Disparate Treatment in Labor Arbitration: An Empirical Analysis

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One of the cornerstones of arbitral due process, advanced since the earliest days of labor arbitration, is the notion that the company should apply its rules, orders, and penalties to all employees evenhandedly and without discrimination. While this notion has become codified as one of seven common tests of just cause,[1] many observe it as a "core concept" of arbitrators' decisions regarding the requirement of disciplinary due process.[2]

In addition to its centrality to any meaningful concept of fundamental fairness in the workplace, the importance of the concept of disparate treatment is evidenced, in part, by its growing presence in arbitration cases involving discipline and discharge. In fact, one could speculate that the ascendancy of disparate treatment as a concept in arbitration is not unrelated to the passage of Title VII of the Civil Rights Act of 1964. Intuitively, its presence in arbitration advocacy would also seem based, in part, upon the rise of the union's duty of fair representation.

By simply looking at the number of cases reported in *CCH Labor Arbitration Awards* or *BNA Labor Arbitration Reports*[3] that include the claim of disparate treatment, we can see that during the years of 1963 to 1968 there was a fairly significant increase in such cases compared with the previous 15 years. Also, since 1968, there has been a relatively steady increase in these cases, with the most recent period (1983 to 1988) having more than 90 such cases reported (an increase from 1963 of approximately 102 percent).[4] *Vaca v. Sipes*,[5] which crystallized the union's duty of fair representation in arbitration, also coincides in time with this increase.[6]

If this concept of equal treatment has been, and increasingly continues to be, at the center of determining just cause, then an understanding of how arbitrators deal with it across different case situations becomes critical to our understanding of arbitrator decision making. Are arbitrators inclined to apply the test of equal treatment without qualification, so that a

[1] See *Enterprise Wire Co.*, 46 LA 359 (Daugherty, 1966) and Adolph M. Koven and Susan L. Smith, *Just Cause: The Seven Tests* (San Francisco: Kendall/Hall, 1985).

[2] See, for example, a recent survey conducted by the American Civil Liberties Union, *Liberty at Work: Expanding the Rights of Employees in America* (1988).

[3] *CCH ARB* Vols. 61-1 through 88-2; *BNA LA* Vols. 11 through 90.

[4] Although it is very difficult to make any conclusive statements regarding the relationship discussed here, given such rough data, we do feel that intuitively there most likely has been a sensitizing effect associated with the concept of disparate treatment in arbitration since Title VII.

[5] Originally reported as *Owens v. Vaca*, (Kansas City Ct App) 51 LC ¶ 19,613; rev'd sub nom *Vaca v. Sipes*, 386 US 171 (SCt 1967), 55 LC ¶ 11,731.

[6] See J. T. McKelvy, editor, *The Changing Law of Fair Representation* (Cornell University: ILR Press, New York State School of Industrial and Labor Relations, 1985). See particularly Chapter X, Rabin, "Fair Representation in Arbitration."

finding of disparate treatment automatically signifies that just cause did not exist? Or, on the other hand, do arbitrators who are confronted with disparate treatment consider individual and/or situational circumstances that may justify different penalties for different employees who commit similar violations of a company rule?

Elkouri and Elkouri point out: "It is generally accepted that enforcement of rules and assessment of discipline must be exercised in a consistent manner; all employees who engage in the same type of misconduct must be treated essentially the same, unless a reasonable basis exists for variations in the assessment of punishment (such as different degrees of fault or mitigating or aggravating circumstances affecting some but not all of the employees)."[7]

In more specific terms, Arbitrator Burton Turkus articulated his position regarding this idea of separate but consistent treatment. "The requirement to apply discipline consistently and even-handedly does not imply nor impose the achievement of a rigid, mechanical uniformity of treatment to a mathematical certainty regardless of the differences in background or circumstances of particular cases. What is critically essential is consistency of purpose, integrity, and fairness in the disciplinary penalty to the end that it is the gravity of the offense or misconduct in the setting and under the circumstances encountered that determines the penalty—not the whim, caprice, or arbitrary rule of those who administer it."[8]

If the background or circumstances of a case can serve as critical factors in requiring or justifying disparate treatment situations, the question becomes: What background and circumstances do arbitrators consider relevant and what impact do they have on the outcomes of arbitration cases?

Purpose of Study and Content Analysis

The central purpose of this study is to examine how arbitrators deal with the issue of disparate treatment when deciding just cause. To do this, however, first requires an identification of the factors arbitrators view as constituting disparate treatment. Secondly, given a definition and finding of disparate treatment, an examination of the specific individual and situational factors arbitrators consider when confronted with the question of reducing the employer's penalty or finding justification for the employer's position was required.

Using cases published in CCH *Labor Arbitration Awards* and *BNA Labor Arbitration Reports*, 192 arbitration awards have been analyzed for the period covering August 1963 to August 1988.[9] The cases, which were decided by 153 different arbitrators, were selected on the basis of whether or not they could be considered as discipline cases involving a claim that the employers' actions consisted of disparate treatment.[10] Given that the claim of disparate treatment is usually one of several issues in a case, the only cases included were those in which the claims were significant enough to be addressed and ruled on by the arbitrators.[11]

With disparate treatment being the key criterion for selection into the sample, it should be noted that the concept of disparate treatment can be divided into two

[7] Frank Elkouri and Edna Asper Elkouri, *How Arbitration Works*, 4th ed. (Washington, D.C.: Bureau of National Affairs, 1985), p. 684.

[8] *Trans World Airlines*, 57 LA 99.

[9] *CCH ARB* Vols. 63-1 through 88-2; *BNA LA* Vols. 41 through 91.

[10] Because of some rather unique aspects associated with cases involving illicit strikes or slowdowns, these cases were not included in this sample.

[11] This also means that the actual effects of factors identified as being relevant to the issue of disparate treatment cannot be statistically determined, since the level of analysis employed in the study does not control for all the other issues included in the cases.

types (although they are not necessarily mutually exclusive). First, there is the lax enforcement of a rule that often comes about as a result of the employer's failure to enforce the rule consistently or uniformly. Secondly, disparate treatment can consist of differences in the penalties imposed on employees who engage in the same type of misconduct. In this regard, even if a rule is consistently enforced (e.g., some action is taken on all known violators), the penalties imposed may vary to the degree that disparate treatment occurs. Both types of cases were included in the sample.

The content analysis performed on these cases consisted of identifying and coding three categories of data. First, the case characteristics were captured, which primarily included the type of employee misconduct, employer discipline, and arbitration award. Second, the issue of disparate treatment was examined to identify what type of disparate treatment was claimed and how the arbitrator ruled on the claim. Finally, given that disparate treatment was found, the individual and situational circumstances considered in the cases were recorded.

Since many of these individual and situational factors can often be viewed as supporting both management and union positions (across different cases), we offer a definition of terms that will be used throughout this study to clarify the distinction. First, the term "mitigating circumstances" will be used to refer to factors that appear to warrant a reduced penalty in relationship to the penalties received by other employees. "Aggravating circumstances" will be used to relate to factors when they appear to serve as justification for the employer's imposition of a more severe penalty against a grievant.

Case Characteristics

The employee misconduct involved in these cases is grouped into the following categories.

Insubordination includes failure or refusal to comply with a management order and abusive behavior toward management personnel.

Attendance includes absenteeism, tardiness, leaving/quitting work early, excessive breaks, and returning late from breaks.

Dishonesty or illegal activities include theft, illegal gambling, falsification of records, improper use of company property, selling weapons to co-workers, and bringing guns to work.

Drugs and alcohol include any infraction involving the use or possession of drugs and alcohol, on or off the work premises.

Fighting and failure to get along with co-workers includes heated disputes, aggressive misconduct, and individual or group antagonisms.

Work performance includes poor performance, incompetence, carelessness, and negligence.

Other misconduct includes infractions associated with horseplay, sleeping on the job, dress code, and other miscellaneous rules and policies.

While the other misconduct category constituted almost one quarter of all cases (23 percent), it is made up of a number of different rule violations. The attendance category, at 17 percent of the cases, is second, closely followed by the fighting or failure to get along with co-workers category at 16 percent. The other three categories, including insubordination, dishonesty or illegal activities, and work performance, each accounted for 11 percent of the case total.

Discharge was involved in 130 or 68 percent of the 192 cases. This discipline was upheld in 42 (32 percent) and reduced in 69 (53 percent) of these cases; the grievance was upheld in the remaining 19 cases (15 percent). Suspension was imposed in 47 of the cases (24 percent), with this discipline upheld 20 times (43

percent) and reduced 12 times (25 percent); the grievance was upheld in the remaining 15 cases (32 percent). Warnings were given in four cases (two percent), with the discipline being upheld in one of these cases and the grievance in the other three. The remaining 11 cases (six percent) involved other disciplines, such as demotion, transfer, loss of bonus, etc. Discipline was upheld in five of these (45 percent), reduced in two (18 percent), and the grievance was upheld in the other four cases (4 percent).

Overall, 83 disciplines were reduced by arbitration (43 percent), 68 disciplines were upheld (35 percent), and the grievance was upheld in the remaining 41 cases (21 percent). Although the results are varied, they generally show that the arbitrators tended to: (1) compromise on discharges (but with a leaning towards upholding the discipline); (2) take more definitive positions (either upholding the discipline or grievance) on suspensions and other cases; and (3) find for the grievant when warnings were involved.

Disparate Treatment

As mentioned previously, disparate treatment consists of two types: lax enforcement and inconsistent penalties. Since one or both of these were claimed in all the cases selected, we first looked at how arbitrators ruled on each of these claims.

In 119 cases (62 percent), the issue of lax enforcement was claimed, and the arbitrators agreed with the grievants in 88 of these cases (74 percent). In the other 31 cases (26 percent), the arbitrators found that the rules had been consistently and/or uniformly enforced.

The issue of inconsistent penalties was raised in 162 cases (84 percent). Arbitrators ruled in 146 of these cases (90 percent) that inconsistent penalties were applied; consistent penalties were found to have been applied in the remaining 16 cases (10 percent). The total number is greater than the 192 misconduct cases examined, because some cases involved both issues.

The findings of lax enforcement or inconsistent penalties do not automatically translate into an arbitration award favoring the grievant (e.g., the discipline being reduced or the grievance upheld). In fact, of a total of 124 cases in which the arbitrators upheld the grievance or reduced the discipline, only 26 (21 percent) were decided solely on the basis of finding lax enforcement and/or inconsistent penalties. This does not mean, however, that these factors, in and of themselves, were not given great weight. Rather, it reflects the fact that in the vast majority of such cases, arbitrators use a number of other related factors to give meaning and definition to the disparate treatment issue. Among these other factors are the following.

1. **Does a rule exist?** Whether or not a rule exists will affect employees' understanding of what is and is not acceptable behavior. Where no rule exists and a practice develops permitting the conduct, a subsequent disciplinary action may be viewed as disparate treatment. This was a factor considered by arbitrators in 101 of the cases studied. In the 93 cases where rules were found, discipline was upheld in 34 (37 percent) and reduced in 35 (38 percent). The grievance was upheld in 24 (26 percent). Of the eight cases where there was no rule, the grievance was upheld in five (62 percent) and discipline was reduced in the other three.

2. **Has the company attempted to establish or reinstitute a rule?** When a company has ignored or condoned certain conduct and then tries to establish, change, or revive a rule that prohibits the conduct, the disciplinary action that ensues may be determined to constitute disparate treatment. Of the 12 cases involved here, discipline was upheld once (eight percent), reduced five times (42 percent), and the grievance was upheld six times (50 percent). Of the 11 cases in which the company attempted to estab-

lish or reinstitute a rule and the discipline was reduced or the grievance upheld, ten of them turned on the fact that the rule had not been adequately communicated. One of these cases involved a decision by Arbitrator Samuel Nicholas, in which he stated that "the sudden enforcement of a rule where nonenforcement has been its chief characteristic (i.e., dormant) for over 5 years warrants the rule being treated as if it were a newly devised policy. As such, a copy of management's decision to enforce the rule to its strictest level should have been posted for the drivers' knowledge and review, together with a copy being forwarded to the union."[12]

3. Is the rule unambiguous? Even if there is a rule (new or longstanding), it should be unambiguous, so that employees can be expected to understand how their conduct violated the rule and how discipline may be imposed. In nine cases, the rule was found to be clear. Discipline was upheld in six cases (67 percent), reduced in one case (11 percent), and the grievance was upheld twice (22 percent). In 14 cases, the rule was found to be ambiguous, and here discipline was reduced in eight cases (57 percent) and the grievance upheld in the other six (43 percent).

4. Has the rule been adequately communicated (including those reinstituted)? Regardless of whether or not a rule is unambiguous, it first must be adequately communicated to the employees, so that they know it exists or that it is now going to be enforced. The rule was found to have been adequately communicated in 13 cases. Discipline was upheld in 10 of these cases (77 percent) and reduced in three (23 percent). However, in the 16 cases where the rule was not adequately communicated, discipline was upheld only twice (12 percent), reduced six times (37 percent), and the grievance was upheld eight times (50 percent).

5. Does common sense override any lack of clarity or communication? Is the situation such that one should simply know that certain behavior will not be tolerated, regardless of whether or not there is a unambiguous and adequately communicated rule? There were two cases that fit this category, and in each the discipline was upheld, even though it was found that the employer had not adequately communicated the rule. One situation involved fighting and the other exploding fireworks, and both arbitrators felt that common sense should have been a determining factor.

Finally, the cases that involved rules not being consistently enforced or penalties not being consistently imposed appear to result in some interesting outcomes. In 17 of the 88 cases (19 percent) in which the rules were found not to be consistently enforced, arbitrators nevertheless upheld the discipline. In 39 of these cases (44 percent), the discipline was reduced, and the grievance was upheld in the other 32 (36 percent). In the 31 cases where the rule was found to have been consistently applied, discipline was upheld 19 times (61 percent), reduced 10 times (32 percent), and the grievance was upheld twice (six percent).

In 45 of the 146 cases (31 percent) in which arbitrators found that penalties were not consistently imposed, they nevertheless upheld the discipline. However, in 76 of those cases (52), the discipline was reduced, and the grievance was upheld in the other 25 (17 percent). In the 16 cases where the arbitrators found that the penalties had been consistent, 13 (81 percent) upheld the discipline, two (13 percent) reduced it, and the remaining decision (six percent) upheld the grievance.

Situational Considerations

A review of these cases reveals that the next step in examining claims of disparate treatment deals with the issue of "similarity." In other words, once the union

[12] *Georgia-Pacific Corporation*, 89 LA 1080.

makes the charge of disparate treatment, it then has the burden of proving that the comparison cases it is relying on are actually the same as, or similar to, the case at hand. Arbitrator Jonathan Dworkin explains this with the following statement. "The claim of disparate treatment constitutes an affirmative defense. In order to prevail, the union bears the responsibility of producing sufficient evidence to demonstrate that an aggrieved employee was in fact singled out by management and subjected to significantly harsher treatment than had been imposed upon other employees under the same or similar circumstances."[13]

The first and most basic issue related to similarity asks the fundamental question: Is the misconduct that is being compared actually similar to the present case? If not, is it because of different levels of employee responsibility, guilt (particularly in cases involving fighting and abusive behavior), or factual situations? Of the 17 cases involving discipline that was upheld by the arbitrator even though inconsistent enforcement of rules was found, 15 (88 percent) were compared to cases that were not similar because of differing factual situations (79 percent), differing levels of guilt (16 percent), or differing levels of responsibility (five percent). Of the 45 cases that involved inconsistent penalties, but which were nevertheless upheld, inappropriate comparisons were found in 34 (76 percent), of which differing factual situations were found in 71 percent, differing levels of responsibilities in 45 percent, and differing levels of guilt in 21 percent of the cases. As is evident, differing factual situations accounted for most of the findings of dissimilarity.

Although the lack of similarity appeared to be rather decisive in its impact on disparate treatment claims, this does not mean that the same level of impact will be granted to the "presence" of similarity. In other words, a preliminary finding that the misconduct in question is similar does not necessarily mean that arbitrators always expect consistent enforcement of the rules or equal penalties. Other factors that could justify different degrees of enforcement and penalties may be found in the context of either situational or individual factors.

There are ten specific situational considerations that we identified and examined in this study. These factors relate to the general conditions associated with the case, particularly the actions and circumstances surrounding the employer and the business.

1. **Does the contract allow for disparate treatment?** This relates to those situations in which the employees in question can contractually be treated differently from the employees they are comparing themselves with. Other cases may involve situations where the contract states that each discipline case must be handled on a case-by-case basis, without any comparisons to other cases. In two cases, the arbitrators found that the contracts clearly allowed for different employees to be treated differently (both involved refusal to follow work orders).[14] In two other cases involving this factor,

[13] *Elwell-Parker Electric Company*, 82 LA 327. See also, Arbitrator Richard Kanner, *Pennwalt Corporation*, 89 LA 585 "The union contends that the employer is guilty of disparate treatment ... the union bears the burden of proving such an affirmative defense. In doing so, it must prove the element of similarity" (p. 586). It should be noted that these cases were the only two in the sample to explicitly state that a union must prove its affirmative defense of a disparate treatment claim. Given this small number of cases, and the traditional practice of the employer having the burden of proof in discharge and discipline cases, it is unclear the extent to which arbitrators generally treat the argument of disparate treatment as an affirmative defense rather than as part of the claim of failure to apply just cause. If, however, the burden of proof shifts to the union after making such an argument, the question then becomes one of how much of an evidentiary burden the union must meet. Of course, the union would need to have some evidence suggesting a basis for its claim of disparate treatment, but since the records of discipline were generally in the hands of management, how much of a factual claim was necessary to be made by the union to put the burden back on the employer to disprove the allegation?

[14] *Fox Manufacturing Company*, 52 LA 7 (Marshall, 1969) and *Midland Ross Corp.*, 68 LA 1010 (Simon, 1977).

the arbitrators held that the contracts allowed the company to handle each employee in an attendance program on an individual basis as the need arose.[15] In these four cases, the discipline was upheld. In the one case in which it was specifically noted that the contract did not allow for disparate treatment, the grievance was upheld, the arbitrator noting that the contract recognized the importance of prohibiting disparate treatment.[16]

2. Was the employer aware of the disparate treatment? The issue here looks at whether the employer knew or should have known of prior violations, in order to determine if the employer waived its right to punish an employee who was detected. In one case the arbitrator ruled that the presence of disparate treatment did not make a discharge discriminatory if the employer had no specific knowledge of prior employee misconduct, and the discipline was upheld.[17] In the other two cases involving this factor, employer awareness of prior cases in which the employees received no punishment was viewed as important, since it sent a message to all employees that such behavior would be tolerated; in one of these cases there was a reduction of discipline and the grievance was upheld in the other.[18]

Safety, Productivity, Law Enforcement, and Morale

In order for an employer to justify disparate treatment, the business necessity factors of safety, production efficiency, and cooperation with law enforcement officials appear to have a direct influence on how arbitrators rule.

3. Was the employer's disparate treatment justified on the basis of safety? This addresses those situations where the disparate treatment may be related primarily to the use of safety equipment or to horseplay. The rules pertaining to these areas may be applied differently to individual employees, depending on the nature and proximity of the safety hazards involved. This issue arose in six cases, and in five of those awards the discipline was upheld; in the other the grievance was upheld. In two cases where safety was noted as not being involved, the grievance was upheld in both instances.

For example, in cases in which employees set off firecrackers at the work site, arbitrators found that not only was such behavior contrary to common sense,[19] but also the safety hazards were not eroded by a mere inability to pinpoint wrongdoers.[20] Moreover, given the legitimate interest of management to provide for a safe workplace, a more severe penalty was justified, since a lesser penalty to another employee in a prior case did not prevent further occurrences.[21] Other such cases examine the extent of hazardous conditions associated with the employee misconduct to justify the disparate treatment.[22]

It should be noted that the reference made to preventing further occurrences may be something strictly related to the safety issue. In another case involving the disparate treatment of an employee drinking on the job, Arbitrator John Keltner ruled that "the company has no justification for making a martyr out of one employee in order to bring the rest into line."[23]

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[15] *North River Energy Company*, 88 LA 447 (Witney, 1987) and *Eastern Airlines. Inc.*, 87-2 ARB ¶ 8363 (Dworkin, 1986).

[16] *Freeman United Coal Mining Company*, 83 LA 776 (Creo, 1984).

[17] *Decar Plastics Corp.*, 65-1 ARB ¶ 8413 (Greenwald, 1965).

[18] *Owens-Corning Fiberglass Corp.*, 70 LA 916 (Williams, 1978) and *Joe Wheeler Electric Membership Cooperative*, 89 LA 51 (Yancy, 1987).

[19] *Midland Ross Corp.*, 65 LA 1151 (Dallas, 1975).

[20] *Westinghouse Electric Corp.*, 47 LA 941 (Hebert, 1966).

[21] Cited at note 19 above.

[22] *National Brush Company*, 76-2 ARB ¶ 8377 (Grant, 1976); *Muskin, Inc.*, 89 LA 297 (DiLauro, 1987); *Tecumseh Corrugated Box Company*, 90 LA 837 (Fullmer, 1988).

[23] *Libby, McNeil & Libby, Inc.*, 70 LA 1028.

In the one case in which a safety hazard was present and the grievance was also upheld, the arbitrator reasoned that while the employer has discretion in administering safety rules in the absence of contractual restrictions, this discretion was subject to the limitation that the rules must be fairly and evenhandedly enforced.[24]

4. Was the employer's disparate treatment justified on the basis of production efficiency? Assume that a group of employees engage in concerted misconduct and that all are equally guilty. Can the employer suspend or discharge only some of the guilty employees, fearing that to discharge them all would impair productivity? Three awards answered this question in the affirmative and upheld the discipline. However, in two cases where the arbitrator found the answer to be in the negative, the discipline was reduced, and in two others the grievance was upheld.

In the cases involving the issue of production efficiency, Arbitrator Louis Yagoda probably best described the positions taken by the arbitrators examined in this study when he stated that "it is my opinion that management is not under an obligation to apply equal punishment to all transgressors, if to do so would cause injury to the operations."[25]

5. Was employer's disparate treatment justified on the basis of cooperating with law enforcement officials? This may occur when more than one employee is involved in an illegal activity, and the employer does not discipline all of them at the same time. The employer argues that by not disciplining one or more employees, the illegal activities may continue and the police investigation should result in more information and arrests. Arbitrators agreed and upheld the discipline in the three cases where this issue arose.

Although the issue of cooperating with law enforcement officials does not arise often, it appears to carry a good deal of weight when it does. In each case where this issue surfaced, the arbitrators simply spoke in terms of the employer having a "valid reason"[26] or "good cause"[27] to justify the disparate treatment. In essence, the nature of the illegal activity (gambling and drugs) seemed to warrant the finding that the disparate treatment, balanced against its goal of broadening the investigation, was neither unreasonable, arbitrary, capricious nor discriminatory.[28]

6. Would reinstatement of the grievant create a threat to plant morale or discipline? Related primarily to issues of fighting (safety) and work unit performance (production efficiency), the threat to plant morale or future discipline may be such that disparate treatment is justified. In the two cases where this issue was addressed, the arbitrators found it not to be persuasive; discipline was reduced in one instance and the grievance upheld in the other. In these cases, it was merely determined that the safety or production concerns either were not present[29] or were groundless.[30]

Intent, Degree, and Progressivity

7. Was there specific intent by the employer to show partiality in treatment? This points to the relevance associated with employer intent to apply disparate treatment, as compared to the effect of the employer's actions. Not surprisingly, in the two cases where the arbitrators found an intent to show partiality, discipline was reduced in one instance and

[24] *Lynchburg Foundry Company*, 64 LA 1059 (Coburn, 1975).

[25] *Interchemical Corp.*, 48 LA 124.

[26] *Bethlehem Steel Company*, 45 LA 646 (Porter, 1965) and *Bethlehem Steel Company*, 45 LA 1007 (Porter, 1965).

[27] *Hussman Refrigerator Company*, 82 LA 558 (Mikrut, 1984).

[28] *Ibid.*

[29] *Caterpillar Tractor Company*, 44 LA 87 (Larkin, 1965).

[30] *Budd Company*, 69-2 ARB ¶ 8720 (Keefe, 1969).

the grievance upheld in the other. However, in the two cases where the arbitrators found no intent to show partiality, the outcome was the same. These results point to the conclusion that this issue is probably irrelevant to most arbitrators. In other words, it seems that the actual presence of disparate treatment was the only issue of concern in these situations, given that the case outcomes were the same whether or not there was a finding of employer intent.

8. Was the extent of disparate treatment de minimus? In other words, was the difference in treatment so minor that it could not actually be described as unequal? In four cases, this question was answered affirmatively, and in all of them the discipline was reduced. In these cases, the arbitrators found that the distinctions in discipline were de minimus and did not warrant a ruling of discrimination. Two of the cases involved differences of only one or two days in suspensions.[31] In another case, a two-day suspension was compared to a warning.[32]

9. Was the extent of disparate treatment so great it wiped out small differences in levels of guilt? The focus here was on the relationship between the different penalties imposed and the degree of fault attributed to the various employees. These cases highlight how arbitrators may find that extreme differences in the penalties imposed on employees can negate particular factors that may otherwise be considered justification for disparate treatment. In the four cases identified, two involved fighting among employees. In both of these cases, the arbitrators ruled that while there might have been a reasonable basis for assessing more severe penalties on some the grievants, the disparity between a discharge and a brief suspension was so great as to amount to unequal treatment.[33] The third case dealt with two employees drinking on the job. One received amnesty for his truthful testimony against the other. Again, the arbitrator ruled that the discrepancy between the handling of the two employees was simply too great.[34] In the final case, the discrepancy was between a seven-day suspension and a discharge.[35]

10. Did the employer apply progressive discipline? While isolated incidents of misconduct may be compared, the history associated with each employee's behavior, and the employer's response to that behavior, can serve as the basis for different treatment. In 14 cases where progressive discipline was employed, the discipline was upheld in 13 instances and reduced in only one. In nine cases where progressive discipline was not employed, the arbitrators upheld only one instance of discipline, while reducing five others and upholding the grievance in one case.

In cases where this issue arose, arbitrators generally held that the history of an employee's misconduct was relevant justification for treating employees differently. The one case in which there was no progressive discipline, but the discipline was nevertheless upheld, involved an employee found in possession of drugs on company premises. The rationale that the arbitrator offered was not necessarily related to the fact that drug offenses should be treated differently from other major violations, but rather to the fact that there had never been another such case in that company to which a comparison could be made.[36]

Individual Circumstances

Six factors were identified pertaining to the individual employee that may or

[31] *Hartman Electrical Mfg. Co.*, 67-1 ARB ¶ 8250 (Dyke, 1967) and *Pacific Telephone & Telegraph Company*, 67 LA 45 (Barsmian, 1976).

[32] *Interchecks, Inc.*, 88 LA 1297 (Weiss, 1987).

[33] *Briggs & Stratton Corp.*, 57 LA 441 (Gunderman, 1971) and *Tri-City Plastics, Inc.*, 80 LA 544 (Larkin, 1983).

[34] *Browning-Ferris Industries of Ohio, Inc.*, 77 LA 289 (Shanker, 1981).

[35] *Schnuck Markets, Inc.*, 73 LA 829 (Holman, 1979).

[36] *Monfort Packing Company*, 66 LA 286 (Goodman, 1976)

may not make him or her different from others who committed similar rule violations. All of these individual circumstances seemed to carry a good deal of weight with the arbitrators. A clear articulation of this can be traced to Arbitrator Carroll Daugherty even before he codified his seven tests of just cause in *Enterprise*.[37] In *Grief Brothers Cooperage Corporation*, he points out that, "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."[38]

1. Was the grievant's work performance affected by misconduct? The theory here was that if job performance can serve as a critical determinant in most human resource decisions, then it may at times be viewed as a factor that could justify different treatment of employees in discipline cases. Three cases noted that employees' work performance had not been affected by their misconduct (two involving drugs/alcohol and the other insubordination), and in all three the discipline was reduced. The arbitrators clearly considered this factor, but they found that the employers had not adequately proved an impairment of work performance. Notwithstanding these findings, the discipline was only reduced in each case, not completely overturned.[39]

2. Did the grievant have long service with the employer? There were 20 cases in which the employee was identified as having been with the employer for a relatively long time. In 12 of these cases, the discipline was reduced, and in the other eight the grievance was upheld. In the three cases where it was noted that the employee did not have long service with the employer, the discipline was upheld each time.

3. Did the grievant have a good work record? Arbitrators found that the grievant had a good work record in 23 cases. In 14 of these the discipline was reduced and in the other nine the grievance was upheld. In five cases it was found that the grievant did not have a good work record. Discipline was upheld in three of those cases and reduced in the other two.

4. Did the grievant have a good disciplinary record? In 11 cases, the arbitrator found that the grievant did have a good disciplinary record, in nine of those the discipline was reduced and in the other two the grievance was upheld. In the eight cases where it was noted that the grievant did not have a good disciplinary record, the discipline was upheld four times, reduced three times, and the grievance upheld once. In this last case, where the employee was charged with theft, the arbitrator apparently enforced a strict application of the disparate treatment test. He pointed out that the contract precluded reliance on "prior disciplinary warnings for minor offenses in connection with [disciplining] serious offenses." He then held that reliance upon such a record could not serve as an adequate nondiscriminatory basis for rebutting a prima facie case of disparate treatment.[40]

5. Did the grievant have a good attendance record? The issue of attendance was found to be relevant primarily in cases where attendance was either directly or indirectly associated with the misconduct. Of the eight cases in which the employee was found not to have a good attendance record, five dealt with the poor attendance itself; two others involved poor work performance and drug/alcohol use. With regard to misconduct that had no relation to poor attendance, the attendance record appeared to

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[37] Cited at note 1 above.

[38] 64-2 ARB ¶ 8586 (1964).

[39] *National Grocers Co., Ltd.*, 57 LA 637 (Weatherill, 1971), *Canteen Corp.*, 86 LA 378 (Hilgert, 1986), and *Merced Irrigation District*, 86 LA 851 (Riker, 1986).

[40] *Weyerhauser Company*, 78 LA 1109 (Gould, 1982).

play virtually no role as either a mitigating or aggravating circumstance in disparate treatment cases.

Factors 2 through 5 address the employment background circumstances associated with the grievant. Presumably, an employee who has been a good performer for a number of years, and who has had no prior disciplinary or attendance problems, may be treated differently from another employee who commits the same violation but whose employment background is the opposite.

6. Was the grievant receptive (open, cooperative) to criticism? How employees respond to discussions with management regarding their misconduct may signify different levels of willingness and ability for them (the employees) to change behaviors. In turn, management may take different disciplinary actions in order to achieve comparable outcomes (i.e., no future misconduct). In the three cases where the grievant was found to be receptive to criticism, the discipline was reduced. In the five cases where the employee was not amenable to criticism, the discipline was upheld.

A comparison of the outcomes involving individual and situational circumstances indicates that the mitigating or aggravating effects of these factors were well accepted by arbitrators. When the situational considerations were determined to be mitigating, the grievance was upheld 29 percent of the time, and discipline was reduced 48 percent of the time but upheld only 23 percent of the time. When the same factors were determined to be aggravating, the discipline was upheld 51 percent of the time and reduced 31 percent of the time, while the grievance was upheld only 18 percent of the time.

The results for the individual circumstances were similar but more dramatic. While the grievance was upheld in 29 percent of the cases in which the factors were mitigating and the discipline reduced in 66 percent of the cases, discipline was upheld in only five percent of the cases. On the other hand, where these factors were found to be aggravating, discipline was upheld in 77 percent of the cases but reduced in only 19 percent, and the grievance was upheld in only 5 percent of the cases.

Conclusion

While the presence of disparate treatment, as reflected by managements' lax enforcement of rules and/or inconsistent penalties, may pose a serious threat to disciplinary due process, the impact it has on the outcome of arbitration cases was not without qualification. First, there were certain related factors that gave meaning and definition to the claims of disparate treatment, all of which served to give the arbitrator a clearer impression of the prima facie aspect to the claim.

Following this preliminary examination and finding that there was disparate treatment, the union must then prove the "similarity" issue between the case at hand and its comparison cases. Failure to show similarity usually resulted in an arbitrator finding of no disparate treatment. The presence of similarity, however, did not appear to have the same direct impact on case outcomes. This was found to be the result of further consideration being given to the various situational and individual circumstances identified in the study. These circumstances were viewed by arbitrators as providing appropriate considerations that either warrant a reduced penalty for the grievant (mitigating circumstances) or employer justification for a more severe penalty (aggravating circumstances).

As the analysis of the case outcomes associated with these circumstances revealed, arbitrators generally gave greater weight to such factors when they were viewed as aggravating, as opposed to when they were viewed as mitigating. One possible explanation for this apparent imbalance may be due to the recognition by arbitrators that powers of leniency or

clemency reside in management.[41] As such, the upholding of an employer action given the presence of aggravating circumstances was a likely occurrence, whereas only a reduction in the discipline (not total clemency as in upholding the grievance) would be the result when there were mitigating circumstances. In a related sense, it may also be that management considered mitigating circumstances at the time of imposing the discipline in light of the comparative cases that the union offered to prove disparate treatment. An explanation to this effect, combined with the existence of aggravating circumstances, would most likely provide a strong incentive for arbitrators to affirm managements' actions.

In essence, it would appear that if management comes to a disparate treatment case prepared to present aggravating circumstances or to refute or redirect the impact of mitigating circumstances, the idea of separate but consistent discipline also becomes a "core concept" of arbitrators' decisions regarding disciplinary due process.

[The End]

Jai Alai Strike Settled

Alan Balfour, who wrote an article on the Jai Alai strike in the July issue, informed the LABOR LAW JOURNAL that the strike has been settled sooner than expected. "As it turns out," he writes, "the issues have been resolved surprisingly quickly. The fronton owners and the International Association of Jai Alai Players reached an out-of-NLRB settlement. The owners agreed to recognize the union, despite public vows never to do so voluntarily, and have agreed to a three-year contract. The owners also agreed to rehire strikers who still have proper visas. Unfair labor practice charges by both sides have been dropped. This should wrap up the case," he concludes.

[41] Cited at note 7 above, p. 669.

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