Discipline Handling Considerations

BMWED ARBITRATION DEPARTMENT

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Discipline and Discharge

- To discipline an employe the Carrier must issue discipline in accordance with just cause. Arbitrators will typically focus on three major areas of concern when deciding discipline cases:
  1. Was there a fair and impartial hearing? (Organization has the Burden of proof)
  2. Did the Carrier meet its burden to demonstrate a rule violation? (Carrier has the Burden of proof)
  3. Was the discipline imposed arbitrary, disparate or excessive? (Organization has Burden of proof)

Fair and Impartial Hearing

Virtually all agreements require the Carrier to provide a Fair and Impartial hearing prior to imposing discipline.

In the event the Claimant is not provided a fair and impartial hearing, where such a right is established in the Agreement a violation of the Agreement occurs.

We always have the burden to establish a violation of the Agreement.

Fair and Impartial Hearing

- When considering what constitutes a fair and impartial hearing, focus on implied/express due process and just cause. Express due process revolves around protections explicitly provided for by the Agreement, whereas implied due process and just cause focus on the fairness of the proceedings, generally.
  - Express due process violations are typically easier to prove. Examples of express due process violations include but are not limited to issues surrounding time limits and notice.
  - Implied due process objections generally require a showing of how the Claimant was prejudiced by the Carrier's actions. Examples of implied due process objections are ex-parte communications; right to confront accuser; pre-determination of guilt. In the event we only provide a general objection without a demonstration of prejudice, we may receive an adverse award on the issue.

Due Process Objections Which Work

THE KEY TO BEING SUCCESSFUL WITH DUE PROCESS VIOLATIONS IS THE ABILITY TO DEMONSTRATE PREJUDICE! General objections which are not supported by evidence of prejudice typically do not result in sustained awards.

We recently had a sustained dismissal claim from a well-respected Section 3 Arbitrator (Gerald Wallin) on Discovery (an issue we have consistently lost and all but abandoned) because we were able to show that a lack of discovery prejudiced the accused (See Award 139 of PLB 7599).

The important point to take away, is that what works is what we can prove prejudiced the Claimant. What generally does not work are bald assertions of due process violations without any evidence of prejudice.

Just Cause Considerations

Just cause can be simply defined as what is fair. Thus, just cause is the central point of analysis when arbitrators determine if the accused was provided a fair and impartial hearing.

> "The central concept permeating discipline and discharge arbitrations is 'just cause.' Most collective bargaining agreements explicitly prohibit the employer from disciplining or discharging employees without just cause. Even in the absence of specific contract language, just cause is the touchstone by which arbitrators judge employer actions. If the arbitrator concludes that the employer lacked just cause to discipline or discharge an employee, the action will be overturned. If there was just cause, the action will be upheld.
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> Two principles that are central to just cause are employed by all arbitrators: due process and progressive discipline. Due process, as it is used in determining just cause, has its origins in both constitutional and criminal law. Arbitrators have made analogies to both types of law in creating a hybrid called 'industrial due process.'[1] Industrial due process encompasses the employer's procedural responsibilities in disciplining employees. In general, arbitrators apply principles "of due process when determining whether an employer had just cause for discipline." (Footnote omitted)

The Seven Tests of Just Cause

A useful starting point for determining just cause is what is commonly referred to as the Seven Tests of Just Cause. If any of the answers are no, the Carrier lack's just cause to discipline the employe and the disciple should be overturned.

1. Did the Carrier give to the employe forewarning or foreknowledge of the possible or probable disciplinary consequences of the employes conduct? (i.e., communication of rules and penalties).
2. Was the Carrier's rule or managerial order reasonably related to the orderly, efficient, and safe operation of the companies' business? Regardless obey now, and grieve later, unless safety or personal integrity jeopardized.
3. Did the Carrier, before administrating discipline to an employe, make an effort to discover whether the employe violated or disobeyed a rule or order from management?

The Seven Tests of Just Cause

4. Was the Carrier's investigation conducted fairly and objectively?
5. At the investigation did the judge obtain substantial evidence or proof that the employe was guilty. We can often argue that a higher standard applies to moral turpitude cases.
6. Has the employer applied its rules, orders, and penalties evenhandedly and without discrimination to all employes? Discriminatory enforcement is the antithesis of just cause.
7. Was the degree of discipline administered reasonably related to (a) the seriousness of the employes proven offense, and (b) the record of the employes service?

Burden of Proof Considerations

The Carrier has the burden to demonstrate that the Claimant violated the charged rules, based upon evidence adduced **at the investigation**. This burden is established in the provisions of your collective bargaining agreement.

The evidentiary standard typically used is substantial evidence. However, in cases involving moral turpitude the arbitrator will often apply a higher evidentiary standard (even if not explicitly stated in the award). Don't concede substantial evidence.

The Carrier must articulate a specific theory of causal wrongdoing associated with each rule the Carrier alleges is violated.

DO NOT MAKE the misconduct theory for the Carrier, and object to the Carrier perfecting its case in subsequent on-property correspondence, especially if the Carrier attempts to add evidence which was not adduced at the investigation.

Arbitrary, Disparate and Excessive

The arbitrary, disparate or excessive defense can be extremely effective but nevertheless is an affirmative defense. As such, we cannot baldly assert that discipline is arbitrary, disparate and excessive without providing some proof in support of our assertions.

Every claim we make should have evidence in support of it. Nevertheless, unrefuted assertions are also often taken as material fact. However, make the assertion specific, not general.

Remedy

Your collective bargaining agreement may have stipulations regarding acceptable or required remedies you can include in a claim or appeal from improperly applied discipline (i.e. Rule 48(h) of the UP Agreement). Your General Chairperson will also have guidance on what items to specify in a request for remedy in such cases.

The Claimant's backpay award may be offset by outside earnings under most agreements. However, we can make claims for remedy based upon the "make whole" concept from which net wage loss is derived. We must also keep "make whole" claims reasonable. Accounting for unique sources of loss, such as employer 401(k) match contributions or other benefits lost by the Claimant, may require consultation with your General Chairperson and our Arbitration Department.