. Ancient Interpretive Maxims

(1) A word in a series is given meaning by the other words in the same series (*noscitur a sociis*).

(2) A general word used in conjunction with a specific term includes only things of the same kind as the specific term (*ejusdem generis*).

(3) The expression of one thing is the exclusion of another (*expressio unius est exclusio alterius*).

(4) A contractual interpretation is preferred that makes an agreement valid over one that makes it unlawful or of no effect (*ut res magis valeat quam pereat*).

(5) Construe language against the drafter (*contra proferentem*).

#### Comment:

a. Certain interpretive dogmas or canons (often expressed in Latin) have been enshrined by arbitrators and secondary sources as useful interpretive tools. It is important to be familiar with the ancient maxims as “an accepted conventional vocabulary” among labor arbitrators, but most arbitrators generally do not accord these canons of interpretation great weight. They are viewed by many arbitrators as a less persuasive source of guidance and possibly even an encumbrance to understanding the contractual intent of the parties.

b. *Noscitur a sociis* means that a word is known from its associates. This maxim reflects the overarching principle of contract interpretation that meaning must be found in context.

For example, providing insurance benefits for “accidents, surgeries, and other illnesses” would not cover routine physical examinations. See *Florsheim Shoe Co.*, 85-1 ARB ¶ 8061 (Raymond Roberts 1984).

c. The maxim *eiusdem generis*, that is, “of the same kind,” may overlap cases covered by the *noscitur a sociis* rule. Use of the maxim *eiusdem generis* usually narrows the interpretation of an agreement. For example, reserving rights in “oil, gas, and other minerals” does not include “coal.” See *Oklahoma ex rel. Commissioners v. Butler*, 753 P.2d 1334 (Okla. 1987).

d. The principle that “the expression of one thing is the exclusion of another” is a direct translation of the maxim *expressio unius est exclusio alterius*. Arbitrators follow an interpretive assumption that if parties specifically enumerated a list of items from a general class to which a provision is applicable, they meant to cover only the specific items listed and to exclude other items of that class from coverage. The 1964 Civil Rights Act’s prohibition of employment discrimination “because of race, color, religion, sex, or national origin” thus does not cover age or disability discrimination. The interpretive guideline may be rebutted, of course, by extrinsic evidence showing that the parties did not intend the language to be exhaustive.

e. The original maxim on the preference of a valid over an unlawful or ineffectual interpretation was used in construing deeds. It generally meant that a liberal construction should be placed on written instruments so as to uphold them, if possible, and carry into effect the intention of the parties. Arbitrators apply a presumption that parties intended their words to have effect and not to be interpreted in a way that causes a provision to perish or be superfluous.

f. *Contra proferentem* means “against the one who produces.” If a contractual expression has two or more plausible meanings, the maxim instructs an arbitrator to prefer the interpretation that is less favorable to the party that drafted the disputed language. That party had an opportunity to resolve the ambiguity and failed to do so. The maxim is customarily used by arbitrators only as an interpretive tool of last resort. Some arbitrators, indeed, believe that this maxim is not an effective guideline in arbitration because selecting who will draft a contractual provision is often a fortuity or the language is a product of both parties.

## REFERENCES

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Llewellyn, Karl N., *The Common Law Tradition* (1960), at 521.

VerSteeg, Russ, *Essential Latin for Lawyers* (1990).

### § 2.8. Specific and General Language

**Specific terms in an agreement more clearly reflect the parties' intention than does general language.**

#### **Comment:**

Most arbitrators assume that, had the parties thought expressly to state it, they would have indicated that a specific provision constituted an exception to general language. An arbitrator uses this interpretive tool in an effort to implement the parties' implicit intent.

### § 2.9. Handwritten Terms

**Handwritten terms agreed to by both parties generally control printed provisions.**

#### **Comment:**

Arbitrators reason that the more attention parties give to a negotiated term, the more likely it is to reveal their intent. Handwritten terms are presumed to have been the subject of greater scrutiny or at least the latest consideration by the parties, and hence to manifest their actual final intent, absent evidence to the contrary. This assumes, of course, that the handwriting is established through initials or otherwise to be a part of the contract.

### § 2.10. A Whole Document

**To better understand the intent of the parties, interpret an agreement as a whole document.**

**Comment:**

Arbitrators make an effort to avoid interpreting contractual terms in isolation from the rest of an agreement, unless the parties manifest a contrary intention. As Harry Shulman observed, “[T]he interpretation which is most compatible with the agreement as a whole is to be preferred over one which creates anomaly.” Shulman, Harry, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1018 (1955).

**II. CONTEXT****§ 2.11. Understanding the Context**

**To ascertain the meaning of a contractual term, arbitrators give appropriate weight to all relevant circumstances of the parties’ continuing relationship.**

**Comment:**

Not only surrounding language in an agreement but also the bargaining history of parties, as well as the nature and customs of an industry or business, provide the context in which contractual terms may be understood. Such information must be presented to the arbitrator and is not examined independently. Some arbitrators follow a restrictive approach and use bargaining history or trade usage only if there is ambiguity in an express term of the agreement. Other arbitrators follow a more inclusive approach and give consideration to bargaining history and industry standards whether or not there is ambiguity in a contractual expression. But even the latter group would use such evidence only for the purpose of interpreting the parties’ agreement and not of contradicting it. Furthermore, it is only what is communicated to the other party in negotiations that will be considered, not one party’s unilateral, subjective intent or understanding.

Regardless of the approach to evidence about bargaining history and industry customs, there is a consensus among arbitrators that what a party failed to obtain in negotiation should not be granted in arbitration. If extrinsic evidence reveals that a party unsuccessfully sought a particular contractual term, arbitrators ordinarily will not later interpret the



contract in a way that makes available what a party failed to gain in negotiation. An exception might arise if a party merely sought clarification of a provision that the arbitrator concluded was implicit in the agreement anyway.

## **§ 2.12. Purpose Interpretation**

**If an arbitrator can determine the principal purpose of the parties, contract interpretation favors that meaning.**

### **Comment:**

Arbitrators strive for an interpretation that is consistent with the principal common purpose of the parties, insofar as that can be discerned from reasonably clear evidence. An advantage of purpose interpretation is the flexibility it brings to a collective bargaining agreement by enabling the agreement to evolve in response to new problems while, at the same time, maintaining stability in the relationship by linking the goal-oriented interpretation to reasonable expectations at the time of contract formation. Arbitrators ordinarily begin their analysis by seeking evidence of the parties' actual intent. A recognition of the complex array of purposes at work at the bargaining table causes arbitrators generally to use purpose interpretation as a secondary approach when the parties' actual intent is obscure.

## **§ 2.13. Rule of Reasonableness**

**An interpretation giving a reasonable meaning to contractual terms is preferred to an interpretation that produces an unreasonable, harsh, absurd, or nonsensical result. Good faith is an element of reasonableness.**

### **Comment:**

Freedom of contract permits parties to enter into an unreasonable or improvident bargain, and arbitrators are willing to honor such bargains, at least when the intent of the parties is clear. At the same time, if it is obvious that unintended language has been included in the parties' agreement, which,

if interpreted literally, would produce results contrary to the purpose of the agreement, the rule of reasonableness permits such language to be excised in order to avoid perpetrating an absurd or nonsensical result. This would be consistent with the standard contract doctrine that, in cases of mutual mistake, language may be reformed to comport with the actual intent of the parties. Underlying a rule of reasonableness are the expectations of the parties as manifested in the language describing their intended performance.

Modern American contract law teaches that every contract imposes on each party a duty of good faith in performing the agreement. Arbitrators use the doctrine of good faith as an interpretive tool to define ambiguous contractual language in a way that prevents an employer or union from evading the spirit of the bargain or willfully rendering an imperfect performance or, in appropriate cases, failing to cooperate in the other party's performance obligations.

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Summers, Robert S., *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 Cornell L. Rev. 810 (1982).

## § 2.14. Presumption Against Forfeitures

**Forfeitures are not favored by arbitrators in the interpretation of collective bargaining agreements.**

### Comment:

A forfeiture is the loss of some right, often as a penalty, for failure to perform an obligation. For example, an employer or a union may fail to sign a form in the grievance procedure exactly as prescribed by contract. When a contractual term is susceptible of several interpretations and one could result in a forfeiture while another reasonable interpretation would not, the interpretation that avoids a forfeiture or a penalty is preferred by most arbitrators. It is an ancient maxim of contracts

that the law abhors forfeitures. Arbitrators generally reason that a fundamental goal of contract interpretation is to gain for the parties the benefit of their bargain and not to penalize anyone.

Assuming no unconscionability or violations of public policy are present, parties are generally free to negotiate the kind of agreement they deem to be responsive to their needs. This might include a “forfeiture” (penalty) clause. But it is for the party who asserts a contractual claim of a forfeiture or penalty to bear the burden of proving such a meaning. Unless a contractual term supporting the claim is expressed with unmistakable clarity, a presumption arises that the parties did not intend it to be interpreted as effecting a forfeiture. Doubts are generally resolved against a forfeiture of rights.

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Lloyd, William H., *Penalties and Forfeitures*, 29 Harv. L. Rev. 117 (1915).

## § 2.15. External Law

**An interpretation giving a contractual term a lawful meaning is preferable to one that makes the agreement unlawful. In the absence of clear direction from the contract or the parties, arbitrators are otherwise divided on whether they should consider external law in applying a collective bargaining agreement.**

### Comment:

When a provision in a collective bargaining agreement is susceptible of more than one meaning, and one interpretation would result in an unlawful contract term while the other would not, arbitrators strive to interpret the term in conformity with the law. This principle has deep arbitral and common law roots. It is premised on an assumption that parties intend to enter into a lawful agreement.

A diversity of opinion exists among arbitrators, however, regarding the appropriate use of external law (ordinarily a statute or regulation) when applying it to unambiguous contractual language. Arbitrators generally agree that they are obligated to interpret an agreement in light of the law when parties have incorporated specific legal references or verbiage into their agreement. Some arbitrators conclude that an agreement should be interpreted in a manner consistent with external law whenever parties have included a severability or savings clause in the agreement indicating a desire to excise unlawful parts of the agreement.

Substantial differences can be found among arbitrators regarding the appropriate arbitral role when interpreting a labor contract that does not clearly incorporate some aspect of the law into the agreement. As Arbitrators Mittenthal and Bloch noted, "The prevailing view, particularly in the private sector, is that laws are not part of the contract and that arbitration is not a forum for enforcing statutory rights." Mittenthal, Richard & Bloch, Richard I., *Arbitral Implications: Hearing the Sounds of Silence: Pt. I*, in 42 NAA 65, 77 (1990). On the other hand, some arbitrators conclude that it is always appropriate to consider external law when interpreting a collective bargaining agreement. Still others sanction an interpretation that includes consideration of external law if it is necessary to do so in order to avoid an award ordering parties to engage in unlawful conduct.

In doubtful cases some arbitrators would ask the parties directly whether external law should be taken into account. A substantial number of arbitrators would not apply external law unless both parties agreed. The theory is that the primary commission of the arbitrator is to interpret the parties' agreement and not the law. This view emphasizes that the ultimate determination of the legality and enforceability of the agreement is for the courts.

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## § 2.16. Use of Prior Arbitration Awards

**Arbitrators give contractual language a meaning that is consistent with a prior arbitration award between the same parties involving the same contractual term, unless they believe the prior award is substantially flawed.**

### Comment:

Some arbitrators believe that precedent has a useful role in labor arbitration. Others oppose its use and believe that reliance on arbitral precedent is inconsistent with the nature of arbitration, with its emphasis on the judgment of a particular arbitrator in deciding the merits of a particular case. Courts hold that whether prior awards are binding on arbitrators is a matter of contract interpretation for the arbitrator. *See American Nat'l Can Co. v. Steelworkers Local 3628*, 120 F.3d 886, 155 LRRM 2905 (8th Cir. 1997). A general consensus exists among arbitrators that, without a contrary contractual provision or mutually recognized custom, prior arbitration awards from any source are not binding on an arbitrator. Those advocating use of prior decisions as an interpretive aid believe that it helps create and maintain a stable and more rational bargaining relationship between the parties. As Harry Shulman observed, "The arbitrator's opinions may thus be a valuable means of seating reason in labor relations." Shulman, Harry, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1021 (1955).

Arbitrators who rely on earlier awards as a source of contractual meaning strive for close consistency with prior awards

between the same parties. But even an award between the same parties involving the identical contractual language may not be followed by a subsequent arbitrator who concludes that the prior award was logically flawed or erroneous in its interpretation of the parties' agreement. Decisions drawn from outside the parties' immediate relationship serve more as a source of industry standards and general reasoning. It is a practical consideration, however, that parties in arbitration frequently cite previous decisions between themselves as well as decisions from outside their relationship.

Some companies and unions, for example in the steel and aluminum industries, have had long-term relationships that are served by permanent umpires or permanent panels of arbitrators. These parties often consider precedents within their system to have binding force.

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## § 2.17. Industry Standards

**Industry standards receive reasonable weight as a source of contract meaning.**

### Comment:

Customs and practices may be so well established in an industry that they provide implicit standards of contract interpretation. Industry practice is particularly helpful if the same agreement has been adopted between one or more employers in an industry and one union representing bargaining units with several employers or in diverse locations. Arbitrators generally do not make use of industry standards if contractual

language is clear and unambiguous, although some arbitrators believe that it is appropriate to use such information to determine whether, in fact, an ambiguity exists. While customs and practices of unrelated industries generally have little persuasive value, an exception may arise if the custom or practice is rooted in a geographical locality rather than in an industry. The party relying on an industry standard must prove the existence of the standard.

## **§ 2.18. Handbooks and Manuals**

**Handbooks and manuals are not contractually binding without agreement of the parties.**

### **Comment:**

It is not uncommon for an employer to develop handbooks and manuals that overlap topics covered in a collective bargaining agreement. Arbitrators generally presume that the parties' labor contract prevails over such unilaterally enacted regulations. Handbooks and manuals often come into existence after formation of the parties' collective agreement, do not represent their mutual acquiescence, and usually receive little or no weight from arbitrators in giving meaning to contractual provisions. On the other hand, such materials may be analyzed by an arbitrator under the concept of past practice. If a union has notice of a unilaterally implemented provision in a handbook and fails to object, the provision may mature into a past practice. If a handbook or manual produces a recurring pattern of activity, it may be deemed a past practice, and the handbook or manual may provide evidence of the practice as well as notice of it.

### **Illustration:**

A contract ambiguously provides that employees who voluntarily seek a lower-rated job relative to their current position are assigned to a pool of unskilled workers. Management later unilaterally enacts a handbook provision stating that any employee who successfully bids for a position but then gives up the position within a year will be

reassigned to a job according to the discretion of management. Most arbitrators would no doubt interpret the contractual term as prevailing, and the employee would be sent to the pool of unskilled workers, rather than having the assignment controlled by managerial discretion. If, however, the handbook provision had been enforced for an extensive period of time with the union's knowledge and without its objection, the handbook provision probably would prevail over and give meaning to ambiguous language in the parties' negotiated agreement.

## § 2.19. Offers of Compromise

**Offers of compromise made to settle a grievance ordinarily are not given any weight by an arbitrator in interpreting the meaning of a contractual term.**

### **Comment:**

Use of "precontract" offers of compromise must be distinguished from "prearbitration" settlement offers. Most arbitrators give evidentiary weight to precontract offers and counteroffers as a source of contractual intent, but arbitrators usually regard as improper the disclosure of prearbitration offers of settlement. Prearbitration settlement offers are presumed to shed little light on the parties' intent. In addition, it is deleterious for an arbitrator to make use of prearbitration settlement offers because of the "chilling" effect on dispute resolution efforts by the parties. There are many reasons for settling a grievance that have nothing to do with the contractual intent of the parties, and one way of encouraging parties to settle their disputes before arbitration is to ensure that neither risks jeopardizing a case in arbitration by making an offer of settlement while a dispute remains unresolved in earlier stages of the grievance procedure.

Prearbitration offers of compromise also must be contrasted with negotiated grievance settlements that can provide a definitive explanation of ambiguous contract language. A negotiated settlement of a contractual dispute in which parties agree on the meaning of vexed language in an existing collective bargaining agreement provides a valuable interpretive aid for arbitrators in a subsequent grievance, unless it is clear



from the grievance settlement either that it is without precedent or that it may not be cited to an arbitrator.

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## III. PAST PRACTICE AND ARBITRABILITY

### § 2.20. Past Practice as an Interpretive Aid

(1) *Definition.* A “past practice” is a pattern of prior conduct consistently undertaken in recurring situations so as to evolve into an understanding of the parties that the conduct is the appropriate course of action.

(2) *Uses of past practice.* Past practice may be used (a) to clarify ambiguous contract language; (b) to implement general contract language; or (c) to create a separate, enforceable condition of employment. Some arbitrators use past practice to modify or amend clear and unambiguous contract language.

(3) *Altering a past practice.* A past practice may be altered or eliminated in appropriate circumstances.

#### Comment:

*a. Definition.* Past practices arise as a dynamic of a collective bargaining relationship in response to traditions, customs, and unique circumstances of a workplace. The most authoritative treatment is provided by Arbitrator Mittenenthal, who analyzed a group of factors that originated in the steel industry and that are now generally applied by arbitrators in determining whether workplace activity qualifies as a “past practice.” The factors are:

- (1) Clarity and consistency of the pattern of conduct,
- (2) Longevity and repetition of the activity,

(3) Acceptability of the pattern, and

(4) Mutual acknowledgment of the pattern by the parties. See Mittenthal, Richard, *Past Practice and the Administration of Collective Bargaining Agreements*, 59 Mich. L. Rev. 1017 (1961).

Arbitrators recognize that the scope of a past practice is restricted by circumstances under which it arose. The practice may be enlarged over time through the administration of the agreement, but it remains linked to its origin and purpose. A party relying on a past practice to prove a case before an arbitrator must establish the existence of the claimed past practice.

*b. Uses of Past Practice.* A controversial use of past practice is to modify clear and unambiguous contractual language. Arbitrators who refuse to use past practice in this way reason that the written agreement is the best evidence of the parties' mutual intent and that, where it is unambiguous, an arbitrator is not permitted to go beyond the express bargain of the parties. Moreover, arbitrators who will not use past practice to modify clear contractual language argue that there is no reason to rely on past actions of the parties as an interpretive aid because the meaning of the agreement is clear from express terms in the labor contract.

Other arbitrators disagree with such a restrictive approach and use past practice to modify clear and unambiguous contractual language. They reason that in some instances the initial written agreement is not necessarily the best evidence of contractual intent and that the parties' conduct after contract formation may provide a clearer expression of their intent. When parties' conduct during the life of an agreement consistently conflicts with written terms of the contract, some arbitrators conclude that, in fact, the parties meant to alter their agreement by substituting what they actually do for what they said in writing they intended to do. There is no judicial consensus regarding the propriety of an arbitrator's using past practice to modify clear and unambiguous contractual language, and the occasions on which such conflict arises are rare.

Arbitrators generally agree that past practice may be used to create a separate, enforceable condition of employment in appropriate circumstances. If a collective bargaining agreement is silent about a particular topic and a practice has been in effect for an extensive period of time, arbitrators often use

past practice to infer the existence of a term not set forth in the written agreement, assuming there are no contractual barriers to such an analysis.

Subject matter is important with regard to this last use of past practice. For example, if a contract is silent and a practice has arisen of giving employees a paid lunch period or a shift-end wash-up period, most arbitrators would conclude that such a benefit, continued over a reasonable period of time, has become part of the working conditions and may not be unilaterally discontinued. On the other hand, if there is a silent contract and an alleged past practice develops regarding a particular method of operating the workplace, most arbitrators are hesitant to define such a method of operation as a past practice that limits an employer's managerial prerogative to decide methods of operating an enterprise.

*c. Altering a Past Practice.* An established practice that is an enforceable condition of employment, wholly apart from any basis in the agreement, cannot be unilaterally modified or terminated during the term of the contract. Either party may repudiate such a past practice, however, at the time a new agreement is negotiated, since its continuing existence depends on the parties' inferred intent to retain existing conditions, in the absence of any objection. On the other hand, a practice that serves to clarify an ambiguous provision in the agreement becomes the definitive interpretation of that term until there is a mutual agreement on rewriting the contract. The practice cannot be repudiated unilaterally. Finally, a change of conditions that initially produced the practice may permit a party to discontinue it. For a full analysis, see Mitten-thal, Richard, *Past Practice and the Administration of Collective Bargaining Agreements*, in 14 NAA 30 (1961).

## **§ 2.21.      Impact of "Zipper" Clauses on Past Practice**

**Arbitrators narrowly interpret "zipper" clauses  
that arguably eliminate a past practice.**

### **Comment:**

An example of a broadly worded "zipper" clause would be one stating that "any matters or subjects not herein covered

have been satisfactorily adjusted, compromised, or waived by the parties for the life of this agreement.” A more general “zipper” clause might state that “this contract expresses the entire agreement between the parties.” Such integration clauses serve either or both of two purposes: (1) to preclude the union (and sometimes the employer) from insisting on bargaining over new proposals during the life of the contract, or (2) to confine the extent of the parties’ bargain to items set forth in the agreement. Most arbitrators, as well as the National Labor Relations Board, require clear and unmistakable language to prove a waiver of bargaining or contract rights.

Some arbitrators hold that a “zipper” clause that does not specifically override a past practice will not negate it and that inferences may still be drawn from express terms of the collective agreement, including recognition of a past practice not mentioned in the contract. Other arbitrators emphasize that a general zipper clause will not displace a past practice that has interpreted ambiguous and unchanged contract language. Finally, a “maintenance of standards” clause may support a past practice, despite the existence of a “zipper” clause.

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## § 2.22. Filling Gaps in Incomplete Contracts

**As an interpretive aid, arbitrators use rules drawn from arbitral jurisprudence to fill gaps in collective bargaining agreements.**

### Comment:

Contractual incompleteness may lead an arbitrator to provide the parties with what they would have contracted for if they had anticipated the gap in their agreement. In the absence of contractual guidance from the parties, arbitrators apply default rules in such situations. Assume, for example, an

agreement contained no “just cause” clause but included other basic provisions covering seniority, a description of the bargaining unit, and a grievance procedure. Most arbitrators would fill the contractual gap by inferring that employees cannot be discharged without just cause.

Gap-filling procedures, now popularly known as “default rules,” are used by arbitrators when evidence shows that the parties would have covered a particular subject matter if they had thought about it. The theory of default rules is that, to fill gaps, arbitrators automatically fall back on arbitral jurisprudence, unless the parties negotiated around established arbitral principles. After decades of evolution, arbitral principles are presumed to be reasonably fair and just. A party relying on an interpretation for filling a contractual gap that differs significantly from well-established arbitral jurisprudence bears the burden of proving that the parties intended to contract around a recognized gap-filler or default rule.

Gaps in a collective bargaining agreement are inevitable, and contract grievances about them follow ineluctably. Because of unforeseen difficulties, such as destruction of equipment or automation, as well as because of the time and expense required to negotiate and draft a contract covering every conceivable contingency, gaps invariably are a part of collective bargaining agreements. An important role of arbitrators is to serve as the parties’ gap-filler. While the essence of gap-filling must be found in the parties’ agreement, that essence “may include, implicitly or explicitly, an authorization for (the arbitrator) to draw upon a range of other sources, including statutory and decisional law.” St. Antoine, Theodore J., *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, in 30 NAA 29, 51 (1978).

Professor David Feller recognized arbitral jurisprudence as a source of gap-filling when he said that “there is a whole set of implicit relationships, not spelled out in the agreement and not confined to any particular employer, which an arbitrator assumes to exist.” Feller, David E., *Arbitration: The Days of Its Glory Are Numbered*, 2 Indus. Rel. L.J. 94, 104 (1977). Default rules are an important means by which arbitrators perform the role of gap-filler. This, of course, does not mean that an arbitrator must assume the labor agreement covers every conceivable situation. Often the proper conclusion is that a silent contract has left management free to act unilaterally.

In other words, an arbitrator must decide whether the agreement even has a gap and whether the parties already allocated a duty so that no gap-filling is necessary. If it is, established arbitral principles provide a source of guidance for completing a labor contract. *See also* Chapter 3, § 3.2, below.

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## § 2.23. Substantive Arbitrability

**An arbitrator may be authorized by the parties to resolve issues of substantive arbitrability, even though the question is otherwise a matter for the courts.**

### Comment:

Arbitration is consensual, and a party is required to submit to arbitration only subject matter covered by the negotiated grievance procedure. For example, if the subject of subcontracting clearly has been excluded from the coverage of an arbitration provision, subcontracting disputes are not eligible

for submission to an arbitrator. The U.S. Supreme Court ruled challenges to substantive arbitrability (subject matter jurisdiction) to be a legal issue that initially is for judicial, not arbitral, determination: "Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *AT&T Technologies v. Communications Workers*, 475 U.S. 643, 648, 121 LRRM 3329 (1986); *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 570–71, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960). See also Chapter 1, § 1.24, above. Nonetheless, the Court also made clear that parties to a labor contract have every right to authorize an arbitrator to resolve issues of substantive arbitrability. See *Nolde Bros. v. Bakery & Confectionery Workers Local 358*, 430 U.S. 243, 94 LRRM 2753 (1977); *John Wiley & Sons v. Livingston*, 376 U.S. 543, 55 LRRM 2769 (1964). Probably most questions of substantive arbitrability are, in fact, decided by arbitrators, acting pursuant to the parties' submission. The Supreme Court created a strong presumption of substantive arbitrability, and doubts are to be resolved in favor of coverage.

In applying the rebuttable presumption of arbitrability, courts routinely ask (1) whether the subject matter of a dispute specifically has been excluded from the arbitration agreement, and (2) if there was no express exclusion of the subject matter in dispute, whether there is other forceful evidence that the parties intended the issue not to be covered by the arbitration provision. While not required to do so, most arbitrators use a similar approach to analyzing questions of substantive arbitrability. The focus of arbitrators is not on what the parties specifically included, but rather on what was specifically excluded from coverage.

Some arbitrators analyze issues of substantive arbitrability without a sense of being restricted by judicial criteria. They view a challenge to coverage strictly as a problem of contract interpretation. A few arbitrators believe that it is within their authority to decide the issue of substantive arbitrability even after a judicial determination of arbitrability. They reason that, while a surface reading of the parties' agreement by a court might make it appear that a particular dispute is arbitrable, an arbitrator's closer inspection and evaluation of

the totality of the transaction might support a contrary result. Such decisions are infrequent.

When an issue of subject matter jurisdiction is presented, an arbitrator first may rule on that question, or, depending on the complexity of the case and the convenience of witnesses, may reserve judgment on arbitrability and hear the merits at once. Parties regularly submit evidence on the issue of arbitrability and then proceed directly to the merits at the same hearing. If subject matter jurisdiction does not exist, an arbitrator does not address the merits of a case in a decision. Occasionally, cases are bifurcated so that parties present evidence only on arbitrability and await a decision on that single issue before later moving to the merits of the case, if the matter is found to be arbitrable. Bifurcation may be required by custom or contract.

## **§ 2.24. Procedural Arbitrability**

**Issues of procedural arbitrability are for an arbitrator to decide.**

### **Comment:**

Parties to a contract are at liberty to decide exactly how their disagreements must be processed in order to gain entrance into the arbitration system described in their agreement. They control their own system of private administrative law. Issues of procedural arbitrability challenge whether a complaint is ripe for arbitration based on a failure to comply with contractual procedures. A typical procedural arbitrability issue is whether the grievance was processed within contractually prescribed time limits. If, for example, a grievance must be filed within 30 days of its occurrence but a grievant or union waits 45 days, a challenge to the procedural arbitrability of the dispute probably would ensue. The U.S. Supreme Court has made clear that such issues are to be resolved in arbitration and not in a court of law. *See John Wiley & Sons v. Livingston*, 376 U.S. 543, 55 LRRM 2769 (1964).

Arbitrators appropriately address issues of procedural arbitrability because such issues involve questions of contract interpretation. Arbitrators are familiar with industry conditions or practices and regularly address the sorts of technical



defenses and evidentiary issues that arise with regard to procedural questions under an arbitration clause of a collective bargaining agreement. It would be inefficient to shuttle a dispute between forums if a court interpreted a collective bargaining agreement with regard to procedural issues while leaving the substance of a contractual dispute to an arbitrator. Moreover, such procedural issues often are inextricably enmeshed in the merits of a case, and the parties contracted for an arbitrator's judgment on the merits of a dispute. *See* Chapter 1, §§ 1.25, 1.26, above. Resolution of challenges to procedural arbitrability requires close attention to the contractual language by which parties bind themselves, and arbitrators apply the same standards of contract interpretation to these questions that they do in other contract interpretation cases.

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## Chapter 3

# Management and Union Rights: Overview

*Gladys W. Gruenberg\**

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## I. MANAGEMENT RIGHTS

### § 3.1. General Definition of Management Rights

**The concept of management rights includes all decisions and activities relating to the direction and control of the employer's operations and property. This definition covers determination of methods, products, and services of the enterprise, as well as composition and direction of jobs and employees, including hiring, discipline and discharge, layoff, assignment, promotion, and transfer.**

#### **Comment:**

In the absence of a collective bargaining relationship, management has the unilateral right to make all decisions affecting the operation of the workplace and the activities of the work force without interference from or consultation with employees, but within the framework of existing law. Once a union has become the employees' exclusive bargaining representative under the National Labor Relations Act (NLRA), an employer may not take unilateral action concerning wages, hours, and other terms and conditions of employment without bargaining in good faith with the union. Different rules may apply to public sector employers covered by other federal and state laws.

Under a collective bargaining agreement, management no longer has unilateral control over many so-called mandatory subjects of bargaining nor even over certain permissive or nonmandatory subjects about which it may have made contractual commitments. Management decisions affecting the work force covered by the agreement may be questioned by the union and ultimately may be subject to the grievance procedure leading to arbitration.

### § 3.2. Management Reserved Rights and Implied Obligations

**Two main theories have developed concerning the extent to which the presence of a collective bargaining agreement affects management rights:**

**(1) the management reserved or residual rights theory, and (2) the implied obligations theory. Most arbitrators will apply modified versions of either or both of these theories, depending on the circumstances.**

**Comment:**

Under the management reserved rights theory, the employer retains or reserves all rights it had before recognizing the union as the bargaining agent, that is, management retains unilateral authority to make decisions affecting employees, except as limited, more or less expressly, by the contract. (Arbitrators ordinarily are not concerned with statutory bargaining duties unless the matter has been deferred to arbitration by the National Labor Relations Board—NLRB). Under the implied obligations theory, particular clauses or the contract as a whole may impose implied duties on the employer, limiting managerial prerogatives, thereby granting the union and the employees certain implied rights. Arbitrators generally agree that, when an employer and a union negotiate an agreement, they produce a unique document that changes the underlying relationship between employer and employees. While the employer previously had total unilateral control over all aspects of workplace governance (absent statutory regulations), the collective bargaining agreement makes the union a party to most workplace decisions either before or after the fact, depending on the particular provisions of the contract.

Although the two theories diverge conceptually, at least in their purest forms, they are often joined in actual application. Thus, an arbitrator may conclude that neither the express nor the implied provisions of a contract prohibit a particular employer action that arguably disadvantages the employees in a bargaining unit. Even in the absence of a clause affirmatively authorizing such management conduct, the arbitrator will then ordinarily sustain the employer's action on the grounds it retained or "reserved" the right to act as it did.

### **§ 3.3. Challenges to Management Decisions**

**Arbitrators are not likely to support union challenges to unilateral management decisions relating**

**to type and price of product, production methods and equipment, marketing practices, or dividend allocation—all under the general heading of “operating the business”—in the absence of a specific contract provision or a strong history of bilateral control. Professional employees, such as doctors, lawyers, engineers, and teachers, may have more of a voice in the nature of their services and how they are performed. But ordinarily these matters are not considered mandatory subjects of bargaining under the NLRA.**

### **Comment:**

When management decisions break down into specific issues—for example, outsourcing, subcontracting, moving an operation, eliminating a job classification, transferring employees because of new technology—that may affect employees adversely, the division in arbitral opinions becomes more pronounced. Unions may challenge management decisionmaking in the event of adverse impact on the work force, even when the contract is silent. In interpreting the collective bargaining agreement, the arbitrator must ultimately decide whether the rights of employees—because of certain provisions, the contract as a whole, or established past practice—displace the preexisting right of management to act unilaterally.

## **§ 3.4. The Contract as a Living Document**

**Arbitrators tend to hold that the collective bargaining agreement is a living document designed to cover almost every situation that affects the work force. In analyzing the justification for the employer’s unilateral action, management rights must be distinguished from employee rights under the contract.**

### **Comment:**

Examples of the questions that arise include:

*a.* Was the employer’s decision to introduce a new work rule reasonable? Was the rule properly promulgated after discussion with the union? When considering the acceptability

of unilateral changes in policies having a highly personal effect on employees, such as drug testing and smoking prohibition, arbitrators tend to require prior negotiation with the union. Where unilateral changes involve strictly work-related practices, such as attendance rules and work requirements, arbitrators tend to support management rights unless discipline is imposed without sufficient advance notice of the new rule or consistent implementation.

b. Has the employer's decision to introduce new technology made work more difficult, possibly justifying training or wage adjustments? Arbitrators generally give management considerable leeway in effecting operational changes unless the contract specifically prohibits such unilateral decisions.

c. Has the employer's decision to contract out work resulted in a significant layoff of employees in the bargaining unit or abrogated unit seniority? There is a wide disparity in arbitral judgment on the matter of outsourcing and subcontracting. In the absence of specific contract language, the arbitrator tends to compare bargaining history and past practice with competitive and profit considerations.

### **§ 3.5. Implied Obligations in the Absence of a Specific Provision**

**In the absence of a specific contract provision, some arbitrators subscribe fully to the theory of implied management obligations, holding that the mere existence of a collective bargaining agreement imposes certain limitations on management decisionmaking that would significantly impair the employees' job security and work opportunities or the integrity of the bargaining unit itself.**

#### **Comment:**

To support these implied obligations, an arbitrator may rely on various provisions in the contract, such as union recognition, seniority, and maintenance-of-standards clauses, to conclude that management has violated the agreement even where the contract is silent and there is no bargaining history or past practice. Specific issues include hiring, discipline and discharge, promotion and transfer, work assignments and

work schedules, job classifications, incentive plans, safety standards, layoff and recall, outsourcing and contracting out, plant closing, and mergers. Other chapters in this volume provide more detailed analyses of these subjects.

Most arbitrators will probably recognize that many cases call for a mix of the management reserved rights and implied obligations approaches, exercising their discretion to assess the totality of the bargaining relationship and the agreement reached between a particular union and a particular employer, as well as the past practices of those parties and the equities of the situation that has given rise to the immediate dispute.

### **§ 3.6. Reserved Rights in the Absence of a Specific Provision**

**In the absence of a specific contract provision to the contrary, some arbitrators hold that employees have only those rights that the union was able to negotiate and may rely on the management rights clause to support that decision, that is, they subscribe wholeheartedly to the reserved or residual rights theory.**

#### **Comment:**

Some arbitrators agree with management that the growing global market and foreign competition, lack of profit, or the need for a better business environment and lower labor costs require swift unilateral business decisions even where union employees may be adversely affected. Although the employer's unilateral decision may not violate the agreement because there is no specific provision prohibiting it, such action may be an unlawful refusal to bargain in violation of state law or §§ 8(a)(5) and 8(d) of the NLRA. *See NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 64 LRRM 2065 (1967); *Jacobs Mfg. Co.*, 94 NLRB 1214, 28 LRRM 1162 (1951).

### **§ 3.7. The Significance of a Management Rights Clause**

**If the collective bargaining agreement contains a clause defining management rights, the specified**



**management decisions and activities are subject to arbitral interpretation. The inclusion of a management rights clause does not remove the listed decisions from the arbitrator's jurisdiction.**

**Comment:**

In an effort to maintain managerial prerogatives, employers introduced management rights clauses, defining those workplace decisions and activities retained under unilateral control, that is, excluded from collective bargaining during the term of the contract and presumably outside an arbitrator's jurisdiction. The management rights clause was designed to convince the arbitrator that an issue was not arbitrable, or at least that management had maintained control over a particular matter. But the *Steelworkers Trilogy* (*Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960)) held that the courts, not the arbitrator, were the normal judges of substantive arbitrability, and that the existence of a management rights clause was not conclusive on the issue.

Most arbitrators downplay the management rights clause in analyzing the propriety of employer decisions. While every contract provision obviously has significance, they consider this clause "boilerplate" wording designed to protect the employer against only the most egregious union encroachment on management decisionmaking. In most instances the clause itself provides that other contract clauses take precedence in case of a conflict. While honoring the employer's right to operate the business, arbitrators do not permit a management rights clause to override a specific union or employee right set forth in the collective bargaining agreement or recognized by an established past practice.

When the written agreement is silent or ambiguous, arbitrators may have to resort to inference. Unwritten bargaining realities—like general industrial custom or a particular past practice—may mandate the use of implication as an interpretive tool in various situations. Arbitrators must determine whether the mere existence of the collective agreement subjects the employer to bilateral decisionmaking, or whether the

contract under all the circumstances permits the exercise of unilateral employer control. This balancing of rights between the employees and the employer is precisely what the parties expect from the arbitrator, as long as the award “draws its essence” from the labor contract.

### Illustrations:

1. An employer unilaterally imposed new work rules. The arbitrator ruled that, without consultation with the union, rules could not be changed. *See PMC Specialties Group*, 97 LA 444 (Theodore K. High 1991); *James B. Beam Distilling Co.*, 90 LA 740 (Alan Ruben 1988). *See also Philips Indus.*, 90 LA 222 (Peter Di Leone 1988) (drug policy); *Baltimore News Am.*, 65 LA 161 (Richard I. Bloch 1975); *United Baking Co.*, 43 LA 337 (Hillard Kreimer 1964). *But see Gross-Givens Mfg. Co.*, 117 LA 225 (Mario F. Bognanno 2002) (attendance incentive); *Electrolux Home Products*, 117 LA 46 (Stephen F. Befort 2002); *Tomkins Indus., Inc.*, 112 LA 281 (James E. Rimmel 1998) (smoking and eating in facility); *Ann Arbor City*, 102 LA 801 (George T. Roumell 1994) (sick leave policy); *Stone Container Corp.*, 95 LA 729 (Dennis R. Nolan 1990) (attendance policy); *General Foods Corp.*, 91 LA 1251 (Elliott H. Goldstein 1988).

2. An employer unilaterally banned smoking in an entire plant for cleanliness and safety reasons, even though the contract permitted smoking in designated areas as long as cleanliness was maintained. The arbitrator set aside the ban on the grounds that the more specific contract language prevailed over the more general. *See Raybestos Prods. Co.*, 102 LA 46 (Sinclair Kossoff 1993); *Department of the Army Dental Command*, 83 LA 529 (A. Dale Allen 1984); *Schein Body & Equip. Co.*, 69 LA 930 (Raymond Roberts 1977). *But see Akron Brass*, 101 LA 289 (Morris G., Shanker 1993) (lunchroom smoking); *Snap-On-Tools Corp.*, 87 LA 785 (Herbert Berman 1986).

3. An employer unilaterally banned “negative” T-shirts customarily worn by auto workers in a plant. Finding an established practice, the arbitrator held that it may be changed only by bilateral negotiations with the

union or as a result of a major change in the conditions supporting it. The arbitrator added: "Sometimes the federal labor policy prescribes protections that not even the most broadly drawn management rights language in a contract can supersede." *Reed Mfg. Co.*, 102 LA 1, 6 (Jonathan Dworkin 1993).

4. An arbitrator upheld an employer's change of a 16-hour schedule to a 12-hour schedule where the contract set forth the schedules but gave management the right to change them. *See Diamond Shamrock Corp.*, 55 LA 827 (Raymond Britton 1970). *See also Westvaco Corp.*, 58 LA 1142 (Samuel Nicholas 1972); *International Nickel Co.*, 50 LA 65 (Joseph Shister 1967); *Allied Chem. Corp.*, 49 LA 773 (Harold Davey 1967).

5. An arbitrator ruled that a management rights clause allowed the employer to transfer distribution from driver salespersons who were unit members to nonunit salespersons, despite loss of seniority and other contract rights. *See Peet Packing Corp.*, 55 LA 1288 (Robert Howlett 1971). *See also St. Louis Coca-Cola Bottling Co.*, 105 LA 356 (James P. O'Grady, Jr. 1995); *Hyatt Cherry Hill*, 103 LA 97 (Thomas J. DiLauro 1994) (job classification elimination); *Container Corp.*, 91 LA 329 (Harry Rains 1988); *Detroit Edison Co.*, 43 LA 193 (Russell Smith 1964). *But see ITT Sheraton*, 102 LA 903 (Robert B. Hoffman 1994) (contract prohibits unilateral change in tipping policy).

6. An employee was penalized for abuse of phone privileges and the employer removed phones for employee use. The arbitrator reversed discipline but upheld the phone removal. *See Anaconda Aluminum Co.*, 62 LA 1049 (Marian Warns 1974). *See also City of North Omsted, Ohio*, 106 LA 865 (Charles R. Miller 1996) (direct deposit of paychecks); *Crompton & Knowles Corp.*, 34 LA 59 (William Fallon 1959) (check-cashing privileges).

7. An employer discharged an employee for failure to meet unilaterally introduced new incentive standards. The arbitrator reinstated the grievant, upholding the employer's right to introduce new standards, but ruling that any new program must maintain employee earnings under a contract clause forbidding wage reductions. *See Advance Furniture Mfg. Co.*, 58 LA 236 (Thomas Roberts 1972);

*Wallace-United Eng'g Co.*, 56 LA 916 (Lee Belcher 1971) (upheld new evaluation procedures).

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The theory that the collective bargaining agreement imposes implied obligations on management and creates implied union rights is discussed in Cox, Archibald, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1, 28-36 (1958); Wallen, Saul, *The Silent Contract vs. Express Provisions: The Arbitration of Local Working Conditions*, in 15 NAA 117 (1962). On the limitations of the management rights clause and the importance of using implied understandings, see Mittenthal, Richard & Bloch, Richard I., *Arbitral Implications: Hearing the Sounds of Silence: Pt. I*, in 42 NAA 65, 67-70 (1990). See also *Celanese Corp.*, 33 LA 925 (G. Allan Dash 1959); *Novelty Shawl Co.*, 4 LA 655 (Saul Wallen 1946).

For a classic effort to distinguish between changes in working conditions, subject to negotiation, and changes in methods of operation, a management prerogative, see *Goodyear Tire & Rubber Co. of Ala.*, 6 LA 681 (Whitley McCoy 1946). See also *W.P. Larson Foundry*, 42 LA 1286 (Samuel Kates 1964); *Celanese Corp.*, 33 LA 925 (G. Allan

Dash 1959); *Bethlehem Steel Co.*, 32 LA 541 (Rolf Valtin 1959). For public employment, see *Cornelius v. Nutt*, 472 U.S. 648, 119 LRRM 2905 (1985); *U.S. Dep't of the Treasury*, 20 FLRA 380 (1985).

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## II. UNION RIGHTS

### § 3.8. Union Rights in General

**In the absence of specific clauses in the collective bargaining agreement, a union's rights, as an organization and as distinguished from employee rights, are limited to those defined by statute or regulation. Under the NLRA, the employer must recognize any union designated as the majority representative of employees in an appropriate bargaining unit.**

#### **Comment:**

In most collective bargaining agreements a specific union (sometimes designated by local, district, or lodge number) is recognized as the exclusive representative of employees in a defined bargaining unit, typically as the result of a determination by a federal or state agency. The union membership need not be limited to employees in the bargaining unit, but the employer is not required to bargain with the union for nonunit employees or for union members who are not in the bargaining unit. The need for interpretation of the recognition clause may arise when the parties cannot agree on whether a particular job classification is included in the bargaining unit or whether an employee is eligible for union representation. Jurisdictional disputes may arise when different unions claim that a particular work assignment should be performed by employees in their bargaining unit. Apart from the provisions of the federal and state statutes covering jurisdictional disputes, arbitrators

tend to decide these cases on the basis of bargaining history, past practice, and the wording of the recognition clause.

## REFERENCES

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### § 3.9. Union Security Provisions

**Unless prohibited by state law (e.g., under “right-to-work” statutes), most collective bargaining agreements contain union security provisions requiring workers to support a union by:**

**(a) paying union initiation fees and dues after a prescribed probationary period (union shop), or maintaining union membership for a specified period of time once they join the union (maintenance-of-membership clause);**

**(b) paying an “agency fee” equal to union dues for collective bargaining services (agency shop or fair share provision); or**

**(c) seeking employment through union referral, for example, a union hiring hall (not technically a “union security” arrangement that is subject to state right-to-work laws).**

#### **Comment:**

*a.* Under a union shop clause, the union may request the discharge of an employee who refuses or fails to pay union dues or fees. The employer may challenge the union’s determination. In deciding whether the union’s request is proper, most arbitrators rely on factual records (i.e., union dues records and employer payroll records). If the time limit for employee compliance has expired and there is no contradictory or mitigating evidence, the arbitrator generally grants the union’s request. The same issues arise under maintenance-of-membership clauses.

*b.* In agency fee cases, arbitrators normally comply with U.S. Supreme Court decisions, notably *Communications Workers v. Beck*, 487 U.S. 735, 128 LRRM 2729 (1988), for the

private sector subject to the NLRA; *Chicago Teachers Union Local 1 v. Hudson*, 475 U.S. 292, 121 LRRM 2793 (1986), for the public sector; and *Ellis v. Railway, Airlines & S.S. Clerks*, 466 U.S. 435, 116 LRRM 2001 (1984), for transportation industries covered by the Railway Labor Act. These cases limit union fees for nonmembers to those charges “germane” to collective bargaining. This limitation requires the arbitrator to rule out payment for most union-sponsored political, promotion, and organizing activities. Doubtful areas for arbitral determination include indirect expenses such as legal fees, publications, and training programs, or contingent payments for entertainment and meals in connection with meetings. In each case, the arbitrator examines union records (international, district, and local) to determine the proper allocation of expenses. Usually this information is verified by an audit, breaking down hours spent by officers and staff on each activity.

c. When a union alleges employer violation of a lawful, nondiscriminatory (i.e., as between union members and nonmembers) referral clause for failure to call the union hall to recruit prospective employees, arbitrators generally enforce the contract by requiring the employer to discharge the nonreferred employees and to pay union referrals who would have been hired but for the violation.

### **Illustrations:**

1. Nonmember objectors filed for arbitration to reduce the amount of dues required under agency fee contracts. The international union submitted evidence to show that for private sector contracts over 84 percent of membership dues had been used for collective bargaining services. The arbitrator upheld the union’s determination, stating that nonmember objectors had been charged for “only those expenditures which relate to the union’s functions in negotiating and administering collective bargaining agreements,” including “adjusting grievances and disputes and administering its internal operations and furthering its organizational existence.” An agency fee amounting to 85 percent of membership dues was approved for public sector contracts. The arbitrator noted that a court had held chargeable to objectors payments to convention delegates and public relations expenses to enhance the reputation

of teachers and to support a lobbying program entitled "Preserve Public Education" since "political' activities are properly chargeable when they are pertinent to the duties of the Union as bargaining agent." *Auto Workers Locals 6000*, 723, 571, 699 & 70, 94 LA 1272, 1276 (Alan Walt 1990). *See also Transportation Communications Union*, 93 LA 732 (James M. Harkless 1989).

2. In awarding 79.04 percent of union dues as an agency fee to a teachers union, an arbitrator held that "the Union has the burden to justify the amount it seeks to retain from objecting fee payers." He listed as chargeable to objectors all union expenses involving training, research, communications, political, administrative, legislative, and legal services relating to collective bargaining, contract administration, and defense against other unions. Listed as nonchargeable were "get out the vote" campaigns, charitable contributions, political action committee support and publications, new member recruitment, and members-only benefits. *See National Educ. Ass'n*, 90 LA 973, 975 (David A. Concepcion 1988). *See also Lutheran Senior City*, 91 LA 1308, 1316 (Nicholas Duda, Jr. 1988) (amount of agency fee is a matter for employee initiative in which "employer has no interest"); *Springfield, Ill., Sch. Dist.* 186, 91 LA 1293 and 1300 (Martin H. Malin 1988); *Montana Educ. Ass'n*, 91 LA 1228 (William Corbett 1988).

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The NLRB first declared the agency shop a proper subject for collective bargaining in *NLRB v. General Motors Corp.*, 373 U.S. 734, 53 LRRM 2313 (1963). Agency-shop rules were later enunciated by the U.S. Supreme Court in *Ellis v. Railway Airlines & S.S. Clerks*, 466 U.S. 435, 116 LRRM 2001 (1984), for Railway Labor Act coverage; in *Chicago Teachers Union Local 1 v. Hudson*, 475 U.S. 292, 121 LRRM 2793 (1986), for the public sector; and in *Communications Workers v. Beck*, 487 U.S. 735, 128 LRRM 2729 (1988), for NLRA coverage. For historical development of the agency shop in private employment contracts, *see Shaw, Lee C., The National Labor Relations Act: 1935-1985: II. The Pendulum Swings*, in 38 NAA 67, 80-81



(1986). For historical development of the fair-share provision in public employment contracts, see Prasow, Paul, *Significant Developments in Public Employment Disputes Settlement During 1980*, in 34 NAA 317, 320, 325–26 (1982). See also Jaffe, Ira F., *The Arbitration of Statutory Disputes: Procedural and Substantive Considerations*, in 45 NAA 110, 128–30 (1993); Matsis, Elena, *Procedural Rights of FairShare Objectors After Hudson and Beck*, 2 Lab. Law. 251 (1990). See also Osborne, Chapter 5.

### § 3.10. Checkoff Provisions

**To avoid disputes over employee payments due the union, a collective bargaining agreement may include a checkoff provision, requiring the employer to deduct the appropriate amounts from employee pay upon receipt of individual written authorizations, as permitted by § 302 of the Labor Management Relations Act of 1947.**

#### Comment:

When disagreement arises over the amount to be checked off, arbitrators generally defer to the union's constitution and bylaws unless the requested payment is unreasonable or discriminatory. Employer checkoff of union fines is unlawful under § 8(b)(5) of the NLRA. See *NLRB v. Spector Freight Sys.*, 273 F.2d 272, 45 LRRM 2388 (8th Cir. 1960).

#### Illustrations:

1. An international union ordered local unions to increase dues by \$10 per month to cover monthly benefits of \$55 for another striking local. Most locals complied after a vote by their membership. One local employer refused to check off the additional \$10 on the ground that it was an assessment, not union dues, and therefore not covered by the agreement. Stating that management's role in checkoff situations was "ministerial," the arbitrator ruled that the checkoff clause required the employer to deduct whatever the union determined was dues. See *International Paper Co.*, 92 LA 760, 763 (Irwin Dean 1988); *Libby, McNeill & Libby*, 26 LA 360 (Peter M. Kelliher 1965);

*Bates Mfg. Co.*, 24 LA 643 (Maxwell Copelof 1955); *John Deere Waterloo Tractor Works*, 14 LA 910 (Clarence M. Updegraff 1950). See also *NLRB v. Food Fair Stores*, 307 F.2d 3, 50 LRRM 2913 (3d Cir. 1962) ("assessments are part of dues").

2. A union changed its dues from a fixed amount to one varying with working hours. The employer objected to checking off the new amount on the ground of burdensome cost to revise the payroll computer program. The arbitrator held that, although an employer normally must deduct the amount fixed by the union's bylaws, in this case the change imposed too great a financial and administrative burden on the employer and permitted the employer to continue checking off the previous amount. See *Great W. Carpet Cushion Co.*, 95 LA 1057 (Leo Weiss 1990); *Texas Utils. Generating Co.*, 85 LA 814, 816 (John F. Caraway 1985).

## REFERENCES

Osborne, Chapter 5.

### § 3.11. Union Privileges and Services

**To aid the union in disseminating information and servicing members, many collective bargaining agreements require the employer to provide bulletin boards and office space, as well as to pay employee union representatives for time spent handling grievances and other labor-management activities.**

#### **Comment:**

Most arbitrators permit the union to decide the content of bulletin-board information, unless it is inflammatory or defaming to the employer. Decisions on the type of activities for which union representatives are to be paid rely on bargaining history and past practice. Depending on the contract clause, employers may be required to pay for attendance at meetings

for discussion of labor-management matters such as grievances, training, quality, productivity, and safety. The contract may also require the employer to grant leave to union representatives for union business such as conventions, training programs, and full-time elective office. Arbitrators are called upon to determine whether specific activities are covered by the agreement and are reasonable under the circumstances. Section 8(a)(2) of the NLRA prohibits employer support or assistance to a labor organization that inhibits employee free choice. *See E. I. DuPont de Nemours & Co.*, 311 NLRB 893, 143 LRRM 1268 (1993); *Electromation, Inc.*, 309 NLRB 990, 142 LRRM 1001 (1992), *enforced*, 35 F.3d 1148, 147 LRRM 2257 (7th Cir. 1994). This must be distinguished from lawful noncoercive cooperation. *See Stoodly Co.*, 320 NLRB 18, 151 LRRM 1169 (1995). *See Hardin, Patrick & Higgins, John E., Jr., eds., The Developing Labor Law*, 4th ed. (2001), at 428–32.

### Illustrations:

1. The employer removed from the union's bulletin board what management considered "vicious and malicious statements" about a matter in dispute. The contract confined posting to announcements of recreational and social affairs, election results, meetings, and educational activities. The arbitrator stated that the union must be given the widest possible latitude in the use of bulletin boards. Even though the material "may [be] inflammatory, [it was] a legitimate matter for discussion." *Greyhound Food Mgmt.*, 87 LA 619, 622 (William M. Ellmann 1985) ("[O]ne does not lose all one's constitutional rights by going to work for a private concern," *id.* at 621). *But see Leggett & Platt, Inc.*, 104 LA 1048 (G. Gordon Statham 1995) (unfavorable cartoons).

2. An arbitrator approved the employer's removal of a "commercial" advertisement on the ground that the bulletin board was reserved for "official Union notices." *Norfolk Shipbuilding & Drydock Corp.*, 91 LA 131, 133 (Donald P. Rothschild 1988). *See also Copley Press*, 91 LA 1324, 1330 (Elliott H. Goldstein 1988) (upheld removal of scatological and obscene material based on the need to balance the union's rights of free expression and free

speech with “employer’s interests in discipline, production, and safety”); *Dalfort Corp.*, 85 LA 70, 71 (John White 1985) (upheld ban of political literature and “defamatory” items attacking the employer).

3. A union steward was disciplined for spending time on union business without making entries on his timecard. The arbitrator held that, in the absence of a specific rule or contractual provision, the employer retained “the right to know how much time the steward spent away from his work on union business and to be notified when such business starts and ends.” *Alofs Mfg. Co.*, 89 LA 5, 7 (William P. Daniel 1987). *See also Sanyo Mfg. Corp.*, 89 LA 80, 85, 86 (Samuel J. Nicholas, Jr. 1987) (“Management is in a much better position to know whether plant operations are sufficiently manned,” and “union[ ] activities should be tailored to the demands of production”).

### **§ 3.12. Union Requests for Information and Access**

**Even if the agreement is silent, there is an implied union contractual right (in addition to federal and often state statutory rights) to obtain information necessary for carrying out the collective bargaining function.**

#### **Comment:**

Employers may argue that certain business data, personnel records, and strategic plans are confidential and need not be shared with the union. Following the lead of the NLRB, arbitrators generally require employers to furnish unions with information affecting their ability to conduct negotiations or to enforce the agreement in an intelligent manner. For similar reasons nonemployee union representatives are given reasonable access to the employer’s facility for contract enforcement and grievance resolution.

Most arbitrators do not require the employer to divulge to the union business information not directly related to employee status, such as pricing practices, strategic plans for business expansion, and stockholder or board of director communications. However, if grievance handling or a particular

contract clause is involved and the employer has sole control over the desired information (e.g., health insurance premiums, pension investments), most arbitrators permit union access. Advance notice and reasonable timing may be required for plant visits. A comparison of employer burden and union benefit usually determines access matters. It is still not clear what effect technology related to the use of “cyberspace” will have on union access. Extensive and unlimited use of e-mail and the internet by employees at the work site for nonwork purposes may entitle the union to tap those sources for information for bargaining and organizing purposes. An employer’s attempt to change or extend control of these resources may give rise to grievances, and arbitrators will probably use the same standards to evaluate union and management rights as in earlier access cases.

### Illustrations:

1. A restaurant owner refused access to nonemployee union representatives on the ground that they interfered with his business. The arbitrator upheld the union’s grievance, stating: “The union has the right without management’s interference to visit and enter the premises of the employer . . . [to] investigate and determine the Union status of all employees who are subject to the terms of the Collective Bargaining Agreement and to ensure that the workers conditions of employment . . . are in conformity with . . . the Agreement.” However, the union representative “has the duty to the Employer to have the proper credentials” and must not interview employees during rush hours, but there is no need to make an advance appointment or to tell the employer the reason for the visit. *Piper’s Restaurant*, 86 LA 809, 810 (William E. Riker 1986). See also *Butler Paper Co.*, 91 LA 311 (Leo Weiss 1988); *Montgomery Ward & Co.*, 85 LA 913, 916 (John F. Caraway 1985) (denied access for solicitation of membership because there was no “clear authority in contract for such activity”).

2. An employee was discharged for selling cigarettes to minors based on a security report. The employer refused to show the report to the union. The arbitrator upheld the union’s request, stating that the employer must divulge

“all available material facts” to facilitate openness and settlement of grievances. *Safeway Stores*, 89 LA 627 (Paul Staudohar 1987). *See also Cannelton Indus.*, 91 LA 744 (Marlin M. Volz 1988); *Regional Transp. Dist.*, 87 LA 630 (Marvin J. Feldman 1986).

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For specific references to cyberspace issues, *see* Robfogel, Susan S., *Electronic Communication and the NLRA: Union Access and Employer Rights*, 16 Lab. Law. 231 (2000); Wilcox, Gwynne A., *Section 7 Rights of Employees and Union Access to Employees: Cyber Organizing*, 16 Lab. Law. 253 (2000). For NLRB rulings in this connection, *see* *Bell South Com., Inc.*, 168 LRRM 1049 (2001); *Electronic Data Systems Corp.*, 159 LRRM 1243 (1998); *Technology Service Solutions*, 156 LRRM 1065 (1997); *E. I. Du Pont de Nemours & Co.*, 143 LRRM 1121 (1993). For general discussions of union access rights, *see* Hardin, Patrick & Higgins, John E., Jr., eds., *The Developing Labor Law*, 4th ed. (2001), at 96–99, 114–16, 856–910, 1457–62, 2548–50.

**Chapter 4**

**Job Assignments**

*Susan R. Brown\**

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## I. BARGAINING UNIT WORK

### § 4.1. Definition

**Work belonging to a bargaining unit is usually defined, by specification or implication, in a collective bargaining agreement's recognition clause, which identifies the employees or the jobs or both that are covered by the contract.**

#### **Comment:**

Disputes concerning the scope of the bargaining unit are generally resolved by the National Labor Relations Board or state labor agencies unless the parties agree to bring the issues before an arbitrator or the Board defers a complaint to arbitration. *See* Bernstein, Neil N., *Bargaining Unit Disputes*, in *Labor and Employment Arbitration*, 2d ed., eds. Bornstein, Tim, Gosline, Ann & Greenbaum, Marc (1997), §§ 24.02 and 24.03 [hereinafter Bernstein].

### § 4.2. Performance by Nonbargaining Unit Personnel

**(1) *In light of contract provisions.* When the contract specifies the circumstances under which nonbargaining unit employees, including supervisors, may perform bargaining unit work, arbitrators follow the contract. The most common provisions include:**

- **when the work is experimental,**
- **when the work is performed for training purposes,**
- **when an emergency exists, and**
- **when the amount of such work is de minimis.**

**Most arbitrations on this issue arise from disputes over whether conditions exist for the exceptions to apply.**

**(2) *Under a silent contract.* When the contract is silent, some arbitrators allow employers, under the management rights clause, to distribute work**



as they see fit. Others infer limitations, arising from the recognition, seniority, and wage and hour clauses, on management's right to assign bargaining unit work to nonbargaining unit employees. The trend over the past 50 years has been toward the view that some extraordinary circumstances must justify the assignment of bargaining unit work to supervisors and other nonunit personnel. Most arbitrators, however, honor past practices that have established certain duties as shared between bargaining unit and nonbargaining unit employees.

#### **Comment:**

The classic published case on this topic, *New Britain Mach. Co.*, 8 LA 720, 722 (1947), was written by Saul Wallen. In it he said:

Job security is an inherent element of the labor contract, a part of its very being. If wages is the heart of the labor agreement, job security may be considered its soul. . . . The transfer of work customarily performed by employees in the bargaining unit to others outside the unit must therefore be regarded as an attack on the job security of the employees whom the agreement covers and therefore on one of the contract's basic purposes.

Many arbitrators have uttered variations of this sentiment. For an in-depth review of cases and arbitral approaches to the question of supervisors and unit work, see Harris, Philip, *Supervisory Performance of Bargaining Unit Work*, 20 Arb. J. 129 (1965), and the update of Harris's article in Petersen, Donald J., *Arbitral Perspectives in Supervisor Work Restriction Cases*, 55 Disp. Resol. J. 62 (Jan. 2001).

See also Bernstein, §§ 24.02 and 24.03.

### **§ 4.3. Performance by Employees in Other Bargaining Units**

When work is transferred to another bargaining unit, arbitrators generally balance the rights of the affected union and employees against the employer's right to operate efficiently. Factors arbitrators are likely to consider include:

- the preservation of the bargaining unit,
- the preservation of employment opportunities for current bargaining unit employees,
- the preservation of conditions of employment,
- the employer's right to assign work,
- the employer's right to operate efficiently,
- the type of work involved, and
- the skills required to perform the work.

### **Comment:**

Transfer of work from one bargaining unit to another most commonly occurs under one or more of the following circumstances: the company has reorganized, there has been a technological change in the means of production, the company or the plant has expanded, or the work has been moved to another location. Some of the precepts discussed in § 4.4, below, are also pertinent here.

## **§ 4.4. Performance of Unit Work by Nonemployees—Subcontracting**

(1) *Defined.* Arbitrators are occasionally called upon to determine whether a particular loss of work is truly the result of subcontracting. Examples include when a company purchases a readymade product rather than having it fabricated by employees, and when volunteers or prisoners perform bargaining unit work, usually for a governmental or nonprofit organization.

(2) *Management's right to subcontract.*

(a) *In light of specific contract provisions.* When the contract specifically grants management the right to subcontract work, the arbitrator's major role is to clarify any ambiguities in the language. Some arbitrators infer the right to subcontract from a specified right to assign work.

(b) *Implied authority.* When the contract is silent, many arbitrators hold that the employer retains the right to subcontract in pursuit of efficiency. No arbitrator, however, deems this authority to be unfettered.

**(3) *Limitations on management's authority to subcontract.***

**(a) *Contractual restrictions.*** When the contract bars management from contracting out specified work, arbitrators may be called upon to determine whether the work in dispute falls into the designated category. Arbitrators generally interpret such categories narrowly. A contract may also require that arbitrators decide whether a task is “normally” performed by a bargaining unit worker, whether bargaining unit employees were “qualified” or “available” to perform the work in question, whether an emergency existed, or whether qualified employees were on layoff at the time of the subcontracting or would be laid off as a result of it. Most arbitrators require proof from the employer, not mere assertion, to establish an exemption from a subcontracting prohibition.

Some arbitrators find limits on subcontracting in other labor agreement provisions such as the recognition, seniority, and wage clauses. These arbitrators conclude that actions that undermine the integrity of the parties' relationship are inconsistent with the understandings set forth in those clauses.

**(b) *Implied restrictions.*** Arbitrators who acknowledge implied rights to subcontract may also infer implied restrictions based on standards of reasonableness or good faith. The factors most commonly used to assess whether the employer's decision was reasonable include:

(i) Business justification, such as efficiency or competitiveness. Merely paying lower wages for the same work is generally not considered a reasonable justification.

(ii) Past practice. If certain work has been contracted out in the past without protest, arbitrators usually will conclude that it is reasonable to do so again.

(iii) Bargaining history. Parol evidence may be considered when the parties' intent is not clear from the contract language. Generally, a party

**may not achieve at arbitration something it tried and failed to achieve at the bargaining table.**

**(iv) Impact on employees, the bargaining unit, or the union. Many arbitrators will conclude that a decision to subcontract is not reasonable if it causes a substantial portion of the bargaining unit to lose employment or is designed to undermine the union's presence in the plant.**

### **Comment:**

Since the early 1990s, employers have increasingly used a tactic known as “double-breasted” operations to transfer bargaining unit work to nonunionized employees. In those situations, employers develop or acquire nonunion affiliates that perform work that is identical to their unionized entities and then use their unionized facilities and workers only when required to do so by bidding specifications. While not strictly a matter for arbitrators, some NLRB analysis of the NLRA Section 8(a)(5) issues raised by unions parallels arbitral analysis of subcontracting claims, specifically whether the practice is designed solely to siphon work away from unionized employees. See Marsh, Ben, *Corporate Shell Games: Use of the Corporate Form to Evade Bargaining Obligations*, 2 U. Pa. J. Lab. & Emp. L. 543 (2000). Relocating work during the term of a contract to nonunion facilities, often overseas, has also increased. This phenomenon has historically been termed a “runaway shop” when found in violation of the National Labor Relations Act, but the NLRB has more recently allowed such relocations if the move is based on “valid economic considerations” and the employer satisfies its duty to bargain with the union it is leaving behind. These more recent rulings have also applied to certain subcontracting activity. See Sturner, Jan W., *An Analysis of the NLRB's “Runaway Shop” Doctrine in the Context of Mid-term Work Relocations Based on Union Labor Costs*, 17 Hofstra Lab. & Emp. L.J. 289 (2000). At least one arbitrator has ruled that she had concurrent authority with the NLRB to determine whether the collective bargaining agreement applied to a newly opened facility. See *A.W. Zengeler, Inc.*, 04-1 ARB ¶13862 (Lisa Salkovitz Kohn 2004).

## REFERENCES

Many informative analyses of subcontracting exist in the literature. See, e.g., Abrams, Roger I. & Nolan, Dennis R., *Subcontracting Disputes in Labor Arbitration: Productive Efficiency Versus Job Security*, 15 U. Tol. L. Rev. 7 (1983); Crawford, Donald A., *The Arbitration of Disputes Over Subcontracting*, in 13 NAA 51 (1960); Dash, G. Allen, Jr., *The Arbitration of Subcontracting Disputes*, 16 Indus. & Lab. Rel. Rev. 208 (1963); Grenig, Jay E., *The Removal of Work From Bargaining Unit Employees: The Supreme Court, the Board, and Arbitrators*, 27 Willamette L. Rev. 595 (1991); Kirsner, Kenneth M., *Arbitral Treatment of Subcontracting After Milwaukee Spring II: Much Ado About Nothing?* 44 U. Miami L. Rev. 371 (1989).

See also §§ 4.2 and 4.3, above, for related concepts.

## II. JOB CLASSIFICATIONS

### § 4.5. Job Status Conferred by Contract

**Most arbitrators hold that job classifications enumerated in the collective bargaining agreement are not fixed for the life of the contract and may be eliminated, combined, or otherwise altered by the employer, provided the action is not arbitrary or for discriminatory purposes.**

#### **Comment:**

Arbitration annals reveal a historic dispute on this issue, with distinguished proponents on both sides. Whitley P. McCoy and Harry J. Dworkin believed that a list of job classifications and wage rates in a labor contract imply an agreement that the specified classifications may not be combined or eliminated during the life of the contract. See *Lone Star Cement Co.*, 41 LA 1161 (Harry J. Dworkin 1963); *Esso Standard Oil Co.*, 19 LA 569 (Whitley P. McCoy 1952). Robben W. Fleming and Paul Prasow, on the other hand, construed a contract's list of classifications and wages as reflecting parties' agreements regarding classifications in effect when the contract was signed, not a limitation on management's right, if exercised in good faith, to direct the work force. See *Simoniz Co.*, 32 LA

115 (Robben W. Fleming 1959); *Axelson Mfg. Co.*, 30 LA 445 (Paul Prasow 1958).

After an extensive review of published awards, Arbitrator James Doyle concluded in 1967 that the weight of arbitral thinking had moved to the Prasow/Fleming point of view, where it remains today. See *Omaha Cold Storage Terminal*, 48 LA 24 (James A. Doyle 1967). This line of thinking does not preclude the possibility that any changes in classifications may require a renegotiation of wage rates. For an extensive discussion of this topic, see Kropp, Steven, *Compensation Systems and Job Evaluations*, in Labor and Employment Arbitration, 2d ed., eds. Bornstein, Tim, Gosline, Ann & Greenbaum, Marc (1997) § 34.03 [hereinafter Kropp]. For a discussion on job security and the arbitrator's role, see Horlacher, John Perry, *Employee Job Rights Versus Employer Job Control: The Arbitrator's Choice*, in 15 NAA 165 (1962).

## § 4.6. Job Descriptions

(1) Disputes over job descriptions most frequently arise when new duties are added. When job descriptions are unilaterally promulgated by the employer, the dispute usually concerns wage rates in light of those new duties. The arbitrator's task then is to analyze the worth of the revised job, using measures consistent with the rest of the parties' compensation system.

(2) When job descriptions have been negotiated, the union may dispute management's right to add or remove particular duties. Pursuant to the "other related duties" provisions found in most descriptions, arbitrators will review relevancy, past practice, and comparative wage rates to determine whether a new duty is properly assigned under the description at issue.

### Comment:

See § 4.9, below, for a discussion of arbitrators' treatment of this matter. See also Seward, Ralph T., *Work Assignments and Industrial Change: II. Reexamining Traditional Concepts*, in 17 NAA 240 (1964).

### § 4.7. Establishing New Jobs and Job Classifications

(1) *At management's initiation.* Management has the right to establish new jobs and new classifications unless that right has been specifically limited by the contract. A "new" job must be distinctly different from any existing job.

(2) *At union's initiation.* Arbitrators will generally grant a union's request for the creation of a new job or classification if the duties being performed are significantly different from existing jobs and classifications or require additional skill or training. The same standards apply to union requests for reclassification of certain jobs.

#### Comment:

*a. Management's Initiation.* As commonly construed, management's discretion must be exercised in good faith. An allegation of bad faith arises most frequently when the content of the new job or classification does not differ materially from an existing job or classification and yet is paid at a lower rate. See Stieber, Jack, *Job Classification, Overtime, and Holiday Pay*, in *Arbitration in Practice*, ed. Zack, Arnold M. (1984), at 103–09, for a discussion of the arbitrator's thought process in such cases.

When a new job or classification is introduced, the question may also arise whether the position belongs in the bargaining unit. See § 4.1, above, for a discussion of this issue.

*b. Union's Initiation.* An exception to the rule of creating a new job classification may occur when job assignments and duties vary within a craft, members of which are all paid at the same rate regardless of what aspect of the craft they perform. Arbitrators are careful not to distort the parties' wage structure.

### § 4.8. Abolishing or Combining Classifications

(1) *Contractual limits to an employer's authority.* Arbitrators observe contractual limits on an employer's right to eliminate or modify jobs and classifications. Such limits may include an outright

bar to any changes, a description of conditions that must exist before modifications may be made, and minimum staffing requirements.

(2) *When the contract is silent.* Arbitrators' points of view on this matter are informed by their treatment of the contractual status of job classifications. See § 4.5, above. Those who take the minority position will not permit unilateral change during the life of the contract. The majority, however, will permit modification under the theory that management retains the right, absent specific limitations, to operate its business efficiently. These arbitrators, for example, will uphold job combination or elimination for legitimate business purposes, such as improved methods of operations, including new equipment and other technological changes. This holds particularly true when operational modifications result in decreased duties for certain jobs or classifications. Combination or elimination of classifications may be disallowed, however, if the arbitrator finds any of the following conditions:

- the action has an antiunion purpose,
- the change will result in a safety hazard, or
- the same work will be performed at lower pay.

### Comment:

Even when there is no dispute about the employer's authority to eliminate a job or a classification, there may be a challenge to the assignment of residual duties from an eliminated position to a nonbargaining unit employee. In that event, arbitrators apply the same standards set forth in §§ 4.2, 4.3, and 4.4, above. For discussions of the various topics addressed in this section, see Brown, Susan R., *New Technology: How Does It Affect the Workplace?* 44 Arb. J. 32 (Sept. 1989); Ornati, Oscar A., *Contributed Papers: II. Rights Arbitration and Technological Change*, in 38 NAA 224 (1986); Sibbernson, Richard D., *What Arbitrators Think About Technology Replacing Labor*, 64 Harv. Bus. Rev. 8 (Mar.-Apr. 1986); Teple, Edwin R., *Contract Provisions Affecting Job Elimination*, 17 W. Reserve L. Rev. 1253 (1966). See also Wolkinson, Benjamin W., et



al., *Arbitration Issues in the Consolidation of Police and Fire Bargaining Units*, 40 Arb. J. 43 (Dec. 1985).

## **§ 4.9. Adding Duties To, or Removing Duties From, Jobs or Classifications**

**Arbitrators generally agree that management has the authority to change the duties of a job and to transfer duties among classifications, although many apply different standards to skilled and unskilled positions. Exceptions for both types of positions may be made in light of specific contractual restrictions, the absence of good faith, discriminatory motives, health and safety problems, or a burdensome workload.**

### **Comment:**

Ford Umpires Harry Shulman and Harry H. Platt set forth the assumptions underlying the conclusion that an employer's authority to reassign duties is greater with respect to unskilled employees than skilled ones. They reasoned that skilled crafts are defined not only within a company and a collective bargaining agreement, but also in the larger world by universally accepted standards of the trade as expressed in apprenticeship and training programs. Therefore, trained practitioners should not be forced to abandon their crafts in order to maintain their employment. These standards may be relaxed for relatively minor tasks, in emergencies, and for temporary assignments. See *Ford Motor Co.*, 30 LA 46 (Harry H. Platt 1958); *Ford Motor Co.*, 19 LA 237 (Harry Shulman 1952); *Ford Motor Co.*, 3 LA 782 (Harry Shulman 1946). Arbitrators still follow these precepts for the most part. But this may be changing, along with the transformation of the American work force and the adoption of new work-team concepts. Skilled workers, however, are generally held not to have exclusive jurisdiction over semiskilled or unskilled tasks that are incidental to their jobs under the theory of management's entitlement to efficient operations.

Even when the jobs in question are unskilled, arbitrators may hold that added duties must be reasonably related to the employee's principal task. They may also consider the parties'

past practices with respect to assignments. Some arbitrators view past practice as preserving job assignments to one job classification during the life of the contract; others view assignments, no matter how longstanding, merely as a present method of operation that management is free to change. Arbitrator Shulman articulated the latter point of view in the 1952 *Ford* decision cited above. Even where management's right to assign tasks is acknowledged, disputes may arise both with regard to lost overtime and to payment for performing duties that generally belong to a higher classification. See § 4.10, below; see also Wallen, Saul, *The Arbitration of Work Assignment Disputes*, 16 Indus. & Lab. Rel. Rev. 193 (1963); Bailer, Lloyd H., *The Right to Assign Employees in One Job Classification to Jobs in Another Classification*, *id.* at 200; Rubin, Milton, *The Right of Management to Split Jobs and Assign Work to Other Jobs*, *id.* at 205.

#### **§ 4.10. Temporary Out-of-Classification Assignments**

Arbitrators generally agree that employers have no obligation to recall laid-off workers to perform small jobs, even though failure to do so might result in the assignment of work to supervisors or to employees in another classification. Most arbitrators will not permit assignment of work to employees in another classification if the primary goal of the unusual assignment is to avoid overtime payments to those employees who ordinarily perform the work. When off-duty employees are called in for unanticipated work, arbitrators may look at the urgency and time required for the task, the parties' past practice, and contract language. Where employees are temporarily assigned tasks ordinarily performed by workers in a higher classification, however, arbitrators generally require that those workers receive the higher rate.

#### **Comment:**

Arbitrators' approaches to recall and call-in have similar underpinnings: if the task to be performed is small enough or

urgent enough, the employer is not obligated to set in motion the entire recall procedure or wait for an off-duty employee to arrive merely to preserve the integrity of job assignments within a particular classification. These determinations are, of course, highly fact-dependent. *See* Bailer, Lloyd H., *The Right to Assign Employees in One Job Classification to Jobs in Another Classification*, 16 Indus. & Lab. Rel. Rev. 200 (1963); Kropp, § 34.03.

With respect to overtime, arbitrators commonly apply the principle that a permissive provision may not be used to avoid or skirt obligations under another contract term. *See* the Comment under § 4.11, below, for another application of this tenet.

### III. VACANCIES

#### § 4.11. Posting and Filling Vacancies

**Absent limiting contract language, an employer retains the right to determine whether a vacancy exists and to post and fill only those positions it deems vacant.**

##### **Comment:**

Although arbitrators uniformly recognize this decision as integral to management's right to make economic decisions, several exceptions are generally acknowledged. For example, management's decision not to post and fill a vacancy must not serve to circumvent other contractual requirements, for example, the nondiscrimination clause. Similarly, management may not use other contractual provisions, such as the temporary transfer clause, to circumvent an obligation to post and fill vacancies.

#### § 4.12. Bidding and Bid Awards

**(1) In the absence of specific contractual restrictions, an employer is free to designate the winning bidder for a vacancy. Such choice may be successfully challenged before an arbitrator if the selection is feared to be arbitrary or discriminatory.**

**(2) Most contracts, however, place some restrictions on an employer's freedom to select a candidate from an array of bidders. A combination of employee's qualifications and seniority is frequently set forth as selection criteria. When the contract requires the employer to select the senior qualified bidder, arbitrators generally scrutinize closely an employer's judgment that a senior employee is not minimally qualified. When the contract allows the employer to choose the most qualified bidder, using seniority only as a tie-breaker where the abilities of two or more employees are relatively equal, arbitrators allow employers considerable leeway in weighing the merits of various qualifications.**

**Comment:**

The two types of promotion clauses mentioned above are commonly referred to as sufficient ability and relative ability, respectively. Absent specific limiting language, arbitrators permit employers, when determining relative ability, to designate the relevant qualifications and to rank and weight them as they see fit. Like other exercises of employer discretion, decisions must withstand challenges regarding discriminatory motive and arbitrary action. For a complete discussion of selection standards and the arbitrator's role, see Brown, Susan R., *Job Bids, Promotions and Transfers*, in *Labor and Employment Arbitration*, 2d ed., eds. Bornstein, Tim, Gosline, Ann & Greenbaum, Marc (1997), Chapter 27. See also Chapter 5, below.

## Chapter 5

### Seniority

*Calvin William Sharpe\**

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## I. ACQUIRING AND CALCULATING SENIORITY

### § 5.1. Definition, Purposes, and Source

(1) Seniority is a relationship among employees that determines their relative priority for certain employment purposes based on length of service in some specified unit.

(2) Seniority is used for two fundamental purposes:

(a) “Competitive status” seniority determines relative priority to job preferences such as layoff, recall, transfers, promotion, work assignment, and overtime.

(b) “Benefits seniority” determines relative priority to employment benefits such as vacation, holidays, sick leave, bonuses, severance pay, pensions, and insurance.

(3) Seniority rights are created and defined by contract.

#### Comment:

*a. Seniority Defined.* Though at first blush seniority might appear to be simply a statement of longevity in employment, essentially it furnishes a method of allocating valuable employment assets among employees. Similarly, the length of service concept may involve more than an employee’s period of employment with the employer. Seniority is specific to some relevant unit and may be broader or narrower than length of service with the company. See § 5.2, below. In *Axelson Mfg. Co.*, 30 LA 444 (Paul Prasow 1958), the arbitrator distinguished between protection of the job—not the mission of seniority—and protection of an employee in relation to other employees.

#### Illustration:

A collective bargaining agreement provides that layoffs, recall of employees from layoff, promotions, transfers, and shift preferences will be determined by seniority. Under this contract a slight difference in rank may determine whether the employee is assigned to the day

or night shift, promoted or demoted, or permitted to work or laid off. *See* Kennedy, Thomas, *Merging Seniority Lists*, in 16 NAA 1 (1963) [hereinafter Kennedy].

*b. Purposes of Seniority.* Because length of service is an objective index, it eliminates preferential treatment and the other dangers of subjectively determining job preferences and employment benefits. *See* Rothschild, Donald P., Merrifield, Leroy S. & Craver, Charles B., *Collective Bargaining and Labor Arbitration*, 3d ed. (1988), at 569–70 [hereinafter Rothschild].

*c. Source.* Though nonunion employers have historically recognized to some extent the equitable claims of senior employees, seniority rights are created by contract. As an employment entitlement, seniority assumed major importance only after the rise of collective bargaining agreements. As a means of allocating job preferences and benefits, seniority was acceptable to employees because it was perceived as more fair than subjective methods. Because of the advantages of seniority to employees, unions view it as one of the most important terms of employment. Unions also benefit from the stability, loyalty, and organizing interest that seniority generates among their constituencies. Employers benefit from the employees' incentive to build seniority, thus providing a steady work force with its attendant effects upon productivity. They also gain from an enhanced reputation as fair-minded users of objectively measurable standards for many worksite purposes. *See* Abrams, Roger I. & Nolan, Dennis R., *Seniority Rights Under the Collective Agreement*, 2 Lab. Law. 99, 101–06 (1986) [hereinafter Abrams & Nolan].

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- Slichter, Sumner E., Healy, James J. & Livernash, E. Robert, *The Impact of Collective Bargaining on Management* (1960), at 104–10.  
Weiler, Paul, *Governing the Workplace—The Future of Labor and Employment Law* (1990), at 65–67.



## § 5.2. Seniority Units

(1) A seniority unit is an employee grouping that corresponds to some part of an employer's organizational structure and constitutes the basis for determining and applying an employee's length of service. Examples of seniority units are the job classification, department, plant, multiplant, division, employerwide, and industrywide.

(2) Unless otherwise specified in the contract, seniority can begin to accrue only when the employee joins the seniority unit.

(3) Different seniority units may be used for different purposes.

(4) Seniority may also be acquired in one unit and exercised in another.

### Comment:

*a. Seniority Unit Defined.* On the origin and importance of the seniority unit concept, see Aaron, Benjamin, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 Harv. L. Rev. 1532, 1534–42 (1962).

*b. Accrual.* As a creature of the contract, the onset of seniority may vary based on the parties' peculiar preferences; however, virtually no contracts have provisions permitting the accumulation of seniority to begin before employees join the unit. See *Collective Bargaining Negotiations and Contracts* 75: 81–84 (BNA 1996). See also, e.g., *Gulf & Western Mfg. Co.*, 80 LA 332, 336 (Steven Briggs 1983) (employee who was never a part of the bargaining unit was not entitled to seniority credit upon his transfer to a unit job, despite contractual provision providing for accumulation of seniority for employees transferred to positions outside the bargaining unit); *Clarkston Community Sch.*, 79 LA 48, 55–56 (Richard L. Kanner 1982) (no accrual of seniority as an administrator). *Accord Long Beach Oil Dev. Co.*, 41 LA 583, 587 (Howard S. Block 1963); *Sterilon Corp.*, 27 LA 229, 231–32 (Jean T. McKelvey 1956).

### Illustration:

1. The company has a departmental seniority system. Employee A is hired on February 22, year 1, as a materials

handler in the production department. On January 1, year 3, he becomes a mechanic in the maintenance department. On February 22 of year 4, A has just over one year of seniority in the maintenance department, even though he is a three-year employee of the company. He has also left the production department with just under two years of seniority.

*c. Differential Use.* The parties have the latitude to circumscribe the use of seniority units as they choose. For example, the contract may use companywide seniority to determine benefits such as longevity pay and pension contributions and departmental seniority to determine promotion.

### **Illustration:**

2. The contract provides that employees may bid on company vacancies in a different job classification, department, or shift and, assuming ability to perform, such vacancies will be filled on the basis of seniority. Another provision says that layoffs will be made in accordance with seniority, the least senior employee in the department being laid off first. Under this contract, companywide seniority determines the filling of vacancies, while departmental seniority governs layoffs. *See Mor-Flo Indus.*, 81 LA 964 (Gordon W. Ludolf 1983). *See also R. A. F. Corp.*, 82 LA 866 (Timothy J. Heinsz 1984).

*d. Acquisition and Exercise Distinction.* The parties may also provide that seniority is earned in one unit and exercised in another, thus eliminating some of the operational disruption that might accompany a broader exercise of seniority rights. *See McFeely Brick Co.*, 22 LA 379 (B. Meredith Reid 1954) (plantwide seniority was limited to the filling of vacancies while departmental seniority governed layoffs).

### **Illustration:**

3. A seniority provision says that seniority shall accumulate on a plantwide basis and apply on a departmental basis. Under the contract, seniority governs the scheduling of vacations. Employee A has worked at the company's Charleston plant since her hire date of January 1, year 1.

She moved from her clerical position in the shipping department to a machinist position in the machine shop in year 5. In year 6, A has priority in the scheduling of her vacation over B, who has been in the machine shop for the entire four years of his employment at the company. Note the difference between this limited use of earned seniority and the differential use shown in Illustration 2.

## REFERENCES

On the emergence of the seniority concept, see Aaron, Benjamin, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 Harv. L. Rev. 1532 (1962); Edwards, Harry T., *Seniority Systems in Collective Bargaining*, in *Arbitration in Practice*, ed. Zack, Arnold M. (1984), at 119; Horlacher, John Perry, *Employee Job Rights Versus Employer Job Control: The Arbitrator's Choice*, in 15 NAA 165 (1962); Meyers, Frederic, *The Analytic Meaning of Seniority*, 18 Proc. Indus. Rel. Res. Ass'n 194, 201-02 (1965).

### § 5.3. Seniority Dates

**(1) Under collective agreements the accumulation of seniority for the new employee is typically suspended during a probationary period defined by the agreement, then applied retroactively following the successful completion of probation.**

**(2) In the absence of the parties' direction in the contract, priority between employees who are hired on the same day may be determined in a variety of ways, including order of clocking in, order of shift, order of appearance on the seniority list, or flipping a coin.**

#### Comment:

*a. Probation.* The probation period is contractually defined. It furnishes the employer an opportunity to evaluate a new employee's suitability for a job; it also prevents seniority and other contractual rights such as just cause protection from taking effect during the period. Sometimes, special problems in applying probation provisions are not addressed by the parties and require arbitral judgment.

**Illustration:**

The contract has a probation provision that partially reads as follows: "New employees shall have no seniority rights during a 45-day probation period after which seniority will be retroactive to the date of hire." Employee A is laid off after working 43 full days and 2 consecutive half-days. Since the contract does not specify how to treat partial days, the arbitrator must interpret the application of the provision to this case. In cases such as this, arbitrators will be influenced by whether the employer had an adequate opportunity to evaluate the new employee's suitability for permanent employment.

The illustration is taken from *Convey-All Corp.*, 41 LA 169 (Samuel S. Kates 1963) (the arbitrator determined that the contract called for 45 days without reference to the number of hours worked each day and that the employee had completed his probation). *See also C. H. Stuart & Co.*, 43 LA 773 (Joseph Shister 1964) (the contract failed to say whether the probation period consisted of 30 calendar or working days and the arbitrator found the latter by referring to the wage clause). Raising similar issues is *American Steel*, 70 LA 494 (Michael H. Beck 1978) (effect of two-month medical leave on probationary period).

*b. Common Seniority Dates.* Though sometimes they will defer to an employer's selection based on merit, arbitrators typically opt for some objective tiebreaker in the absence of party direction. They view this as required by the very purpose of a seniority system. *See U.S. Plywood-Champion Papers*, 50 LA 507 (Robert G. Howlett 1968) (deference to employer choice); *McCall Corp.*, 49 LA 183 (Robert G. McIntosh 1967) (coin flip); *Robertshaw-Fulton Controls Co.*, 22 LA 273 (Ralph R. Williams 1954) (order of clock-in).

**§ 5.4. Seniority Lists**

**(1) The seniority list is generally *the* accurate source of information on the relative seniority of employees in the seniority unit. The contract usually specifies how employees are to be informed of the contents of the seniority list and how the currency of the list is to be maintained.**

**(2) If the contract establishes a time limit for questioning a seniority date, challenges must generally be brought within the time limit or the rights are lost. When the union or affected employee has had access to the list and the contract contains no time limit for challenging the seniority date, a failure to challenge after a reasonable period of time may be deemed a waiver of the right to challenge the listed date.**

**Comment:**

*a. Function and Maintenance.* The seniority list is the official record of seniority dates for employees in the seniority unit. For reasons of practicality the list is kept by the employer and made available to the employees or the union for monitoring. Because employees participate in the monitoring of seniority lists for accuracy, disputes regarding relative seniority are often conclusively resolved by reference to the seniority list. For an example of the authoritativeness of the seniority list, see *Mallory-Sharon Metals Corp.*, 33 LA 60 (Harry J. Dworkin 1959) (a dispute concerning contemporaneous hiring was settled by reference to seniority dates on the seniority list).

*b. Effect of Error.* When the parties promulgate a clear rule governing challenges to the accuracy of a seniority list and the employer has complied with the publication requirements of the contract, arbitrators must apply the rule unless circumstances, such as the potential beneficiary's involvement in creating the error, suggest a different result. Concerns about avoiding employee detrimental reliance and encouraging employee monitoring may lead to findings of waiver after a reasonable time, even if the contract specifies no time limits for challenging accuracy. Since the same problems of reliance are not presented in cases involving inaccurate benefits seniority lists, waivers of the right to challenge erroneous benefits seniority dates are less likely to be found.

See *Mooney-Kiefer-Stewart, Inc.*, 69 LA 477 (Edwin R. Render 1977); *Saturn Airways*, 67 LA 521 (John E. Gorsuch 1976), for examples of strictly applied time limits for challenging seniority lists. See *Kelsey-Hayes Co.*, 85 LA 774 (Louis M.

Thomson, Jr. 1985), for an example of arbitral resistance to preventing employee challenges to the seniority date. *Republic Steel Corp.*, 25 LA 434 (Harry H. Platt 1955), is an example of an employer's estoppel from preventing an employee's challenge.

## REFERENCES

*See generally* Abrams & Nolan, at 114–15.

## II. RETAINING, ACCUMULATING, AND LOSING SENIORITY

### § 5.5. Interruptions in Employment

#### (1) *Temporary interruptions.*

(a) Collective agreements that determine the effect on seniority of temporary work interruptions such as layoffs and medical leaves may be incomplete in their coverage of work interruptions. The intent of the parties as found in written and oral contractual expressions governs.

(b) Where the parties have not expressed their intent, a rule of reason may apply to determine the effect of temporary interruptions on seniority.

#### (2) *Military service.*

(a) Generally, military service is an interruption in employment that does not prevent the accumulation of seniority.

(b) The circumstances of military service leading to termination of seniority depend on contractual terms and may depend upon the operation of federal law.

(3) *Resignation and discharge.* The typical contract calls for termination of seniority if the employee resigns or if the employee is discharged. A discharge is involuntary termination, while a resignation is voluntary.

**Comment:***a. Temporary Interruptions.*

(1) *Express intent.* Contractual specificity determines when an interruption in employment results in the loss of seniority. When the contract contains the parties' complete agreement on the effect of temporary interruptions, the clear provisions of the contract must be applied. If the contract is ambiguous, factors such as past practice and bargaining history may be applied as indicia of intent. However, when it is shown that the parties' intended agreement was not expressed in the written document, the actual agreement rather than the writing is applied.

**Illustration:**

1. Employee S goes on sick leave for one year. The written contract provides that seniority is terminated after a layoff of one year but makes no reference to sick leave. An oral agreement provides that disabled employees retain seniority for two years. The written contract does not embody the parties' full agreement, while the oral agreement regarding disabled employees effectuates the intent of parties. Application of the latter rather than the former is appropriate. However, this result may be altered by the working of a zipper clause that defines the contract exclusively by its written terms. *See SCM Corp.*, 83 LA 1186 (B. J. Speroff 1984).

(2) *No expression of intent.* Where the parties have not expressed their intent, a rule of reason may apply to determine the effect of the interruption based on the nature and circumstances of the interruption. This approach recognizes that an inordinate interruption in employment would reasonably warrant a discontinuation of seniority, while other interruptions might reasonably not warrant it and should be dealt with on the basis of their particular circumstances. See Chapter 2, § 2.22, above; Abrams & Nolan, at 116–18.

**Illustration:**

2. Employee D takes a leave of absence to help a sister relocate to a different state and returns to work

after one year. Employee E takes a medical leave to recuperate from an industrial accident and is released by his physical therapist after one year to return to work. The rule of reason may require a loss of seniority for D and a retention of seniority for E depending on the terms of the leave.

*b. Military Service.*

(1) *General rule.* Military service and other temporary interruptions such as sick leave, personal leave, layoff, absenteeism, and leaves for union or company business normally do not terminate seniority, because they normally do not sever the employment relationship. But termination may follow if the length of these interruptions becomes inordinately long. *See* Abrams & Nolan, at 118–19; Rothschild, at 602.

(2) *Preferences under the contract and external law.* Like other examples of temporary interruptions, the contract may prescribe the effect of military service on seniority. Unlike other examples of temporary interruptions, military leave often involves an interpretation of federal statutes such as the former Veterans Reemployment Rights Act, 38 U.S.C. § 2021 (1976), and the current Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301 (2000). The arbitrator must interpret and apply contractual provisions; whether the arbitrator interprets the veterans preference statutes will be determined generally by contractual language. When the federal statutes are applied, their purpose of preventing employees from being prejudiced by military service rather than exempting them from the normal operation of the seniority system is the focus of arbitral interpretation. *See* Abrams & Nolan, at 118–19.

**Illustration:**

3. The contract requires the company to “accord each employee who applies for reemployment after conclusion of his military service . . . such reemployment rights as he shall be entitled to under existing statutes.” In this case the contract incorporates the statutes and requires the arbitrator to interpret and apply them. Another version of incorporation would be writing the language of the



statute into the contract. Arbitrators differ on whether such statutes should be interpreted and applied when the contract makes no reference to them. *See U.S. Steel Corp.*, 37 LA 1011 (Clare B. McDermott 1962).

(3) *Military service coinciding with layoff.* Assume an employee would have been on layoff at all times in the period that he or she in fact spent in military service. Under a contract such as that provided in Illustration 3, above, the layoff would have endured long enough to cause him or her to lose his or her seniority. In such cases it has been held that the employee would not be entitled to a continuation of seniority, since he or she would have been terminated under the normal seniority system.

*c. Resignation and Discharge—Voluntariness.* While discharges present few problems of interpretation for applying seniority termination provisions, an apparent resignation may raise questions about voluntariness. Arbitrators may find the critical component of voluntariness missing, if circumstances indicate that a resignation was coerced or not seriously intended. *See Abrams & Nolan*, at 119. Examples are *Albertson's, Inc.*, 65 LA 1042 (Thomas Christopher 1975) (finding a constructive discharge rather than resignation and ordering reinstatement without loss of seniority); *Koehring Co.*, 56 LA 690 (Edwin R. Teple 1971) (a grievant's emotional distress caused by the breakup of his marriage was an "extenuating circumstance" that properly negated his resignation).

## § 5.6. Work Outside the Unit

**(1) Though contractual provisions control and may require otherwise, generally employees do not accumulate seniority for service outside the bargaining unit.**

**(2) Where contractual provisions are ambiguous, arbitrators attempt to decipher the intent of parties through interpretive aids.**

**(3) When the contract is silent and no relevant past practice or bargaining history exists, arbitrators have ruled in various circumstances and often as a matter of policy that employees retain but do not accumulate seniority.**

**(4) When an employee's entire period of service with the company precedes entry into the bargaining unit, many arbitrators find this service not creditable in the absence of contractual guidance.**

**(5) The treatment of seniority accumulated in one seniority unit while an employee serves in a different seniority unit raises analogous issues.**

### **Comment:**

*a. Alternative Seniority Outcomes for Service Outside the Unit.* Agreements may provide that seniority be accumulated, completely lost, or retained but not accumulated during periods of service outside the unit. Since such provisions often apply to rank and file employees who become supervisors, most provide for retention without accumulation. This is a compromise between the union's opposition to the retention of seniority on the part of those who leave the unit for supervisory positions and management's need to attract good unit people to move to supervisory positions—a move that they would be reluctant to undertake if they did not at least retain their seniority for potential return to the unit. See *Abrams & Nolan*, at 120; *White Pidgeon Paper Co.*, 68 LA 177, 182 (John B. Coyle 1977).

*b. Ambiguous Provisions.* A particularly useful aid in examining such provisions is past practice.

*c. Nonexistent Provisions.* As a contractual creature, seniority does not thrive in circumstances not governed by the contract. Nor does it perish unless contractually ordained. Based on this reasoning, work outside the unit may not lead to the accumulation of seniority, while seniority may not be lost in the absence of a contractual provision. Arbitrator Thomas J. McDermott well articulates this approach in *Pannier Corp.*, 41 LA 1228, 1230–31 (Thomas J. McDermott 1964).

### **Illustration:**

1. An agreement provides that an employee promoted to supervisor who returns to the unit will “retain his seniority in the department that he left.” The company

sought to return the employee to the unit based on her length of service both in the unit and in the supervisory position, claiming that the supervisor could not retain her relative seniority in the department if her seniority did not accumulate during her tenure as supervisor. The union argues that “retention” is not the same as “accumulation.” Since an ambiguity exists, the arbitrator may examine past practice to resolve the ambiguity. *See Mississippi Lime Co.*, 31 LA 859 (Robben W. Fleming 1959).

*d. Prior Service.* Seniority is normally based on crediting employees for service within the unit. This creates a presumption against crediting nonunit service, which can be overcome only by evidence of the parties’ contrary intent. However, this view is not uniformly held.

### **Illustration:**

2. A contract defines seniority as “length of service with the company.” An employee works for two years as a supervisor and then takes a position within the unit. Based on the contractual language, an arbitrator might hold that the seniority date should be the employee’s initial hire date rather than the date when he joined the unit. An arbitrator actually made this ruling in *Caterpillar Tractor Co.*, 80 LA 625 (Henry L. Sisk 1983). Though plausible, the ruling has been criticized as “not consistent with what the parties most probably meant.” *See Abrams & Nolan*, at 122.

*e. Interunit Issues.* Like questions surrounding the movement of employees in and out of the bargaining unit, the contract governs the treatment of employees who transfer among seniority units. Based on reasoning such as that set forth in Comment c, above, some argue that, absent contractual guidance, seniority should be retained but not accumulated when a seniority unit is abandoned. *See Bethlehem Steel Co.*, 23 LA 538 (Ralph T. Seward 1954); *Huron Portland Cement Co.*, 9 LA 735 (Harry H. Platt 1948); *Abrams & Nolan*, at 122.

## REFERENCE

Ruben, Alan Miles, ed., Elkouri & Elkouri, *How Arbitration Works*, 6th ed. (2003), at 861–63 [hereinafter Elkouri].

### § 5.7. Merger of Seniority Lists

(1) **Merger of separate companies or consolidation of different plants or departments with separate seniority lists raises issues about the relationship between seniority systems.**

(a) **When a contract provides either a solution or a procedure for resolving these issues, the arbitrator's task may be straightforward.**

(b) **The threshold question of whether there has been a merger usually involves a functional rather than a formal analysis.**

(2) **Where no contract addresses these issues, the arbitrator may choose from any of the following five methods of reconciling seniority lists.**

(a) ***Endtailing*.** The employees of the acquiring company receive a seniority preference over those of the acquired company.

(b) ***Dovetailing*.** Seniority lists are merged based only on length of service.

(c) ***Follow-the-work*.** In a merger or consolidation employees will follow the work and seniority rights attached to the work will continue to be protected.

(d) ***Absolute Rank Principle*.** Seniority lists are integrated based on rank.

(e) ***Ratio-Rank*.** Places on the new seniority list are assigned according to the ratio of employees supplied by each group.

#### Comment:

*a. Economic Cause.* In a dynamic market economy, competitive and technological factors lead to intercompany as well as intracompany combinations. Part of this merger of operations entails the integration of groups of employees. How the task is accomplished will have important consequences for the postmerger relative status of these employees.

(1) Agreements may simply require the employer and union to agree upon the effect of the merger on seniority rights without prescribing a solution, or they may actually spell out a mandated accommodation. *Cf. Weber Truck & Warehouse*, 66 LA 1029 (William S. Rule 1976); *Bruno Food Stores*, 66 LA 999 (Ralph Roger Williams 1976).

(2) Rather than focusing on the technical requirements of a merger under securities and tax laws, arbitrators will determine whether companies have combined economically in a way that affects labor-management relations. *See Otto Milk Co.*, 51 LA 408 (Clair V. Duff 1967) (in determining that a merger had occurred, the arbitrator noted that both companies had the same headquarters, central telephone exchange, persons negotiating and administering the labor agreement, suppliers, labels and officials, that is, a functional merger had occurred).

*b. Methods of Integration.* These five methods emerged from the Kennedy survey, at 5–30. Obviously, as noted below, an agreement might include any one or some combination of more than one. However, each is supported by a rationale that is sustainable in the absence of a contractual provision explicitly dealing with one or more of the methods.

(1) *Endtailing.* This method has been an accepted practice in some industries such as printing and trucking and is thought to be justified by the unsound financial condition of the acquired company, which should be deemed incapable of supplying jobs. Sometimes questions arise concerning whether an acquisition or a merger has occurred. *Id.* at 6–10.

(2) *Dovetailing.* Since being an acquired company may not reflect on the company's financial condition, dovetailing is thought to be more equitable than endtailing. It is also more consistent with the definition of seniority in most agreements, and it is generally easy to apply. *Id.* at 12–16.

(3) *Follow-the-Work.* This method recognizes the inequity that may result from giving employees in a financially declining company the same seniority rights as those in the sound merger partner under a dovetailing approach. This

method also depends on the work retaining a distinct identity or a determinable ratio. *Id.* at 17–22.

(4) *Absolute Rank Principle.* The most important aspect of competitive status seniority is rank; it is the factor that distinguishes among employees for purposes of granting preferences. Endtailing only protects the rank of the acquiring company's employees, and dovetailing results in the loss or inequitable gain of rank. The absolute rank method prevents these losses and windfalls, while preserving the most important aspect of seniority. *Id.* at 22–26.

(5) *Ratio-Rank.* The absolute rank method works well when the number of employees in each seniority group is relatively equal. It disfavors the larger group, when the number of postmerger positions available is less than the total of the two groups of workers. Like the absolute rank system, the ratio-rank approach eliminates the inequities of dovetailing. Unlike the absolute rank method, the ratio-rank principle protects seniority rights regardless of the size of the two groups.

### Illustration:

Company A with 40 employees merges with company B with 20 employees to create a postmerger work force with 30 positions. Under the absolute rank method each company would contribute 15 employees to the postmerger work force, causing 25 employees from company A and 5 from company B to be laid off. Under the ratio-rank approach, company A would contribute 20 employees and company B would contribute 10 employees to the postmerger work force. This is a more equitable result, since company A is twice as large as company B. This illustration is an adaptation of one used in Kennedy, at 24–30.

## REFERENCES

The pioneer work on the impact of mergers and other business combinations on seniority was done by Thomas Kennedy. *See also* Kahn, Mark L., *Seniority Problems in Business Mergers*, 8 *Indus. & Lab. Rel. Rev.* 361 (1955).

## § 5.8. Contract Termination and Successorship

(1) Seniority rights are terminated upon the expiration of the agreement.

(2) Except under limited circumstances such termination occurs when the company ceases to exist because of a merger or sale of its assets to another company.

(3) When the successor's duty to arbitrate survives such a business transition, arbitrators are expected to construe the rights of employees under the predecessor agreement in light of their potential impact on successor labor relations.

### Comment:

*a. Termination.* Seniority exists only by virtue of the collective bargaining agreement. Without an agreement, seniority rights cannot be sustained. See Aaron, Benjamin, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 Harv. L. Rev. 1532, 1534 (1962); Abrams & Nolan, at 104.

*b. Successorship.* Though the Supreme Court held in *John Wiley & Sons v. Livingston*, 376 U.S. 543, 55 LRRM 2769 (1964), that the duty to arbitrate seniority and other claims arising under a predecessor agreement survives the merger of the predecessor and successor employers, the Court in later cases has restricted the reach of that case. The existence of a duty to arbitrate requires a "substantial continuity of identity in the business enterprise before and after" the change of ownership that includes retention of a majority of the predecessor employees. See *Howard Johnson Co. v. Hotel Employees, Detroit Executive Bd.*, 417 U.S. 249, 263, 86 LRRM 2449 (1974); *NLRB v. Burns Int'l Sec. Servs.*, 406 U.S. 272, 80 LRRM 2225 (1972); *John Wiley & Sons v. Livingston*, 376 U.S. 543, 55 LRRM 2769 (1964).

*c. Arbitrator's Role.* In *John Wiley & Sons v. Livingston*, 376 U.S. 543, 551–52 n.5, 55 LRRM 2769 (1964), the Court noted that "[p]roblems might be created by an arbitral award which required Wiley to give special treatment to the former

Interscience employees because of rights found to have accrued to them under the Interscience contract.” The Court then expressed a confidence “that within the flexible procedures of arbitration a solution can be reached which would avoid disturbing labor relations in the Wiley plant.” *Id.* In the actual arbitration case, it was held that the rights of the employees remained intact as long as there was “substantial continuity of identity in the business enterprise.” *Id.* at 551. When the separate identity was altered, the contract was no longer applicable. See *Interscience Encyclopedia*, 55 LA 210 (Benjamin C. Roberts 1970).

## REFERENCE

See generally Gorman, Robert A. & Finkin, Matthew W., *Basic Text on Labor Law, Unionization, and Collective Bargaining*, 2d ed. (2004), at 804–07.

## III. THE APPLICATION OF SENIORITY

### § 5.9. Seniority Versus Ability

**(1) Competitive status usually turns on considerations of seniority and ability. Agreements spell out the relationship between these factors in a variety of seniority clauses.**

**(2) Strict and modified seniority clauses are the two basic types.**

**(a) Strict seniority clauses require job preference decisions to be based solely on seniority rankings.**

**(b) Sufficient ability clauses require that the job preference be given to the senior employee who possesses sufficient ability to do the job.**

**(c) Relative ability clauses make seniority determinative if the senior and junior employees' abilities are substantially equal.**

**(d) A hybrid clause requires a comparison of both seniority and ability.**



(3) As reflected in the sufficient ability and relative ability clauses, the ability term may refer to minimum competency for the job or comparative ability among competing candidates.

(4) When the agreement does not set forth the methods or factors to be applied in determining ability, those considered by the employer must fairly and nondiscriminatorily relate to job requirements and the employee's ability to meet job requirements.

(a) Criteria typically considered are written or oral performance on aptitude tests, performance reviews, opinions of supervisors, production records, attendance or disciplinary records, education, experience, physical fitness, and trial periods on the job.

(b) Though the allocation of burdens of proof when ability is an issue in seniority cases varies from case to case, as well as from arbitrator to arbitrator, and is sometimes difficult to decipher, generally the employer must show that the bypassed senior employee is unable to perform the work or less able than the selected junior employee.

(5) When a trial period is required under the agreement without details governing the length or conditions of such period, arbitrators will determine such details based on the circumstances. Some arbitrators require the granting of a trial period when there is a reasonable doubt about the ability of a senior employee and the trial would not be unduly inconvenient, even in the absence of a contractual provision calling for a trial period.

### **Comment:**

*a. Competitive Status and the Interplay of Seniority and Ability.* An employee's competitive status for job preferences is determined vis-à-vis fellow employees on the basis of seniority, often in conjunction with other factors set forth in the seniority clause. Such preferences include layoff and reemployment, promotions, transfers, work assignments, and

overtime distribution. See Rothschild, at 569–70. Cf. Chapter 4, §§ 4.11–4.12, above.

*b(1). Strict Seniority.* Since strict seniority provisions elevate the concerns of longevity over those of efficiency, they are not typical. See Elkouri, at 872.

*b(2). Sufficient Ability.* This type of clause is also sometimes termed “senior-qualified.” Comparisons among employees are improper under this kind of clause, since the only question is whether the senior employee has minimum competency. *Id.* at 875.

*b(3). Relative Ability.* This kind of clause may be worded in a variety of ways including “substantially equal,” simply “equal,” or something more elaborate, such as “seniority shall govern unless there is a marked difference in ability.” However worded, the clause typically calls for rough equality rather than exactitude and gives preference to a junior employee only where that employee is clearly superior to a more senior employee. *Id.* at 873–75.

*b(4). Hybrid.* In general, these clauses usually provide that both seniority and ability should be considered without indicating how to weigh the factors. The factor given greater weight is the one that better separates competing employees. *Id.* at 876.

### Illustration:

The agreement has a hybrid seniority provision that reads as follows: “In filling vacancies due consideration shall be given to length of service, aptitude, and ability.” Employee A has five years seniority. Employee B has 5½ years seniority. However, employee A’s ability to perform the posted job is far greater than employee B’s ability. Under the hybrid seniority provision, the job goes to A, since the difference in ability is great, while the disparity in length of service is small. The result would be reversed were A only slightly more able than B and were B’s seniority substantially greater, for example, 10 years. See *Callite Tungsten Corp.*, 11 LA 743 (I. Robert Feinberg 1948).

*c. Meaning of Ability.* Since the language describing the requisite ability will vary from agreement to agreement, an arbitrator may be required to determine the appropriate meaning of ability through interpretation. *Compare American Sawmill Mach. Co.*, 79 LA 106, 107 (Edward L. Harrison 1982) (language requiring the job to go “to the bidder who has the apparent ability to perform the work and the greatest plant seniority” was a “sufficient” ability provision), *with Screw Conveyor Corp.*, 72 LA 434 (D. L. Howell 1979) (a provision awarding the job to the most senior applicant only where ability and physical fitness were relatively equal was a comparative ability clause).

*d. Measuring Ability.* Ultimately, the agreement dictates the relevant methods and factors to be used in determining ability. Where the agreement is silent, management’s chances of prevailing in arbitration are enhanced by the use of more objective factors. *See generally* Elkouri, at 845–55.

(1) *Criteria.* There is a nonexhaustive list of factors, since other fair methods of determining ability are thought to be available to the employer. *See Celotex Corp.*, 53 LA 746, 755 (Harry J. Dworkin 1969):

The contract contains no specific procedure governing the exercise of the company’s responsibility to determine an employee’s ability and qualifications. Nevertheless, it must be assumed that in delineating areas of responsibility, the contracting parties contemplated that a party charged with a duty or responsibility under the contract would exercise his authority in a sound, practical and rational manner, consistent with the purpose and object sought to be accomplished. It is inherent in the delegation of responsibility to management that it would fashion, adopt and utilize measures and procedures that meet the standards of fairness and reasonableness, and designed to determine ability and qualifications.

(2) *Burden of proof.* In “strict seniority” cases the employer has the burden of showing that the senior employee is not qualified to do the work. In “sufficient ability” cases the employer must show that the bypassed senior employee is incapable of performing the work. In “relative ability” cases employers are often required to show why a junior employee

is abler than the bypassed senior employee. In “hybrid” cases the employer is required to justify its weighting of ability over seniority. However, in some cases the arbitrator may impose the burden on the union to show that the employer’s determination of ability was wrong or based on discriminatory, arbitrary, or capricious considerations.

*See, e.g., Elkhart Community Sch.*, 78 LA 64, 66 (Robert S. Rifkin 1981) (hybrid); *United States Steel Corp.*, 73 LA 508, 512 (Ruth E. Kahn 1979) (relative ability); *Illinois Bronze Paint Co.*, 71 LA 850, 852 (Phillips L. Garman 1978) (sufficient ability); *Alabama Power Co.*, 18 LA 24, 25 (Whitley P. McCoy 1952) (insufficient evidence produced by company at the hearing to prove grievant incompetent under a sufficient ability provision); *Chrysler Corp.*, 5 LA 333, 336 (David A. Wolff 1946) (strict seniority). *See generally* Abrams & Nolan, at 128–31.

*e. Trial Periods.* Trial periods are short orientation periods to determine ability and are distinguishable from a training period, where an employee may undergo a relatively protracted period of instruction to acquire the knowledge and skill to perform the job. Details such as the length of a trial period or the circumstances of the trial vary from contract to contract. When an employee demonstrates a lack of qualifications, the trial period may be truncated. Some scholars argue that an arbitrator should not award a trial period in the absence of a contractual provision or binding past practice. *See* Abrams & Nolan, at 131–32; Elkouri, at 892–98.

## REFERENCES

Elkouri, at 877–921.

Rothschild, at 590–602.

### **§ 5.10. Seniority as a Mitigating Factor in Discipline**

**(1) Arbitrators routinely consider seniority as a mitigating factor in discipline.**

**(2) Despite seniority, misconduct that breaches substantial employer interests will not be excused based on years of service.**

**Comment:**

*a. Mitigation.* The classic case of mitigation involves unsatisfactory performance of a minor nature, for example, attendance problems or an occasional breach of a minor work rule. In this situation an employee's past work record might offer assurances that the employee can be rehabilitated and justify an award of reinstatement, perhaps without back pay.

*b. No Mitigation.* When an employer's interests are substantial, for example, general deterrence of physical violence against supervisors or theft of valuable company property, the full measure of discipline is likely to prevail over even long service. But seeking to find the right balance between the severity of the disciplinary action and the employee's length of service with the company seems always to be involved.

**REFERENCES**

Abrams, Roger I. & Nolan, Dennis R., *Toward a Theory of Just Cause in Employee Discipline Cases*, 1985 Duke L. J. 594.

**§ 5.11. Benefits Seniority**

**Seniority may determine the existence and amount of employee benefits.**

**Comment:**

Contrasted with job preferences governed by relative seniority (i.e., employees' seniority in relation to each other) are benefits such as paid vacations, paid holidays, pensions, severance pay, sick leave, insurance, welfare programs, bonuses, profit sharing, and other benefits geared to service. These are part of the compensation package and are governed by benefits seniority, which is usually seniority with the company rather than seniority in a particular unit within the company, without any reference to other individuals' seniority with the company. Benefits seniority and competitive or relative seniority each reward longevity in a different manner. For job preferences, there may be only one job available and several employees would like it. Someone has to have the

relatively greater seniority for purposes of deciding who should get the job, even if that relative seniority is just one day in the hiring process. In benefits seniority, on the other hand, no such line drawing is necessary. Several employees may have exceeded three or five years of service, and they would all get whatever benefits are provided for persons at that level, without any distinctions being drawn based on their seniority relative to each other.

## REFERENCES

Abrams & Nolan, at 133.  
Rothschild, at 569–71.

## IV. SUPERSENIORITY

### § 5.12. The Legality of Superseniority

**(1) Superseniority is the grant of seniority credits beyond those earned by length of service to a particular employee or group of employees.**

**(2) Superseniority as an employer economic weapon is unlawful.**

**(3) Superseniority for union officials is lawful, if it is limited to layoff and recall and awarded only to those officials who are essential to the day-to-day administration of the collective bargaining agreement.**

#### **Comment:**

*a. Economic Weapon.* In a case where the employer granted superseniority to replacement workers during a strike in an effort to return production to its prestrike levels, the Supreme Court found such a tactic to be “inherently discriminatory” and destructive of the right to strike. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 53 LRRM 2121 (1963).

*b. Union Security.* Were superseniority applicable to other job preferences or benefits, it would run afoul of §§ 8(a) (3) and 8(b) (2) of the National Labor Relations Act, prohibiting

discrimination to encourage or discourage union activity. See *Gulton Electro-Voice*, 266 NLRB 406, 112 LRRM 1361 (1983); *Dairylea Coop.*, 219 NLRB 656, 89 LRRM 1737 (1975).

### **§ 5.13. Superseniority in Arbitration**

(1) In view of the illegality of certain superseniority clauses of an agreement as set forth in § 5.12(2), above, arbitrators disagree on whether the external law or the agreement should govern where the agreement calls for the unlawful grant of superseniority.

(2) When arbitrators choose to interpret the agreement rather than external law, they often must resolve the following issues: (a) Who is entitled to superseniority? (b) When do superseniority rights attach and expire? (c) What is the role of ability? (d) Does superseniority apply for all layoffs? and (e) Does the superseniority provision apply to other job changes?

(a) Typically, an arbitrator will not grant superseniority where the agreement has failed to do so, and the agreement will specify the terms of the superseniority grant.

(b) Superseniority rights attach when the employee assumes the union office and expire when the term of office ends.

(c) Arbitrators must give effect to provisions conditioning the exercise of superseniority upon the ability to perform the job.

(d) In the absence of specific contract language to the contrary, arbitrators apply superseniority provisions in all layoffs regardless of duration.

(e) Unless past practice or other evidence reveals a contrary intent, arbitrators will limit superseniority to layoff and recall situations.

#### **Comment:**

*a. External Law.* This debate reflects the competing views of members of the National Academy of Arbitrators that

informed discussions at meetings during the 1960s and 1970s. See Edwards, Harry T., *Labor Arbitration at the Crossroads: The Common Law of the Shop Versus External Law*, 32 Arb. J. 65 (June 1977); Feller, David E., *The Coming End of Arbitration's Golden Age*, in 29 NAA 97 (1976); Meltzer, Bernard D., *Ruminations About Ideology, Law, and Labor Arbitration*, in 20 NAA 1 (1967); Howlett, Robert G., *The Arbitrator, the NLRB, and the Courts*, *id.* at 67; Mittenthal, Richard, *The Role of Law in Arbitration*, in 21 NAA 42 (1968); St. Antoine, Theodore J., *Judicial Review of Labor Arbitration Awards*, 75 Mich. L. Rev. 1137 (1977). Compare *Heil Quaker Corp.*, 79 LA 513 (Carl Cabe 1982), with *Hunter Eng'g Co.*, 82 LA 483, 485 (Reginald H. Alleyne 1984). See also § 2.15, above.

*b. Contractual Issues.* The choice to interpret the contract rather than external law usually requires a focus on several issues.

(1) *Entitlement.* Superseniority is lost when the position is no longer held. See, e.g., *Matlock Trailer Corp.*, 75 LA 263 (Donald P. Crane 1980).

(2) *Attachment and expiration dates.* Such timing may have an immediate impact upon the seniority rights of other employees.

### **Illustration:**

A company tells the grievant that she is to be transferred from the cutting department to the welding department. A few days later, but before her transfer, she is elected union steward and promptly notifies the foreman. Three days later the company carries out its previously announced intent to transfer the grievant. She grieves the transfer. The arbitrator upholds the grievance based on the contract language prohibiting the transfer of representatives. The illustration is taken from *Koehring Co.*, 64 LA 1080 (Gerald Cohen 1975). See also *Keller Indus.*, 63 LA 1230, 1234 (A. Howard Bode 1974). See generally *American Safety Razor Co.*, 69 LA 157, 161 (Max B. Jones 1977) (shop steward lost superseniority when voted out of office).



(3) *Ability*. Though the policy of continuing contract administration is still present, the parties have agreed upon a provision that favors the employer's interest in efficiency. See *Kennecott Corp.*, 80 LA 1142 (Mei L. Bickner 1983).

(4) *Application to all curtailments*. This approach recognizes the continuing need for the union official as contract administrator. See *Litton Bus. Sys.*, 78 LA 1145 (Gladys W. Gruenberg 1982); *American Precision Indus.*, 78 LA 247 (Arthur J. D. Cook 1982).

(5) *Other job changes*. As usual the task in these cases is deciphering party intent. See *Styberg Eng'g Co.*, 77 LA 780, 782 (William W. Petrie 1981); *District Concrete Co.*, 74 LA 719 (Arnold Ordman 1980).

## V. SENIORITY AND DISCRIMINATION

### § 5.14. The Legal Context of Seniority Agreements

**(1) Federal discrimination law may ultimately determine the validity of various seniority arrangements under collective bargaining agreements.**

**(2) Generally, bona fide seniority systems are enforceable against discrimination claims.**

#### Comment:

*a. Federal Discrimination Law Generally.* Title VII of the Civil Rights Act of 1964 makes an employer's discrimination regarding the employment relationship and conditions of employment on the basis of race, color, religion, sex, or national origin an unlawful employment practice. Section 703(h) specifically insulates bona fide seniority systems from the impact of the general prohibition. 42 U.S.C. § 2000e-2(a), (h) (2000). For a discussion of the impact of the ADA on seniority systems, see Comment *c.*, below.

*b. Bona Fide Seniority Systems.* Bona fide seniority systems are those established for legitimate business reasons and not for the purpose of discriminating in ways prohibited by

Title VII. Though the operation of a bona fide seniority system may be affected by a finding of discrimination under Title VII, such a system is not rendered unlawful because it perpetuates pre-Act discrimination. The bona fides of a seniority system is a matter of intent, not effect, and that is a pure question of fact. See *Pullman-Standard v. Swint*, 456 U.S. 273, 289–90, 28 FEP Cases 1073 (1982).

Section 703(h) reads in relevant part as follows:

Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

See *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976) (§ 703(h) did not prevent make whole remedies, such as “constructive seniority,” designed to restore “the economic status quo that would have obtained but for the company’s wrongful act”).

c. ADA. The Americans With Disabilities Act (ADA) prevents an employer from discriminating against a qualified individual with a disability. 42 U.S.C. § 12112(a) (2000). A qualified individual includes “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions” of the relevant employment position. 42 U.S.C. § 12111(8) (2000). Discrimination within the meaning of these provisions includes not making reasonable accommodations to the physical or mental limitations of an otherwise qualified individual, including assignment to a vacant position, unless the accommodation would impose an undue hardship upon the operation of the business. 42 U.S.C. §§ 12111(99)(B) and 12112(b)(5)(A) (2000). In *US Airways, Inc. v. Robert Barnett*, 535 U.S. 391, 405 (2002), the Court held that an accommodation that would require the employer to violate neutral seniority rules would be unreasonable in the usual case unless the plaintiff could “show that special circumstances warrant a finding that, despite the presence of a seniority system (which the ADA may not trump in the run of cases),

the requested ‘accommodation’ is ‘reasonable’ on the particular facts.”

### **Illustrations:**

1. Employee A applies for a job with the employer after July 2, 1965, the effective date of the statute. She is denied the job based on gender. Employee A prevails in a Title VII action against the employer. The Court may properly remedy the Title VII violation by awarding her “constructive seniority” that places A at the position on the seniority list that she would have occupied in the absence of the discriminatory act against her. She would enjoy greater seniority than those hired after the date of her denial of employment.

2. Before July 2, 1965, the employer prevented the employees in group X from transferring into the maintenance department because of race, permitting the employees in group Y to transfer instead. Group X employees successfully transferred into the department at the first opportunity after July 2, 1965. However, when promotions were later awarded in the maintenance department based on the employer’s bona fide seniority system, the positions went to employees in Group Y rather than those in Group X. This perpetuation of past discrimination under the employer’s bona fide seniority system does not violate Title VII.

3. An employee, RB, with a disability requests a mailroom assignment as a reasonable accommodation of his disability. More senior employees bid on the mailroom assignment, and they are entitled to the assignment in preference to RB under the seniority system. RB can show that the employer retains the right to change the seniority system unilaterally and frequently exercises that right. The employer’s assignment of RB to the mailroom over the more senior bidders would violate the neutral seniority rules and be an unreasonable accommodation in the run of cases. However, RB’s showing of the employer’s manipulation of the seniority system would constitute special circumstances making the accommodation reasonable in this case.

## REFERENCES

Elkouri, at 843–57.

Greenbaum, Marc, *Arbitration and the Civil Rights Laws*, in Labor and Employment Arbitration, 2d ed., eds. Bornstein, Tim, Gosline, Ann & Greenbaum, Marc (1997), § 44.06.

### § 5.15. **Arbitral Seniority Decisions in Discrimination Cases**

**(1) Discrimination issues often present the problem of reconciling seniority agreements with discrimination law.**

**(2) Reconciliation is straightforward, where the agreement specifically incorporates federal law or the prohibitory language of Title VII, or specifically voids the agreement if it conflicts with federal law.**

**(3) When reconciliation is not possible, arbitrators differ on whether to give priority to external law or the agreement.**

**(a) To be enforceable by the courts, an arbitration award must draw its essence from the agreement, not violate the law, and not violate public policy.**

**(b) Arbitration decisions in these cases may depend upon whether the employer's entry into a conciliation agreement or consent decree is with the agreement or approval of the union.**

#### **Comment:**

*a. The Problem of Reconciling Seniority Agreements and the Law.* Unlike garden variety cases where a grievant is claiming the denial of some job preference based on one of the prohibited categories under Title VII, seniority cases tend to deal with reverse discrimination issues. The grievance may involve a claim that an employer's action affecting competitive status violated the seniority provision of the agreement. Elkouri, at 845–49.

#### **Illustration:**

The employer enters into a conciliation agreement with the Equal Employment Opportunity Commission

(EEOC) requiring it to maintain a certain proportion of women in the event of a layoff. The collective bargaining agreement covering unit employees provides that layoffs be made by reverse seniority. The employer then lays off more senior employees while retaining women of lesser seniority pursuant to the conciliation agreement. When the layoff occurs, senior male employees file a grievance claiming that the employer's implementation of the conciliation agreement violates the collective bargaining agreement. The illustration is an adaptation of *W.R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757, 113 LRRM 2641 (1983).

*b. Specific Incorporation of Title VII Restrictions.* Many agreements refer to Title VII, incorporate its language verbatim, incorporate its language more generally, or contain a severability provision voiding the agreement to the extent that it conflicts with external law. One form of specific incorporation is where the parties agree to modify contractual seniority provisions in order to comply with some affirmative action plan. Under any of these circumstances the agreement furnishes a vehicle for the arbitrator's reconciliation assignment. See Elkouri, at 846; *Operating Eng's Employers*, 72 LA 1223 (Jay Kramer 1979) (the arbitrator used the agreement's antidiscrimination provision to deprive the exclusive hiring hall agreement of its effect in light of a judicial finding of illegality). See also *Stardust Hotel*, 61 LA 942 (Edgar A. Jones, Jr. 1973) (the arbitrator construed the consent decree as not requiring noncompliance with the seniority provision).

*c. When Reconciliation Is Impossible.* Where the agreement furnishes no basis for reconciliation, the arbitrator is confronted with a dilemma. If the agreement is ignored and the conciliation agreement or consent decree is applied, the award may not draw its essence from the agreement. If the agreement is applied and the conciliation agreement or consent decree ignored, the award may violate public policy, though its effect may be the same.

(1) Arbitrators are likely to honor the conciliation agreement, where the employer entered it with the agreement or approval of the union. It should be noted that such an agreement or approval is different from a modification of the

seniority provision. Some cases involve the threshold issue of whether the union gave its approval or consent. *See* Elkouri, at 846 n. 39 and cases cited.

(2) Where the conciliation agreement is entered without the union's consent, the arbitrator may or may not give priority to the conciliation agreement. *W.R. Grace & Co. v. Rubber Workers Local 759*, above, is an example of a case where the employer unilaterally entered into a conciliation agreement with the EEOC. One arbitrator gave priority to the conciliation agreement, while the other upheld the collective bargaining agreement.

(3) If the award draws its essence from the agreement and does not violate the law or a dominant public policy, it is enforceable even if a contrary award would be similarly enforceable. In *W.R. Grace* the Supreme Court enforced the award of the arbitrator who enforced the collective bargaining agreement over the conciliation agreement, saying that it drew its essence from the agreement and did not violate law or public policy. The Court did leave open the possibility that the award would have violated the agreement if it had ordered the protected employees laid off in defiance of the lower court order.

## REFERENCE

Elkouri, at 842-57.

## Chapter 6

# Discipline and Discharge

*Gladys Gershenfeld, Chapter Editor\**

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## I. STANDARDS FOR DISCIPLINE AND DISCHARGE

*Dennis R. Nolan\**

### § 6.1. The Just Cause Principle

**An employer may discipline an employee for just cause.**

#### **Comment:**

*a. Definitions.* As used in this chapter, the term “discipline” means any punishment up to and including discharge. Terms like “cause,” “good cause,” “proper cause,” “sufficient cause,” and so on are, unless otherwise agreed, synonyms for just cause.

#### *b. Origin of the Principle.*

(1) The just cause principle is normally contractual. It arises from collective bargaining agreements, individual contracts of employment, and, in some jurisdictions, from the implied covenant of good faith and fair dealing. It may also stem from statutory protections, such as those provided to public sector employees or, in a few jurisdictions, to private sector employees.

(2) In some situations, the just cause principle may be implied in the employee’s contract of employment. For example, an employer’s statements in employee handbooks, disciplinary policies, or other documents may establish a promise to discipline only for just cause. The parties’ past practices or the industry’s practices may also create legitimate expectations that discipline will be only for just cause.

(3) In other situations, however, the absence of an express just cause provision may demonstrate a lack of agreement on the just cause principle. For example, an employer’s rejection of an employee’s or a union’s request to incorporate the principle in an individual or collective contract may make the implication of a just cause requirement untenable. Absent

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an express or implied agreement on the just cause principle, an employer's disciplinary decisions will be subject only to prohibitions on circumvention of an employment contract's substantive provisions or (in some jurisdictions) to an overriding requirement of good faith and fair dealing.

### Illustrations:

1. An employer suspended the grievant for accumulating nine points under the company's no-fault attendance plan. ("Accumulation of six points during any rolling six-month period leads to suspension, and nine points to discharge.") The collective bargaining agreement contained no limitation on the employer's power to discipline employees. The company therefore argued that the grievance, which alleged that the suspension was not for just cause, was not arbitrable. *See Westvaco, Va. Folding Box Div.*, 92 LA 1289, 1289 (Dennis R. Nolan, 1989). Most arbitrators would find that the case is arbitrable because the just cause standard is normally implied in all collective agreements. *See* Ruben, Alan Miles, ed., Elkouri & Elkouri, *How Arbitration Works*, 6th ed. (2003), at 926 n.7 and cases cited [hereinafter Elkouri].

2. The facts are otherwise as stated in Illustration 1, with the addition of this clause:

The Company reserves all the rights, powers and authority possessed by it except insofar as they are specifically surrendered or abridged by express provisions of this Agreement. . . . This Agreement is the only agreement between the parties and is intended to satisfy all demands of the Union with respect to hours, rate[s] of pay and working conditions.

That clause bars an arbitrator from inferring further limitations on management rights. The grievance is therefore not arbitrable on the claim of just cause. However, if there is a claim that the employer suspended the grievant to undercut other provisions (e.g., the seniority or antidiscrimination clauses), the dispute would be arbitrable. Moreover, even under an agreement without a just cause clause, neither side may act arbitrarily or capriciously. *See Westvaco, Va. Folding Box Div.*, 92 LA 1289, 1290 (Dennis R. Nolan 1989).

## REFERENCES

Because the just cause principle is so widespread and so fundamental, the literature on it is immense. Among the more comprehensive sources are the following:

Abrams, Roger I. & Nolan, Dennis R., *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 85 Duke L.J. 594 (1985) [hereinafter Abrams & Nolan].

Bloch, Richard I., *The Changing Face of Just Cause: One Standard or Many?* 53 NAA 20 (2001) (discussing the impact of external laws on the determination of just cause in labor arbitration).

Elkouri, at 924–1000.

Jennings, Ken, Sheffield, Barbara & Wolters, Roger S., *The Arbitration of Discharge Cases: A Forty-Year Perspective*, 38 Lab. L.J. 33 (1987).

Koven, Adolph M. & Smith, Susan L., *Just Cause: The Seven Tests*, 2d ed., revised by Farwell, Donald F. (1992) [hereinafter Koven & Smith].

Redeker, James R., *Employee Discipline: Policies and Practices* (1989).

Zack, Arnold M., *Just Cause and Progressive Discipline*, in Bornstein, Tim, Gosline, Ann & Greenbaum, Marc, eds., *Labor and Employment Arbitration*, 2d ed. (1997), Chapter 19 [hereinafter Zack].

Zack, Arnold M. & Bloch, Richard I., *The Arbitration of Discipline Cases* (1979).

The "seven tests" of just cause enunciated in several of Carroll R. Daugherty's cases (notably *Enterprise Wire Co.*, 46 LA 359 (1966)) have provoked a great deal of comment, including the Koven & Smith book cited above. For an alternative, and critically convincing, view of Daugherty's approach, see Dunsford, John E., *Arbitral Discretion: The Tests of Just Cause: Pt. I*, in 42 NAA 23 (1990).

## § 6.2.      Procedural Rights

**The just cause principle entitles employees to due process, equal protection, and individualized consideration of specific mitigating and aggravating factors.**

### Comment:

*a. Due Process Rights.* On the employee's due process rights, see §§ 6.12 to 6.20, below. On the employee's rights

against discrimination under statutory and derivative contractual standards, *see* §§ 6.21 to 6.23, below.

A difficult problem for arbitrators is the occasional “collision of substantial grounds for discipline with substantial violations of due process,” *Associated Grocers of Colo.*, 82 LA 414, 419 (Jerome Smith 1984).

### **Illustration:**

1. A supervisor informed his superiors that he had seen the grievant steal money from the supervisor’s car. The company accepted the supervisor’s report and fired the grievant without giving her a chance to respond to the allegation. The discharge violated the grievant’s right to due process and was therefore not for just cause. If the company can prove the grievant’s guilt, however, most arbitrators would limit the remedy, perhaps to back pay without reinstatement (or in some cases, to reinstatement without back pay). *See American Bakeries Co.*, 77 LA 530 (Lee Modjeska 1981). *See also Kohl’s Food Stores*, 117 LA 660 (Aaron S. Wolff 2004) (discharge for harassment and threats overturned where the employer didn’t include the employee in the investigation and relied purely on hearsay).

*b. Mitigating Factors.* Mitigating factors include an employee’s seniority, good work record, good faith, the absence of serious harm from the employee’s conduct, and, in appropriate cases, the presence of provocation or misrepresentation leading to an employee’s misconduct.

### **Illustration:**

2. During her first week on the job, the grievant was subjected to continued hazing and horseplay from fellow employees, notably her foreman and her benchmate. The hazing was typical for new employees at the company, but the grievant did not know that. On her third day on the job, she grew so frustrated she pushed her benchmate out of the way and left the workroom. The benchmate was not hurt but still complained to the supervisor, who fired

the grievant for violating the company's rule against "assaulting another employee." Because of the provocation, the arbitrator reduced the discharge to a written warning.

*c. Aggravating Factors.* Aggravating factors include such things as the seriousness, willfulness, or repetition of the employee's misconduct and the presence of serious harm stemming from that misconduct.

## REFERENCES

On employees' procedural rights, see Abrams & Nolan; Fleming, Robben W., *Some Problems of Due Process and Fair Procedure in Labor Arbitration*, 13 Stan. L. Rev. 235 (1961); Wirtz, W. Willard, *Due Process of Arbitration*, in 11 NAA 1 (1958); Zack. On aggravating and mitigating factors, see Koven & Smith, at 394–97.

### § 6.3. Last-Chance Agreements

**An arbitrator must abide by the terms of a last-chance agreement fairly negotiated between an employer, an employee, and (where applicable) the union representing the employee.**

#### Comment:

*a.* Occasionally parties may settle a disciplinary grievance with a "last-chance" agreement. These agreements vary in terms but usually grant the employer discretion to discharge the employee for any subsequent offense (sometimes for a subsequent *similar* offense) and commonly state or imply that the usual procedural protections will not apply. One of the most common occasions for last-chance agreements is the reinstatement of an employee discharged for problems related to substance abuse. See Vaughn, M. David, et al., *Drug and Alcohol Issues*, in Bornstein, Tim, Gosline, Ann & Greenbaum, Marc, eds., *Labor and Employment Arbitration*, 2d ed. (1997), Chapter 18, § 18.12(3). On last-chance agreements for "troubled" employees, see § 6.29, below.

*b. Preclusive Effect.* Depending on its exact phrasing, the last-chance agreement may definitively resolve the question

of whether a given offense provides a legitimate basis for discharge. Such an agreement may bar an arbitrator from imposing a further requirement of proportionality or progressivity, but it normally would not bar inquiry into the question of whether the employee committed the final offense charged by the employer.

### Illustration:

1. Following the grievant's conviction for possession of cocaine, his employer threatened to discharge him for using illegal drugs. The grievant, his union representative, and the company entered into a last-chance agreement that provided for his reinstatement on the condition that he successfully complete a rehabilitation program of the company's choosing. The agreement obliged him to submit to random testing and provided that if he tested positive during the first year after reinstatement, he would be discharged "without recourse or appeal." During the grievant's rehabilitation, the company transferred him to another state but failed to choose a new treatment program for him. Shortly after his arrival at the new work site, the grievant failed a random drug test. The company argued that his grievance was not arbitrable and that he violated the terms of the agreement.

The arbitrator held that the grievance was arbitrable because the company's own failure to comply with the agreement deprived it of the benefit of the "without recourse or appeal" provision. The clear implication was that, but for the company's breach, the dispute would not have been arbitrable. Turning to the merits of the case, the arbitrator held that the positive test justified the discharge. *See C II Carbon, L.L.C.*, FMCS Case No. 95-06834, 1996 WL 787755 (John F. Caraway 1996) (unpublished decision). *See also International Paper Co.*, 117 LA 1426 (Hyman Cohen 2002) (lack of termination date in last-chance agreement made it invalid and thus arbitrable).

*c. Relationship to the "Just Cause" Requirement.* Depending on its wording, the agreement may or may not replace the just cause requirement. Because the just cause requirement is so fundamental, an arbitrator should not, without

express language, presume the parties intended to abandon it. If the agreement does replace the just cause requirement, the arbitrator's authority may be limited to interpreting the last-chance agreement itself and determining whether the employee actually violated that agreement.

*d. Necessary Parties.* In a unionized workplace, no employee may enter into an agreement that conflicts with the collective bargaining agreement. The union, however, is generally free to modify the collective agreement, even in the context of a last-chance agreement affecting a single employee. If the last-chance agreement conflicts with the collective agreement, the union must be a party to it before it will be binding.

### **Illustration:**

2. The grievant signed a last-chance agreement when her employer threatened to discharge her for repeated tardiness. The agreement provided that the company could discharge her for any further tardiness within the next year and that the company's decision was "not subject to the arbitration procedure." She neither sought nor was offered the union's advice when she signed the agreement. Six months later she was 15 minutes late to work after a collision between a car and a truck blocked the road to the plant. The company fired her. The union filed a grievance on her behalf, claiming that the discharge violated the collective bargaining agreement's just cause provision. The company claimed the grievance was not arbitrable because of the last-chance agreement. The grievance is arbitrable. No agreement between an individual employee and the employer can amend the collective bargaining agreement.

*e. Duration.* A well-drafted last-chance agreement will specify an expiration date, after which the employee will be subject to the same disciplinary rules and procedures applicable to other employees. If the agreement does not state how long it lasts, an arbitrator should find that the parties intended it to last a "reasonable" time, depending on the nature of the offense, the parties' practices, and other relevant factors.

## REFERENCES

The best works on last-chance agreements include Peterson, Donald J., *Last Chance Agreement*, 52 Disp. Resol. J. 37 (Summer 1997); Grimstead, Kenneth, *The Arbitration of Last Chance Agreements*, 48 Arb. J. 71 (Mar. 1993); and Snow, Carlton J. & Pringle, Janine Catherine, *Should Arbitrators Have the Last Word on "Last Chance" Settlement Agreements?* 27 Willamette L. Rev. 513 (1991).

### § 6.4. Constructive Discharge

**A constructive discharge remains a discharge, and is therefore subject to the just cause principle. Whether a purported resignation is voluntary or is the result of constructive discharge is a question of fact for the arbitrator.**

#### Comment:

*a. Discharge or Quit.* Employers often tell employees that they will be discharged if they do not resign. An arbitrator must consider various circumstances in order to determine whether the employee has voluntarily quit, in which case he or she would have no basis for grieving, or whether the "quit" is in fact a constructive discharge. Among the relevant factors are the employee's state of mind, the amount of time given the employee to consider the options, and whether the employee was represented by a union.

#### Illustration:

Married grievants had refused to support a supervisor who was being investigated for improper contracting practices. He then made veiled threats that he would tell the police that they were selling drugs or had abused their children. They quietly resigned, then changed their minds and tried to get their jobs back. The arbitrator held that the resignations were involuntary and ordered their reinstatement. *Federal Aviation Administration*, 106 LA 38 (Charles H. Frost 1996).



## REFERENCES

Elkouri, at 894–96.

Katz, Lawrence E., *Non-Disciplinary Termination*, in Bornstein, Tim, Gosline, Ann & Greenbaum, Marc, eds., *Labor and Employment Arbitration*, 2d ed. (1997), Chapter 22 [hereinafter Katz].

### § 6.5. Reasons Constituting Just Cause

(1) The essence of the just cause principle is the requirement that an employer must have some demonstrable reason for imposing discipline. The reason must concern the employee's ability, work performance, or conduct, or the employer's legitimate business needs.

(2) *Ability and performance.* An employer may discipline an employee for failure to meet reasonable work standards.

(3) *Conduct.* An employer may discipline an employee for violations of stated or generally known and reasonable work rules and expectations.

(4) *Business necessity.* A termination for business reasons other than the employee's ability, work performance, or conduct is normally not regarded as discipline. A layoff for lack of work, for instance, is not disciplinary. In rare cases, however, a termination that is in fact within the classification of disciplinary and that would not otherwise be permissible may be justified for business reasons. See comment *d.*, below.

(5) Just cause is not synonymous with "fault." An employee may violate work rules and merit discipline even if the employer cannot prove the employee actually intended the violation.

#### Comment:

*a. The Fundamental Understanding.* Part of the fundamental understanding between every employee and employer is an expectation that the employee will provide satisfactory work. Among other things, satisfactory work includes prompt

and regular attendance, obedience to reasonable orders and work rules, production of a sufficient quality and quantity of work, and avoidance of conduct at or away from work that would interfere with the employer's ability to carry on its business effectively.

*b. Ability and Performance.* Before disciplining an employee for failure to provide satisfactory work, the employer must first supply the necessary preconditions, including a safe workplace, appropriate tools and raw materials, competent supervision, and relevant training. If the employer has fulfilled its responsibilities, employees must fulfill theirs or face the consequences. The employer's standards of quality and quantity must be reasonable, of course, and must apply equally to all employees. Moreover, warnings and opportunities to correct deficiencies are especially important when the problem is the employee's perceived lack of ability rather than the employee's misconduct.

*c. Conduct.*

(1) It is unfair to punish an employee for conduct the employee has no reason to know would be unacceptable. Normally that elemental requirement of justice will mean that the employer must announce the rules it expects the employees to follow and must give some indication of the penalties that will follow a breach. Some rules and expectations are so obvious, however, that employees are presumed to know them. These include prohibitions on theft, fighting, lawbreaking, and insubordination. Because these "capital offenses" are so well known and so serious, they do not require express rules to support discipline, and may not require the use of progressive discipline; see § 6.7(3), below.

(2) Employees normally must obey even those rules or orders with which they disagree, and may challenge them after the fact through the grievance and arbitration process. On the "obey now, grieve later" rule, see § 6.8, below.

(3) While an employer's rules normally will be reasonable only to the extent they govern conduct on the employer's time or property, some types of off-duty conduct may subject the employee to discipline. On the scope of an employer's power to discipline for off-duty misconduct, see § 6.6, below.

(4) Most rules designed to facilitate safe production and otherwise advance an employer's business interests will be sufficiently reasonable to justify discipline for their breach. Unreasonable work rules include those that would violate an agreement or binding past practice, or would force an employee to commit an illegal, unethical, or immoral act, or would impermissibly control an employee's conduct off the employer's time and premises.

*d. Business Necessity.* Normally an employer's actions in response to business developments such as lack of suitable work are not considered disciplinary. Other legitimate business interests may justify formal discipline. Among those interests are the justified refusal of other employees or of customers to work with an individual and the employee's failure to obtain a qualification required by applicable law or contract, such as a security clearance for work in a nuclear power plant.

*e. No-Fault Discipline.*

(1) In some circumstances an employer may discipline an employee for conduct carrying with it no indication of "fault." This raises a potential inconsistency because the common understanding of the term "discipline" is the imposition of penalties because of a person's misconduct. In these cases, however, discipline may still be appropriate. Discipline can help to determine whether the employee's problems are voluntary or involuntary. It also serves to give the employee proper warning.

(2) For example, a consistent inability to produce satisfactory work might justify discharge of employees who are doing their best. The discipline may be necessary to give the employee every opportunity to improve before the employer severs the employment relationship. Similarly, a "no-fault" attendance policy may justify discipline for repeated unexcused absences or tardiness even though the employee asserts a plausible explanation for each incident.

**Illustration:**

A software company hired the grievant as a computer programmer in February of this year. Despite receiving

the standard training, she proved unable to meet the production standards applied to all employees. She either could not produce sufficient work in the allotted time or produced work that failed quality tests. Her supervisors counseled her and worked with her to improve her work. When that failed, they warned her, suspended her, and finally discharged her. Even though there is no evidence that her problems were intentional or negligent, her lack of competence justified the discharge.

(3) Just as there can be discipline without fault, so can there be fault without an occasion for discipline. Some morally blameworthy conduct (particularly that committed off the employer's time or premises) may not constitute just cause for discipline. *See also* § 6.6, below, on discipline for off-duty conduct, and § 6.28, below, on the "troubled employee."

## REFERENCES

All the sources cited under § 6.1, above, are relevant to this topic. On the "fundamental understanding," *see* in particular Abrams & Nolan. On the duty to obey reasonable work rules, *see* Koven & Smith. On reasons in general for discipline, *see* Goldsmith, Steven J. & Shuman, Louis, *Common Causes for Discipline*, in Bornstein, Tim, Gosline, Ann & Greenbaum, Marc, eds., *Labor and Employment Arbitration*, 2d ed. (1997), Chapter 16. On no-fault discipline, *see* Katz. On discipline for misconduct attributable to substance abuse or mental illness, *see* §§ 6.24 to 6.30, below.

## § 6.6. Discipline for Off-Duty Conduct

(1) *The requirement of nexus.* An employer may discipline an employee for off-duty conduct if there is some demonstrable and harmful connection, or "nexus," between the conduct and the employer's legitimate business interests.

(2) The employer may show the required nexus in several ways:

(a) Conduct involving harm or threats to supervisors, co-workers, customers, or others with an actual or potential business relationship with the employer;

**(b) Conduct that could seriously damage an employer's public image;**

**(c) Conduct that reasonably makes it difficult or impossible for supervisors, co-workers, customers, or others with an actual or potential business relationship with the employer to deal with the employee; or**

**(d) Public attacks by the employee on the employer, supervisors, or the employer's product.**

### **Comment:**

*a. Necessity of Nexus.* Employers are not society's chosen enforcers. They have no general authority to punish employees for illegal or offensive off-duty conduct that has no significant impact on the employer's business. Some collective bargaining agreements specify the off-duty conduct for which employers may discipline employees. Such a provision will eliminate the necessity of proving a causal nexus.

*b. Harm or Threats of Harm to Individuals Connected With the Enterprise.* In some situations the off-duty conduct's nexus is obvious. Attacking a supervisor just outside the plant gate, for example, has virtually the same effect on the business as would an attack just inside the gate. In other cases the nexus may not be so clear. A fight at a bar between two employees might or might not provide the required nexus. If the reason for the fight was work related and the employees would have to work together every day, the impact on productivity or safety could be severe. A fight for some other reason between two employees who never see one another at work, in contrast, probably would not provide the needed nexus.

### **Illustration:**

1. The grievant, a letter carrier, was charged with sexually abusing his young daughter. In a plea bargain, he pled *nolo contendere* to the lesser charge of lewd and lascivious assault on a minor child. His employer, the Postal Service, discharged him out of fear that he presented a danger to children on his route, but it presented no evidence to support its fear. There was no proof the

grievant ever had engaged or ever would engage in misconduct with anyone outside his family, and his job offered little opportunity for extended contact with children. The discharge was not for just cause, because the employer did not prove the required nexus. *See U.S. Postal Serv.*, 89 LA 495 (Dennis R. Nolan 1987). On an alternative justification for discharge in such cases, harm to the employer's public image, *see* Comment *c*, below.

*c. Harm to the Employer's Public Image.* A teacher convicted of child abuse away from work and a drug counselor convicted of selling drugs away from work are clear examples of situations in which the employer's image might be irreparably harmed if it retained the offending employee. In both cases the misconduct is closely related to the nature of the employee's job. Nevertheless, the employer must prove the reasonableness of its fear for its public image. Mere assumptions will not suffice. If a lawbreaking employee is not publicly identified with the employer, for example, there may be no serious harm to the employer's image and therefore no reason to discipline the employee.

### Illustrations:

2. A telephone company fired the grievant for making obscene and harassing calls to a customer while off duty and away from the company's property. His arrest and subsequent plea bargain were matters of public record. His off-duty conduct affected the company's business interests because it could not responsibly send him onto a customer's premises. Customers must be able to trust utility employees sent into their homes. *See Southern Bell Tel. & Tel. Co.*, 75 LA 409 (Laurence E. Seibel 1980).

3. As a result of the grievant's well-publicized off-duty activities with the Ku Klux Klan, his employer, a local bus company, faced the prospect of a boycott by the local minority community. His off-duty conduct harmed the company's image and justified his discharge. *See Baltimore Transit Co.*, 47 LA 62 (Clair V. Duff 1966).

*d. Inability to Work With Others.* An employee notoriously involved with racist activities may so offend other

employees or customers as to make productive work unlikely. Again, the employer must prove that the misconduct actually had the alleged effect. Assumptions and anonymous complaints will not suffice. Unreasonable reactions by fellow employees or customers do not provide a basis for discipline. Their irrational fear of AIDS, for example, is no reason to discharge an HIV-positive employee. See Abrams, Roger I. & Nolan, Dennis R., *AIDS in Labor Arbitration*, 25 U.S.F. L. Rev. 67 (1990).

*e. Attacks on the Employer's Interests.* Even at common law, employees have a duty of loyalty to their employer. At a minimum, the duty of loyalty means the employee must refrain from deliberately interfering with the employer's business interests. Public attacks on the employer or its representatives obviously breach this duty. Private conversations including critical comments about the employer, in contrast, do not provide just cause for discipline. Differences in the political arena present some of the knottiest problems. An employee who opposes the employer's plans to expand its business or who lobbies to ban the employer's product normally does not belong in the employment relationship. On the other hand, supporting a candidate the employer believes would be bad for business is not enough to demonstrate nexus.

### **Illustration:**

4. The grievant gave two weeks' notice of resignation in protest over her newspaper employer's decision to airbrush the penis off the Infant Jesus in a published photo of Veronese's *Holy Family*. During the notice period, she disclosed the incident to a competing paper that made a headline story out of it. She then attempted to withdraw her resignation notice. Her subsequent discharge was for just cause because she had breached her duty of loyalty to her employer. See *Los Angeles Herald Examiner*, 49 LA 453 (Edgar A. (Ted) Jones 1967). Note also Arbitrator Calvin L. McCoy's negative answer to his rhetorical question, "Can you bite the hand that feeds you, and insist on staying for future banquets?" in *Forest City Publishing Co.*, 58 LA 773, 783 (Calvin L. McCoy 1972).

## REFERENCES

The authoritative source for information on employer regulation of employees' off-duty conduct is Hill, Marvin F., Jr. & Wright, James A., *Employee Lifestyle and Off-Duty Conduct Regulation* (1993). Regarding Illustration 4, see *id.* at 228–34. See also Elkouri, at 938–42; Hill, Marvin F., Jr. & Kahn, Mark L., *Discipline and Discharge for Off-Duty Misconduct: What Are the Arbitral Standards?* in 39 NAA 121 (1987); Koven & Smith; Marmo, Michael, *Public Employees: On-the-Job Discipline for Off-the-Job Behavior*, 40 Arb. J. 3 (June 1985). See also § 6.26 on off-duty conduct by “troubled employees.”

### § 6.7. Magnitude of Discipline; Progressive Discipline

(1) A given “cause” may justify some types of discipline but not others. The employer’s chosen level of discipline itself must be “just.”

(2) *Proportionality.* The level of discipline permitted by the just cause principle will depend on many factors, including the nature and consequences of the employee’s offense, the clarity or absence of rules, the length and quality of the employee’s work record, and the practices of the parties in similar cases. Discipline must bear some reasonable relation to the seriousness or the frequency of the offense.

(3) *The progressive discipline principle.*

(a) Unless otherwise agreed, discipline for all but the most serious offenses must be imposed in gradually increasing levels. The primary object of discipline is to correct rather than to punish. Thus, for most offenses, employers should use one or more warnings before suspensions, and suspensions before discharge.

(b) “*Capital offenses.*” Some offenses are sufficiently serious to justify serious discipline for a first offense. These include theft, physical attacks, willful and serious safety breaches, gross insubordination, and significant violations of law on the employer’s time or premises. Some collective bargaining agreements list the offenses punishable by



**immediate discharge. If the agreement is silent on the point, the arbitrator must identify dischargeable offenses by using common sense, past practice, and company, industry, and societal standards.**

**(c) Some collective bargaining agreements expressly deny arbitrators the power to evaluate the appropriateness of the penalty. In that case, as in all others, the arbitrator must follow the contract.**

### **Comment:**

*a. Proportionality.* The concept of “just cause” implies not only that the employer have a “cause” for disciplining the employee, but also that the discipline be “just” in relation to the asserted cause. One critical element of justice, in both the common sense and legal meanings, is reasonable proportionality between offense and penalty. Everyone would regard imposing capital punishment for jaywalking as impermissibly extreme. So, too, in the employment relationship: few people would describe discharge (often referred to as the “capital punishment of the employment relationship”) as a “just” penalty for one brief instance of tardiness. The seriousness of an offense varies with many factors: the magnitude of the (actual or potential) harm, the frequency of the offense, the degree of knowledge the employee had about the rules and penalties, and the impact of the degree of punishment on other employees, among other things.

### **Illustration:**

1. A supermarket employee with seven years’ seniority was warned for putting the wrong price on a package of meat. When she repeated the error a short time later, the company fired her. The arbitrator found that the punishment did not fit the crime, because the amount at stake was small, she was a long-service employee, and there were no customer complaints. *See Shop Rite Foods*, 67 LA 159 (Leo Weiss 1976).

*b. Progressive Discipline.* Because industrial discipline is corrective rather than punitive, most arbitrators require

use of progressive discipline, even when the collective agreement or employment contract is silent on the subject. In most cases, the principle of progressive discipline benefits employers as well as employees. With progressively increasing penalties, employees have an opportunity to conform their performance and conduct to the employer's reasonable expectations. Rehabilitating the employee is less expensive and less disruptive than hiring a replacement.

Some employers now use a "positive discipline" system that involves oral and written "reminders" and a paid "decisionmaking leave" rather than the traditional warnings and suspensions. The new terminology does not change the fundamental disciplinary nature. An arbitrator encountering such a system should follow it in the award. For example, if the arbitrator finds that the employee's conduct merited discipline but not the discharge imposed by the employer, the appropriate remedy might be to reduce the discharge to a decisionmaking leave.

*c. "Capital" Offenses.* It is universally accepted that some offenses are so serious as to justify immediate termination. To use an analogy from contract law, some offenses are "material" to the employment bargain and thus release the other party from its obligations (in this case, the obligation to continue employing the offender). In the words of one authority, progressive discipline is required

except in cases involving the most extreme breaches of the fundamental understanding. In particular, discharge may be imposed only when less severe penalties will not protect legitimate management interests, for one of the following reasons: (1) the employee's past record shows that the unsatisfactory conduct will continue, (2) the most stringent form of discipline is needed to protect the system of work rules, or (3) continued employment would inevitably interfere with the successful operation of the business.

Abrams & Nolan, at 612. Each asserted "capital" offense needs careful examination. For example, thefts of trivial value may justify immediate discharge in some settings such as banks or retail businesses with a well-known "zero-tolerance" policy, while in others a small theft may require only progressive discipline. The arbitrator must also consider affirmative defenses such as provocation to fighting or insubordination, disparate treatment, and condonation.

**Illustration:**

2. A coffee shop fired the grievant for theft of a can of orange juice worth 58 cents. The company had a firm, well-publicized, and consistently enforced “zero-tolerance” policy for theft because pilferage was a serious problem that was hard to detect or prevent. The discharge was for just cause. *See Greyhound Food Mgmt.*, 89 LA 1138 (Kenneth Grinstead 1987).

*d. Contractual Limitations on the Arbitrator’s Authority.*

Some employers, perhaps fearing that arbitrators might rashly second-guess the employer’s disciplinary decisions, insist on contractual provisions limiting the arbitrator’s authority to determining whether the employee committed the charged offense. Some clauses go further, expressly denying arbitrators the right to determine the appropriateness of the penalty. In either case, the arbitrator must follow the contract. Faced with such a clause, the arbitrator may not overturn the discipline on the basis of its purported lack of proportionality or progressivity.

**Illustration:**

3. A college fired a 30-year employee for stealing a box of soap worth \$5. The collective agreement stated that an arbitrator shall not have “the power to mitigate penalties or disciplinary action . . . where the arbitrator has found that the employee did in fact commit the acts of which he was accused.” The arbitrator had no choice but to sustain the discharge once he found the grievant guilty as charged. *See Bridgford Frozen-Rite Foods*, 91 LA 681 (William L. McKee 1988).

**REFERENCES**

Koven & Smith, at 384–431.

Zack, Chapter 14, § 14.03(3).

Zirkel, Perry A., *Labor Arbitrators’ Inference of “Progressive Discipline” in Just Cause Cases: The Courts’ View*, 17 J. Collective Negotiations Publ. Sector 27 (1988).

## § 6.8. “Obey Now, Grieve Later”

**(1) An employee who disagrees with a work order or work rule normally must obey the order or rule and challenge its legitimacy through the grievance and arbitration procedure or other channels. Failure to do so may constitute insubordination.**

**(2) Employees need not immediately obey an order or rule if they**

**(a) reasonably believe it to be illegal, unethical, or immoral;**

**(b) reasonably believe that obedience would place the employee or others in imminent danger of harm; or**

**(c) would suffer immediate and substantial harm, and would lack any satisfactory remedy after the fact.**

**Even in these cases, however, disobedience will be excused only if the employee has no other feasible way to resolve the dispute.**

### **Comment:**

*a. Basis for the Principle.* Like other hierarchical organizations, businesses require a chain of command if they are to operate efficiently. “The shop floor is not a debating society,” arbitrators sometimes say. If the employee believes an order or rule violates the agreement or is otherwise improper, there are formal ways to challenge it, most obviously by filing a grievance. In the meantime, however, the employee must obey the order or rule so that work may continue. An employee who wins a grievance will be made whole for any losses.

*b. Exceptions.* The exceptions to the principle are logical and obvious. First, no employee should be punished for disobeying an illegal, unethical, or immoral order, or one that would endanger the employee or others. Because it is not always possible to know with absolute certainty whether an order is lawful or safe, employees have to make their decisions on the basis of the knowledge they have at the time. So long as they act reasonably—that is, so long as they do what a

reasonable person in the circumstances might do—they should not be punished if the order later proves proper. On the other hand, an unreasonable refusal is not protected. A final category of exception is necessarily vaguer. Some contractual breaches are not remediable after the fact. If the order or rule is in fact improper and obedience would substantially and irreparably harm the employee, an employee may not be required to follow the usual principle.

### Illustrations:

1. A hotel discharged a maintenance mechanic for refusing an order to clean part of a roof that had no catwalk or railing, during freezing temperatures and high winds. He tried twice to complete the work, but finally reported that it was unsafe to work under those conditions. The arbitrator held that the discharge was not for just cause. *See Leland Oil Mill*, 91 LA 905 (Samuel J. Nicholas, Jr. 1988). *See also Greene County Dep't of Human Servs.*, 109 LA 353 (Phyllis E. Florman 1997) (a “reasonable” belief in the danger will suffice, even if it later turns out there was no actual danger).

2. The Federal Aeronautics Administration interpreted a regulation as forbidding a pilot to begin a flight if the scheduled arrival time would require the pilot to work more than 16 consecutive hours. The employer ordered a pilot to begin such a flight because it believed the FAA’s interpretation was erroneous, and fired the pilot when he refused to fly. The arbitrator found that the pilot’s good-faith and reasonable belief that the order to fly violated federal regulations constituted a valid exception to the “obey now, grieve later” rule. *Pan American Airways Corp.*, 116 LA 757 (Dennis R. Nolan 2001).

3. The employer ordered the employee to sign a release form that would give it access to her complete medical records, then discharged her for insubordination when she refused. The arbitrator found that the requested release was overly broad and invaded the grievant’s privacy rights. The grievant’s refusal to sign was therefore proper. *Dakota Gassification Co.*, 120 LA 762 (Ann S. Kenis 2005). Although the arbitrator did not mention it, “obeying” here would have would have forced the employee to waive her

privacy rights; a subsequent grievance could not have undone the harm.

*c. Lack of Reasonable Alternatives.* All these cases assume the absence of reasonable alternatives. If there is time to appeal to a higher management official, for example, or time to call in a government inspector, or time to file a grievance, failure to use those alternatives will remove the employee's excuse for violating the principle.

## REFERENCE

Elkouri, at 261–67, 1023–36.

### § 6.9. Burden of Proof

**(1) The employer bears the burden of proving just cause for discipline. That includes proof that the level of discipline imposed was appropriate. The employer must also prove any alleged aggravating factors.**

**(2) The employee bears the burden of proving any affirmative defenses (such as condonation by the employer, provocation by other employees, or disparate treatment) and any mitigating factors.**

#### Comment:

*a. Allocation of the Burden of Proof.* Normally a party bringing a grievance, like a party bringing a lawsuit, bears the burden of proving the claim. One exception to that rule involves the imposition of discipline. Arbitrators uniformly hold that employers bear the burden of proving just cause for discipline. The reasons for reversing that burden of proof are lost in the mists of history. Nevertheless, parties and arbitrators alike accept that reversal. Because “just cause” includes a requirement that discipline be proportional and progressive (see § 6.7, above), part of the employer's burden of proof is to show that the discipline imposed satisfies those tests.

*b. Affirmative Defenses.* After an employer has satisfied its normal burden of proof, the grievant may argue that the discipline was nevertheless improper because of the employer's procedural errors or disparate treatment, the employee's justification for the misconduct, or other mitigating factors. These are affirmative defenses on which the grievant bears the burden of proof.

### **Illustration:**

The employer alleges that the grievant voluntarily resigned after an investigator charged her with smoking marijuana on company property. At the arbitration hearing, the grievant claimed that the purported resignation was invalid because of duress. She testified that the personnel manager threatened to have her arrested if she did not resign. The personnel manager, an equally credible witness, flatly denied making a threat. No one else was present during the conversation. A claim of duress is an affirmative defense on which the grievant bears the burden of proof. Because she could not prove by a preponderance of the evidence that the alleged threats actually occurred, she failed to meet that burden. Her resignation bars her grievance. *See Chivas Prods.*, 101 LA 546 (Richard L. Kanner 1993).

## **REFERENCES**

Gorske, Robert, *Burden of Proof in Grievance Arbitration*, 43 Marq. L. Rev. 135 (1959).

Hill, Marvin F., Jr. & Sinicropi, Anthony V., *Evidence in Arbitration*, 2d ed. (1987), at 39–47 [hereinafter Hill & Sinicropi].

Schoonhoven, Ray J., ed., *Fairweather's Practice and Procedure in Labor Arbitration*, 4th ed. (1999), at 269–89.

## **§ 6.10. Quantum of Proof**

**(1) For most arbitrators, the normal quantum of proof required in disciplinary cases is “preponderance of the evidence.” For a minority, it is “clear and convincing evidence.”**

(2) When the employee's alleged offense would constitute a serious breach of law or would be viewed as moral turpitude sufficient to damage an employee's reputation, most arbitrators require a higher quantum of proof, typically expressed as "clear and convincing evidence." Some require proof "beyond a reasonable doubt" but, absent an express contractual provision to the contrary, most hold that the criminal-law standard of "beyond a reasonable doubt" has no place in an informal dispute resolution mechanism like arbitration.

### Comment:

*a. Necessity of a Quantum Standard.* Some arbitrators reject the very idea of a quantum of proof as a distracting legalism. Others argue that it is impossible to avoid at least an implicit quantum requirement. At some point in close cases, the arbitrator has to decide how much proof is "enough." An arbitrator satisfied with more proof on one side than on the other implicitly applies the "preponderance of the evidence" standard. An arbitrator who demands more evidence than that implicitly applies the "clear and convincing" standard. Many arbitrators therefore conclude that it is better to address and resolve the applicable quantum so that the parties know the standard they are required to meet.

*b. The Normal Quantum Required.* Most disciplinary grievances amount to a claim that the employer breached the agreement by disciplining the employee without just cause. A breach of contract action in court requires the plaintiff to prove that its assertions are more likely than not—in other words, to prove the assertion by a "preponderance of the evidence." Similarly, many arbitrators apply the same standard to discipline grievances. The quantum required does not change with the level of discipline. Other rules, however, may protect the employee facing discharge or other serious discipline, such as the requirements that the penalty be proportional to the offense and that the employer use progressive discipline (see § 6.7, above).



*c. The Special Quantum.* The most common variation from the normal quantum of proof arises when the alleged offense would seriously damage an employee outside the immediate employment relationship. Discharge for illegal or immoral conduct, for example, could destroy an employee's reputation in the community and could do far more harm to his or her future employment prospects than would discharge for absenteeism. In such cases, many arbitrators insist on a higher standard of proof, requiring "clear and convincing evidence" of the employee's guilt. A diminishing minority of arbitrators accept the argument that discharge in these instances is the equivalent of "economic capital punishment" and therefore apply the criminal-law standard of proof "beyond a reasonable doubt."

### **Illustration:**

The grievant, a printer at a magazine, was discharged for sexually harassing one co-worker on one occasion. The evidence was disputed. The union argued that the company had to prove the grievant's guilt beyond a reasonable doubt; the company argued that it had to show a mere preponderance of the evidence. The arbitrator ruled that when the charge involved moral turpitude, a higher degree of proof than normal was required. Because the criminal-law standard would often be impossible to meet in an arbitration proceeding, the appropriate standard is the intermediate one of "clear and convincing evidence."

*d. "Beyond a Reasonable Doubt."* Discharged grievants frequently assert that the employer must prove guilt "beyond a reasonable doubt" because discharge amounts to "economic capital punishment." The rebuttal is that the familiarity of that criminal-law standard does not make it applicable to what is essentially a contract dispute. Moreover, the valued speed and informality of the arbitration process make it an unsuitable vehicle for proving anything to that degree of certainty. Courts of law have full discovery processes, easy enforcement of subpoenas, the possibility of criminally punishing perjurers, advocates and adjudicators skilled in the law, and so on. Arbitration may have none of those attributes. The criminal-law standard is thus said not to fit the arbitration process.

For examples of arbitrators using the criminal-law standard, see *Dockside Mach. & Boilerworks*, 55 LA 1221 (Howard Block 1970); *Great Atl. & Pac. Tea Co.*, 63-1 ARB ¶ 8027 (Burton Turkus 1962). For examples of arbitrators rejecting that standard, see the Aaron and Gorske articles cited below. Hill & Sinicropi provide a thorough and concise summary of the competing positions.

## REFERENCES

Aaron, Benjamin, *Some Procedural Problems in Arbitration*, 10 Vand. L. Rev. 733, 740-42 (1957).

Benewitz, Maurice C., *Discharge, Arbitration, and the Quantum of Proof*, 28 Arb. J. 95 (1973).

Gorske, Robert, *Burden of Proof in Grievance Arbitration*, 43 Marq. L. Rev. 135 (1959).

Hill & Sinicropi, at 32-39.

For a rare argument favoring the criminal-law standard of "beyond a reasonable doubt," see Farley, Larry D. & Allotta, Joseph J., *Standards of Proof in Discharge Arbitration: A Practitioner's View*, 35 Lab. L.J. 424 (1984).

## § 6.11. Conduct After Discipline

**(1) A grievant's unrelated conduct following discipline is generally not relevant to the determination of whether there was just cause for the discipline.**

**(2) When postdiscipline conduct is closely and functionally related to the conduct causing the discipline, however, a party may use evidence of that conduct to support its position on just cause.**

**(3) In any event, postdiscipline conduct may affect the remedy if the arbitrator finds there was not just cause for discharge.**

### Comment:

*a. Postdiscipline Conduct.* This section deals with a grievant's conduct following the discipline, as distinguished

from after-acquired evidence of prediscipline conduct. On the latter point see Chapter 1, § 1.83, above. The postdiscipline conduct involved may be either positive or negative.

(1) Positive conduct includes demonstrations of remorse, attempts to compensate for harm caused, and, most commonly, rehabilitation after a discharge related to alcohol or drugs.

(2) Negative conduct includes threats or actions directed against the employer, supervisors, employees, or others connected to the employer or involved in the discipline. It can also include additional misconduct either similar to or different from that causing the discipline.

(3) It is sometimes said that the legitimacy of a discipline must stand or fall on what the employer *knew* at the time of the discipline. That statement is too broad to be accepted at face value. The critical question is whether there was in fact just cause for the discipline at the time. Whether the employer knew of the evidence may bear on its good faith, but not on the factual question. To put it differently, it would be more accurate to say that discipline normally stands or falls on what the employee *did* before the discipline. This is so because the discipline has to be for a good reason. If there was a good reason, the employee's later conduct does not eliminate that reason; if there was *not* a good reason for the discipline, the employee's later conduct normally would not provide it. (As noted in Comment *e*, below, however, postdiscipline misconduct may provide a new basis for discipline even if it does not support the initial discipline.)

*b. Positive Postdiscipline Conduct.* The primary type of positive postdiscipline conduct offered in arbitration is rehabilitation after a period of drug or alcohol abuse. This is also a topic on which arbitrators are strongly divided. Some arbitrators have even overturned an otherwise valid discharge for substance abuse on the basis that successful completion of a rehabilitation program shows that the misconduct will not recur. *But see* §§ 6.24 to 6.30, below. Logically, postdiscipline rehabilitation cannot affect the usual issue of whether the employer had just cause to discipline the employee. Emotionally, however, the appearance of a repentant and allegedly cured employee can be powerful.

In the case of the severely “troubled” employee, the cause of the “trouble” (mental illness, drug addiction, alcoholism) might be relevant. If the employee were not fully responsible for the charged offenses, discharge might not be appropriate. Of course an employer need not tolerate unsatisfactory performance, no matter what the cause. If the grievant’s problems remain so serious as to prevent satisfactory work, an arbitrator should sustain the discharge. However, proof that a contributing factor has been removed, for example, by taking medication for depression, may be relevant to the question of whether the employee had a potential for rehabilitation of which the employer should have been aware. As with other mitigating factors, the union bears the burden of proof. In the case of the “troubled” employee, that means proving that the employee was seriously “troubled,” that the “trouble” contributed to the offense, and that subsequent treatment has cured the “trouble.” See §§ 6.24, 6.27, and 6.28, below.

The “closely and functionally related” test helps to determine the admissibility of evidence about positive postdiscipline conduct. Striking a supervisor in a grievance meeting after the discharge is unrelated misconduct that does not affect the merits of the grievance (although it might well make reinstatement inappropriate if the arbitrator sustains the grievance). If the employer’s basis for discharge was an estimate of the employee’s future ability to perform satisfactorily, however, successful rehabilitation might be “closely and functionally related” postdischarge conduct relevant to the employer’s judgment.

### **Illustration:**

1. The employer discharged the grievant for excessive absenteeism. The grievant claimed that the absenteeism was due to his alcoholism. Following his discharge but before the arbitration hearing, the grievant successfully completed an alcohol rehabilitation program. At the hearing he argued that his rehabilitation made the discharge improper. The original discharge was for just cause, and this was not changed by the employee’s subsequent actions. See *Bemis Co.*, 81 LA 733 (Wendell W. Wright 1983). See also *Dahlstrom Mfg. Co.*, 78 LA 302 (Margery Gootnick

1982) (giving great weight to the grievant's postdischarge rehabilitation efforts but denying reinstatement). *Contra Cowin & Co.*, 81 LA 706, 711 (Richard P. O'Connell 1983) (using postdischarge rehabilitation to support reinstatement because alcoholism has come to be regarded as a treatable illness and the grievant "should be given encouragement").

*c. Negative Postdiscipline Conduct.* Disciplined employees can get into all sorts of trouble after the discipline, in some cases because of the discipline. With the exception of "functionally related" actions, postdiscipline misconduct does not affect the legitimacy of the original discipline decision, although it may affect the remedy and may even provide the basis for a separate decision to terminate the employee.

### Illustrations:

2. An airline fired the grievant after he was beaten by two men he had invited to his hotel room. The company believed he had invited the men to his room for immoral purposes and thus was partly to blame for the fight. Six months later the grievant was convicted of "indecent practices—disorderly conduct" for taking nude photographs of a young boy. The later conviction does not affect the legitimacy of the discharge. *See Northwest Airlines*, 69-1 ARB ¶ 8122 (Murray M. Rohman 1968).

3. After her discharge for leaving work without permission, the grievant told a supervisor that he was "lucky that someone doesn't come up [here] and split your head open." The arbitrator found that the discharge was not for just cause. The quoted statement has "some degree of ambiguity" but was nevertheless improper. The arbitrator therefore ordered the grievant reinstated but denied her back pay. *Auto Warehousing Co.*, 114 LA 699 (Deborah M. Brodsky 2002).

*d. "Closely and Functionally Related" Postdiscipline Conduct.* If the pre- and postdiscipline conduct is continuous or closely related, the latter conduct might bolster a case based upon the former. This usually involves negative postdiscipline

conduct, for example, continued and similar acts of fraud, theft, violence, crime, or drug use.

**Illustration:**

4. The company fired the grievant after he showed up at a company softball game wearing a sweatshirt with an obscene message and refused to leave or to remove the sweatshirt. After his discharge, he threatened the person who had reported the incident to management. Later, despite his suspension, he attended another softball game and came to the plant. On both those occasions, he refused to leave when directed to do so. The grievant's postdiscipline conduct was related to, and aggravated, the original misconduct. *See Glass Container Mfg. Inst.*, 70-1 ARB ¶ 8140 (Harry J. Dworkin 1969).

*e. Impact of Postdiscipline Conduct on the Remedy.* Several types of postdiscipline conduct may affect the remedy for an improper discipline. The most obvious example concerns the so-called "duty to mitigate." (Technically there is no such "duty" because no one can be sued or jailed for failing to mitigate. Mitigation is at most a condition to recovering back pay.) As a general matter, a discharged employee is expected to seek and accept other work. If the employee does so, alternative earnings will be deducted from any back pay due. If the employee does not seek or accept other work, the arbitrator may reduce the back pay due by the amount the employee would have earned had he or she made a reasonable effort to find another job. A second example involves postdiscipline conduct that, if it had occurred before the discipline, would have provided an independent reason for discipline. The new misconduct might justify an immediate second discipline if the first is overturned in arbitration, or it might reduce or eliminate the amount of back pay. A new discipline for a different reason could, of course, provide the basis for a new grievance.

**Illustration:**

5. An airline fired a flight attendant for failing to take a scheduled drug test. The neutral system board member circulated a draft award finding that the discharge was not for just cause because the employer failed

to prove the employee knew of the test. Before the draft award became final, the company recalled the grievant. Following its usual procedure for recalled employees, it gave her a drug test as soon as she returned. She failed that test, so the employer sent her home. It then argued that the second test proved that the first discharge was proper. It also introduced substantial evidence that she had not looked for alternative work after the original discharge. The second drug test was postdiscipline conduct that proved nothing about her failure to take the first test, but it provided an independent ground for dismissing the grievant as of the second test date. That had the effect of cutting off any back pay. The failure to search for alternative work was postdischarge conduct (or nonconduct) that eliminated any right to back pay. *See Atlantic Southeast Airlines*, 101 LA 511 (Dennis R. Nolan 1992); 101 LA 515 (Dennis R. Nolan 1993); and 103 LA 1179 (Dennis R. Nolan 1994).

## REFERENCES

This section relies heavily on Hill & Sinicropi, at 60–66. *See also* Nicolau, George, *The Arbitrator's Remedial Powers: Pt. I*, in 43 NAA 73 (1991) (concentrating on postdischarge conduct and postdischarge evidence).

*Comment b.* On the special issues presented by substance abuse cases, *see* §§ 6.24 to 6.30, below. *See also* Denenberg, Tia Schneider & Denenberg, R. V., *Alcohol and Other Drugs: Issues in Arbitration* (1991), and *The Arbitration of Employee Substance Abuse Rehabilitation Issues*, 46 Arb. J. 17 (Mar. 1991); Collins, Daniel G., *Just Cause and the Troubled Employee: Pt. I*, in 41 NAA 21 (1989); Miller, Thomas R. & Oliver, Susan M., *Pt. II: A Management Viewpoint*, *id.* at 34; Lampkin, Linda, *Pt. III: A Union Viewpoint*, *id.* at 68; Koven, Adolph M. & Smith, Susan L., *Alcohol-Related Misconduct* (1984).

*Comment d.* Arbitrator William P. Daniel stated the general rule in *Rochester Community Sch.*, 86 LA 1287, 1290 (William P. Daniel 1986): “Once the employer has satisfied that burden of proof [showing just cause on the basis of the evidence it had at the time], then it may introduce supporting [postdischarge] evidence of the same nature revealing the totality of the grievant’s conduct. This may be allowed for a number of reasons: to test the credibility of the grievant, to

emphasize the knowing and intentional repetition of acts of misconduct, and generally to depict the egregious character of the misconduct in response to any assertion that the disciplinary penalty is too severe.”



## II. DUE PROCESS IN DISCIPLINE AND DISCHARGE

*James Oldham\**

### § 6.12 Due Process in General

**It is generally accepted that some level of procedural due process is owed by employers to employees in the imposition of discipline or discharge. The scope of the protection will usually be greater for employees in the public sector than for employees in the private sector.**

#### **Comment:**

##### *a. Background and Sources of the Protection.*

(1) The recognition by arbitrators of procedural due process rights for employees in the discipline and discharge process began cautiously. As stated by Willard Wirtz, “[D]ue process’ is a symbol borrowed from the lexicon of the law and [is] therefore suspect in this shirtsleeves, seat-of-the-pants, look!-no-hands business of arbitration.” Wirtz, W. Willard, *Due Process of Arbitration*, in 11 NAA 1, 1 (1958). Propelled in part by Wirtz’s endorsement of the concept, the recognition of such rights is now well-established. Several developments have converged and overlapped. Most important has been the articulation by the Supreme Court and other federal courts of due process protections for public employees under the First, Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution. These Constitutional requirements do not apply to employees in the private sector, but they have nevertheless been influential, and private-sector arbitrators have referred to them by analogy. Independently, arbitrators in the private sector have built into the just cause standard procedural due process protections as part of the “fundamental fairness” that just cause embodies.

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(2) A contributing development of increasing importance is the incorporation by negotiating parties of specific procedural due process protections in collective bargaining contract language.

(3) Earlier in this work the “seven tests” articulated by arbitrator Carroll Daugherty as a formula for assessing just cause are discussed. *See* § 6.1, above. As is there indicated, some arbitrators do not favor the “seven tests” approach. *See also Sterling Chemicals, Inc.*, 119 LA 171 (Donald P. Goodman 2002); *County of Lake [Ill.]*, 116 LA 216 (Elliott H. Goldstein 2001). Nonetheless the formula has been undeniably influential. One of the striking features of the “seven tests,” attributable to Arbitrator Daugherty’s experience with the National Railroad Adjustment Board, is the fact that four of the seven tests relate to the procedure followed by the employer in evaluating the employee’s alleged wrongdoing, namely:

- whether the employer gave the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee’s conduct;
- whether the employer tried to confirm, before administering discipline, that the employee in fact violated a work rule or order;
- whether the employer’s investigation was fairly and objectively conducted; and
- whether the employer has applied its rules, orders, and penalties even-handedly. *See Whirlpool Corp.*, 58 LA 421 (Carroll R. Daugherty 1972); *Grief Bros. Cooperage Corp.*, 42 LA 555 (Carroll R. Daugherty 1964).

Variations on these tests are given in the propositions stated below. Note, however, that arbitrators hold a range of different views on what constitutes the appropriate remedy for violation of procedural protections inherent in the concept of just cause. *See* §§ 6.19 and 6.20, below.

*b. Cross-references.* For additional related material on due process rights generally, *see* § 6.2, above, and § 6.29 and Chapter 10, § 10.22, below.

*c.* In the Illustrations that appear throughout this Part II, examples are given from both the public and private sectors.

The illustrations relate, however, to procedural due process protections found by arbitrators or courts either as an inherent part of the just cause standard, or as a result of specific, negotiated contract provisions. Customarily it is not the arbitrator's function to be the expositor of constitutional rights such as due process or free speech.

This Part is predominantly concerned with procedural due process protections in connection with the employer's investigation of alleged employee wrongdoing and the process of imposing discipline or discharge. This Part does not address due process protections that have been articulated in grievance arbitration cases in regulating the presentation of evidence at the arbitration hearing, borrowing from or adapting constitutional protections available to defendants in the courts in criminal cases. For treatment of the propriety of a private-sector grievant's invocation at the hearing of the privilege against self-incrimination, as well as other privileges, see Chapter 1, § 1.66 et seq., above.

### Illustrations:

1. *Public-sector employees.* As observed by arbitrator Carlton Snow, "Public sector employees often enjoy a heightened level of due process rights derived from federal or state constitutions." *Westminster Education Association*, 2002 WL 32395426 (Arb.) (Carlton J. Snow 2002). Procedural due process rights that have been identified by the Supreme Court as constitutionally mandated by the Fifth Amendment (which have been extended to public employees at the state level through the Fourteenth Amendment) include: a pretermination hearing giving the employee notice of charges lodged against the employee, an explanation of the employer's evidence, and an opportunity to tell his or her own story. *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 118 LRRM 3041 (1985); see also the "Douglas Factors" enumerated by the Merit Systems Protection Board as appropriate for evaluating a disciplinary penalty imposed on a federal employee (especially the ninth factor—"the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the

conduct in question”), in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305 (1981). At the state level, the California Supreme Court has characterized the expectation of continued employment as a property interest that cannot be taken away from a state employee without notice and hearing except in “extraordinary circumstances.” See *San Francisco Bay Rapid Transit District*, 2002 WL 31594268 (Arb.) (Bonnie G. Bogue 2002). Other rights that have been found by courts and arbitrators to emanate from constitutional protections include: free speech (First Amendment); privacy protection against unreasonable searches and seizures (Fourth Amendment); the right to resist employer demands that might result in self-incrimination (Fifth and Fourteenth Amendments); the right not to be subjected to double jeopardy (Fifth and Fourteenth Amendments). See, e.g., *Board of County Commissioners of St. Lucie County, Florida*, 115 LA 1046 (Charles H. Frost 2001) (double jeopardy). In the federal sector, it appears to be necessary to show as well that any deprivation of procedural due process falls within the MSPB’s definition of “harmful error.” See Clarke, Jack, *To What Extent Do and Should the Seven Tests Guide Arbitrators or the Parties*, in 55 NAA 51, 53–56 (2003). For state employees, moreover, the constitutional protection may be limited. See, e.g., *City of Indianapolis*, 117 LA 911 (Ellen J. Alexander 2002) (the privilege against self-incrimination, while undeniable as a protection against criminal prosecution, does not protect against termination of employment).

2. *Private-sector employees.* Most of the protections extended to public employees have been applied in some degree by courts and arbitrators to private-sector employees. This is especially true of the right of such employees to receive notice of charges against them and the nature of the employer’s evidence, and to be given an opportunity to be heard. Some arbitrators, however, as in the federal sector, require a showing of harmful error before granting a remedy for procedural due process deprivation. See *Aluminum Color Industries, Inc.*, 2001 WL 1758280 (Arb.) (Matthew M. Franckiewicz 2001); *Weyerhaeuser Paper Co.*, 2003 WL 23178037 (Arb.) (Russell C. Neas 2003). In the

context of drugs in the workplace, private employees have been found to have protected privacy interests. They have also been found to be protected against double jeopardy. There are, moreover, particular rights that were first articulated as inherent in the private-sector collective bargaining agreement and that have, in turn, been extended to unionized public-sector employees—notably the right of an employee to have a union representative present when called upon to meet with the employer to discuss matters that might lead to discipline or discharge. See discussion in § 6.16, below, of *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 88 LRRM 2689 (1975); see also *U.S. Department of the Air Force*, 75 LA 994 (William S. Hart 1980).

## REFERENCES

This section depends upon Brand, Norman, *Due Process in Arbitration*, in Labor and Employment Arbitration, 2d ed., eds Bornstein, Tim, Gosline, Ann & Greenbaum, Marc, (1997, 1999), Chapter 15; Zack, Arnold, *Just Cause and Progressive Discipline*, *id.*, Chapter 14, § 14.03(2)(a). Other useful general references are Mackenzie, Susan T., Clarke, Jack, Gross, James & Beck, Michael, *Is Procedural Due Process an Element of Just Cause or a Separate Issue with Distinct Remedies*, in 55 NAA 49 (2003); Carlson, Alan & Phillips, Bruce, *Due Process Considerations in Grievance Arbitration Proceedings*, 2 Hastings Const. L.Q. 519 (1975); Cooper, Laura J., Nolan, Dennis R. & Bayles, Richard A., *Due Process of Arbitration*, in ADR in the Workplace: A Coursebook (2000), Chapter 6, § B; Edwards, Harry T., *Due Process Considerations in Labor Arbitration*, 25 Arb. J. 141 (1970); Estlund, Cynthia L., *Free Speech and Due Process in the Workplace*, 71 Ind. L.J. 101 (1995); Fleming, R. W., *The Labor Arbitration Process* (1965), at 107–98 [hereinafter Fleming]; Grenig, Jay E., *When Due Process is Due: The Courts and Labor Arbitration*, 3 Det. C. L. Rev. 889 (1995); Hill, Marvin F., Jr. & Sinicropi, Anthony V., *Evidence in Arbitration*, 2d ed. (1987), at 229–72, 308–11; Hogler, Raymond L., *Industrial Due Process and Judicial Review of Arbitration Awards*, 31 Lab. L.J. 570 (1980); Schoonhoven, Ray J., ed., *Due Process Considerations*, in Fairweather's Practice and Procedure in Labor Arbitration, 4th ed. (1999), Chapter 13; Ver Ploeg, Christine D., *Investigatory Due Process and Arbitration*, in 45 NAA 220 (1993); Wirtz, W. Willard,

*Due Process of Arbitration*, in 11 NAA 1 (1958). On Carroll Daugherty's "seven tests," see the references given at § 6.1 and this section, above; see also McPherson, Donald F., *The Evolving Concept of Just Cause: Carroll R. Daugherty and the Requirement of Disciplinary Due Process*, 38 Lab. L.J. 387 (1987).

## § 6.13 Notice of Charges and Hearing

**Just cause requires that an employee being disciplined or discharged be given notice of the charges against him or her and a meaningful opportunity to be heard.**

### Comment:

a. At the extremes are (1) the public employee who has constitutionally protected rights against arbitrary or peremptory state action (action taken in such cases by government employers) and (2) the unrepresented private sector employee who has no contractual or state law protections and who is terminable at will. Most discipline and discharge grievances that come before arbitrators involve employees who fall between these extremes—typically those with just cause protection in a collective bargaining contract. In such cases, absent specific contract language to the contrary (see Comment b), arbitrators uniformly rule that an employee is entitled to notice and opportunity to be heard.

b. Some collective bargaining contracts itemize offenses that are considered so serious that the employer is permitted to discharge the employee immediately, without notice. Examples would be serious cases of theft, violence, or drug use in the workplace. See § 6.7(3)(b) above. Contract provisions of this type are upheld and enforced by arbitrators. Indeed, some arbitrators would forgive the lack of notice and hearing for such serious offenses even without a contract provision so stating.

c. When the employee's behavior is not so serious as to justify immediate discharge without notice but is sufficiently serious that the discharge would have been upheld had procedural due process been provided, many arbitrators will order reinstatement without back pay or with limited back pay. See *Kohl's Food Store, Inc.*, 117 LA 660 (Aaron S. Wolff

2002); *Dreyer's Grand Ice Cream, Inc.*, 2001 WL 1152560 (Arb.) (Joseph E. Grabuskie 2001).

### Illustrations:

1. A physician's assistant in a correctional facility was issued a notice of proposed discipline for refusing to take orders from a nurse. The notice gave only a general summary of the factual incident, despite a contract provision requiring the employer to "assemble and make available to the employee the evidence file for his or her review." The arbitrator did not uphold the discipline since the notice lacked critical information of time, place and circumstances, as well as witnesses' statements and names, all of which were not only required by the contract but also necessary for the grievant to understand fully the nature of the charges against him and to prepare his response. See *Department of Corrections, District of Columbia*, 106 LA 8, 10 (Sean J. Rogers 1996).

2. A paramedic in a unionized county office had difficulty getting along with some of the employees in another county office that was not unionized. After one heated exchange, a complaint was lodged against the paramedic, who was then discharged without being permitted to give a detailed statement of his own and without being allowed to see the write-ups against him. The employer's justification was a written rule that threatening or intimidating fellow workers would lead to immediate discharge without warning. The refusal to allow grievant to tell his side of the story would be an improper deprivation of the due process that is thought by most arbitrators to be part of just cause. See *Shaeffer's Ambulance Serv., Inc.*, 104 LA 481 (Jack H. Calhoun 1995).

### REFERENCES

The following oft-quoted illustration of an example of extreme behavior that would require no predischARGE notice was given by Robben Fleming: "If . . . an employee gets drunk on the job and starts smashing valuable machinery with a sledge hammer, it would hardly seem appropriate to nullify his discharge on the sole ground that it was

in violation of a contractual requirement that the union be given advance notice.” Fleming, at 139–40. For a discussion of the notice requirement in a more prosaic context—disciplining employees for sleeping on the job—see Snow, Carlton J., *Deciding an Arbitration Case: The Evolution of Arbitral Principles in ‘Sleeping on the Job’ Decisions*, 2 Widener J. Pub. L. 491, 509–12 (1993). See also § 6.19, below, for cases in which arbitrators have refused to reinstate the grievant but have nevertheless awarded back pay because of the employer’s failure to provide the notice and hearing required by procedural due process.

## § 6.14 Investigation

**Most arbitrators require that an employer’s decision to discipline or discharge an employee be based on a meaningful, more-than-perfunctory factual investigation.**

### Comment:

a. This requirement is sometimes described as part of an employee’s procedural due process protections, and sometimes as an element of the employer’s necessary showing of just cause. See Brand, Norman, *Due Process in Arbitration*, in *Labor and Employment Arbitration*, 2d ed., eds. Bornstein, Tim, Gosline, Ann & Greenbaum, Marc (1997, 1999), Chapter 15. The requirement is both.

Procedurally an employee is to be protected against peremptory employer action that is taken without giving the employee the chance to know the employee’s accusers and the accusations, and which the employer then attempts to justify after-the-fact. Substantively, an employer cannot be disciplining or discharging an employee for just cause if the employer has not bothered to verify that cause in fact exists. Some arbitrators accept the argument that an employer’s failure to investigate fully does not matter when the proof brought out in the grievance and arbitration process clearly establishes just cause, so that the inadequate investigation is harmless error. Others, however, point out that had there been an adequate investigation the employee might have been able to present mitigating circumstances that would have altered the



outcome. *See State of Oregon*, 2004 WL 1690532 (Arb.) (Carlton J. Snow 2004).

b. As with deprivations of notice and hearing (§ 6.13, above) the remedy for inadequate investigation may be limited in some cases: “generally arbitrators appear reluctant to award back wages in situations where the employee has committed a serious offense but is reinstated because of a procedural defect in the way the company handled the matter.” *Middendorf Meat Co.*, 2002 WL 486995 (Arb.) (Geoffrey L. Pratte 2002). Also, in situations involving violent or potentially violent behavior by the employee, the employer’s failure to investigate fully before discharging the employee may be overlooked altogether. *See Cutrale Citrus Juice USA*, 117 LA 1149 (Nicholas Duda Jr. 2002).

c. In sexual harassment cases, the employer is often faced simultaneously with employees claiming to have been victims and with the problem of disciplining the accused harasser. This may be happening while the sexual harassment claims are being investigated by the Equal Employment Opportunity Commission or a counterpart state agency. For these and related reasons, it is rapidly becoming standard for employers to mount much more elaborate investigations in sexual harassment cases than would be typical in other discipline and discharge cases. *See Abell, Nancy L. & Jackson, Marcia Nelson, Sexual Harassment Investigations—Cues, Clues, and How-To’s*, 12 Lab. Law. 17 (1996). This development may have the effect of raising the general standard of what type of employer investigation arbitrators expect as part of procedural due process. *See generally* Pt. III, Introduction, below.

### **Illustration:**

A nonunion hospital discharged a nursing manager for alleged gross insubordination in refusing to call nurses in from vacation. The employee manual specified a five-member review panel and called for an investigative report from the human resources department. These procedures were not followed, even though the employee manual had been unilaterally promulgated by the employer. The investigation was perfunctory. In such circumstances,

the employee is improperly denied a fair opportunity to respond to the charges against her, and the employer has acted precipitously, without just cause. *See Toledo Hosp.*, 105 LA 310 (Marvin J. Feldman 1995). A different problem arises if the investigation was *not* perfunctory but a unionized employer failed to follow contractual procedures. *See* § 6.28, below.

## § 6.15 Timeliness

**Most arbitrators agree that an employer's action in disciplining or discharging an employee must be timely—taken without undue delay after the incident or incidents relied on by the employer in justifying its action.**

### Comment:

This is seen as a component of procedural due process since employees are not to be subjected to the difficulties of responding to stale claims—claims by the employer relating to events so distant that witnesses or participants may be gone, memories may have faded, documentary evidence may have scattered. Each case will, of course, depend on its specific facts. When the delay appears not to have prejudiced the employee, arbitrators may call it harmless error and uphold the discipline or discharge. *See Union Metal Corp.*, 2004 WL 2011304 (Arb.) (Mitchell B. Goldberg 2004); *Federal Aviation Administration*, 115 LA 1028 (Samuel J. Nicholas Jr. 2001).

### Illustration:

A government security officer was given a 7-day suspension for misuse of government property, unprofessional conduct, and unauthorized absence of 8 hours. The employer imposed the discipline nearly two years after the events in question occurred. Absent clear proof that the events could not have been known earlier to the employer, the discipline was not timely. *See Department of*

*Justice, Bureau of Prisons, Federal Correctional Inst., Milan, Mich.*, 95 FLRR 2-1157, 1995 WL 593898 (L.R.P.) (William P. Daniel 1995).

## REFERENCES

For other decisions emphasizing the importance of timeliness as an element of procedural due process, see *Jefferson Smurfit Corp., Pacific Plant*, 1995 WL 852227 (Arb.) (Thomas J. Cipolla 1995); *Department of Justice, Bureau of Prisons, Federal Correctional Inst., Danbury, Conn.*, 94 FLRR 2-1263, 1994 WL 795429 (L.R.P.) (Peter Florey 1994). See also *City of Berkeley*, 106 LA 364 (C. Allen Pool 1996) in which a library assistant was discharged for allegedly stealing a \$15 fine that a library user had given him. The arbitrator observed that the just cause standard required the city to make a full, fair, and timely investigation, and under the circumstances before the arbitrator, the city's delay of two to three days before asking the grievant about the incident denied him the fundamental due process to which he was entitled.

## § 6.16 Union Representation

**An employee is entitled, on request, to have a union representative present at meetings or interviews with the employer whenever the meeting or interview is one that the employee reasonably believes may lead to discipline or discharge.**

### Comment:

*a.* This right has been identified and shaped by the courts, beginning with *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 88 LRRM 2689 (1975). The right is sometimes said by arbitrators to have constitutional roots, analogous to the inadmissibility of evidence obtained from a criminal suspect without giving the suspect a *Miranda* warning. See *Miranda v. Arizona*, 384 U.S. 436 (1966). Indeed, this idea can be found in arbitration cases that antedate *Weingarten*. In *Weingarten*, however, the Supreme Court's decision was based on preserving to unionized employees their right to

engage in protected, concerted activity under § 7 of the National Labor Relations Act.

b. Because a refusal by an employer to honor a proper request for union representation would be an unfair labor practice under § 8(a)(1) of the NLRA, many arbitrators, relying on *Weingarten*, find such a refusal to be a procedural due process violation even if the right is not specified in the collective bargaining contract. Arbitrators generally follow the courts, however, in saying that the employer has no obligation to inform the employee of his right to union representation; the employee must make the request.

c. Some arbitrators have followed the lead of the U.S. Court of Appeals for the District of Columbia Circuit (see *United States Postal Serv. v. NLRB*, 969 F.2d 1064 (D.C. Cir. 1992)) and have extended *Weingarten* to allow employees to confer with the union representative *before* the meeting with the employer takes place. Also, it is increasingly common for arbitrators to require employers to inform employees that a meeting may lead to discipline, at least when the purpose of the meeting is unclear to the employee. The reasoning is that otherwise the employee will not have made an informed choice in not requesting that a union representative be present.

### **Illustration:**

A school bus driver crashed her bus into the back of another bus, causing \$5,000 worth of damage and injuring three students. She was issued a verbal warning and required to take a commercial driver's license test at her own expense. She filed a grievance, claiming that no discipline was justified, no ticket having been written by the police in connection with the accident, and claiming that she had no idea the meeting where she received her verbal warning was disciplinary in nature, so that she was effectively denied union representation. Some arbitrators would rule that the verbal warning should be nullified because of the omission of the procedural protection. See *Norwalk City Sch. Dist. Bd. of Educ.*, 99 LA 825 (Charles R. Miller 1992). Other arbitrators, however, would hold

that, absent both a contract provision embodying *Weingarten* and a request by the employee for representation, the discipline should stand.

## REFERENCES

For other cases in which the arbitrator required the employer to notify the employee that a requested meeting might lead to discipline, thereby allowing the employee to make an informed choice about whether or not to request that a union representative be present, see *Cutrale Citrus Juices USA*, 118 LA 1691 (Wallace Tanksley 2003); *County of Cook [Ill.] (Cook County Hosp.)*, 105 LA 974 (Aaron S. Wolff 1995); *Syro Steel Co.*, 22 LAIS 3832, 1995 WL 673842 (L.R.P.) (James E. Rimmel 1995). In *Lenzing Fibers Corp.*, 105 LA 423 (Stanley H. Sergent 1995), an employee under a last-chance agreement was denied a request for a shop steward at a discipline meeting, despite a contract provision guaranteeing an employee who requests a steward the right to have one when the employee is called to the office to be given a disciplinary personnel slip or planned discipline or discharge. The arbitrator ruled that the last-chance agreement did not deprive the employee of procedural rights specified in the contract. For a general discussion of the *Weingarten* principle in the context of labor arbitration, see Schoonhoven, Ray J., ed., *Fairweather's Practice and Procedure in Labor Arbitration*, 4th ed. (1999), at 408–12.

## § 6.17 Notice of Consequences

**An employee is entitled to be informed of, or to have a sound basis for understanding, the disciplinary consequences that will result from violating policies or work rules in effect at the employee's place of employment.**

### Comment:

a. This proposition is similar to the right to notice and opportunity to be heard before discipline is imposed for a specific offense (see § 6.13, above). In general, arbitrators believe that employees are entitled to know what is expected of them in the workplace, and conversely, to know what action will

befall them in the event they violate an employment policy or work rule. This employee awareness often comes from collective bargaining contract provisions and from published or posted work rules and procedures. Some offenses are sufficiently serious, however, that as a matter of common sense and common understanding employees will be held to know the consequences of committing them.

b. Another important application of the proposition is that, in the administration of disciplinary action by an employer, employees should not have to suffer *disparate treatment*; that is, there should be equal treatment for like offenses.

c. A difficult context in which to apply the principle is sexual harassment. The difficulty rests in determining what constitutes the offense, in order to decide what behavior is forbidden and what consequences will follow from violations. Compounding this difficulty is the fact that there may be real gender differences in perceiving what types of behavior are unacceptably offensive. *See, e.g., In re KIAM*, 97 LA 617 (Howard M. Bard 1991) (the arbitrator determined that grievant's actions did create a hostile working environment for a fellow employee, but concluded that, in the absence of a clear employer policy prohibiting the conduct in question, grievant was not shown to be aware that his conduct constituted sexual harassment). *See generally* Bornstein, Tim, *The Arbitration of Sexual Harassment*, in 44 NAA 109 (1992); Neuborne, Helen R., *Comment, id.* at 120; Silberman, R.Gaull, *Comment, id.* at 133; Crow, Stephen M. & Koen, Clifford M., *Sexual Harassment: New Challenge for Labor Arbitrators*, 47 Arb. J. (June 1992). *See also* §§ 6.21 and 6.22, below.

### **Illustration:**

An employer's Work and Safety Rules set out a five-step program of progressive discipline as a guideline, although the rules stated that no specific order or sequence of disciplinary action was required. Grievant was discharged for leaving work without permission, an offense of which he was guilty. In administering discipline over a period of years, the employer had paid little attention to the progressive discipline guidelines in the Work and Safety Rules, and had issued numerous written warnings

for comparable offenses. The discharge was not sustained, since the employee could not have known what to expect from his absence from work, or what the consequences would be for further incidents. *See Power Flame*, 1995 WL 791638 (Arb.) (Lawrence H. Pelofsky 1995).

## REFERENCES

As Benjamin Aaron once observed, “Absolute consistency in the handling of rule violations is, of course, an impossibility, but that fact should not excuse random and completely inconsistent disciplinary practices.” Aaron, Benjamin, *The Uses of the Past in Arbitration*, in 8 NAA 1, 10 (1955). When the question of disparate treatment arises, it is often difficult to determine what past incidents of discipline are sufficiently similar to the case before the arbitrator, especially since it is rarely possible for the arbitrator to become fully conversant with the facts of the past incidents. Nevertheless, the arbitrator can often discern whether the employer has been generally consistent in implementing disciplinary policies or whether the employer has been playing favorites. *See generally* Ruben, Alan Miles, ed., Elkouri & Elkouri, *How Arbitration Works*, 6th ed. (2003), at 994–99 [hereinafter Elkouri]. *See also* Blancero, Donna & Bohlander, George W., *Minimizing Arbitrator “Reversals” in Discipline and Discharge Cases*, 1995 Lab. L.J. 616, 618–20 (reviewing 269 private sector discipline and discharge cases published between 1980 and 1994).

## § 6.18 Right to Privacy

**Discipline is not to be based on an invasion of an employee’s protected right to privacy.**

### Comment:

*a.* This principle is born of the same spirit as the protection against invasive state action enforced by the courts under the Fourth Amendment of the U.S. Constitution. It has deep historical reverberations, such as the notion that persons’ homes are their castles. Nonetheless, an employee’s workplace is more the employer’s home than the employee’s, and most arbitrators have been ready to recognize the employer’s legitimate interest in limited searches of lockers, lunchboxes, and clothing in the interest of preventing theft or of guarding

against having illicit drugs on the premises. There are limits beyond which arbitrators will not go, often due to the recognition of the need to protect employees' personal dignity. Such an issue would arise, for example, in the use by employers of personal surveillance cameras in restrooms or dressing rooms.

### **Illustration:**

As part of a "conservative jewelry" policy, the Store Director of a grocery store announced a policy that "tongue rings" were prohibited and policed the rule by asking selected employees from time to time if they were wearing a tongue ring. The first time grievant was asked, she admitted she had a tongue ring; she was sent home and came to work the next day without it. Several weeks later the Director asked her again, and after she said she was not wearing a tongue ring, the Director demanded that she prove it by sticking out her tongue. Grievant refused several such requests, after which she was discharged for insubordination. The arbitrator reinstated the grievant, concluding that the Director did not have good cause to think grievant was wearing a tongue ring, and that the order that grievant stick out her tongue was "unreasonably intrusive" and violated grievant's "reasonable right to privacy." *See Albertson's, Inc.*, 115 LA 886 (Sandra Smith Gangle 2000).

b. The employee's right to privacy is most often at issue in connection with employers' policing of the use of drugs in the workplace. Because drug testing invariably invades the sanctity of the person, arbitrators will employ a rule of reason in limiting the use of personally intrusive or humiliating tests or testing techniques or procedures. Where the employer has probable cause for inquiry, or where regular preemployment testing is arranged, or in like situations, drug testing is upheld by arbitrators.

### **REFERENCES**

There is a large literature on drugs in the workplace, as manifested in arbitration decisions. For a useful survey, *see* Vaughn, M. David,



Shore, Linda K., Paulson, Beth A. & McKissick, Andréé Y., *Drug and Alcohol Issues*, in Labor and Employment Arbitration, 2d ed., Boornstein, Tim, Gosline, Ann & Greenbaum, Marc (1997, 2004), Chapter 18. For other works, see Denenberg, Tia Schneider & R.V., *Alcohol and Drugs: Issues in the Workplace* (1991); Redel, Charles Abbey, Augustus, *The Arbitration of Drug Use and Testing in the Workplace*, 48 Arb. J. 80 (Mar. 1993); Elkouri, Frank and Edna Asper, *Resolving Drug Issues* (1993).

## **§ 6.19 Remedies for Due Process Violations in General**

**When a due process guarantee of the contract (either one that is an inherent part of just cause, or one arising out of a specific contract provision) has been violated in a significant way, most arbitrators conclude that the violation will affect the degree of the penalty or other adverse employer action, and some arbitrators conclude that the violation will nullify the penalty entirely.**

### **Comment:**

*a.* Arbitrators attach considerable importance to contractual provisions concerning the procedure that employers must follow in discharging, disciplining, or otherwise adversely affecting employees. At the same time, arbitrators hesitate to negate a penalty entirely because of procedural irregularities if they are satisfied the result was not a substantial injustice to the employee. In most cases arbitrators take the rule violation into account in assessing the appropriateness of the penalty or other employer action but do not declare the entire action a nullity. *See, e.g.*, cases discussed at §§ 6.13, Comment *c*, and 6.14, Comment *b*, above.

*b.* When good cause exists for an employee's termination but procedural due process rights are not fulfilled, some arbitrators will award back pay without reinstatement. *See Los Angeles County Metro. Transp. Auth.*, 2003 WL 22879045 (Arb.) (Bonnie G. Bogue 2003); *Cincinnati Fed'n of Teachers Local 1520*, 2003 WL 223759773 (Arb.) (Mitchell B. Goldberg 2003).

c. Occasionally a collective bargaining contract may provide for more specific or detailed procedural due process protections than would be required by constitutional principles and general concepts of fairness. When this occurs, the more extensive protections will be enforced. *See County of Blair*, 118 LA 238 (Kathleen Miller 2002) (grievant's contractual right "to question any witnesses" upheld).

### **Illustration:**

In discharging an employee for theft, an employer failed to observe a contractual requirement that there be a prior hearing in the presence of union representatives. The evidence of the employee's guilt was clear and convincing. Most arbitrators will sustain such a discharge but may award back pay from the date of the discharge to the date of the award or some other appropriate date. Some arbitrators will consider the failure to comply with the procedural requirement a matter of significance only if the employee was prejudiced as a result. An arbitrator will rarely set aside the discharge in a case as serious as theft merely because of the procedural defect.

## **REFERENCES**

Examples of arbitrators' sustaining a discharge but awarding back pay to a certain point are *Southwest Airlines*, 80 LA 628, 631 (Otis H. King 1983); *Kaiser Steel Corp.*, 78 LA 185, 190–91 (Melvin Leonard 1982). A discharge for assault on a supervisor was negated because of procedural irregularities in *Baldwin-Lima-Hamilton Corp.*, 19 LA 177 (Jack G. Day 1952). For further discussion of the issues treated in this and the following section, see Elkouri, at 967–69; Fleming, at 135–44; Hill, Marvin F., Jr. & Sinicropi, Anthony V., *Remedies in Arbitration*, 2d ed. (1991), at 6–20.

## **§ 6.20      Alternative Sanctions Against Employers for Due Process Violations**

**(1) When a specific due process guarantee of the contract has been violated in a significant way, but the relevant law or the contract does not permit an**

**otherwise appropriate make-whole remedy for the employee, an alternative sanction will be imposed on the employer.**

**(2) When a specific due process guarantee of the contract has been violated, but the violation is insufficient to affect the substantive rights of the employee in a significant way, an alternative sanction may be imposed on the employer.**

### **Comment:**

This section recognizes that positive contractual obligations are not to be ignored, even when their direct enforcement is blocked by a relevant law, or when a make-whole remedy is inappropriate because the due process violation was not sufficient to deny the employee substantial justice, or when there is a limitation on the arbitrator's powers. The theory is that when the parties provide for a positive obligation, rather than hortatory or aspirational language, they intend to have that obligation enforceable through sanctions. In some instances, the violation is *de minimis* and does not require an alternative employer sanction.

### **Illustrations:**

1. A nontenured school teacher is accused of sexual harassment by several students. He is summarily dismissed by the School Board, which also issues a press release explaining the circumstances. The Board acts in disregard of detailed procedures in the union contract for confrontation and cross-examination of accusers. State law makes the School Board the final judge of a nontenured teacher's capacity to teach and prohibits the arbitrator from ordering reinstatement. The arbitrator should award compensatory damages to the teacher for the earnings lost as a result of his dismissal, and for the damage caused by the defamatory press release.

2. A nontenured school teacher is absent an excessive amount of time and is dismissed by the School Board. The Board failed to have a court reporter transcribe the administrative hearing as required by the union contract. A Board member tape recorded the entire proceedings,

however, and there is no doubt about the tape's accuracy or about the sufficiency of the evidence. The arbitrator may require future compliance with the contract and may order reimbursement to the union, if such a remedy is within the arbitrator's contractual powers, for any added expenses incurred because of the absence of a transcript. But the arbitrator would not award damages to the employee, since the procedural violation had no significant effect on the employee's job rights.

### III. DISCRIMINATION AS MISCONDUCT OR BASIS FOR MITIGATION

*Susan Mackenzie\**

#### Introduction

Discrimination under statutory standards is the primary subject of Part III of this chapter. For disparate treatment in the administration of discipline, *see* § 6.17, Comment *b*, above.

Standards for discipline and discharge under just cause principles have essentially been derived from experience in the workplace. By contrast, where the alleged misconduct—or mitigating circumstance—is a form of racial, ethnic, religious, or sexual discrimination, statutory and legal standards frequently provide guidance for arbitral thinking. These concepts have developed over the last 40 years, since passage of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (2000). Title VII, which prohibits job discrimination based on race, color, religion, sex, or national origin, focused national attention on discrimination in the workplace. The Pregnancy Discrimination Amendments of 1978 provided for an expansion of the definition of the term “sex” under Title VII to include “pregnancy, childbirth, or related medical conditions. . . .” 42 U.S.C. § 2000e(k) (2000). Many state statutes and local ordinances contain similar provisions, and at times also cover other forms of discrimination, such as sexual orientation and marital status. Other federal antidiscrimination statutes include the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. (2000), and the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. (2000). Executive Order 11375 prohibits discrimination by federal contractors or subcontractors.

Parties increasingly have included in their collective bargaining agreements express prohibitions against such discrimination.

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By incorporating in their agreements the same language as or language similar to that of a statute, the parties are deemed to be aware of the legal and judicial interpretations of the same or similar statutory provisions and to intend that meaning, absent an express provision to the contrary. Another reason for consistency in interpretation is that a court may set aside an arbitration award interpreting a collective bargaining agreement if that award conflicts with a well-identified public policy and the violation of public policy is clearly shown on the record. An established public policy prohibiting discrimination in the workplace has been articulated by legislative bodies and the courts under Title VII and other antidiscrimination statutes, and the courts may vacate arbitration awards found to be contrary to this policy. *See, e.g., Eastern Associated Coal Corp. v. United Mine Workers, Dist. 17*, 531 U.S. 57 (2000); *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 126 LRRM 3113 (1987). Public policy does not require that “every harasser be fired.” *Westvaco Corp. v. Paperworkers*, 171 F.3d 971, 977 (4th Cir. 1999). *See also Weber Aircraft Inc. v. Warehousemen & Helpers Local 767*, 253 F.3d 821 (5th Cir. 2001); *City of Brooklyn Center v. Law Enforcement Labor Services, Inc.*, 635 N.W.2d 236 (Minn. Ct. App. 2001).

Legislatures and the courts are increasingly approving the use of alternative procedures to resolve statutory claims, placing greater emphasis on a need for consistency in resolving issues that involve both contractual and statutory rights. Indeed, parties to a collective bargaining agreement may not be able to exclude discrimination claims from arbitration. *See Austin v. Owens-Brockway Glass Container*, 78 F.3d 875, 151 LRRM 2673 (4th Cir. 1996). Consequently, the antidiscrimination language of a collective bargaining agreement is generally interpreted as incorporating the public policy against discrimination in the workplace, reflected in Title VII and other statutes.

For an excellent and concise review of relevant case law and related arbitration decisions, *see* Greenbaum, Marc D., *Arbitration and External Law*, in *Labor and Employment Arbitration*, 2d ed., eds. Bornstein, Tim, Gosline, Ann & Greenbaum, Marc D. (1997, 2000), Chapter 44 [hereinafter Greenbaum]; Knowlton, Anita Christine & Simmelkjaer, Robert T., *Sexual Harassment, id.*, Chapter 21.

## **§ 6.21. Acts of Sexual Harassment Constituting Misconduct**

(1) A single act as well as a pattern of acts may constitute quid pro quo or hostile environment sexual harassment and serve as an appropriate basis for discipline.

(2) Employee (or employer) conduct or speech must be sexual in nature, unwelcome to the target, and considered offensive by a reasonable person in a similar situation to constitute hostile environment sexual harassment.

(3) Unwelcome and offensive sexual conduct or speech must be sufficiently pervasive or severe to create a hostile environment. In most instances a pattern of misconduct must be established. However, a single act may suffice.

(4) The perspective of the target, not the alleged harasser, must be considered in assessing whether an act is unwelcome. Therefore, the fact that an employee charged with harassment does not understand that the conduct is unwelcome may not necessarily serve as an extenuating circumstance.

(5) The employee's conduct and speech as a whole should be evaluated in the totality of the circumstances in determining whether harassment is sufficiently severe to constitute a hostile work environment. The standard is whether the harassment would substantially affect the work environment of a reasonable person.

(6) An employee who is in a position to grant or withhold tangible job benefits from fellow employees and who does so based on submission to or rejection of unwelcome requests for sexual favors would be guilty of quid pro quo sexual harassment.

(7) The unwelcome conduct, such as a sexual advance or a request for sexual favors, must be used as the basis for employment decisions affecting the target of the advance, or explicitly or implicitly be made a term or condition of employment. The target of an unwelcome sexual advance need not submit to the request for the request to constitute

**misconduct. Nor is “voluntary” submission by the victim necessarily a defense to the harasser.**

**(8) An employer’s policy may set forth a definition of sexual harassment that is broader than the legal standard.**

**(9) An employer’s requirement to maintain a working environment free of sexual harassment is an appropriate consideration in assessing the propriety of the penalty imposed. Principles of progressive discipline are not necessarily applicable, but termination is not the only appropriate penalty. The penalty need only be reasonably calculated to end the harassment.**

### **Comment:**

*a.* A substantial majority of collective bargaining agreements—widely reported to exceed 85 percent—include language that tracks statutory provisions prohibiting discrimination based on sex. The parties are generally deemed to be aware of the underlying legal framework and judicial interpretation of these provisions. The growing trend among arbitrators is to incorporate established legal standards in assessing whether or not an act constitutes quid pro quo or hostile environment sexual harassment. Similarly, arbitrators are increasingly relying on legal principles in determining whether a proven act of sexual harassment constitutes just cause for discipline or discharge. This trend is consistent with established patterns of arbitral interpretation in cases involving other forms of discrimination or other statutory rights.

*b.* Also promoting consistency in the interpretation of statutory and contract provisions prohibiting discrimination based on sex is the trend among courts, as well as legislative bodies, to articulate an “established public policy” of prohibiting sexual harassment in the workplace. The courts may vacate arbitration awards deemed contrary to this established public policy. *See, e.g., Stroehmann Bakeries v. Teamsters Local 776*, 969 F.2d 1436, 140 LRRM 2625 (3d Cir. 1992); *Chrysler Motors Corp. v. Allied Indus. Workers of Am.*, 959 F.2d 685, 687–89 (7th Cir. 1992); *Newsday Inc. v. Typographical Union Local 915 (Long Island)*, 915 F.2d 840, 135 LRRM 2659 (2d Cir.



1990); *Communications Workers of Am. v. S.E. Elec. Coop.*, 882 F.2d 467, 468–70 (10th Cir. 1989).

### Illustrations:

#### *Hostile Environment*

1. A night-shift dispatcher sent a computer “message”—including a description of sexual acts between a female supervisor and various animals, as well as a graphic description of her involvement in various group sex activities—intended as a “joke” to over 50 remote locations. Although a one-time event, the act was found to be unwelcome and embarrassing to the supervisor and sufficiently offensive and severe to constitute hostile environment sexual harassment. Neither the fact that the employer’s sexual harassment policy did not specifically identify this act as constituting sexual harassment, nor the fact that the employee claimed it a mistake and considered the message a “joke,” served as grounds for mitigating a 5-day suspension.

2. On at least three occasions a male employee or team leader received oral warnings to cease grabbing female co-workers by the shoulders and kissing them. He persisted in kissing female employees and remarking on the size of their breasts and buttocks. He was terminated for creating a hostile environment. Over 15 years of service as well as the absence of any written warning or suspension were not considered sufficient to mitigate the termination given the persistence and pervasiveness of the misconduct.

3. The discharge of a male employee who persisted in calling one female employee a “fat sow” and “bitch” despite repeated oral and written warnings, the last of which stated that he would be discharged if the name-calling did not stop, was sustained. The arbitrator found the speech offensive, pervasive, and sexual in nature given that the terms “fat sow” and “bitch” would not have been used but for the target’s sex.

4. A male and female employee work in the same department of a manufacturing firm. They have engaged in a romantic relationship for several months. They have not been observed in inappropriate behavior on the job,

until the male employee, who is married, informs the female that he is ending the relationship. She is overheard making repeated efforts to encourage his attention, to make "dates," and to offer meetings after work. The male employee reports to the supervisor that he is being sexually harassed. The female is warned to refrain from close contact with the male but she persists. The employer decides on her discharge. The arbitrator noted her expressions of remorse and representations of no future interaction. The arbitrator reduced the discharge to a two-week suspension with a final warning.

5. An employee's lack of awareness that certain female employees considered his appellations of "honey buns" and "my sweetness" offensive was found to be a sufficient mitigating circumstance to reduce a two-week suspension to a written warning where the conduct was found not to be so egregious and the male employee using these greetings appeared able to refrain from such comments in the future.

6. A two-week suspension for sexual harassment was reduced in arbitration where a male employee flashed pornographic pictures at a female co-employee who had previously stated her abhorrence of pornography. The arbitrator found that the act, directed at a specific employee, was more than mere horseplay but did not rise to the level of legally impermissible conduct. However, it was sexual harassment under the company policy's broader definition of sexual harassment. The arbitrator found the penalty of a two-week suspension excessive under the totality of circumstances and reduced it to a written warning, noting that the grievant, who otherwise had a good record, had publicly apologized to the co-employee and appeared remorseful for what he had perceived as a joke.

#### *Quid Pro Quo Harassment*

7. An arbitrator found just cause for the demotion and transfer of an engineering technician charged with sexual harassment. The male grievant previously had an affair with a female engineering technician when both worked at the same location, but the affair ceased when

the female employee was reassigned to another location. Upon reassignment back to the common location, the female technician was placed on the work team of which her former "friend" was the lead. Team leaders not only were in charge of the group work product, but also made assignments and formally evaluated the work of team members. The arbitrator credited the testimony of the female technician that soon after she was placed in the work group, the leader began pressing her to continue the prior relationship. When she rebuffed his advances, he criticized her work product in performance reports. The arbitrator found that objective criteria indicated no diminution in her performance and that the team leader had sought sexual favors in exchange for improvement or maintenance of a working condition.

8. The discharge for quid pro quo sexual harassment of a male African-American hotel reservations agent in charge of assignments of two female agents on the Saturday tour was sustained by an arbitrator. The grievant admitted that he had flirted with one of the female agents and said, "Give me a little kiss will you, hon?" in a joking manner, and that he had previously been warned about making comments of a sexual nature to female employees. The grievant denied the charge of having repeatedly cornered the female agent in the bathroom and denied threatening that he would "make your assignments look so bad that the Company will have to get rid of you" as claimed by the female agent and asserted that the accusations were false and that he was "set up" because he was an African-American.

At arbitration a former female agent testified that the grievant had also solicited sexual favors from her during her employment. The arbitrator found both female witnesses credible and the grievant's testimony that he was "merely joking" not credible. The arbitrator noted that although neither had submitted to the demands for sexual favors, the female agents reasonably believed that the male agent could "make good" on his threats, and there was no support on the record for the assertion that the allegations were a pretext and the grievant was in fact terminated because he was an African-American.

## REFERENCES

The U.S. Supreme Court set forth the legal definition of acts constituting legally impermissible hostile environment sexual harassment in *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 40 FEP Cases 1822 (1986), finding an employer liable for a violation of Title VII if the harassment produced a “hostile work environment” regardless of whether the hostile work environment resulted in a tangible loss, and in *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993), holding that the claimed misconduct must be “severe or pervasive enough to create an objectively hostile or abusive work environment.”

Case law also has established that retaliation against employees who oppose discriminatory or perceived discriminatory actions is prohibited. In order to establish a retaliation claim, an employee must demonstrate participation in protected activity under the statute, awareness by the employer of the employee’s participation, a subsequent adverse action against the employee by the employer, and a causal connection between the protected activity and the adverse action. See, e.g., *Cosgrove v. Sears, Roebuck & Co.*, 9 F.3d 1033 (2d Cir. 1993). Section 704(a) of Title VII prohibits discrimination based on an employee’s having “made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.” *Id.* at 1038; *Sumner v. U.S. Postal Serv.*, 899 F.2d 203 (2d Cir. 1990). A violation may also occur if an employer is motivated by retaliatory animus, even if valid reasons for an adverse employment action exist. An adverse employment action must cause “materially significant disadvantage,” *Galabya v. New York Board of Ed.*, 202 F.3d 636, 641 (2d Cir. 2000), citing *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994), but “there are no bright line rules . . . to determine whether the challenged actions reaches the level of ‘adverse’. . . .” *Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 466 (2d Cir. 1997).

To constitute legally impermissible harassment, unwelcome conduct must be “so objectively offensive that it alters the conditions of the victim’s employment.” *Oncale v. Sundowners Offshore Services*, 523 U.S. 75 (1998). An employer may not be liable for the conduct of individuals that does not constitute a “tangible” employment action if it can demonstrate affirmatively that it has “exercised reasonable care to prevent and correct . . . harassing behavior.” *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). See also *Burlington Industries v. Ellerth*, 529 U.S. 742 (1998).

See generally Ogden, Judith S., *Do Public Policy Grounds Still Exist For Vacating Arbitration Awards?* 20 Hofstra Lab. L. J. 87 (2002); Glanstein, David M., *A Hail Mary Pass: Public Policy Review of*

*Arbitration Awards*, 16 Ohio St. J. Disp. Resol. 297 (2001); Hodges, Ann C., *Judicial Review of Arbitration Awards on Public Policy Grounds: Lessons From the Case Law*, 16 Ohio St. J. Disp. Resol. 91 (2000); Baker, Chris, *Comments: Sexual Harassment v. Labor Arbitration: Does Reinstating Sexual Harassers Violate Public Policy?* 61 U. Cin. L. Rev. 1361 (1993); Bornstein, Tim, *Arbitration of Sexual Harassment*, in 44 NAA 109 (1992); Feller, David E., *Essay: Arbitration and the External Law Revisited*, 37 St. Louis U. L.J. 973 (1993); Fraser, Leslye M., *Sexual Harassment in the Workplace: Conflicts Employers May Face Between Title VII's Reasonable Woman Standard and Arbitration Principles*, 20 Rev. L. Soc. Change 1 (1992-93); Hayford, Stephen L. & Sinicropi, Anthony V., *The Labor Contract and External Law: Revisiting the Arbitrator's Scope of Authority*, 1993 J. Disp. Resol. 249; Jaffe, Ira F., *The Arbitration of Statutory Disputes: The Role of the Arbitrator*, 10 Hofstra Lab. L.J. 1, 317 (1992).

For arbitration decisions expressly citing statutory and administrative standards or case law, see *Jefferson Smurfit Corp.*, 118 LA 911 (Lionel Richman 2003); *Lockheed Martin*, 114 LA 481 (Joseph F. Gentile 2000); *Albertson's Inc.*, 115 LA 887 (Sandra Smith Gangle 2000); *Conagra Frozen Foods*, 113 LA 129 (Barry J. Baroni 1999); *Thompson Food Basket*, 98-2 ARB 7077 (Lamont E. Stallworth 1998); *State of Nebraska*, 107 LA 910 (Sharon K. Imes 1996).

For arbitration decisions relying in part on employer policies or collective agreements that incorporate legal standards or public policy, see *Ohio Dept. of Public Safety*, 119 LA 1050 (Robert Brookins 2003); *Bruno's Supermarkets*, 118 LA 1451 (Roger I. Abrams 2003); *PPG Industries, Inc.*, 113 LA 833 (Fredric R. Dichter 1999); *Rodeway Inn*, 102 LA 1003 (Matthew Goldberg 1994); *Can-Tex Indus.*, 90 LA 1230 (John C. Shearer 1988); *Tampa Elec. Co.*, 88 LA 791 (W. Gary Vause 1986); *Social Sec. Admin.*, 81 LA 459 (James R. Cox 1983). For a different position relying on traditional just cause standards, see *Lyon Workplace Prods.*, 119 LA 737 (David A. Singer, Jr. 2004); *Flushing Community Sch.*, 100 LA 444 (William P. Daniel 1992); *Honeywell, Inc.*, 95 LA 1097 (Thomas P. Gallagher 1990).

For an arbitration decision regarding an employee's obligation to report harassment, see *Allied Tube & Conduit Corp.*, 118 LA 555 (Lisa Salkovitz Kohn 2003).

## **§ 6.22. Verbal Harassment Constituting Misconduct**

**(1) Oral or written comments based on race, color, religion, or national origin, in addition to sex,**

**may constitute discrimination and create a hostile environment. Such misconduct is appropriate grounds for discipline.**

**(2) To rise to the level of a discriminatory hostile environment, the comments must be unwelcome, offensive, or derogatory and based on one of the impermissible classifications.**

**(3) It is the perspective of the target, not that of the commentator, that must be considered in determining the offensiveness of the statements. The comments must also be viewed under the totality of circumstances.**

**(4) The penalty assessed must be reasonably calculated to end the harassment. Principles of progressive discipline may or may not be applicable, depending on the severity of the misconduct.**

### **Comment:**

*a.* Derogatory comments and slurs have traditionally been considered inappropriate in the workplace, but frequently the intent of the commentator has been the focus of inquiry in determining whether discipline, or the extent of discipline, meets just cause standards. In the context of claims of verbal remarks that constitute discrimination, by contrast, the focus is on the perspective of the target. What in other contexts may be deemed to be mere joking or horseplay takes on a different meaning when based on legally impermissible classifications such as race, religion, or ethnicity. Since the 1970s, the courts have recognized that racial remarks can create a hostile work environment that constitutes discrimination under Title VII. *See, e.g., Rogers v. EEOC*, 454 F.2d 234, 4 FEP Cases 92 (5th Cir. 1971), *cert. denied*, 406 U.S. 957, 4 FEP Cases 771 (1972). More recently, courts apply the same analysis for establishing a racial harassment hostile environment that is applied to existing sexual harassment hostile environment. *See, e.g., Daniels v. Essex Group*, 937 F.2d 1264, 56 FEP Cases 833 (7th Cir. 1991). Arbitrators are also increasingly applying the legal analysis, expressly or implicitly, where the misconduct alleged involves racial slurs.

*b.* Race, ethnicity, and religion are not specifically defined in Title VII, but guidelines adopted by the Equal Employment

Opportunity Commission (EEOC) in its Compliance Manual (§§ 615.7, 615.8, and 615.9) are generally followed by the courts. Race includes groups identified by ancestry or ethnic characteristics. Racial discrimination is prohibited even with respect to groups that would not be classified as “races” under modern scientific theory. Thus, “whites” or “Caucasians” are protected from discrimination based on race. Under Title VII, national origin includes an individual’s place of birth or country from which the individual’s ancestors came. However, national origin does not equate to the legal relationship an individual has with a particular country by virtue of citizenship. National origin discrimination, therefore, may be based on an individual’s physical, cultural, or linguistic characteristics related to a national origin group, but not on the basis of citizenship.

### **Illustrations:**

#### *Racial Harassment*

1. An arbitrator sustained the three-week suspension of a maintenance mechanic, a white male who was charged with creating a racially hostile environment. The mechanic wore a T-shirt with a picture of Aunt Jemima on the front and whistled “My Old Kentucky Home” whenever in the presence of the sole black supervisor at the work site. The grievant had also previously been warned in writing not to make racially derogatory remarks when certain African-American mechanics had claimed that he referred to them as “sambos.”

2. An arbitrator reduced a termination of a warehouse employee for racial harassment to a final warning and suspension without pay. The warehouse employee, a white male, acknowledged that he had told racially based jokes but claimed he was unaware that his remarks were unwelcome or offensive to African-American employees because they had laughed at the jokes. The arbitrator found the remarks intentional, offensive, and unwelcome, noting that minority employees, particularly where the work force is overwhelmingly white, as in the case presented, might be reluctant to publicly acknowledge the offensiveness of such remarks in an attempt to “fit in” with others in the work environment. Because the employee had not

previously been warned about the impropriety of making racially derogatory jokes and there was a substantial likelihood that the conduct would not be repeated, the penalty was deemed excessive. Based in part on *Customized Transp.*, 102 LA 1179 (Lamont E. Stallworth 1994).

### *Religion and Ethnicity*

3. An arbitrator found that there was not just cause for a two-week suspension of an engineering technician charged with creating a hostile environment based on religion and ethnicity. While the grievant had called a fellow employee who was an Orthodox Jew a "Nazi," the arbitrator noted that the grievant was also Jewish and had made the statement in the course of an argument, provoked by the remark of the fellow employee who had compared the grievant to Hitler. The arbitrator found the remarks offensive and inappropriate in the workplace. However, because the comment was made in the "heat of the moment" and was related to a personal relationship with little or no adverse impact on the working environment, it did not rise to the level of creating a hostile environment. The suspension was reduced to a written warning to refrain from making offensive comments in the workplace.

### *Age*

4. An arbitrator found no just cause for the termination of a 25-year-old office clerk for violation of the employer's harassment policy where the grievant referred to the most senior clerk in the office as the "oldest living clerk" and "oldest living negro." The employer's internal investigation of the complaint lodged by the elder clerk indicated that the grievant had previously made comments about the complainant's age and choice of clothes, and had compared the grievant to a character in an Eddie Murphy movie. Other employees indicated that they had been offended by statements of the grievant in the past. However, the record also established a widespread practice of joking and banter existed in the workplace, known to supervision, and no employee had previously complained about the grievant's remarks. While the arbitrator found the



grievant's comments inappropriate and offensive, termination was deemed to be too harsh a penalty under the totality of circumstances, and the penalty was reduced to a suspension without pay.

## REFERENCES

For examples of arbitrators citing legal standards in policies on racial harassment, see *Albertson's*, 117 LA 39 (Walter N. Kaufman 2002); *ESAB Welding & Cutting Products*, 115 LA 79 (Benjamin Wolkinson 2000); *McDonnell Douglas Space Sys. Co.*, 92 LA 1107 (Neil M. Herring 1989). Racially offensive or pornographic e-mails may also constitute harassment. See, e.g., *M T Detroit*, 118 LA 1777 (Richard E. Allen 2003); *PPG Industries*, 113 LA 833 (Fredric R. Dichter 1999). On arbitration awards involving harassment based on religion or ethnicity, see *State of New York*, 118 LA 1817 (Beverly Gross 2003); *Allan S. Goodman, Inc.*, 27 LAIS 3295 (Albert Murphy 1999); *Vicksburg Community Sch.*, 101 LA 771 (William P. Daniel 1993); *Georgia Power Co.*, 94 LA 1303 (Barry J. Baroni 1990).

### § 6.23. Discrimination as a Mitigating Circumstance

**(1) When an employee subjected to discipline or discharge demonstrates that discrimination based on race, sex, religion, national origin, disability, or age was the root cause of or a contributing factor to the circumstances giving rise to discipline, the discrimination may be sufficient to mitigate the penalty even though the employee's misconduct would otherwise constitute just cause for discipline.**

**(2) An employer's inadequate response to a claim of discrimination or harassment may constitute a mitigating circumstance sufficient to reduce or rescind discipline.**

**(3) Failure to provide a reasonable accommodation for a religious observance or a disability may constitute a mitigating circumstance under just cause analysis.**

**(4) The fact that a disciplined or discharged employee is the subject or target of discrimination does**

**not, standing alone, constitute mitigation. The nexus between the discriminatory act and the circumstances giving rise to the discipline must be sufficiently clear, and there must be a sufficient showing that but for the discriminatory act, discipline would not likely have occurred.**

**(5) Once a claim of discrimination is raised as a mitigating circumstance, most arbitrators will specifically address the issue in the written decision.**

### **Comment:**

*a.* In cases where a grievant or union raises a discrimination claim as a mitigating circumstance in an arbitration involving discipline or discharge based on some other form of misconduct, arbitrators generally view the discrimination claims as in the nature of an affirmative defense. Therefore the burden of proving discrimination is placed on the employee or the union. Arbitrators also frequently follow the legal analysis for establishing that an act rises to the level of impermissible discrimination once the employer has demonstrated facts deemed sufficient to warrant the discipline or discharge imposed.

For example, where an employee discharged for absenteeism raises a claim of discrimination as a mitigating circumstance, the employee must demonstrate that (1) the absences were motivated by a reasonable fear for personal safety due to racial harassment by co-workers, and were taken in reasonable proportion to the threats; (2) the employee communicated his fears to the employer and expressed a willingness to cooperate in correcting the situation; and (3) the employer failed to take appropriate remedial action. This framework for analysis is consistent with the analysis applied by the courts. For a discussion of related case law, *see* Greenbaum, § 44.11.

*b.* Most collective bargaining agreements expressly or implicitly incorporate the Title VII standard of reasonable accommodation of an employee's religious observance or practice unless doing so would constitute an undue hardship on the operations of the entity. *See, e.g., Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 42 FEP Cases 359 (1986); *Trans World*

*Airlines v. Hardison*, 432 U.S. 63, 14 FEP Cases 1697 (1977). Religion is broadly defined to include all aspects of religious observance, practice, and belief even if they are not formally required under specific tenets of a faith. However, there must be a clear demonstration that the beliefs are sincere, and for less traditional religions that the belief is tantamount to belief in God in traditional religions. *Cf. United States v. Seeger*, 380 U.S. 163 (1965).

c. In an arbitration where religion is claimed as an affirmative defense, an employee would likely have been discharged or disciplined for refusing to comply with some work requirement. Again, the trend is for arbitrators to follow the established legal analysis to determine if the claim of failure to accommodate is sufficient to militate against the penalty imposed. That is, the union must establish that a reasonable accommodation is required by demonstrating that the employees have a bona fide belief that compliance with a work requirement is contrary to their religious faith, and that they have informed the employer of the conflict. After the union establishes a prima facie defense, the burden then shifts to the employer to demonstrate that an accommodation would cause “undue hardship.”

d. When an adversely affected disabled employee claims that the employer was obligated under the Americans with Disabilities Act to make reasonable accommodation to a handicap, the same analysis is frequently applied. *See* Chapter 8, § 8.29, below. Recently, cases asserting age discrimination as a mitigating circumstance have been reported. Under the Age Discrimination in Employment Act, which prohibits age discrimination not only against employees at least 40 years of age in favor of younger employees but also between protected individuals themselves, an employer may take action otherwise prohibited if the differentiation is based on reasonable factors other than age, such as job performance or safety concerns.

## Illustrations:

### *Sex Discrimination*

1. An arbitrator rescinded the termination of an employee charged with repeated negligent work performance

when the union claimed and sufficiently demonstrated sex discrimination as a mitigating circumstance. The employer acknowledged the employee had experienced sexual harassment on the job and until that time her work performance had been rated highly. The arbitrator found the employer failed to consider the effect of the harassment on the employee's subsequent performance, a sufficient basis for reversing the discipline.

### *Racial Discrimination*

2. A discharge of an African-American assembly worker based on "inability to get along with others" was deemed by an arbitrator to violate the antidiscrimination provisions of a collective bargaining agreement and sufficient grounds for rescinding the termination. The arbitrator found that supervision was aware of racial disharmony at the plant, but no formal investigation of allegations of discrimination or their effect on the grievant had been undertaken.

3. A supervisor's racial harassment and intimidation over an 18-month period was found to constitute provocation and a sufficient basis for rescinding the termination of a health care worker who verbally attacked a supervisor.

4. The discharge of a clerk who physically assaulted a co-employee was sustained by an arbitrator despite a demonstration that the clerk had been the subject of a racial slur. The one incident was found to be an insufficient provocation and not tantamount to racial harassment, and the arbitrator found the violent response was out of proportion to the provocation.

### *Religious Discrimination*

5. The discharge of an employee for excessive absenteeism who asserted as an affirmative defense an inability to attend scheduled training sessions because they conflicted with the employee's Sabbath was sustained by an arbitrator. The arbitrator, following Title VII standards cited by both parties, determined that the accommodation would have resulted in the imposition of undue hardship and the employer did not need to make the requested concession to the employee's religious beliefs.

6. A termination for poor work performance was overturned by an arbitrator where the arbitrator found a sufficient demonstration that the employee's performance was affected by a diagnosed stress disorder caused by a supervisor's religious harassment and retaliation. The employer failed to take corrective action against the supervisor or to grant the employee's request for a transfer to another work area upon notice of the harassing condition, where an appropriate vacancy at another location was available at the time of the request.

#### *Disability Discrimination*

7. The termination of a swing-shift operator who was diagnosed as having hypertension and a sleep disorder was rescinded by an arbitrator who sustained the union's claim of disability discrimination by virtue of the employer's failure to find a reasonable accommodation for the grievant's request to be placed on a fixed schedule. The record established that a fixed schedule was available during the relevant time period and there was no demonstration that placing the grievant in that position would have resulted in an undue hardship. See § 6.25, Comment *d*, below, on the Americans with Disabilities Act.

#### *National Origin Discrimination*

8. The termination for poor performance of a sales representative at a commercial news service for Latin American customers was rescinded by an arbitrator where the union raised a claim of national origin discrimination as the motivating factor in the discharge decision. The arbitrator noted that the representative's supervisor, who was from Spain and spoke Castilian Spanish, had frequently criticized and mocked the representative's accent and complained to management about the accent and her belief that customers could not understand and would be offended by the "guttural Puerto Rican" used by the representative. There was no demonstration of any customer complaints and an absence of proof of poor performance.

## REFERENCES

See generally Perkovich, Robert, *Does Gilmer v. Interstate/Johnson Lane Corp. Compel the Consideration of External Law in Labor Arbitration?: An Analysis of the Influence of the Americans with Disabilities Act on Arbitral Decision-Making*, 25 Stetson L. Rev. 53 (1995); Hodges, Anne C., *The Americans with Disabilities Act in the Unionized Work Place*, 48 U. Miami L. Rev. 567 (1994).

On the issue of disability discrimination where the arbitrator follows but does not cite legal standards on reasonable accommodation, see *Cleveland Elec. Illuminating Co.*, 100 LA 1039 (Nathan Lipson 1993); *Bunge Corp.*, 96 LA 105 (Gerard A. Fowler 1990). For cases where religion is raised as a mitigating circumstance, see *Toshiba Display Devices, Inc.*, 28 LAIS 3092 (Margery Gootnick 2000). For examples of arbitrators following legal standards on retaliation, see *Southern Nuclear Operating Co.*, 118 LA 1227 (Barry Baroni 2003); *Chicago School Reform Bd. of Trustees*, 27 LAIS 3666 (Elliot Goldstein 1999); *Gunite Corp.*, 111 LA 897 (Lawrence Cohen 1999).

## IV. THE TROUBLED EMPLOYEE

*Janet Maleson Spencer\**

## § 6.24. Definition

A “troubled employee” is an employee who is addicted to drugs or alcohol, or who has a serious mental illness.

**Comment:**

a. An employee’s status as “troubled” is significant because it may be viewed as warranting a modification of the just cause standard, as described in §§ 6.28, 6.29, and 6.30, below. *See, e.g., Koch Ref. Co.*, 86 LA 1211 (Richard John Miller 1986); *Allegheny Ludlum Steel Corp.*, 84 LA 476 (Ellen J. Alexander 1985); *Ohio River Co.*, 83 LA 211 (Thomas L. Hewitt 1984). *See also* Chapter 8, § 8.28, below.

b. An employee who takes drugs or drinks to excess is not necessarily a “troubled employee.” For cases distinguishing addiction and indulgence, *see Pennwalt Corp.*, 89 LA 585 (Richard L. Kanner 1987); *Southwestern Ohio Steel*, 201 AAA 5 (Harry J. Dworkin 1975). For a comparison of the addicted employee and the distraught or stressed employee, *see Employers Should Help Troubled Workers or Neutrals Will, Arbitrator Declares: Remarks of George Nicolau at FMCS/IRRA Conference, Seattle*, 1991 Daily Lab. Rep. (BNA) (Mar. 6), No. 51:A-7.

The fact that the employee is addicted must be established since the critical underpinning of any special treatment for the troubled employee is that the employee was not responsible for misconduct. In the absence of an addiction, the employee acts voluntarily and is, thus, responsible for use of alcohol or drugs and for the related misconduct. *See* § 6.27, below.

c. The employee who is diagnosed as seriously mentally ill is a “troubled employee.” The employee who, though not diagnosed as seriously mentally ill, is stressed or in crisis, is not a “troubled employee” within the scope of this discussion. In extreme cases, such an employee resembles the “troubled employee” and some arbitrators may treat the employee as troubled. While an inability to control one’s anger may or may

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not be a symptom of mental illness, many arbitrators consider employees exhibiting a pattern of aggressive, threatening, or related behavior to be troubled employees, at least to the extent of considering them to be entitled to the benefit of anger management training or therapy. *See, e.g., Ralph's Grocery Co.*, 118 LA 748 (Joseph F. Gentile 2003); *In re Rhodia, Inc.*, 118 LA 455 (Russell C. Neas 2003).

### Illustrations:

1. A pilot was seen drinking in a bar five hours before flight time in violation of airline rules. The penalty for such a rule violation is discharge. He is discharged. He does not deny taking a drink during this period. However, the union urges that the discharge should not be sustained because he should have been referred to the employee assistance program (EAP) in lieu of discharge. (There is no contract language or practice regarding referrals to the EAP.) The employee is not entitled to a modification of the just cause standard or to conditional reinstatement (e.g., subject to rehabilitation). There is no evidence that he is an alcoholic.

2. A telephone installer threatened to kill her supervisor when she was assigned to an unpleasant task. Making such a threat is grounds for discharge. She is discharged. The union urges that, in lieu of discharge, the employer should have sent her to the EAP because her husband had just been laid off and she was "on edge." Without more, she is not entitled to a modification of the just cause standard by the arbitrator as a "troubled employee" because she has not established that she is mentally ill. However, some arbitrators might consider the extenuating circumstances and mitigate the penalty of discharge.

### REFERENCES

Hill, Marvin F., Jr. & Sinicropi, Anthony V., *Other Arbitral Issues: II. Remedies, Troubled Employees, and the Arbitrator's Role*, in 42 NAA 160 (1990) [hereinafter Hill & Sinicropi II].

*Employers Should Help Troubled Workers or Neutrals Will, Arbitrator Declares: Remarks of George Nicolau at FMCS/IRRA Conference, Seattle*, 1991 Daily Lab. Rep. (BNA) (Mar. 6), No. 51:A-7.



Spencer, Janet M., *The Developing Notion 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) [hereinafter Spencer].

## **§ 6.25. Discipline or Discharge Because of "Trouble" Per Se**

**(1) Neither current alcoholism or mental illness per se, nor a history of alcoholism or mental illness, is an appropriate basis for discipline or discharge.**

**(2) Drug addiction per se may or may not be viewed as an appropriate basis for discipline or discharge.**

**(3) The majority of arbitrators treat drug addiction like alcoholism and view it as an inappropriate basis for discipline or discharge per se. A minority distinguishes drug addiction from alcoholism on the basis of the illegality of drug use and thus view addiction to an illegal drug per se an appropriate basis for discipline or discharge.**

### **Comment:**

a. Possession or use of illegal drugs or alcohol on the premises, whether addiction driven or not, constitutes an independent basis for discipline, and discipline or discharge for such reasons is outside the scope of this section. For purposes of this section, then, it is assumed the addicted employee engages in these activities only off the premises and outside work hours.

b. Both alcoholism and mental illness are viewed as illnesses. Hence the employer's interest in the employee's addiction or condition, as such, is no different from its interest in the medical condition, standing alone, of any employee. This is true even where the employee is disabled and unable to come to work as the result of the alcoholism or mental illness, as long as the employee does not have an independent problem of tardiness or absenteeism. *See Hercules, Inc.*, 332 AAA 1 (Lloyd L. Byars 1986); *Durion Co.*, 85 LA 1127 (Thomas J. Coyne 1985); *Michigan Dep't of Soc. Servs.*, 84 LA 1030 (David T. Borland 1985) (dictum); *Greenlee Bros.*, 67 LA 847 (Aaron S. Wolff 1976). With respect to mental illness, *see Foundry*

*Equip. Co.*, 28 LA 333 (Horace C. Vokoun 1957); *International Harvester Co.*, 24 LA 229 (David L. Cole 1955). See also *Pennwalt Corp.*, 86 LA 686 (William P. Daniel 1986); *Ohio River Co.*, 83 LA 211 (Thomas L. Hewitt 1984); *National Archives & Records Serv.*, GSA, 21 GERR (BNA) 31 (Ira F. Jaffe 1983) (federal employee). Subsection (1), above, is consistent with the protection afforded alcoholics and the mentally ill by the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 (2000), as well as by the Rehabilitation Act of 1973, 29 U.S.C. § 701 (2000).

c. Current alcoholism, drug addiction, or mental illness, standing alone, may make an employee unfit for the particular job to which the employee is assigned. In such instance a nondisciplinary (as opposed to disciplinary) adverse action, including termination, may be appropriate; a disciplinary suspension or discharge would never be appropriate. *But see Aurora West School District 129*, 119 LA 1618 (Harvey A. Nathan 2004) (“challenged” janitorial employee’s peculiar behavior had always been peculiar and could not, standing alone, constitute grounds for discharge). The burden would be on the employer to demonstrate that the safety of the public or of co-workers would be put directly at risk by the continued performance of the job by the employee or that the absence of addiction or mental illness is in some way a fundamental requisite of the job. When the employer cannot demonstrate this, an adverse action against an employee because of the condition, even though characterized as nondisciplinary, would be deemed punitive, and hence inappropriate. See *Scott Paper Co.*, 100 LA 1113 (John F. Caraway 1993); *West Monona Community Sch. Dist.*, 93 LA 414 (Marvin F. Hill, Jr. 1989). For cases involving mental illness, see *Herr-Voss Corp.*, 70 LA 497 (Herbert L. Sherman, Jr. 1978); *Arandell Corp.*, 56 LA 832 (Clark J.A. Hazelwood 1971); *Ashtabula Bow Socket Co.*, 45 LA 377 (Harry J. Dworkin 1965); *Alcas Cutlery Corp.*, 38 LA 297 (Edwin L. Guthrie 1962) (noting lesser standard of proof where action, because of mental incapacity, is nondisciplinary).

d. In enacting the ADA, Congress has taken a more conservative view with respect to illegal drugs than have many arbitrators, excluding from the protection of the Act “any employee . . . currently engaging in the illegal use of drugs, when the [employer] acts on the basis of such use.” 42 U.S.C. § 12114(a).

The Rehabilitation Act has been amended to conform to this view. Statutory protection would still extend to the employee with a history of illegal drug use and to the employee addicted, currently or historically, to legal drugs. Illegal use of drugs refers to drugs made unlawful by the Controlled Substances Act, and does not include “a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.” 42 U.S.C. § 12111(6)(A).

Concerning drug addiction, *see generally* Denenberg, Tia Schneider & Denenberg, R. V., *Alcohol and Other Drugs: Issues in Arbitration* (1991), at 28 (“Although the notion of alcoholism as a treatable disorder has gained ground among industrial relations decisionmakers, there is greater resistance among them to the concept of rehabilitating an employee who is dependent on drugs other than ethanol”). Cases treating drug addiction as analogous to alcoholism include *Aeroquip Corp., Sterling Div.*, 95 LA 31 (Jack Stieber 1990); *Ashland Petroleum Co. Div.*, 90 LA 681 (Marlin M. Volz 1988); *Continental Airlines*, 75 LA 896 (Marshall Ross 1980).

When an employer contemplates nondisciplinary adverse action against a troubled employee because of the employee’s trouble, the employer must be mindful of federal (ADA and Rehabilitation Act of 1973) and state statutory obligations to accommodate, which may affect the nature of the nondisciplinary action. Where such obligations apply, termination would be a last resort. *See* §§ 6.21–6.23 above, on Discrimination.

Adverse action against an employee because of the employee’s history of alcoholism, drug addiction, or mental illness is impermissible under the ADA.

### **Illustrations:**

1. A pipefitter is an active alcoholic. He drinks to excess after work but shows no symptoms of being impaired when at work. Another employee, a packer, is depressed and is under treatment on an outpatient basis for this disorder. He was briefly hospitalized last week because of a suicide attempt, but generally comes to work each day and performs his job adequately. The employer

is concerned that these two employees will cause problems at work in the future. There is, however, no cause, at this point, to discipline or discharge either one on these facts.

2. A pilot, although an active alcoholic, shows no symptoms of being under the influence of alcohol when on the job. Nonetheless, because he, as an active alcoholic, is, by definition, not totally in control of his drinking, and because the risk to passengers is sufficiently great should he perform his job while under the influence of alcohol, he is unfit to fly and may be removed from his position until he is rehabilitated, though not disciplined or discharged.

3. A production worker in a knife factory is a paranoid schizophrenic who has suffered bouts of violent behavior, including one recently, away from the workplace. Although she has not been violent in the workplace to date, the employer fears that she might harm her co-workers in the future, in view of the stressful environment and her easy access to knives. The significant direct safety risk the employee presents justifies a non-disciplinary action to remove her from her position. This action, however, can be no more adverse than is necessary to eliminate the threat.

4. An active alcoholic is employed as an alcohol rehabilitation counselor. Because the alcohol rehabilitation counselor must be either a nonalcoholic or a rehabilitated alcoholic in order to perform the job effectively, the employer may, with a nondisciplinary action, remove the employee from the position, since the employee is fundamentally unfit for the job.

## REFERENCES

*See generally* Spencer, at 686–89. *See also* § 6.26, below. With respect to ADA implications, *see* §§ 6.21–6.23, above, on Discrimination. *See also* Haggard, Loretta K., *Reasonable Accommodation of Individuals With Mental Disabilities and Psychoactive Substance Use Disorders Under Title I of the Americans with Disabilities Act*, 43 Wash. U.J. Urb. & Contemp. L. 343 (1993).

## **§ 6.26. Discipline for Off-Duty Conduct Related to “Trouble”**

(1) An employee’s off-duty conduct is generally not considered to be a legitimate basis for discipline or discharge. When one of the exceptions applies (see § 6.6, above), the principles relating to the “troubled employee” may apply (see §§ 6.28, 6.29, and 6.30, below).

(2) An employee’s off-duty conduct may be considered an adequate cause for discipline or discharge where the conduct, for example, drinking or taking drugs, violates a last-chance agreement, the terms of which cover off-duty conduct.

### **Comment:**

a. The principles applicable to the nontroubled employee, as set forth in §§ 6.1–6.11, above, are equally applicable to the troubled employee, with the exception of conduct that violates a last-chance agreement, which occurs only with respect to a troubled employee. See §§ 6.3 and 6.6, above, for cases. Other cases include *Herr-Voss Corp.*, 70 LA 497 (Herbert L. Sherman, Jr. 1978); *Alcas Cutlery Corp.*, 38 LA 297 (Edwin L. Guthrie 1962).

Where, pursuant to generally applicable principles, an employer may consider off-duty conduct as grounds for discipline or discharge because there is a nexus between the conduct and the employee’s job, the “troubled” employee may receive special treatment in accordance with §§ 6.27 and 6.28, below. As to what establishes the required nexus, see *Scott Paper Co.*, 100 LA 1113 (John F. Caraway 1993). Random drug and alcohol testing is commonplace in certain industries and with respect to certain safety-related functions, e.g., commercial drivers. Although an employee who imbibed drugs or alcohol off duty and who subsequently tests positive at work may seem unimpaired, there is a presumption of impairment that justifies the employer’s concern and disciplinary policy.

### **Illustrations:**

1. Employee A gets drunk at home from time to time but reports to work regularly and performs satisfactorily.

Employee B reports to work regularly and performs satisfactorily and never gets drunk, or even drinks. Both A and B are similarly situated insofar as the employer's legitimate interests are concerned, that is, A's and B's regular attendance and satisfactory work performance. Neither is properly subject to discipline or discharge.

2. Employees X and Y commit acts of violence while off duty. Their co-workers, reasonably, are afraid to work with them. Both are discharged. The discharge of Y, with respect to whom there is no evidence of mental illness, will be sustained. However, X is mentally ill and her act of violence was brought on by her mental illness. The majority of arbitrators will uphold the removal of X from the workplace, possibly pending rehabilitation, but will not sustain a disciplinary discharge.

b. The last-chance agreement is discussed in §§ 6.28 and 6.29, below, and § 6.3, above. An employee subject to a last-chance agreement has been reinstated, or spared an otherwise justifiable discharge, on the condition, *inter alia*, of abstaining from drugs or alcohol in the future. Violation of a last-chance agreement, whether it occurs on or off duty, establishes that the employee is not salvageable or that rehabilitation efforts have failed, and therefore the off-duty conduct is relevant to a determination of just cause.

Strictly speaking, a discharge of a troubled employee for violation of a last-chance agreement should not be characterized as a disciplinary discharge since the employee's action was symptomatic of an intractable addiction, akin to an incurable illness. If the union contests the discharge in arbitration, however, it will most likely contend that the discharge was without just cause. The arbitrator who upholds the discharge may characterize it as a nondisciplinary termination.

For cases, see *City of Detroit*, 106 LA 1131 (Barry C. Brown 1996); *Ohio Dep't of Highway Safety, State Highway Patrol*, 96 LA 71 (Jonathan Dworkin 1990); *Atchison, Topeka & Santa Fe Ry.*, 87 LA 972 (J.R. Johnson 1986).

## REFERENCES

See generally Spencer, at 686–89. See also § 6.25, above.

## § 6.27. **Arbitral Approaches to Troubled Employees**

(1) Some arbitrators accord no special consideration to the troubled employee and apply traditional just cause standards.

(2) Some arbitrators insist that the troubled employee be treated in a nondisciplinary manner, for example, as the employer treats other employees unable to perform their jobs due to disability or illness.

(3) Some arbitrators assume that the employee is subject to discipline, but modify the just cause standard. See §§ 6.28 and 6.29, below.

### **Comment:**

While most arbitrators accept the application of disciplinary procedures to the addicted employee, most do not do so where a mentally ill employee is concerned. Some arbitrators insist that a termination of a mentally ill employee, if warranted, be nondisciplinary. Others make no distinction between disciplinary and nondisciplinary terminations, arguing that the difference is one of semantics.

In determining whether termination is warranted, most arbitrators will expect the employer to have considered the employee's potential for recovery or rehabilitation, and to have allowed this to take place (possibly putting the employee on medical leave), before terminating the employee.

As to Subsection (1), above, see *Southern Cal. Rapid Transit Dist.*, 96 LA 1113 (Joseph F. Gentile 1991). As to Subsection (2), above, see *Veterans Admin. Med. Ctr.*, 83 LA 51 (Fred L. Denson 1984). As to Subsection (3), above, see *Ralph's Grocery Co.*, 118 LA 748 (Joseph F. Gentile 2003); *In re Rhodia, Inc.*, 118 LA 455 (Russell C. Neas 2003); *Monte Mart-Grand Auto Concession*, 56 LA 738 (Arthur B. Jacobs 1971).

## **REFERENCES**

See generally Denenberg, Tia Schneider & Denenberg, R.V., *Alcohol and Other Drugs: Issues in Arbitration* (1991); Hill & Sinicropi II

(concluding, inter alia, that most arbitrators, where the trouble involves an addiction, take the approaches in Subsections (1) or (3) above).

Regarding the arbitral attitude with respect to the mentally ill, see Spencer, at 703–07 and cases cited. See also *Herr-Voss Corp.*, 70 LA 497 (Herbert L. Sherman, Jr. 1978); *Menasco Mfg. Co.*, 19 LA 405 (Spencer D. Pollard 1952). See §§ 6.21–6.23, above, on Discrimination for implications of the Americans with Disabilities Act.

## **§ 6.28. Prerequisites for a Modified Just Cause Standard**

**(1) As in all cases, the employer bears the burden of proving that the employee is guilty of the misconduct that is charged. The order of proof and the standards of proof, where a troubled employee is concerned, are also unchanged.**

**(2) The union bears the burden of proving that the employee is a “troubled employee.” The employee must be found to be troubled before any special consideration or modification of the just cause standard is warranted.**

**(3) The union bears the burden of proving that the employee’s “trouble” caused, in whole or in part, the misconduct for which the employee was discharged. Unless this is established, no special consideration or modification of the just cause standard will be warranted.**

### **Comment:**

*a.* This section contemplates a disciplinary discharge, where the employer must establish “just cause,” or the equivalent thereof, as opposed to a nondisciplinary termination because, for example, the employee is unfit to return to work from disability leave. As to the employer’s burden of proof, see *Koch Ref. Co.*, 86 LA 1211 (Richard John Miller 1986).

*b.* Where the misconduct triggering the discharge was intoxication or drug use, the standard of proof is the same whether or not the employee was known to be a user of drugs or alcohol. Cases relating to an employer’s proof of intoxication or drug use where the employee is a known alcoholic or drug user include *Sherwin-Williams Co.*, 66 LA 273 (Julius Rezler



1976); *City of Buffalo*, 59 LA 334 (Thomas N. Rinaldo 1972). See generally Spencer, at 691–95 and cases cited.

c. For the union's use of the grievant's "trouble" as an affirmative defense, see *Ashland Petroleum Co. Div.*, 90 LA 681 (Marlin M. Volz 1988).

d. When the grievant's status is not conceded by the employer, it is a threshold question in considering whether any special treatment is warranted. The grievant's status as troubled is frequently not in dispute. However, it is improper to assume that, simply because an employee tests positive for drugs or alcohol, the employee is addicted, hence "troubled" and entitled to special consideration or modification of the just cause standard. Arbitrators routinely uphold discharges of employees who test positive under company drug and alcohol policies.

e. If the employee's "trouble" did not cause the dischargeable conduct, the employee's position is identical to that of a nontroubled employee; the grievant did not act involuntarily and, therefore, was responsible for the conduct. Whether this causal connection was present is a threshold question in considering whether any special consideration or modification of the just cause standard is warranted. See *Koch Ref. Co.*, 86 LA 1211 (Richard John Miller 1986).

### Illustration:

Employee A is an alcoholic and, while intoxicated, punched his supervisor. Employee B sometimes drinks too much and, while intoxicated, punched his supervisor. Employee C is an alcoholic and, though not intoxicated, punched his supervisor. All three were discharged. Only A will be entitled to any modification of the just cause standard.

### REFERENCES

For difficulties in proving drug use, see generally Levin, Edward & Denenberg, Tia Schneider, *How Arbitrators View Drug Abuse*, 31 Arb. J. 97 (June 1976); Wynns, Pat, *Arbitration Standards in Drug Discharge Cases*, 34 Arb. J. 19 (June 1979).

## § 6.29. The Modified Just Cause Standard

When a troubled employee has engaged in dischargeable conduct (because of the trouble), the arbitrator expects the employer to assess the employee's potential and willingness for rehabilitation prior to opting for discharge; that is, before discharging the troubled employee, the employer must (1) have given the employee an adequate opportunity to become rehabilitated and (2) have concluded, with reason, that the employee is not salvageable.

### Comment:

*a. Rationale for Special Treatment.* Addicted or mentally ill employees are not in control of their condition and may not be in control of their behavior.

Because the traditional concept of progressive discipline presupposes that employees can voluntarily modify their behavior, progressive discipline will be ineffective in correcting the unacceptable behavior of a troubled employee.

Progressive discipline also will not affect the job performance or behavior of the chronically ill or incompetent employee attributable to the chronic illness or incompetence. The troubled employee, however, is distinguishable from the chronically ill or incompetent employee in that, with help, the troubled employee may be salvageable and, hence, able to satisfy the employer's expectations in the future.

For cases applying the modified test, see *Weyerhaeuser Paper Co. (NC)*, 448 AAA 7 (Thomas E. Terrill 1996); *Dresser Indus.*, 86 LA 1307 (F. Jay Taylor 1986); *Nabisco Brands*, 86 LA 430 (James R. Cox 1985); *Bordo Citrus Prods. Coop.*, 67 LA 1145 (Douglas C.E. Naehring 1977); *Mass Transit Admin.*, 187 AAA 15 (Seymour Strongin 1974).

*b. Nature of the Employer's Obligation.* When the employer has, prior to discharge, fulfilled its obligations with respect to the troubled employee's rehabilitation and the employee's misconduct continues, the discharge will be sustained. This is so even though the employee has sought and achieved rehabilitation subsequent to the discharge.

In determining whether the employee was given adequate opportunity for rehabilitation, the arbitrator will expect the employer to have actively encouraged the employee's rehabilitation. The extent of the employer's obligation in this respect may vary. A relevant consideration will be the employer's awareness of the problem, or whether the employer had reason to be aware of the problem. If the employer was not aware of the problem and had no reason to be aware of the problem prior to the discharge, arbitrators generally will not find the employer liable for a violation of the just cause provision. Other relevant considerations include the employee's prior efforts at rehabilitation; the availability and utilization of an employee assistance program (EAP); the employee's awareness or denial of the problem; and the existence and effect of, or nonexistence of, a contract clause encouraging rehabilitation.

There is some indication that employers are being advised not to actively encourage troubled employees to seek help even where the employer has an EAP in place, for fear of being held liable for discriminating against the employee under the "perceived as" prong of the ADA. See, e.g., Burke, K. Tia for Christie Pabarue Mortensen and Young, A Professional Corporation, *Violence in the Workplace: Why Employers Are Caught in the Middle*, Findlaw for Legal Professionals 2005 (1999) <<http://library.findlaw.com/1999/Nov/1/129180.html>> ("Under the ADA's . . . unique definition of disability, an employee who is perceived as having a mental disability is equally protected. . . . In some instances [where an employee has engaged in workplace misconduct] an employer may require the employee to participate in an Employee Assistance Program or may 'diagnose' the employee as troubled rather than characterize the employee's behavior. Employers addressing behavioral issues in the workplace must be careful: An employer's awareness of behavior that is commonly a symptom associated with a mental disability will not be sufficient to establish a 'perception' claim, although an employer's 'diagnosis' of an individual very well may."). See also *Miners v. Cargill Communications, Inc.*, 113 F. 3d 820 (8th Cir. 1997). In such a climate, the opportunity for allowing an opportunity for rehabilitation may, as a practical matter, not occur until the disciplinary crisis occurs—when the union or the employee comes forward and admits the "trouble."

Arbitrators consider the employee's potential for rehabilitation, not simply whether the employer, as such, has offered it. Thus, for example, an employee, without the employer's intervention, may have attempted rehabilitation (e.g., therapy), but may have failed to cooperate or simply failed to have had any success. If the employee was not salvageable and there was otherwise just cause for the discharge, arbitrators will sustain the discharge.

Cases on an employer's obligations include *Wacker Silicones Corp.*, 95 LA 784 (Louise Hodgson 1990); *Bethlehem Steel Corp.*, 54 LA 1090 (Alexander B. Porter 1970); *Eastern Air Lines*, 45 LA 932 (Robert J. Ables 1965). As to an employee's being unsalvageable, see *Anchorage School District*, 119 LA 1313 (John P. DiFalco 2004); *National Archives & Records Serv.*, GSA, 21 GERR (BNA) 31 (Ira F. Jaffe 1983); *P.N. Hirsch & Co.*, 60 LA 1335 (Wilber C. Bothwell 1973).

Most arbitrators would expect a reasonable drug and alcohol policy to allow a "troubled" employee the opportunity to seek rehabilitation after the first positive test in lieu of discharge. In fact, many plans allow any employee such an opportunity after the first positive test. See, e.g., the plan in *Argosy Gaming Co.*, 110 LA 540 (Gerard A. Fowler 1998). Notably, however, arbitrators are mindful that the Third Circuit has ordered the vacatur of an arbitrator's award declaring the company's zero tolerance policy unreasonable; the court stated, "We do not understand how the arbitrator could conclude on this record that it is unreasonable for CITGO to adopt a policy that attempts to pressure impaired employees into stepping forward and seeking help *before* their impairment results in a catastrophe." *CITGO Asphalt Refining Co. v. Local 2-991*, 175 LRRM 3057, 3065 (3d Cir. 2004) (emphasis in original).

Concerning employee relapses and a possible obligation to give more than one chance, see *City of Buffalo*, 59 LA 334 (Thomas N. Rinaldo 1972); *Thrifty Drug Stores*, 56 LA 789 (Edward Peters 1971).

*c. When an Employee Has Violated a Last-Chance Agreement.* Generally, arbitrators will enforce last-chance agreements. They will need to be convinced, however, that the terms of the last-chance agreement were communicated to the employee.

The conditions imposed in a last-chance agreement generally parallel those imposed by an arbitrator in ordering a

conditional reinstatement. See § 6.30(3)(a)–(c), below, for typical conditions.

See *City of Detroit*, 106 LA 1131 (Barry C. Brown 1996); *Carlson Co.*, 99 LA 677 (Robert B. Hoffman 1992); *Ohio Dep't of Highway Safety, State Highway Patrol*, 96 LA 71 (Jonathan Dworkin 1990); *Atchison, Topeka & Santa Fe Ry.*, 87 LA 972 (J.R. Johnson 1986).

*d. Evidence of Postdischarge Rehabilitation.* Frequently, and generally in the case of addiction, the discharge question will be raised before the arbitrator only after the employee has been successfully rehabilitated. Although arbitrators are divided on the relevance of this postdischarge conduct (see § 6.11, above), most arbitrators who apply a modified just cause standard where a troubled employee is concerned will accept evidence of the employee's postdischarge successful rehabilitation. This evidence is relevant to the question of whether the employee had a potential for rehabilitation at the time of discharge, of which, presumably, the reasonable employer should have been aware. See *Ralph's Grocery Co.*, 118 LA 748 (Joseph F. Gentile 2003); *Bemis Co.*, 81 LA 733 (Wendell W. Wright 1983); *Pacific Northwest Bell Tel. Co.*, 66 LA 965 (Lafayette G. Harter, Jr. 1976); *City of Buffalo*, 59 LA 334 (Thomas N. Rinaldo 1972).

### **Illustration:**

With respect to the rationale for special treatment:

Employee A is an excellent worker when she is at work, but she is frequently absent. Her absences are due to excessive drinking, which she cannot control because of her alcoholism. Increasingly severe discipline has not resulted in a change in her attendance pattern. Eventually, she is discharged.

Employee B is in the same position as A, except his absenteeism is due to the demands of a second job. After increasingly severe discipline results in no change in his attendance pattern, B is discharged.

Employee C is in the same position as A, except that his absenteeism is due to chronic back problems. In due course, and well after he has exhausted his rights under the Family and Medical Leave Act, C is discharged.

An employer has the right to expect employees to show up for work on a regular basis. (Employers with

more than 50 employees, however, are required to grant up to 12 weeks of unpaid leave per year to employees having serious health problems or needing to care for members of their immediate families, under the Family and Medical Leave Act, 29 U.S.C. § 2601 (2000)). B could show up for work. He has chosen not to do so. If B is not convinced to modify his behavior by the imposition of progressive discipline, then the employer has cause to discharge him. C is unable to maintain an acceptable attendance record because of his chronic back problems; C is, therefore, not fit for the job. A, like C, does not voluntarily choose to be absent. But, unlike C, and like B, A is not forever unable to modify her behavior. If A can be brought to acknowledge she has an alcohol problem and to seek to overcome her problem through rehabilitation, A can modify her behavior and meet the employer's attendance standards.

## REFERENCES

With respect to the rationale for special treatment, *see generally* Spencer, at 696–98; Collins, Daniel G., *Just Cause and the Troubled Employee*: Pt. I, in 41 NAA 21 (1989). Relevant cases include *Greenlee Bros.*, 67 LA 847, 855 n.7 (Aaron S. Wolff 1976); *City of Buffalo*, 59 LA 334 (Thomas N. Rinaldo 1972); *Chrysler Corp.*, 26 LA 295 (David A. Wolff 1956).

In *American Synthetic Rubber Corp.*, 73-1 ARB ¶ 8070 (1973), Arbitrator Lewis Kesselman outlined the prerequisites for discharge of alcoholic employees, equally applicable to the drug addicted or mentally ill: (1) they must be informed of the nature of their illness, (2) they must be directed or encouraged to seek treatment, (3) they must refuse treatment, or (4) they must fail to make substantial progress over a considerable period of time. For a discussion of the expected scope of the employer's efforts and tolerance of relapse, prior to discharge, *see* Hill & Sinicropi II.

### § 6.30. Remedies Because of Modified Just Cause Standard

- (1) An immediate reinstatement may be conditioned on an objective evaluation of fitness for work.
- (2) (a) When the grievant is not fit to return to work but is deemed salvageable, the discharge may

be converted to a medical leave or leave of absence, with reinstatement conditioned on the employee's undertaking and successfully completing rehabilitation.

(b) Postrehabilitation reinstatement may be conditional under Subsection (3).

(3) When the grievant is fit to return to work, reinstatement is generally conditional. For example:

(a) Reinstatement may be conditioned on future sobriety and compliance with a specific rehabilitation regimen, for example, attendance at Alcoholics Anonymous meetings, taking of medication, etc.

(b) When safety is concerned, reinstatement may be conditioned on random drug and alcohol testing.

(c) The employee may be reinstated subject to discharge, possibly without recourse to arbitral review, where the employee violates any of the conditions of the reinstatement or commits a wrongdoing similar to that which was the cause of discharge.

(4) Typically, no back pay is awarded. It is assumed that the employee, though improperly discharged, was not fit for work. The period since the discharge may be converted, however, to a leave of absence, sick leave, or disability leave, rather than treated as a disciplinary suspension.

### **Comment:**

a. More frequently than not, the employee will have been rehabilitated by the time the hearing is held. If not, the arbitrator may have to establish the length and nature of the leave and the method for determining fitness to return to work.

b. Conditioning reinstatement on rehabilitation would be a typical remedy in the case of a mentally ill employee who, with some time off and medical (psychiatric) care, will be fit for work. See, e.g., *Greenlee Bros.*, 67 LA 847 (Aaron S. Wolff 1976).

c. On conditions attached to reinstatement, see *City of Detroit*, 106 LA 1131 (Barry C. Brown 1996); *Ohio Dep't of Highway Safety, State Highway Patrol*, 96 LA 71 (Jonathan Dworkin 1990); *Wacker Silicones Corp.*, 95 LA 784 (Louise

Hodgson 1990); *Atchison, Topeka & Santa Fe Ry.*, 87 LA 972 (J.R. Johnson 1986); *Land O'Lakes Bridgeman Creamery*, 65 LA 803 (C.F. Smythe 1975); *Texaco, Inc.*, 42 LA 408 (Paul Prasow 1963). For an example of nonconditional reinstatement, see *Thrifty Drug Stores*, 56 LA 789 (Edward Peters 1971).

### Illustration:

An employee was discharged for tardiness. The arbitrator accepts the union's defense that he was an active alcoholic and that his habitual tardiness was attributable to his addiction. Had he not been a troubled employee, his discharge would have been sustained. Because the employee is troubled, he will be reinstated subject, *inter alia*, to his compliance with a treatment program, to his not drinking, and to his not showing up late for work.

Should he manifest the same pattern of tardiness after his conditional reinstatement, the employer should be able to discharge him whether or not the postreinstatement tardiness is caused by a relapse. He will have demonstrated, by his behavior, that he has either had a relapse, or that the tardiness was always unrelated to his addiction and that he did not deserve conditional reinstatement in the first place.

### REFERENCES

See generally Hill & Sinicropi II (discussing conditions precedent and subsequent to reinstatement) and cases cited; Nicolau, George, *The Arbitrator's Remedial Powers: Pt. I*, in 43 NAA 73 (1991); Spencer and cases cited.



Chapter 7

Wages and Hours

*Timothy J. Heinsz\* and Terry A. Bethel\*\**

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## I. WAGES AND JOB EVALUATION

### § 7.1. Definition of “Wages”

**Wages are compensation for services performed or for time that an employee is obligated to follow or be subject to an employer’s instructions.**

#### **Comment:**

*a. Rationale.* Although the remuneration owed by an employer to an employee may take many forms or be paid on different bases, its essence is that it is for services actually rendered. Thus, salaries, fees, bonuses, commissions, tips, pensions, and retirement pay are forms of wages. Wages may be paid hourly, daily, weekly, monthly, or annually (although this is sometimes regulated by state law) and may be paid on the basis of piecework or percentage of profits or earnings.

*b. Wages Versus Income.* Under the Internal Revenue Code, an employer is required to withhold tax payments on wages to employees but not necessarily on other forms of income. Some forms of employee benefits, such as medical services, entertainment, courtesy benefits, and discounts, while income to an employee, may not be wages. The key determinants are (1) whether the payments are the type of benefit treated as wages under the Internal Revenue Code, and (2) whether there is a reasonable basis for belief that such benefits should not be considered as remuneration for services performed.

#### **Illustration:**

1. The collective bargaining agreement between Company X and Union Y provides for a \$100 annual boot allowance that is paid to employees regardless of the number of hours that employees work or their experience or classification. The employer withholds applicable wage taxes on the allowance and the union grieves. The “boot allowance” would not be considered “wages” subject to withholding because the benefit is not the type of payment treated as a wage for services performed under applicable

law and is a flat fee paid to numerous employees regardless of their number of hours worked, comparative experience, or wage rates. *See Grays Harbor Pub. Util. Dist. No. 1*, 89 LA 961 (Roger Tilbury 1987).

*c. Pay When in Standby or On-Call Status.* Even though an employee may not be performing services, a contract may provide that an employer pay an employee for the time that the employee is under the control of the employer. Such payment to an employee for being in a standby or on-call status is based on the notion that the employer is significantly restricting the employee's nonwork time by requiring the employee to remain in a geographical area or otherwise to be ready to perform services if necessary.

### **Illustration:**

2. City X requires one group of its firefighter employees to remain at the firehouse after their hours of work to be on standby alert. City X provides this group of firefighters with food and lodging and requires no work unless the employees are dispatched to fight a fire. A second group of firefighters is released from duty and allowed to leave the firehouse after their hours of work but are required to carry a beeper by which they can be contacted by telephone and, if available, called back to work in the event of a fire. The city refuses to pay both the first group of employees for the off-duty hours spent at the fire station and the second group of employees for the hours that they must carry the beeper, unless either group of employees is called out to a fire. City X has a contract with Union Y that it will pay the firefighters for all hours while the employees are in service to the city. If Union Y grieves the nonpayment of wages, the arbitrator might determine that the first group of employees is entitled to payment for the time spent at the firehouse even if they perform no physical duties for the employer because they are under the employer's control. It is doubtful that the second group of firefighters would have their free time inhibited by the beepers to such an extent as to require payment for standby duty or on-call status, at least if their movement

was not restricted. *See City of Washington*, 116 LA 686 (Gregory P. Szuter 2001); *Corpus Christi Naval Air Station*, 102 LA 404 (James P. O'Grady 1994); *Fire Dep't, County of Los Angeles, Cal.*, 76 LA 572 (William S. Rule 1981).

*d. Pay or benefits while on leave.* Disputes sometimes arise concerning an employee's eligibility for continued benefit payments while on disability or workers' compensation leave. Agreements sometimes count such absences as "time worked" for purposes of certain benefits, such as vacation accrual. Others have maintenance of benefits clauses that apply generally. But arbitrators will not necessarily imply an obligation to continue costly benefits such as health insurance in the absence of language indicating the parties' intent to do so. *See, e.g., Providence Health Care Ctr.*, 114 LA 136 (Matthew M. Franckiewicz 2000).

## § 7.2. Bonuses

**Bonuses tend to be either periodic, lump-sum bonuses or incentive bonuses. Lump-sum bonuses are given by an employer either unilaterally as a gratuity, often following a profitable period, or under an agreement that requires the bonus be awarded as a substitute for or in addition to normal wages. An employee who receives an incentive bonus has that bonus determined according to the basis agreed on by the parties, e.g., based on the productivity or performance of the entire bargaining unit, or of a subdivision thereof (such as a department), or of the individual employee.**

### Comment:

*a. Gratuity or Obligation.* To ascertain whether a lump-sum bonus is a gratuity or an obligation in the nature of wages, arbitrators look to a number of factors such as (1) whether the decision to grant the bonus is within the exclusive judgment of management, (2) the manner in which the bonus is given, (3) whether the employer informs employees that a bonus is part of their wage package, and (4) whether the bonus is a

binding past practice. A lump-sum bonus may take the form of a monetary payment or some other tangible benefit such as an annual holiday distribution of a turkey or ham. For the factors in determining whether a bonus is a gratuity or an obligation, see *Scott Paper Co.*, 82 LA 755 (John F. Caraway 1984); *Vulcan Iron Works*, 79 LA 334 (Ralph Roger Williams 1982).

*b. Discontinuance.* If a bonus is a gratuity, then generally an employer can discontinue it unilaterally; however, where a bonus has become an obligation, then the company must meet its bargaining obligations with the union before discontinuing it. See, e.g., *St. Laurent Paper Co.*, 114 LA 682 (James M. Harkless 1999). However, even when a bonus has become part of the agreement of the parties, many arbitrators will not require an employer to provide the bonus if there is a change in the circumstances that gave rise to the employer's practice. In such situations most arbitrators will allow the employer to discontinue the otherwise binding bonus only for as long as the fundamental circumstances remain changed.

### **Illustration:**

1. An arbitrator concludes that Company X's annual Christmas holiday distribution of hams to employees that had taken place without interruption for 10 years constitutes a binding past practice within the meaning of the contract and cannot be unilaterally terminated by the employer. Nevertheless, if the arbitrator determines that the practice was dependent upon Company X's operations having been financially successful in each of the 10 years, then the arbitrator might well allow the employer to make a unilateral decision not to distribute hams in a year when it experiences financial loss. When the employer's operations return to profitability, the arbitrator would likely direct that the practice of distributing hams at Christmas be resumed. See *Saginaw Mining Co.*, 76 LA 911 (Alan Miles Ruben 1981).

*c. Calculation of Incentive Bonus.* Where job performance is the basis for an incentive bonus, an employer's job-performance evaluation of individual employees often constitutes the method of calculating the amount of each employee's

bonus. Where the actual production either of an individual employee or of an entire bargaining unit serves as the basis for an incentive bonus, the method for calculating the amount of the bonus usually takes into account (1) production totals and (2) the total hours worked by an individual or a unit. The employer generally may deduct flawed products from a production total if the cause of the defects was within the control of the employee or the unit.

### **Illustration:**

2. Company X, a paper company, withdraws an incentive bonus from all of the employees in a production department after finding seven rolls of water-damaged paper on the ground. An arbitrator would likely conclude that this was improper even though the goods were defective if the employer cannot determine which particular employees caused the defect or was using the withdrawal as a method of group discipline. *See Lawrence Paper Co.*, 96 LA 297 (Mark Berger 1991).

## **REFERENCE**

*See generally* Ruben, Alan Miles, ed., Elkouri & Elkouri, *How Arbitration Works*, 6th ed. (2003), at 671–73.

## **§ 7.3. Profit-Sharing Plans**

**An employer and union may agree to a profit-sharing plan under which employees in a bargaining unit are entitled to a certain percentage of the employer's profits during an established period of time.**

### **Comment:**

*a. Calculation.* Under a typical profit-sharing plan, an employer agrees to contribute a certain percentage of its annual pretax net profits to a “profit-sharing pool.” The employer generally calculates the amount of this pool to which each “qualified employee” is entitled by dividing such employee's gross W-2 earnings for the year by the total gross W-2 earnings

of all qualified employees. The resulting percentage represents the proportion of the profit-sharing pool to which an individual employee is entitled. An alternative method of calculation is that each employee is entitled to a flat percentage of such employee's gross W-2 earnings for the year. The employer pays each employee such amount from the employer's net profits for the year. For methods of calculating employees' entitlement in profit-sharing plans, see *Western Piece Dyers & Finishers*, 95 LA 644 (Elliott H. Goldstein 1990); *United States Steel Corp.*, 94 LA 1266 (Shyam Das 1990); *Mackintosh-Hemphill Mfg. Co.*, 88 LA 767 (Herbert L. Sherman, Jr. 1987).

*b. "Qualified Employee."* Most profit-sharing plans require that in order to be a "qualified employee," the worker must participate in the plan by making contributions to its administrative costs. An employer generally withholds such contributions from the wages of participating (i.e., qualified) employees. Such administrative costs generally include the fees of the trustee to manage the profit-sharing fund and the costs of record keeping.

### **Illustration:**

Company X and Union Y have a profit-sharing plan in which employees contribute to the administrative costs of the plan. The employer underestimates the administrative costs and requires an increased amount of contributions from qualified employees. Many arbitrators would conclude that if the mistake in assessing administrative costs was that of the company, then only the company should be required to bear the additional costs based upon its erroneous calculations. See *United Distillers Mfg.*, 104 LA 600 (J. Scott Tharp 1995).

*c. Receipt of Funds.* The timing of the payment of profit-sharing funds to qualified employees normally corresponds with the purpose of the profit-sharing plan: (1) if the purpose of the plan is to be a substitute for or a portion of wages, the plan will normally require annual or periodic payments, or (2) if the purpose is to provide qualified employees with a retirement or severance benefit, the plan will likely provide

for the payment of profit shares at the time of retirement or termination.

## § 7.4. Pension Plans

**An employer and union may agree that the employer or an individual employee shall contribute to a pension plan fund from which employees, after completing a required number of years of service, may collect a pension upon retirement. There are two general types of pension plans to which an employer and union may agree: (1) a “defined benefit” plan or (2) a “defined contribution” plan. Both types of pension plans are likely covered by the federal Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq. (2000).**

### Comment:

*a. “Defined Benefit” Plan.* A “defined benefit” pension plan is one in which individual employees are entitled to a periodic, fixed payment upon retirement. The method of contribution in such plans usually involves the employer and/or individual employee contributing a certain amount for each hour the individual employee works. The most common method of determining the amount of benefits under defined benefit plans is to credit an individual employee with a “benefit year” when such employee works an established number of hours within the period of one year. The employee is then entitled to a monthly payment equal to the number of credited benefit years multiplied by some amount fixed under the plan. An example of the methodology is *U.A. Local 38 Pension Trust Fund*, 1994 WL 838201 (William E. Riker 1994).

### Illustration:

1. Company X and Union Y have a defined benefit pension plan that guarantees employees a certain level of minimum monthly benefits based upon years of service. Because a large number of employees worked more than the minimum number of hours required for a credited benefit year, the pension fund accumulates a surplus. The union trustees want this surplus to be applied to increase



pension benefits; the company trustees want the extra funds to be held in reserve to underwrite possible unfunded, future liabilities of the plan. The parties deadlock on how the surplus funds should be applied and, in accordance with the terms of the plan, utilize arbitration to break the deadlock. An arbitrator would likely rule that if there were no clause in the pension trust agreement specifically stating how surplus funds would be handled, these monies could be used to increase benefits only if there were sufficient funds to meet the established purposes of the pension plan and the present guaranteed level of benefits and payment of administrative expenses. *See Association Trustees of the United Automotive Ass'n of St. Louis*, 96 LA 222 (Raymond E. McAlpin 1990).

b. *"Defined Contribution" Pension Plan.* A defined contribution plan requires employer and/or individual employee contributions to individual employee accounts. Upon retirement, an individual employee is entitled to all of the funds in such employee's account rather than a fixed, periodic benefit. The method of contribution under such plans usually involves the employer and/or individual employee contributing an established percentage of such employee's annual earnings into the employee's individual account. A defined contribution plan may provide for (1) a lump-sum payment to a retiring employee, (2) deferred periodic payments to retiring employees, or (3) a choice for a retiring employee between these two options. For an analysis of the method of contributing to a defined contribution plan, *see Whitehall Township*, 1995 WL 715543 (Thomas J. DiLauro 1995); *Sun Life Ins. Co. of Am.*, 87 LA 598 (James M. Harkless 1986). For a discussion of the various methods of payment in a defined contribution plan, *see Mohawk Rubber Co.*, 77 LA 90 (John F. Caraway 1981).

c. *ERISA.* ERISA, which in many instances preempts state law, can significantly affect the interpretation of rights and duties under a pension plan. ERISA imposes minimum funding requirements upon parties to a pension agreement to ensure that individual employees receive their entitled pension payments upon retirement. ERISA also provides requirements for the administration of pension plans by trustees who have fiduciary obligations in the carrying out of their duties.

For a discussion of the effect of ERISA on benefit amounts and funding requirements, and the fiduciary duties of plan trustees, see ABA Section of Labor & Employment Law, *Employee Benefits Law*, 2d ed. (2000), at 200–41, 661–771; *Daniels Co.*, 102 LA 1064 (Matthew M. Franckiewicz 1994); *Texas Carpenters Health Benefit Fund & N. Tex. Carpenters Pension Fund*, 90 LA 1097 (Samuel J. Nicholas, Jr. 1988); *Hertz Corp.*, 81 LA 1 (Eugene Mittelman 1983).

### **Illustration:**

2. Company X decides to withdraw from a multiemployer pension plan between Association A, of which Company X is a member, and Union Y. Company X claims that it can only be obligated to make annual payments for the three-year period that the current collective bargaining agreement between Association A and Union Y is in effect. The employer trustees of the pension plan support this position. The union trustees claim that Company X is responsible for its portion of the unfunded liability of the pension plan regardless of the number of years it is required to make contributions by the terms of the current collective bargaining agreement. An arbitrator might well decide that, despite the three-year limit of duration of the collective bargaining agreement, the employer must continue payments beyond this term to meet its portion of the unfunded liability of the plan in light of the overriding purposes of ERISA (1) to protect the rights of plan participants to receive pensions that they have earned by virtue of their employment, and (2) to protect the long-term solvency of the multiemployer pension plan. See *Bethlehem Steel Corp.*, 91 LA 777 (Rolf Valtin 1988).

*d. Effect of Disability.* Many pension plans provide for the contingency of an employee who, after having accumulated a required number of continuous years of service for the employer, becomes disabled before reaching the normal retirement age, so that the employee can draw disability pension benefits. To be eligible for such benefits, most plans require that an employee suffer a “permanent disability” that may include any of the following elements: (1) bodily or mental injury or disease causing an employee to become unable to

meet the requirements of a job, (2) the opinion of a physician that the disability is permanent, (3) the incapability of the employee to work in any employment or occupation for remuneration, and (4) the continuance of the disability for an established minimum period of time. Many pension plans will not allow an employee on permanent disability benefits to receive the full amount of pension payments established under the plan, but rather will provide for a reduction by a certain percentage of the recipient's minimum periodic payments. The amount of this percentage may depend on the difference between the normal retirement age and an employee's actual retirement age due to the disability. For criteria to establish eligibility requirements of employees who become permanently disabled to receive benefits, see *United States Steel Corp.*, 107 LA 243 (James C. Duff 1996); *Crown Cork & Seal Co.*, 105 LA 929 (Barry J. Baroni 1995); *Buckeye Steel Castings*, 80 LA 1196 (Fred E. Kindig 1983). For a discussion of reduction in disability retirement benefits, see *Tarkett, Inc. (Fullerton)*, 107 LA 241 (James C. Duff 1996).

*e. Effect of Layoff or Termination.* Pension plans between employers and unions may also provide a pension for laid-off or terminated employees who have accumulated an established number of years of service and/or reached a prescribed age. For cases discussing benefit plan eligibility for laid-off and terminated employees, see *Bethlehem Steel Corp.*, 104 LA 452 (Shyam Das 1995); *Dayco Prods.*, 92 LA 876 (Gerard A. Fowler 1989).

## REFERENCE

See ABA Section of Labor & Employment Law, *Employee Benefits Law*, 2d ed. (2000).

## § 7.5. Reimbursement of Expenses

**An employer and union may agree that the employer will reimburse employees for expenses related to employment for clothing, meals, travel, living and housing, and tools and equipment.**

**Comment:**

*a. Clothing Allowance.* Companies and unions often agree that an employer will pay employees a clothing allowance when the wearing of a uniform or certain articles of clothing is a condition of employment and the employer does not provide such clothing to employees. Where employees select the item of clothing for which they are to be reimbursed, employers generally have a right to inspect the article to ensure that it meets the employer's reasonable requirements for the business. If an employee receives a personal benefit from owning a required article of clothing, then often the agreement between the employer and union will provide that the employee contribute to the garment's cost.

**Illustrations:**

1. The contract between Company X and Union Y states that an employer will provide the cost of one pair of safety shoes per year. Employees claim that the employer violated the contract when Company X refused to reimburse employees for cowboy boots. Most arbitrators would conclude that the employer has a right to verify whether the shoes purchased meet reasonable safety standards. If the cowboy boots do not meet such standards, then the employer should be able to refuse to reimburse the employees for the expense despite the contract provision concerning the allowance for safety shoes for the employees. *See Nekoosa Corp.*, 83 LA 676 (Milo G. Flaten 1984).

2. Company X and Union Y have a contract provision that the employer reimburse employees for clothing and equipment used solely for safety purposes. An employer requires its production employees to purchase cotton gloves and its welders to purchase special heavy-duty gloves. Company X demands that the employees pay for one-half of the expenses of these gloves and Union Y grieves. Many arbitrators apply a "dual purpose" test to determine whether the employees must contribute to such a purchase. Under this standard, arbitrators will evaluate "whether the item in question is ordinarily worn by employees [and] whether it can be worn in and out of work which can indicate it is personal wearing apparel." An

arbitrator would likely find that the employees must contribute to the purchase of the cotton gloves because they can be worn outside the workplace as personal wearing apparel, but not for the welders' heavy-duty gloves. See *Consolidated Coal Co.*, 1992 WL 717240 (William C. Heekin 1992).

*b. Meal Expenses.* Often an agreement between a company and a union will require the employer to compensate an employee for meal expenses incurred when an employee is required to be away from home overnight or to travel to some location other than the workplace. Normally such agreements provide that the employee will receive compensation only for "normal and reasonable" meal expenses. "Normal" expenses generally include tips that are not a part of the actual price of the meal. In evaluating "reasonableness" an arbitrator may look to such factors as (1) the prices on area menus; (2) the limitations, if any, placed upon the meal allowances of employees in other job classifications; and (3) the amount of physical effort an employee must exert in performing the work entitling the employee to the meal allowance. For some arbitrators, more strenuous labor apparently may justify heartier and more frequent nourishment. For a case describing "normal" meal expenses, see *Armstrong Rubber Co.*, 89 LA 659 (Fred E. Kindig 1987); for a case describing "reasonable" meal expenses, see *Southwestern Bell Tel. Co.*, 75 LA 57 (A. Dale Allen, Jr. 1980).

*c. Travel Expenses.* Often employers and unions agree that employees required to travel to destinations other than their place of work will receive a travel expense allowance. Such travel expense allowance may cover the cost of "ordinary, normal and reasonable" expenses such as (1) airline tickets, (2) rental cars, (3) mileage reimbursement for the use of an employee's own automobile, (4) motel accommodations, (5) meals, (6) parking, and (7) taxi fares. An agreement may also require that an employee receive a travel expense allowance when the employer temporarily assigns the employee to a new place of work or a field location or when the employee must travel to more than one place of work on a daily basis. Reimbursable expenses are limited to amounts or time periods specified in the agreement. See, e.g., *Defense Contract Audit*

*Agency*, 199 LA 289 (Harold E. Moore 2003). For cases involving different types of reimbursable travel expenses, see *United Tel. Co. of Texas*, 1996 WL 713026 (Harold E. Moore 1996); *Armstrong Rubber Co.*, 89 LA 659 (Fred E. Kindig 1987).

### **Illustration:**

3. Company X requires an employee to change reporting locations from an employee's normal place of work to company headquarters while the employee is on special assignment. The employee files a grievance for travel time and mileage incurred by the employee due to the change in reporting location. Many arbitrators would conclude that, in the absence of a contractual provision requiring travel time and mileage payment, an employee's temporary assignment to a new job location will not entitle the employee to a travel expense allowance so long as the employer has a legitimate business purpose for making the assignment. See *Equitrans Inc.*, 101 LA 571 (Thomas L. Hewitt 1993).

*d. Living and Housing Expenses.* Agreements between employers and unions sometimes require that an employer provide a subsistence allowance to an employee who must live in a temporary residence after the employee's temporary or permanent transfer to a new work location. A subsistence allowance may reimburse an employee for (1) expenses of lodging during the temporary period, (2) house-hunting costs during the period, (3) laundry and cleaning expenses, (4) costs of moving to the new location, (5) food or meal expenses, and (6) expenses for commuting from the temporary residence to the new job location. For cases describing various living and housing expenses, see *Federal Aviation Admin.*, 105 LA 954 (David A. Concepcion 1995); *Southern Cal. Edison Co.*, 89 LA 1129 (R. Douglas Collins 1987).

*e. Tools and Equipment Allowance.* Labor agreements often require that an employer provide employees with a tool or equipment allowance to cover employees' costs of purchasing, maintaining, and replacing tools or equipment that the employer requires employees to use in the performance of their

work. Often employers reserve the right to institute accountability measures to ensure that employees actually purchase appropriate new tools and replace old ones. Such measures may (1) require employees to make purchases from employer-designated sellers, (2) allow the employer to inspect purchased tools prior to disbursement of the allowance, or (3) require that employees return old tools to the employer. If such tools and equipment are lost, damaged, or stolen, responsibility for such tools and equipment usually depends upon who had control over such tools and equipment.

For a case discussing an employer's right to establish accountability measures to ensure the purchase of appropriate tools and equipment, see *Birmingham-Jefferson County Metro. Transit Auth. / Metro Area Express*, 103 LA 1 (Barry J. Baroni 1994). Examples of required tools or equipment would be the weapons of a police officer, *Law Enforcement Labor Servs.*, 1992 WL 717503 (William J. Berquist 1992); work tools of a mechanic, *Greater Cleveland Regional Transit Auth.*, 1992 WL 726324 (Marvin J. Feldman 1992); and the belt and pole straps of a lineman working on utility poles, *Louisville Gas & Elec. Co.*, 79 LA 921 (Marshall J. Seidman 1982). See also Chapter 8, § 8.15, below.

### **Illustration:**

4. Company X, a bus company, and Union Y have a provision in their collective bargaining agreements that the employer will provide a tool allowance for its mechanics. Employee A's toolbox is stolen from his locker one night after hours when he has left the workplace. Employee B's tools are stolen from him during the workday while he is working on a bus that had been towed back to Company X's garage. Most arbitrators would conclude that Company X must reimburse Employee A for the stolen box and tools because the theft occurred on the employer's premises during off hours and thus the tools were under the employer's control. However, the employer should not be held responsible for the tools stolen from Employee B who had exclusive control of them while repairing a bus on the employer's premises. See *Niagara Frontier Transit Metro Sys.*, 90 LA 1171 (Jerry A. Fullmer 1988).

## REFERENCE

Steifel, Howard, *Miscellaneous Employee Benefits*, in Labor and Employment Arbitration, 2d ed., eds. Bornstein, Tim, Gosline, Ann & Greenbaum, Marc (1997), Chapter 38.

### § 7.6. Job Evaluation

**The amount of compensation that is negotiated between an employer and a union for a particular job usually is based on factors such as the duties and responsibilities involved in the performance of the duties and the qualifications and training necessary for the position. These criteria are often found in job descriptions. Many employers and unions determine pay rates through job evaluation systems that attempt to establish the worth of each position in relationship to other jobs at the workplace and in the general marketplace.**

#### **Comment:**

*a. Rationale.* In determining the amount that an employer should pay for a particular job, many factors come into play; however, the general underlying principles are that an equal amount should be paid for work that is worth the same in the production of goods or delivery of services and that jobs that require extra effort or skill will be paid appropriately.

*b. Methods of Payment.* Employees generally are paid on an hourly or annual-salary basis or by an incentive method. The latter involves the determination of a base rate that is guaranteed to the worker for producing a certain amount and which is calculated in terms of what a normal employee could perform with reasonable effort. Any greater amounts produced result in additional earnings for that employee at a rate determined in the collective agreement.

*c. Methods of Job Evaluation.* The most common method of determining job worth is through a “point” system. Under such a method certain factors are considered and assigned points or levels. Typical factors in a job evaluation would include education or other qualifications, experience, skill, effort,



time to perform, responsibility, conditions, equipment or automation, and job hazards. A level or grade is given to each factor to the extent that it exists in a job and a point value is given for each level or grade. The total points then determine the worth of the job.

**Illustration:**

Company X and Union Y hire a job evaluator to determine the worth of a new position of computer operator under their job evaluation system. The evaluator reviews all background facts and observes the operator. The evaluator determines that Qualification Level A (100 points), Skill Level B (75 points), Effort Level D (25 points) apply to this position for a total of 200 points. The wage rate of the computer operator is then established at the same amount as other jobs with the same rating.

**REFERENCE**

See Elkouri, at 676–77; Kropp, Steven, *Compensation Systems and Job Evaluations*, in Labor and Employment Arbitration, 2d ed., eds. Bornstein, Tim, Gosline, Ann & Greenbaum, Marc (1997), § 34.01 [hereinafter Kropp].

**§ 7.7. Changes in Job Classifications**

**In the absence of an agreement to the contrary, an employer generally has the right to add, combine, or eliminate a job classification if there is a justifiable reason and management acts in good faith. If the duties in a job classification are changed so as to increase materially the workload, then the wage rate should be raised accordingly.**

**Comment:**

*a. New Job Classifications.* If a new job occurs in a plant as a result of a change in production or technology or for some other economic reason, an employer normally has the right to create a new job classification. A job is usually considered a “new” one if it is distinctly different from present jobs in the

workplace. An employer should pay employees in a new job classification a wage rate in accordance with the parties' job evaluation system. An employer should not be allowed to label as a job under an existing classification what is really a new job classification in order to pay a lower rate than would otherwise be required. In such an instance, most arbitrators would require an employer to create a new job classification at a proper rate of pay. *See ABB Power T&D Co.*, 116 LA 1161 (Lisa Salkovitz Kahn 2001).

*b. Combining or Eliminating Job Classifications.* There has been a split of authority among arbitrators as to whether an employer has the unilateral right to change job duties in a classification or to combine or eliminate job classifications when the classifications are listed in the contract. The majority view is that the listing of job classifications in a contract does not obligate an employer to "freeze" these for the term of the contract. Rather, arbitrators following this view conclude that such a listing is primarily for the purpose of indicating the wage rate that will be paid for work performed in that classification. Legitimate business reasons, such as new technology, improved equipment or other means of production, and greater efficiencies, that should allow an employer to change job classifications and work duties may occur. In addition, arbitrators sometimes allow employers to combine classifications or create a new classification to enhance efficiency in the face of declining economic performance. *See, e.g., Pliant Plastics Corp.*, 119 LA 425 (Roger I. Abrams 2004). However, if such a change results in a material increase in workload for an employee, that worker's wages should be adjusted accordingly. Some arbitrators have required management to negotiate over the appropriate rate before creating or changing a job classification; others have allowed an employer the initial right to institute a rate and then the union can grieve the appropriateness of the wage. For a discussion of the two views on the right of management to change or eliminate existing job classifications, see Kropp, § 31.03(1) and (2). For a discussion of whether management must first negotiate a rate for a changed job classification or whether the union must file a grievance, *see Elkouri*, at 680–83. *See also* Chapter 4, § 4.8, above; *Blaw-Know Construc. Equip. Corp., Ingersoll-Rand Road Dev. Group*, 116 LA 1095 (Aaron S. Wolff 2001) (arbitrator denied

employer the right to combine classifications where contract allowed creation or termination but did not mention combination).

### **Illustration:**

The collective bargaining agreement between Company X and Union Y includes a category of “warehouse worker” that is the lowest labor grade in the plant. The union files a grievance claiming that the employees in this category should be upgraded because in the past 10 years there have been additional duties including the use of new machinery, more items in the warehouse, and the use of a computer to locate items in the warehouse. Most arbitrators would determine whether these new duties, when viewed in relation to all of the factors involved in the job, are sufficient to change materially the job of the warehouse workers. If these new tasks did not require significant new skills or took up only a small percentage of the employees’ overall duties, the arbitrator would likely deny the grievance because, although there has been a change in duties, they have not increased materially the workload or responsibilities of the warehouse workers. *See Raynor Mfg. Co.*, 93 LA 774 (Milton T. Edelman 1989).

*c. Assigning Work Outside a Job Classification.* Arbitrators are split on whether an employer can assign or transfer an employee to work outside the employee’s particular job classification. Often these cases turn on how detailed the job descriptions are or whether the job classifications are negotiated between the parties. Arbitrators tend to allow transfers outside an individual’s job classification if there is a good reason and the transfer is temporary, because such transfers do not undermine the normal job duties of the worker. If an employee is properly assigned to perform work of a higher-rated position, the employee should receive the pay of that job if most of the employee’s work is the performance of these higher-rated tasks.

For instances where job descriptions or contract language have been held to limit an employer from assigning an employee work outside a job description, see *Allied Plant Maintenance Co. of Okla.*, 88 LA 963 (Ed W. Bankston 1987); *Cadillac*

*Gage Co.*, 87 LA 853 (George W. Van Pelt 1986). For examples of where temporary or emergency transfers have been allowed, see *Standard Register Co.*, 83 LA 1068 (Roger I. Abrams 1984); *Amax Coal Co.*, 83 LA 1029 (Robert W. Kilroy 1984). As to the proper rate of pay when an employee performs work outside that person's job classification, see *AFG Indus.*, 96 LA 628 (William H. Holley, Jr. 1990).

## REFERENCES

See Elkouri, at 680–86; Kropp, §§ 34.03 and 34.04.

### § 7.8. Definition of “Red Circle” Rates

**A “red circle” rate is one where, by agreement of the employer and union, the wage for a particular job is higher than the normal rate called for in the collective bargaining agreement for that job classification. It is usually a personal benefit and a temporary or transitional device to ameliorate the effects of a job transfer or new job evaluation system by maintaining preexisting pay scales. Unless provided for in the contract, employees who receive red circle rates are often not entitled to general wage increases until others in the job classification reach the same pay level.**

#### **Comment:**

*a. Rationale.* In many instances employers and unions agree to provide an individual or group of employees with special rates of pay higher than those assigned to a particular job classification. These rates are usually to maintain the income of employees whose pay would otherwise be lowered as a result of a new job evaluation or classification system, a first contract between an employer and a union, or the involuntary transfer of an employee to a new position.

*b. Negotiation.* Because a red circle rate involves wages, an employer generally may not grant one unilaterally to an

employee. Such a special rate must ordinarily be negotiated with the union.

**Illustration:**

1. Employee A, who is a craft employee paid at a high rate under the collective bargaining agreement between Company X and Union Y, settles a sexual harassment charge against the company. As part of the settlement agreement between A and Company X, the company agrees to transfer A to an office position but to maintain her higher craft rate of pay. Company X must also consult and negotiate with Union Y over this special rate because it is a mandatory item of bargaining and is at a rate above that called for in the labor agreement for the classification of office worker. *See City of Norman, Okla.*, 103 LA 606 (Don J. Harr 1994).

*c. Wage Increases.* In many instances both employers and unions do not favor red circle rates because of the problems caused by differential payments to employees who perform the same job tasks. Oftentimes contracts that provide for red circle rates to certain employees will also allow for either no wage increases or limited pay increases to these workers until the wage difference is eliminated. In the absence of specific contract language, most arbitrators hold that general wage increases for job classifications do not include employees with red circle rates. Such holdings are normally on the bases that red circle rates are personal and general wage increases are for a classification and that the presumed intent of the parties is to eliminate nonstandard rates.

**Illustration:**

2. As a result of downsizing, Company X demoted Employee A from the position of chief operator to assistant operator but, with the agreement of Union Y, continued to pay A at the higher rate of chief operator. Company X and Union Y enter into a new labor contract that provides for a general wage increase for assistant operators but that results in a total amount of wages that is less than the red circle rate received by A at the chief-operator rate under the old contract. If Union Y filed a grievance for A

seeking the amount of general wage increase for assistant operators, an arbitrator would likely deny this grievance, in the absence of specific contract language or past practice allowing such, until A's rate of pay is the same as other assistant operators. *See The News-Sun*, 92 LA 713 (Timothy J. Heinsz 1989); *Owens-Corning Fiberglass Corp.*, 83 LA 1038 (Rankin M. Gibson 1984).

## REFERENCE

*See* Kropp, § 34.06(1) and (2).

### § 7.9.      **Transfer From Red Circle Rated Position**

**Normally, a red circle rate is paid only so long as the employee stays in the job for which the rate was established. When an employee with a red circle rate of pay voluntarily transfers to a new position, the employee should lose the red circle rate if it was based upon a special skill or as an accommodation for special work; however, if the employee is involuntarily transferred, then the rate likely would be retained in the new position.**

#### **Comment:**

*Rationale.* Because a red circle rate is a personal one normally to compensate an employee for taking or maintaining a position that otherwise would cause that person to be paid a lower wage rate than previously received, it should last only as long as the employee works in that job. If the employee voluntarily transfers from the red circle position, in most cases the special skills or situation that gave rise to the overscale, personal rate no longer apply. On the other hand, if the transfer is an involuntary one, then the employee has not given up the right to the premium that resulted due to unique or personal circumstances or because of an overall job evaluation scheme that initially gave rise to the red circle rate. *See, e.g., Phoenix Symphony Ass'n*, 97 LA 724 (Geraldine M. Randall 1991);

*Schauer Mfg. Corp.*, 94 LA 1116 (Jonathan Dworkin 1990);  
*John Morrell & Co.*, 76 LA 1017 (Harvey A. Nathan 1981).

## REFERENCE

See Kropp, § 31.06(3).

## II. HOURS AND PREMIUM PAY

### § 7.10. Premium Pay

**Many contracts between employers and unions make provision for premium pay for work performed outside an employee's normal work hours or for work the employee performs under adverse conditions. Typically premium pay is required for employees who work on their scheduled time off, such as sixth or seventh days, holidays, or vacations. In addition extra pay is often provided for shift differentials, split shifts, or hazardous or onerous duties.**

#### **Comment:**

*a. Rationale.* Employees who are scheduled to be off work have an expectation that their leisure time will not be interrupted. Contractual obligations that an employer pay a premium for the inconvenience to the employee of unscheduled work are a means whereby an employer in effect purchases the employee's leisure time. These provisions also act as a disincentive for an employer to require employees to work outside of their normal hours. By the same token, the premium pay serves as an encouragement to employees to work on the days that they are otherwise scheduled to be off.

There are some jobs where the increase in pay is primarily because of the conditions of the work. Thus, employees who must work nights or work in the morning, then have time off, and then return to work in the late afternoon or evening often receive premium pay because of the disruption in normal living customs.

Employers and unions many times agree to extra payments to employees who perform tasks that are of a dangerous nature, such as working in a radioactive area or dealing with hazardous waste or contaminated material, because of the risk involved. *See, e.g. U.S. Marine Corps Air Station, Cherry Point N.C.*, 114 LA 20 (Eva C. Galambos 1999). Often the same is true with jobs that require continuous physical or mental exertion because of the strain caused by such tasks.

For a discussion of the rationale for premium pay, see Abrams, Roger I. & Nolan, Dennis R., *Time at a Premium: The Arbitration of Overtime and Premium Pay Disputes*, 45 Ohio St. L. J. 837, 838, 855–56 (1984) [hereinafter Abrams & Nolan I]. Shift differentials are discussed in *General Cable Corp.*, 33 LA 327 (Lennart V. Larson 1959); *Pennwoven, Inc.*, 14 LA 649 (Bertram F. Willcox 1950). Hazardous duty pay is noted in *Pacific Towboat & Salvage*, 97 LA 968 (John D. Perone 1991); *Pan Am World Servs.*, 91 LA 859 (Howard V. Finston 1988).

*b. Eligibility.* Most disputes over premium pay pose the question whether employees are entitled to receive the increased pay. Arbitrators consider closely the contract language allowing for a premium and, if that is uncertain, then past practice or bargaining history may provide a basis for decision.

## Illustrations

1. The contract between Company X and Union Y provides that Christmas Eve and Christmas Day will be paid holidays and that any holiday falling on Sunday will be celebrated on the following Monday. The labor agreement also states that employees will be paid a premium rate of time and one-half for all hours worked on a scheduled holiday. When Christmas Eve fell on Sunday and Christmas Day on Monday, the union filed a grievance that the employees should be paid the premium rate time of one and one-half for the work performed on Tuesday, December 26, because otherwise the employees would be deprived of a second holiday as a result of the two holidays falling on Sunday/Monday. Because the contract makes no provision for premium pay when there is a Sunday/



Monday holiday, an arbitrator might determine that no extra pay is due for the Tuesday work.

The facts in Illustration 1 are based on *Nekoosa Packaging Corp.*, 96 LA 442 (Jack Clarke 1990) (no premium pay due for Tuesday work after Sunday/Monday holiday because contract language does not provide for such pay), and *Inland Container Corp.*, 96 LA 1023 (James C. Duff 1991) (premium pay allowed for Tuesday work after Sunday/Monday holiday because otherwise employees would be deprived of second holiday).

2. The contract between Company X and Union Y provides for premium pay for all hours worked by an employee on the sixth and seventh day of the workweek. Employee A worked Monday through Thursday and was on funeral leave Friday through Sunday. The labor agreement allows pay for funeral leave as regular days of work at normal wage rates. Employee A files a grievance that she should receive premium pay for Saturday and Sunday as the sixth and seventh workdays of a week. An arbitrator would likely deny this claim if the contract clause on premium pay is interpreted to mean that to be eligible the individual must perform actual "work" on the sixth or seventh day. See *PPG Indus., Chem. Div.*, 96 LA 1029 (Theodore H. Ghiz 1991).

## REFERENCE

Abrams & Nolan I.

### § 7.11.     **Pyramiding of Premium Pay**

**Most agreements between employers and unions prohibit the pyramiding of premium pay. "Pyramiding" occurs when an employee seeks multiple types of premium pay for hours worked. The prohibition on multiple premium payments prevents an employee from receiving a windfall when circumstances occur that two or more different premium pay rates would otherwise apply.**

**Comment:**

*Application.* If a contract has a clause that time and one-half will be paid for overtime and that double-time rates will be paid for Sunday work and there is a provision preventing the pyramiding of premium pay, then an employee who works overtime on a Sunday should receive the greater of the two rates, that is, double time, but not an accumulation of the premium rates, that is, three and one-half time, for the Sunday overtime. On the other hand, arbitrators have allowed such pyramiding of premium rates in the absence of any contract prohibitions. *See Mason County*, 97 LA 45 (Walter M. Stuteville 1991) (employees entitled to triple pay for all hours worked on contractually designated holidays where one provision allowed for double time for hours worked on a holiday, holiday clause gave all employees straight-time pay for listed holidays, and contract did not prohibit pyramiding).

**REFERENCES**

Abrams & Nolan I, at 861–62; *Holy Family Hosp.*, 99 LA 1122, 1127 (Roger Tilbury 1992), quoting Roberts, Harold S., Roberts' Dictionary of Industrial Relations, 3d ed. (1986) (defining pyramiding as “‘payment of overtime on overtime’”).

**§ 7.12. Guaranteed Pay**

**Normally an employer need pay employees only for work performed or for hours when they are obligated to follow an employer's work instructions. In some situations where employees are required to work outside of their scheduled hours, employers and unions have negotiated guaranteed pay for a minimum number of hours regardless of the amount of time actually worked. The most common of these types of guarantees are call-in pay and reporting pay.**

**Comment:**

*Rationale.* At one time it was thought that an employee's nonworking hours were unimportant and subject to the employer's needs. Thus, under a general management rights

clause to direct the work force, an employer could call an employee in to work or send the person home from work early without advance notice or scheduling. The unfairness caused by this uncertainty and the disruptive impact that such actions had on an employee's personal life caused a number of unions to negotiate guaranteed pay provisions in collective bargaining agreements, especially for call-in pay and reporting pay. The explication for the genesis of guaranteed pay provisions can be found in *Houdaille Indus.*, 59 LA 621, 627–28 (Dallas M. Young 1972); *Niagara Mach. & Tool Works*, 55 LA 386 (Dallas M. Young 1970).

### § 7.13. Reporting Pay

**Reporting pay provisions guarantee employees a specified minimum amount for reporting to work as scheduled even if there is no work available during the employee's normal schedule.**

#### **Comment:**

*a. Rationale.* The basis for a reporting pay clause is that management agrees to a minimum wage guarantee to fulfill the employee's expectation of working for the amount of time that the employee has been scheduled. Under a reporting pay provision, the parties allocate the risk of potential loss when work is not available to the employee. Reporting pay is intended to compensate for the wages that the employee would have received if the employee had been allowed to work the normal or scheduled shift, and is compensation for the inconvenience and expense suffered by the employee who has traveled to the workplace. See, e.g., *FMC-Ordnance Div.*, 84 LA 163 (Earl J. Wyman 1985); *Monsanto Research Corp.*, 70 LA 530 (Rankin M. Gibson 1978); *General Dynamics Corp.*, 54 LA 405 (Thomas T. Roberts 1970).

*b. Required Contract Provision.* Normally, an employee is entitled to compensation only for the hours worked. Most arbitrators conclude that contract provisions that define a normal workday or workweek do not limit the employer's right to schedule hours, nor do these clauses create a guarantee of work. Thus, in the absence of a specific reporting pay or other

guarantee clause, most arbitrators would not imply such an obligation upon management. Similarly, because in a reporting pay provision the parties specifically allocate the risk of potential loss when work is not available, arbitrators typically closely follow the contract language. This applies as well to exclusions from coverage under the reporting pay provisions. See, e.g., *County of Mariposa*, 119 LA 277 (Herman M. Levy 2003) (arbitrator denied reporting pay for bargaining unit superintendent where applicable clause had been interpreted to apply only to FLSA non-exempt employees). For cases discussing that contractual references to a “normal” or a “regular” workday or workweek are not a guarantee, see *Coca-Cola Foods Div.*, 88 LA 129 (Douglas C. E. Naehring 1986); *Family Food Park*, 86 LA 1184 (Donald J. Petersen 1986); *FMC Corp.*, 85 LA 18 (Sheldon D. Karlins 1985).

## REFERENCES

Abrams, Roger I. & Nolan, Dennis R., *Buying Employees' Time: Guaranteed Pay Under Collective Agreements*, 35 Syracuse L. Rev. 867 (1984) [hereinafter Abrams & Nolan II].

Buckalew, Timothy J., *Work Schedules and Compensation for Work-Related Time*, in *Labor and Employment Arbitration*, 2d ed., eds. Bornstein, Tim, Gosline, Ann & Greenbaum, Marc (1997), § 29.07 [hereinafter Buckalew].

Elkouri, at 732–34.

### § 7.14. Reporting Pay Exceptions

**Reporting pay clauses often include exceptions to the guarantee of pay. Typical exceptions found in such contractual provisions are:**

- (a) an act of God,
- (b) conditions beyond the control of management,
- (c) emergencies,
- (d) power failure and equipment breakdowns,
- (e) weather or natural calamities, and
- (f) strikes.

**In applying provisions regarding the eligibility for or exceptions to reporting pay requirements, arbitrators will require that parties act reasonably and in good faith.**

**Some contracts require management to notify employees of the lack of work before applying an exception and, even in the absence of such a provision, arbitrators may require that employers act reasonably and promptly.**

**Comment:**

*a. The Exceptions.* Just as arbitrators usually do not infer reporting pay guarantees, likewise they normally do not create exceptions in the absence of applicable contract language. If there are no exceptions to a job guarantee provision, the employer has accepted the risk that work will be available during regularly scheduled hours. Most arbitrators place the burden of proof on the employer to demonstrate that an exception to a reporting pay provision applies. *See, e.g., Ingalls Iron Works Co.*, 51 LA 246 (Samuel Krimsly 1968).

The exception for “an act of God” means an event that is due to an extraordinary force of nature that is beyond the control of human beings and from the effects of which reasonable measures of prevention cannot be taken. “Conditions beyond the control of management” are actions not reasonably anticipated or, if they could be anticipated, could not be protected against through the exercise of reasonable care or foresight. An “emergency” is a sudden, unexpected happening or unforeseen occurrence or condition that involves a pressing necessity.

In contracts that provide for exceptions to reporting pay guarantees for power failure or equipment breakdown, arbitrators generally apply these exceptions only in situations where management is not responsible for the failure or breakdown. As to exceptions for weather or natural calamities, arbitrators normally excuse the guarantee only if it is probable that the circumstances will interrupt the employer’s normal operations. As to specific exceptions for strikes or work stoppages, employers usually must demonstrate a causal nexus between the strike and the lack of available work.

**Illustrations:**

1. Because of a power failure caused by a severe ice storm, X Corp. shut down its plant and sent its first shift employees home shortly after they arrived at work. The company later refused the employees' request for reporting pay. The contract provides that employees who report in for work and are told no work is available will be paid a minimum of four hours of report-in pay. The contract also provided that the company shall not be liable for report-in pay "when its failure to provide work is due to fire, floods, outside electrical or power failure, labor disputes, Acts of God, or other cause beyond the company's control." The company's action does not violate the contract because the ice storm and subsequent power failure are beyond the company's control.

2. The collective bargaining agreement between Company X and Union Y provides for four hours of reporting pay unless work is interrupted by "an act of God or conditions beyond the control of management." An unidentified caller phones in a bomb threat to Company X at 8:30 a.m., which is one-half hour after the beginning of the workday. Company X has all employees leave the plant and wait in the parking lot until 11:00 a.m. while the police search the building for a bomb. At 11:30 a.m., the company releases the employees for the rest of the workday. The employees file a grievance claiming four hours of pay under the reporting provision. While the bomb scare is not an act of God, it would fall under the exception of being beyond the control of management. However, because the employees were held on standby under the employer's control while the police search took place, an arbitrator might conclude that the employer has not acted reasonably and has waived the exception and that the guarantee applies.

Illustration 2 is based on *Miller Printing Mach. Co.*, 64 LA 141 (Thomas J. McDermott 1963), discussed in *Abrams & Nolan II*, at 882. *But see Century Prods. Co.*, 99 LA 569 (Morris G. Shanker 1992), where reporting pay was not ordered even though employees were required to spend six hours at the job site while the fire department

investigated a suspicious fire because the order to remain came from the fire chief and not the employer.

3. Company X decides to close its operations because of a snowstorm. A number of employees file a grievance for four hours of reporting pay because they came to the plant only to find that it was closed. The employer defends on the ground that the contractual exception for “conditions beyond the control of management” applies. The arbitrator’s decision likely would turn on the extent to which the snowstorm affected plant operations. For instance, if the snowstorm was severe enough to prevent such a large number of employees from reporting that production could not have been maintained, then the exception might apply. *See Textron, Inc.*, 70 LA 656 (Robert F. Grabb 1978), as discussed in *Abrams & Nolan II*, at 885.

4. Company X decides to shut down its operations because its truckers are on strike and have a picket line around the premises. Nonstriking production employees who are in a different bargaining unit and whose contract with the employer is in effect file a grievance claiming that they are entitled to a four-hour reporting pay guarantee in the contract. An arbitrator might uphold the grievance if the strike did not affect the work of the production employees. On the other hand, nonstriking employees who refused to cross the picket line probably would not be entitled to the guarantee because they had failed to report as scheduled. A discussion of the strike situation in *Illustration 4* can be found in *Abrams & Nolan II*, at 891–92. The facts are based on *Consolidated Packaging Corp.*, 73 LA 962 (Leon J. Herman 1979). *See also Rotorex Co.*, 99 LA 190 (Charles Feigenbaum 1992), where the arbitrator held that a power failure caused by a circuit breaker that shorted out was a circumstance beyond the employer’s control since it could not have been foreseen.

*b. Requirement of Good Faith and Reasonableness.* Arbitrators generally interpret reporting pay and exception clauses as requiring both employers and employees to act reasonably and in good faith. For instance, the exception does not apply when management has failed to anticipate production requirements properly. In addition, the mere fact that there was a

major equipment failure is often not sufficient to prove that it was beyond the employer's control.

### Illustration:

5. Contract language is the same as in Illustration 1. The company shuts down production and sends its employees home because the motor on the conveyor belt burns out and there is no replacement available in the plant. The company is not excused from paying report-in pay because it was aware that the motor was in poor condition and had not repaired it or arranged for a replacement. The illustration is based on *Crescent Tool Co.*, 44 LA 815, 816 (Paul N. Lehoczky 1965), where the arbitrator ordered report-in pay when an equipment failure was "due entirely to Management's decision to run a key motor in a crippled condition for weeks on end," and *Chrysler Corp.*, 21 LA 573 (David A. Wolff 1953), where report-in pay was required when a power failure was foreseeable and could have been prevented by a spare circuit. *See also Brown Shoe Co.*, 8 LA 910 (Verner E. Wardlaw 1947), where report-in pay was required when employees were sent home due to the absence of a key employee.

*c. Notification Requirements.* Either a contract may require notification or an arbitrator may determine that an exception is waived in the absence of notification. In the latter situation, most arbitrators conclude that only if management knows or should have known of the excusing situation and has an adequate opportunity to notify the workers not to report should failure to give such notice constitute a waiver. In cases requiring notice, the employer must use reasonable means to notify employees and do so in a timely manner. *See Elkouri*, at 735–36; *Material Serv. Corp.*, 99 LA 789 (Donald J. Petersen 1992).

### Illustrations:

6. Contract language is the same as in Illustration 1. The ice storm has not caused a general power failure, but has produced shortages that require rolling blackouts. The employer delayed announcing the plant closing until six



hours after receiving notice from the power company. The company owes report-in pay to employees who did not hear the closing announcement since the company's delay was not a matter beyond its control. *See Keystone Carbon Co.*, 103 LA 623 (John M. Felice 1994). *See also National Homes Corp.*, 71 LA 1106, 1108–09 (Bernard Dobranski 1978), where the arbitrator stated that “although it was reasonable to give notice to the employees via radio, it was not reasonable to delay that notice until shortly before the first shift began.”

7. The collective bargaining agreement between Company X and Union Y provides for four hours of reporting pay unless there is an emergency condition and reasonable attempts have been made to notify employees. The first shift begins at 8:00 a.m. Management learns at 6:00 a.m. that power to the plant has failed. The company unsuccessfully attempts to restore power at 6:30 a.m. and again at 7:00 a.m. but did not contact employees scheduled to report at 8:00 a.m. until 7:45 a.m. The employees who did not receive notification file a grievance for four hours of reporting pay and Company X defends on the grounds that the emergency excuses the guarantee pay. An arbitrator might find that the company has violated the notice requirement because the company unreasonably waited 45 minutes after its last attempt to restore power and began contacting employees only 15 minutes prior to the start of work. In such a situation, the employer knew and accepted the risk that power might not be restored in time for production.

## REFERENCES

For a discussion of the reporting pay exceptions, *see* Abrams & Nolan II; Buckalew, § 29.07(2); Elkouri, at 730–36.

### § 7.15. Contiguous Call-In Time

**Contracts often guarantee minimum payments to employees who are called in to work at other**

**than their regularly scheduled time. Although exceptions exist, arbitrators often enforce such provisions even if the call-in time merges with the employee's regular schedule.**

### **Comment:**

*a. Rationale.* Arbitrators have sometimes disagreed about the purpose of call-in pay, with the difference in theory having an influence on the way they decide cases. For example, some arbitrators believe that call-in payments are intended to protect employees against the additional expense incurred in traveling to and from work. In such cases, arbitrators may deny call-in pay when the call-in period is contiguous with the employee's ordinary workday since the employee would incur no additional commuting expense.

### **Illustrations:**

1. X Corp. calls employee Smith in to work for a 6:30 a.m. meeting. Smith, whose shift normally starts at 7 a.m., comes in early as requested and works until the end of his ordinary shift. The contract provides that employees who are called in to work shall be guaranteed at least four hours' pay. X Corp. refuses to pay call-in pay, but does pay Smith for 30 minutes of overtime. Smith grieves, claiming the right to four hours' pay. The arbitrator denies the grievance, stating that the purpose of call-in pay is to reimburse employees for the inconvenience and extra work involved in going to the plant following completion of a full eight-hour shift. *See Central Soya Co.*, 25 LA 496 (W. Howard Mann 1955). *See also Weyerhaeuser Co.*, 92 LA 361, 367 (Anne Holman Woolf 1989), where the arbitrator said "the degree of inconvenience is lessened when the employee is called in . . . and *continues* to work into his regularly scheduled shift. Such an employee does not have the expense and inconvenience of an additional trip to and from the work site and the packing of a lunch."

Other arbitrators read call-in provisions strictly and allow employees to collect payments even though the call-in hours may be contiguous with regular working hours. In such cases, arbitrators reason that call-in pay is intended to discourage an employer from using unscheduled

employees and that it also reimburses employees for incursions into their unscheduled time. Thus, employers are not necessarily precluded from requiring employees to perform services when needed, but employees are compensated for the disruption of their free time.

2. Y Corp. calls in employee Jones 30 minutes prior to the start of his regular shift in order to repair a leaking steam line. Jones comes in early and works through his regular shift. The contract provides that employees who are called in to work shall be paid a minimum of four hours call-in pay. The arbitrator sustains the grievance, stating that employees who are summoned in to work at other than their regular hours should be paid call-in pay rather than overtime pay. *See McGraw-Edison Co.*, 41 LA 1136 (John F. Sembower 1963). *See also Columbia Gas of Ky.*, 45 LA 481 (Marlyn E. Lugar 1965).

3. The collective bargaining agreement between Company X and Union Y provides for 4 hours of call-in pay at double time and for overtime rates of time and one-half for all hours over 40 in one week. Management calls A on her day off and asks her to work two hours because of unexpected production needs. An arbitrator who applied the "inconvenience" theory (as in Illustration 1) might reject A's claim for call-in pay because A was a volunteer and, thus, arguably not inconvenienced. An arbitrator who applied a strict interpretation (as in Illustration 2) might allow A's claim for call-in pay because A's leisure time had been interrupted. *See Furr's, Inc.*, 76 LA 1232 (Harold B. Klaiber 1981).

*b. Call-In Pay or Overtime.* Many grievances regarding call-in pay arise in the context of whether hours worked outside an employee's normal work schedule should be compensated under a call-in provision or at overtime rates. A typical situation is when an employer requests an employee to work beyond the employee's regular shift. While an employee may expect that leisure time will begin at the termination of the shift, it can be argued that such an expectation should be limited by the possibility that overtime may be required and that such employees are not called back to the work site. Typically, call-in pay is not available to employees who stay beyond their normal shift. *See, e.g., Ravena-Coeymans-Selkirk Central*

*School Dist.*, 199 LA 495 (Ira B. Lobel 2003). There are cases, however, that require payment of call-in pay to employees who have already clocked out, but return to work, even though they have not yet left the employer's property.

### **Illustration:**

4. Employee Doe completes his shift, clocks out, and begins to shower and change clothes prior to leaving the company's premises. Doe is summoned from the shower and asked to perform some emergency repair work. The contract provides that employees who are called in during off hours will receive a minimum of four hours' call-in pay. Doe grieves the company's decision to pay him overtime for the time worked, rather than four hours' call-in pay. The arbitrator sustains the grievance because the employee's workday had ended and he sacrificed his personal time to accommodate the needs of the company. *See Joseph T. Ryerson & Sons*, 97 LA 1187 (Louis V. Imundo, Jr. 1991). *But see General Am. Transp. Corp.*, 73 LA 478, 479 (John F. Caraway 1979), where the arbitrator held that call-out pay was not required to be paid to an employee who was called back into the plant after clocking out and driving through the gate, reasoning that call-out pay is a "guarantee of pay for the inconvenience caused [the employee] by working hours other than those of his regular schedule."

## **REFERENCES**

Abrams & Nolan II; Buckalew, § 29.08.

### **§ 7.16. The Right to Establish and Change Schedules**

**Except as specifically limited by contract, most arbitrators hold that management has the right to establish work schedules, including days of work, hours of work, and the number of shifts. Arbitrators typically allow management to alter existing schedules if the change is supported by a business reason.**

**A contract provision that recognizes a “normal” or “standard” work schedule will not necessarily limit this right.**

**Comment:**

*Rationale.* “Hours” is listed along with “wages” and “other conditions of employment” as a mandatory bargaining subject in the National Labor Relations Act and in much state legislation authorizing collective bargaining. Although regulatory agencies typically apply strict standards to waiver of bargaining rights, arbitrators have typically not applied comparable tests when asked whether unions have relinquished the right to bargain about changes in the work schedule. Collective bargaining agreements, of course, can establish mandatory schedules and can place limitations on management’s right to alter hours of work. In the absence of such express restrictions, however, arbitrators have generally viewed work scheduling as within the rightful prerogative of management. *See, e.g., Beacon Journal Publ’g Co.*, 114 LA 122 (Alan Miles Ruben 1999) (“[M]ore often than not, work schedules are set forth in the contract, but left to the discretion of management”); *Ohio/Oklahoma Hearst Argyle Television, Inc., dba WLWT-Channel 5*, 116 LA 713 (Robert W. Kilroy 2001). Arbitrators apply a reasonableness standard to changes in work schedules.

Arbitrators usually construe strictly a provision purporting to limit management’s right to establish schedules. In particular, management discretion is generally not limited by contract provisions establishing a “normal” or “standard” work day or week. By contrast, management rights clauses are often read expansively and have been held to embrace the right to schedule work, even if not expressly mentioned. The absence of a management rights clause, however, is not determinative.

**Illustration:**

Because of a decline in the demand for its product, X Corp. announced that it would not schedule production employees on Friday during the month of June. The contract provides that “eight hours shall constitute a standard work day and Monday through Friday inclusive shall constitute a standard work week.” The management rights clause contains standard language but is silent about the

right to schedule employees. The company's action does not violate the contract. The standard workweek language did not establish a minimum but merely recognized the normal workweek. Management has the right to make schedule changes when it acts reasonably.

The illustration is based on *Stacey Mfg. Co.*, 50 LA 1211 (Carroll R. Daugherty 1968). See also *Ampco-Pittsburgh Corp.*, 80 LA 472 (Steven Briggs 1982); *Georgia-Pacific Corp.*, 71 LA 1256, 1259 (D. L. Howell 1978) (“[t]he very notion of ‘normal hours of work’ suggests that there may be times when abnormal hours are necessary and proper, if such a shift is fully justified by operational or production requirements—in other words, if business conditions dictate it”). See *Pinn-Oak Resources, LLC*, 119 LA 349 (Norman R. Harlan 2003); *Riverside County Office of Educ., Chapter 693*, 119 LA 513 (Joseph F. Gentile 2004). But see *Anchor Hocking Corp.*, 81 LA 502 (Roger I. Abrams 1983), where the arbitrator said that a contract clause specifying a “normal work day” of eight hours was not a guarantee, but that the company, nevertheless, could not convert full-time employees to part-time employees since the expectation of eight hours was “expressly protected by the contract.” As to the right to make changes to limit overtime, see *Tribune-Star Publ’g Co.*, 95 LA 210 (Fred Witney 1990).

Arbitrators typically require that employers have a business-related, nonarbitrary reason for changing a work schedule during the contract term. The desire to limit overtime payments often satisfies this test, even in the face of past practice or employee expectations.

## REFERENCES

Elkouri, at 722–28; Buckalew, §§ 29.01, 29.02, and 29.03.

### § 7.17. Scheduling Breaks and Meal Periods

**Absent contractual limitation, management has the right to reschedule, expand, limit, or abolish breaks and meal periods. However, management’s discretion to make such changes may also be limited**

**by past practice, as set forth in Chapter 2, § 2.20(2), above.**

**Comment:**

*Rationale.* As with most contractual provisions, arbitrators will enforce contract clauses that establish breaks at particular times or for a particular period. Moreover, arbitrators will enforce provisions that call for breaks, even if the time or length of the break is not specifically set forth in the agreement. In such circumstances, arbitrators may be guided by custom or practice in establishing the time and length of breaks.

Sometimes, the contract is silent with respect to breaks or meal periods. As is true with other matters that benefit employees, arbitrators are often guided by past practice in determining whether break or meal customs have ripened into a contractual right. As with other protected past practices, however, management retains the right to make changes if justified by changed circumstances or other conditions.

See, e.g., *Sperry Rand Corp.*, 69-2 ARB ¶ 8477 (Joseph Alton Jenkins 1969), where the arbitrator held that the company had the right to change the scheduling of the lunch break without discussing the subject with the union when the change was necessitated by a move to a new plant. See *Western Area Power Admin.*, 113 LA 513 (Daniel J. Jacobowski 1999). See also *Toledo Edison Co.*, 96 LA 908, 914 (Robert Bressler 1991), where the arbitrator said “[a]rbitrators have historically held that where there is an absence of prohibitory contractual language, management reserves its inherent right to determine the scheduling of lunch periods.” See *United States Dep’t of Agric., Food Safety and Inspection Svc.*, 119 LA 417 (Barry J. Baroni 2004). See Chapter 2, § 2.20(3), above, concerning past practice.

## REFERENCE

Elkouri, at 616–17.

### § 7.18. Definition of Overtime

**Overtime is normally understood as time worked in addition to an employee’s normal work period, calculated on a daily or weekly basis.**

**Employees typically receive premium pay for working overtime.**

**Comment:**

*Rationale:*

a. Overtime is often assigned or offered on the basis of seniority, either on a departmental or plant level. Some collective bargaining agreements also require that the employee selected for the assignment have the skill and ability to perform the work. This requirement is a frequent source of disagreement, with the union often contending that the employee passed over could have performed the work competently. However, arbitrators often uphold management determinations of skill and ability so long as its decision was not an abuse of discretion. *See, e.g., Beverage Concepts*, 114 LA 340 (Joseph S. Cannavo 1999); *Tower Automotive Prods., Inc.*, 116 LA 677 (Edward L. Suntrup 2001).

b. Assignment of overtime is often limited by express contract provisions or by past practice. *See, e.g., T.J. Maxx*, 113 LA 533 (Lionel Richman 1999). Most collective bargaining agreements contain provisions defining and governing overtime. Perhaps most common are provisions that require premium pay—typically time and one-half—for all hours worked in excess of 8 in a day or 40 in a week. The federal Wage and Hour Law requires overtime for nonexempt employees for hours worked in excess of 40 in one week. There is no law, however, that requires premium payment for more than eight hours' work in a day.

Contracts may define overtime differently. For example, it may require overtime for work outside normal working hours, even if the normal workday is less than 8 hours or the normal workweek is less than 40 hours. In addition, the contract may include in the calculation time that is not actually worked, such as paid holidays. However, most contracts forbid pyramiding overtime and, even when they are silent on the matter, arbitrators typically will not permit one day to count for more than one premium payment.

**Illustration:**

ABC Corp. is party to a collective bargaining agreement in which employees receive time and one-half for all



hours over 8 in any one day or over 40 in any one week. All work on Sunday is compensated at double time. Employees who work 40 hours Monday through Friday and are then called in on Sunday are paid at double time for that day. They are not entitled to count the Sunday hours in order to receive overtime pay for the previous Friday. *See Witte Hardware Corp.*, 95 LA 1259 (Mark W. Suardi 1990). For other overtime cases, *see Armco, Tex-Tube Div.*, 101 LA 61 (Edward C. Koenig, Jr. 1993); *North Am. Rayon Corp.*, 95 LA 748 (Jack Clarke 1990). *Compare Inland Steel Co.*, 106 LA 794 (Elliott H. Goldstein 1996) (paying double time for Sunday work and counting Sunday hours for purposes of overtime computation). *See also Beacon Journal Publ'g Co.*, 114 LA 122 (Alan Miles Ruben 1999) (even though contract defined first shift as beginning at 7 a.m., employees were not entitled to overtime when their starting time was changed to 6 a.m.). *But see Township of Pemberton*, 114 LA 523 (Thomas J. DiLauro 2000).

## REFERENCES

Abrams & Nolan I. For a survey of overtime provisions in major collective bargaining agreements, *see* 2 Collective Bargaining: Negotiations and Contracts (BNA) 57:1B4.

### § 7.19.      **The Right to Determine Whether                  There Is Overtime**

**In the absence of contractual restriction, management has the right to determine whether work will be performed during regular working hours or on overtime.**

#### **Comment:**

*Rationale.* Contracts sometimes guarantee overtime or otherwise restrict management's right to schedule work. In the absence of such provisions, arbitrators have recognized management's right to plan its work so as to avoid premium payments. Such measures are not necessarily limited to scheduling work during normal working hours. Subject to contractual limitation, management has also been permitted to avoid

overtime payments by subcontracting or by use of part-time employees.

*See, e.g., Continental Can Co.*, 53 LA 809, 810 (Sidney L. Cahn 1969), where the arbitrator said that because the contract did not contain a provision guaranteeing overtime to the employees, “[i]t follows that the determination of whether or not work shall be performed on an overtime basis is solely a management prerogative.” *See also U.S. Tobacco Co., Franklin Park, Ill.*, 103 LA 908, 914 (Donald J. Petersen 1994) (“arbitrators are in agreement that where no provision exists in a collective bargaining agreement guaranteeing overtime to employees, management has the sole discretion to determine whether work shall be performed on an overtime basis”).

## REFERENCE

Elkouri, at 728, 737–41.

### § 7.20. The Right to Assign Overtime

**Management may require employees to work a reasonable amount of overtime and to determine who will work overtime. The contract sometimes limits an employer’s ability to require overtime or restricts the way in which it can be assigned. Absent a limitation in the contract, management has no obligation to equalize overtime or to assign it by seniority.**

#### **Comment:**

*a. Rationale.* Although unions frequently question an employer’s right to assign “mandatory” overtime, an employee’s right to refuse must ordinarily be grounded in the contract. Absent contractual limitation, arbitrators typically recognize that employees can be required to work a reasonable amount of overtime. That does not mean, however, that management can assign overtime without regard to an employee’s personal life. The issue often arises in disciplinary cases after an employee has refused an overtime assignment. Arbitrators have

sometimes found a lack of cause for discipline where employees proffered the employer a reasonable excuse for refusing the assignment.

### **Illustration:**

The contract between ABC Corp. and the union provides that “management may assign overtime to employees who normally perform the job.” On Thursday, management announced that Joe’s department would work on Saturday. Joe’s apartment lease expired on Saturday and he had already rented a truck to move his possessions that day. Management has no right to discipline Joe if he refuses the Saturday work assignment.

*b. Equalization of Overtime.* Contracts sometimes require that overtime be equalized among employees in a particular overtime unit. When such limitations exist, arbitrators must respect them. The meaning of such provisions, however, is not always obvious. The contract may not indicate the period during which equalization is to occur or may not clearly identify the equalization unit. In such cases, arbitrators apply tests of reasonableness, and may take into account such matters as previous practice or training and ability. Provisions that require equalization “to the extent practicable” or comparable language afford management more flexibility but do not dispense with the obligation to treat employees fairly. *See Pinn-Oak Resources, LLC*, 119 LA 349 (Norman R. Harlan 2003).

As to the employer’s right to assign overtime, *see Halsey W. Taylor Co.*, 55 LA 1185, 1186 (Rankin M Gibson 1971): “It is generally held by arbitrators that if the labor agreement is silent on the subject of hours of employment or fails explicitly to limit the length of the work day o[r] work week beyond which no further work may be required, the management has the right to demand overtime work from employees so long as the overtime work is of reasonable duration commensurate with the employee health, safety and endurance and the direction to so work is issued under reasonable circumstances.” *See also General Elec. Co.*, 31 LA 403, 412 (James J. Healy 1958) (“management starts with the inherent right to require overtime work [and] . . . this right . . . can be lost only by some

fairly concrete language to that effect . . . .”). *See also Bell Aircraft Corp.*, 25 LA 755 (Ralph E. Kharas 1955). For a decision that requires adherence to contractual bidding requirements even when such requirements result in overtime and even when other employees were available at straight time, *see Krise Bus Svc., Inc.*, 119 LA 296 (Edward A. Grupp 2003).

As to an employee’s right to refuse overtime in certain circumstances, *see Chromalloy Am. Corp.*, 83 LA 80, 85 (F. Jay Taylor 1984) (“Management is obligated to give consideration to an individual’s situation until all other alternatives have been completely exhausted”). *See also Sunbeam Elec. (P.R.) Co.*, 41 LA 834 (David M. Helfeld 1963).

## REFERENCES

Abrams & Nolan I.

Elkouri, at 738–43.

Gershenfeld, Gladys, *Overtime*, in *Labor and Employment Arbitration*, 2d ed., eds. Bornstein, Tim, Gosline, Ann & Greenbaum, Marc (1997), Chapter 33.

## Chapter 8

# Safety and Health

*Mark Thompson\**

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## **Introduction**

Safety and health are matters of growing concern to many employers and workers. A substantial body of common law has developed from a variety of sources—arbitration awards, government regulation, and occasional court decisions. The variety of these sources, added to the need to consider scientific and technological evidence in regulating occupational safety and health, makes these issues unusually complex. Moreover, the issues in occupational safety and health are especially compelling—confronting the physical safety of workers, the possibility of industrial diseases that are diagnosed years after exposure to toxic substances, or the right of management to control the workplace.

The field is dynamic. Rules formulated in the past may be subject to revision as scientific knowledge expands. For example, new rules governing restrictions on smoking in the workplace appeared as awareness of the dangers to nonsmokers from exposure to cigarette smoke increased. Conversely, many observers expected AIDS to become a major issue in workplace safety when the disease first became well known. This development did not occur, presumably because when employers, workers, and unions became aware of the limited risk AIDS poses in most work situations, they adopted measures to protect workers from exposure in those situations where there might be a risk of contracting AIDS.

## **I. THE LEGAL FRAMEWORK FOR ARBITRATION**

### **§ 8.1. Statutory Basis**

**The statutory basis of the “common law” of workplace safety and health is the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §§ 553, 651–678 (2000).**

#### **Comment:**

OSHA requires that each employer:

shall furnish to each of his [sic] employees employment and a place of employment which are free from recognized hazards

that are causing or are likely to cause death or serious physical harm to his employees; . . .

OSHA, § 654(a)(1). The Act provides for extensive regulation of occupational safety and health in most workplaces under federal jurisdiction. The statute also permits individual states to establish their own safety regulations if these meet or exceed OSHA standards and to regulate subjects on which there are no federal standards. Other legislation, such as the Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000), established a regulatory framework for specific industries. In addition, legislation regulating other aspects of the workplace may affect occupational safety and health.

## **§ 8.2. State Workers' Compensation Systems**

**State workers' compensation systems insure workers injured on the job.**

### **Comment:**

To complement the regulation of safety and health, each state mandates a system of workers' compensation by which workers who are injured or are afflicted by a disease in the course of their employment receive compensation from a fund into which employers pay. Most workers' compensation systems bar common law suits for negligence because of industrial injuries or diseases. Thus, disputes over health and safety arise under collective agreements, OSHA, or other legislation.

## **§ 8.3. Arbitration of Safety and Health Disputes**

**Disputes over health and safety are subject to arbitration.**

### **Comment:**

The legal bases for this rule are well established. A leading case in the federal courts, *NLRB v. Gulf Power Co.*, 384 F.2d 822, 66 LRRM 2501 (5th Cir. 1967), determined that health and safety issues are mandatory subjects of bargaining, thereby stimulating negotiations on those subjects. This principle was extended in *Gateway Coal Co. v. Mine Workers*



*Dist. 4, Local 6330*, 414 U.S. 368, 85 LRRM 2049 (1974), when the Supreme Court established a presumption in favor of arbitration of disputes over occupational safety and health. The employer in this case was subject to the Coal Mine Health and Safety Act of 1969. A dispute arose when two foremen who had been suspended after being accused of falsifying safety records returned to work. The union struck in an effort to force the employer to reimpose the suspension.

The employer offered to submit the dispute to arbitration under a relatively broad arbitration clause in the parties' collective agreement, and sought an injunction against the strike. The union resisted on the grounds that § 502 of the Labor Management Relations Act (LMRA) protects work stoppages because of "abnormally dangerous conditions." The Court rejected that argument, holding there had to be "ascertainable, objective evidence" of unsafe conditions. It explicitly linked the statutory basis for arbitration, § 301(a) of the LMRA and its earlier decisions in the *Steelworkers Trilogy*: *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960), to safety and health. The Court noted that an arbitrator's special knowledge is as important to safety disputes as it is to other subjects.

## § 8.4. OSHA Protections

**OSHA protects workers who complain about unsafe working conditions or who refuse to work under conditions they consider unsafe.**

### **Comment:**

OSHA includes provisions allowing workers to file complaints about unsafe working conditions or who refuse to work under circumstances they consider to be unsafe. Complaints are filed with the Department of Labor, which enforces the OSHA regulations. Because the statutory mechanism for disputes over safety may be parallel to a grievance procedure in a unionized workplace, the problem of competing forums for dispute resolution may occur.

In *Marshall v. N. L. Indus.*, 618 F.2d 1220 (7th Cir. 1980), the court dealt with this question. An employee was dismissed

for refusing to work under conditions he believed to be unsafe. After the union grieved the dismissal, an arbitrator reinstated the grievant without back pay. The employee also launched a complaint with the Department of Labor under OSHA, which initiated action against the employer. The employer attempted to block action on the OSHA complaint. It argued that the arbitration proceeding was a bar to any other action. Relying on the principles in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 7 FEP Cases 81 (1974), the court held that the arbitrator's award did not preclude enforcement of the OSHA by the Department of Labor. The employee did not waive his rights under the law by submitting his grievance to arbitration, and the Department of Labor could seek remedies against the employer that were beyond an arbitrator's authority. The law on parties' access to arbitration and statutory tribunals is still not settled, and further developments may affect the relationship between arbitration and OSHA remedies.

### § 8.5.      **Effect of Collective Bargaining Agreements**

**The bases for deciding most disputes over safety and health are general provisions of collective agreements.**

#### **Comment:**

Although the courts in *Gulf Power* and *Gateway Coal* established the legal authority for the negotiation and arbitration of safety and health issues, the basis for deciding most disputes lies in management rights clauses or general safety provisions of collective agreements. The lack of contract language leaves considerable discretion to arbitrators in determining the common law in this area.

Because disputes over safety and health issues are not numerous in most unionized workplaces, the common law originating from arbitration is less well defined than in other fields. In many organizations, employers and unions work cooperatively to prevent accidents and injuries. Finding specific rules and regulations in collective agreements to protect safety and health, despite the mandatory nature of bargaining over them, is also unusual. In a sample of 744 private sector collective

agreements, 58 percent contained safety and health clauses, with higher proportions in the traditional blue-collar industries, that is, manufacturing, transportation, mining, and construction. However, the majority of these clauses were very general; for example, the most common clause was a pledge of union cooperation on safety and health. Myers, Donald W., Gray, George R. & Myers, Phyllis S., *Collective Bargaining Agreements: Safety and Health Provisions*, 121 Monthly Lab. Rev. 13 (May 1998) [hereinafter Safety and Health Provisions].

An earlier study of 65 arbitration awards found no evidence of medical-safety language in collective agreements to guide arbitrators in the application of medical evidence to disputes involving safety and health. Leap, Terry L., Srb, Jozetta H. & Petersen, Paul F., *Health and Job Safety: An Analysis of Arbitration Decisions*, 41 Arb. J. 41 (Sept. 1986). The lack of specific language first places an onus on the union to demonstrate that the employer's operations are not safe and may discourage the filing of grievances and, second, leaves the neutral to determine what conditions are safe.

Approximately half of the agreements in the sample provide for joint safety and health committees, again with heavier representation in manual industries. These bodies fundamentally have a consultative role. In about half of the collective agreements, they have the right to make periodic inspections but seldom have the authority to stop work or take other actions to alleviate or prevent unsafe working conditions. See Safety and Health Provisions. It is possible that an employer's slow response to a union safety committee's concerns can create a presumption of an unsafe work environment. When safety committees function effectively, they not only forestall formal grievances and disputes, but their recommendations form part of the common law of the workplace where they function.

## REFERENCES

This chapter draws heavily on Snow, James F., *Health and Safety*, in Labor and Employment Arbitration, 2d ed., eds. Bornstein, Tim, Gosline, Ann & Greenbaum, Marc (1997), Chapter 36 [hereinafter Snow]. See also Gellens, Kathryn A., *Resolving Industrial Safety Disputes: To Arbitrate or Not to Arbitrate*, 34 Lab. L.J. 149 (1983);

Ruben, Alan Miles, ed., Elkouri & Elkouri, *How Arbitration Works*, 6th ed. (2003), esp. at 1004–44; Wolfson, Beth Anne, *Arbitration and OSHA*, 38 Arb. J. 12 (Sept. 1983).

## II. RULES GOVERNING SAFETY AND HEALTH

### § 8.6. Employer Safety Rules

**The employer has the right to establish reasonable rules regulating safety and health in the workplace.**

#### **Comment:**

In the absence of negotiated health and safety rules, arbitrators consistently have upheld the employer's right to establish such rules in the workplace, even in the absence of specific authority in the collective agreement. The broadest basis for this authority can be management rights. In addition, general health and safety clauses in collective agreements and employer obligations under safety and health legislation are seen as giving employers the right to regulate those subjects. The existence of a labor-management safety committee established under a collective agreement does not constitute a waiver of management's unilateral right to make rules; nor is the employer required to show a history of accidents or injuries to justify the imposition of regulations. In general, management's views of the necessity for health and safety rules and their contents are accorded considerable weight by arbitrators, although grievances do arise in several areas.

### § 8.7. Arbitral Treatment of Employer Safety Rules

**The treatment of safety rules is similar to other rules imposed by management.**

#### **Comment:**

Arbitrators apply the same principles to the scope of safety rules as they do to other rules imposed by management—a rule must be reasonably related to its stated objective, in this

case elimination of a potential hazard, and consistently applied. General prohibitions on normal employee conduct must be justified by an immediate connection to safety. For instance, Arbitrator Heinsz found that an employer policy that banned employees from wearing rings while working in a smelter was too broad, because many employees wore gloves and there was no record of accidents caused by rings prior to the imposition of the rule. *See Doe Run Co.*, 95 LA 705 (Timothy J. Heinsz 1990). Similarly, a rule requiring all employees to wear safety shoes was found unreasonable because some employees did not work in a setting requiring such equipment. *See Packaging Corp. of America*, 114 LA 809 (Dennis R. Nolan 2000). On the other hand, employers may require employees to wear personal protective equipment related to their duties when other employees are free from this requirement if there are reasonable grounds for the employer making this distinction based on safety and health.

## **§ 8.8.      Arbitral Decisions on Reasonableness**

**Arbitrators decide whether the contents of safety and health rules are reasonable.**

### **Comment:**

A second issue is the substance of the rules. Arbitrators have the authority to determine whether the contents of health and safety rules are reasonable, although they seldom overrule the judgment of management on this topic. Even when the employer has not imposed formal safety and health rules, OSHA regulations are accepted as appropriate statements of safety requirements, thereby avoiding any potential conflict between the employer's obligations under the collective agreement and OSHA. Conversely, OSHA regulations may impose a limit on the contents of a safety rule, that is, an employer must justify requirements that go beyond the legal standards. General statements in collective agreements that discipline will be imposed for the violation of safety rules or carelessness that might jeopardize the safety of employees have been upheld. Arbitrator Lalka upheld an employer rule requiring employees to read "flashpoints" on tags before welding tank cars even though none of the fatalities or injuries that prompted

the rule involved the same fact pattern. *See Union Tank Car Co*, 110 LA 1128 (Coleman Lalka 1998).

### **§ 8.9. Removal of Unsafe Employees**

**Employers have the right to remove an employee from the workplace after demonstrating that the employee poses a risk to safety and health.**

#### **Comment:**

If an employer seeks to remove employees from the workplace because they pose a safety hazard, it must demonstrate that they cannot perform normal duties without posing a risk to their health and safety, their fellow workers, or the general public. Management action may take several forms, apart from discipline (discussed in § 8.16, below). An employer normally has the right to place employees on medical leaves of absence if there are reasonable grounds for concern about health or safety. However, the evolving law of accommodation for employees with disabilities may require employers to consider reorganizing an employee's work to avoid safety hazards rather than placing the worker on a medical leave of absence (*see* § 8.29, below).

### **§ 8.10. Smoking Restrictions**

**Most arbitrators uphold the employer's right to restrict smoking in the workplace.**

#### **Comment:**

An especially contentious issue in the 1980s and 1990s was the employer's right to restrict smoking in the workplace. Traditionally, employers have banned smoking in areas where there is a risk of fire or explosion. The substance of these rules was seldom in dispute, although there were cases arising from the severity of disciplinary penalties that employers could impose for violations. As evidence of the impact of smoking on health became available, employers began to impose restrictions on smoking even in areas where the practice did not create a physical hazard. Employers imposed more rules as

concern about the negative effects of passive (secondhand) smoke on nonsmoking employees grew and as energy-efficient buildings used centralized ventilation systems. See Abernathy, John R., *Smoking in the Workplace*, in Labor and Employment Arbitration, 2d ed., eds. Bornstein, Tim, Gosline, Ann & Greenbaum, Marc (1997), Chapter 37.

Unions challenge restrictions on smoking on the grounds that a more permissive past practice has been eliminated or that the employer was obligated to negotiate over the subject. Unions must also represent the interests of both smoking and nonsmoking members. When employers impose general restrictions on smoking, most rely on a general management rights clause as their authority to forbid smoking in part or all of their installations. See *Snap-On Tools Corp.*, 87 LA 785 (Herbert M. Berman 1986). When general safety and health provisions exist in the collective agreements, these clauses provide additional bases for management's action.

A majority of arbitrators favor the employer's right to restrain smoking, although a few cases restrict management action. The usual grounds for upholding management's action are the right of the employer to make reasonable rules or the lack of any language in the agreement limiting management's right to take such action. In *J.R. Simplot Co.*, 91 LA 375 (Gregg L. McCurdy 1988), for instance, the arbitrator upheld a two-stage employer ban on smoking. The first stage restricted smoking to designated areas, to be followed by a total ban for the second stage. The employer's motive was to reduce costs of health insurance, and it provided assistance to employees who wished to stop smoking. The employer in *Tompkins Industries*, 112 LA 281 (James E. Rimmel 1998), was found not to have violated the collective agreement when it disregarded a joint committee recommendation about smoking in its facility because the collective agreement gave it the right to make reasonable rules.

In *Morelite Equip. Co.*, 88 LA 777 (Carl F. Stoltenberg 1987), the employer had permitted employees to smoke in most areas of the plant. When the company unilaterally limited smoking to designated areas, the union grieved based on an appendix to the collective agreement listing all company rules. The arbitrator upheld the new rule because a carelessly discarded cigarette had caused a fire at the plant. Apart from

the language of the collective agreement, arbitrators look at the nature of the past practice, evidence of hazards nonsmokers face from passive smoke, employer consultation with the union, advance warning of the change, and the assistance provided to employees who wish to stop smoking. When unions have failed to request bargaining within a reasonable time after the employer announcement, they are deemed to have waived their right to bargain.

### **§ 8.11. Employees' Hair and Beards**

**Management has the authority to regulate the length of employees' hair and beards to protect safety and health.**

#### **Comment:**

Arbitrators uphold the right of management to regulate the length of employees' hair and beards when these restrictions are reasonably related to safety and health. Disputes generally arise when the restrictions are linked to the use of safety equipment, such as respirators, which require a tight seal to the user's face. Arbitrators have determined that an employer can impose restrictions on employees who are likely to use respirators. Broader restrictions covering all employees, whether or not they were required to use respirators, have not been upheld.

### **§ 8.12 Violence in the Workplace**

**Management can implement policies to protect employees from physical harm and threats of physical harm in the workplace.**

#### **Comment:**

Concern about violence in the workplace has grown in recent years. At a minimum, management has the right to establish policies to avert workplace violence. Some arbitrators have concluded that management has an obligation to implement necessary rules. Under such policies, employees who threaten physical violence may be subject to the same discipline, including discharge, as employees who commit acts of



violence. For example, an arbitrator found that the employer was obligated to remove an angry employee who made provocative remarks about the murder of employees at another work site. *Eaton Corp.*, 114 LA 1007 (Louise Hodgson 2000).

### § 8.13. Random Drug Tests

**Management can require random drug tests of employees whose work may pose a hazard in the workplace.**

#### **Comment:**

Employers' right to control the use of drugs by their employees is one of the most complex issues in the protection of safety and health. The right of employers to prohibit the use of intoxicants during working hours and on their premises is long established. In the 1980s, many employees sought to impose rules prohibiting the use of drugs both during and outside of working time. A frequent rationale for rules governing employees' use of drugs is the need to protect the safety of the public and fellow workers. Two subjects—the right of employers to require drug tests of their employees and the right to discipline workers for the use of drugs—are prominent in this area. One technique for controlling drug use by employees is random testing, usually through urine analysis. The National Labor Relations Board has declared that drug testing of incumbent employees (but not job applicants) is a mandatory subject of bargaining. *Johnson-Bateman Co.*, 295 NLRB 180, 131 LRRM 1393 (1989). In keeping with this ruling, unilateral drug testing policies are regarded as an invasion of privacy, although employers subject to government regulation may be required to implement a policy. In the absence of negotiated contract language, arbitrators generally do not permit employers to require random drug testing of employees unless there is evidence of drug abuse among the work force. Arbitrators balance the employer's need for testing against the invasion of employees' privacy.

This general rule may be relaxed when the workplace involves hazards to the public or to other workers. Thus, arbitrators have upheld the right of employers to require random drug tests of nurses, miners, nuclear power plant employees,

and truck and bus drivers without any evidence of drug use by employees. These decisions generally were based on either management rights or the hazards posed by the work these employees perform. However, this view of the employer's rights is not unanimous. Arbitrators have also refused to permit management to impose random tests of miners, munitions plant workers, and bus drivers where there was no evidence of drug use. They have also declined to endorse random tests when there is no evidence of a safety hazard.

When the collective agreement directs the parties to make safety rules on a cooperative basis, management may be limited in its rights to impose a drug policy unilaterally. If employers can demonstrate that employees are using illegal drugs (or even reasonable grounds for believing that illegal drugs are being used), then arbitrators tend to take a broad view of the right to order tests. This right is also strengthened in workplaces where safety hazards are significant.

Arbitrators have been reluctant to overturn employer policies including drug testing in the screening of prospective employees, especially for occupations such as truck drivers, where safety hazards are significant. Persons recalled from layoff are not regarded as equivalent to new hires and thus may not be subject to random testing. After they become employees, individuals may not be singled out for drug testing where there is no evidence they use drugs, even for occupations such as bus drivers or after an accident on the job when there is no evidence of drug use. Where the employer can show that drugs are used in the workplace or employees are working while under the influence of a drug, the employer may require tests for use of drugs in nonworking time.

## § 8.14. Intoxicants

**Disciplinary penalties imposed on employees who are intoxicated or who use intoxicants in the workplace are more severe when the work setting poses safety hazards.**

### **Comment:**

The right of employers to discipline employees who are intoxicated or who use intoxicants in the workplace has long

been accepted. Once applied only to alcohol, this rule has been expanded to cover narcotics. The penalties for such behavior are higher when the work setting poses hazards to the safety of the public or other workers. Thus, transit operators have been dismissed for working while under the influence of marijuana or other drugs or for having produced a positive test for marijuana even in the absence of evidence of on-the-job use.

## **§ 8.15. Safety Equipment**

**Employers can impose rules requiring employees to wear special safety equipment.**

### **Comment:**

Safety equipment includes clothing, safety shoes or glasses, earplugs, hard hats, and the like. In general, management can require the use of special equipment that is reasonably necessary to protect employees against the normal hazards of the workplace.

The rules on who should pay for such equipment are less clear. The courts have determined that paying for safety equipment is a bargainable issue and that OSHA regulations do not require that the employer pay for such equipment. Arbitrators consequently look to the collective agreement for guidance when deciding these questions. When the agreement imposes a general requirement, such as management must provide protective devices, arbitrators have ruled that the company must pay for safety shoes. On the other hand, when a collective agreement stated that the employer would furnish all tools, safety goggles, and hard hats that it requires to be used, an arbitrator ruled that management could require employees to pay for half of the cost of safety shoes, which were similar in appearance to street shoes. *See Sky-Top Sunroofs*, 89 LA 547 (Melvin L. Newmark 1987). The suitability of safety equipment for use outside the workplace often is a factor in determining the division of cost. When equipment can be used only at work, arbitrators tend to require the employer to pay for part or all of the cost. Employees may be required to pay for part or all of the cost of safety equipment that can be used outside the work setting. *See* Chapter 7, § 7.5, above.

## **§ 8.16. Discipline for Safety Violations**

**Employees may be disciplined for violations of safe work practices.**

### **Comment:**

It follows from management's right to establish safety rules that it may discipline workers for failure to observe them. In general, employees are required to avoid risk to themselves and their fellow workers in the performance of their duties. Thus, employees have been disciplined for committing violent acts, careless handling of hazardous materials, horseplay, operating mobile equipment at excessive speed, and fighting, among other offenses, on the grounds that these actions constituted safety violations. Arbitrators have recognized that management can impose discipline under general language in the collective agreement covering management rights or discipline. The employer's position obviously is strengthened when formal safety rules have been established.

## **§ 8.17. Application of Just Cause**

**The normal principles of "just cause" apply to discipline for safety violations.**

### **Comment:**

Arbitrators hold discipline for violations of safety rules to the same just cause standards used for other disciplinary actions. Thus, arbitrators have reduced dismissals or lengthy suspensions when the employer had not enforced safety rules consistently or when there was no history of prior discipline, even when the risk of actual injury was serious. For example, the two-week suspension of a mechanic whose hand was injured after he failed to tag a machine that maintenance was underway was reduced to a written warning on the grounds that the employer's enforcement of safety rules had not been uniform. *See National O Ring*, 97 LA 600 (Kenneth Cloke 1991). Similarly, a crusher operator who caused the permanent disability of a co-worker by energizing a mill when the other worker was inside received a reduced suspension (from 30 to 27 days) when the arbitrator found that there had been lax

enforcement of safety rules. *See ASARCO, Inc.*, 95 LA 1016 (Mathew W. Jewett 1990). Safety rules must be communicated to employees. Arbitrators also are reluctant to uphold discipline when there are doubts that employees were adequately informed of the requirements they faced.

## **§ 8.18. Immediate Discipline**

**Serious safety violations often warrant immediate discipline.**

### **Comment:**

In keeping with the application of the principles of progressive discipline, the employer may dismiss employees without a previous history of discipline for serious breaches of safety rules or practices. Such breaches frequently put the employee or fellow workers at risk of their lives or physical safety. For example, a grain elevator worker was dismissed for smoking near the elevator that contained highly explosive grain dust. *See ADM/Growmark River Sys.*, 99 LA 1033 (Mark W. Suardi 1992). Another discharge was upheld after a worker injured a co-worker when the employee knew that such horseplay could lead to dismissal. *See Muskin, Inc.*, 89 LA 297 (Thomas J. DiLauro 1987).

Demotions are seldom upheld as a proper disciplinary penalty in most workplace situations. In several cases of repeated violations of safe work practices, however, arbitrators have sustained demotions of the grievants to positions where fewer safety hazards existed rather than discharging them. A utility lineman was demoted to meter reader as a result of his involvement in numerous safety-related incidents, in *Southern Ind. Gas & Elec. Co.*, 100 LA 160 (William F. Euker 1992), and in a similar case a long-term employee was demoted after he caused a serious accident through his negligence. *See Iowa Power*, 97 LA 1029 (John R. Thornell 1991).

## **§ 8.19. Crew Size**

**Arbitrators generally uphold the right of management to determine the appropriate size of crews.**

**Comment:**

When a union challenges a reduction in the size of a crew based on safety and health considerations, it bears the onus of persuading the arbitrator that the proposed change will create a risk. In practice, this test has been difficult to meet unless there is specific language in the collective agreement. In the absence of such language, arbitrators often require a union to prove that a reduction in crew size will in fact result in an increase in the hazards normally associated with the job. Thus, an arbitrator upheld management's right to reduce the size of a press room crew on the grounds that safety depended on the conduct of each individual rather than the number of pressmen on duty. *See Idaho Statesman*, 98 LA 753 (William L. Corbett 1992).

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### **III. REFUSAL TO WORK: THE SAFETY EXCEPTION**

#### **§ 8.20. Refusal of Unsafe Work**

**Workers may refuse an order if obedience would cause a safety hazard.**

**Comment:**

One of the primary principles of labor arbitration is the requirement that employees follow instructions clearly delivered by persons in authority over them, known as the “obey now, grieve later” rule. The basis of this rule lies in the grievance procedure, which provides employees with a forum for redressing disputes over an order. However, the remedies available through a grievance procedure are limited and certainly do not include redress for injuries suffered as a result of following an otherwise valid order. Thus, arbitrators have long recognized that employees may refuse orders if obedience would subject them to a risk to their safety or health. Section 502 of the Labor Management Relations Act, 29 U.S.C. § 143 (2000), and § 11(c) of OSHA also establish the right of workers to refuse hazardous work assignments. Disputes do arise when the employer challenges an employee’s assertion that the work in question entailed a risk of accident or injury. The basis of management authority usually is its reserved rights or disciplinary powers. Collective agreements occasionally refer to the right of employees to refuse hazardous assignments, but there is no evidence that such provisions are common. *See also* Chapter 6, § 6.8, above.

#### **§ 8.21. Employees’ Statements of Concern**

**Employees must state their concerns for safety or health at the time they refuse work.**

**Comment:**

In these cases, the employee first is obligated to state at the time of the refusal to work that the action is based on concern for health or safety and that the hazard is abnormal for the job. Management must ensure that instructions to

perform the work are clearly given and the employee is warned of the possible consequences of refusal to carry out the assigned work. The employer must also investigate the alleged hazard and an employee's physical condition if the circumstances warrant. If the dispute goes to arbitration, the employee bears the burden of showing that a safety hazard did exist.

## § 8.22. Arbitrators' Assessment of Risk

**Arbitrators endorse either of two principles—a “reasonable belief” or an “objective standard”—to govern an employee's obligation to demonstrate that a disputed assignment entails a risk to safety or health.**

### **Comment:**

*a. “Reasonable Belief” and “Objective” Standards.* Arbitrators differ in the burden they expect employees to assume in demonstrating that the disputed assignment did pose a risk to safety and health. A majority of arbitrators appear to endorse the principle that workers must have a “reasonable belief” that a hazard existed in order to escape discipline for a refusal to work. In turn, the worker usually must produce some objective evidence or factual basis for the reasonable belief, such as an odor or abnormal condition in the workplace. The alternative view is that a worker must show that an actual hazard existed if discipline is not to be imposed. The “objective standard” requires that an employee produce evidence of a safety hazard, usually in the form of measurements, such as temperature or gas levels, although arbitrators may also view the workplace in the course of a hearing and may accept the views of experienced workers.

In applying both standards arbitrators frequently examine the context of the refusal to work when reaching their decisions, that is, prior complaints about the hazard in question, the way in which the worker presented the complaint, the grievant's willingness to accept an alternate assignment, the grievant's physical condition and the like. Some authorities refer to the “good faith belief” standard, by which an employee must only demonstrate a genuine fear that an assignment



would pose a risk of accident or disease. In fact, decisions overturning discipline based on this standard are almost unknown, although it has been invoked to mitigate disciplinary penalties.

### Illustrations:

1. Workers were told to clean a motor on the roof of a mill without a catwalk or railing in conditions of freezing temperatures and high winds. After attempting to perform the work for 20 minutes, two workers came down and told their supervisor that the assignment was unsafe. He ordered them to finish the job, and they made a second attempt with the same result. An argument ensued, and the employer terminated one of the workers. In reinstating the grievant, the arbitrator stated that the majority opinion of arbitrators was that if an employee truly believes that the performance of said work would create a serious health hazard to him, and a reasonable man could reach the same conclusion under like circumstances, the employee may refuse to comply with the work assignment. In such an instance, the employee has the duty of stating that he believes there is a risk to his safety and of showing a reasonable basis for his belief. *Leland Oil Mill*, 91 LA 905, 907 (Samuel J. Nicholas, Jr. 1988).

2. An employee refused an order to load 28 pounds of parts into a barrel. An arbitrator upheld his dismissal on the grounds that he failed to prove the reasonableness of his belief that loading this quantity would result in a back injury, noting also that the grievant was not required to load 28 pounds at one time. See *Lancaster Electro Plating*, 93 LA 203 (Robert Bressler 1989). This case was typical in that arbitrators look for evidence to support the grievant's claim when applying the "reasonable belief" test. They also recognize that some workplaces are inherently hazardous and compare the worker's concern with normal risk levels.

*b. "Objective Standard."* A minority of arbitrators who rely on the "objective standard" place a higher burden on the grievant in such cases. They demand that workers must

demonstrate in an arbitration hearing, if necessary, that a substantial risk to health or safety existed. This standard is parallel to the Supreme Court's interpretation of § 502 of the Labor Management Relations Act, which gives employees the right to refuse work when conditions are "abnormally dangerous." Quoting an earlier decision in the case, the Court stated in *Gateway Coal Co. v. Mine Workers Dist. 4, Local 6330*, 414 U.S. 368, 387, 85 LRRM 2049 (1974), that a union must present "ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists" in order to invoke the protections of § 502. Arbitrators who use the objective standard rely on the safety record of the operation in question, compliance with OSHA regulations, or the results of safety inspections to judge the grievant's claim that a hazard existed.

### **Illustration:**

3. A worker refused to work around an apparatus containing molten iron. The arbitrator noted that the work in the plant was inherently dangerous and workers endured many minor burns. The employer provided evidence of high safety standards for the foundry. Although the grievant honestly feared for his safety, the company demonstrated that conditions were safe by the standards of the industry and the arbitrator upheld discipline. See *United States Pipe & Foundry Co.*, 84 LA 770 (David A. Singer, Jr. 1985).

c. *AIDS*. In the 1980s, there were concerns about exposure of workers to AIDS, especially in health care facilities and penal institutions. Initially, it appeared that many cases would arise when workers refused to perform some of their duties because of the risk of contamination by the virus. However, as scientific knowledge about the transmission of AIDS grew, early fears subsided, and workers were trained in proper procedures to protect themselves from this hazard, just as they would be trained to deal with other dangers in the workplace. In addition, persons with AIDS or who carry HIV are protected by the Rehabilitation Act of 1973, 29 U.S.C. § 701 (2000), and the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101

(2000). An effect of these statutes was that discrimination against persons with these diseases must be based on sound scientific information. Thus, refusals to work were upheld when the employer distributed misleading information about the spread of AIDS and where no training had been provided for dealing with persons with AIDS-related illnesses. In general, however, there have been few disputes about refusals to work involving AIDS.

## REFERENCES

See references at the end of Section II.

## IV. ALLEGATIONS OF UNSAFE WORKING CONDITIONS

### § 8.23. Employer's Duty of Safety

**The employer is obligated to provide a safe environment in which employees work.**

#### **Comment:**

This rule is grounded in external law (OSHA and other federal or state legislation), as well as arbitration decisions. Grievances may arise when employees believe that this obligation has been violated, especially when the alleged violation may pose a serious threat to the employees' safety and health. Disputes also frequently arise when workers refuse to carry out assigned duties, as discussed in § 8.20, above. Grievances over unsafe working conditions may involve situations that do not pose an immediate threat to the safety or health of employees. As noted above, an employee has the right to file a complaint under OSHA and pursue a grievance for the same condition. Since safety hazards vary greatly among industries, the results of these cases tend to turn on specific fact patterns.

## **§ 8.24. OSHA Regulations**

**OSHA regulations generally guide decisions about workplace safety.**

### **Comment:**

The most significant sources of guidance for the employer's obligations on specific conditions of work are OSHA regulations. Arbitrators tend to defer to OSHA regulations when confronted by an allegation that a workplace is unsafe. If an employer can demonstrate that the conditions in question do not violate federal regulations, only very specific collective agreement language would impose a higher standard.

## **§ 8.25. Distinguishing Between Discomfort and Hazard**

**Arbitrators distinguish between discomfort and hazard in determining whether a threat to safety or health exists.**

### **Comment:**

A typical working condition that does not pose an immediate threat to the safety or health of employees is the temperature of the workplace. In deciding these cases, arbitrators frequently draw the distinction between discomfort and hazard, and they are reluctant to impose a specific requirement on the employer. An employer may require employees to work in uncomfortable circumstances without violating any safety and health provisions or regulations. Thus, in an office setting, temperatures that varied between 68 and 80 degrees Fahrenheit, combined with poor air circulation, did not violate a safety and health clause. *See Social Sec. Admin.*, 73 LA 267 (William Eaton 1979). When a collective agreement lacked a provision requiring the employer to install air conditioning in mobile equipment, an employer was not required to provide this feature, despite evidence of heat and dust. *See Brownies Creek Collieries*, 83 LA 919 (Charles P. Chapman 1984). Brewery workers were unable to convince an arbitrator that working in 40–45 degrees Fahrenheit violated the safety and health provision of the collective agreement because they could not

provide evidence that the temperatures would cause respiratory illnesses. *See Anheuser-Busch Co.*, 72 LA 594 (Marshall J. Seidman 1979).

## § 8.26. Training for Employees

**Employers must ensure employees are trained for duties when a risk of accident exists.**

### Comment:

Employers must ensure that workers are adequately trained for their duties where a risk of accident or injury exists. An employer who assigns inadequately trained employees to operate equipment may violate safety provisions of the collective agreement when the tasks could be performed safely by properly trained workers. Unions have successfully grieved the level of training provided by management in positions where safety is a significant concern. *See Exxon Co. U.S.A.*, 89 LA 979 (Barry J. Baroni 1987).

The spread of AIDS brought new risks in the workplace, and arbitrators have imposed requirements on employers under safety and health provisions to protect workers who might be exposed to the disease. When employees have the right to know the names of corrections inmates who are suspected of having a communicable disease, the employer must provide that information for persons who have tested positive for AIDS. *See Delaware Dep't of Corrections*, 86 LA 849 (Lewis M. Gill 1986). A state law covering nursing home employees was preferred to less rigorous federal guidelines for dealing with an AIDS-infected health care worker. *See Nursing Home*, 88 LA 681 (Thomas Sedwick 1987).

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## V. MEDICAL CONDITIONS AND DISABILITIES

### § 8.27. Duty of Accommodation

**Because of legislation or provisions in a collective agreement, employers may be obligated to accommodate employees with disabilities.**

#### **Comment:**

Under the common law, employers were not obligated to accommodate employees for disabilities. The rules for most workplaces are based on the presumption that employees are physically and mentally able to carry out their normal duties. When employees cannot perform prescribed duties because of a disability, the employer traditionally has been entitled to remove them from their positions. For example, employees who are chronically absent from work may be terminated when absenteeism policies have been communicated to employees and applied consistently, even if the cause of their absenteeism is a physical or mental illness.

The ADA, however, requires employers to accommodate disabled employees. *See* § 8.29. If the employee's disability may cause a health or safety hazard, the employer's obligation to provide a safe workplace for all employees (including a disabled employee) must be balanced against the duty to accommodate. Frequently, employers and arbitrators have relied on concerns about hazards to a worker, other workers, and the public to justify insistence on employees being able to perform all aspects of their jobs. Employers have the authority to transfer employees to new positions when medical evidence indicates that they pose a safety or health hazard to workers or the public. Similarly, management has the right to place employees on medical leave of absence when they might pose a threat to their own safety or that of other employees. Even when a collective agreement incorporates the ADA, an employer can discharge a disabled employee for poor performance when rehabilitation has been unsuccessful and future success is unlikely. *See Interstate Brands Corp.*, 113 LA 161 (D.L. Howell 1999).

## **§ 8.28. Arbitrators' Assessment of Employees' Capabilities**

**Arbitrators tend to place considerable weight on management's view of the existence of a hazard to safety or health, but rely on medical evidence to assess an employee's ability to work safely.**

### **Comment:**

*a. Medical Evidence.* When confronted by conflicting medical evidence, arbitrators generally take a conservative position, preferring to uphold a termination rather than to reinstate employees who may pose a risk to their own safety or to the safety of fellow workers. Arbitrators also consider the nature of the work involved. They are especially reluctant to order the reinstatement of an employee whose error may result in serious injury to the employee or fellow workers. In *Trailmobile*, 78 LA 499 (Wallace B. Nelson 1982), the arbitrator dealt with an employee who had been terminated after experiencing "passing out episodes" at work, although no injury had occurred. There were conflicting medical opinions regarding the grievant's suitability to return to work, but no definitive diagnosis. The arbitrator concluded that the employer's judgment should carry great weight in such cases and declined to order reinstatement.

*b. Diabetes, Epilepsy, and Similar Diseases.* Cases in which employees suffer from diseases such as diabetes or epilepsy are especially difficult. Although symptoms can be controlled by medication, medical evidence often differs about the prognosis for recurrence of the symptoms. When the job in question is hazardous, arbitrators often sustain management decisions to remove an employee from the position. See *Acme Galvanizing*, 61 LA 1115 (Robert B. Moberly 1973).

*c. Disabilities.* Traditionally, only a small proportion of disabled persons were able to find employment. Transportation, physical barriers at work sites, and popular prejudices about the capabilities of persons with disabilities contributed

to their exclusion from the labor force. The rules of the workplace summarized in this section undoubtedly contributed to the lack of job opportunities for persons with disabilities.

## § 8.29. Effects of Legislation

**Legislation requiring employers to accommodate persons with disabilities affects the regulation of safety in the workplace.**

### **Comment:**

*a. Statutory Standards.* The first major legislation directed at the employment status of persons with disabilities was the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. (2000). It prohibits discrimination by federal government agencies and contractors against disabled individuals and requires them to take affirmative action to employ and advance qualified disabled persons. Many of the principles of the Rehabilitation Act were incorporated in the ADA, enacted in 1990. It covers all employers with 15 or more workers engaged in interstate commerce. The ADA bans discrimination on the basis of disability against qualified individuals in a variety of aspects of the employment relationship, including hiring, promotion, termination, job assignments, and the like. In addition, employers are required to provide “reasonable accommodation” to qualified disabled applicants and employees. Both the Rehabilitation Act and the ADA provide broad definitions of a disability as follows:

(1) a person with a physical or mental impairment that substantially limits that person in some major life activity,

(2) a person with a record of such physical or mental impairment, or

(3) a person regarded as having such an impairment.

Under the ADA, employers are required to provide “reasonable accommodation” in the work environment to permit persons with disabilities to enjoy equal employment opportunities. “Reasonable accommodation” includes modifications to the work environment, work schedules, and equipment, and



the provision of special training. Employers are not required to provide an accommodation that imposes an “undue hardship” on their operations. The concept of “undue hardship” includes the financial realities an employer faces. The provisions of a collective agreement may also help define “undue hardship” in a particular employment setting.

The effects of the legal requirement to provide reasonable accommodation for employees whose disability may pose a risk to safety are unclear. In *Mantoletto v. Bolger*, 767 F.2d 1416, 38 FEP Cases 1081 (9th Cir. 1985), the court required the employer to base a decision on accommodation on the nature of an individual employee’s disability. In *Doe v. Region 13, Mental Health-Mental Retardation Comm’n*, 704 F.2d 1402, 1412, 31 FEP Cases 1332 (5th Cir. 1983), the court held that “where there is uncontroverted evidence of a chronic, deteriorating situation which is reasonably interpreted to pose a threat” (in this case to patients), no violation of the ADA existed.

*b. Arbitral Standards.* These legal requirements pose problems to arbitrators in formulating the common law of the workplace. Traditionally, most arbitrators have limited their role to interpretation of the collective agreement and have been reluctant to interpret external statutes. The ADA specifically encourages the use of arbitration and other alternative forms of dispute resolution to settle disputes arising under its provisions. As discussed above, few collective agreements contain specific language on safety and health, and arbitrators have been reluctant to impose obligations on management to accommodate workers with disabilities in the absence of language in the collective agreement. However, the requirements of the ADA may pose greater difficulties for arbitrators when confronted with cases involving workers with disabilities where risks to safety or health may exist.

Depending on the language of the collective agreement as regards safety and health or the application of external law, the duty to accommodate found in the legislation may apply to the employer (and perhaps to the union). In these circumstances, for example, an employer might well be required to grant employees paid or unpaid leave to enable them to

undergo treatment for an illness or recuperate and thereby eliminate a possible risk to safety and health. Job descriptions and the organization of work may have to be modified in order to enable a person with a disability to perform the core duties of a position safely. Employers may be required to obtain special equipment to permit such individuals to work safely.

Employers may well face a burden in persuading an arbitrator that an employee poses a threat to the safety of fellow workers or the public. Interpretation guidelines for the ADA suggest that in determining whether an employee is a direct threat to health or safety in the workplace the following factors must be considered:

- (1) the duration of the risk,
- (2) the nature and severity of the potential harm,
- (3) the likelihood that the potential harm will occur, and
- (4) the imminence of the potential harm.

See Grenig, Jay E., *Disabled Workers*, in Labor and Employment Arbitration, 2d ed., eds. Bornstein, Tim, Gosline, Ann & Greenbaum, Marc (1997), Chapter 23, § 23.09(3) [hereinafter Grenig]. Moreover, determination of the existence of a direct threat must be based on objective factual evidence, not subjective perceptions or stereotypes, and must be based on the circumstances of the individual under consideration. Evidence must be compelling and supported by expert opinion.

None of these criteria is foreign to arbitrators. However, future rules of the workplace will have to acknowledge the importance of these factors in determining whether an employee may be excluded from the workplace because of a possible risk to safety or health. The level of analysis and use of data may well be more rigorous than arbitrators and the parties have used in the past.

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# Chapter 9

## Fringe Benefits

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## I. VACATIONS

### § 9.1. Entitlement to Paid Vacation—General

**Entitlement to paid vacation is governed by the terms of the collective bargaining agreement. The majority view among arbitrators is that paid vacation is deferred compensation for work performed, and, once earned, it should not be forfeited except where that result is clearly required by the collective bargaining agreement.**

#### **Comment:**

*a.* Entitlement to paid vacation is a matter of contract. There is no inherent or legal right to paid vacation, at least in the private sector. Virtually all collective bargaining agreements provide for paid vacations for eligible employees. Eligibility requirements may include a minimum service requirement, a minimum work requirement in a qualifying base period, and a requirement that the individual be actively employed during or at the start of the vacation period. Frequently, the amount of vacation increases in relation to length of service.

*b.* In interpreting and applying vacation provisions, past practice may be a relevant factor. Arbitrators also take into account the majority view that paid vacation is a form of deferred compensation for work performed. In particular, once a paid vacation has been earned, arbitrators generally hold that any forfeiture must be clearly required by the agreement.

## REFERENCES

Abrams, Roger I. & Nolan, Dennis R., *The Common Law of the Labor Agreement: Vacations*, 5 Indus. Rel. L.J. 603 (1983) [hereinafter Abrams & Nolan], provides a useful and succinct treatment of this subject, and cites many illustrative cases. Additional cases may be found in Ellis, Sharon Henderson, *Vacations and Vacation Pay*, in *Labor and Employment Arbitration*, 2d ed., eds. Bornstein, Tim, Gosline, Ann & Greenbaum, Marc (1997), Chapter 31.

## **§ 9.2. Vacation Eligibility— Work Requirements**

**To receive vacation and vacation pay, an employee must meet the work requirements specified in the collective bargaining agreement. Generally, an employee is not entitled to a prorated vacation benefit based on partial fulfillment of a work requirement, except when the agreement so provides. Proration also has been applied when the employer has closed the workplace during the qualifying period.**

### **Comment:**

*a.* Many vacation provisions include a work requirement specifying that an employee must have worked a certain number of hours, days, or weeks (or some other minimum) within a qualifying base period (often the calendar year preceding the vacation year). The agreement may deal specifically with loss of work time during the base period resulting from various kinds of absence, such as layoff, illness, work-related injury, strike, or union business. When the agreement does not refer to such absences, arbitrators generally do not credit them as time worked, since no services were performed. Arbitrators have credited time spent on union business, even when not specified in the agreement, so as not to penalize union officers for time spent in support of collective bargaining. Some arbitrators also have held that vacation credit should be granted for a period in which employees were unable to work due to a lockout by the employer.

*b.* Unless the agreement provides for a prorated vacation benefit based on partial fulfillment of a work requirement, most arbitrators do not find an implied right to a prorated vacation. Arbitrators have granted prorated vacation benefits, however, when the employer has closed the workplace before the end of the qualifying period, thereby preventing the employees from satisfying the work requirement.

*c.* Arbitrators have found that discharged employees who are reinstated with back pay for all or some of the period of their discharge are entitled to receive vacation credit for the time they would have worked had they not been improperly discharged, as reflected in the back pay award.



### **§ 9.3. Vacation Eligibility—Active Employment Requirement**

**Generally, to receive vacation and vacation pay, an employee must satisfy any active employment requirement specified in the collective bargaining agreement. Arbitrators sometimes make exceptions where the worker's employment was terminated before the specified eligibility date due to management action.**

#### **Comment:**

*a.* The agreement may require not only that an employee earn a vacation by satisfying a work requirement, but also that the employee continue to be actively employed as of a particular date, usually the beginning of the period in which the vacation is granted. The general view is that the purpose of such a requirement is to encourage continuity of employment. Such a requirement should be applied only where clearly specified by the terms of the agreement.

#### **Illustration:**

An agreement provides: "Each employee who has accrued more than one year of continuous service as of January 1 of any year, and who has worked a minimum of 1200 hours in the preceding calendar year, shall be eligible for a vacation." An employee whose employment is terminated prior to the start of the vacation year, but who met the service and work requirements at the time of termination, is entitled to a vacation benefit unless some other provision of the agreement or past practice compels a different result. Although the wording of the vacation eligibility provision can be read to apply only to persons actively employed on January 1 of the vacation year, that is not the only reasonable interpretation and should be avoided, in the view of many arbitrators, because it would work a forfeiture of an otherwise earned vacation benefit.

*b.* When the agreement requires that an employee must be actively employed at the start of the vacation year (or other

specified date) in order to receive vacation, an employee who quits or otherwise voluntarily fails to meet that requirement is not entitled to vacation pay. Some arbitrators hold that when management action results in the employee's inability to meet that requirement, otherwise earned vacation pay should be granted. Arbitrators are particularly likely to render such a decision in cases where the employer has closed the workplace and terminated all of its employees. (See § 9.2, above, with respect to proration of vacation benefits in that situation.) Some arbitrators have made similar decisions in cases involving discharge or forced retirement. Other arbitrators have concluded that, regardless of the reason, an employee who does not satisfy an active employment requirement contained in the agreement is not entitled to vacation pay.

c. In several reported cases arbitrators have denied vacation benefits where death prevented an employee from meeting an active employment requirement. Some commentators have suggested, however, that a vacation benefit should be paid to the employee's estate if the employee otherwise had earned a vacation, because the employer's interest in job continuity did not extend beyond the employee's death.

## REFERENCE

For a discussion of the situation of the deceased employee, see Abrams & Nolan, at 612.

### § 9.4. Scheduling of Vacations

**Management has broad authority to determine when vacations are to be taken, subject to the terms of the collective bargaining agreement and past practice. In applying contractual provisions, arbitrators generally seek to strike a balance between employee preference and management's right to schedule vacations to meet legitimate needs of the enterprise.**

**Comment:**

*a.* Arbitrators have held that management retains the right to schedule vacations, absent contract language or past practice restricting that right. Some arbitrators have ruled that when the contract is silent, employee preferences should be honored to the extent permitted by the employer's requirements, but that management's discretion is greater than where the contract speaks to that issue. Where the agreement provides that employee preference is to be taken into account, it typically also will recognize management's right to schedule vacations consistent with the needs of the enterprise. Arbitrators seek to strike an appropriate balance in applying such provisions, but it is not possible to formulate a general rule as to how that is done. The specific language of the agreement, past practice, and the nature of the enterprise all must be considered. If the agreement requires the employer to honor employee preference, subject to its right to maintain orderly operations, the employer may be required to explain reasonably, or even justify, the basis for its action, depending on the particular terms of the agreement.

*b.* Some arbitrators have held that management may schedule the vacations of all employees or a group of employees during a planned shutdown period, except when this right is limited by contract language or past practice. Other arbitrators have disallowed a vacation shutdown where the contract requires the employer to consider employee preferences and does not specifically authorize vacation shutdowns.

*c.* The Family and Medical Leave Act (FMLA), which is incorporated into or referred to in many contracts, permits either the employee or the employer to substitute paid vacation leave for otherwise unpaid FMLA leave. 26 U.S.C. § 2612(d)(2) (2000). The Department of Labor (DOL) issued an advisory letter on March 29, 1994, which states that the FMLA does not preclude a collective bargaining agreement from providing that the choice belongs solely to the employee. This is consistent with DOL regulations under the FMLA. 29 C.F.R. 825.700(a). When the contract states that employee preferences should be honored subject to the employer's operational needs, arbitrators have held that the employer must show such

a need in order to force the employee to substitute vacation for unpaid FMLA leave.

*d.* Remedy issues relating to vacation scheduling grievances are discussed in Chapter 10, § 10.31, below.

## **§ 9.5. Calculation of Vacation Pay**

**Vacation pay is calculated in accordance with the terms of the collective bargaining agreement and past practice.**

### **Comment:**

*a.* Absent controlling language in the agreement or past practice, some arbitrators hold that vacation pay is to be calculated on the basis of the employee's earnings at the time the vacation is taken. The rationale is that vacation pay is compensation for earnings lost during the vacation period. Other arbitrators hold that vacation pay is to be calculated on the basis of the employee's earnings at the time the vacation was "earned" (see § 9.1, above), particularly if there has been a subsequent increase in wage rates or if the employee controls the timing of the vacation.

*b.* When the agreement specifies that vacation pay is to be computed on the basis of the employee's "earnings" during a specified period, arbitrators generally include as "earnings" all forms of compensation—including overtime, incentive pay, holiday pay, shift differential, etc.—unless such compensation is excluded by contract language or past practice.

## **II. HOLIDAYS**

## **§ 9.6. Entitlement to Holiday Pay—General**

**Entitlement to holiday pay for unworked holidays is governed by the terms of the collective bargaining agreement.**

### **Comment:**

*a.* Entitlement to holiday pay is a matter of contract. Absent an agreement to provide holiday pay, there is no right to

holiday pay for legal holidays or other days generally observed as holidays in the community. (External law may provide for payment of holiday pay to certain public employees.) The collective bargaining agreement is controlling with respect to matters such as the holidays for which holiday pay is to be received; the dates on which holidays are to be observed (§ 9.13, below); eligibility for holiday pay, including service and attendance requirements (§§ 9.7 through 9.12, below); and the amount of holiday pay. Past practice may be a consideration in applying the terms of the collective bargaining agreement. A well-established past practice of paying employees for specific unworked holidays may be enforced in the absence of any express contractual provision relating to holiday pay, but almost all collective bargaining agreements contain such provisions.

*b.* Some arbitrators have held that because holiday pay is a negotiated benefit and part of the bargained-for compensation package, ambiguous eligibility provisions should be interpreted so as to avoid forfeiture of that benefit.

## REFERENCES

Abrams, Roger I. & Nolan, Dennis R., *Resolving Holiday Pay Disputes in Labor Arbitration*, 1983 Case W. Res. L. Rev. 380, provides a comprehensive and succinct treatment of this subject, and cites many illustrative cases. *See also* Buckalew, Timothy J., *Holidays and Holiday Pay*, in *Labor and Employment Arbitration*, 2d ed., eds. Bornstein, Tim, Gosline, Ann & Greenbaum, Marc (1997), Chapter 32.

### **§ 9.7. Eligibility for Holiday Pay— Service Requirements**

**To be eligible for holiday pay, an employee must meet any minimum service requirement specified in the collective bargaining agreement.**

#### **Comment:**

*a.* Because entitlement to holiday pay is a matter of contract, an employee must satisfy the eligibility requirements

expressly set forth in the agreement, including any minimum service requirement. Such a requirement usually is not inferred in the absence of an express provision, although a well-established past practice may provide a compelling basis to conclude that the parties intended to impose such a requirement.

### **Illustrations:**

1. The agreement provides that “an employee with seniority” shall be eligible for holiday pay, and the seniority provisions of the agreement provide that an employee attains seniority on completion of a 90-day probationary period. An employee who is still in her probationary period is not entitled to holiday pay for a holiday occurring during that period.

2. The agreement does not expressly impose a minimum service requirement for holiday pay eligibility, but the consistent practice for many years has been to exclude employees who have not completed their probation period. The past practice may be applied to deny holiday pay to a probationary employee if the arbitrator is convinced that it reflects the mutual understanding of the parties with respect to holiday pay eligibility.

*b. Part-time employees.* Part-time employees who otherwise meet eligibility requirements are likely to be entitled to holiday pay unless expressly excluded from coverage by the terms of the agreement. A well-established past practice, however, may provide a compelling basis to conclude that the parties intended to exclude part-time employees from holiday pay coverage.

## **§ 9.8. Eligibility for Holiday Pay— Attendance Requirements**

**To be eligible for holiday pay, an employee must meet any attendance requirement specified in the collective bargaining agreement.**

**Comment:**

*a.* Because entitlement to holiday pay is a matter of contract, an employee must satisfy the eligibility requirements expressly set forth in the agreement, including any attendance requirements. Such a requirement usually is not inferred in the absence of an express provision. Most collective bargaining agreements require that an employee work on the (or the employee's) last scheduled day before and first scheduled day after the holiday or some variation on that standard. It is generally accepted that the purpose of this requirement is to deter employees from "stretching" the holiday and to ensure a full working force on days surrounding a holiday. Arbitrators have taken this into account in interpreting and applying such provisions to various fact situations.

*b.* Exceptions to a contractual attendance requirement, beyond any specified in the agreement, usually are not inferred, absent compelling evidence of a past practice recognizing the exception. Many agreements make an exception for absences that are excused or for just cause. Under other agreements, however, an employee's absence may be excused or for just cause and yet not constitute an exception to an attendance requirement for holiday pay purposes.

**Illustration:**

1. The agreement conditions eligibility for holiday pay on the employee working the employee's last scheduled day before and first scheduled day after the holiday and provides no exceptions. An employee who was ill on her last scheduled day before the holiday may be found ineligible for holiday pay even if the employer accepts her proffered medical excuse as justifying her absence from work that day. The result may be different if there has been a past practice of paying holiday pay to employees whose absence on a qualifying day is excused by management under similar circumstances, or if the arbitrator finds some other basis for inferring an exception to the stated requirement.

*c.* When the agreement makes an exception for "excused" or "justified" absence on a qualifying day, and management

refuses to accept an employee's explanation for the absence, the arbitrator must determine whether the exception applies based on the particular facts involved.

*d.* Arbitrators have taken different approaches in cases where an employee was on disciplinary suspension on a qualifying day. Some arbitrators have held that an employee on suspension is disqualified if the agreement does not make an exception for suspensions. Other arbitrators have concluded that the employee should not be penalized by loss of holiday pay, in addition to the disciplinary suspension, or have concluded that disqualification should not occur because management controls the timing of the suspension and the employee cannot be accused of trying to "stretch" the holiday. Arbitrators sometimes also have held that an employee on suspension on a qualifying day is not scheduled to work, and, therefore, is not disqualified if the agreement establishes the qualifying day(s) on the basis of the employee's scheduled day(s).

*e.* Questions have arisen as to whether an employee has satisfied an attendance requirement if the employee was tardy or left work early on a qualifying day or failed to work scheduled overtime (as opposed to a "regular scheduled day") on a qualifying day. Decisions in such cases turn essentially on the language of the particular agreement and any relevant past practice.

### **Illustration:**

2. The agreement provides that an employee must work "his full last scheduled day" prior to the holiday. An employee who is tardy on that day generally would not be considered eligible for holiday pay, absent relevant past practice or an applicable just cause exception. If, however, the agreement required only that the employee work "his last scheduled day" prior to the holiday, some arbitrators hold that the employee should not be disqualified for his tardiness because there was no attempt by the employee to stretch the holiday. If, in the latter case, the employee left work early on his last scheduled day before the holiday, that would amount to stretching the holiday, and would be a basis for disqualification. Even in that instance, however, some arbitrators would find the employee eligible for holiday pay if management approved the early quit.



## **§ 9.9. Eligibility for Holiday Pay— Nonwork Periods—General**

**Employees who are not scheduled to work during the week (or other specified period) in which a holiday occurs may or may not be eligible for holiday pay depending on the terms of the collective bargaining agreement.**

### **Comment:**

Employees who are off work due to layoff, vacation, other leave, or because of a plant shutdown may be expressly disqualified from receiving holiday pay or may be unable to satisfy the eligibility requirements for holiday pay under the terms of the agreement. In addition to attendance requirements (§ 9.8, above), some agreements require that an employee be “actively” employed or perform work within a specified period of the holiday to be eligible for holiday pay. Some recurring situations that frequently have arisen in arbitration are discussed in the following sections (§§ 9.10 through 9.12, below).

## **§ 9.10. Eligibility for Holiday Pay— Employees on Layoff**

**The eligibility of employees on layoff to receive holiday pay is governed by the terms of the collective bargaining agreement and past practice. In the absence of an express provision either qualifying or disqualifying employees on layoff from receiving holiday pay, or past practice, arbitrators have taken different approaches.**

### **Comment:**

*a.* The agreement may expressly qualify or disqualify employees on layoff from receiving holiday pay. Absent such a provision, past practice may be controlling. When the agreement does not expressly disqualify employees on layoff, they still may be ineligible for failure to satisfy a work or attendance requirement (§ 9.8, above).

**Illustration:**

The agreement contains no express provision relating to the eligibility of laid-off employees to receive holiday pay, but provides that an employee must work “the last scheduled workday” before the holiday or have an “excused absence.” An employee on layoff on the last scheduled workday before the holiday is ineligible for holiday pay unless layoff is considered an “excused absence.” Past practice may be relevant in making the latter determination. Absent such past practice, arbitrators differ as to whether layoff constitutes an “excused absence.” If the agreement requires an employee to work “his last scheduled workday” before the holiday, and does not otherwise disqualify employees on layoff, an employee on layoff may be found to have satisfied the attendance requirement by working his last scheduled workday before his layoff commenced. As noted in Comment *b*, below, however, an arbitrator may conclude that the holiday pay provision as a whole does not afford eligibility to an employee on layoff, particularly if the employee has been laid off for an extended period of time prior to the holiday.

*b.* Some arbitrators have held that if the agreement does not expressly qualify employees on layoff, and there is no relevant past practice, such employees should not be deemed eligible for holiday pay. The premise for these decisions is that the purpose of holiday pay is to provide a “level paycheck” in weeks when an employee does not work on a holiday that otherwise would have been a workday. Other arbitrators, particularly in more recent decisions, have reasoned that holiday pay is part of the overall bargained-for compensation package, and that an employee—even if on layoff—should only be deprived of holiday pay if the employee is not able to satisfy the express eligibility requirements in the agreement.

*c.* Some arbitration decisions have held that employees should not be disqualified from receiving holiday pay when they are unable to satisfy a work requirement because the employer has temporarily shut down the enterprise to coincide with a holiday and its qualifying days. There are other decisions holding that employees are not eligible for holiday pay in case of a permanent shutdown and permanent layoff of the work force.

### **§ 9.11. Eligibility for Holiday Pay— Employees on Vacation or Leaves of Absence**

The eligibility of employees on vacation or various types of leaves of absence to receive holiday pay is governed by the terms of the collective bargaining agreement and past practice. In the absence of an express provision either qualifying or disqualifying such employees from receiving holiday pay, or past practice, arbitrators have taken different approaches.

#### **Comment:**

*a.* The agreement may expressly qualify or disqualify employees who are on vacation or various types of leaves of absence, such as sick leave or leave due to a work-related injury. (It appears to be more common for agreements to specify that employees on vacation, as opposed to various types of leaves of absence, are eligible for holiday pay.) Absent such a provision, past practice may be controlling. In other cases, issues similar to those involving employees on layoff (§ 9.10, above) may arise.

*b.* Some arbitrators have held that an employee on vacation should not be deprived of holiday pay simply because the holiday coincides with the employee's chosen vacation period, unless the agreement clearly disqualifies the employee. Decisions relating to employees on various types of leaves of absence do not reflect a uniform approach by arbitrators. Some arbitrators have held that employees on contractual leaves, such as funeral or sick leave, should not be disqualified from holiday pay for failure to work on a qualifying day, absent express contract language to that effect, particularly when there is no intent to "stretch" the holiday.

### **§ 9.12. Eligibility for Holiday Pay— Strike Situations**

Employees who are on strike or who honor the picket line of another union during the term of a collective bargaining agreement may not be eligible

**for holiday pay because of failure to satisfy contractual work or attendance requirements. Employees on strike after the expiration of a collective bargaining agreement generally are not deemed entitled to holiday pay for holidays falling in the strike period.**

**Comment:**

Some arbitrators have held, depending on the circumstances, that employees who do not work on a qualifying day because of refusal to cross a picket line had “just cause” for not working, when the agreement provided for such an exception. Other arbitrators have reached the contrary conclusion. There are some decisions in which arbitrators have denied holiday pay to employees on strike when a holiday occurs during the term of the agreement even where there are no express work requirements that would disqualify them. Generally, arbitrators have held that employees on strike after the expiration of the agreement are not entitled to holiday pay for holidays falling in the strike period, because the right to holiday pay does not exist when there is no contract.

**§ 9.13. Determination of When a Holiday Is Observed**

**Holidays are to be observed on the dates specified in the collective bargaining agreement, or in accordance with past practice.**

**Comment:**

*a.* When the agreement does not specify the date on which a named holiday is to be observed, arbitrators generally apply past practice. The date for legal celebration of the holiday, under federal or state law, is not controlling unless the agreement or past practice so provides. In the unlikely event that neither the agreement nor past practice provides a solution, management may reasonably designate that date of observance.

*b.* A recurring issue in arbitration is the paired holiday dispute. Some agreements provide that holidays that fall on Saturday will be observed on Friday and those that fall on

Sunday will be observed on Monday. Every seven years Christmas Eve and Christmas Day and New Year's Eve and New Year's Day fall on either a Friday and a Saturday, or on a Saturday and a Sunday. Arbitrators differ as to whether a "domino theory" should be applied (resulting in observance of the paired holidays on Thursday and Friday or Monday and Tuesday) or whether only Friday or only Monday is to be observed as a holiday during the regular workweek. In either case, holiday pay generally should be paid for both holidays, since the agreement contemplates that holidays falling on the weekend will be observed on workdays.

### **§ 9.14.      Holiday Pay for Holidays Not Falling on a Workday**

**Entitlement to holiday pay for holidays not falling on a workday is governed by the terms of the collective bargaining agreement and past practice.**

#### **Comment:**

Some agreements expressly limit payment of holiday pay to those designated holidays that fall on workdays. Some arbitrators have held that when the agreement designates a particular holiday for holiday pay, employees are entitled to holiday pay even if that holiday falls on a nonworkday and the practice has been not to pay holiday pay in such circumstances. The rationale has been that the practice is contrary to the terms of the agreement, which do not limit payment of holiday pay to holidays falling on workdays. Other arbitrators, finding that the agreement is ambiguous, have followed past practice in such cases. In the absence of either express contract language or past practice limiting payment of holiday pay to holidays that fall on a workday, two approaches have been taken. One is to focus on the "level paycheck" theory, and deny holiday pay because the employees have not lost a workday because of the holiday. The other, more recent approach is to recognize holiday pay as part of the overall bargained-for compensation package, and to hold that employees are entitled to holiday pay unless the agreement provides to the contrary.

### III. LEAVES OF ABSENCE

#### § 9.15. Leaves of Absence

Entitlement to various types of paid and unpaid leaves of absence, and the conditions under which a particular leave of absence is to be granted, are governed by the terms of the collective bargaining agreement and past practice. External law, which may or may not be incorporated or referred to in the agreement, also may be applicable. Subject to specific contractual and/or regulatory requirements, the employer generally is recognized as retaining the right to approve or deny a leave of absence, but must exercise this prerogative in a reasonable and nondiscriminatory fashion.

#### Comment:

*a.* Collective bargaining agreements frequently include provisions for various types of leaves of absence. Examples of these types of leave are: sickness or disability, maternity and parental, funeral, jury duty, union business, personal, military duty, and sabbatical. The provisions of the agreement and relevant past practice govern such matters as the circumstances under which the employee is entitled to the leave, procedures for requesting the leave, limitations on the length of the leave, whether the leave is paid or unpaid, and seniority consequences.

*b.* External law—including such federal statutes as the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2000), and the Family and Medical Leave Act, 26 U.S.C. § 2601 (2000), and state statutes relating to paid jury leave—may apply to a particular situation. The agreement may require the arbitrator to consider external law by incorporating or referencing it in the agreement. Arbitrators differ as to whether external law should be considered or applied when that is not provided for in the agreement or otherwise sanctioned by the parties.

*c.* In some instances, the agreement may require that a leave of absence be granted if certain express conditions are met. The employer must abide by those provisions, and by any external law determined to be applicable in arbitration.

Otherwise, the employer generally is recognized as retaining the right to approve or deny a leave of absence, provided the employer acts in a reasonable and nondiscriminatory fashion. For example, an employer generally has the right to verify illness when an employee requests sick leave.

**Illustration:**

The agreement provides that an employee is entitled to 10 paid days of sick leave per year. Subject to any further specific provisions or past practice governing sick leave, the employer has the right to verify illness, but may not deny a request for sick leave up to the contractual limit except on the grounds of lack of verification. In verifying the illness the employer may require the employee to provide reasonable documentation or other evidence of illness and incapacity to work.

**REFERENCES**

Various types of leaves of absence are discussed in Knapp, Andria S., *Leaves of Absence*, in Labor and Employment Arbitration, 2d ed., eds. Bornstein, Tim, Gosline, Ann & Greenbaum, Marc (1997), Chapter 30. See also Ruben, Alan Miles, ed., Elkouri & Elkouri, How Arbitration Works, 6th ed. (2003), Chapter 17, in particular at 1083–1110.

**IV. SICKNESS, ACCIDENT, AND HEALTH BENEFITS****§ 9.16. Entitlement to Sickness, Accident, and Health Benefits—General**

Entitlement to sickness, accident, and health benefits for non-work-related illness and injury, and the conditions under which such benefits are to be granted, are governed by the terms of the collective bargaining agreement. In some instances, in application of the agreement, the terms of an outside instrument, such as an insurance policy or benefit plan document, may be controlling. External

**law, which may or may not be incorporated or referred to in the agreement, also may be applicable.**

**Comment:**

*a.* Most collective bargaining agreements provide for some form of medical and hospitalization benefits and income protection in the event an employee is unable to work due to a non-work-related injury or illness. (Workers' compensation statutes generally apply to work-related injury or illness. See Chapter 8, § 8.2, above.) When the agreement specifies the benefits to be provided, the terms of the agreement and relevant past practice generally are controlling. When benefits are provided in accordance with an insurance policy, benefit plan, or other outside instrument, the terms of that outside instrument may be controlling with respect to matters not addressed in the agreement. In case of conflict, however, the agreement is controlling. (See also § 9.15, above, with respect to sick leave).

*b.* In some instances, the employer's obligation under the agreement is only to purchase coverage under a designated or particular type of insurance policy or independent benefit plan. In those cases, disputes relating to application of the plan or policy generally are not subject to review under the grievance procedure of the agreement, but must be dealt with under the procedures of the policy or plan.

*c.* External law may require that certain sickness, accident, or health benefits be afforded to employees, or may otherwise regulate the provision of such benefits. The agreement may require the arbitrator to consider external law by incorporating or referencing it in the agreement. Arbitrators differ as to whether external law should be considered or applied when that is not provided for in the agreement or otherwise sanctioned by the parties.

## REFERENCE

Health and related benefits are discussed in Nathan, Harvey A. & Kohn, Lisa Salkovitz, *Sickness, Accident, and Health Benefits*, in Labor and Employment Arbitration, 2d ed., eds. Bornstein, Tim, Gosline, Ann & Greenbaum, Marc (1997), Chapter 35.



## § 9.17. Changes in Sickness, Accident, and Health Benefit Plans

**An employer may not unilaterally change the provisions of sickness, accident, and health benefit plans so as to deprive employees of a negotiated benefit. When the plan is provided through an outside carrier, the employer generally may change the carrier, unless it has agreed not to do so, provided this does not result in a material change in plan benefits.**

### **Comment:**

*a.* If the agreement specifies that benefit coverage is to be provided through a particular carrier, the employer may not unilaterally change carriers unless the agreement permits it. Some arbitrators hold that an employer must negotiate a change in carriers unless the agreement specifically recognizes the employer's right to make a unilateral change. Even when the employer is found to have the right to change carriers, a unilateral change may be held to violate the agreement if it results in a change, even a slight one, in the benefits provided to employees. In a case where the contract specifically authorized a change in carriers, but did not authorize a change in benefits, an arbitrator held the benefits under the new plan had to be substantially equal (*see* Comment *b*, below), recognizing that no two plans are likely to be exactly the same. *Washington County Child Support*, 111 LA 644 (Jerry A. Fullmer 1998). Usually the employer must bear any increase in the cost of providing negotiated benefits, unless the agreement, past practice, or bargaining history supports a different result.

*b.* Some contracts provide that management may make unilateral changes in health benefit plans provided the benefits under the new plan are "comparable" or "substantially similar" or "substantially equal" to the prior benefits. In deciding whether benefits under a new plan are materially different from or comparable to benefits under a prior plan, arbitrators may consider changes in employee co-pays and deductibles, cost of out-of-network providers, and restrictions on selection of health care providers, among other matters. Arbitrators may have to decide whether the contract requires the comparison to be made in terms of the benefit package as a whole or as to

each significant benefit. In one case, an arbitrator held that the new plan, which was self-funded by the employer, was substantially equal except for a 50% (\$5) increase in the urgent care co-pay, which he held should be reimbursed by the employer. *County of Muskegon*, 115 LA 1239 (Patrick A. McDonald 2001).

### **§ 9.18. Proof of Disability or Certification of Treatment**

**In administering sickness, accident, and health benefits, the employer has the right to require reasonable proof of disability and certification of treatment. The employer also generally has the right to have the employee examined by its physician.**

### **§ 9.19. Eligibility for Disability Income Protection During Vacations and Layoffs**

**The collective bargaining agreement, including any agreed-to income protection plan, determines the eligibility of employees to receive disability income protection during vacations and layoffs. When the agreement does not expressly cover these situations and there is no relevant past practice, arbitrators usually have concluded that employees on vacation are eligible for such benefits, but that employees on layoff are not.**

#### **Comment:**

The rationale for holding that an employee on vacation is not ineligible for contractual sickness and accident income protection, absent a restriction in the agreement or past practice, appears to be that vacation pay is a benefit for services already rendered, whereas sick pay is a form of insurance, and the one should not cancel out the other. (The employer, however, may be able to reschedule the vacation.) In the case of a layoff, the rationale for disallowing sick pay, in the absence of express coverage in the agreement, is that it is a form of income protection and, therefore, not applicable when the laid-off employee otherwise would not be receiving income.

**Chapter 10**

**Remedies in Arbitration**

*Marvin F. Hill, Jr.\**

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## Introduction

The subject of remedies is one of the most controversial and complex topics in labor arbitration. While there is no doubt that arbitrators can formulate remedies when they determine that the employer or the union has not complied with the parties' collective bargaining agreement, questions frequently arise regarding the source of arbitrators' remedy power and the extent, scope, or application of that power.

The use of remedy power is situational. Remedial authority depends on numerous factors, including the specific facts of a case, the labor agreement in force at the time, and (especially in the public sector) the statutes and the case law governing the jurisdiction in question. Accordingly, each case and corresponding remedy must be decided on its own merits.

*The Arbitral Remedy Power: Two Views.* There are two perspectives from which to examine an arbitrator's remedy power. One is the "legal" authority of the arbitrator to formulate a specific remedy under the labor agreement. The other deals with policy concerns, that is, what will be the likely impact of a specific remedy on the collective bargaining relationship.

The legal authority concept stresses the parties' contractual provisions (often "silent" contracts) as well as state and federal statutes and sometimes even the common law. It also includes judicial responses to remedial determinations because, despite the directive of the Supreme Court in the *Steelworkers Trilogy* (*Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960)), federal and state courts are increasingly accepting invitations to review the merits of arbitrators' awards under the guise of determining contractual restrictions on arbitral authority.

Under the policy concept, the focus is not on whether the remedial measure is permissible under the labor agreement or the law but, instead, on how the remedy, if awarded or implemented, might affect the collective bargaining institution. What, for example, is the long-term effect of a "punitive" award upon the parties? What is the effect of ruling that an

employee's seniority is a mitigating factor in a refusal to submit to a drug test case? When, if ever, should the arbitrator be concerned with such considerations when formulating remedies?

*The Arbitrator's Function in Formulating Remedies.* Any examination of arbitral remedial authority, whether from a legal authority or policy point of view, must address the question of what the arbitrator's function should be within the "private rule of law" established by the collective agreement. Arbitral opinion is divided on this question.

Some arbitrators and practitioners equate the arbitrator's remedy power with that of a court. Under this approach, arbitration is viewed as a speedy and informal way of dealing with what is essentially a suit for breach of contract. The basic remedies available in breach-of-contract cases—damages, restitution, and equitable remedies—may, unless proscribed by the agreement, be awarded by the arbitrator, who essentially acts as a surrogate judge. Questions concerning the propriety of a specific remedy may be readily understood by reference to legal texts such as Corbin on Contracts, Williston on Contracts, or the Restatement (Second) of Contracts.

The opposing view is that the arbitrator's function is to explicate what is implicit in a collective bargaining agreement. According to David Feller, an arbitrator's sole function in deciding what remedies should be awarded is to determine what the agreement says about remedy. The arbitrator's task is not to enforce the agreement or to award "damages." A court performs a different function when it formulates remedies, such as in a breach-of-contract lawsuit. In that case, the rules involved are external to the agreement and may not correspond to the intentions of the parties. Feller argues that arbitrators should limit themselves to awarding only those remedies that they find either implicitly or explicitly in the parties' collective bargaining agreement. Feller, David E., *Remedies: New and Old Problems: I. Remedies in Arbitration: Old Problems Revisited*, in 34 NAA 109 (1982) [hereinafter Feller].

The majority view is probably this: Collective bargaining agreements are special types of contracts with respect to which the principles of ordinary contract law, though not strictly applicable, are nonetheless helpful to arbitrators because they tap the "wisdom of the past." Although the parties are free to make the arbitrator the equivalent of a judge formulating

remedies in a contract dispute, the parties generally do not anticipate that an arbitrator will act in this fashion. If, as claimed by the Supreme Court, arbitrators are usually chosen because of the parties' confidence in their knowledge of the "common law of the shop," it is expected that they will draft remedies that may not explicitly be cited within the four corners of the agreement. *See Steelworkers v. Warrior & Gulf Navigation Co.*, above, at 582.

## I. SOURCES OF ARBITRATORS' REMEDIAL AUTHORITY

### § 10.1. The Collective Bargaining Agreement and Remedy Formulation

An arbitrator has wide latitude in formulating remedies to meet a wide variety of situations. A particular remedy should not be disturbed merely because a court's reading of a collective bargaining agreement is different from the arbitrator's. But to be enforceable an award must "draw its essence" from the agreement, since an arbitrator "does not sit to dispense his own brand of industrial justice." *Steelworkers v. Enterprise Wheel & Car Corp.*, above, at 597. Still, as stated by the Supreme Court, the arbitrator's "source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it." *Steelworkers v. Warrior & Gulf Navigation Co.*, above, at 581–82.

#### Comment:

The Supreme Court expressed the dual themes of the arbitrator's flexibility in fashioning remedies and the "essence" of the contract test in *Steelworkers v. Enterprise Wheel & Car Corp.*, above, at 597. The Court emphasized the use of "industrial common law" as a supplement to a contract's express provisions in *Steelworkers v. Warrior & Gulf Navigation Co.*, above, at 581–82.

A problem with the “essence” test is that it invites a reviewing court to set aside an award “because the judge is not satisfied that the award has a basis in a particular provision of the contract.” *Ethyl Corp. v. Steelworkers*, 768 F.2d 180, 184, 119 LRRM 3566 (7th Cir. 1985). The courts of appeals have attempted to flesh out the *Enterprise* rule. See, e.g., *Storer Broadcasting Co. v. Television & Radio Artists*, 600 F.2d 45, 47, 101 LRRM 2497 (6th Cir. 1979), *cert. denied*, 454 U.S. 1099, 108 LRRM 3152 (1981) (“no support whatever”); *Railroad Trainmen v. Central of Ga. Ry.*, 415 F.2d 403, 404, 71 LRRM 3042 (5th Cir. 1969), *cert. denied*, 396 U.S. 1008, 73 LRRM 2120 (1970) (“unconnected with the wording and purpose” of the agreement); *Newspaper Guild, San Francisco-Oakland v. Tribune Publishing Co.*, 407 F.2d 1327, 1328, 70 LRRM 3184 (9th Cir. 1969) (not “possible for an honest intellect”); *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 70 LRRM 2368 (3d Cir. 1969) (manifest disregard of the agreement).

Even if the arbitrator engages in misconduct, a court ordinarily should “not foreclose further proceedings by settling the merits according to its own judgment of the appropriate result, since this step would improperly substitute a judicial determination for the arbitrator’s decision that the parties bargained for in the collective-bargaining agreement.” *Paperworkers v. Misco, Inc.* 484 U.S. 29, 40–41 n.10 (1987).

## **§ 10.2. Remedial Authority When the Contract Is Silent**

**An arbitral appointment carries with it the inherent power to specify an appropriate remedy. Unless there is clearly restrictive language withdrawing the subject matter or a particular remedy from the jurisdiction of the arbitrator, the arbitrator generally possesses the power to make an award and fashion a remedy even though the agreement is silent on the issue of remedial authority.**

### **Comment:**

Arbitrators, supported by the courts, uniformly hold that the parties are not engaged in an academic exercise in seeking



a ruling as to whether a contract has been violated, and that “jurisdiction means power to grant relief.” *Phillips Chem. Co.*, 17 LA 721, 722 (Clyde Emery 1951) (“the power merely to decide that the Agreement has been violated, without power to redress the injury, would be futility in the extreme”); *Gilmore Envelope Corp.*, FMCS Case No. 98-1029-00758 (Marshall Ross 1998) (pointing out that arbitrators have universally held that even though a contract is silent as to the remedy, the arbitrator has the authority to fashion a remedy, including a monetary award, in order to make whole the party damaged by the violation). See also Feller, at 116 (arbitrator’s award remedies found “implicit in the agreement”). The remedy, like the rest of the decision, must “draw its essence” from the collective agreement. No hard and fast rules exist, however, to determine when a specific remedy draws its essence from a “silent” contract.

### § 10.3. Contractual Limitations on Remedial Authority

**Parties are free to limit arbitral authority concerning remedies by completely removing a subject area from the arbitrator’s jurisdiction, by placing specific limitations on the exercise of discretion in awarding remedies, or by explicitly designating a particular remedy to be applied for a violation of the agreement. Thus, liquidated damage provisions may designate a specific sum to be awarded to the injured party in case of a breach. A bona fide settlement agreement precludes an arbitrator from exercising jurisdiction over the same grievance and, by implication, from ordering a remedy.**

#### Comment:

*a. General.* For Supreme Court reaffirmation of the parties’ control over arbitrators’ authority to resolve disputes, see *AT&T Technologies v. Communications Workers*, 475 U.S. 643, 121 LRRM 3329 (1986).

*b. Specifying Remedies.* The difficulty of specifying remedies for a particular breach of the agreement is illustrated

in *Lynchburg Foundry Co. Div. v. Steelworkers Local 2556*, 404 F.2d 259, 69 LRRM 2878 (4th Cir. 1968). The contract provided that in the event of an unjust discharge, “the Company shall reinstate such employee to his former position and pay full compensation for time lost.” *Id.* at 260. The arbitrator found “culpable conduct” in keeping records but not enough to justify the discharge. Reinstatement was ordered but no back pay. The company argued that the arbitrator had exceeded his authority. The Fourth Circuit stated that the employer’s rigid interpretation of the arbitrator’s authority would be warranted only if the agreement expressly forbade the exercise of any discretion in the fashioning of the award. In the absence of language showing a clear intent to deny the arbitrator any latitude, it was for the arbitrator to decide whether the contract language made reinstatement with full back pay the sole remedy for an unjustly discharged employee, or merely marked the outer limits within which an arbitrator could fashion an appropriate remedy.

*c. Liquidated Damage Provisions.* Liquidated damage provisions are contract clauses in which the parties designate a specific sum (or a formula by which to calculate such a sum) to be awarded to the injured party in the case of a breach of contract. The difficulty of calculating damages may lead the parties to incorporate a liquidated damage provision in their collective bargaining agreement. Although the better rule is that an arbitrator, as the parties’ official contract reader, should respect such language when a breach is found, conflicts with a reviewing court may result when, for example, a court concludes that the provision is “punitive” in nature.

*d. Settlement of Disputes as a Limitation of Remedial Authority.* An agreement settling a dispute precludes an arbitrator from exercising jurisdiction over the same grievance and, by implication, ordering a remedy. Section 2.E.2 of the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes (2003) provides: “A direct settlement by the parties of some or all issues in a case, at any stage of the proceedings, must be accepted by the arbitrator as removing further jurisdiction over such issues.”

May an arbitrator ignore a settlement agreement? The Sixth Circuit has declared: “It is not arbitration per se that

federal policy favors, but rather final adjustment of differences by a means selected by the parties.” *Bakers Union Factory Local 326 v. ITT Continental Baking Co.*, 749 F.2d 350, 353, 117 LRRM 3145 (6th Cir. 1984) (quoting *Mine Workers v. Barnes & Tucker Co.*, 561 F.2d 1093, 1096 (3d Cir. 1977)). When a party claims that a prior settlement agreement controls the parties’ obligations, the policy in favor of the finality of arbitration must yield to the broader policy in favor of the parties’ chosen method of nonjudicial dispute resolution. The court reasoned that otherwise a party who became unhappy with a settlement would have every incentive to breach the agreement and then submit the controversy to an arbitrator. Even if a settlement agreement is not final and binding in the sense that it can be enforced in federal court without first having been submitted to an arbitrator, the settlement is binding on the arbitrator. The court did note, however, that the presumption binding an arbitrator to a settlement may be overcome by a contrary, unambiguous provision in the parties’ collective bargaining agreement.

Whether the withdrawal of a grievance constitutes a “settlement” so as to preclude later arbitration on the merits is a question of contract interpretation and is properly resolved by the arbitrator. *See, e.g., Machinists Lodge 862 v. Safeguard Powertech Sys. Div.*, 623 F. Supp. 608, 123 LRRM 3058 (D.S.D. 1985). Likewise, when the issue is the preclusive effect of a prior withdrawal of a grievance or, alternatively, the effect of a prior award, courts have held that the matter is one of procedural significance and is for the arbitrator to decide under the parties’ agreement. *See, e.g., Little Six Corp. v. Mine Workers Local 8332*, 701 F.2d 26, 112 LRRM 2922 (4th Cir. 1983).

*e. Equity Considerations.* Can an equity argument ever trump the parties’ collective bargaining agreement? Generally, a party asserting that a remedy is in order due simply to equity considerations is unlikely to succeed before an arbitrator. *See, e.g., City of Reno*, 119 LA 1289 (Bonnie G. Bogue 2003) (rejecting an equity argument and denying the union’s plea for a remedy when the contract on its face precluded any employee from qualifying for a new sick leave buyout benefit). A party seeking a remedy from an arbitrator must ordinarily point to a specific provision or set of provisions in the labor agreement

and convince the arbitrator that the requested remedy is tied to a proven violation. While other contract interpretation principles are sometimes invoked (the avoidance of harsh or absurd results, for example), it is generally (but not always) insufficient to argue “equity” without establishing a contractual basis. See Chapter 2, § 2.13, above, for a discussion of this contract interpretation principle.

*f. Time Limits and Arbitrability.* Timeliness is a jurisdictional issue. Thus, when the parties’ collective bargaining agreement specifies a time limit for filing grievances and provides language regarding forfeiture of the grievance for failing to comply with the time limitations, the better rule is that a grievance submitted outside the time limits is not arbitrable absent waiver, estoppel, or fraud. If, however, the contract provides for time lines without specifying the effect of failing to timely file, many arbitrators may reach the merits of the grievance, especially when the procedural infirmity is not voiced until the hearing. Generally, failure to observe time lines will result in dismissal of the grievance. See the discussion of Arbitrator Stanley H. Sergeant in *Triangle Construction & Maintenance*, 120 LA 559, 566 (2004): “‘When a grievance has not been filed within the time limits set forth in the collective bargaining agreement, the arbitrator generally will dismiss the grievance as non arbitrable unless the opposing party has waived this procedural defect’” (quoting Fairweather, Owen, *Practice and Procedure in Labor Arbitration*, 2d ed. (1982)).

#### **§ 10.4. The Submission Agreement and Remedial Authority**

A submission, or stipulation, or agreement to arbitrate, is ordinarily necessary when (1) the parties have not negotiated a grievance procedure calling for arbitration, (2) the parties are arbitrating a dispute over future contract terms, or (3) the contract provides for arbitration only if both parties agree to submit a specific dispute. In addition to specifying in writing the issue to be resolved, the

**submission will frequently indicate the relief desired or the remedy authorized.**

**Comment:**

The submission is especially well suited to spelling out the arbitrator's authority on remedies. The parties may be more disposed to moderation on the appropriate remedy before the award is issued, and if the submission contains a clause as to remedies, the parties are less likely to be surprised at the result.

Agreeing in advance to the issues and remedies appropriate in a case will not only reduce delays in the arbitration process, but will also place the parties on a clear track as to any limitations or directives that the parties desire to place upon the arbitrator. The submission agreement, coupled with the contract, defines the outer limits of the arbitrator's authority.

It is not always possible for the parties to reach agreement concerning the scope of the submission to the arbitrator. In many cases the task of determining scope will be left to the arbitrator. The Fourth Circuit has held that "the agreement to arbitrate particular issues need not be express. It may be implied or established by the conduct of the parties." *Chemical Workers Local 566 v. Mobay Chem. Corp.*, 755 F.2d 1107, 1110, 118 LRRM 2859 (4th Cir. 1985). An arbitrator's authority to fashion a remedy may vary, depending upon the particular submission agreement that is adopted. Unless otherwise stated in the parties' collective bargaining agreement, the recalcitrance of a party to agree on the framing of the issue submitted will not divest the arbitrator of subject matter jurisdiction. To hold otherwise would frustrate the provisions of agreements calling for final and binding arbitration. See, e.g., *Stauffer Chem. Co. v. Rubber Workers*, 116 LRRM 2738, 2740-41 (S.D. W. Va. 1983).

A carefully drafted submission enables the parties to limit or expand the arbitrator's authority to formulate a remedy. Although most courts are receptive to inferring broad power to fashion a remedy based merely on a submission to rule on the substantive issue, courts have sometimes vacated awards based on claims that arbitrators exceeded their authority in

formulating remedies that were not explicitly called for in the submissions. For example, the First Circuit refused to allow back pay to an employee adversely affected by layoff when the submission before the arbitrator was: "Did the Company violate the contract by placing [the grievant] in the laborer's job [and if so, what shall be the remedy?]" See, e.g., *Courier-Citizen Co. v. Graphic Communications Local 11*, 702 F.2d 273, 281, 112 LRRM 3122 (1st Cir. 1983).

### § 10.5. External Law and Remedial Authority

**An arbitrator frequently will fashion a remedy patterned after external law either at the parties' request or on the arbitrator's own motion. Duplicative remedies now exist in several areas, particularly in discipline and discharge cases that may also involve discrimination in violation of the National Labor Relations Act, as amended, Title VII of the Civil Rights Act of 1964, as amended, the Age Discrimination in Employment Act, and the Americans with Disabilities Act.**

#### **Comment:**

*a. General.* There are wide differences on the question of applying external law when issuing awards and formulating remedies. A number of patterns emerge depending upon whether the parties have granted the arbitrator the authority to consider statutory issues, whether the contract is silent on the matter of external law, and whether the award will cause or require unlawful conduct by a party. Frequently, the parties explicitly incorporate external law into the agreement or, alternatively, by submission, empower the arbitrator to rule on a legal issue.

A noteworthy example of the issues involved is *Postal Workers v. U.S. Postal Serv.*, 789 F.2d 1, 122 LRRM 2094 (D.C. Cir. 1986), a decision written by Judge Harry Edwards, a former arbitrator. A unanimous court upheld an arbitration award that applied *Miranda*-type warnings to the Postal Service (*Miranda v. Arizona*, 384 U.S. 436 (1966)). The grievant had been discharged for alleged dishonesty in handling postal

transactions. After more than an hour of questioning, a postal inspector read the employee his *Miranda* rights and presented him with a waiver. The grievant then signed two statements admitting his dishonesty. The arbitrator ruled the statements inadmissible in a civil removal proceeding because the grievant had not been given timely *Miranda*-type warnings. The grievant's dismissal was reversed because the excluded statements were the only evidence of theft.

Judge Edwards noted that the parties' collective bargaining agreement specified that the discharge of a Postal Service employee must be "consistent with applicable laws and regulations." *Postal Workers v. U.S. Postal Serv.*, above, at 6. The *Miranda* rule, said Edwards, "is surely within the realm of 'applicable law' when interrogation by federal law enforcement officers leads to the discharge of an employee." *Id.* It did not matter whether the arbitrator's construction and application of the *Miranda* rule was correct as a matter of law. Judge Edwards stated that an award will not be vacated even though the arbitrator may have made errors of fact and law unless it compels the violation of law or conduct contrary to accepted public policy.

*b. What Should Be the Focus of the Arbitrator in a Case Where External Law Becomes an Issue?* David Feller submits that the tendency of some arbitrators to reach out, without agreement by the parties, to engage in the process of public law adjudication can, in the end, only be detrimental to the arbitral profession. See Feller, David E., *The Coming End of Arbitration's Golden Age*, in 29 NAA 97, 115 (1976). See also Meltzer, Bernard D., *Ruminations About Ideology, Law, and Labor Arbitration*, in 20 NAA 1 (1967) (arbitrator should follow contract in conflict between it and the law). Robert Howlett has argued that an award that does not consider the law may result in error. See Howlett, Robert G., *The Arbitrator and the NLRB: II. The Arbitrator, the NLRB, and the Courts*, *id.* at 67. The overlap between the contract and external law does not mean that the arbitrator is precluded from exercising jurisdiction over the *contractual* issue. An arbitrator should not, therefore, refuse to rule on a grievance simply because the dispute may be cognizable in another forum.

In an attempt to avoid the multiplicity of remedies available under the agreement and external law, the parties may

attempt to limit the grievance-arbitration mechanism only to those grievances that do not allege or involve an issue of external law. Arguably, failure to make discrimination claims grievable under the contract constitutes a separate violation of Title VII or other applicable statute. Accordingly, it may be difficult to eliminate the multiplicity of remedies that frequently may be available to an employee arising out of a single factual occurrence.

Neither arbitrators, advocates, nor scholars agree on the extent to which arbitrators, in resolving grievances, should rely upon external law rather than the agreement when the two conflict. Perhaps the most that can be offered is to quote Arbitrator Milton Edelman's declaration that "an arbitrator's position on this matter of law versus agreement must rest on his conception of the arbitration process, the clarity of the law, and the role ascribed to arbitration by the legislature and the courts." *Hollander & Co.*, 64 LA 816, 819 (Milton T. Edelman 1975). In the difficult situation where the arbitrator has not been given the authority to apply external law, and the arbitral award would seem to conflict with Title VII or another statute if one were to follow the clear purport of the agreement, the Supreme Court appears to direct the arbitrator to follow the agreement. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57, 7 FEP Cases 81 (1974) ("[w]here the collective-bargaining agreement conflicts with Title VII, the arbitrator must follow the agreement"); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (award exceeds scope of submission if "based solely upon the arbitrator's view of the requirements of enacted legislation").

## II. REMEDIES IN DISCHARGE AND DISCIPLINE CASES

### § 10.6. Remedies in General

**When a finding is made that the employer did not have cause for imposing discipline or discharge, the arbitrator is left with the task of formulating a remedy. Even when cause existed for assessing some discipline, a remedy may still be forthcoming**



**because the penalty was too severe for the offense or because mitigating circumstances existed.**

**Comment:**

How the remedy should be formulated is a difficult question to answer definitively. A review of both published and unpublished awards indicates that arbitrators have demonstrated no uniformity in formulating remedies in the disciplinary area.

There is no serious debate over the principle that when the collective bargaining agreement does not impose a clear limitation on the arbitrator's authority to modify a penalty in a discipline case, an arbitrator indeed has the authority to modify penalties. Most arbitrators exercise the right to modify a penalty when that penalty is shown to be arbitrary, capricious, or otherwise unreasonable under the evidence record.

## **§ 10.7. Reinstatement**

**An order of reinstatement is normally issued when a discharge is held not to be for just or proper cause. There are exceptions, such as when the grievant's postdischarge behavior is so destructive of the employment relationship that an arbitrator, notwithstanding a finding of no just cause, will not order reinstatement.**

**Comment:**

It is well established that an arbitrator may grant equitable-type relief, including reinstatement, even though a court of equity ordinarily will not order specific performance of a contract for personal services.

## **§ 10.8. Conditional Reinstatement**

**An award of reinstatement may be conditional. For instance, when it was demonstrated that the basis of a discharge was due not to an intentional fault of the grievant, but rather to a defect in mental or physical capacity to perform the job, arbitrators**

**have ordered reinstatement conditioned upon a proper showing of mental or physical fitness.**

**Comment:**

Remedies in these situations may range from requiring the employee to submit to a psychological or physical examination as a condition of continued employment, to imposing serious long-term mental therapy. Also, arbitrators have frequently ordered reinstatement conditioned upon the nonrecurrence of the conduct giving rise to the initial disciplinary penalty. Often referred to as “last-chance” remedies, they are applied in a variety of situations. For example, when an employee is discharged for excessive absenteeism, an arbitrator may find mitigating circumstances and order reinstatement, but condition it upon some satisfactory level of attendance in the future. Numerous arbitrators have reinstated employees on condition of a special act or promise by the grievant. In a case involving a conflict of interest of a sports reporter, an arbitrator reinstated the employee provided he disposed of all interest in a co-owned racehorse. *See New York Post Corp.*, 62 LA 225 (Milton Friedman 1973).

In ordering an employee reinstated, an arbitrator may condition or otherwise limit the effect of the award pending an outcome in another forum. This limitation is found especially in cases where an employee is discharged as a result of a collateral criminal proceeding. A conditional remedy might be to order reinstatement if the employee is found not guilty of the offense that also gave rise to the termination.

Still another approach is reinstatement with demotion or transfer. Generally when arbitrators have ordered reinstatement to positions lower than the employees held prior to the discharge, the facts have not indicated an intent to impose a punitive sanction but, rather, an effort to place the employees in positions commensurate with their abilities.

## **§ 10.9. Reinstatement and Seniority**

**Reinstatement customarily entails the full restoration of seniority rights. Arbitrators may sometimes order reinstatement with loss of seniority for part or all of the period between termination and reinstatement.**

**Comment:**

Some arbitrators have reasoned that it would be inappropriate to permit accumulation of seniority for the time the grievant has been away from work. While it is rare, arbitrators have even ordered reinstatement to an entry-level position with loss of seniority.

**§ 10.10. Reinstatement When Grievant's Position Is Eliminated**

**When the grievant's former position has been eliminated for economic reasons or has been converted to a non-unit position, employer compliance with an arbitrator's reinstatement order depends on the specific words used in the award as well as the circumstances of each case. With few exceptions, an arbitrator will be without authority to create a new position for a reinstated grievant.**

**Comment:**

An employee who is "reinstated to his former position" or "reinstated to his employment" may be subject to any adverse consequences associated with the former job classification. Thus, similar to the law under the Labor Management Relations Act (LMRA), 29 U.S.C. § 141 et seq. (2000), and Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq. (2000), if the grievant's position has been eliminated during the interim period from discharge to reinstatement, the grievant may be without an effective remedy, at least as far as reinstatement is concerned. *See, e.g., City of Tampa*, 111 LA 65 (Robert B. Hoffman 1998) (pointing out that the ADA does not require management to create a position as an accommodation). A grievant may fare better when management is ordered to "reinstatement him to employment." Arbitrators may occasionally reinstate an employee to disability leave if the arbitrator is unsure whether the employee is fit to return to work. *See, e.g., East Ohio Gas Co.*, 91 LA 366 (Jonathan Dworkin 1988).

Arguments that a successful grievant should not be reinstated to his former position because the employer has already hired someone else to fill the vacancy will, with few exceptions, not be credited. An employer that hires an employee to replace

a discharged grievant runs the risk of having to terminate the newly hired employee if the grievant is successful.

### **§ 10.11. Reinstatement and Retroactive Bidding Rights**

The normal make-whole remedy entitles the grievant to be placed in the same position the employee would have occupied had the improper discharge not occurred. Some arbitrators direct reinstatement without making a determination as to which job the grievant should be returned. That leaves open such questions as whether a reinstated employee has retroactive bidding rights to a job posted during the period from the date of discharge to the date of reinstatement.

#### **Comment:**

Since it is infeasible for an employee who is discharged to bid on a vacancy before the resolution of the grievance concerning the dismissal, the better course for an arbitrator is to order reinstatement to the position the employee held at the time of dismissal, with the understanding that this means "the position in relation by seniority to other employees in the bargaining unit."

### **§ 10.12. Back Pay**

The purpose of a back pay award is to make the employee whole for the loss of earnings incurred by reason of the employer's contract violation. This loss of earnings is generally measured by the wages and benefits that would have been earned during the period they were denied. The amount owed is usually reduced by the income that the employee received from substitute employment, or by the amount that would have been received with reasonable efforts to find interim employment.

**Comment:**

Although the power to award back pay is generally regarded as automatic, the parties may by contract limit the amount of back pay that may be awarded by an arbitrator. When an arbitrator finds that discharge was improper, he or she may grant reinstatement with full, partial, or no back pay.

Infrequently, an arbitrator may award back pay, but not order the grievant reinstated. *See, e.g., Yellow Cab Co. v. Democratic Union Org. Comm. Local 777*, 398 F.2d 735, 68 LRRM 2812 (7th Cir. 1968); *Safeway Stores*, 64 LA 563 (William B. Gould 1974). William Gould has argued that arbitrators' usual inflexibility in ordering reinstatement whenever they find an employer contract violation prompts excessive judicial review of labor arbitration awards. Specifically, courts have reacted against reemployment of workers they perceive as harmful to the employment relationship, especially where the arbitrator has not made findings with regard to the potential for rehabilitation. Gould concludes that when reinstatement is not ordered, but rather some other form of relief is fashioned, the concerns of a reviewing court ought to diminish. *See Gould, William B., Judicial Review of Labor Arbitration Awards—Thirty Years of the Steelworkers Trilogy*, 64 Notre Dame L. Rev. 464, 492–93 (1989).

**§ 10.13. Conditional Back Pay**

**An arbitrator may condition a back pay award upon an employee's fulfillment of some prerequisite. When there is a question about the employee's sincerity in continuing employment, an arbitrator may condition the award of back pay upon the grievant's completion of a specified period of employment.**

**Comment:**

One arbitrator held that an employer was not justified in suspending an employee pending resolution of a homicide incident. While the arbitrator reinstated the employee, he nevertheless reserved consideration of the grievant's entitlement to back pay until the determination of the criminal charge, at

which time the back pay issue was to be determined in a supplemental award. *See Raytheon Corp.*, 66 LA 677 (Burton B. Turkus 1976).

### **§ 10.14. Remands for Computing Back Pay**

**Once it is determined that a back pay award is appropriate, an arbitrator may remand the task of computation to the parties. Such a remedy is usually, but not always, accompanied by retention of jurisdiction by the arbitrator in the event that there is a subsequent dispute over the amount.**

#### **Comment:**

When the parties present the remedy question as part of the overall merits of the dispute, and the remedy determination is remanded to the parties for further consideration, the arbitrator has not adjudicated an issue that has been submitted and thus has not exhausted the assigned function. A subsequent determination remains open for the original arbitrator, and not for a reviewing court or a new arbitrator, should the parties not reach agreement on the financial or other implications of a particular remedy. However, when a collateral dispute arises from an award that is not self-executing, it may be more appropriate to channel the dispute back through the entire grievance machinery.

Perhaps the safer view is that when the remedy can be specifically formulated, it should be; when this is inappropriate, the arbitrator, with concurrence from the parties, should retain jurisdiction for a specified period of time. Such jurisdiction should then be exercised only if the parties cannot reach accord on the nature of the remedy. One view is that retention of jurisdiction by the arbitrator should be initiated only if both parties agree to this procedure. Others believe that, in the absence of a prohibition in the submission, the arbitrator may retain jurisdiction on the motion of either party or on the arbitrator's own motion. In any event, the arbitrator has an obligation to attempt to make the award final. Fidelity to finality requires as complete and specific treatment of all aspects of the award as possible, including the formulation of the remedy. *See generally* Dunsford, John E., *The Case for*

*Retention of Remedial Jurisdiction in Labor Arbitration Awards*, 31 Ga. L. Rev. 201 (1996).

### § 10.15. Computation of Back Pay

In computing back pay, arbitrators have borrowed from court and National Labor Relations Board (NLRB) decisions and applied similar “make-whole” concepts when ordering monetary relief for wrongfully discharged employees, as long as the remedy has some basis in the parties’ contract.

#### Comment:

The Supreme Court has declared: “[A]n order requiring reinstatement and back-pay is aimed at ‘restoring the economic status quo that would have obtained but for the company’s wrongful refusal to reinstate.’” *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 188, 84 LRRM 2839 (1973) (quoting *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263, 72 LRRM 2881 (1969)).

Can “make-whole” relief ever be fully effectuated in the arbitral forum? One argument is that discharged employees are never made whole simply by putting them back to work. They were offended; their families were embarrassed. What about grievants who lose their cars, who have to borrow money and pay interest, who lose their homes? How are they to be made whole? Arbitrators must derive their authority from the parties’ contract, but many of the concepts and policies applicable under the Taft-Hartley Act or the common law have been incorporated by arbitrators in formulating “make-whole” relief for a branch of a collective bargaining agreement. *But cf.* Feller, at 132 (arbitral remedies are not “damages” but “almost universally injunctive”).

### § 10.16. Period of Back Pay

A variety of periods may be used in computing back pay, such as (1) from the date of discharge to the date of reinstatement; (2) each separate calendar quarter; or (3) a monthly, biweekly, weekly, or even daily basis.

**Comment:**

Selecting a specific period for the computation of back pay is important because one computational period may make the grievant more or less than “whole” as compared with another computational period. After the period is selected, the arbitrator determines what the grievant would have earned during that specific period.

Back pay may be estimated by reference to another employee who performed the same kind of work the claimant performed or would have performed. Alternatively, back pay can be based on an estimate of the employee’s average earnings for some specified period prior to discharge, which is called the “projection of average earnings” formula. That formula generally takes into account overtime and other monies that would have been received. Adjustments for normal absences of the employee are included in the computation. Also, “make-whole” relief may, but need not, include any of the following: special bonuses, wage increases, expenses incurred by reason of removal from any insurance benefit program, lost seniority credits, contributions or “credit” to a pension or welfare retirement fund that were not made on behalf of the discharged employee, and adjustments made in connection with a supplementary unemployment benefit fund.

**§ 10.17. Reductions in Back Pay**

**With few exceptions, arbitrators, like the courts and the NLRB, will deduct actual interim earnings and willfully incurred losses from an order of back pay. The burden is on the employer to prove such earnings or losses. Failure by the employee to search for alternative work or a refusal to accept substantially equivalent employment will result in a corresponding reduction in a back pay award. Only “reasonable exertions” on the part of the employee are required, and not the highest standard of diligence.**

**Comment:**

The NLRB has held that overtime earnings in interim employment are similar to supplemental pay or earnings from



“moonlighting,” and thus should not be deducted from back pay orders. This position, however, has not always been accepted by arbitrators or appellate courts.

When monetary or “in-kind” benefits flow from the employee’s association with a union or some other “nonemployer,” the better rule applied by arbitrators, similar to the Board’s, is that these benefits should not be used as a “setoff” in computing the employer’s back pay liability if they are not “earned.” Examples are strike benefits or other assistance payments.

Other sources of income may or may not be set off against an employer’s back pay liability. The majority view on “in-kind” income is that it should not reduce back pay. Income from a spouse may or may not reduce back pay. If the grievant’s spouse is already employed and no additional income was realized as a result of the discharge, a setoff is not appropriate. On the other hand, if the employee’s spouse takes a job to make up the loss in income while the grievant remains home to tend house, it may be appropriate to reduce the employer’s back pay liability.

An alternative approach to reducing back pay by deducting interim income is to reduce the employer’s liability for the grievant’s failure to mitigate damages. This approach appears to be preferred by most (but not all) arbitrators. One issue that may arise is the effect of an employee’s rejection of an offer of reinstatement *without* back pay. Should refusal to accept reinstatement preclude the employee from receiving an award of back pay past the period where the employee refused employment? The better view appears that the employer is not entitled to create a “Catch 22” situation for the employee by offering the same or similar work after a wrongful discharge on the condition that the employee give up the back pay claim. On the other hand, a bona fide settlement agreement whereby an employee, as consideration for reinstatement, waives any claim to back pay or other benefits is binding on the parties and should be respected by the arbitrator.

What is “substantially equivalent” employment? The better rule is that an employee who is seeking to mitigate damages need not apply for or accept *any* job that happens to be available that day. As stated by one arbitrator, “[a] discharged employee should be required to make a reasonable effort to mitigate ‘damages’ by seeking substantially equivalent employment. The reasonableness of his effort should be evaluated in light

of the individual's qualifications and the relevant job market. His burden is not onerous, and does not require that he be successful in mitigating his "damages." See *Foster Wheeler Envtl. Corp.*, 116 LA 120, 122–23 (Jack H. Calhoun 2001) (quoting Hill, Marvin F., Jr. & Sinicropi, Anthony V., *Remedies in Arbitration*, 2d ed. (1991), at 216). A mere showing that there are jobs available is not sufficient. The employee is not required to explore every possibility or devote every day to a search for work. At some point, however, an employee may be required to reduce his expectations and accept a lower-paying job.

### **§ 10.18. Suspension of Back Pay**

**Arbitrators will not order back pay for any period when the employee is not available for work. Common situations where back pay may be suspended or tolled include: (1) any period of a strike, (2) a seasonal slack or layoff period, and (3) periods of illness or other incapacity to work.**

#### **Comment:**

There is authority, for example, in the federal sector, for not extending back pay beyond the date on which the employee was properly separated from employment if the separation would have been effected regardless of the employer's wrongful act. Also, a recomputation may not include any period during which (1) the employee was not ready and able to perform the job and (2) this unavailability was not related to or caused by the wrongful action.

### **§ 10.19. Reductions for Unemployment Compensation**

**Arbitrators are split over the question of whether unemployment compensation benefits received during a period of layoff or suspension should be deducted from a back pay award.**

#### **Comment:**

Under one view, the benefits are paid out of a fund to which only the employer contributes, and are the equivalent

of outside compensation. They should therefore be deducted from an award of back pay. *See Cognis Corp.*, 115 LA 1214 (Joseph L. Daly 2001) (ordering a set-off for any unemployment compensation and compensation received from other employment). Other arbitrators have treated unemployment compensation as a collateral benefit and have not deducted such benefits from back pay awards. Since unemployment benefits are administered by the individual states, a state statute may control the outcome, for example, by requiring the employee to repay the state for the benefits.

The NLRB's policy, approved by the Supreme Court, is that unemployment benefits should be considered a collateral benefit that the employee receives from the state as a matter of social policy. *See NLRB v. Gullett Gin Co.*, 340 U.S. 361, 27 LRRM 2230 (1951). According to this approach, employees are not compensated for collateral losses when they are wrongfully discharged and, similarly, collateral benefits, such as unemployment compensation, should not be considered a setoff in favor of management.

### **§ 10.20.      Reductions for Undue Delay                  or Self-Help**

**Arbitrators may deny back pay completely or limit the award to partial back pay where there has been delay in bringing the grievance to arbitration or where one or both of the parties are found remiss in their duties under the contract. The latter includes self-help, an employee's refusal to carry out a work order on the grounds, real or imagined, that it violates the collective bargaining agreement or is otherwise improper.**

#### **Comment:**

Absent unusually hazardous work, the general rule is that employees must obey supervision even when they disagree with an order. When employees can effectively protect their interest by filing a grievance, arbitrators have required that the employees pursue this route rather than resort to "self-help." The rule is, "Obey now, grieve later." An employee who forgoes this option risks loss of back pay for "failing to mitigate

damages,” even if it is subsequently determined that the employee’s interpretation of the agreement was correct. *See also* Chapter 6, § 6.8, above.

### **§ 10.21. Reductions for Dishonesty or Comparative Fault**

**Arbitrators may reduce or deny back pay altogether because of an employee’s dishonesty, even after the discharge, or because the employee was partially at fault in the actions leading to the discharge.**

#### **Comment:**

A grievant who is dishonest regarding interim earnings, for example, may properly be denied any remedy under a dishonesty theory. Once the award is issued, however, any setoff for dishonesty is beyond the jurisdiction of the arbitrator.

Somewhat related to grievant dishonesty is the notion of comparative fault. In one case the grievant falsely stated on a medical claim for his wife that she was not insured through her own employer. The employer dismissed the grievant for receipt of payments in excess of the amount properly owed. Finding that the employee was careless and inattentive but lacked the intent to deceive, the arbitrator ordered reinstatement. But on the theory of “comparative fault,” the arbitrator limited the back pay to half of what otherwise would be due. *See Panhandle E. Pipeline Co.*, 88 LA 725 (Sol M. Yarowsky 1987) (holding that an employee who was wrongfully discharged for improper receipt of medical benefits be reinstated but awarding only 50% back pay on the basis of *comparative fault*, where the employee was careless and inattentive in not reading medical provisions of medical plan more carefully or seeking advice from company officials). *See also S.B. Thomas, Inc.*, 106 LA 449 (Reginald Alleyne 1995) (noting that reinstatement without back pay is normally an appropriate remedy where the employee is partially at fault, but the fault must be job-related, not off-duty conduct with no nexus to the job).

## **§ 10.22. Remedies for Procedural Violations**

When the employer has not observed contractually mandated procedures, or has otherwise engaged in procedural irregularities inconsistent with a “just cause” standard, arbitrators faced with the problem of formulating a remedy may adopt one of three positions: (1) unless there is strict compliance with the procedural requirements, the entire disciplinary action will be nullified; (2) the requirements are of significance only when the employee can demonstrate prejudice by the failure to comply; or (3) the requirements are important and any failure to comply will be penalized, but the employer’s action is not necessarily null and void.

### **Comment:**

This subject is treated in detail in Chapter 6, §§ 6.12–6.20, above. *See generally* Fleming, R.W., *The Labor Arbitration Process* (1965), at 134–64.

## **§ 10.23. Arbitral Authority to Reduce Discipline**

In the absence of a contractually specified penalty or a clear limitation on arbitral discretion, both arbitrators and courts agree that the arbitrator may reduce the penalty imposed by management. Most arbitrators will change a penalty if, given the facts of the case, including the grievant’s seniority and work record, it is clearly out of line with generally accepted industrial standards of discipline. When the parties have contractually removed the arbitrator’s power to change the penalty, however, arbitrators must respect this limitation.

### **Comment:**

“Just cause,” “good cause,” or “proper cause” language generally incorporates the notion of a reasonable relation between the penalty and the offense. But clear language in an

agreement may divest the arbitrator of discretion to reduce the penalty. Thus, when a collective bargaining agreement explicitly provided that “[t]he Arbitrator may not modify disciplinary penalties,” an arbitrator held that his only authority was to decide whether some disciplinary action should have been taken against the grievant. *See Allied Paper Co.*, 52 LA 957, 958 (Ralph Roger Williams 1969). However, language denying the arbitrator the “power to [a]dd to or subtract from or modify [the] Agreement” in any manner will not preclude arbitral discretion. *See, e.g., Lima Elec. Co.*, 63 LA 94, 97 (L. Paul Albrechta 1974).

### **§ 10.24. No-Fault or Last-Chance Agreements**

**Most arbitrators find no-fault plans reasonable in principle but may reject their “perverse application” in exceptional cases on the grounds of a conflict with just cause requirements. Arbitrators have generally ruled that last-chance agreements, executed as part of a grievance settlement, are binding on the parties and an arbitrator has no authority to modify a penalty once a violation of the last-chance agreement is found.**

#### **Comment:**

No-fault plans provide fixed disciplinary standards for excessive absenteeism regardless of whether the absences are the employee’s fault. The better rule is that such plans do not override an express just cause provision. *See generally* Block, Howard & Mittenthal, Richard, *Arbitration and the Absent Employee: Absenteeism*, in 37 NAA 77 (1985). When an employee was dismissed for violating the employer’s zero tolerance drug policy, one arbitrator, reflecting the better authority, had this to say: “a zero tolerance policy cannot, and does not, override and trump the express just cause and related protections of the collective bargaining agreement against wrongful discharge.” *Interstate Brands Companies*, 120 LA 356, 358–59 (David L. Gregory 2004).

## **§ 10.25. Employers' Remedies for Breach of No-Strike Clauses**

**Employees who participate in a work stoppage in violation of a no-strike clause may be severely disciplined or even discharged. Assessment of penalties must be exercised consistently so that all employees who engage in the same kind of prohibited activity will be similarly treated. But an employer may assign disparate penalties on the basis of some "rational" evaluation, such as employees' presence on an illegal picket line or their individual activities or statements connected with the strike.**

### **Comment:**

*a. General.* Most reported cases deal with whether the employer's system for assessing penalties is "rational" and has been applied in an evenhanded manner. Some agreements, however, preclude an arbitrator from ruling that the penalty assessed for participating in a strike in violation of a no-strike clause is too severe.

*b. Increasing a Penalty Based on Union Status.* Arbitrators have held that union representatives occupy a position of responsibility and thus may be disciplined more severely than other employees for participating in an illegal work stoppage. Just because an individual is an official of the union, however, is not sufficient by itself to warrant the imposition of a penalty. Moreover, the Supreme Court held in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 112 LRRM 3265 (1983), that in the absence of an explicit contractual duty imposed on union officials, disciplining them more severely for merely participating in (not leading) a work stoppage in breach of a no-strike clause would violate § 8(a)(3) of the National Labor Relations Act.

## **§ 10.26. Damages for Breach of No-Strike Clauses**

**Arbitrators have applied damage principles adopted by the courts when awarding employers**

**monetary relief against unions for breach of no-strike clauses. Under both § 301 and § 303 of the Labor Management Relations (Taft-Hartley) Act (LMRA), the amount of damages recoverable are “actual” or “compensatory” damages, representing those damages directly caused by the breach of the collective bargaining agreement or other illicit activity. Individual employees are not liable in damages for breach of no-strike clauses.**

**Comment:**

When direct and proximate cause has been established, arbitrators have allowed recovery for a variety of economic losses sustained by employers as a result of an “illegal” strike or boycott. The most comprehensive review of damage awards is contained in the opinion of Joseph F. Gentile in *Dan J. Peterson Co.*, 66 LA 388 (1976). Recoverable economic losses included the abandonment of an independent project caused by a strike, attorneys’ fees, consultant fees, the costs of obtaining goods elsewhere to sell to customers during a strike, depreciation, destruction of business, equipment idled, freight loss and damage, inability to receive shipments of goods, insurance, interest on judgment, loss of good will, overhead expenses, penalties for late completion, pension liability, profit loss, protection of freight during a strike, punitive damages, recovery when business was operating at a loss before the strike, salaries of nonbargaining unit personnel, telephone charges, travel expenses, and various categories of labor costs.

In contrast, monetary damages have been denied when the arbitrator has determined that there was no basis for establishing actual damages, the monetary claim was not part of the original grievance, the employer did not have “clean hands,” or the work stoppage was of short duration.

**§ 10.27. Injunctions and Other  
Interim Relief**

**Unless specifically prohibited by the agreement, an arbitrator may issue an “injunction” or**



**cease-and-desist order against a union strike in violation of the contract. An arbitrator may issue an interim rather than a final award in certain situations, for example, when the record is insufficient to allow determination of (1) the nature and extent of a disciplinary suspension to be imposed in lieu of discharge, (2) the period of back pay, or (3) who shall bear the costs of excessive delay in bringing the case to arbitration.**

**Comment:**

An arbitrator's cease-and-desist order may be enforced by a court, including a federal court, notwithstanding federal antiinjunction legislation. *See Buffalo Forge Co. v. Steelworkers*, 428 U.S. 397, 405, 92 LRRM 3032 (1976).

### **III. REMEDIES IN NONDISCIPLINARY CASES**

#### **§ 10.28. Subcontracting and Improper Transfer of Operations**

**When subcontracting violations or improper transfers of operations are found, the remedy ordered will depend upon the facts of each case and, in particular, the specific contractual provisions at issue. Preferred remedies include cease-and-desist orders, mandates to return the improperly subcontracted or transferred work to the bargaining unit, and traditional make-whole relief for employees who were displaced or denied work. Preferential hiring and superseniority for the old employees at the new location may be ordered when restoration is impracticable.**

**Comment:**

Substantive issues concerning subcontracting are treated in Chapter 4, § 4.4, above.

A common monetary remedy is to award an amount equal to the lost earnings of the employees laid off as a result of the

subcontracting, or the amount paid to the employees performing the contracted-out work. Other remedies include an order terminating the subcontract and directing the return of the work to bargaining unit members. *See, e.g., Besser Co.*, 117 LA 1413 (Sol Elkin 2002).

When a contract contains a meet-and-discuss provision and the employer subcontracts without discussing the matter, the union should be provided some remedy even though the contracting out was reasonable. *But see Georgia-Pacific Corp.*, 106 LA 980 (Harold E. Moore 1996) (finding violation of subcontracting provision, but declining to order monetary remedy where no bargaining unit employee was laid off).

Arbitrators have formulated a wide variety of remedies where improper transfers of operations are found, for example, relocation of a plant or the shift of work from a union to a nonunion facility of the same employer. One remedy is ordering the return of machinery and equipment and, in the case of a "run-away shop," even an entire plant to the original location and the resumption of operations at that site.

The parties' agreement may contain explicit language limiting the right of an employer to move the plant. For example, where the contract provided that the employer would not remove its plant outside a 15-cent fare zone of greater New York, Sidney Wolff ruled that the contract was violated when the employer diverted a portion of the jobs covered by the agreement. As a remedy, the arbitrator directed (1) recovery of all machinery sold, (2) cessation of transferring work to another company, and (3) reinstatement with "damages" for lost time for all laid-off employees. *See Address-O-Mat*, 36 LA 1074 (Sidney A. Wolff 1961).

Other remedies are an offer to the displaced employees of employment at the new site, plus all moving costs. Super-seniority is also possible, although this may give rise to integration problems at the new site. Those remedies may come into play if restoration of the plant or the equipment to the original site would impose an undue hardship or otherwise be impracticable.

A further remedy employed by arbitrators in subcontracting and plant removal cases is the reimbursement of union dues and assessments lost to the union as a result of the employer's breach. This remedy may be especially appropriate

when the union is also alleging a breach of the union security clause.

## § 10.29. Overtime

**When employees are improperly denied overtime assignments, arbitrators either award monetary compensation for the loss or issue quasi-injunctive relief providing the employee the opportunity to work overtime at some later date. While a majority of arbitrators prefer a monetary award rather than a makeup remedy, the decision may vary depending upon the context of the violation. Monetary relief is more likely when overtime is distributed on a strict seniority basis rather than on an equalization basis.**

### Comment:

The most important variable in the arbitrator's decision on overtime violations is the relevant contract provision. Absent contractual language specifying the exact remedy, the predominant position of arbitrators is to award back pay at overtime rates where overtime assignments are allocated according to seniority. Arbitrators may differ, however, when the bypass was inadvertent, when the parties' past practice mandates otherwise, or when the makeup work does not prejudice the rights of other employees.

When overtime opportunities have been lost under an overtime equalization scheme, the decisions are split. The weight of authority is that if equalization is still possible within the time frame for equalizing assignments, an employee is not really damaged and an order to permit a grievant to make up lost overtime before the equalization period expires is an appropriate remedy. If, on the other hand, the overtime is forever lost, either because of an assignment outside the equalization unit or because the period of equalization has expired, a monetary award may be appropriate. *See, e.g., Dayton's*, 108 LA 113 (Daniel G. Jacobowski 1997) (ordering eight hours' overtime pay for employee who was improperly denied opportunity to work Saturday overtime).

When arbitrators have awarded a makeup remedy in equalization cases, the theories cited have been the “punitive” nature of awarding compensation for work not performed, the “intent of the parties’ agreement,” and the fact that such overtime opportunity would not affect the overtime rights of other employees.

It is expected that in a discipline or discharge case an arbitrator will order the payment of overtime, when warranted, on the same basis as the payment of lost wages. Thus, in cases where the grievant unquestionably would have worked overtime, arbitrators will award overtime as part of a make-whole remedy. *See, e.g., Northville Psychiatric Hospital*, 117 LA 122 (Deborah Brodsky 2002) (holding that employee who was suspended with pay while investigated for disciplinary problem is entitled to overtime pay).

### **§ 10.30. Work Assignments**

**When work is assigned to the wrong classification of employees or when a supervisor improperly performs bargaining unit work, an identifiable group of workers have had their rights infringed, but it is difficult or impossible to show that any particular individual would have received the additional work and resultant pay if the agreement had not been violated. Arbitrators have decided both ways with regard to awarding monetary damages. It would seem that when a violation is established, the burden should shift to the employer to demonstrate that the breach did not cause an employee a loss of earning opportunity.**

### **§ 10.31. Scheduling Vacations**

**Arbitrators are divided concerning the remedy for an employee who has been improperly denied a preference in vacation time. Some would assess a monetary award since the employer caused an inconvenience by forcing the employee to take the vacation at a rescheduled time. A significant number of arbitrators have held that no effective remedy is possible in these cases.**

**Comment:**

Some arbitrators oppose monetary relief on the grounds the employee is not damaged merely by being forced to take a vacation at a different period as opposed to being denied a vacation. Still other arbitrators have reasoned that if there are any damages, they are not the type that can be compensated in the arbitral forum. These views might be different if an employer, relying on the absence of any effective remedy, has engaged in deliberate or repeated violations. An important consideration is the arbitrator's determination as to when the vacation benefit is "earned" and whether the benefit is considered "deferred compensation." The general rule is to treat vacation as earned in the previous year and, therefore, the amount earned is determined by the labor agreement in existence during the previous year. *Hollymatic Corp.*, 117 LA 417 (Aaron S. Wolff 2002).

**§ 10.32. Promotion Decisions**

**Under a relative-ability clause, which makes seniority controlling in promotions only if the qualifications of the competing employees are relatively equal, an aggrieved senior employee does not necessarily prevail by showing superiority to the promoted employee. Other bypassed employees might have even better claims, and the arbitrator's remedy may be to order management to set aside the wrongful promotion and to fill the vacancy consistent with the labor agreement. Under a sufficient-ability clause, which makes seniority controlling as long as the senior employee is qualified to perform the job, the senior employee is presumptively entitled to the position, absent a bona fide showing that other employees should be considered for the promotion as provided in the contract.**

**Comment:**

*See also* Chapter 5, § 5.9, above. When there are procedural infirmities in a promotion or transfer decision, but it is not clear that the grievant would have been selected but for the improper evaluation, a common remedy is to declare the

position vacant and order management to reevaluate all candidates. Since the assumption is that an arbitration award will move incumbents to the position they would have occupied absent the contract violation, the impact on them should be given little if any weight.

Absent other language in the contract, an arbitrator considering a grievance under a labor agreement containing a relative-ability clause is not likely to give a senior but less able employee an opportunity to “prove up on the job” in a trial period reserved for the person who qualifies for the job. See *Wolf Creek Nuclear Operating Corp.*, 111 LA 801 (Thomas J. Erbs 1998).

At least in the federal sector, an arbitrator is expected to award retroactive promotions with back pay where a direct, causal connection exists between a violation of an applicable law, regulation, or collective bargaining agreement and an employee’s nonpromotion.

### § 10.33. Remedies for Mistake

**The law of contracts generally applies in the arbitration of collective bargaining agreements when issues of mistake are raised. Poor judgment in making a deal or a mere misunderstanding are not grounds for reformation of the contract. Absent fraud, duress, or deceit, there is ordinarily no remedy for a unilateral mistake when only one party is in error. But if there is a mutual mistake, that is, both parties contracted in the mistaken belief that certain material facts existed, arbitrators may grant a remedy. For example, if there was a mutual mistake in “integration,” the reduction of the parties’ agreement to writing, an arbitrator is likely to “reform” the words of the contract to correspond with the parties’ actual intent.**

#### **Comment:**

With rare exceptions, arbitrators, like the courts, grant relief only in cases of mutual mistake. The rationale for this was provided by one arbitrator as follows: “A contract which, by reason of a mutual mistake of the parties does not accurately

reflect the agreement consummated, may be reformed to accurately reflect the true intention of the parties. This rule has long been recognized by law, and every reason exists for such rule to be equally applicable to collective bargaining agreements.” *IOOF Home of Ohio, Inc.*, 115 LA 1517, 1521 (Phyllis Florman 2001) (quoting from Jacobson Mfg. Co., 64-3 ARB ¶ 9097 (Arvid Anderson 1964), and holding that the contract may be reformed where the term “unplanned illness” was improperly added to the agreement where the proposal was not made or discussed in bargaining). A unilateral mistake generally will not be sufficient for relief. See the discussion of Arbitrator Elliott H. Goldstein in *School of Hobart*, 110 LA 592 (1997) (ordering reformation of a contract in view of mutual mistake in integration, when the parties made a mutual mistake in referring to two different statutes that provided differing ways of calculating benefits).

Occasionally relief will be granted for a unilateral mistake, when enforcement would be oppressive and substantially burdensome, and rescission of the contract would impose no undue hardship on the other party. Here the remedy would be avoidance of the contract, not reformation.

The mutual mistake requirement may be disregarded when there are mistakes in performance rather than negotiation. For example, an employer who overcompensates an employee may be allowed recovery on a theory of restitution, so as to avoid unjust enrichment of the employee by permitting the retention of payments that were clearly not authorized by the parties’ agreement. Under state law, a public employer may have no choice but to seek restitution when an employee improperly receives a benefit not warranted under the collective bargaining agreement. The theory is that such an act is *ultra vires* and thus the mistake must be corrected by public management when discovered. In such a case the arbitrator may be influenced or controlled by state statutes.

## § 10.34. Punitive Remedies

**A penalty or award of “punitive damages,” intended solely to punish and deter the breaching party is, with few exceptions, ruled inappropriate in the arbitral forum. Punitive sanctions have been**

**upheld as a deterrent to recurrent violations, however, when there were repeated breaches of a collective bargaining agreement and actual damages were only nominal. Merely because an arbitrator's award is not derived by precise mathematical calculations does not make it punitive or improper.**

### **Comment:**

Arbitrators and courts sometimes refer to monetary awards as "punitive" when there is no provable financial loss or proof is uncertain. An alternative test of whether a remedy is punitive is whether it goes beyond making the employees whole for the employer's violation of the agreement. The better focus is not whether the award is labeled "punitive" but whether it is reasonable in light of the findings of the arbitrator. *See, e.g., Sheet Metal Workers Local 416 v. Helgesteel Corp.*, 335 F. Supp. 812, 80 LRRM 2113 (W.D. Wis. 1971). Even when arbitrators characterize a remedy as compensatory and not punitive, the courts may disagree with that characterization. For example, in *Westinghouse Elec. Corp., Aerospace Div. v. Electrical Workers (IBEW) Local 1805*, 561 F.2d 521, 96 LRRM 2084 (4th Cir. 1977), *cert. denied*, 434 U.S. 1036, 97 LRRM 2341 (1978), an arbitrator ordered three additional paid vacation days because the company had violated the agreement by failing to provide sufficient time for negotiating a vacation shutdown period. The court vacated the award as actually punitive though nominally compensatory, since no employee showed monetary loss or hardship.

A common judicial attitude is that the parties rarely think of authorizing punitive damages "because of the great power it would give the arbitrator . . . , and the bitter note a claim for punitive damages could inject into the parties' relationship." *Miller Brewing Co. v. Brewery Workers Local 9*, 739 F.2d 1159, 1164, 116 LRRM 3130 (7th Cir. 1984), *cert. denied*, 469 U.S. 1160, 118 LRRM 2192 (1985).

A party seeking a penalty as a remedy, for example, in cases where willful and repeated violations are alleged, should raise the issue at the beginning of the grievance procedure.

It is unlikely that an arbitrator could ever impose a punitive remedy on a non-party to the collective bargaining agreement. *See, e.g., Headquarters, U.S. Army Garrison*, 98 LA 629



(Ernest E. Marlatt 1992) (declining to impose punitive remedy against non-unit supervisors, reasoning that it is not the function of an arbitrator to impose retribution and humiliation upon non-unit employees).

### **§ 10.35. Interest, Costs, and Attorneys' Fees**

**In the absence of an express contract provision to the contrary, arbitrators traditionally do not award interest on back pay or other monetary awards, and do not assess costs or allow attorneys' fees for the simple breach of a collective agreement. There are exceptions when one party has acted arbitrarily, capriciously, or in bad faith. Many agreements, however, do contain loser-pays-all provisions, so that the arbitrator assesses the losing party all costs, such as the arbitrator's fees and transcript costs.**

#### **Comment:**

The parties rarely request interest and it is not customary in industrial relations. The absence of interest in arbitration may be attributed in part to the now-abandoned practice of the NLRB in dealing with back pay awards and to the parties' failure to change their contracts following arbitral denials of interest. Today there is some movement in favor of interest. When awarded, interest may be calculated at the current market rate or the state "legal" rate. *See, e.g., Champlain Cable Corp.*, 108 LA 449 (David F. Sweeney 1997) (awarding interest at 5 percent, the rate on short-term Treasury bills).

When interest, costs, or attorneys' fees are granted in the absence of an express contractual provision authorizing them, it is usually because a party has engaged in willful or repeated contract violations, delaying tactics in the arbitration, or other egregious wrongdoing. Arbitrators have also awarded damages for expenses incurred in securing a party's compliance with an award. It is common to assess costs against a party causing an untimely postponement of a hearing, even when the contract provides that costs are equally shared. Concerning loser-pays provisions, see also Chapter 1, § 1.109, above.

Interest and attorneys' fees are not uncommon in the federal sector under the federal Back Pay Act, 5 U.S.C. § 5596 (2000), when the grievant is affected by an unjustified personnel action. *See, e.g., Vandenberg Air Force*, 106 LA 107 (Marvin J. Feldman 1996) (awarding attorneys' fees); *Dept. of the Navy*, 113 LA 1214 (Robert Lubic 2000) (award of \$245 per hour justified by billing practices of Washington, D.C., lawyers).

#### IV. MISCELLANEOUS PROBLEM AREAS

##### **§ 10.36. Remedy for Noncompliance With Arbitrator's Award**

**An arbitrator has jurisdiction to interpret the terms of a prior award by another arbitrator, especially when the contract provides that the decision of the arbitrator shall be final and binding, and to fashion an appropriate remedy for noncompliance.**

##### **Comment:**

When a private-sector party does not comply with an award, the other party is entitled to sue under § 301 of the LMRA or, alternatively, rearbitrate the case (assuming there is some reason to believe that the second award will be authoritative with the recalcitrant party). A grievance arising from a re-termination of an employee whom an employer was ordered to reinstate may be viewed as not arbitrable by a second arbitrator if it is considered as seeking enforcement of a prior award. The better view is that the second arbitrator is without jurisdiction since enforcement must be sought in the courts in an LMRA § 301 lawsuit. *See Metropolitan Tulsa [Okla.] Transit Auth.*, 98 LA 205 (Donald P. Goodman 1991).

##### **§ 10.37. Remedies Where Grievance Procedure Cannot Provide Relief**

**In situations where the grievance procedure, including arbitration, could provide no relief for an employee who "obeys now and grieves later," it may be that arbitrators should be more flexible about the employee's right to engage in self-help at the time.**

**Comment:**

If employees are improperly ordered to work overtime when they have tickets for a "Final Four" basketball game, it can be argued that an arbitrator's later ruling on discipline against them for insubordination and absenteeism should apply judicial criteria for injunctive relief in cases of "irreparable injury." Self-help that would otherwise be forbidden may be justified in such circumstances. *See, e.g.,* Prasow, Paul & Peters, Edward, *Arbitration and Collective Bargaining* (1962), at 224.

**§ 10.38. Granting a Remedy Not Requested by a Party**

**In addition to authorizing the arbitrator to decide the substantive issue, parties should specifically outline the requested relief, either in the grievance or submission, or at the hearing. In most cases submission of the question, "What is the appropriate remedy?" will suffice.**

**Comment:**

It is not always certain that an arbitrator will order a remedy that has not been requested or discussed, either in the first steps of the grievance procedure or at the hearing. This is especially true when a particular remedy cannot be inferred from the nature of the grievance.

**§ 10.39. Extending a Remedy to a Nongrievant**

**An arbitrator may appropriately grant class relief when the grievance is filed by the union as representative of a group of similarly situated employees, or the grievance is clearly intended to apply to all employees in a group.**

**Comment:**

These situations are exceptions to the view of many arbitrators that no jurisdiction exists to extend a remedy to employees not named as grievants. By joining multiple complaints

into one grievance, identical or similar issues can be decided in one hearing, thus permitting the expeditious, efficient, and inexpensive handling of the matter in dispute. This assumes the contract does not preclude such an approach. *See, e.g., Regional Transport. Dist.*, 120 LA 306 (William M. Slonaker 2004) (arbitrator retained jurisdiction until all grievants within the named class had been made whole).

## § 10.40. Forfeiture Clauses

**Although a contract may provide for granting a grievance if management does not answer within specified time limits, in rare instances arbitrators may hold that any remedy must have a foundation in reason and fact in order to avoid a result that is manifestly unjust and contrary to good faith.**

### Comment:

Forfeiture or default provisions are narrowly construed by arbitrators. As expressed by one arbitrator, “[u]nless a contractual term supporting a claim of forfeiture is expressed with unmistakable clarity, a presumption arises that the parties did not intend it to be interpreted as effecting a forfeiture. Doubts are generally resolved against a forfeiture of rights.” *Kenai Peninsula Borough*, 113 LA 1164, 1168 (Robert W. Landau 2000) (holding that in order for the union to receive the relief it requested after the employer failed to answer the grievance, the union must demonstrate that the requested relief falls within the range of reasonableness).

Many collective bargaining agreements provide that if a written answer is not given within a specified time limit, the grievance should be considered granted as requested. Suppose a grievant requests a remedy that is clearly outlandish and, through oversight, management does not deny the grievance within the time period outlined. Does the existence of the forfeiture clause mandate that the remedy requested should be granted? Arbitrator Anthony V. Sinicropi, in an unpublished decision, held that a forfeiture clause could not work against management when the grievance at issue was filed seven years after the contractual time limit. In denying any monetary remedy the arbitrator reasoned that no remedy could be

awarded for a bad faith attempt to slip by management a grievance that the union knew was untimely. The grievance, as well as the remedy, must have a foundation in reason and fact. If the requested relief is unreasonable, it is unlikely to be awarded, since an interpretation giving reasonable meaning to the parties' contractual language is preferred to an interpretation that produces unreasonable, harsh, absurd, or nonsensical results.

### **§ 10.41. Remedies for Mental Distress**

**The absence of many reported decisions indicates that arbitrators refrain from awarding damages for mental distress, even where there is no question of actual injury to the grievant.**

#### **Comment:**

The question of awarding a remedy for mental distress is not one of power generally but, rather, whether it reasonably can be concluded that the parties, in negotiating their agreement, contemplated that such relief could be secured in the arbitral forum. One arbitrator stated that he was not prepared to award tort damages in a breach-of-contract case absent "evidence of conduct on the part of the employer which might reasonably be found to support a finding of the intentional infliction of emotional harm." *Champlain Cable Corp.*, 108 LA 449, 453 (David F. Sweeney 1997). Another arbitrator, reflecting the better view, pointed out that there is a strong argument that an arbitrator should never award damages for mental distress, even when there is no question of actual injury to the grievant. *Union Camp Corp.*, 104 LA 295 (Dennis R. Nolan 1995) (citing Hill, Marvin F., Jr. & Sinicropi, Anthony V., *Remedies in Arbitration* (1991), as authority).

### **§ 10.42. Dues Withholding**

**An arbitrator may order compliance with a union security agreement, for example, by requiring an employer that has failed to honor a valid checkoff to deduct and transmit to the union the**

**dues that should have been collected, or by requiring an employer to provide “back pay” to an employee to cover any amount improperly deducted.**

**Comment:**

Arbitrators seldom order the termination of an employee for failure to tender union dues pursuant to a valid union shop agreement. The preferred remedy is to notify all employees that they must make arrangements to pay initiation fees and dues, and that failure to do so will result in their termination. *See also* Chapter 3, § 3.10, above.

**§ 10.43. Consequential Damages  
and Foreseeability**

**Before a monetary remedy is awarded by an arbitrator, the individual grievant or the union must generally establish a causal relationship between the breach of the collective bargaining agreement and the loss of some contractual benefit.**

**Comment:**

With few exceptions, arbitrators follow the common law requirement that “damages” are not recoverable unless they arise naturally from the breach or were contemplated by the parties as a probable result of the breach at the time the contract was made. If it can be demonstrated that the grieving party would have incurred the loss regardless of the breach, it should not be recoverable as consequential damages. Sometimes arbitrators, importing common law principles, will speak of remedies that are both “reasonable and foreseeable.” *See, e.g., County of Santa Clara*, 119 LA 335 (William E. Riker 2003) (employer required to pay all reasonable and foreseeable consequential damages caused by its failure to implement a retirement program). Any remedy requested by a party, especially a monetary remedy, should meet this test.

Consequential damages, such as the loss of a home or the repossession of a vehicle, are not considered to be within the boundaries of the employment relationship and so are not recoverable in arbitration. *Marriott–Host International*, 100 LA 1005 (Anita C. Knowlton 1992).

## § 10.44. Perjury

**Once an award is issued, an arbitrator cannot reopen a hearing based on the discovery of new evidence, such as the commission of perjury by a witness. If a party's evidence was perjured, however, a court may vacate the award on the grounds it was obtained by fraud. Furthermore, an employer may discipline or discharge an employee for deliberately making false statements at a hearing.**

### **Comment:**

On the possibility of vacating an award resulting from perjury, see *Dogherra v. Safeway Stores*, 679 F.2d 1293, 110 LRRM 2790 (9th Cir.), *cert. denied*, 459 U.S. 990, 111 LRRM 2856 (1982). Generally, courts have been reluctant to vacate awards based on a claim of perjury.

In certain situations an employer may deny back pay and reinstatement on the basis of the grievant's perjury at the original hearing. If the employer's action is subsequently challenged before an arbitrator, the employer may be required to show that the perjured testimony could not have been discovered during the initial arbitration. See *Pacific Steel Casting Co.*, 76 LA 894 (Harvey Letter 1981) (holding that an improperly discharged employee may not be denied back pay and reinstatement on the basis of an employer's allegation of employee perjury during arbitration hearing, when the employer could not show that the employee had committed the felony of perjury *as defined by state law*).

## § 10.45. Protective Remedies

**Arbitrators have sometimes implemented protective remedies when necessary to shield a witness from undue influence or possible retaliatory measures, such as fines, demotions, or other sanctions.**

### **Comment:**

When a valid issue of possible retaliation is raised, an arbitrator may exclude or sequester witnesses, or order the

withholding of the identity of witnesses until the hearing. A victimized witness may also seek redress from the NLRB.

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