STANDARDS WHICH MAY BE UTILIZED BY AN ARBITRATOR IN DISCIPLINARY CASES

The issue before the arbitrator frequently requires findings in respect to the existence of non-existence of "just-cause" for discipline, including discharge. Few 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. This definition consists of a set of guidelines or criteria that are to be applied to the facts of any one case, and the criteria are set forth below in the form of questions.

A flat "no" answer to any one or more of the following questions normally indicates that just and proper cause did not exist. In other words, a "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 the decision constituted an abuse of managerial discretion warranting the arbitrator to substitute his judgment for that of the employer.

The answers to the questions in any particular case are to be found in the evidence presented to the arbitrator at the hearing. Frequently, of course, the facts are such that the guidelines cannot be applied with precision. Moreover, occasionally, in some particular case an arbitrator may find one or more "no" answers so weak, and the other "yes" answers so strong, that he may properly, without any "political" or spineless intent to "split the difference" between the opposing positions of the parties, find that the correct decision is to "chastise" both the company and the disciplined employee by decreasing but not nullifying the degree of discipline imposed by the company – e.g., by reinstating a discharged employee without back pay.

THE QUESTIONS

1. Did the company give the employee forewarning or foreknowledge of the possible or probable disciplinary consequence of the employee's conduct?

NOTE 1: The forewarning or foreknowledge may properly have been given orally by management or in writing through medium or typed or printed sheets or books of shop rules and 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 such communication does not in all cases require a "no" answer to Question No. 1. This is because certain offenses such as insubordination, coming to work intoxicated, drinking intoxicating beverages on the job, or theft of the company or of fellow employees, are

so serious that any employee in the industrial society can properly be expected to know alread6y that such conduct is offensive and heavily punishable.

2.	Was the company's rule or managerial order reasonably related to the orderly, efficient, and safe operation of the company's business?

Note: If any 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 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 grounds 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.

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 must include an inquiry into possible justification for alleged rule violation.

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

NOTE 1: At such an investigation the management official may be both "prosecutor" and "judge", but he should 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 management person there are no witnesses to an incident other than the two immediate participants. In such cases it is particularly important that the management "judge" questions 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 preponderant, conclusive or "beyond 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 taken what participants or "volunteer" witnesses tell him.

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

NOTE 1: A "no" answer to this question requires a finding of discrimination and warrants negation 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.