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STEWARDS CORNER

Monthly Newsletter for Union Stewards

Due Process in the Workplace: Just Cause

Maintenance Worker Sarah Jones was recently terminated for a lockout/tagout violation. She had been asked to check on a malfunctioning belt in the inspection department. Jones left the belt running in order to determine which rollers were malfunctioning from underneath. In the process, Jones's sleeve was inadvertently caught between the rollers, resulting in her hand being severely injured. Management sent her to the hospital. Once released, Jones returned to work but she was immediately terminated.

As chief steward, you must conduct a grievance investigation in order to determine if Jones's termination was overly severe and to persuade management to reinstate Jones with lesser discipline.

Without a Union, in most cases, an employer can discipline or terminate an employee for any or no reason except a protected classification. This is called "*employment at will*." Having a Union and a collective bargaining agreement completely changes the rules. In a Union workplace, **management has the burden of proving it disciplined an employee fairly**. Many contracts include language that requires the employer to discipline with "*just cause*," "*good cause*," "*for cause*," "*with cause*," etc. As a steward, you will want to cite this language when writing a grievance dealing with a discipline or termination. If your contract does not have this language, many (but not all) arbitrators will "imply" a just-cause limitation on employer discipline of employees. In either case, it is important that you understand what is meant by "just cause."

What is Just Cause

Just cause is a standard management must meet when disciplining or discharging an employee. Think of it as a workplace version of due process …if an employer wants to discipline an employee, they have to follow certain procedures in order to justify its actions.

These procedures are often referred to as "steps" or "tests." These steps are not explicitly written into a collective bargaining agreement but are inferred and applied by arbitrators. Some arbitrators apply fewer tests that management must meet in order to justify discipline, while some arbitrators apply even more, but the following is a checklist of steps that a union steward should review to determine if management acted with just cause:

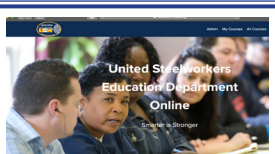
1. **Notice**. Was the employee made aware the rule exists and the disciplinary consequence of breaking the rule?
2. **Prior Enforcement**. Has the employer uniformly enforced the rule?
3. **Investigation**. Was there an investigation? Was the disciplined employee interviewed? Was it in a timely fashion? Did it occur prior to issuing formal discipline?
4. **Proof**. Was there convincing proof that the employee is guilty of the alleged violation?
5. **Equal Treatment**. Have others with a similar disciplinary record and seniority committed the same infraction and not been disciplined or disciplined less severely?
6. **Progressive Discipline**: Did the contract require or allow for lesser discipline? Was the penalty too severe vis-a-vis the violation?
7. **Mitigating Circumstances**. Does the employee warrant a second chance? Do they have extensive service/seniority with the company? Do they have a relatively clean disciplinary record? Are they an outstanding employee? Did management have any role in the employee breaking the rule?

Depending on the nature of the offense and severity of the discipline, some arbitrators may determine just cause has not been met by virtue of the employer failing any one of these tests. Others may uphold some discipline decisions despite the employer having not met one or more of the above tests. However, the more failed tests the grievance investigator can identify, the greater the odds of proving the employer did not act with just cause.

During the course of your investigation of Jones's accident and subsequent termination, you discover the following:

- Jones was aware of the rule about turning off the belt but didn't think it was enforced. It rarely has been in the relatively low hazard inspection department.
- Jones was never asked why she got under the belt while it was moving or asked any question by management prior to her being told she was terminated.
- Others have violated this rule but not been terminated. Management attempted to justify this disparate treatment because Jones's violation resulted in an injury.
- Jones has 20 years of seniority and relatively no discipline record.

Given all the tests of just cause that the employer failed to meet, you are equipped to make a compelling case to management and to argue for lesser discipline and to reinstate Jones. If management refuses, you have begun to build a strong case for arbitration.



Understanding Past Practice

In the May 2021 issue of Stewards Corner, we discussed the different types of Grievances. The various categories of grievances include violations of the collective bargaining agreement (CBA), relevant laws, management's rights, just cause, and the topic of this article, past practice.

The principle of past practice is the idea that CBAs are living agreements. It is impossible for both the Union and Management to capture every situation that may occur during the life of the CBA. The principle of past practice was cemented into labor relations via the US Supreme Court, stating: "*the labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law. . .the past practice of the industry and the shop. . .is equally a part of the collective bargaining agreement although not expressed in it.*"

Defining Past Practice

Simply defined, past practice is typically a **long-standing**, **frequent practice** that is **accepted** and **known** by the Union and Management. The longer a practice exists (especially if it exists over the life of multiple agreements), the more likely an arbitrator will uphold it. A practice that occurs due to lax supervision and that higher-level management is not aware of will not generally meet these commonly accepted standards.

Also, a practice must be **clear** and **consistent**. This means that it shows a predominant pattern in its application when a practice occurs. Thus, a past practice needs to be easily explainable, clear on why it exists, and easy to show how/when it applies.

As stated above, a bona fide past practice is considered part of the contract. Therefore, an established past practice cannot be abolished without first bargaining with the Union, and the Union can file grievances when that practice is violated.

Types of Past Practice

There are three different categories of past practice: contract clarifying, independent, and contract conflicting. The latter being the weakest and the hardest to prove. Let's look at each one.

1. Contract Clarifying Past Practice

These practices generally exist when there is general or vague contractual language. Clarifying practices define general language and are the strongest type of practice because they support and are supported by the negotiated language. Because of this, clarifying practices require management to bargain with the Union if they want to change or abolish the practice—and in most instances would not be able to do so if the Union disagrees.

2. Independent Past Practice

This practice is not addressed in the CBA and is typically seen as a "benefit" that workers have come to expect or take for granted. This is a lesser form of past practice, and Management may be able to terminate it if there have been any of the following reasons: a significant change in the original conditions that started the practice, ongoing employee abuse of the practice, or if the Company notifies the Union during contract negotiations that they will end the practice during the next contract. The employer **must** bargain with the union before ending the practice even under the "*change in conditions*" and "*abuse*" situations.

3. Contract Conflicting Past Practice

As its name says, these practices conflict with the contractual language and are the hardest to prove. It is generally accepted that clear and unambiguous language shall prevail. Thus, most arbitrators will require strong adherence to the standards stated above: **long-standing**, **frequently repeated**, **clear and consistent**, and are **very clearly known to both parties** before they will uphold the practice. Therefore, if a conflicting past practice exists and management seeks to change or end it, it must bargain with the Union. After bargaining, the employer may terminate the practice.

In conclusion, when determining a past practice's existence, a Steward/Union Representative should thoroughly investigate if the practice meets the standards stated in this article, and when in doubt, reach out to your Local Union Leadership and USW Staff Representative to get direction on how to move forward.

TEACHING TUESDAYS

All classes are held at **11 AM (EST)** and **8 PM (EST)**

- 4/5/22: **Writing Grievances and Presenting them to Management** (11 AM EST) (8 PM EST)
- 4/12/22: **Contract Language Basics** (11 AM EST) (8 PM EST)
- 4/26/22: **Immigrant Rights Are Civil Rights** (11 AM EST) (8 PM EST)

Save the Date: Thursday, May 19th at 7:30 PM EST

A Conversation with **Kim Kelly**, Author of **Fight Like Hell: The Untold Story of American Labor**

Scan the QR code to get more information
http://usw.to/teachingtuesdays