This file contains pieces of the Discussion part of a number of decisions I've written over the years. I often come back here to avoid reinventing the wheel. In a number of these, I copied not only general statements but also parts of the explanations leading to the decision. Those explanations are case specific, of course. I have found them useful to re-start my thinking process regarding whatever issue is involved. All of the Federal cases predate the Trump Administration.

Following are variations on how I start the Discussion section of every disciplinary grievance. What I think is most important is to begin with the contractual phrase – cause, just cause, proper cause – whatever it is. Make clear that you are interpreting and applying a provision of the CBA and not your own sense of justice. Throughout, substitute "cause", "just cause", "proper cause", "just and sufficient cause", etc.

The stipulated issues to be resolved in this arbitration are whether the discharge of the Grievant was for just cause and, if not, what should be the remedy. The Arbitrator finds the discharge of the Grievant was/was not for just cause and therefore denies/grants Grievance no. …. The Arbitrator's reasoning follows.

Article …, Section … of the … Agreement provides that the Company may discharge employees "for cause". It is well established in labor arbitration that where, as in the present case, an employer's right to discharge or suspend an employee is limited by the requirement that any such action be for cause, the employer has the burden of proving that the suspension or discharge of an

employee was for cause. Therefore the Company had the burden of persuading the Arbitrator that discharge of the Grievant was for cause.

“Just cause” is a term of art in collective bargaining agreements. "Just cause" consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the employee engaged in the conduct for which he/she was discharged or disciplined. Other elements include a requirement that an employee know or reasonably be expected to know ahead of time that engaging in a particular type of behavior will likely result in discipline or discharge, the existence of a reasonable relationship between an employee's misconduct and the punishment imposed and a requirement that discipline be administered even-handedly, that is, that similarly situated employees be treated similarly and disparate treatment be avoided.

“Just cause” is a term of art in collective bargaining agreements. “Just cause” consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the employee engaged in the conduct for which he/she was discharged or disciplined. Other elements include requirements:

1. that an employee know or reasonably be expected to know ahead

of time that engaging in a particular type of behavior will likely result in discipline or discharge,

2. that there is a reasonable relationship between an employee's misconduct and the punishment imposed and
3. that discipline be administered even-handedly, that is, that similarly situated employees be treated similarly and disparate treatment be avoided.

Article Fourteen of the 1996 Agreement, quoted in pertinent part in another part of this Opinion and Award, limits the Company's right to discharge bargaining unit employees to situations wherein such an action is for proper cause. It is well established in labor arbitration that where an employer's right to discharge employees is so limited, the employer has the burden of proving that the discharge of an employee was for proper cause. Therefore the Company had the burden of persuading the Arbitrator that the provisional discharge of the Grievant was for proper cause.

"Proper cause" is a term of art in collective bargaining agreements. "Proper cause" consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the employee engaged in the conduct for which he/she was discharged or disciplined. Having alleged that it terminated the Grievant because he was not

totally disabled on or about May 26, the Company was required to persuade the Arbitrator that the Grievant was not then totally disabled.

As noted above, just cause requires that an employer administer discipline even handedly. The Union contends the evidence shows discharge of the Grievant constituted disparate treatment. The Arbitrator respectfully disagrees. The essence of disparate treatment is differently disciplining similarly situated employees. But administering different punishments to different employees does not necessarily constitute disparate treatment; on the contrary, if all other elements were equal, one would expect an employee who had engaged in serious misconduct to be disciplined more rigorously than one who had committed a minor transgression. Thus, in the present case, it was entirely proper for the Company to discipline the Grievant and the employee who was displaced from the ammunition truck differently. Both engaged in misconduct, but the Grievant's was far more serious than that of the other employee. The evidence does not show any prior situation in which an employee violated ammunition transportation and storage regulations as flagrantly and blatantly as the Grievant did on July 21, 1994. Furthermore, much of the Union's evidence regarding disparate treatment related to employees' having used Government vehicles to obtain food from retail establishments. But the witnesses who testified about those incidents also said that the practice stopped when the Company began to pay closer attention and that happened before July 1994. In short, the

evidence does not show that discharge of the Grievant constituted disparate treatment.

Finally, to determine whether the Grievant's termination was supported by just cause, the Arbitrator must determine if the Grievant's conduct warranted discharge. But an arbitrator's discretion to substitute his/her judgment regarding the appropriate penalty for that of management is not unlimited. Rather, if an arbitrator is persuaded that the discipline imposed was within the bounds of reasonableness, he/she may not impose a lesser penalty. This is true even if the arbitrator would likely have imposed a different penalty in the first instance. On the other hand, if an arbitrator is persuaded the punishment imposed by management was beyond the bounds of reasonableness, he/she must conclude that the employer exceeded its managerial prerogatives and impose a reduced penalty. In reviewing the discipline imposed on an employee, an arbitrator must consider and weigh all relevant factors including the employee's seniority and prior work record and the seriousness of the misconduct. As indicated above, the misconduct for which the Grievant was discharged was very serious. The Grievant exhibited a total disregard for the dangers involved in transporting and securing live ordnance. Moreover, the Grievant compounded his misconduct by lying and by threatening co-employees for having done what was required of them, that is, having reported a serious breach of ordnance security. Under the circumstances, the Grievant's seniority and good record are not sufficient to

outweigh the factors favoring the Company's discharge decision. Certainly, the Arbitrator cannot conclude that discharge was so excessive a punishment as to be unreasonable and therefore beyond the Company's managerial prerogatives.

As stated above, just cause requires that there be a reasonable relationship between an employee's misconduct and the punishment imposed for that misconduct. But an arbitrator does not have unlimited discretion to substitute his/her judgment for that of management about the magnitude of a penalty given. Rather, an arbitrator must determine if the penalty imposed by management was within the bounds of reasonableness. If the arbitrator is persuaded the punishment was so excessive as to be beyond that limit, he/she not only may but must reduce the punishment. On the other hand, if an arbitrator is persuaded that the punishment imposed was reasonable --- even if the arbitrator would have imposed a less severe punishment if he/she had the power to do so --- the arbitrator must find the punishment was within the employer's managerial discretion and for just cause. In reviewing the reasonableness of punishment imposed, an arbitrator must look at all relevant circumstances including the seriousness of the offense and the employee's record.

In the present case the Grievant's misconduct was very serious. By their very nature guns have the potential to cause serious and indeed mortal injuries. Except in the hands of trained security personnel, guns have no place in an industrial situation. Moreover, the Grievant compounded his offense by lying to

Company officials investigating the incident and eventually to this Arbitrator. The Grievant worked for the Company for about 9 years, and there being no evidence to the contrary, the Arbitrator must assume the Grievant's record was essentially free of discipline. That the Grievant was a good worker is undisputed. Welch testified to that specific point. Welch also testified that but for the Grievant's having brandished a gun on February 9, Welch would not have discharged the Grievant and had need for his services even as of the date of the arbitration meeting. But giving appropriate weight to all relevant factors, the Arbitrator cannot find discharge of the Grievant was so excessive a punishment as to be unreasonable. The seriousness of the Grievant's misconduct outweighs his 9-year record. The Arbitrator concludes discharge of the Grievant was within the Company's managerial prerogatives.

An employer's need to show cause typically requires a board of arbitration determine whether there exists a reasonable relationship between the disciplined employee's misconduct and the penalty imposed on him or her. But parties to a collective bargaining agreement may amend the usual definition of "cause". For example, such parties may agree that an employee's engaging in a particular type of behavior warrants imposition of a specific level of discipline including discharge. And where parties to a collective bargaining agreement have agreed that in the event an employee behaves a certain way discharge is proper and the employer has discharged an employee for that misconduct, the only question to

be resolved by a board of arbitration is whether the employee did or did not behave as alleged. If the board is satisfied the employee engaged in the misconduct for which he/she was discharged, it must deny the grievance it its entirety because the board lacks the power to determine that the penalty imposed was unreasonable.

It is well established that under a collective bargaining agreement which limits an employer's right to discipline or discharge to situations wherein such actions are for just cause, the parties to that agreement may agree that specific types of misconduct warrant certain disciplinary measures.[1] In the event an employer imposes the agreed upon discipline on an employee for having allegedly performed the specific misconduct and the resulting grievance goes to arbitration, the only question before the arbitrator is whether the employee did or did not engage in the misconduct. If the arbitrator concludes that the employee did engage in that misconduct, he/she must deny the grievance in its entirety. The arbitrator must respect the parties' collective decision regarding the propriety of the penalty. But in the present case the Arbitrator determined that [name deleted]'s September 11, 1996 interpretation of the Treatment of Each Other policy and the Instructor's Guide neither separately nor collectively put employees on notice that uttering certain words or phrases would result in immediate discharge regardless of the circumstances involved. Therefore the

[1] See Union Camp Corp., 91 LA 749 (1988) (Clarke, Arb.).

Arbitrator need not and will not decide whether Article 22, sections 22.0 and 22.2 of the 1997 Agreement empowered the Company to fix certain penalties for specific types of misconduct and thereby to remove from the Arbitrator the power to review the punishment for reasonableness.

"Just cause" is a term of art in collective bargaining agreements. Just cause consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the employee engaged in the conduct for which he/she was discharged or disciplined. Another element is a requirement that there be a reasonable relationship between an employee's misconduct and the punishment imposed. However, this element is subject to the parties' power to jointly determine appropriate discipline in specific circumstances.[2] A corollary is that when the parties to a collective bargaining agreement have agreed upon specific limitations on the employer's power to determine appropriate discipline, just cause requires that the employer abide by those limitations.

"Just cause" is a term of art in collective bargaining agreements. Just cause consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the

[2] See Union Camp Corp., 91 LA 749 (1988) (Clarke, Arb.).

employee engaged in the conduct for which he/she was discharged or disciplined. Other elements include requirements (1) that discipline be administered even-handedly, that is, that similarly situated employees be treated similarly and disparate treatment be avoided and (2) that there be a reasonable relationship between an employee's misconduct and the punishment imposed. But parties to a collective bargaining agreement may amend the usual definition of "just cause".[3] Specifically, such parties may agree that an employee's engaging in a particular type of behavior warrants imposition of a specific level of discipline including discharge. Where parties to a collective bargaining agreement have agreed that in the event an employee behaves a certain way discharge is proper and the employer has discharged an employee for that misconduct, the only question to be resolved by an arbitrator is whether the employee did or did not behave as alleged. If the arbitrator is satisfied that the employee engaged in the misconduct for which he/she was discharged, the arbitrator must deny the grievance it its entirety. In such a case the arbitrator lacks the power to determine that the penalty imposed was excessive.

It is generally agreed that labor arbitrators acting within their respective jurisdictions are not strictly bound by the principles of stare decisis and res

[3] See Union Camp Corp., 91 LA 749 (1988) (Clarke, Arb.).

judicata.[4] In labor arbitration the question to be answered is whether an arbitrator should resolve a grievance in accordance with a prior arbitral decision involving the same issue between the same parties at the same facility. A norm to assist in answering that question in individual cases has been established. The norm is that arbitrators respect and follow prior arbitral decisions involving the same issue between the same parties at the same facility except in a small number of well defined circumstances. This is true even in some situations wherein the later arbitrator would have reached a different conclusion if he/she had resolved the issue in the first instance.

The norm is supported by a number of reasons. Deferring to prior arbitration decisions promotes stability in collective bargaining relationships and ordinarily avoids the expense of re-arbitrating the same issue. Re-arbitrating the same issue and obtaining a different result may only encourage arbitration of the same issue a third time. Furthermore, following existing arbitral decisions promotes similar treatment of similarly situated employees.

The situations in which arbitrators commonly decline to follow a prior arbitration decision between the same parties at the same facility and involving the same issue are those wherein: (1) the prior decision was an instance of bad judgment, (2) conditions existing at the time of the prior grievance and of the grievance being arbitrated are significantly different, (3) there was not a full and fair hearing at the time of the earlier decision and (4) the prior decision was made without the benefit of some important facts or considerations.

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[4] See generally, North American Rayon Corp., 91-1 ARB ¶8156, 95 LA 748 (1990) (Clarke, Arb.) and materials cited at footnotes 4, 5 and 6; see also Mead Corp., 83-2 ¶8585 (Clarke, Arb.).

CONTRACTING OUT WORK

It is well established in labor arbitration that even under a collective bargaining agreement that says nothing about the employer's contracting with third parties for the performance of work done by members of the bargaining unit, the employer does not have an unfettered right to subcontract such work.[5] It is also well established that an employer's right to contract out bargaining unit work may be expanded or further limited by specific language in a collective bargaining agreement.[6] Where, as in the present case, a labor agreement contains such language, an arbitrator faced with resolving a subcontracting grievance should focus on those provisions.

What becomes clear when one closely studies Article 29, Section 1 of the 1993 Agreement is that its drafters intended to carefully balance the interests of the Company and the of Union, especially its concern for the job security of Maintenance employees. The first sentence appears to set a goal to be considered in any subcontracting situation, that is, maintaining as uniform a Maintenance work force as the Company can. But in same sentence in which that goal was stated, the drafters hedged. Despite testimony regarding the Union's (or the Company's) intentions in agreeing to the provisions of Article 29, the drafters' use of the phrase "will strive to attain this end" evidences something less than an absolute commitment to not contract out work which could be

[5] See Georgia Kaolin Co., 86 LA 81 (1985) (Clarke, Arb.).

[6] Id.

performed by the Company's own Maintenance employees. The word "strive" is not equivalent to "will" or "shall", and its use in the first sentence of Article 29 shows that the Union's negotiators had not succeeded in obtaining an absolute commitment from the Company. The second sentence also evidences an attempt on the part of the drafters to satisfy the needs of both the Union and the Company. Taken as a whole, the sentence states that the Union recognizes that the Company may contract out work from time to time. But the sentence appears to incorporate a quite restrictive standard, that is, when "the Company's operating requirements ... necessitate the Company securing the service of outside Contractors". The drafters' choice of the word "necessitate" may reasonably be understood as evidencing agreement that the Company could contract out Maintenance work only when it was necessary that it do so. Used in the context of a contracting out provision, "necessary" is a substantial limitation. "Necessary" relates to one's having no reasonable or realistic alternative to the action in question, in this case no reasonable or realistic alternative to contracting out maintenance work. But the second sentence may not be read in isolation but rather must be read consistently with the first and third sentences. The third sentence does not set out an absolute standard but instead lists a number of factors to be considered whenever "determining the needs of securing the services of outside contractors". The drafters' statement that the listed factors should be considered in determining the "need" for contracting out maintenance work clearly shows they did not mean "necessary" to be taken for the maximum it otherwise could be. Illustrative is the drafters' inclusion of "economics" as one of

the factors. If the Company could subcontract work only when it was really necessary that it do so, that is, when the Company had no option to do otherwise, economics would not be a consideration. Whether a contractor could perform work less expensively than it could be done by the Company's employees would not be a question. Regardless of cost differences, the Company would be prohibited from contracting out the work. But because the drafters of the third sentence included "economics" as a consideration in determining "need", one must conclude they contemplated that if the cost difference between assigning a particular job to the Company's Maintenance employees and contracting out that work was great enough, contracting out the work would be considered "necessary".[7] Similarly, inclusion of "availability of equipment, personnel or skills" shows the drafters perceived that there might be situations wherein the Company could contract out maintenance work and not train its own employees to do the job. To paraphrase the first sentence of this paragraph, a study of Article 29, Section 1 of the 1993 Agreement shows that its drafters intended to carefully balance the interests of the Company and the job security interest of the Union. In view of their concern that those interests be balanced, Article 29, Section 1 should be interpreted and applied in specific cases by a review of that balance with especial respect for the factors listed in the second sentence.

In the present case, two factors stand out as being especially important. The first is that the Company's contracting out repair and maintenance of the

[7] Nothing contained in this Opinion and Award should be understood as explaining what, if any, cost difference standard the drafters of the third sentence of Article 29, Section 1 intended. That question is not involved in this grievance, and the Arbitrator expresses no opinion about it.

Factory E Crown forklifts had almost no impact on the bargaining unit. While the quantity of the work involved does not appear in evidence, it is undisputed that the Company's contracting out that work did not cause or contribute to a reduction of the size of the Maintenance work force.[8, 9] The second factor is that in order to maintain those equipments, the Company's Maintenance employees would need at least some training. Given that the Company's subcontracting repair and maintenance of the Factory E Crown forklifts was not inconsistent with its commitment "to strive to attain" "as uniform a Maintenance work force as possible" and that the Company's Maintenance employees did not have all the skills needed to perform that work, the Arbitrator finds that the Company's contracting out that work did not violate Article 29, Section 1 of the 1993 Agreement. The Arbitrator must therefore deny Grievance no. 15-24-92 at least in part.[10]

NOTICE OF CONTRACTING OUT

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[8] The evidence makes clear that the reduction of the size of the Maintenance work force was caused by changes in the products manufactured at the … plant.

[9] Nothing contained in this Opinion and Award should be understood as holding that the impact on the bargaining unit of a decision to contract out any specific maintenance job must always be viewed without regard to the cumulative impact of that and other decisions to subcontract work. The question of cumulative impact is not involved in this grievance, and the Arbitrator expresses no opinion about that issue.

[10] The Arbitrator's interpretation of Article 29, Section 1 is not inconsistent with the evidence presented regarding its amendment in 1979. Substitution of the present third sentence for "The Company will use this Article reasonably and in the spirit outlined in the Preamble of this Contract" clearly imposed a more stringent limitation on the Company's right to subcontract maintenance work. The earlier sentence would likely have been interpreted as affording the Company much greater discretion to contract out work than the Arbitrator has found the Company has under the current language.

Section 2 of Article 29 consists of two paragraphs regarding notice of the Company's use of outside contractors to do maintenance work. The first sentence of the section commits the Company "to meet with the Outside Contracting Committee on a monthly basis to discuss the planned use of outside contractors". The next sentence makes very clear that the Company is obligated to provide written notice only when the need for an outside contractor arises between monthly meetings. Bridges testified without contradiction or rebuttal that he had told members of the Outside Contracting Committee of the Company's intention to contract out repair and maintenance of the Factory E Crown forklifts sometime before the Grievant became a member of the Committee. Because that testimony was not refuted, the Arbitrator concludes that the Company satisfied its Section 2 notice with regard to initial notification of its plan to contract out repair and maintenance of the Factory E Crown forklifts.

The Company's plan to contract out that work was not a one-shot situation, however. On the contrary, it is undisputed that the Company continued to contract out such work from about 1990 to the date of the arbitration hearing and entered into an on-going service contract with a vendor for that work. The evidence makes clear that the parties discussed how often the Company should in effect re-notify the Outside Contracting Committee of its continuing to subcontract repair and maintenance of the Factory E Crown forklifts. Sometime after the present grievance was filed, the Company offered to do once every 6 months; the Union insisted the Committee be notified every time the subcontractor came to the plant.

Taken together, the last sentence of the first paragraph and the second paragraph of Section 2 provide a clear answer to the question of how often the Company must re-notify the Outside Contracting Committee about an on-going use of a subcontractor. The last sentence of the first paragraph provides for meetings “as requested” “with the Outside Contracting Committee to discuss problems related to outside Contractors”. The second paragraph provides that “[u]pon request” “the Company will review with the Business Committee on a quarterly basis the status of the use of outside Contractors” [emphasis added]. Despite the fact that the second paragraph relates to the Business Committee and not the Outside Contracting Committee, it is proper to read the quarterly standard found in the second paragraph into the third sentence of the second paragraph. Having devoted so much attention to providing for meetings with the Outside Contracting Committee including meetings in addition to the regular monthly ones, it is most unlikely that the drafters of Article 29 intended the Company could give notice of an on-going subcontract one time. It is much more probable that they intended incorporation of the quarterly advice standard set out in the last paragraph of Section 2. That the Company did not re-notify the Outside Contracting Committee of its continuing to subcontract repair and maintenance of Factory E Crown forklifts as frequently as quarterly is undisputed.

The Company contends there was and is a list of projects which it and the Union agreed were exempt from the notice requirements of Section 2. Assuming --- without deciding --- that such a list existed at times pertinent to this grievance, it was incumbent on the Company to show that the Union had agreed to add

repair and maintenance of Factory E Crown forklifts to it. The Company did not satisfy that burden. Indeed, a careful review of Bridges' testimony shows he did not state that any Union officer had acquiesced to the Company's request to so amend the "exempt list".

In summary, Article 29, Section 2 of the 1993 Agreement obligated the Company, upon request, to re-notify the Outside Contracting Committee of its continuing to subcontract repair and maintenance of Factory E Crown forklifts as least as frequently as quarterly. The evidence leaves no doubt but that the Outside Contracting Committee asked for re-notification more frequently than quarterly and that the Company declined to provide such notice as often as quarterly. Finally, the evidence is insufficient to prove the Union agreed to add the subcontracting of repair and maintenance of Factory E Crown forklifts to a list of projects exempt from the notice requirements of Section 2. The Arbitrator concludes the Company violated Article 29, Section 2 by not re-notifying the Outside Contracting Committee at least quarterly of the Company's continuing to subcontract repair and maintenance of Factory E Crown forklifts. The Arbitrator must therefore grant Grievance no. 15-24-92 in part.

As a remedy the Arbitrator will direct the Company to cease and desist from refusing to re-notify the Outside Contracting Committee of its continuing to subcontract repair and maintenance of Factory E Crown forklifts at least quarterly, provided such re-notification is requested. The Arbitrator will not direct a monetary remedy. Unlike the situation involved in the decision by Arbitrator Foster cited by the Union at endnote 3, the evidence in this case shows that even

though the Company did not provide re-notification as frequently as quarterly, the Company had advised the Outside Contracting Committee of its intention to contract out the repair and maintenance of Factory E Crown forklifts. Phrased differently, the Union had an opportunity to try to convince the Company to not subcontract that work but was not able to do so. Under the circumstances it cannot be said that if the Company had complied with its obligation to provide re-notification, it might have decided not to subcontract the work.

The Company correctly notes that the Union sought but did not achieve a change to the language of Paragraph 51 which, if adopted, would apparently require granting the present grievance. In 1967 the Union proposed an amendment which would have prohibited the Company's contracting out emergency work "until all available employees in the proper classifications have been called to work". And in 1977 the Union proposed language which would have required "that electrical work ... be performed by union men when reasonably possible".[11] Neither proposal was agreed to. But an arbitrator must be careful to not give undue weight to unadopted proposals when interpreting existing contractual provisions. It frequently happens that parties make contractual amendment proposals not for the purpose of changing the substance of existing provisions but rather to clarify their meaning without the need for arbitration. To give undue weight to unadopted proposals would only benefit

[11] Irby was a non-union contractor.

arbitrators without any equivalent benefit to the parties to a collective bargaining agreement.

Numerous arbitration decisions have held that even when a labor agreement is silent regarding an employer's right to contract out work performed by bargaining unit members, the employer's right to contract out such work is not without limitation. Some arbitrators have founded such decisions on recognition and other clauses like those cited by the Union in the present case; other arbitrators have apparently founded their decisions on an employer's implied obligation to behave reasonably. The different foundations identified have not produced significantly different results. It is generally agreed that an employer must act in good faith. That has generally been interpreted to mean that an employer must not subcontract out of anti-union animus. In other words, even if an employer might otherwise contract out work performed by the bargaining unit, it may not do so where its motivation is to damage the bargaining union or to avoid obligations of the collective bargaining agreement. Arbitrators also generally agree that where a collective bargaining agreement does not specifically restrict an

employer's right to contract out work performed by members of the bargaining unit, any such contracting out must be reasonable.[12]

Well respected authors have identified lists of factors to be weighed in determining whether contracting out was reasonable.[13]

In the present case, it is especially important that the Company's contracting out grass cutting was done on a one-time basis in response to a situation which is unlikely to ever reoccur and that at the time all of its bargaining unit employees could work as much overtime as each wished. It is clear that the contracting out decision was made in good faith and was not intended to injure the Union as an organization or members of the bargaining unit in any way and that the contracting out had no financial impact on members of the unit. If the Company contracted out grass cutting on a regular basis, the Union could reasonably argue that the Company's decision had displaced a number of bargaining unit employees. But no evidence was introduced that the Company intends to do so on a regular basis. On the contrary, the evidence shows the Company contracted out the grass cutting because of the Governor's then upcoming visit and because it could use all the overtime available from volunteers inside the plant. It is undisputed that some members of the bargaining unit would have preferred to work overtime cutting grass rather than inside the plant, but in view of the fact that the Company needed to effect a clean-up of the

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[12] Id. at 86 (citations omitted).

[13] Frank Elkouri & Edna A. Elkouri, How Arbitration Works 540-43 (4th ed. 1985); Sinicropi, Revisiting an Old Battle Ground: the Subcontracting Dispute, in Arbitration of Subcontracting and Wage Incentive Disputes, Proceedings of the Thirty-second Annual Meeting, National Academy of Arbitrators 125-57 (Stern & Dennis, eds. 1979); see also General Metals Corp., 25 LA 118 (1955) (Lennard, Arb.).

entire plant, it was entirely reasonable for the Company to use its own employees inside.[14] The fact that the Governor was engaged in a re-election campaign at the time is irrelevant to all issues involved in this grievance including whether the Company acted in good faith. Because the State of Mississippi had issued bonds to enable the plant to continue operating in Natchez, the Company could hardly be expected to decline the Governor's "request" to visit. If the Governor perceived the plant visit as having the potential to gain votes, that was a matter beyond the Company's control.

It is undisputed that the Company could have scheduled employees who had not volunteered to work overtime to cut grass on overtime. But that does not mean the Company was required to exercise its right to schedule employees to work and does not evidence that its decision to contract out the grass cutting was contractually improper. Exercising its right to "force" employees to work overtime only when it believes such is necessary cannot reasonably be viewed as evidencing an anti-Union motivation.

In summary, Article 3, section 4 of the 1994 Agreement does not relate to whether the Company may or may not contract out work normally done by members of the bargaining unit. Furthermore, under the unique circumstances of this case, the Company did not exceed the limitations on its right to contract out bargaining unit work implied in that Agreement when it subcontracted yard work to an outside contractor as part of its preparations for a visit to the plant by the Governor of the State of Mississippi. The Arbitrator concludes the Company's

[14]One witness testified with truly refreshing frankness that he enjoyed driving the Company's tractor.

subcontracting action did not violate the 1994 Agreement. The Arbitrator must therefore deny the grievance.

The Opinion by Chairman Marvin Hill, Jr. in the decision cited by the Union at endnote 10 below is instructive. At page 33 Chairman Hill correctly noted that "not ... every violation of a DOT regulation must result in the test being thrown out." But the evidence must show compliance with those regulations to the point the Board can reasonably conclude whose urine tested positive. The evidence in this case does not satisfy that standard.

To repeat, the Company did not satisfy its burden of persuading a majority of the Area Board of Adjustment that the Company had complied with DOT mandated procedures for drug testing programs to the point the Board could be reasonably confident the tested samples were those of the Grievant. The Board must therefore find the Company did not satisfy its burden of proving the Grievant violated Rule 33 as alleged.

Nothing contained in this Opinion and Award should be understood as holding that an employee's testimony standing alone may be sufficient to overcome the apparent regularity of the collection of a specimen for a drug test. Because documentary evidence cast doubt on whether the Company had complied with DOT mandated drug collection procedures and corroborated significant aspects of the Grievant's testimony in the present case, the question

of the sufficiency of an employee's uncorroborated testimony was not presented, and the Chairperson expresses no opinion about that issue.

That the requirements for the award of back pay set out in the Back Pay Act, 5 U.S.C. § 5596, are satisfied in this case is virtually self-evident. Certainly, violating and attempting to unilaterally modify a collective bargaining agreement to which one is a party by denying an employee sick and/or personal leave and/or holiday pay to which she/he is contractually entitled are unjustified and unwarranted personnel actions. Moreover, the evidence leaves no doubt but that the Agency's violations resulted in reductions of some employees' pay and leave allowances and that those reductions would not have occurred if the Agency had not breached the 1990 Agreement and had instead continued to apply the pre-1991-92 practice discussed above. The Arbitrator will therefore further direct the Agency to make whole all covered employees whose sick or personal leave entitlements and/or holiday pay were reduced as a result of the Agency's ceasing to apply the pre-1991-92 practice discussed above by paying each of those employees back pay calculated in accordance 5 C.F.R. §§ 550.805 - 550.806.

[AWARD] The Agency is directed to cease and desist from not applying the pre-1991-92 practice found in the Discussion above when determining covered employees' sick and/or personal leave and/or holiday pay. The Agency is further directed to make whole all covered employees whose sick and/or personal leave entitlements and/or holiday pay were reduced as a result of the

Agency's disregard of the pre-1991-92 practice discussed above at the end of that school year and thereafter by paying each such employee back pay calculated in accordance 5 U.S.C. § 5596(c) and 5 C.F.R. §§ 550.805 - 550.806.

The Arbitrator will retain jurisdiction of the present grievance until [***INSERT A DATE – I USUALLY USE 60 DAYS FROM THE AWARD DATE***] to (1) resolve disputes regarding the remedy directed herein, if any and (2) receive and consider a request for attorney's fees, if any is submitted. If the Arbitrator is advised by telephone or other means of (1) any dispute regarding the remedy directed or (2) that the Association intends to seek attorney's fees in this case on or before 4:30 p.m. Central Time on [***INSERT SAME DATE***] December 9, 2008, the Arbitrator's jurisdiction over this grievance shall be extended for so long as is necessary to resolve all such issues. If the Arbitrator is not advised of (1) the existence of a dispute regarding the remedy directed herein and/or (2) that the Association intends to seek attorney's fees in this case by that time and date, the Arbitrator's jurisdiction over this grievance shall then cease.

The Union contends that in applying marginal paragraph 19 there exists a past practice whereby disciplinary actions issued for safety violations and performance problems are counted separately. The quantum of proof needed to

establish the existence of a past practice is well established and need not be discussed at length here.[15] It is sufficient at this point to note that to prove the existence of a binding past practice, the party alleging the practice must show that it was unequivocal, clearly enunciated and acted upon and readily ascertainable over a reasonable period of time as a fixed and established practice. The Union's evidence does satisfy those requirements. No specific situations were cited, and insufficient evidence was offered from which the Arbitrator could reasonably conclude that the practice had been enunciated or that the Company had accepted it. The appearance of separate boxes for "job performance", "safety", "absenteeism" and "other" on disciplinary forms is not enough to satisfy the Union's burden of proof. Recording the type of misconduct as being one these four does not necessarily imply separate application of paragraph 19.

It is well established in labor arbitration that where, as in the present case, a Federal employer's right to suspend an employee is limited by the requirement that any such action be for such cause as will promote the efficiency of the service, the employer has the burden of proving by a preponderance of the evidence that the suspension of an employee was for such cause. Therefore the Agency had the burden of persuading the Arbitrator by a preponderance of the evidence that the 90-days suspension of the Grievant was for such cause as will

[15] See Frank Elkouri & Edna A. Elkouri, How Arbitration Works 632-33 (Marlin M. Volz & Edward P. Goggin, eds., 5th ed. 1997).

promote the efficiency of the service.

"Such cause as will promote the efficiency of the service" requires that a Federal employer taking an adverse action against an employee establish the following:

1. The charged conduct occurred;
2. a nexus exists; and
3. the particular penalty imposed is reasonable.[16]

Such cause as will promote the efficiency of the service also requires the employer to impose discipline consistently with applicable laws, rules, and regulations and an applicable collective bargaining agreement, if any.

The Agency correctly argues that some employees may be held to a higher standard.[17, 18] However, it is also correct that the fact that an employee is subject to a higher standard does not mean a penalty imposed on him/her may not be mitigated.[19]

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[16] Dixon v. Dept. of Commerce, 109 MSPR 314 (2008); *see also* Douglas v. Veterans Administration, 5 MSPB 313, 5 MSPR 280 (1981).

[17] See Holliman cited at footnote 30 above.

[18] The Agency has not cited the Arbitrator to an MSPB decision in which the Board has applied grade level/job responsibility as an aggravating factor to a General Schedule (GS) employee below GS-13, and the Arbitrator's limited research has uncovered none. The MSPB has referred to the factor in sustaining the removal of a GS-13 Criminal Investigator, noting application of the concept is proper with respect to "law enforcement officers" in Prather v. Dept. of Justice, 2011 MSPB 100 (2011). The evidence in this case does not clearly show whether the Grievant is a law enforcement officer.

The MSPB has considered an employee's job allows application of a "higher standard" with respect to a Postmaster EAS 22 in Holliman, *supra*; an EAS 17 supervisor in Edwards v. U.S. Postal Service, 112 MSPR 196 (2010); an Assistant U.S. Attorney in Byrnes v. Dept. of Justice, 91 MSPR 551 (2002); Administrative Law Judges in Steverson, *supra*, and Social Security Administration v. Brennan, 27 MSPR 242 (1985), aff'd, 787 F.2d 1559 (Fed. Cir. 1986); and a supervisory police officer in Reid v. Dept. of the Navy, 118 MSPR 396 (2012).

[19] Reid v. Dept. of the Navy, 118 MSPR 396 (2012).