FROM A TO ARBITRATION

EPISODE 23- JUST CAUSE PRINCIPLE IS THERE A RULE?

WHERE TO START

- AS A NEW SHOP STEWARD WHEN YOU GET A LETTER OF CHARGE, (LOW, 7 DAY, 14 DAY, WHATEVER) FROM A CARRIER AND DON'T KNOW WHAT TO DO WITH THIS DISCIPLINE ALWAYS START WITH THE JUST CAUSE PRINCIPLES
- IT'S A GOOD IDEA TO ALSO GET A HOLD OF A COPY OF THE NALC HANDBOOK DEFENSES TO DISCIPLINE

ARTICLE 16-DISCIPLINE PROCEDURE

- THE FIRST CHARGE OF ARTICLE 16.1 THE JUST CAUSE PRINCIPLE
  - IS THERE A RULE?
  - IS THE RULE A REASONABLE RULE?
  - IS THE RULE CONSISTENTLY 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?

ELKOURI & ELKOURI - HOW ARBITRATION WORKS

- JUST CAUSE-
  - SCOPE OF MANAGEMENT RIGHTS PAGE 610
    - IN THE ABSENCE OF A COLLECTIVE BARGAINING AGREEMENT IT IS GENERALLY AGREED THAT THE ONLY RESTRICTION ON MANAGEMENTS RIGHT TO DISCHARGE AND DISCIPLINE EMPLOYEES IS THAT CONTAINED IN FEDERAL AND STATE LABOR RELATIONS ACTS OR OTHER LAWS DEALING WITH DISCRIMINATION. THE SAME RESULT MIGHT BE REACHED WHERE A COLLECTIVE AGREEMENT EXISTS BUT CONTAINS NO EXPRESS LIMITATION ON SUCH RIGHT. WHERE IN AGREEMENT EXPRESSLY RECOGNIZED THE RIGHT OF MANAGEMENT TO DISCHARGE AND CONTAIN NO EXPRESS LIMITATION UPON THAT RIGHT AN ARBITRATOR WHO IS UNWILLING TO READ A JUST CAUSE LIMITATION INTO THE AGREEMENT. HOWEVER, MANY ARBITRATORS WOULD IMPLY A JUST CAUSE LIMITATION AND ANY COLLECTIVE AGREEMENT.

ELKOURI CONTINUED

- FOR INSTANCE ARBITRATOR WALTER E BOLES HELD THAT A JUST CAUSE BASIS FOR CONSIDERATION OF DISCIPLINARY ACTION IS ABSENT A CLEAR **PROVISO** TO THE CONTRARY, IMPLIED IN A MODERN COLLECTIVE BARGAINING AGREEMENT. THE REASONING IS IF THE COMPANY CAN DISCHARGE WITHOUT CAUSE, IT CAN LAY OFF WITHOUT CAUSE. IT CAN RECALL, TRANSFER OR PROMOTE IN VIOLATIONS OF THE SENIORITY PROVISIONS SIMPLY BY INVOKING IT'S CLAIMED RIGHT TO DISCHARGE. THUS, TO INTERPRET THE AGREEMENT AND ACCORD WITH THE CLAIM OF THE COMPANY WOULD REDUCE TO ANILITY THE FUNDAMENTAL PREVISION OF THE LABOR MANAGEMENT AGREEMENT. THE SECURITY OF A WORKER IN HIS JOB.

PROVISO = A PROVISION ATTACHED TO AN AGREEMENT

IT MAKES US ALL EQUAL

- THIS IS THE BEST LANGUAGE YOU CAN READ ABOUT JUST CAUSE. IT'S THE SECURITY OF A WORKER IN HIS JOB.
- THAT MEANS THAT MANAGEMENT CAN NOT JUST FIRE YOU AT WILL.
- THEY CAN NOT FIRE YOU BECAUSE OF THE COLOR OF YOUR SKIN.
- THEY CAN NOT FIRE YOU BECAUSE OF YOUR GENDER
- THEY CAN NOT FIRE YOU BECAUSE YOUR WORK ETHIC IS DIFFERENT FROM ANOTHER CARRIERS WORK ETHIC

ELKOURI CONTINUED

- MOREOVER IN AT LEAST ONE CASE IT HAS BEEN HELD THAT MANAGEMENT DOES NOT HAVE AN UNRESTRICTED RIGHT TO DISCHARGE AT ITS OWN DISCRETION. EVEN WHEN NO BARGAINING RELATIONSHIP EXISTS SINCE THE FAIR AND GENERALLY ACCEPTED UNDERSTANDINGS OF THE EMPLOYER EMPLOYEE RELATIONS IS THAT THERE IS OBLIGATIONS ON THE PART OF BOTH PARTIES. AND THEN AN OBLIGATION ON THE EMPLOYER IS THAT AN EMPLOYEE SHALL NOT BE DISMISSED WITHOUT CAUSE. MOST COLLECTIVE BARGAINING AGREEMENTS DO IN FACT REQUIRE CAUSE OR JUST CAUSE FOR DISCHARGE OR DISCIPLINE.

ARBITRATOR JOSEPH D. MCGLODRICK

- THE GENERAL SIGNIFICANCE OF THESE TERMS WAS DISCUSSED BY ARBITRATOR JOSEPH D MCGOLDRICK:
  - IT IS COMMON TO INCLUDE THE RIGHT TO SUSPEND AND DISCHARGE FOR JUST CAUSE , JUSTIFIABLE CAUSE, PROPER CAUSE, OBVIOUS CAUSE OR QUITE COMMONLY SIMPLY FOR CAUSE. THERE IS NO SIGNIFICANT DIFFERENCE BETWEEN THESE VARIOUS PHRASES. THESE EXCLUDE DISCHARGE FROM MERE WHIM OR CAPRESE. THEY'RE OBVIOUSLY INTENDED TO INCLUDE THOSE THINGS FOR WHICH EMPLOYEES HAVE TRADITIONALLY BEEN FIRED. THEY INCLUDE THE TRADITIONAL CAUSES OF DISCHARGE IN A PARTICULAR TRADE OR INDUSTRY. THE PRACTICES WHICH DEVELOP IN THE DAY TO DAY RELATIONS OF MANAGEMENT AND LABOR AND MOST RECENTLY THEY INCLUDE THE DISCISSIONS OF THE COURTS AND ARBITRATORS. THEY REPRESENT A GROWING BODY OF COMMON LAW THAT MAY BE REGARDED EITHER AS THE LATEST DEVELOPMENT OF THE LAW OF MASTER AND SERVANT OR PERHAPS MORE PROPERLY AS PART OF A NEW BODY OF COMMON LAW OF MANAGEMENT AND LABOR UNDER COLLECTIVE BARGAINING AGREEMENTS.

ARBITRATOR JOSEPH D. MCGLODRICK CONT.

- THEY CONSTITUTE THE DUTIES OWED BY EMPLOYEES TO MANAGEMENT AND IN THEIR CORELATIVE ASPECT AND ARE PART OF THE RIGHTS OF MANAGEMENT. THEY INCLUDE SUCH DUTIES AS HONESTY, PUNCTUALITY, SOBRIETY, OR CONVERSELY THE RIGHT TO DISCHARGE FOR THEFT, REPEATED ABSENCE OR LATENESS, DESTRUCTION OF COMPANY PROPERTY, BRAWLING AND THE LIKE. WHERE THEY ARE NOT EXPRESSED IN POSTED RULES THEY MAY VERY WELL BE IMPLIED, PROVIDED THEY ARE APPLIED IN A UNIFORM NON DISCRIMINATORY MANNER. SOME AGREEMENTS ENUMERATE SPECIFIC GROUNDS FOR DISCIPLINE. IT HAS BEEN RULED THAT THE FACT THAT AN AGREEMENT SPECIFIES CERTAIN TYPES OF MISCONDUCT FOR WHICH EMPLOYEES MAY BE DISCHARGED DOES NOT MEAN THAT CAUSE IS NOT EXPRESSLY STATED MAY NOT BE USED WHERE THE GROUNDS ENUMERATED ARE MERELY ILLUSTRATIVE AND NOT EXCLUSIVE

ARBITRATOR JOSEPH D. MCGLODRICK CONT.

- SIMILARLY THE LISTING OF CERTAIN OFFENSES IN WRITTEN PLANT RULES DOES NOT NECESSARILY EXCLUDE OTHER OFFENSES AS GROUNDS FOR PUNISHMENT. ARBITRATORS HAVE HELD THAT A CONTRACT GIVING THE RIGHT TO DISCHARGE FOR CAUSE AND MAKING NO REFERENCE TO OTHER FORMS OF DISCIPLINE DOES NOT DEPRIVE MANAGEMENT OF THE RIGHT TO IMPOSE OTHER FORMS OF DISCIPLINE LESS SEVERE THAN DISCHARGE. DISCHARGE MAY BE TOO SEVERE A PENALTY FOR THE OFFENSE UNDER THE CIRCUMSTANCES OF THE CASE. ASSERTING THAT DISCHARGE INEVITABLY CASTS A SHADOW ON A WORKERS CHARACTER AND REPUTATION AN ARBITRATOR WOULD NOT PERMIT DISCHARGE FOR LACK OF WORK WHERE THE AGREEMENT REQUIRED JUST CAUSE FOR DISCHARGE. THE ARBITRATORS STATING THAT LAYOFF IS THE PROPER ACTION IN CASE OF LACK OF WORK. OTHER ARBITRATORS TOO HAVE HELD THAT DISCHARGE IS LIMITED TO TERMINATION DUE TO THE FAULT OF THE EMPLOYEE

HANDBOOK EL-921-
SUPERVISOR'S GUIDE TO HANDLING GRIEVANCES

- 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. DISCIPLINE SHOULD NOT BE ISSUED IF "NO" IS THE ANSWER TO ANY OF THE QUESTIONS.
  - THIS SHOULD BE PUT INTO EVERY FORM OF DISCIPLINE GRIEVANCE WE FILE

SUB-QUESTIONS IN JCAM ARTICLE 16.1

- JUST CAUSE PRINCIPLE
  - THE PRINCIPLE THAT ANY DISCIPLINE MUST BE FOR “JUST CAUSE” ESTABLISHES A STANDARD THAT MUST APPLY TO ANY DISCIPLINE OR DISCHARGE OF AN EMPLOYEE. SIMPLY PUT, THE JUST CAUSE PROVISION REQUIRES A FAIR AND PROVABLE JUSTIFICATION FOR DISCIPLINE.
  - JUST CAUSE IS A TERM OF ART CREATED BY LABOR ARBITRATORS. IT HAS NO PRECISE DEFINITION. IT CONTAINS NO RIGID RULES THAT APPLY IN THE SAME WAY IN EACH CASE OF DISCIPLINE OR DISCHARGE. HOWE

IS THERE A RULE?

- 99% OF THE TIME THIS IS WHERE MANAGEMENT STOPS. THEY SAY YES THERE IS A RULE, AND STEWARDS WILL GET A TON OF RULES FROM MANAGEMENT
- STEWARDS WILL GET RULES IN THE LETTER OF CHARGES AND THE FORMAL A CONTENTIONS
- THERE'S A RULE FOR EVERYTHING. WELL, FOR MOST THINGS

IS THERE A RULE? IF SO…

- WHY THE WORDS IF SO ARE IMPORTANT….BECAUSE NOT EVERYTHING IS A RULE

  EXAMPLE: IF THE STEWARD GETS A CHARGE LETTER WITH THE ISSUE STATEMENT THAT THE CARRIER VIOLATED THE ZERO TOLERANCE POLICY FOR BACKING, RIGHT OFF THE JUMP YOU KNOW THAT MANAGEMENT'S LETTER IS FAULTY BECAUSE THERE IS NO SUCH POLICY.

  IT IS IN POSTAL VEHICLES THAT ALL DRIVERS ARE TO LOOK BEFORE BACKING. IF THERE IS A ZERO TOLERANCE OF BACKING HOW THEN CAN THE CARRIER BACK-UP AT ALL, OR EVER?

  IF ALSO IN THAT LETTER OF CHARGE MANAGEMENT CLAIMS THAT THE CARRIER FAILED TO HAVE ON THEIR LIGHTS, STEWARDS BETTER BE CHECKING THE TIMES THAT ARE ON THE STREET OBSERVATION SHEET AND CHECK TO SEE THAT IT WAS INDEED NIGHT TIME AND DARK OUT. THERE IS NO RULE THAT STATES THAT CARRIERS ARE TO HAVE THEIR LIGHTS ON DURING THE DAY

IS THERE A RULE: CONTINUED

- IF THE CARRIER IS QUESTIONED BY MANAGEMENT AND IS ASKED IF THEY ARE AWARE OF THE RULE THEY ARE SUPPOSING TO HAVE VIOLATED, THE SHOP STEWARD NEEDS TO STOP THE QUESTIONING AND ASK TO SEE THE ACTUAL RULE AND WHERE ITS WRITTEN OF THE SUPPOSED VIOLATION. STOPPING THE CARRIER FROM ANSWERING A QUESTION WITH YES BECAUSE THEY JUST WANT TO GET THIS OVER AND LEAVE
- WAS THE CARRIER AWARE OF THE RULE? MANAGEMENT WILL SAY THE CARRIER HEARD IT IN A STAND-UP. ASK FOR THAT STAND-UP AND THE DATE.

WAS THE CARRIER AWARE OF THE RULE?

- WHEN MANAGEMENT DOES THEIR ISSUE STATEMENT AND THEY STATE THAT THE CARRIER IS IN VIOLATION OF SOMETHING, LIKE THE M-39, M-41 OR EL 814, WE HAVE TO MAKE SURE THAT THE CARRIER WAS ASKED ABOUT THIS IN THE INVESTIGATIVE INTERVIEW. INFORMAL A REPS GOTTA CATCH THAT. ASK THE CARRIER IN THE PRE-INVESTIGATIVE INTERVIEW IF THEY HAVE EVER HEARD OF THE M-39 OR THE M-41 AND DO THEY KNOW WHAT IT SAYS? IF WE CAN GET THAT IN OUR QUESTIONS PRIOR TO THE INVESTIGATIVE INTERVIEW, THE INFORMAL A REP CAN STATE THAT THE CARRIER HAS NO IDEA THERE WAS A RULE BECAUSE I JUST ASKED THEM
- FORMAL A REPS NEED TO ALSO CATCH THIS IF THE CARRIER DID ANSWER YES, WHEN YOU INTERVIEW THE CARRIER ASK THEM IF THEY KNOW WHAT THIS SUPPOSED VIOLATION IS AND HAVE THEY EVER BEEN TOLD THAT IT WAS INDEED A RULE? MAKE THAT CONTENTION.

CONTENDING THE VIOLATION OF JUST CAUSE

- WHEN MANAGEMENT DOES THEIR INVESTIGATIVE INTERVIEW, IF THEY NEVER ASKED THE CARRIER IF THEY WERE AWARE OF A RULE THAT THEY ARE CHARGING THEM OF VIOLATING, WE NEED TO MAKE THAT CONTENTION THAT MANAGEMENT NEVER EVEN ASKED THE CARRIER IF THEY WERE AWARE OF THE RULE.
- FORMAL A REPS, WHEN YOU GET THERE THEY MAY ACTUALLY HAVE 10 MORE PROVISIONS. IF THEY ADD ANY MORE, THE CARRIER HAS NEVER BEEN ASKED IF THEY WERE AWARE OF THOSE NEW RULES AND THAT IS A VIOLATION OF THE JUST CAUSE PROVISION. WE NEED TO MAKE THAT CONTENTION. CARRIER WAS NEVER MADE AWARE OF THE CHARGE AND NEVER ASKED IF THEY KNEW OR WERE AWARE OF THE RULE

IT'S NOT ENOUGH

- THE REASON YOU ASK FOR THE STAND-UP TALKS IS BECAUSE IF THE MANAGER SAYS THAT THE CARRIER WAS MADE AWARE OF THE RULE AND THE CONSEQUENCES OF THE VIOLATION OF THAT RULE THEN THE STAND-UP ITSELF MUST HAVE LANGUAGE THAT TELLS THE CARRIERS WHAT THE CONSEQUENCES ARE FOR VIOLATION OF THE RULE, AND WHERE THEY CAN FIND THIS RULE, THAT THEY ARE SPEAKING OF.
- YOU HAVE TO CONTEND THIS BY STATING THAT MANAGEMENT HAS CITED IN THEIR CONTENTIONS THAT THE CARRIER WAS PRESENT DURING THE STAND-UP TALK THAT COVERED THIS RULE, BUT THEY NEVER FOREWARNED THE CARRIER OF THE DISCIPLINARY CONSEQUENCES FOR FAILURE TO FOLLOW THE RULE

16.2 AND THE DIFFERENCE

- A STAND-UP TALK IS NOT A 16.2 DISCUSSION TALK WHERE THE MANAGER TELLS THE CARRIER OF THE RULE AND HOW THEY HAD POSSIBLY VIOLATED THAT RULE AND WHAT THE SPECIFIC RULE IS, AND WHAT THE CONSEQUENCES ARE FOR NOT OBEYING THAT RULE
- WHEN A CARRIER GETS HANDED A LETTER WHEN THEY COME BACK FROM SICK LEAVE, THAT TOO IS NOT A 16.2 DISCUSSION. IT DOES NOT TELL THE CARRIER THE RULE, THE VIOLATION AND WHAT THE CONSEQUENCES ARE BY THEIR IMMEDIATE SUPERVISOR
- IF MANAGEMENT CAN NOT ANSWER YES TO EVERY ONE OF THE JUST CAUSE PROVISIONS THEN WE HAVE TO MAKE THOSE CONTENTIONS

THREE PARTS TO THE RULE

- THERE ARE THREE PARTS TO IS THERE A RULE?
- MANAGEMENT WILL ALWAYS CITE THE FIRST ONE, IS THERE A RULE? AND ANSWER YES TO IS THERE A RULE BECAUSE THERE ARE PROBABLY 20 RULES
- WE CAN NOT LET MANAGEMENT GET AWAY WITH THAT. WE HAVE TO HOLD THEM ACCOUNTABLE FOR THE NEXT PARTS. WAS THE EMPLOYEE AWARE OF THE RULE AND WAS THE CARRIER FOREWARNED OF THE DISCIPLINARY CONSEQUENCES FOR FAILURE TO FOLLOW THE RULE?

EL 921- CONTINUED

- IMPORTANT: IT IS NOT ENOUGH TO SAY, WELL EVERYONE KNOWS THAT RULE. OR WE POSTED THAT RULE 10 YEARS AGO. (THIS IS A CASE BY CASE BASIS AND IF THE CARRIER IS NEW, THEY HAVE NEVER EVEN LOOKED AT THE BOARD IT WAS POSTED ON 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

IT'S THE ANY DARNED FOOL RULE

- ANY DARN FOOL KNOWS THAT'S A RULE, BUT WITH SO MANY RULES, DO THEY REALLY?
- WE SHOULDN'T BE MISSING THE OTHER 2 PARTS OF THE IS THERE A RULE OF THE JUST CAUSE PRINCIPLE, AND DID THE CARRIER KNOW THERE WAS A RULE AND THE CONSEQUENCES OF VIOLATING THAT RULE
- WE HAVE TO ASK THE CARRIERS IF THEY KNEW THAT WAS A RULE AND WE HAVE TO HOLD MANAGEMENT ACCOUNTABLE TO THE EL-912, WHICH IS THEIR OWN HANDBOOK