Arbitration Session: Burden of Proof and Witness Preparation

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Atlantic Coast Labor Management Conference, October 20, 2017

INSTRUCTIONS

1. Read the cases below and decide them as if you were the arbitrator. Break into groups and discuss the first case. Designate a spokesperson for your group.

2. How would you rule? Answer the following questions:
    a. What key facts should the union present to win the case?
    b. What key facts should the company present to win the case?
    c. Has the burden of proof been met?

CASE DESCRIPTIONS

Case #1: Job Given to a Contractor

Issue: Did the company violate the collective bargaining agreement when it subcontracted the work of the line person?

Description:

Ajax Company has, in its contract with the Union, a provision for a "Lineperson" and a salary scale for this position. Upon the retirement of the lone occupant of this position, the company assigns an independent contractor to fulfil the duties of this role. The collective bargaining agreement says: "The company agrees that it will not use contract labor to the degree that it will cause full-time employees to have to work part-time or layoff regular employees." The company argues that, since the job was vacant, there was no regular employee who was affected. Thus, the company says it is within its management rights to take this action.

Case #2: The Over-Enthusiastic Salesperson

Issue: Did the company have just cause to discharge the grievant for sales fraud?

Description:

The grievant worked for the Company in the position of Sales Associate. The grievant had previously been recognized as the top salesperson in the region. The duties of a Sales Associate are to answer the telephone inquiries of customers, ask them if they would like to augment their service with other services, price any additional services, and to complete the sales order. All sales associates (120 in total) are managed by eight supervisors who report to the Director of the Call Center. The Director of the Call Center reported to the Acting Director of the office.

The company's policy is to do business in a way that creates and maintains a relationship of trust with the customer. Company policy states the representatives must deal with customers honestly. The Company's policy is not to add services customers' accounts without the customer's permission. During her training, the grievant had signed a statement agreeing to uphold this this policy.

What prompted the investigation of the grievant was a set of anonymous complaints to the Company's ombudsman by call center employees. The complaints were that the grievant had committed ethical transgressions by adding items to customer accounts without getting permission from the customer. The Acting Director anonymously investigated these claims via an audit of the grievant's sales records (comparing the tape records of the call to sales logged by the grievant). This investigation yielded eight errors, all of which suggested the grievant committed fraud. Subsequently, there was another investigation: customers in all eight cases were called to confirm their sales. Each customer denied requesting additional services.

At the hearing, there was a dispute about whether two of the eight flagged cases were actually fraudulent. Upon cross-examination, management admitted that two of the cases were erroneously flagged as being fraud. Management also admitted that their investigation into the grievant did not involve looking into the account history of the six fraudulent actions. Doing this could have revealed if there were other sales associates who had gotten into the sales record besides the grievant. But management also testified the account history of the cases were irrelevant, as not enough time had elapsed between the call cases being open and closed for another associate to tamper with the records.

The hearing also revealed two potentially mitigating factors. First, there testimony suggesting the grievant was working in an environment characterized by extreme competition. Second, the Union claimed that management in effect condoned the fraud by not acting soon enough after it discovered the grievant's actions.

Case #3: Dynamite

<u>Issue</u>: Did the company have just cause to discharge the grievant for sexual harassment?

<u>Description</u>:

The grievant was employed as a Production Operator by Big Blast Company, which manufactures gun powder. She is accused of violating the Company's sexual harassment rules. A male co-worker accuses the grievant of "flashing" her bare breasts to him and other male employees. Specifically, he describes an incident where she drove a truck, beside a loading dock where he and other male employees were working, with her breasts exposed. The grievant is also accused by another male employee of showing him (and two other employees) a cell phone video of herself engaged in sexual acts. This was done in the lunch room during a lunch break. The company has a rule that states: "Sexual harassment is not tolerated and may lead to dismissal."

The grievant denies these charges and claims that the men are out to get her. She has testified that her co-workers don't like women to be in her job. The grievant offers several reasons for why her coworkers would falsely accuse her. She testified her co-workers think her job is dangerous and believe that these jobs should be done by a man. She also testifies that her accusers don't like her because she has resisted past sexual advances. She also claims that the men often show sexually explicit videos to one another and, rather than being offended, would enjoy seeing her exposing her breasts to them.

Case #4: Stolen Light Blubs

Issue: Did the company have just cause to discharge the grievant for stealing?

Description:

Mr. R.U. Robber was discharged for theft. Previously, he was an electrician with 30 years seniority and an exemplary employment record. The grievant had received an award for running into a fiery building to put out a fire while working. An anonymous tip had been called in that someone wearing shorts from a local sports team was leaving the building with stolen property. The guard at the gate found six unopened but unmarked light bulbs in Mr. Robber's gym bag. The light bulbs were not stamped "Property of XYZ Company," but it was also not company practice to stamp each light bulb.

At the company, light bulbs are kept in a storage room which has an access log. The access log did not reflect any entries for Mr. Robber on the date of the incident. At the hearing, testimony revealed the gym bag (which held the stolen light bulbs) had been stored in a unlocked locker in an unguarded area which all employees had access to. The grievant testified that he had this very common light bulb in his bag due to night fishing hobby. There was testimony that the light bulbs had a street value of $25.