In an arbitration decided by Arbitrator Edward Gutman the grievant was a bus driver for a public transit company with 12 years' experience and no prior history of discipline. The transit company's substance abuse policy required drivers in an accident resulting in physical injuries or where one or more of the vehicles incurred disabling damage to submit to post-accident drug and alcohol testing According to the policy, the employer had the option to waive testing in a non-fatality accident if the employee could be completely discounted as a contributing factor to the accident. If testing were conducted, employees were to be placed on administrative suspension pending the results of the drug test. In the event discipline was finally imposed the employer's CBA required the employer to provide a written statement of charges to the employee within five days after the employer learned of the cause for discipline.

On a day in question, a Friday, a tractor trailer pulled out from a parked position and collided with and disabled a bus operated by grievant. The tractor trailer driver admitted to police he caused the collision and was cited for a traffic violation. The grievant was cleared as a contributing factor and though this was a non-fatality incident, no consideration was given for a waiver of testing as permitted under company policy. Rather, the driver was transported by a company supervisor to the private laboratory the employer used to conduct post-accident drug testing.

At the testing facility, despite four attempts, the driver did not produce a urine specimen of the minimum 45ml required by federal regulations for a drug screen. Under federal drug testing regulations, the lab collector is then required to begin a detailed "shy-bladder" protocol urging the employee to drink up to 40 ounces of fluid, distributed reasonably through a period of up to three hours or until the individual has provided a sufficient urine specimen, whichever occurs first, and to inform the employee of the time at which the three-hour period begins and ends. After three hours, the collector is directed to discontinue the collection and immediately notify the company's drug enforcement director ("DER") and send a written report to the company's medical review officer ("MRO") and a copy to the DER within 24 hours or the next business day. By federal regulations the MRO is responsible to act as an independent and impartial "gatekeeper" and advocate for the accuracy and integrity of the drug testing process and provide a quality assurance review of the drug testing process to determine whether there is a legitimate medical

explanation for confirmed positive, adulterated, substituted, and invalid drug tests results from the laboratory. If the MRO receives a confirmed positive, adulterated, substituted, or invalid test result from the laboratory, the MRO is required to contact the employee directly (i.e., actually talk to the employee) on a confidential basis, to determine whether the employee wants to discuss the test result and direct the employee to obtain, within five days, an evaluation from a licensed physician.

The grievant was not contacted by either the DER or MRO through the weekend after the accident nor told she was on administrative suspension pending the results of post-accident drug tests. She called the company on the Monday following the accident and was told she was not back on the driving schedule but that someone would call her. No one called until a week later when the same supervisor called and told her the DER would meet with her the following day. She met with the DER the next day and was given a "Disciplinary Action Report" advising her she was terminated for "Violation of company drug and alcohol policy."

The Company claimed the grievant violated clearly stated and reasonable work rules and that the punishment of termination was reasonably related to the seriousness of her behavior.

Arbitrator Gutman disagreed. As equity is an underlying principle of the collective bargaining process, an employer must conduct a fair and objective investigation to determine whether an employee violated or disobeyed a rule or order and must give the employee a chance to tell her side of the story before a final decision is made. In this case, the contractual requirements in the CBA included the necessity for the Company to provide a written statement of charges against the employee prior to the commencement of any discipline. None of these safeguards were provided.

Nor did the testing lab or the company satisfied their obligations under the Federal Regulations. For example, the evidence showed the collector did not follow the steps required of collector in a shy bladder situation with the employee. She did not "urge" her to drink 40 ounces of fluid. Rather, on a show of seeming indifference the collector directed the grievant to the waiting room where there was a water fountain. Moreover, the evidence showed a clear failure of compliance with the steps to be followed by the company after the collector informed the DER that the employee had not provided a sufficient

amount of urine. At that point, the DER, by Regulation, must "consult with the MRO, and afterwards direct the employee to obtain, within five days, an evaluation from a licensed physician, acceptable to the MRO, who has expertise in the medical issues raised by the employee's failure to provide a sufficient specimen." The evidence revealed that these steps were ignored until more than two weeks after the date of the incident. Likewise despite the contractual requirement, there was no evidence that the driver was placed on administrative leave or that she was even aware of the "offense" until she met with the DER two weeks later.

Justice Oliver Wendell Holmes Jr., the distinguished Supreme Court Justice once commented, "Great cases, like hard cases, make bad law." This is not a great case but it is a hard case. It is a "hard" case because of the murky cloud that descended over an employee with twelve years of bus driving experience with this employer, about whom there was no evidence of any prior unsatisfactory work performance or drug related misconduct which might have suggested a reason to be suspicious of her failure to produce a specimen, who lost her job following an accident in which it was clear, based upon the information available to law enforcement at the time, she had not been "a contributing factor," despite a clear exception of the federal drug testing regulations that would have allowed the company to exempt her from the testing requirement. The company made no effort to explain the reason why this exemption was not considered. For example, had the Company shown her treatment was consistent with other cases like her's where the bus operator was blameless, its failure to consider the testing exemption might have been a probative factor.

It is a "hard" case too because the termination process went forward despite evidence that neither the specific federal regulations which the Company relied on to support the discharge or the CBA were followed. She was not given a written statement of the charges against her prior to the commencement of the discipline. The Company argued that she was well aware on the day of the incident of her failure to produce a urine specimen as required by the Company drug and alcohol policy. While she was obviously aware she had not produced the required specimen, that did not relieve the Company from its CBA contractual obligation to give her a written statement of the charges against her in the discipline determination, prior to the commencement of the discipline or of its

obligation to call to her attention within five days after management was aware or should have been aware of the alleged offense.

The Company claimed she had been placed on administrative leave but the only response from the supervisor when the employee called Monday morning was she was not on the schedule. Yet, there was no evidence that the employee had been placed on administrative leave as the Company maintains or that she received any notice from the Company that she was terminated within the 5 days required by the CBA. Rather the employee went out following the accident and her visit to the drug collection site and had no contact from any Company official to discuss and find out first-hand her status any time prior to her notice of termination. Rather she was told to go home and someone would call her but no one called her for over a week when she was told to attend a meeting the next afternoon at which she learned she was fired.

"Abuse of discretion" is one of those general, formless, terms that is used and frequently applied and defined in different ways. It has been said to occur when action is taken by a party without reference to any guiding rules or principles. It has also been said to exist when a ruling under consideration appears to have been made on unsustainable grounds or when the ruling is clearly against the logic and effect of facts and inferences and fairly deprives a party of a substantial right and denies a just result. The Federal Regulations embody this concept in CFR 40.11 by recognizing that compliance with all agreements and arrangements, written or unwritten, between and among employers and service agents concerning the implementation of DOT drug and alcohol testing requirements are deemed "material term(s)" of all such agreements and arrangements.

Had the collector followed the shy bladder protocol and had the DER and MRO complied with Federal Regulations and had the company complied with the requirements of the CBA the dark cloud that shrouded the events may have been lifted.

Therefore, the Arbitrator found that the decision to terminate the grievant was made in disregard of the procedural requirements of the Federal Regulation and the CBA. In the context of the collector's failure to conform to federal regulation protocol, she was denied a substantial right. This denial of due process and the shoddy process of the termination support a finding that the company failed to prove in a clear and convincing manner that it had just cause to terminate her.

The Regulations ask the question "What happens if I test positive, refuse a test, or violate an agency specific drug and alcohol rule?" They say: "When you test positive or refuse a test, you are not permitted to perform safety-sensitive duties until you have seen a Substance Abuse Professional (SAP) and successfully completed the return-to-duty process, which includes a Federal return-to-duty drug and/or alcohol test. Working in a safety-sensitive position before successfully completing the return-to-duty process is a violation of the regulations." Since the Company considered the incident as a test refusal it was under an obligation to provide the employee a listing of SAPs that she could have accessed in order to qualify for a return to work. It's failure was further disregard of her rights