

LEADER'S GUIDE

to accompany . . .

ARBITRATION: The Seven Tests of Just Cause

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INTRODUCTION

The concept of “just cause” is central to any case of arbitration. Unfortunately, the term does not have a universally accepted, clear definition. Just cause is an attempt to maintain civil rights and due process in an industrial or corporate setting. However, there are seven measurable criteria for just cause that may be used to determine the appropriateness of a disciplinary action for alleged misconduct. These criteria are:

- 1. Reasonable rule or order**
- 2. Clear and unambiguous notice**
- 3. Timely and thorough investigation**
- 4. Fair investigation**
- 5. Proof**
- 6. Equal treatment**
- 7. Fair penalty**

The video *Arbitration: The Seven Tests of Just Cause* is based on a true situation. Adolph Koven, the arbitrator in the video actually conducted the investigation and provided the ruling that bound the real-life supervisors and union members in this hearing. However, their names have been changed and actors play their roles in this highly engrossing reenactment of an arbitration case.

In this video, arbitration is necessary because two parties, the supervisors of the Blackacre Aircraft Company and the National Union of Workers, Local 202 disagree on whether the firing of three workers for alleged alcohol-related offenses was appropriate. As in any case of arbitration, the two parties have agreed to accept the decision of the arbitrator as final and binding. During this formal hearing, each side is represented by a lawyer; counsel may provide its own witnesses and may cross-examine witnesses from the opposing side. After all witnesses are questioned, each lawyer summarizes his or her side’s evidence for just cause. After their arguments are presented, you may stop the video so that participants can discuss their evaluations of the evidence and reach a verdict. When participants have concluded their discussion, you should show the rest of the video in which Mr. Koven explains his verdict. As in a regular court, the accused parties are presumed innocent until proven guilty. The company must prove that it had just cause for its disciplinary actions.

OBJECTIVES

After viewing the video *Arbitration: The Seven Tests of Just Cause* and participating in discussion groups, participants will be able to:

- define the term “just cause”
- explain why just cause is central to arbitration
- list and define the seven tests of just cause
- evaluate the testimony of each of the witnesses in the video in relation to the seven just cause criteria
- decide whether the company in the video had just cause for its disciplinary action
- examine their verdict in relation to the decision of the arbitrator
- determine procedures for supervisors or managers to follow if an infraction of company rules occurs
- explain the process of arbitration

PARTICIPANT’S HANDOUT

It is recommended that the Arbitrator’s Opinion and Award be made available to the session participants as take home support material. A reading of the decision will not only provide a fuller understanding of the case and the arbitration process, but will provide insight into the kind of concerns the arbitrator has and the thinking he employs in resolving a case. It also provides detailed information about each of the seven tests of just cause.

Copies of the Arbitrator’s Opinion and Award are available from BNA Communications Inc. This document is printed in the legal format employed by arbitrators, complete with “blue backer”, thereby lending realism to the case material. Quantity prices are available upon request from BNA Communications Inc.

PHYSICAL SETTING

Having the proper physical setting is extremely important for any conference or class which combines video viewing with a discussion period. There are certain tips that will enable you to have a conducive setting:

- 1.** Provide an informal setting. Rather than a lecture hall, use a conference table or a semi-circle of chairs without a table. The use of "buzz groups" (3-6 participants per small group) may require the use of an additional room or two.
- 2.** Be certain to have a chalkboard or easel and flip chart ready.
- 3.** Provide each participant with paper and pencil if participants have not already brought them.
- 4.** Test the room for distracting noises which can be controlled before the meeting begins.
- 5.** Keep the group small (10-15 maximum).
- 6.** Check your equipment—the player, videocassette, and monitor prior to using them.
- 7.** The room should be dimly lit.

PRE-VIEWING DISCUSSION

1. Tell participants that they are going to see a video which will help them understand the concept of just cause. Tell them that they are going to watch a reenactment of an arbitration case.
2. Ask participants to describe the process of arbitration. Have them briefly describe the similarities and differences between arbitration and a court trial.
3. Ask participants if any of them have ever participated in arbitration proceedings.
4. Tell participants that the concept of just cause is central to this video. Ask them to attempt definitions.
5. Ask participants if they can describe any standards for just cause. After participants have attempted to provide standards, have them write down the seven tests: • reasonable rule or order, • notice, • timely and thorough investigation, • fair investigation, • proof, • equal treatment, and • fair penalty. Tell them that they should keep these concepts in mind as they watch the video. Later they will need to evaluate the company's actions in relation to these standards.
6. Introduce the video using your own words or by reading the introduction provided at the beginning of this guide.

SUMMARY OF THE VIDEO

Arbitration: The Seven Tests of Just Cause is a 52 minute reenactment of an actual arbitration case that was presided over by the noted arbitrator Adolph M. Koven. The controversy is between the Blackacre Aircraft Company and the National Union of Workers, Local 202. Three union members have been dismissed for allegedly violating alcohol-related company rules. Did they flagrantly violate these rules? Were they fired for "just cause"? Or, were these three employees behaving the same as every Christmas season? Was the company, in fact, out to find a reason to fire Mike Armstrong, a militant shop steward, and in doing so, violated the rights of Harry Workman and Molly Maguire as well as Mike Armstrong?

When a disciplinary case goes to arbitration, both sides have agreed beforehand that they will accept the arbitrator's decision as binding. The arbitrator listens to the witnesses' testimony and ensures that the proceedings are held in an orderly manner. As in a court of law, both sides are represented by their attorneys; Winifred Court, Esq. directs questions for the company while Sam Lawson, Esq. represents the union. Both lawyers call and examine their witnesses and cross-examine the witnesses of the opposing side. As in judicial proceedings, both attorneys will summarize their arguments and evidence after all witnesses have testified.

Since the burden of proof is on the company to show that it acted with just cause, the company's attorney calls all of her witnesses first. Miles Foreman, the first line supervisor who filed the accusation against the three employees is the first person to testify for the company. Before we see the case proceed, Adolph Koven, as narrator, explains the seven criteria for just cause: reasonable rule or order, notice, sufficient investigation, fair investigation, proof, equal treatment, and appropriate penalty. The scene switches back to the arbitration hearing where Winifred Court is about to question Foreman.

COMPANY'S POSITION

According to Foreman's testimony, once Molly Maguire explained there would be a Christmas party, he returned to the break room with a cheese platter. Then Harry Workman entered with an open bottle of wine and asked Foreman if he would like to join them for a drink. Within a few minutes Workman had alcohol on his breath and was unsteady on his feet. Foreman states that he reprimanded the three by saying, "That bottle is not supposed to be here, Harry." If he said this, was Foreman putting the employees on sufficient notice not to drink? Workman told Foreman that employees regularly drank on Christmas and he proceeded to pour drinks for Maguire and Armstrong. Foreman then confiscated their cups and returned to his office to call his immediate supervisor, Chuck Masters. Workman and Armstrong followed him to the office and Armstrong demanded to speak with Masters. He also demanded that Foreman search the company premises since he was certain many other employees had alcohol. Chuck Masters arrived thirty minutes later; he had already called Andrew Powers in Personnel. Masters told the three employees to report back to work on Tuesday at 11:00 AM when they would see Mr. Powers. Later that night a search was conducted by Powers and a union steward; they found nothing.

Under cross-examination by Mr. Lawson, Foreman admits that he had heard from Powers that Armstrong had filed many grievances. Foreman further testifies that he could not tell if Workman's eyes were red; he never questioned Workman further because he was too flabbergasted with Workman's behavior. Foreman also admits that he never saw Maguire drink and that he never ordered the sobriety test that Workman requested. Nor did he investigate whether other employees had brought alcohol that day. Foreman contacted Masters at Masters' parents' home; four hours later Masters arrived. By 5:30 that day, after Masters had contacted Powers, the decision was made to fire the grievants. At this point did Foreman have enough evidence that Workman was under the influence of alcohol? Were all employees receiving equal treatment?

The next witness, Arnold Hammer, a company employee, testifies that management has never condoned drinking on the premises. However, under cross-examination, Hammer admits that he drank some whiskey at 3:00 PM with some of his fellow workers. He contradicts Foreman's testimony by stating that Workman did not open the bottle of wine until after Foreman had returned with his cheese platter. Hammer was too busy reading to notice whether anyone was drinking. Does his testimony show equal treatment of all employees?

The next witness for the company is Florence Kraft, an assistant personnel manager. She states that management has always maintained a strict no-alcohol policy, even around holidays. One of the supervisors used to sniff the holiday punch to be certain it was not spiked.

UNION'S POSITION

Sam Lawson, the lawyer for the union, calls on Andrew Powers, the head of personnel for his first witness. He testifies that the premises were checked for alcohol and that no one else has ever violated the no alcohol rule. Powers never spoke with the three employees the night of the party, although when he spoke with them on Tuesday, Maguire and Armstrong asserted that they had never had a drink and Workman denied that he had been under the influence. Powers' decision was based solely on Foreman's testimony. He says that he made up his mind to terminate the employees between 3:00-3:30 PM on Tuesday; this does not corroborate with Foreman's earlier testimony. Earlier two employees had been caught gambling; one was fired, the other remained at his job. Has the company shown equal treatment in this current situation? Has it conducted a real investigation? Has the company treated these three employees fairly?

Workman testifies next. He says that he brought out a bottle of wine and asked Foreman if it would be okay to have a holiday drink. Foreman shrugged his shoulders. When Workman asked Foreman if he would like to join them, Foreman said that he didn't drink. Workman then poured two cups of wine, one for himself and one for Mike Armstrong. He took a few sips. Then Foreman suddenly returned to confiscate the cups and wine. Workman claims that he was unsteady because he was tired from working overtime. When he was in Foreman's office, Workman offered to take a blood test or breatholizer; he said that he could walk a straight line and touch his nose. Workman states that he had drinks with supervisors—about six or seven years ago. He would often have to “work around” a supervisor before drinking.

According to the next witness, Molly Maguire, Foreman shrugged his shoulders when asked if they could drink. Maguire poured herself some wine. She did not drink in the break room. However, during the day, she did have a drink in the model room.

Next we learn about the character and behavior of Mike Armstrong. According to Armstrong, a year ago at a Christmas party, Chuck Masters had seen him drinking some Chivas Regal and had said nothing. At the recent Christmas party when Foreman confiscated the cups, Foreman took such a long time to act that the employees assumed they had permission. When the cups were confiscated they were still full. When Masters saw them later that evening, he agreed that they were not drunk, but he told them to return on Tuesday. Armstrong stated that management dislikes him because he regularly files grievances. He says that no one else would have been fired as he was.

The last witness, Merle Goodman from the shipping department, says that supervisors drank with workers. He had smelled alcohol on other employees' breath. Over the past six years, he says there has never been any crackdown.

Since all witnesses have testified, the two lawyers provide a summation of their arguments. Now Mr. Koven asks that you stop the video and invite the participants to decide if the company had just cause for its actions. Participants should evaluate all testimony in relation to the seven tests of just cause. If any of the tests does not seem to apply, do not consider it. After their discussion is completed, they should also determine what actions should be taken in regard to the three employees. You may want to go over topics 1-6 in the post-viewing discussion section at this time. These questions will help participants recall and analyze the witnesses' testimony. After the group has reached a consensus on these two issues, you should then resume watching the video to hear Mr. Koven's ruling and explanations.

POST-VIEWING DISCUSSION

1. Have participants discuss and evaluate Miles Foreman's handling of the break room incident.
 - What should he have said if people were serving and drinking alcoholic beverages? (Miles could have firmly told the workers that their possession of alcoholic beverages was in violation of company policy and that they would face disciplinary measures if they did not get rid of their wine.)
 - What actions should he have taken to verify employees' states of intoxication? (If he suspected Workman of intoxication he could have ordered breathalyzer tests immediately.)
 - What other actions could he have taken to verify the alleged events? (He could have called another supervisor into the break room as a witness and both of them could have checked Workman's motor coordination. They also could have tested the other two employees and taken statements from them. They also could have obtained signed statements from any witnesses.)
2. Have participants consider which of the seven tests of just cause is not at issue in this video (reasonable rule or work order). Why is it not an issue? (It is not an issue for two reasons: (a) In an aircraft company where people work with dangerous machinery it is reasonable for alcohol to be prohibited. This is for the safety of the workers and eventual passengers. (b) The order is reasonable because it appears in the contract and therefore was a condition for employment.)
3. Have participants evaluate the actions of Chuck Masters and Andrew Powers in relation to the seven tests of just cause. What should Masters and Powers have done in this situation? (They could have come in immediately to investigate. They could have taken testimony from the three accused persons. They could have administered tests for inebriation. They could have conducted a fair, thorough, and timely investigation and reached a decision for disciplinary action based on proof.)
4. Using a chalk board or flip chart, list the witnesses in the order in which they testified. The witnesses in order are: Miles Foreman, Arnold Hammer, Florence Kraft, Andrew Powers, Harry Workman, Molly Maguire, Mike Armstrong, and Merle Goodman. Have participants vote on the most and least credible persons testifying and have them explain the reasons for their choices.
5. Have participants explain why the company called on Florence Kraft and Arnold Hammer as witnesses. (They were trying to establish that Blackacre Aircraft had a firm no-alcohol policy. Kraft explained why a supervisor would check the holiday punch; Hammer stated that employees would never risk drinking around supervisors.)
6. Divide the group of participants in half. Ask one group to represent the company; the other, the three workers. Have each group write down the main arguments of its assigned role. Then ask each group to appoint a spokesperson to present its position to the entire group.
7. Ask participants if any of them have ever participated in an arbitration hearing. Ask them to compare their situation to the one shown in the video in terms of issues, procedures, behavior of the lawyers, types of witnesses called, and most important of all, how the issue of just cause was defined and how appropriate evidence was provided.

8. Disciplinary action should be appropriate to the offense. Have participants brainstorm as many types of infractions as possible for an aircraft company or for another type of business. Then have the group reach a consensus on which actions require (a) an oral comment from the supervisor, (b) a written reprimand, (c) a suspension, (d) a dismissal. Have participants discuss whether the length of a worker's employment with the company or repetition of the same offense should be factored into a decision about appropriate disciplinary action.
9. Have participants explain why the company did not have just cause for its actions. They should include each of the seven tests except for reasonable rule or order. (Foreman did not give firm notice. He did not attempt to investigate Workman's alleged drunken behavior or allow him any tests for inebriation. The investigation was neither thorough or fair, since according to Foreman, Powers had made a decision on the evening of the incident. The three employees were not treated in the same manner as all other employees with offenses. Other than Workman bringing a bottle of wine to the break room and having a few sips, there was no proof of other offenses. Nor was the severe penalty fair in relation to the alleged first time offenses of employees with a long and positive work record.)
 - Have participants then explain what the company should have done if this were a real and serious infraction. (If this were a real offense, the company should have followed each of the just cause tests before taking disciplinary action.)
10. Have participants read the Arbitrator's Opinion and Award. Then they may compare Mr. Koven's explanations and verdicts to their group's ideas. This activity may be done as a home-work assignment or as a follow-up activity.

FOR FURTHER REFERENCE

Anatomy of a Labor Arbitration, Sam Kagel (BNA book).

Proving Your Arbitration Case, Boaz Siegal (BNA booklet).

Supervisor's Handbook on Insubordination, Maurice S. Trotta (BNA soft cover). (Conference leader's guide also available.)

How Arbitration Works, Elkouri & Elkouri (BNA).

Arbitrator's Opinion and Award (the case of Conveyance Union, Local No. 831 v. B & H Transit Company). Adolph M. Koven (BNAC).

