

CHAPTER 1

JUST CAUSE

One of the most misunderstood concepts and requirements of our Collective Bargaining agreement is the Just Cause mandate under Article 16. Managers are often not held to proving they issued discipline for Just Cause. Arbitrators are often not held to issuing decisions, which apply the standards of Just Cause. Grievances are often not investigated, processed, and presented in a method requiring management to meet the tests of Just Cause.

We begin where Just Cause first appears in our Collective Bargaining Agreement:

“ARTICLE 16 DISCIPLINE PROCEDURE

Section 1. Principles

In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause such as, but not limited to, insubordination, pilferage, intoxication (drugs or alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations. Any such discipline or discharge shall be subject to the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay.”

The above quoted provision explains that Management must have just cause to issue discipline, but the provision does not explain what just cause is. In Collective Bargaining Agreements throughout the United States, ours may be unique in that we have a clear definition of what just cause is. That definition is found in the **EL-921 Handbook, "Supervisor's Guide to Handling Grievances"**, under Article 19 of the Collective Bargaining Agreement:

“Just Cause

What is just cause? The definition of just cause varies from case to case, but arbitrators frequently divide the question of just cause into six sub-questions and often apply the following criteria to determine whether the action was for just cause. These criteria are the basic considerations that the supervisor must use before initiating disciplinary action.

Is there a rule?

Is the rule a reasonable rule?

Is the rule consistently and equitably enforced?

Was a thorough investigation completed?

Was the severity of the discipline reasonably related to the infraction itself and in line with that usually administered, as well as to the seriousness of the employee's past record?

Was the disciplinary action taken in a timely manner?"

The definition of Just Cause stated in the EL-921 is based upon the benchmark definition developed and first stated by **Arbitrator Carroll R. Daugherty** in the Grief Brothers Cooperage Corp. decision in 1964 and in a later decision, **Enterprise Wire Company** (1966). Arbitrator Daugherty stated:

"Few if any union-management agreements contain a definition of "just cause." Nevertheless, over the years the opinions of arbitrators in innumerable discipline cases have developed a sort of "common law" definition thereof. This definition consists of a set of guidelines or criteria that are to be applied to the facts of any one case, and said criteria are set forth below in the form of questions.

A no answer to any one or more of the following questions normally signifies that just and proper cause did not exist. In other words, such no means that the employer's disciplinary decision contained one or more elements of arbitrary, capricious, unreasonable, or discriminatory action to such an extent that said decision constituted an abuse of managerial discretion warranting the arbitrator to substitute his judgment for that of the employer.

The Questions

1. Did the company give to the employee forewarning or foreknowledge of the possible or

probable disciplinary consequences of the employee's conduct?

Note 1: Said forewarning or foreknowledge may properly have been given orally by management or in writing through the medium of typed or printed sheets or books of shop rules and of penalties for violation thereof.

Note 2: There must have been actual oral or written communication of the rules and penalties to the employee.

Note 3: A finding of lack of such communication does not in all cases require a no answer to question 1. This is because certain offenses such as insubordination, coming to work intoxicated, drinking intoxicating beverages on the job, or theft of the property of the company or of fellow employees are so serious that any employee in the industrial society may properly be expected to know already that such conduct is offensive and heavily punishable.

Note 4: Absent any contractual prohibition or restriction, the

company has the right unilaterally to promulgate reasonable rules and give reasonable orders; and same need not have been negotiated with the union.

2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?

Note: If an employee believes that said rule or order is unreasonable, he must nevertheless obey same (in which case he may file a grievance thereover), unless he sincerely feels that to obey the rule or order would seriously and immediately jeopardize his personal safety and/or integrity. Given a firm finding to the latter effect, the employee may properly be said to have had justification for his disobedience.

3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

Note 1: This is the employee's "day in court" principle. An employee has the right to know with reasonable precision the offense with which he is being charged and to defend his behavior.

Note 2: The company's investigation must normally be made before its disciplinary decision is made. If the company fails to do so, its failure may not normally be excused on the ground that the

employee will get his day in court through the grievance procedure after the exaction of discipline. By that time, there has usually been too much hardening of positions. In a very real sense, the company is obligated to conduct itself like a trial court.

Note 3: There may, of course, be circumstances under which management must react immediately to the employee's behavior. In such cases, the normally proper action is to suspend the employee pending investigation, with the understanding that (a) the final disciplinary decision will be made after the investigation and (b), if the employee is found innocent after the investigation, he will be restored to his job with full pay for time lost.

Note 4: The company's investigation should include an inquiry into possible justification for the employee's alleged rule violation.

4. Was the company's investigation conducted fairly and objectively?

Note 1: At said investigation the management official may be both "prosecutor" and "judge," but he may not also be a witness against the employee.

Note 2: It is essential for some higher, detached management official to assume and conscientiously perform the judicial role, giving the commonly accepted meaning to that term in his attitude and conduct.

Note 3: In some disputes between an employee and a man-

agement person, there are not witnesses to an incident other than the two immediate participants. In such cases, it is particularly important that the management "judge" question the management participant rigorously and thoroughly, just as an actual third party would.

5. At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

Note 1: It is not required that the evidence be conclusive or "beyond all reasonable doubt." But the evidence must be truly substantial and not flimsy.

Note 2: The management "judge" should actively search out witnesses and evidence, not just passively take what participants or "volunteer" witnesses tell him.

Note 3: When the testimony of opposing witnesses at the arbitration hearing is irreconcilably in conflict, an arbitrator seldom has any means for resolving the contradictions. His task is then to determine whether the management "judge" originally had reasonable grounds for believing the evidence presented to him by his own people.

6. Has the company applied its rules, orders, and penalties even-handedly and without discrimination to all employees?

Note 1: A no answer to this question requires a finding of discrimination and warrants ne-

gation or modification of the discipline imposed.

Note 2: If the company has been lax in enforcing its rules and orders and decides henceforth to apply them rigorously, the company may avoid a finding of discrimination by telling all employees beforehand of its intent to enforce hereafter all rules as written.

7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?

Note 1: A trivial proven offense does not merit harsh discipline unless the employee has properly been found guilty of the same or other offenses a number of times in the past. (There is no rule as to what number of previous offenses constitutes a "good," a "fair," or a "bad" record. Reasonable judgement thereon must be used.)

Note 2: An employee's record of previous offenses may never be used to discover whether he was guilty of the immediate or latest one. The only proper use of his record is to help determine the severity of discipline once he has properly been found guilty of the immediate offense.

Note 3: Given the same proven offense for two or more employees, their respective records provide the only proper basis for "discriminating" among

them in the administration of discipline for said offense. Thus, if employee A's record is significantly better than those of employees B, C, and D, the company may properly give a lighter punishment than it gives the others for the same offense; and this does not constitute true discrimination.

Note 4: Suppose that the record of the arbitration hearing established firm yes answers to the first six questions. Suppose further that the proven offense of the accused employee was a serious one, such as drunkenness on the job; but the employee's record had been previously unblemished over a long, continuous period of employment with the company. Should the company be held arbitrary and unreasonable if it decided to discharge such an employee? The answer depends of course on all the circumstances. But, as one of the country's oldest arbitration agencies, the National Railroad Adjust-

ment Board, has pointed out repeatedly in innumerable decisions on discharge cases, leniency is the prerogative of the employer rather than of the arbitrator; and the latter is not supposed to substitute his judgment in this area for that of the company unless there is compelling evidence that the company abused its discretion. This is the rule, even though an arbitrator, if he had been the original "judge," might have imposed a lesser penalty. Actually, the arbitrator may be said, in an important sense, to act as an appellate tribunal whose function is to discover whether the decision of the trial tribunal (the employer) was within the bounds of reasonableness above set forth. In general, the penalty of dismissal for a really serious first offense does not, in itself, warrant a finding of company unreasonableness.

*Arbitrator Carroll Daugherty
Enterprise Wire co. 1966*

From those questions of Just Cause (or "tests" as they have come to be termed) the **EL-921 "Supervisor's Guide to Handling Grievances"** provides our Collective Bargaining Agreement definition:

“III. Discipline

C. Just Cause

What is just cause? The definition of just cause varies from case to case, but arbitrators frequently divide the question of just cause into six sub-questions and often apply the following criteria to determine whether the action was for just cause. These criteria are the basic considerations that the supervisor must use before initiating disciplinary action.

Is there a rule?

If so, was the employee aware of the rule? Was the employee forewarned of the disciplinary consequences for failure to follow the rule?

Important: It is not enough to say, "Well, everybody knows that rule," or, "We posted that rule 10 years ago." You may have to prove that the employee should have known of the rule.

Certain standards of conduct are normally expected in the industrial environment and it is assumed by arbitrators that employees should be aware of these standards. For example, an employee charged with intoxication on duty, fighting on duty, pilferage, sabotage, insubordination, etc., may be generally assumed to have understood that these offenses are neither condoned nor acceptable, even though management may not

have issued specific regulations to that effect.

Is the rule a reasonable rule?

Management must maintain work rules by continually updating and reviewing them, and making sure that they are reasonable, based on the overall objective of safe and efficient work performance. Management's rules are reasonably related to business efficiency, safe operation of our business, and the performance we might expect of the employee, and this is known to the employee.

Is the rule consistently and equitably enforced?

If a rule is worthwhile, it is worth enforcing, but be sure that it is applied fairly and without discrimination.

Consistent and equitable enforcement is a critical factor, and claiming failure in this regard is one of the union's most successful defenses. The Postal Service has been overturned or reversed in some cases because of not consistently and equitably enforcing the rules.

Consistently overlooking employee infractions and then disciplining without warning is one issue. If employees are consistently allowed to smoke in areas designated as No Smoking areas, it is not appropriate suddenly to start disciplining them for this violation. In such cases,

management loses its right to discipline for that infraction, in effect, unless it first puts employees (and the unions) on notice of its intent to enforce that regulation again.

Singling out employees for discipline is another issue. If several employees commit an offense, it is not equitable to discipline only one.

When the Postal Service maintains that certain conduct is serious enough to be grounds for discharge, it is unwise--as well as unfair--to make exceptions. If the Postal Service is to maintain consistency in its position that theft or destruction of deliverable mail is grounds for discharge even on a first offense, for example, then the otherwise good employee guilty of this offense, like the border-line or marginal employee, must be discharged.

Was a thorough investigation completed?

Before administering the discipline, management must make an investigation to determine whether the employee committed the offense. Management must ensure that its investigation is thorough and objective.

This is the employee's day in court privilege. Employees have the right to know with reasonable detail what the charges are and to be given a reasonable opportunity to defend themselves before the discipline is initiated.

Was the severity of the discipline reasonably related to the infrac-

tion itself and in line with that usually administered, as well as to the seriousness of the employee's past record?

The following is an example of what arbitrators may consider an inequitable discipline: If an installation consistently issues 5-day suspensions for a particular offense, it would be extremely difficult to justify why an employee with a past record similar to that of other disciplined employees was issued a 30-day suspension for the same offense.

There is no precise definition of what establishes a good, fair, or bad record. Reasonable judgment must be used. An employee's record of previous offenses may never be used to establish guilt in a case you presently have under consideration, but it may be used to determine the appropriate disciplinary penalty.

The Postal Service feels that unless a penalty is so far out of line with other penalties for similar offenses as to be discriminatory, the arbitrator should make no effort to equalize penalties. As a practical matter, however, arbitrators do not always share this view. Therefore, the Postal Service should be prepared to justify why a particular employee may have been issued a more severe discipline than others.

Was the disciplinary action taken in a timely manner?

Disciplinary actions should be taken as promptly as possible after the offense has been committed.”

In conjunction with the tests of just cause and the EL-921, the most important tool the Union has at its disposal--and one of the least utilized in developing thorough, well-reasoned defenses vs. discipline--is our ability under Articles 17 and 31 of the Collective Bargaining Agreement to interview witnesses during the course of grievance investigations.

The Collective Bargaining Agreement states:

“ARTICLE 17 REPRESENTATION

Section 3. Rights of Stewards

The steward, chief steward or other Union representative properly certified in accordance with Section 2 above may request and shall obtain access through the appropriate supervisor to review the documents, files and other records necessary for processing a grievance or determining if a grievance exists and shall have the right to interview the aggrieved employee(s), supervisors and witnesses during working hours. **Such requests shall not be unreasonably denied.**” (Emphasis added)

“ARTICLE 31 UNION-MANAGEMENT COOPERATION

Section 3. Information

The Employer will make available for inspection by the Union all relevant information necessary for collective bargaining or the enforcement, administration or interpretation of this Agreement, including information necessary to determine whether to file or to continue the processing of a grievance under this Agreement. Upon the request of the Union, the Employer will furnish such information, provided, however, that the Employer may require the Union to reimburse the USPS for any costs reasonably incurred in obtaining the information.”

Utilizing our right to interview, the questions the shop steward must ask of management are crucial if success is to be achieved through the grievance-arbitration process. Too often, Union advocates are faced with presenting cases in Arbitration in which the Union has not developed defenses addressing the tests of Just Cause. Too often, Union advocates do not know prior to the hearing what management witnesses and managers themselves will testify to at the hearing. Union interviews done at the earliest steps--prior to Steps 1 or 2--will enable the Union to address Just Cause as a structured requirement, not as a variable concept.

Once interviews are conducted, the steward becomes a valuable witness for the Union and can, at an arbitration hearing, refute a manager's changed story and seriously cripple a manager's credibility.

The best way to develop solid defenses vs. disciplinary actions is to specifically utilize the authority of Articles 17 and 31 for interviews in conjunction with the EL-921s Just Cause definition. The following is illustrative of that process:

EL-921 JUST CAUSE INTERVIEW QUESTIONS

1. Is there a rule?

- What is the rule?
- Is the rule posted in the Post Office?
- If yes, where is it posted?
- If yes, when was it posted?
- If yes, who posted it?
- If yes, were you present when it was posted?
- Was the rule related to the grievant by you?
- If yes, when?
- If yes, where?
- If yes, who else was present?
- Was the grievant informed of the rule when he/she was hired?
- If yes, were you present?
- If yes, who told you?
- How do you know if you weren't there and no one told you?

2. Is the rule a reasonable rule?

- How is this rule related to the job?
- How is this rule related to safe operations?
- What caused the creation of this rule?
- When was the last updating of this rule?
- When did you inform the grievant of this update?
- Who informed the grievant of this update?
- You don't know whether the grievant was informed of any update?

3. Is the rule consistently and equitably enforced?

- How many people have violated the rule?
- How often is it violated?
- How many employees have you disciplined for violating the rule?

- When was the last violation of the rule of which you are aware?
- When did you last issue discipline for a violation of the rule?
- Have you done a comparison of other employees' records who violated the rule?
- Did you consider the Grievant's violation in comparison to others?
- Why haven't other employees received the same degree of discipline for similar infractions?
- Why haven't you issued discipline to others for similar infractions?

4. Was a thorough investigation completed?

This question is covered in great detail in Chapters 2 and 3.

5. Was the severity of the discipline reasonably related to the infraction itself and in line with that usually administered, as well as to the seriousness of the employee's past record?

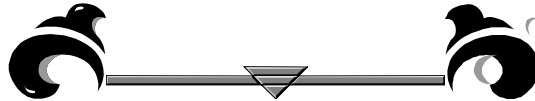
- Others have not received so severe discipline have they?
- Isn't the Grievant's record very similar to others under your supervision?
- Doesn't employee Doe have more absences than the grievant and yet no discipline?
- If other employees were all issued letters of warning for this particular infraction, why was the grievant suspended?
- Doesn't the Grievant's past record reflect no discipline?
- No employee has ever been fired for taking a break outside the building; why now a removal to the grievant?

6. Was the disciplinary action taken in a timely manner?

- The last absence you cited in the removal was May 5, 1997. You issued the removal on July 15. Why the delay?
- What new information came into your possession between May 5 and July 15?
- When did you make the decision to remove the grievant?
- When did your investigation begin? End?
- When did you initiate the removal?
- How is a delay of 71 days timely?

The above illustrations are not intended to be complete lists of every question a steward should ask. Each case will differ and will require development of strategically different questions. In any event, no disciplinary grievance must ever be processed without a detailed interview of the managers issuing discipline.

When the steward composes the interview questions and compiles them in writing, prior to the interview, with adequate space for responses and extemporaneously asked questions, the interview questionnaire should be developed using the format discussed above. Questions for each test should be placed under the test on the form. This will better enable the steward to keep track of the context--and under what just cause test--each question is asked.



In our grievances, it is important that we structure our contentions so they address each "test" or element of Just Cause. Listing the individual tests from the EL-921 and how each test has been violated through due process will focus our arguments and create a further due process breach for management should management fail to address each "test" argument in its Step 2 grievance decision. We will argue that management is prevented from raising refutations at arbitration to our "test" arguments since they failed in their obligation to raise those refutations as per Article 15, Section 2, Steps 2d and f, at Step 2 of the Grievance/Arbitration procedure. Those provisions are as follows:

“Article 15 GRIEVANCE-ARBITRATION PROCEDURE

Section 2 Grievance Procedure Steps

Step 2(d) At the meeting the Union representative shall make a full and detailed statement of facts relied upon, contractual provisions involved, and remedy sought. The Union representative may also furnish written statements from witnesses or other individuals. The Employer representative shall also make a full and detailed statement of facts and contractual provisions relied upon. The parties' representatives shall cooperate fully in the effort to develop all necessary facts, including the exchange of copies of all relevant papers or documents in accordance with Article 31. The parties' representatives may mutually agree to jointly interview witnesses where desirable to assure full development of all facts and contentions. In addition, in cases involving discharge either party shall have the right to present no more than two witnesses. Such right shall not preclude the parties from jointly agreeing to interview additional witnesses as provided above.

Step 2(f) Where agreement is not reached the Employer's decision shall be furnished to the Union representative in writing, within ten (10) days after the Step 2 meeting unless the parties agree to extend the ten (10) day period. The decision shall include a full statement of the Employer's understanding of (1) all relevant facts, (2) the contractual provisions involved, and (3) the detailed reasons for denial of the grievance.”

Specific structuring of Just Cause tests, interview questions and responses, and Union contentions/issues/arguments will move our disciplinary grievances from broad, general defenses to sharp, concrete due process issues.

The next chapters in this Handbook address those specific due process issues.



**MANAGEMENT ARGUMENT THAT THE EL-921
IS NOT AN OFFICIAL HANDBOOK UNDER ARTICLE 19**

The USPS often takes the position that the EL-921 is only a guide, not an official Article 19 Handbook. To refute such an argument, the Union relies upon the following:

1. Directives and Forms Catalogue Publication 223.

This USPS publication lists all the USPS Handbooks and Manuals, including the EL-921. In addition, it includes two handbooks (the EL-401 and EL-501), which are not part of Article 19's Handbooks and Manuals.

In a binding Step 4 interpretive decision, **H1C-NA-C 114** dated October 1, 1984, the USPS and APWU agreed the EL-401, "Supervisor's Guide to Scheduling and Premium Pay", was not an Article 19 Handbook or Manual:

“The issue in this case is whether management was proper in the manner under which EL-401 (Supervisor's Guide to Scheduling and Premium Pay) was issued.

In final resolution of this grievance we agreed on the following clarification of the purpose and intent of EL-401.

The EL-401 has no authority as a handbook or manual and should never be cited or referred to in any manner to support management's position with regard to scheduling and premium pay for bargaining unit employees.”

In a National level arbitration case, **H8C-NA-C 61** dated December 27, 1982, Arbitrator Gamser determined that the EL-501, "Supervisor's Guide to Attendance Improvement", was not an official Article 19 Handbook or Manual:

“This case was brought on for arbitration by the APWU, in a grievance subject to disposition at the National Level challenging the force and effect which the Postal Service allegedly bestowed upon EL-501, a publication entitled SUPERVISOR'S GUIDE TO ATTENDANCE IMPROVEMENT which was published in November of 1980.

1. The Employer shall promulgate an official document in which it clarifies the status of EL-501, making it clear that it is not to be regarded by management, the Unions, or employee covered by the National Agreement as a handbook having the force and effect of such a document issued pursuant to Article 19. Copies of such promulgation shall be furnished to the Unions concerned.”

The parties, through a Step 4 resolution and a National level arbitration decision have determined that both the EL-401 and EL-501 are not Handbooks or Manuals under Article 19. There is no such Step 4 decision or National Arbitration decision excluding the EL-921 from Article 19. Absent such authority and determination for the EL-921, and recognizing the EL-921's inclusion in the Directives and Forms Catalogue, the Union position is that the EL-921 is a binding Article 19 Handbook. When the USPS argues against the EL-921, we must put forth the Catalogue, the Step 4, the National Award, and Regional arbitral authority in support of the EL-921 as a binding Handbook under Article 19 of the Collective Bargaining Agreement.