*Union:*

Union argued that Gates had already been disci-d for a long period of time (nine months by the of the arbitration hearing) and Gates should be sumed innocent until proven guilty. The Union ned that Rule 10, Category C requires "conviction felony." Gates had not been convicted. Gates was sted and charged, but not convicted. In fact, Gates a good work record. Mr. Colbert, plant manager, fied that Gates had no performance issues.

The Union stated that the Company had allowed employees who were convicted of felonies to nue to work. The Union presented a document h involved Jackie Johnson who was convicted felony and who was allowed to continue to at the Company. In addition, Mr. Blackwater, dent, Local No. 345, identified other similarly ted employees—Marvin Holden, Bob Cooper, Troy Lode—who were convicted of felonies, were allowed to continue to work.

Union stated that Gates tested negative for rugs in his system. Gates's personal locker vehicle had been searched and no illegal rugs were found.

The Union stated that Mr. Colbert made the decision to permanently suspend Gates. Mr. Colbert said that if the charge is reduced or the Grievant is found not guilty, the Company knows that Gates will be brought back to work and made whole for any losses.

The Union contended that Gates agreed to go to his girlfriend's house to receive the package. Gates did not open the package, but put it in the back of his truck. Gates told the police that the package was not his, and he did not know the package contained drugs. The Union stated that Gates cooperated with the police in order to secure the arrest of Stone, the addressee of the package containing the illegal drugs. The Union stated that Gates knew Stone as a childhood friend in Kentucky. However, Stone was a drifter who lived in Kentucky and who had an address in West Virginia.

The Union concluded that Gates did not violate Rule 10 of Category C, there was no just cause for this indefinite suspension, and Gates should be reinstated and made whole for any losses.

**Questions**

1. Which party has the burden of proof in this case? Why?
2. What is the rule about off-duty conduct in regard to employee discipline?
3. What type of evidence are the e-mails received from employees about Gates's on-duty behavior? Should this evidence be considered by the arbitrator? Why or why not?
4. Should the Company's offer to pay back pay and to restore seniority and benefits if Gates is found not guilty be considered by the arbitrator? Why or why not?
5. You be the arbitrator. Should the Grievance be sustained or denied? Explain your reasoning.

Assignment

# Last Chance Agreement Versus Just Cause–Progressive Discipline

**CASE STUDY 12-2**

**Background**

On March 27, 1998, the Company, the Union, and Mr. Danny Webb, the Grievant, entered into and signed the following Agreement:

> *Without precedent, the Company, the Union, and Mr. Danny Webb agree to the following:*
>
> 1. *Mr. Webb has reached the discharge step for progressive discipline under Category "B" rules. He is, hereby, given a final opportunity to save his job by compliance with conditions set forth in this agreement.*

2. *There will be a suspension from 3/27/98 to 4/20/98. Mr. Webb will return to work the week of 4/20/98.*
3. *There will be a probationary period of 18 months, which will expire September 27, 1999.*
4. *The violation of any plant rule during the probationary period will result in immediate discharge.*
5. *Any absence of scheduled work time, including tardiness, during the probationary period will result in immediate discharge, unless determined by supervision to be beyond Mr. Webb's control.*
6. *Mr. Webb understands that overtime is a part of his job.*
7. *Mr. Webb has been made aware of the Employee Assistance Program, for help with the anger problem he says he has.*

On April 27, 1999, Warehouse Supervisor Mr. Ted Holt wrote the following Notice:

*Reason for Warning or Reprimand:*
*Violation of plant rules including negligent act resulting in damage to company property. Category B (12) Danny flipped over (2) crates of 1/8" × 48" × 60" heavy case (HC) glass in zone #326 on the top row and then took (1) crate of HC from the bottom and placed it in front of the damaged crate. This hid the flipped-over crate. He went home without reporting the incident. Other employees observed the incident and reported to Tommy Biggers.*

*Supervisor's Comments:*
*Danny did not report the incident to any supervisor. He placed a crate in front of the two crates that he caused to flip over to hide the damage and presented a hidden danger to other employees. This is in violation of his Last Chance Agreement dated March 27, 1998, and therefore results in discharge.*

On the same day, Mr. Joe Broadway, first vice president, Local Union no. 911, filed the following Grievance:

*Statement of Grievance:*
*The Union asks that Mr. Webb be put back to work and made whole for any lost wages.*

The Company denied the Grievance in a letter dated June 11, 1999, to Mr. Thomas Rowe, president, Local Union no. 911. The reason given was:

*The facts of the case indicate that Mr. Webb did indeed tip two crates of glass, knowingly concealed the damage, and failed to report the incident to his supervisor. The disciplinary action taken was appropriate given the facts. Grievance denied.*

The Grievance was appealed in a letter dated June 16, 1999. The appeal stated:

*L-26-9—The Union is in dispute with the Company's position pertaining to the discipline of this Grievant; therefore this grievance is appealed to arbitration.*

### Issue

Was the Grievant's discharge for just cause? If not, what is the remedy?

### Relevant Provisions of the Agreement

#### *Article 2—Management*

2.01 The Union agrees that the Company is vested exclusively with the management of the business, including the direction of the working force; the right to plan, direct, and control all plant operations; the right to relieve employees from duty because of lack of work or for any other legitimate reason; the right to establish, change, or introduce new or improved production methods or facilities; and, except as expressly limited by the provisions of this Agreement, the right to hire, promote, suspend, demote, discipline, or discharge employees for just cause.

2.02 All authority normally exercised by Management is and shall remain the exclusive prerogative of the Company, except where such authority is expressly limited by the terms of this Agreement.

2.03 Any alleged discrimination or violation of the terms of this Agreement deemed to exist as a result of the exercise of these prerogatives by the Company shall be subject to the Grievance Procedure of this Agreement.

#### *Article 5—Settlement of Grievances*

(e) Step 5: Arbitration

...The arbitrator shall have jurisdiction and authority only to interpret, apply, or determine compliance with the provisions of this Agreement insofar as shall be necessary to the determination

of the grievance submitted to him, but he shall not have jurisdiction or authority to add to, subtract from, or alter in any way, the provisions of this Agreement....

***Article 32—Rules***

32.01 For the purpose of plant discipline, the Company shall have the right to make and, after publication thereof, to enforce reasonable factory rules, not otherwise inconsistent with the terms of this Agreement.

32.02 The purpose of disciplinary action is not to punish, but to discourage repetition of misbehavior by the offender.

32.03 If the Company should post a new rule that the Union should consider unreasonable, it shall be subject to the grievance procedure.

32.04 The reasonableness of the following factory rules are agreed to by the parties and shall be subject to the following outlined disciplinary action.

Category B—This covers the disciplinary procedure for handling those types of offenses that require more severe penalty:

*First Offense—Five-day suspension (working days)*
*Second Offense—Discharge*

(12) Negligent acts resulting in loss of production or damage to Company property.

**Positions of the Parties**

*The Company:*

The Company stated that on April 27, 1999, Mr. Webb, a forklift operator in the Shipping Department, was working the day shift pulling orders for glass crates from the warehouse. The order list from which the Grievant was working called for one crate of 1/16" × 48" × 84", heavy case (HC) gray glass located in Zone no. 326. The Grievant proceeded to this location and was removing a two-crate pack (banded together) of the required glass when he accidentally tipped over a second two-crate pack, which was located immediately behind the first one. The tipped-over pack made a loud noise when it fell, and the noise was heard by both the Grievant and two employees who were working in the "repair" area some 25 to 30 feet away. Instead of stopping to check to see what had happened, the Grievant proceeded to lower the two-crate pack he had on his forks, cut the band holding them together, set one single crate back on top of a three-tier stack, and drove off to the dock staging area with the single crate. His actions were observed by two other hourly employees who were working in the "repair" area and who subsequently reported the incident to supervision. Mr. Webb never reported the incident to any member of supervision. In fact, the Grievant created a safety hazard for his fellow employees by setting a single unbanded crate on a three-tier stack.

On investigation of the incident by area supervision, the Company determined that Mr. Webb had acted negligently in the performance of his duties. His failure to report the accident and making the situation a dangerous one by stacking a single unbanded crate on the three-tier stack reflected a total disregard for his job responsibilities and the safety of his fellow employees.

The Company argued that the Grievance is without merit. At the time of his discharge, Mr. Webb was working in a probationary status under the terms of a last chance agreement dated March 27, 1998. The terms of this agreement specifically state that "the violation of any plant rule during the probationary period will result in immediate discharge." The probationary period extended from March 27, 1998, through September 27, 1999. The present incident occurred on April 27, 1999, well within the probationary period. The last chance agreement was a final opportunity for the Grievant to preserve his job. Mr. Webb, the president of Local 911, and the vice president of Local 911 all signed the agreement. The agreement has both a starting and ending time frame, and its probationary period does not exceed any of the probationary time frames outlined under Article 32—Rules of the Labor Agreement.

The Company argued that Mr. Webb had been given an opportunity to retain his job. The Company went beyond what the Labor Agreement demands in the way of "second chances." This is evidenced by the fact that a last chance agreement was entered into with the Grievant. Although the Company was well within its rights and the provisions of the Labor Agreement to discharge the Grievant in March 1998, it gave the Grievant a final opportunity to save his job. The last chance agreement was above and beyond the requirements of the Labor

Agreement and demonstrates that the Company was not "out to get" the Grievant.

Eyewitness testimony from fellow employee Donnie Ossie indicated that he saw the Grievant tip over the two crates of glass in question. Although fellow employee James Staples did not see it, he testified that he heard a loud noise where Mr. Webb was working and asked Donnie Ossie if "Danny had turned over some glass." Even Mr. Webb himself admitted that he heard a loud noise when he attempted to lift two crates of glass (banded together) from the third tier, but he did not check to see if there was any damage. This action goes to the very heart of why the Grievant was charged for performing his job in a negligent manner. Basic common sense would dictate that a person would check to see if he had caused an accident and, if so, to report it to the proper authority.

The Company claimed that Mr. Webb is not an inexperienced novice in the workplace who can claim he did not know what he was supposed to do in such a situation. Webb confirmed that he had worked at the Company since 1973, that he was aware of the fact that he was supposed to report all accidents to supervision, and if cleanup was involved, that the person causing the damage was the one who was supposed to clean it up. Yet, despite his understanding of the rules, he failed to report the accident and clean up his mess. Furthermore, he exacerbated the situation by creating a safety hazard by placing a single crate of glass (unbanded) on the third tier.

The Company claimed that Mr. Webb did not admit to nor deny that he "could have" tipped over the two crates of glass. Webb's lone defense was that he just did not know whether he had tipped the glass over. Webb did admit to hearing a loud noise as he was removing two other crates of glass. Again, the fact that the Grievant was experienced on the job and the fact that basic common sense would prompt any prudent person to check to see what had caused the noise calls into question the credibility of the Grievant. The Grievant confirmed that the lone eyewitness was positioned at a location where he could have observed if any crates had been turned over. The noise created by the falling glass was of sufficient volume that another employee in the "repair" area heard and reacted to it. All these facts paint an undeniable picture that Mr. Webb acted negligently.

The Company stated that the Union alleged that forklift operators had been told by supervisors to stack single crates on the third tier. The Grievant testified that supervisors had instructed them to "pack the crates tight" against one another. When Mr. Webb was asked if any supervisor had ever told him to stack single crates on the third tier, Mr. Webb said that he had been told to pack them tight. When pressed further, Mr. Webb admitted that he had never been told directly by any member of supervision to stack single crates on the third tier. In fact, Mr. Webb confirmed that the standard method of operation was to stack two-crate packs of glass, which are banded together, when stacking three tiers high.

The Grievant was asked if he thought that stacking single crates, three tiers high presented a safety hazard to himself or to others. The Grievant said, "No." He further stated that on April 27, 1999, he broke the band on a two-crate pack, took one crate out, and returned the single crate to its former position on top of the third tier. Mr. Webb stated that the total width of a single crate was 12 to 13 inches wide and that the weight of a single crate would exceed 4,000 pounds. It is clear that such a crate would be less stable than a two-crate banded pack, yet Mr. Webb maintained that he did not believe this to be a safety hazard. In fact, he admitted to setting a single crate on the third tier as a freestanding object with no other standing crate behind it. This action violates even the Grievant's own version of the stacking instructions, which was to pack single crates tight against other crates. There were no standing crates behind the single crate that the Grievant placed on the third tier. This illustrates that Mr. Webb was negligent in the performance of his job and that he did indeed create a real safety hazard for himself and other employees.

Supervisor Brian Waters testified that the two crates of glass that were tipped over by the Grievant were valued at $2,320. This figure did not include the cost associated with removal and disposal of the broken glass. Mr. Waters testified that both of the crates of glass were total losses. Supervisor Waters pointed out that the proper way to handle crates of glass would have been to insert the forks

of the forklift under the two-crate pack to be loaded but not to the point that the forks would extend beyond the two-crate pack being lifted. If the forks were fully inserted, they would extend below the next two-crate packs behind the two-crate pack being lifted. When the driver raised the forks to lift the front two-crate pack, the tips of the protruding forks would act as a lever on the second two-crate pack and cause it to topple. The Company's position is that this is exactly what Mr. Webb did when he toppled the crates of glass.

The Company concluded that it had presented unrefuted evidence that:

- The Grievant was given one more chance to save his job than was required by the labor contract.
- The Grievant had previously reached the discharge step for progressive discipline under Category B rules.
- The Grievant was working under a last chance agreement in which any violation would subject him to immediate discharge.
- The last chance agreement was agreed to by the Company, the Grievant, and the Union as evidenced by their signatures on the document.
- The last chance agreement specified a beginning and ending date, set a probationary period that was in line with the probationary periods used elsewhere in the labor contract, and specified that violation of any plant rules during the probationary period would result in immediate discharge.
- The incident that occurred on April 27, 1999, was within the probationary period of the last chance agreement (March 27, 1998, to September 27, 1999).
- The incident was witnessed by bargaining unit employee Donnie Ossie and heard by bargaining unit employee James Staples, as well as the Grievant himself.
- The Grievant removed a two-crate pack from the third tier, broke the band, removed a single crate, and set a single crate back on the third tier, thus creating a safety hazard.
- The grievant was never instructed by any member of supervision to stack a single crate on the third tier of any stack.
- The Grievant acted negligently in the performance of his job.

Therefore, the Company respectfully requests that the Arbitrator deny this grievance.

***The Union:***

The Union stated that Mr. Webb was hired by the Company into the Flat Glass Department on April 23, 1973. Webb worked packing glass for three years and drove a forklift approximately eight years. Webb had been working in this shipping department since 1991 and has worked all the jobs in the department. At the time of his discharge, he was a forklift driver, pulling stock.

On April 28, 1999, the Grievant worked the day shift (7:00 A.M. to 3:00 A.M.). Near the end of the shift, the Grievant was told by his supervisor that he was required to work overtime on the next shift. Webb was not the lowest in used overtime and went looking for Mr. Bob Crain, the Union Steward for the department on that shift. While he was looking for Mr. Crain, Webb saw Mr. Joe Broadway, the Local Union vice president. Mr. Broadway told the Grievant that Mr. Crain was in the personnel office to talk to the Grievant. Mr. Broadway told the Grievant that the Company was going to fire him for turning over some glass the day before. Mr. Webb told Mr. Broadway he did not know anything about it. The Grievant went back to his department, and his supervisor told him that he was wanted in Mr. Don Grey's office. The Grievant and his supervisor went to Mr. Grey's office, where the Grievant was discharged for "violation of plant rules including negligent act resulting in damage to Company property. Category B (12)" and "violation of last chance agreement dated March 27, 1998."

The Union stated that Mr. Donnie Ossie testified that he and Mr. James Staples were working in the "repair" area of the shipping department approximately 30 to 40 feet from where the Grievant removed two crates of HC glass from the third stack with a forklift. The two crates were banded together. Ossie stated that when the Grievant was getting the two crates down, the fork on the forklift tipped over two other crates of glass and that he heard glass breaking. Ossie stated that the Grievant cut the bands of

the two crates, put one crate back up where the two crates had been, and carried the other crate of glass with him. Ossie testified that the Grievant said something to him, but he could not hear what he said because of the noise. Ossie testified that there was space behind the two crates that were tipped and that, if they had been stacked properly, the two crates could not have fallen. Ossie indicated that the two-crate pack that was tipped over was next to and behind the two-crate pack that the Grievant removed from the stack.

Mr. Ossie testified that the glass in question had been shipped from Mexico, that the crates were not very steady, and that the crates of glass from Mexico would sometimes fall if you looked directly at them. Ossie testified that everyone who worked in shipping had broken some glass and that employees had to do the best they could. Mr. Ossie admitted that he did not see any broken glass in the area.

Mr. James Staples testified that he and Mr. Ossie were in the "repair" area and that he heard a noise and determined that it came from the area where Mr. Webb was loading crates of glass. Staples did not see any crates of glass fall and could not see the two crates that were laying flat. Staples admitted that it was common for people to break glass and that it was a noisy work area.

The Company had stated that the Grievant said that he had an order for one crate of 1/16" × 48" × 84" glass and went into the area and pulled a two-crate pack of 1/16" × 48" × 84" glass from the third tier, cut the bands, and put one crate back on the third tier as he had been instructed to do by his supervisor. Webb then carried one crate with him and put it in the dock area. The Grievant testified that, when he was loading the two-crate pack of 1/16" × 48" × 84" glass, he heard a noise but could not see what had caused the noise and that he did not know whether or not he had turned over the two-crate pack of glass. Webb stated that he had to drive down the aisle before he could see the two crates laying flat on the top of the other crates. He did not know if they were laying flat before he got the two crates or not. Webb testified that he asked Mr. Ossie and Mr. Staples if they had heard the noise, but they could not hear him because of the noise in the plant, and he did not pursue it. Webb stated that he saw an empty space behind the two-crate pack of glass that he loaded but could not see any other crates behind on the third tier. The Grievant testified that he had broken glass before and that everyone who drove a forklift had broken glass. To his knowledge, no one had *ever been* disciplined for breaking glass. Webb stated that no one from Management ever talked to him about the alleged incident until the meeting near the end of the shift on April 28, 1999, and he knew nothing about the alleged incident until that meeting. Each employee testified that, if the two crates of glass in question had been stacked properly, they would have been against the wall and could not have fallen.

The Union argued that the Company did not afford the Grievant anything that even slightly resembled due process. Mr. Crain testified that he made up his mind to discharge the Grievant at about 6:00 P.M. on April 27, 1999. At that time, Crain had talked only to his supervisors, none of whom had any direct knowledge of what had or had not happened. Until the meeting on April 28, 1999, the only supervisor who possibly had any direct knowledge of what happened was the supervisor to whom Mr. Ossie reported that the glass had been tipped over by Mr. Webb. There was no evidence that any Company official ever talked to Mr. James Staples until the day of the arbitration hearing. In other words, Mr. Crain made the decision to discharge Mr. Webb at 6:00 P.M. on the April 27, 1999, without talking to anyone other than Mr. Ossie, who could not have possibly seen the forks on the Grievant's forklift tip over the two-crate pack of glass in question. There was no evidence that any member of management checked the wood on the crates to see whether there were marks other than those made by the forks on the lift truck. The Union argued that Mr. Crain made the decision to discharge Mr. Webb on April 27, 1999, at 6:00 P.M. and was not going to change his mind.

The Union stated that it is clear that the Company did not conduct a fair investigation and did not afford the Grievant due process by any stretch of the imagination. As such, there are grounds to sustain the Grievance. The majority of arbitrators have reversed discipline and discharge of employees when the employer has violated the basic notion of fairness and due process.

The Union stated that Mr. Webb testified that, when he was getting the two-crate pack of 1/16" × 48" × 84" glass, he could see empty space behind them, that he could not see any other crates behind them, and that during the time he was removing the two-crate pack he heard a noise but could not tell what had caused it. Mr. Staples testified that he heard a noise but that it did not sound like glass breaking. Mr. Webb testified that he broke the bands on the two-crate pack of glass, cut the band, set one crate back on top, and took the one crate he needed with him to the dock area. Webb stated that as he was backing up with the two-crate pack of glass, at some point he could see the two crates laying flat on top of the stack. The Grievant stated without reservation that he did not know if the two crates of glass were laying flat when he came to the row or if he had accidentally tipped them over.

The Union argued that the evidence clearly shows that the glass fell over on its own as a result of the Grievant possibly bumping the front of the stack or that the movement of the glass being lifted caused the row to move, causing it to tip over. Mr. Ossie testified that the glass packed at the Mexico plant would fall over if you looked at it. It is clear that the fork of the forklift could not have possibly tipped over the glass.

The crate extended eight to ten inches beyond the end of the forks. According to the order list, the glass was 48 inches wide. Allowing two inches on each side for the crate, the total width of the crates would be 52 inches. The forks were approximately 46 inches long. If two of the crates are 24 to 26 inches across, the forks would not go all the way through the four crates. If the Grievant had attempted to raise the four crates up as described by Mr. Ossie, they would have had to have been stacked close together. If the two crates were set up from where they are shown to be laying, there is no possible way the forklift could have touched them. If the forks had gone under all four of the crates as described by Mr. Ossie, the forklift could not have lifted them, and they surely could not have fallen off the forks.

The Union stated that there were no marks of any kind anywhere on the wooden crates that could have been made by the forks on the forklift. If they had been tipped over by the forks, there would have had to be some type of marks on the wood. Thus, the crates could not possibly have been turned over or tipped over by the forklift driven by Mr. Webb.

The Union stated that the Company position that Mr. Webb set the single crate of glass back on top was destroyed by the testimony of the Grievant that just a few days before the alleged incident his supervisor had told him to do exactly as he did in this case. Therefore, the Company presented no evidence whatsoever that the Grievant was negligent or that he tried to hide anything.

The Union closed by stating:

> *For all of the above, the Union requests that the arbitrator sustain the grievance, order the Company to reinstate the Grievant to his job without loss of seniority and make him whole for all wages and benefits lost.*

## Questions

1. What is a last chance agreement?
2. Does a last chance agreement limit the arbitrator's authority? If so, how? If not, why not?
3. Is the length of the probationary period in the last chance agreement reasonable? If not, does this period make the last chance agreement unreasonable?
4. What proof does the Company have that the Grievant did what he was accused of?
5. What are the mitigating factors in this case? Should the arbitrator consider these mitigating factors in reviewing the penalty assessed by the Company?
6. You be the arbitrator. You decide and give your reasoning.