ARBITRATORS' DECISIONS ON DISCIPLINE OF UNION OFFICIALS, 1945-1951

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ARBITRATORS' DECISIONS ON DISCIPLINE OF UNION OFFICIALS, 1945-1951

By

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ARBITRATORS' DECISIONS ON DISCIPLINE OF UNION OFFICERS, 1945-1951

Chapter I

A STATEMENT OF THE PROBLEM

The discipline of union officials represents a very important and delicate problem in labor-management relations, and arbitration represents a promising avenue for the solution of this problem.

The imposition of discipline, usually in the form of discharge or lay-off, is perhaps the greatest single cause of disputes under contract between company and union.[1] The whole area of discipline is particularly susceptible to dispute because of the general ambiguity that characterizes collective bargaining contracts on this topic. The typical contract provides that no employee shall be subject to discipline except for "good and just cause". This provision has become so commonplace as to be nearly standard contract equipment.[2] Even in a contract that contained no such provision[3], and under which management claimed the absolute and unlimited power of discipline, arbitrator Blair ruled that no such absolute right could exist consistent with the contract. The assumption of such power by management, by his reasoning, would subvert the entire contract, since all authority to determine conditions of work would then pass to management, and the contract provided for a sharing of this authority between union and company.

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1 Clarence M. Updegraff and Whitley P. McCoy, Arbitration of Labor Disputes, Commerce Clearing House, New York, 1946, p. 131.
2 Maxwell Copelof, Management-Union Arbitration, Harper & Brothers, New York, 1948, p. 110.
3 Labor Arbitration Reports, The Bureau of Public Affairs, Washington, vol. 6, p. 593, In re The Caterpillar Tractor Co. and the United Farm Equipment and Metal Workers, (CIO), Jacob J. Blair, arbitrator.

Even in contracts without this wording, then, apparently employees can be disciplined only for "good and just cause".

Contracts with more comprehensive and specific discipline clauses are the exception, rather than the rule.[1] In one such case a contract negotiated between company and union provided that no discharge should take place except by the common consent of union and company. In another unusual contract, the union was granted the exclusive right to discipline union officials.[2] Such provisions seem to be extremely uncommon at the present time, however, and union officials are generally subject to the same disciplinary process as other workers.

In the typical contract, then, much room is left open for interpretation of what constitutes "good and just cause". One arbitrator has said[3] that the phrase must be interpreted "in the light of common experience". This is quite often a difficult problem to solve in the case of a rank and file worker, but in the case of a union official, the problem becomes greatly magnified.

The discipline of union officials is a problem quite different from the discipline of a rank and file employee because of the peculiar dual status of union officials. They are both employees of the company and agents of the union. The difficulty of serving two masters, attested to by the Bible, also presents itself in the more

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1 Labor Arbitration Reports, op. cit., vol. 12, p. 233, In re The Progress Furniture Mfg. Co. and the United Furniture Workers of America, (CIO), Michael I. Komaroff, arbitrator.
2 Labor Arbitration Reports, op. cit., vol. 9, p. 819, In re The Symington-Gould Corp. and the United Steelworkers of America, (CIO), Dudley Whiting, chairman of the tripartite arbitration board.
3 Labor Arbitration Reports, op. cit., vol. 6, p. 7, In re the January & Wood Co. and the Textile Workers' Union of America, (CIO), Nelson Schwab, arbitrator.

modern context of industrial relations. A union official must serve two masters: he acts for the company, commonly in a productive capacity, but he also acts for the union, and in such actions frequently opposes the company.

The discipline of a union officer, with such dual status, presents a problem quite different from the many problems found in other discipline cases. While acting in his capacity as a productive employee, justice requires that he be subject to the same degree of discipline as other employees, but when acting in his capacity as a union official, he should be immune from disciplinary action by the company. The drawing of a precise line between these two different activities of the same person is frequently a difficult proposition.

As one would be inclined to expect, cases involving discipline of union officers are among the most bitterly and vigorously contested of all arbitration cases.[1]

Aside from the great bitterness and force with which such cases are pursued by companies and unions, they are important because of the greater implications that they have on the entire process of collective bargaining. The law of the land prohibits the domination of labor unions by employers, and that principle is recognized by virtually all students in the field of labor economics as a necessary prerequisite to genuine collective bargaining. If employers are permitted to discipline union officials without restraint, they can indeed dominate unions to a tremendous extent through this mechanism. On the other hand, if union officers are not at all

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1 Copelof, op. cit., p. 123.

subject to discipline by their employers they may cause countless interferences with production to further the union's goals, or indeed their own personal goals. In such a situation, the union might virtually operate the business enterprise to the exclusion of the owners.

Reasonable men might well choose one of these extreme alternatives of company-dominated unions or union dominated companies, with resultant destruction of the collective bargaining process. For those who are willing to accept one of these extreme doctrines, the problem of discipline may be solved very simply. Dominant public opinion in the United States, however, would probably reject both of these choices and search for some sound, defensible middle ground upon which both management and union could be protected in the exercise of their essential rights, and upon which collective bargaining could be preserved. This latter approach is the one taken in this paper. If true collective bargaining is to take place it is manifestly impossible that union officers should be subject either to absolute company discipline or to no company discipline at all.

The great fervor and vehemence with which these discipline cases are contested, then, is most understandable in view of the great implications that it has on the entire process of collective bargaining. But they have firm roots in the day-to-day process of collective bargaining aside from these greater overall considerations.

In the first place, unionists tend to regard the officers of the union as a personification of the union, and action taken against them as merely thinly disguised action taken against the

union itself. Whenever action of any type is taken against a union officer, the union usually[1] charges that management has taken disciplinary action against the individual because of his union leadership, and would not have taken comparable action against a rank and file worker. An answer to the controversial question of whether authority in the trade union movement comes from the top down or from the bottom up[2] seems to be indicated by the fact that the rank and file workers stand so firmly behind their elected officials throughout the grievance procedure, and that in fact, discipline frequently[3] resulted because workers chose to obey orders of union officials rather than those of company officials. The discipline of union officials would not be such a serious question if the ordinary members of the union did not stand so firmly behind them, respect them, and obey their orders to such a great extent.

A second reason why unions consider the discipline of officers so damaging lies in the psychological effect that it has on the officers and potential officers. Subjecting union officials to discipline might make it increasingly difficult for the union to

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2 For a sympathetic presentation of each of these theories, see Irving McCann, Why the Taft-Hartley Act?, The Committee for Constitutional Government, New York, 1950, and Jack Barbash, Labor Unions In Action, Harper & Bros., New York, 1948. Both points of view are quite widely prevalent.

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obtain officers of high caliber. Certainly one would hesitate in accepting a job if such job would endanger his entire economic future. This point of view was very effectively vocalized in the dissenting member's opinion in an arbitration decision made by a tripartite board.[1] It is another reason discipline cases involving union officers are contested with such heat.

A third consideration, applicable to both companies and unions, is that these disciplinary actions become a test of strength between union and employer, and consequently their importance becomes magnified out of all proportion to their intrinsic worth. Like a prolonged strike over a fraction of a cent in wage rates,[2] the merits of the case become less and less important as the two economic competitors vie for power, rather than for the fractional cent, or for the firing or reinstatement of a shop steward.

From the company's point of view, too, there exist several reasons why discipline cases involving union officials are fought with such enthusiasm. Management looks at the right to discharge as an aspect of their right to run the business, to direct the factors of production so as to obtain the greatest level of output at the lowest possible cost. Each succeeding authority that is taken over by unions is looked upon as hastening the day when unions will have appropriated all power, and the free enterprise system will be at an end.

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1 Labor Arbitration Reports, op. cit., vol. 5, p. 363, In re the Carnegie-Illinois Steel Corp. and the United Steelworkers of America, Herbert Blumer, chairman of the arbitration board, Eugene Maurice, labor representative, dissenting.

2 Arthur M. Ross, Trade Union Wage Policy, University of California Press, Berkeley, 1950, p. 47. Professor Ross gives several examples of non-rational union behavior, of which this might be one, although he does not mention it.

Restrictions on the authority to discipline union officers are particularly unpalatable to employers who regard such restrictions as the requirement that they be compelled to retain on their payroll men who may bacome their active enemies, and who may be working against them, rather than for them. To paraphrase an expression of Samuel Gompers, management is prohibited from rewarding their friends and punishing their enemies, but is required to reward its enemies as well as its friends.

Company officials are inclined toward a wholesome distrust of union officers, even in situations where amicable labor-management relations prevail. The possibility that union officers may permit a thirst for power to dominate their actions, or that they will habitually strive to aggrandize union power is a possibility that companies are usually willing to entertain.

The fact that feelings run so high on each side, the fact that the applicable contract provisions are so vague, the fact that the regular grievance procedure, with its attendant negotiation and compromise,[1] has failed, the fact that the arbitrator cannot often look to previous decisions for a precedent,[2] and the fact that the arbitrator cannot consistently decide issues by compromise,[3] but

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1 As an almost invariable rule, company-union contracts provide for several levels of preliminary grievance procedure, with arbitration as the last step, to be used only if agreement can be reached in no other way.

2 Updegraff and McCoy, op. cit., p. 129; Copelof, op. cit., p. 41. These authors agree that precedent cannot be respected in labor arbitration cases as it is in legal cases for a variety of reasons, but primarily because of the widely varying conditions from case to case.

3 Updegraff and McCoy, op. cit., p. 113. The authors substantiate this viewpoint very convincingly. Their major contention is that participants in disputes will lose confidence in any arbitrator from whom they can expect only half-justice at best.

must often make decisions completely distasteful to one side all combine to make this one of the most difficult problems facing arbitrators.

In recent years, arbitration has become increasingly more popular in the settlement of industrial disputes as a substitute for "industrial warfare".[1] Arbitrators have frequently been confronted by the problem of disciplinary action against union officials. Their decisions exhibit areas of uniformity and areas of conflict and inconsistency.

In this paper an attempt will be made to discover these areas of agreement and disagreement, and to finally arrive at a statement of desirable policy that arbitrators ought to follow, given our original goals of collective bargaining preservation.

While this is hardly a place for a discussion of the advantages and shortcomings of arbitration as a method of settling labor disputes, the particular attributes that make it potentially capable of solving problems of this type should be mentioned briefly. Industrial disputes are notoriously miscast in law courts. The advantages of arbitration over courtroom litigation are several. In arbitration proceedings legal technicalities, most notably the laws of evidence, may be waived at the discretion of the arbitrator. The arbitrator may go into the field and examine areas of conflict first hand. The experienced arbitrator will be familiar with shop lingo and terminology, and over a period of time may develop insight

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1 Copelof, op. cit., p. 2; Updegraff and McCoy, op. cit., p. 9. Both of these works expressed the belief that arbitration increased greatly in popularity during the 1940's, quite largely due to the influence of the War Labor Board. Statistics to adequately prove or disprove the contention are not available.

into the problems created by personalities, the conditions of production peculiar to a particular industry or plant, and the historical relationships of the bargaining parties.

Arbitration as a method of settling disputes concerning the discipline of union officers also has several advantages over direct negotiation between the parties involved. One of these advantages has already been developed: that the strong feelings of the disputing parties on the matter and the general nature of the pertinent contract provisions make their resolution through grievance procedure impossible.

At first glance, it might appear that more extended and inclusive contract provisions might suffice to settle all discipline problems without resort to arbitration. This would have the definite advantage that it would make these issues the joint determinations of employers and employees rather than the arbitrary decisions of a third party. But while more inclusive contract provisions might reduce the need for the services of arbitrators, it is all but inconceivable that they could completely obviate the need. As it will be more fully developed in later chapters, the causes for discipline and the extenuating circumstances that may make discipline unjust in some cases take a tremendous variety of forms. It would be all but impossible for negotiators to anticipate all of these possible causes for discipline, and all of the possible extenuating circumstances that might be submitted. Even if omniscient negotiators could anticipate all of these possible causes and circumstances, solution of disputes concerning facts, which are characteristic of almost every arbitration case

involving discipline, would still be a sizeable task for a disinterested third party to perform.

In some happy future day with more highly developed contract provisions and grievance procedures the determination of the true facts disputed by conflicting evidence may be the sole function of labor arbitrators. In the forseeable future they have important functions of interpretation to perform that can be done more effectively by them than by any other agency.

More uniform policy by arbitrators would be an advantage both to company and to union. An employer, not knowing just how great his area of unilateral decision is, may be forced to pay sizeable sums in back pay to union officers that it has discharged without "good and just cause". A union officer, not knowing how far he may press union rights against management rights with impunity, may either fail to exercise power commensurate with his responsibility or subject his union to the demoralizing effects of the discharge of a leader.

The compilation and publication of many of the most significant decisions of labor arbitrators in a publication of the Bureau of National Affairs, Labor Arbitration Reports, provides us with a useful technique for looking at the problem of discipline, as applied to union officers, and the steps that arbitrators have made toward its solution. In the preparation of this paper 108 decisions of arbitrators concerning the discipline of labor union officers, all that were published in these volumes, have been considered. These decisions involve the discipline of 214 union officials, and

so may be considered as 214 individual discipline cases.

This should be a reasonably adequate frame of reference upon which to analyze such things as the causes for discharge that arbitrators have accepted or rejected, the extenuating circumstances that have caused them to modify or rescind disciplinary action by companies, the areas of agreement in arbitrators' decisions, and the conflicts and inconsistencies in their past decisions. A careful evaluation of the decisions with the original goal of collective bargaining preservation in mind should enable an answer to our major question of what the decisions of arbitrators ought to be in the interest of furthering industrial peace.

These 214 discipline cases were published in the five year period from 1945 to 1950, and include a few decisions earlier than 1945 in time. Throughout this paper, they will be cited LA, with volume number preceding, and the page number following. The companies and unions involved, and the arbitrators making the decisions will also be identified.

Through a process of time and sifting, some tendency towards uniformity in decisions has developed, and is developing. The primary concern of this paper is the direction that this uniformity is taking, and should take, if the process of collective bargaining is to be advanced and the legitimate rights of union and company are to be preserved.

Chapter II

The Causes for Discipline

The causes for discipline brought forth by companies take a great variety of forms. They include violation of the contract, violation of company rules established under the contract, and many other causes of lesser importance.

The leading cause for discipline of union officers is work stoppages, or "wildcat" strikes in violation of contract. These charges were made in 107 individual cases, exactly half of the total reported in Labor Arbitration Reports during this period. The typical contract provision prohibits any strike or work stoppage during the period of the contract, and provides some type of grievance machinery, with arbitration as its terminal point, to deal with any problems that may arise under the contract. Since offended workers have a remedy under the contract for any excesses of management, the work stoppage is considered highly culpable, and heavy penalties are usually meted out to strikers. A few of the contracts have unusually strong anti-strike provisions, specifying the highest penalty of discharge for anyone instigating, abetting, condoning, or participating in a work stoppage.[1] The greater number, however, merely outlaw strikes during the duration of the contract, and levy no specific penalties for violations. Under these contracts, arbitrators have assumed the dual task of determining if discipline is justified, and determining if the discipline

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1 1LA285, In re the Pittsburgh Tube Co. and The United Steelworkers of America, (CIO), Robert J. Wagner, arbitrator.
6LA414, In re John R. Evans & Co. and the International Fur and Leather Workers' Union of the United States and Canada, (CIO), decision of the tripartite board of arbitration.

is proper in severity.

Absenteeism and tardiness are the next most important causes for discipline of union officers, but are much less important numerically than work stoppages. 14 of the discipline cases here considered were for this cause. Some of the contracts provided the limits of tolerable absenteeism, but more commonly these were specified by company rules.

Insubordination was the third most common cause for discipline. It was offered as a cause 13 times, principally in instances where union officers countermanded orders of company officials or supervisory employees.

Violent or illegal conduct during a legal strike has also been considered a cause for discipline. Examples of such conduct, found in these decisions, are mass picketing and tipping over the car of a company official who tried to cross a picket line. Ten of the discipline cases here treated had such a cause.

Failure to follow correct grievance procedure is equally popular as a cause for disciplinary action, occuring ten times. Union officials who skip steps provided by the contract or assume excessive personal authority in processing grievances have been held liable to discipline by arbitrators.

A surprisingly low number of disciplinary actions resulted from poor job performance, poor quality of work, or low productivity. In only eight of the 214 cases considered in this paper was discipline for this cause.

A refusal to perform an assigned task was the cause for discipline in eight cases. In most of these cases job transfers or

demotions were involved, the offending union officers refusing to accept such transfers or demotions.

Slowing down on the quantity of work turned out, or inducing others to slow down, was another of the minor causes for discipline, contributing 7 cases.

Leaving the job during working hours was another of the less important causes of discipline, being offered as a cause in seven cases. In all of these cases, the employee's position as a union official was offered as a justification for such action.

The solicitation of union members or the collection of union dues on company time was the cause for discipline in five cases. The contracts under which these cases were processed forbade such activity.

Transaction of union business on company time was submitted as the grounds for discipline upon three occasions. The rather inclusive and specific provisions for conduct of union business on company time that characterize most modern collective bargaining contracts are doubtlessly responsible for the scarcity of decisions on this subject.

Three more discipline cases arose from fighting in the plant. In other cases of this general nature, physical violence against a foreman, an attack against a non-union worker in a union shop, and an assault case tried in the civil courts, and occuring off company property, have all occasioned disciplinary action by companies.

The use of profanity was a cause of discipline in two cases. In both cases the union contended that the union officers had merely used language common among men in the shop.

In the most lengthy of the discipline cases involving union officials, the cause of the discipline was the activities of the union officer in the communist party.

The remainder of the causes for discipline are seemingly non-recurrent in nature, and might be most conveniently grouped in a miscellaneous classification. In one unusual case which might be termed the discipline for least cause, three shop stewards were discharged for no other apparent reason than that they presented a grievance which personally antagonized the company vice-president. Punching the time card of a fellow worker as two employees reported for work together, playing a "practical joke" on a night watchman, "laziness", formulating a conspiracy to defraud, loitering, and washing hands on company time were the other miscellaneous causes for discipline.

In the cases involving contract violations, the arbitrators in general had two jobs: to determine the truth or untruth of disputed facts, and to interpret the contract, deciding just what it means. In the cases involving violation of company rules, the arbitrators generally had three duties to perform: to determine whether the rule was violated, to pass on the justice and reasonableness of the rule, and to decide if the rule was uniformly and fairly enforced.

Since these two causes, contract violations and infraction of company rules of one sort or another, are behind most discipline cases, it may prove fruitful to examine them further.

Arbitrators have heard cases and upheld discipline for both affirmative and negative actions by union officials. Union officers have been disciplined for violations of contract or

company rules; for encouraging others to violate rules or contract provisions; and for failing to urge rank and file workers to obey the contract and shop rules. An instance of the first case will be here termed a discipline for "positive" cause, the third a "negative" cause for discipline, and the second, which in reality lies somewhere between the other two, will be called a discipline for "provocative" cause.

If labor-management relations are to be two-sided, and the rights of both parties to determine conditions of work are to be preserved, then management should be given the authority to use all three of these as causes for discipline, but should be limited in its power to use each of them. Quite clearly, a union official can inflict financial and material damage on his employer in any of these three ways, by his positive actions, by his provocative actions, or by his "sins of omission" in not acting, when it is his duty as an officer of the union to act. Equally clearly, an anti-union management can supress or control a union by abusing its disciplinary powers in any of these three fields. Sensible policy requires that management have authority to discipline in all three of these areas, and that its power to discipline be limited in all three of these areas. Discipline for any of these causes should not be looked at as vengeance or as "an eye for an eye", but as a legitimate exercise of management's authority to direct the working force in such a way as to minumize the inputs and maximize the outputs.

While all three of these should be recognized as legitimate and valid causes for discipline, the differences between them are considerable, and ought to be understood. In the case of "positive"

discipline, the duty of the company, or the arbitrator, is comparatively simple. A determination of whether an action is illegal under the contract, a determination of whether the accused individual has actually performed this act, and an evaluation of extenuating circumstances that might justify the act will suffice for a decision. In the case of a disciplinary action for "provocative" cause, the same tasks must be performed, but they will be fraught with much more difficulty. The tone of voice of a speaker, the exact wording of a casual statement, the facial expression at the time of speaking, or a multitude of other intangible factors play a great part, and by the nature of the case, must carry a great deal of weight. The determination of a case based on a "negative" cause is yet a more difficult task. All of the difficulties inherent in the other two types of decisions are present here, and in addition the extraordinarily difficult questions of what is "reasonable effort", what is "good intent", and a complex array of other problems, so individualized to the cases that it is difficult to catalog them.

Further problems arise in connection with the causes of discipline. In the affirmative cases, the union official may be treated substantially the same as a rank and file employee. In the provocative cases, it would seem logical to make some differentiation between officers and ordinary union members. In the negative cases, the disciplinary action is peculiar to union officers.

If management is to be adequately protected in its right to direct the working force, then, it would appear that union officials must be subject to a higher order of discipline than rank and file

employees, since the acceptable causes for discipline must be more numerous for them than for others. Attendant with this higher order of discipline is the problem, previously mentioned,[1] of attracting a high caliber of men to union office who must be subjected to this higher level of discipline.

Examples of the three types of discipline should help to make more clear the distinction drawn between them here.

Discipline for positive cause may be illustrated by a case[2] in which a union president was discharged for a criminal assault that had taken place a few feet outside the company gates. Arbitrator Hampton's task was to determine if this was a justifiable cause for discharge, since the incident had not occured during working hours, or on company property, and the union president had already paid a fine for his misconduct in the civil courts. The arbitrator decided that these other factors made the discharge unjustified, and ordered the president reinstated with back pay. Here discharge was for a positive action, claimed by the company to justify discharge, and the arbitrator had only to decide, on the merits of the case, if the company's action was justified. The discharged employee's status as a union official did not enter into the decision.

In other discipline cases for positive cause, the offender's position as an officer of the union may influence the final determination of the case. The problem of differential treatment of union

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1 See p. 6, above.
2 7LA554, In re the Caterpillar Tractor Co. and the United Farm Equipment and Metal Workers, (CIO), Charles G. Hampton, arbitrator.

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officers, with which this paper is most concerned, becomes involved in cases of this type. In a case in point[1] a union president was discharged for washing his hands on company time in violation of a plant rule. The company argued that this offense warranted the discharge penalty since it was more serious than the same offense coming from an ordinary employee, as the union president sets an example for others to follow. Arbitrator Hampton decided that the president's action was culpable, but that making an example of him to the extent of discharge was unjustified and unnecessary, and ordered the penalty reduced to a disciplinary lay-off. In the positive discipline cases the employee's status as a union officer may be not considered at all, a minor element of the case, or the principle consideration, as it was in this case.

An extreme example of a provocative cause for discipline is found in a decision[2] by arbitrator Lesser involving two union committeemen discharged for instigating a slowdown. The company submitted evidence showing that the two union officers had threatened members with expulsion from the union if they did not decrease their production. Here the union officials were not more guilty than others as far as their participation in the slowdown was concerned, but were discharged for provocative acts. The arbitrator upheld the company's action and ruled that the discharges should stand. In other cases coercive action by union officers has been

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1 6LA443, In re the Metal Auto Parts Co. and the United Automobile, Aircraft, and Agricultural Implement Workers of America, (CIO), Charles G. Hampton, arbitrator.
2 2LA615, In re L. O. Koven & Brother, Inc. and the United Association of Journeymen Plumbers and Steamfitters, (AF of L), Arthur Lesser, arbitrator.

more subtle, but in all of them, the status of the offender as an officer of the union has been of paramount importance.

An example of discipline for a negative cause may be found in a case[1] involving eight men discharged for their connection with an illegal strike. Four of the offenders were union officers; four were not. Arbitrator McCoy in his decision ruled that the four non-officers should be reinstated with back pay, since evidence could not be produced to prove them more guilty than others who were not disciplined. In the case of the union officers, however, the company's disciplinary action was permitted to stand. No more evidence was introduced to substantiate the discharge of the union officers than was submitted for the rank and file employees. Since they had failed to properly discharge their duties as union officials, and persuade, or attempt to persuade the men to continue at work, the arbitrator decided that the discipline of the company was justified in their case. One of the officers with special extenuating circumstances was reinstated without back pay, and the other three were permanently discharged. In their affirmative actions, the union officials were not more guilty than the rank and file workers who were reinstated with back pay, and there was no charge that they had provoked or persuaded other workers to perform illegal actions. They were discharged for actions that they did not perform. It is difficult to imagine a union member, not an officer, being subject to discipline of this type.

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1 4LA744, In re the Stockham Pipe Fittings Co. and the United Steelworkers of America, (CIO), Whitley P. McCoy, arbitrator.

more subtle, but in all of them, the status of the offender as an officer of the union has been of paramount importance.

An example of discipline for a negative cause may be found in a case[1] involving eight men discharged for their connection with an illegal strike. Four of the offenders were union officers; four were not. Arbitrator McCoy in his decision ruled that the four non-officers should be reinstated with back pay, since evidence could not be produced to prove them more guilty than others who were not disciplined. In the case of the union officers, however, the company's disciplinary action was permitted to stand. No more evidence was introduced to substantiate the discharge of the union officers than was submitted for the rank and file employees. Since they had failed to properly discharge their duties as union officials, and persuade, or attempt to persuade the men to continue at work, the arbitrator decided that the discipline of the company was justified in their case. One of the officers with special extenuating circumstances was reinstated without back pay, and the other three were permanently discharged. In their affirmative actions, the union officials were not more guilty than the rank and file workers who were reinstated with back pay, and there was no charge that they had provoked or persuaded other workers to perform illegal actions. They were discharged for actions that they did not perform. It is difficult to imagine a union member, not an officer, being subject to discipline of this type.

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An analysis of the 214 instances of discipline in the 108 decisions of arbitrators included in the scope of this study shows that discipline was for positive cause in 111 cases, for provocative cause in 47 cases, and for negative cause in 58 cases.[1] The division of cases into these three classes is sometimes arbitrary and difficult, and little mathematical significance can be given to this data, but it seems to indicate that all three causes for discipline are important ones.

Other classifications of the causes for disciplinary action would be possible. The system just outlined "splits hairs" in a good many cases, it is abstract, and it makes scholarly distinctions that would probably not be recognized by unions and companies in the day to day process of collective bargaining and grievance presentation. It is, however, a sensible classification, and the one that seems most helpful in solving the problem of discipline for union officials, for it best takes into consideration those areas in which differentiation should be made between union officials and rank and file workers. This differentiation may take a number of different forms, but a differentiation in the acceptable causes for discipline is the most basic, since all discipline must, by contract provision or contract interpretation, be based on "good and just cause".

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exhausted, since an interpretation of the phrase "good and just cause" would settle any discipline case. In actual practice, however, arbitrators have frequently ruled that discipline should not be taken even when "good and just cause" exists. These extenuating circumstances which indicate that discipline should not be taken will be discussed in the next chapter. The study of these two basic elements of all discipline cases will complete a preliminary survey of the field of discipline of union officers, and lay the ground for the drawing of conclusions on policy.

Chapter III

Extenuating Circumstances

The variety of extenuating circumstances that have been presented by unions as reasons why disciplinary action should be completely withdrawn, or reduced in severity, is even greater than the multiplicity of causes for discipline brought forth by companies.

In one case[1] a union steward was discharged for a prolonged absence from his post as an elevator operator, and the union submitted the thesis that since the incident occurred on V-E day, and considerable excitement prevailed among crowds in the street, the steward's natural curiosity impelled him to leave his post temporarily, and for this reason the discharge penalty was too severe. Arbitrator Scarborough rejected this interesting contention, and upheld the company's action.

A cataloging of all the circumstances that might justify the reversal or lessening of disciplinary action would have considerable human interest, but would shed little light on the problem of disciplining union officials while maintaining collective bargaining. Two of these circumstances are so common, however, that they deserve special mention. As would be expected, long years of service and a good work record of high productivity have been quite successful in favorably influencing arbitrators. The charge of discrimination, that others equally guilty were not punished, is

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1 1LA554, In re the Hoboken Land & Improvement Co. and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, (AF of L), Harland J. Scarborough, arbitrator.

probably the most common of all extenuating circumstances offered as a reason discipline should not take place.

These and all the other extenuating circumstances of less frequent occurance have sometimes influenced arbitrators to completely negate the company's action, and have often caused arbitrators to substitute a lighter penalty for the one imposed by the company.

The multitude of extenuating circumstances offered in the 214 arbitration cases considered here may be divided into two groups, and the particular circumstances most relevant to this study examined at some length. We shall define "ordinary" circumstances as those extenuating circumstances that are equally applicable to union officials and to rank and file employees. We will consider extenuating circumstances which, by their nature, are applicable only to union officials, and not to rank and file workers, as "extraordinary" circumstances.

Examples of ordinary and extraordinary circumstances that have been accepted by arbitrators to lighten or reverse company action in discipline should help to make their meaning more clear.

In one case[1] a union steward was discharged for the violation of a plant rule against loitering. The union contended that the rule had never been posted by the company, or strictly enforced by them in the past, and that the discharge was therefore unjustified. There was no denial that the steward had really been loitering. Arbitrator Healy accepted the union's contention as an extenuating

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1 6LA430, In re the Joy Manufacturing Co. and the United Steelworkers of America, (CIO), James J. Healy, arbitrator.

circumstance, and ordered the steward reinstated with full back pay for all earnings lost due to the discharge. These extenuating circumstances would clearly have made the discharge unjustified even if the steward had been an ordinary employee. It could therefore be termed an ordinary one.

An extenuating circumstance of the extraordinary type may be found in another case[1], in which a union vice-president was discharged for ordering men not to report for work on a Saturday, in contravention of management directives. Arbitrator Tucker accepted as an extenuating circumstance the fact that the dischargee was an officer of a minority union. The work session, which was irregular in nature, had been jointly negotiated by the company and the majority union, but the officers of the minority union had not been consulted. The fact that he, as a union officer, was so slighted gave rise to a feeling of great resentment in him, and provided an extenuating circumstance. The arbitrator gave this as his principal reason for ordering the lightening of discipline from discharge to a disciplinary lay-off.

Union officials because of the nature of their position are both subject to a higher level of discipline, and exempt from discipline for a greater number of extenuating circumstances, since only they may make use of extraordinary extenuating circumstances, and only they may be disciplined for negative cause.

A more careful investigation of these extenuating circumstances

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1 3LA126, In re the Welin, Davit, & Boat Corp. and the International Association of Machinists, (Independent), William L. Tucker, arbitrator.

of an extraordinary nature shows that several of them are of common recurrence, and are quite basic to the question of differential treatment of union officers in discipline cases.

The most common of these is the frequent[1] charge that the company's stated cause is not really the basic one, and that the real motive for discipline is the fact that the union activities of the accused are obnoxious to the employer. Arbitrators have accepted this contention as a valid extenuating circumstance only in a few cases, where the union could prove that the company had a long history of anti-union action and that the discipline was really an attempt to break the union, and not to punish a worker for an individual wrong. This plea has generally not been accepted as an extenuating circumstance standing alone unless the union could supplement it by disproving the company's positive contention as to the grounds for discipline, and if the union could do this, the claim of prejudice against union officers was really not necessary, for the discipline would in all probability have been rescinded in any event.

An extreme case[2] of this type occured when all eight officers of a local union were discharged for the part they played in an illegal strike. The union contended that the company's discharges would have the effect of destroying the union, and so should not be permitted. The majority of the tripartite board of arbitration

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2 5LA363, In re the Carnegie-Illinois Steel Corp. and the United Steelworkers of America, (CIO), decision of the tripartite board, Herbert Blumer, chairman; Eugene Maurice, union-appointed arbitrator; and Walter Kelly, employer-appointed arbitrator.

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which heard the case dismissed this contention and upheld the action of the company. In a dissent from the opinion of the majority, arbitrator Maurice strongly defended this contention of the union which the majority of the board had dismissed rather lightly.

Another extenuating circumstance of extraordinary character frequently claimed by unions is the condition of "democratic process". Using this doctrine, unions often contend that their officials should not be subject to discipline for the leadership of illegal activities when such activities are the result of a democratic vote of the membership, since the leaders of the union are compelled to act in accordance with the wishes of the majority. This argument has received widely varying treatment at the hands of arbitrators.

In one case[1] a union president and vice-president were discharged for instructing union members to present grievances from the hours of 9:00 to 9:30 one morning instead of working. Arbitrator Updegraff found that such action was in truth nnt mere grievance presentation, but a work stoppage, illegal under the contract. However, in his decision he ordered that since the work stoppage had been the result of a democratic process, in which the entire membership of the union had participated, the discharge penalty was too severe, and should be reduced to disciplinary layoff for the two union officers. In this case, the vote of the union seemingly lightened the burden of responsibility that the officers were required to carry.

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1 3LA374, In re Ampco Metal, Inc., and the Employee's Mutual Benefit Association, (Independent), Clarence M. Updegraff, arbitrator.

In another case[1] involving the application of the doctrine of democratic process, a union president was discharged for his leadership in an illegal strike. The union presented a number of extenuating circumstances, one of which was that the stoppage was the result of a democratic process. Arbitrator Scheiber, in his decision, said "...a decision to do a wrongful act, though democratically arrived at, gains no sanctity, but still leaves the doer responsible." Other extenuating circumstances were accepted by the arbitrator, however, and the president's reinstatement with back pay was ordered in the decision. In this case the arbitrator seemed to completely reject the doctrine of democratic process.

Another extenuating circumstance commonly pleaded by unions is the condition of spontaneity. Using this argument, unions frequently argue that illegal work stoppages or actions of workers are the result of spontaneous action by the workers, and not leadership by officers. Union officials, by this doctrine, are not accountable for those actions of employees that are of a spontaneous nature, since the element of leadership is absent. This claim is quite frequently made in cases in which the union official does not directly participate in the illegal action, and has been used more rarely in some cases in which the union officials actually participated in the illegal act, but denied leadership of such action, notwithstanding their participation.

This line of argument is somewhat similar to the doctrine of democratic process, but is much more difficult to prove or disprove

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1 7LA3, In re the Nathan Mfg. Co. and the International Association of Machinists, (Independent), Isrel Ben Scheiber, arbitrator.

by objective evidence. If we contend that a strike was the result of a democratic process, we can frequently prove or disprove it by examining the minutes of a union meeting or hearing verbal evidence that a democratic decision took place. But if we argue that a strike resulted from the spontaneous action of workers, we will find it quite difficult to prove or disprove because of the difficulty of determining the psychological motivation of the strikers, or the precise location of leadership in the strike.

Like the doctrine of democratic process, the argument of spontaneous origin has received varied treatment at the hands of arbitrators.

In a case[1] in which four union officers were discharged because they were seen on an illegal picket line, where violence took place, arbitrator Lehocsky said "The fact that an individual is an 'officer of the union' does not mean that he is the moving spirit...". His finding was that the pickets were on the line due to their own, spontaneous free will decision, and that the company could not discharge the union officers unless they could prove specific, individual acts of violence in which they had partaken.

In another very similar decision[2] seven union stewards were given disciplinary lay-offs for their presence in a picket line during an illegal strike. Arbitrator Wolf felt that their mere presence on the picket line constituted leadership, and denied the

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1 11LA211, In re the Univis Lens Co. and L. W. Wornstaff et. al., members of the United Electrical, Radio, and Machine Workers, (Independent), Paul N. Lehoczky, arbitrator.
2 3LA285, In re the Mueller Brass Co. and the United Automobile, Aircraft, and Agricultural Implement Workers of America, (CIO), David A. Wolf, arbitrator.

contention of the union that the picketing was spontaneous, upholding the company's disciplinary action.

The doctrine of spontaneous causality has usually been accepted as a valid one, but has infrequently resulted in the nullification of discipline because it is so difficult to prove.

The mere fact of union official status does not seem to have been accepted as an extenuating circumstance. In a few cases arbitrators have implied that union officials, because of their position, deserved more consideration than rank and file workers, but they have not used this argument to negate company action in discipline cases.

In a case of this type[1] arbitrator Scheiber stated that "... discharge of a steward should be only for very grave cause", and said that "additional consideration" was due in the case of a union official. The meaning of these words is not very clear, however, since in this particular case Mr. Scheiber upheld the discharge of a steward for failing to follow correct grievance procedure in spite of the "additional consideration" due him.

There seems to be no clear cut case among the 214 cases in which a union official was given preferential treatment solely because of the office he held, with no other extenuating circumstances present, although arbitrator Scheiber's statements about "additional consideration" and "very grave cause" are found in a few other decisions. The much more common attitude of arbitrators is that union officials owe a higher responsibility to the contract than rank and file

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1 7LA3, In re the Nathan Mfg. Co. and the International Association of Machinists, (Independent), Isrel Ben Scheiber, arbitrator.

workers, and so "union office does not imply that one can act with impunity, but rather confers added responsibility".[1]

Discriminatory treatment may be either an ordinary or an extraordinary extenuating circumstance. In discipline cases where the wrongdoer can show that others equally guilty were not punished his discipline is usually not upheld by the arbitrator, even though the cause of discipline may be just.

When disciplined union officials can show that other union officers equally guilty were not punished, they are usually exempt from discipline. In a case in point[2], two union stewards were discharged for leading a strike in violation of contract. Arbitrator Whiting held that the stewards were guilty, but rescinded the discharge penalty because the local president, who was equally guilty, was unpunished. One steward was reinstated with half back pay and the other with none. In no case where the offending union officer could show discriminatory treatment of this type was company action upheld by arbitrators.

When the question is one of discriminatory treatment between union officers and non-officers, the issue becomes much less clear. Arbitrators have sometimes held that disciplinary action taken against union officials when rank and file workers equally guilty were not punished was discriminatory, and consequently void. Other arbitrators have held that discipline of this type was permissable.

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1 3LA285, In re the Mueller Brass Co. and the United Automobile, Aircraft, and Agricultural Implement Workers of America, (CIO), David A. Wolf, arbitrator.
2 1LA506, In re the Freuhauf Trailer Co. and the United Automobile, Aircraft, and Agricultural Implement Workers of America, (CIO), Dudley Whiting, arbitrator.

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In a case[1] involving a strike in violation of contract five union officials were discharged for their participation, although the company produced no evidence that they had participated to a greater extent than the many rank and file employees who received no punishment. Arbitrator Wolff, in his decision said that the company's action in singling out union officials for discharge was discriminatory: "I feel it would be most unfair for them (the union officials) to receive the maximum punishment possible in cases of this kind while the other employees escaped all responsibility". Primarily for this reason, the arbitrator ordered that the union officers should be reinstated to employment, but without back pay.

In another case[2] involving a work stoppage seven union stewards were given disciplinary lay-offs of one week for participation in a picket line. Although many other employees took part equally and were given no discipline at all, arbitrator Wolf upheld the company's action. He ruled that the company's action was not discriminatory, since the higher obligation owed to the contract by the union officials justified this differential treatment.

Another frequently recurring instance in which union office is pleaded as an extenuating circumstance comes in the charge of absenteeism. Arbitrators have usually taken a sympathetic attitude toward union officers charged with absenteeism when the officers can prove that their absences were necessitated by union business.

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1 7LA180, In re the Simplicity Pattern Co. and the United Office and Professional Workers of America, (CIO), Sidney A. Wolff, arbitrator.
2 3LA285, In re the Mueller Brass Co. and the United Automobile, Aircraft, and Agricultural Implement Workers of America, (CIO), David A. Wolf, arbitrator.

In a particularly interesting case[1] of this type, a high union official, who was a lobbyist in the state legislature and the vice-president of the state CIO council, was discharged by the company for excessive and unauthorized absences. Although the company submitted records showing an attendance record that could hardly be characterized as anything but miserable, the tripartite board that heard the case decided that the employee's union activities justified his poor record of attendance, and ordered that he be reinstated with full back pay for all his lost earnings.

In only a very few cases has company disciplinary action for absenteeism been upheld against union officials when the union officials could satisfactorily prove that their absence was necessitated by union business. In these cases specific contract provisions limiting the amount of time to be spent on union activities were incorporated into the contract.

In a few cases where discipline was for poor work performance or low productivity the fact that the employee was a union official has been offered as an excuse on the grounds that the union activities of the offender justify poorer performance records, since they may on occasions interfere with production. No arbitrator in any of these decisions recognized this as a valid excuse.

In yet another less frequently occuring type of case union officers have claimed greater immunity from discipline than rank and file employees. This lies in their right to interpret the contract,

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1 9LA905, In re the Carnegie-Illinois Steel Corp. and the United Steelworkers of America, (CIO), decision of the tripartite board, Ralph Seward, chairman; Eugene Maurice, union-appointed arbitrator; and Walter Kelly, employer-appointed arbitrator.

a right that is always denied to other employees. When employees disobey orders of supervisors they are usually held liable to discipline, even though the orders of the supervisors are in violation of the contract. The logic behind this type of decision is that if they believe the employer's actions illegal, the contract provides them with a grievance procedure, and they should obey the supervisor's order and file a grievance rather than attempting to interpret the contract themselves.

In one very important case[1] a union steward was discharged for failing to obey a direct order of a supervisor to leave the company employment office, where he was assisting a union member in processing a grievance. Arbitrator Seward ruled that the company did have a legal right under the contract to order him from the office. Despite this fact his reinstatement with back pay was ordered, because the steward's interpretation of the contract, that the company had no such right, although not the same as the arbitrator's was nevertheless a reasonable one, and because the steward had acted with good intent.

In these last few cited examples, union officials have claimed, and have sometimes been granted immunity from discipline where rank and file workers would be subject to discipline for the same offense.

Union officials have frequently availed themselves of other extenuating circumstances. They have charged that the company was "out to get them" and supplied them with faulty materials and

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insufficient helpers.[1] They have charged that the company violated the contract first, and so the succeding contract violation by them was justified.[2] In all of these cases no differentiation can be made between union officials and ordinary employees, and so they will be considered as ordinary circumstances, not especially relevant to our query, and will be pursued no further.

The principle extraordinary circumstances that make discipline unjustified for union officials, in summary, are: (1) discharge for activities as a union officer, with another cause, not the real one, merely stated as "window-dressing", (2) the doctrine of democratic process, (3) the condition of spontaneous action by workers without leadership by the union officials, (4) discriminatory treatment of officials as contrasted with treatment of rank and file employees or other officials, and (5) the nature of the union office itself, which may justify conduct by union officials that would be intolerable when practiced by other employees. These have been examined in some detail, and the reasoning applied to them by various arbitrators considered. This should provide valuable material in formulating a solution to the problem of union officer discipline.

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1 2LA335, In re Grayson Heat Control, Ltd., and the United Electrical, Radio, and Machine Workers, (Independent), decision of the tripartite board, Paul Prascow, chairman; Edwin Thompson, union-appointed arbitrator; and T. H. Pender, employer-appointed arbitrator.

2 11LA917, In re the Fox Co. and the Metal Polishers', Buffers', Platers', and Helpers' International Union, (AF of L), Joseph G. Stashower, arbitrator.

Chapter IV

The Areas of Agreement in Arbitrators' Decisions

In arbitrators' decisions during the period from 1945 to 1951, the fundamental postulate, basic to all other considerations, that discipline, including discipline of union officers, is one of the conditions of work subject to joint determination by employer and employees, seems to have been unanimously accepted by arbitrators. The right to discipline has not been recognized as an absolute right, to be unilaterally determined by either company or union, but a relative right, in which both union and company participate in determination, just as they do in determining the wage rate or the hours of work. No arbitrator in any decision has stated, or even hinted, that the authority of management in this field should be unlimited or that union officials should be completely immune from discipline, or subject only to discipline from the union.

Inside this broad framework of agreement on general principle, a great deal of agreement prevails in the many smaller phases of interpreting the phrase "good and just cause". This area of agreement must be described as being much larger than the area of conflict in the decisions. Considerable agreement prevails about what constitutes a good and just cause for discipline, and a somewhat lesser degree of unanimity about what can be accepted as an extenuating circumstance may also be seen in the decisions.

A rather important point of agreement is the acceptance of the theory that the degree of discipline, and not merely the decision to discipline or not to discipline, should be a subject of joint determination, and not a unilateral decision by the company. This

principle was stated by arbitrator Shipman in one of his decisions[1] in the form of an old aphorism: "The punishment should fit the crime". In this particular case, the five principal officers of a union local were discharged when the union went out on strike in violation of the contract. The officers had been culpable in not attempting to keep the other employees at work, but they had not committed the supreme offense of leading the walkout. For this reason, the arbitrator ruled that the supreme penalty should not be given to them, and the discharge penalty was reduced in severity to disciplinary lay-off.

The great importance of this principle is more fully recognized upon noting that arbitrators upheld company discipline, but reduced the severity of the company's disciplinary action in 43 cases of the 214 published during the 1945-51 period.

Arbitrators have unanimously held that the supreme penalty of discharge was indeed a serious one, to be given only in the most serious cases. In one decision[2] it was referred to as "a sentence of economic death." It has accordingly been upheld only for offenses in which the company suffered very serious damage from the misconduct of the offenders or for other offenses that seemed trivial in themselves, where the company could prove that the offense had such serious implications as the undermining of discipline or morale in the plant.

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1 2LA194, In re the Bethlehem Steel Co. and the United Steelworkers of America, (CIO), Mitchell M. Shipman, arbitrator.
2 15LA431, In re Cutter Laboratories and the United Office and Professional Workers of America, Federation of Architects, Engineers, Chemists, and Technicians, Bio-Lab Union, (CIO), decision of the tripartite board, Hubert Wyckoff, chairman; Paul Heide, union-appointed arbitrator; J. Paul St. Sure, employer-appointed arbitrator.

Another principle that seems to have been unanimously accepted by arbitrators is the theory that union officials owe a higher obligation to the contract than do rank and file workers. Using such phrases as "union office imposes added responsibility"[1] and "union officials, having negotiated the contract, owe higher responsibility to the contract than do rank and file workers"[2], arbitrators have generally decided that the causes for discipline should be more numerous for union officials than for others.

An apparent contradiction to this principle is found in a decision, previously cited[3] in which arbitrator Scheiber stated that "...discharge of a steward should be only for very grave cause" and that "additional consideration" is due in the case of a steward's discharge. While these statements are apparently in conflict with the idea that a union officer should be more subject to discipline than others, a closer look at the case in point brings it into harmony with the other decisions. The steward in question was discharged for failing to follow correct grievance procedure and instructing workers not to obey orders of management which he thought to be in violation of the contract. This was a discharge for provocative cause to which he would not have been subject had he not been an officer of the union. Despite the "grave cause" and

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1 2LA630, In re the Michigan Contracting Corp. and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, (AF of L), Dudley Whiting, arbitrator.
2 10LA660, In re the Goodyear Decatur Mills and the United Textile Workers of America, (AF of L), Whitley P. McCoy, arbitrator.
3 7LA3, In re the Nathan Mfg. Co. and the International Association of Machinists, (Independent), Isrel Ben Scheiber, arbitrator. See note 1, p. 30.

"additional consideration" necessary, arbitrator Scheiber upheld the company's action and ordered that the discharge should stand.

It seems reasonable to believe that even in the few cases in which arbitrators have stated that union officials ought to receive greater consideration than ordinary workers in discipline cases, the arbitrators have also accepted the doctrine that union officials should be subject to a higher level of discipline than others, although perhaps greater care should be taken in evaluating their cases.

Another matter that all arbitrators seem to agree upon is the idea that the arbitrator should not interfere with the internal affairs of the union. This principle has been best stated in a decision[1] by arbitrator Miller. In this case, a union steward's discharge had been consented to by the shop committee, but the steward entered a claim that a vote of the entire union membership was necessary before the union could be said to consent to his discharge. The arbitrator upheld the action of the company and the shop commitee, and denied the right of the arbitrator to "interfere with the internal affairs of the union". No arbitrator has asserted this right in any of these decisions.

In the positive causes for discipline, the decisions of arbitrators exhibit probably the highest degree of unanimity that any phase of the decisions possess. Fighting, the use of profanity, leading a work stoppage, poor job performance, and many other causes have been

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1 1LA291, In re Spencer Kellog & Sons, Inc. and the United Gas, Coke, and Chemical Workers of America, (CIO), Max J. Miller, arbitrator.

accepted as legitimate causes for discipline. A few decisions may seem to be somewhat out of line with others, but close examination discloses that the differences that exist can be satisfactorilly explained away by differences in the attendant circumstances. As a general rule, discipline has been justified for any positive action of the employee that interferes with efficient production, or undermines the right of management to conduct the business and direct the working force, and the severity of discipline appropriate to each offense has been judged to be roughly proportionate to the severity of the offense, judged by these objective criteria.

In the provocative and negative cases, unanimity in the decisions of arbitrators does not exist to so great an extent. All of the arbitrators seem to admit the possibility of discipline for positive, provocative, or negative causes. When an attempt is made to draw a line between the area in which a union official may act with impunity and the area in which he becomes subject to company discipline, however, it will be found that the decisions of arbitrators present no clear and consistent picture of where such a line exists, if indeed it exists at all. Few arbitrators have attempted to draw such a line, but have only decided the case at hand on its particular merits, without laying down any principles that would be helpful in settling other cases. This is probably due to the fact that arbitrators do not generally recognize precedent in making their decisions.[1] At any rate, this is a very important factor producing inconsistencies in decisions on provocative and negative discipline cases.

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1 Updegraff and McCoy, op. cit., p. 129. Cf. p. 7, above.

In a number of cases[1] arbitrators have made specific statements that union officials, when acting in their capacity as representatives of the union, should be exempt from discipline. The reverse statement has not been made by any arbitrator. In several cases[2], however, some question might be raised as to whether all arbitrators have in fact followed this principle. In a typical case from this group[3] a local union president was discharged for ordering a union meeting to be held during working hours. The company defended its action on the grounds that the union meeting, under these circumstances, was a work stoppage. The majority decision of the tripartite board of arbitration was that the union meeting was in fact a work stoppage, and that the company's action in discharging the union president was justified, despite the fact that he was

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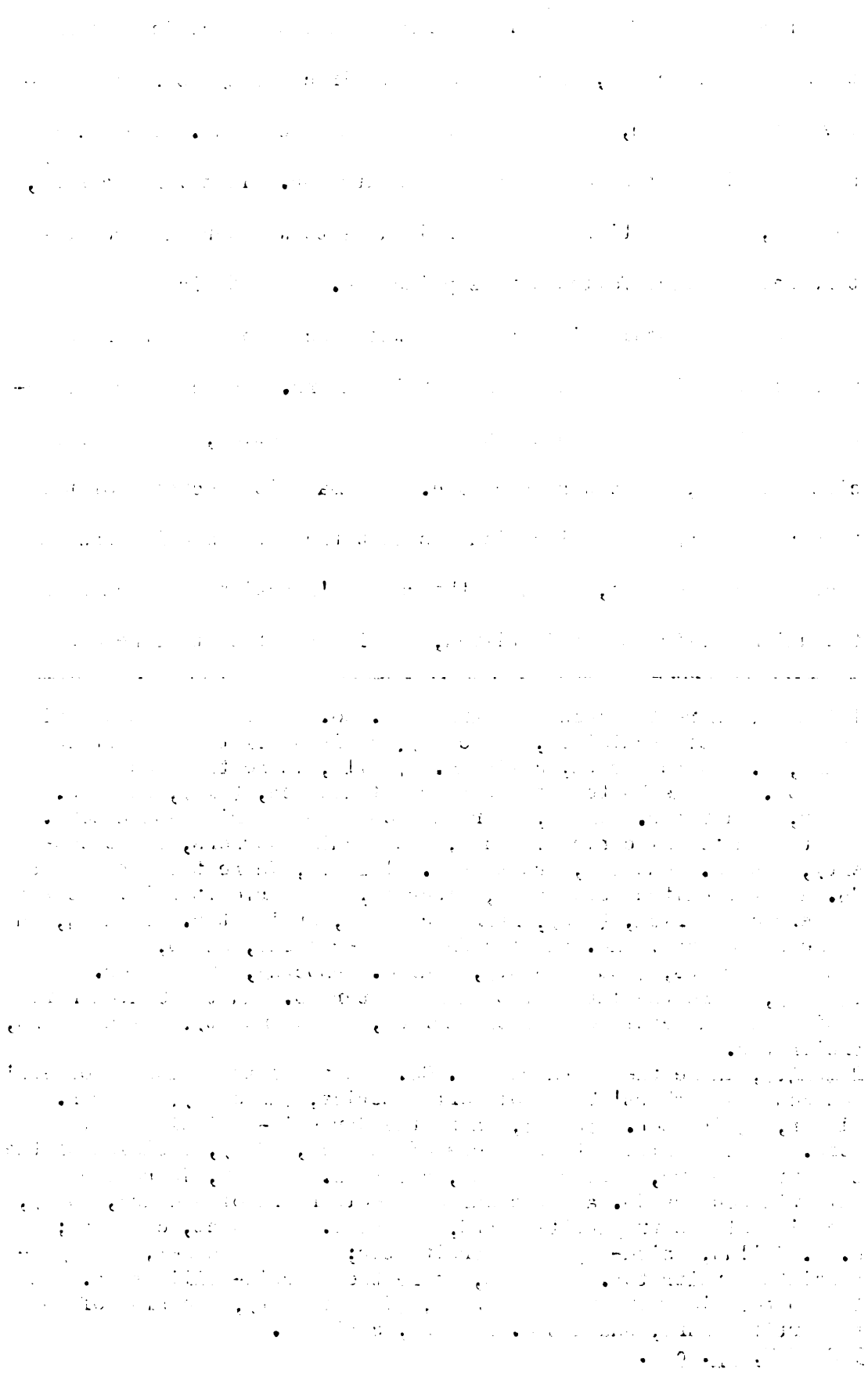
1 1LA423, In re the Brown & Sharpe Mfg. Co. and the International Association of Machinists, (AF of L), decision of the tripartite board, A. Howard Meyers, chairman. 7LA113, In re the Rhode Island Tool Co. and the United Steelworkers of America, (CIO), James J. Healy, arbitrator. 9LA63, In re the Copeland Refrigeration Corp. and the United Electrical, Radio, and Machine Workers, (Independent), Paul N. Lehoczky, arbitrator. 10LA213, In re the Ford Motor Co. and the United Automobile, Aircraft, and Agricultural Implement Workers of America, (CIO), Harry Schulman, arbitrator. 13LA204, In re Neon Products, Inc. and the United Electrical, Radio, and Machine Workers, (Independent), Paul N. Lehoczky, arbitrator. 14LA925, In re the International Harvester Co. and the United Farm Equipment and Metal Workers of America, (Independent), Ralph Seward, arbitrator.

2 4LA419, In re the Eberhard Mfg. Co. and the International Molders' and Foundry Workers' Union of North America, (AF of L), James P. Miller, arbitrator. 5LA363, In re the Carnegie-Illinois Steel Corp. and the United Steelworkers of America, (CIO), decision of the tripartite board, Herbert Blumer, chairman. 8LA807, In re the Atlantic Foundry Co. and the United Steelworkers of America, (CIO), decision of the tripartite board, Albert I. Cornsweet, chairman; J. W. Childs, union-appointed arbitrator; Wilfred Andrew, employer-appointed arbitrator. 12LA238, In re the Sherwin-Williams Co. and the United Mine Workers of America, (Independent), decision of the tripartite board, Charles O. Gregory, chairman.

3 8LA807, op. cit.



acting in his capacity as a union officer when he performed the misdeed of which he was accused. In this case, it would appear that the ordering of the meeting was not a legitimate union activity, and that the immunity from discipline of union officials extends only to their legitimate activities as officers of the union, and not to all their activities.

This modification actually has the effect of giving arbitrators the authority to declare almost any union activity illegal. It makes the guaranties of freedom from discipline stated in the earlier cited cases much less meaningful, for union officials are free from discipline only while pursuing legitimate union activities, and arbitrators, as will be shown more conclusively in the next chapter, are not in perfect accord as to the definition of proper duties of union officers.

Generally speaking, the field of extenuating circumstances is one in which less unanimity among the decisions of arbitrators prevails than in the field of causes for discipline. Agreement upon the ordinary circumstances, such as long seniority and high productivity, is quite well developed, but in regard to extenuating circumstances of extraordinary nature, greater disagreement and inconsistency are found than in any other area of this study.

If a company has a long history of anti-union activities, if it has resisted and fought strongly against every inch of ground that the union has gained and finally recognized the union only out of necessity, and with obvious reluctance, then arbitrators are inclined to take a dim view of any disciplinary action against union officers

taken by the company. Arbitrators have unanimously agreed that company discipline with weakening of the union as its real purpose should be negated. Unions have frequently advanced this claim of anti-union prejudice, and arbitrators have very seldom upheld it. Even in cases where the arbitrators denied the union claim, however, they have recognized anti-union activities of the company as a valid extenuating circumstance and merely denied the union's assertion that the company was anti-union.[1]

The claim of discrimination has been accepted by arbitrators only to a limited extent. As a general rule, where the discrimination is between rank and file employees, or between union officials, it has always been considered by arbitrators as an extenuating circumstance of the strongest nature. In the special case of a union officer selected for discipline from a group of ordinary employees, however, the case is much less clear. Some arbitrators have held that action of this type is discriminatory, and some have held that it is not. In other words, if a disciplined union officer can show that other union officers equally guilty were not punished, he will always be immune from discipline, but if the disciplined officer is able to show only that rank and file workers equally guilty were not punished, his status is somewhat indeterminate, and may vary from arbitrator to arbitrator.

The idea that the nature of the union office should justify certain actions by union officers that would be intolerable when practiced by others is another theory that has received only limit-

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1. For example, in 2LA520, In re the Mack Mfg. Co. and the United Automobile, Aircraft, and Agricultural Implement Workers of America, (CIO), Harland J. Scarborough, arbitrator.

ed acceptance at the hands of arbitrators. Some of the special immunities of union officers have been accepted, and some have been only partially accepted.

In evaluating attendance records, in passing on the validity of disciplinary action for charges of absenteeism, arbitrators have accepted absences incurred because of activities as a union officer as excusable absences, and have shown considerable generosity to union officers in permitting poor attendance records to go undisciplined.

Concerning low productivity or poor work quality, arbitrators have held without exception that position as a union official could not justify such shortcomings.

In the matter of giving to union officers the right to interpret the contract, or disobey orders of management that they believe to be in violation of the contract, arbitrators have not taken a clear-cut, unanimous stand.

In yet another rather important area, the determination of the burden of proof, arbitrators seem to have shown complete agreement. This is frequently a very important determining factor in cases with conflicting evidence.

In the discipline cases for positive or provocative cause, where company action is based on some action of the offending employee, the burden of proof rests entirely upon the company. The principle of English common law, that a person should be innocent until he is proven guilty, makes this assumption of the burden of proof by employers a virtual necessity. A clear statement of the obligation that employers have due to the following of this common

law doctrine by arbitrators may be found in a case previously mentioned[1], involving a discharge for unsatisfactory job performance.

In the discipline cases for negative cause, the burden of proof is shared between the company and the union. It is the duty of the company to show that an illegal act has taken place, and that the offending union officer could have prevented such action by a proper exercise of his power and duties as an officer of the union. It is the duty of the union to show that the officer did properly try to prevent the illegal act, and if this cannot adequately be done, the disciplinary action of the company should stand. To this extent, the company having met its obligation of proof, the union officer is guilty until he is proven innocent. A clear statement of this burden of proof may be found in a decision[2] by arbitrator Updegraff, in which the union's burden of proof was sufficiently met, and the company's action was negated by the arbitrator.

In retrospect, it might be seen that the area in which arbitrators' decisions are in agreement is a large one. In includes broad agreement on the general place of union officer discipline in collective bargaining, considerable agreement on the acceptable causes for discipline, limited agreement as to what extenuating circumstances should be accepted, and general agreement as to the fields in which arbitrators should exercise their authority and the

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1 2LA335, In re Grayson Heat Control, Ltd. and the United Electrical, Radio, and Machine Workers, (Independent), decision of the tripartite board, Paul Prascow, chairman.
2 11LA675, In re the John Deere Ottumwa Works and the United Automobile, Aircraft, and Agricultural Implement Workers of America, (CIO), Clarence M. Updegraff, arbitrator.

fields that they should refrain from entering in their decisions. The uniformity attained by arbitrators in these aspects of their decisions suggests the possibility of achieving more complete unanimity in all facets of the decisions of arbitrators.

Chapter V

The Areas of Disagreement in Arbitrators' Decisions

Although small by comparison with the areas of unanimity, the areas of disagreement in the decisions of arbitrators include a number of the points most particularly concerned with the differential treatment of union officers and rank and file workers. Different conclusions have been reached by different paths of reasoning, notwithstanding the fact that arbitrators universally subscribe to the doctrine that the right to discipline is a relative right only, that cannot be decided by one party without check from the other participant in the collective bargaining contract. An attempt will be made here to follow these divergent paths of reasoning, that an evaluation may be later made of what sorts of decisions are most conducive to industrial peace and the furtherance of collective bargaining.

In the acceptance or rejection of provocative cause as "good and just cause" for disciplinary action, two quite different types of reasoning have been developed by arbitrators.

Beginning with the premise that the contract is jointly negotiated by company and union, and provides within it adequate machinery for the correction of any contract violation by either party, the first type of decision is quite harsh in dealing with any union officer who instructs or encourages any rank and file workers to disobey orders of management which he believes to be in violation of the contract. These arbitrators rule that no union officer should ever sabotage an order of management that he believes to be illegal under the contract, but should instead obey it, encourage

his fellow workers to obey it, and file a grievance under the contract, eventually presenting his case, if necessary, to an impartial arbitrator, from whom he can always obtain justice. Since the contract provides that an arbitrator shall interpret the contract, union officials have no right to interpret the contract, but should always obey the orders of management as they are given, and leave contract interpretation to other agencies better qualified to exercise it. The only admissable exceptions to this rule permitted by this line of reasoning are cases in which the health or safety of the workers are threatened by a company's illegal action, in which case the union officer would have authority to disregard the order of management and instruct other workers to do likewise. Any other actions of union officials in disobedience of orders from supervisory employees is punishable, even though the disobeyed orders were in violation of the contract in the first place.

Action of union officials in interpreting the contract is held by this line of reasoning to be really undermining of the contract, and not to be tolerated. The intent of the union officer in provoking others to disobey management orders is inconsequential, because his actions are illegal whatever his intent may be. Arbitrators following this path of reasoning usually state that offenders are not immune from punishment by reason of their union office, but are more responsible than other union members, since they participated in the contract negotiations, are the most familiar with the contract of all workers, and set a perpetual example for others to follow.

This line of reasoning, while nowhere stated completely in this form, seems to run through several decisions of arbitrators during the period under consideration.[1] Under this line of reasoning, the authority of union officials would be quite clearly defined and limited. Their functions would be to always urge workers to obey management orders, and to submit grievances if they considered any of the orders unfair.

Other arbitrators have taken a somewhat different approach to the problem of discipline for provocative cause in cases of this type. In their decisions, a great deal of emphasis has been placed upon the "good intent" of the union officials. They have taken a broader view of the proper functions of union officials, and have decided that where the intent of the union officer was good, and where his interpretation of the contract was a reasonable one, he

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1 3LA285, In re the Mueller Brass Co. and the United Automobile, Aircraft, and Agricultural Implement Workers of America, (CIO), David A. Wolf, arbitrator. 3LA779, In re the Ford Motor Co. and the United Automobile, Aircraft, and Agricultural Implement Workers of America, (CIO), Harry Schulman, arbitrator. 4LA419, In re the Eberhard Mfg. Co. and the International Molders' and Foundry Workers' Union of North America, (AF of L), James P. Miller, arbitrator. 4LA744, In re the Stockham Pipe Fittings Co. and the United Steelworkers of America, (CIO), Whitley P. McCoy, arbitrator. 7LA3, In re the Nathan Mfg. Co. and the International Association of Machinists, (Independent), Isrel Ben Scheiber, arbitrator. 7LA735, In re the Texas Company and the Oil Workers' International Union, (CIO), decision of the tripartite board. 8LA807, In re the Atlantic Foundry Company and the United Steelworkers of America, (CIO), decision of the tripartite board. 9LA789, In re the Chrysler Corp. and the United Automobile, Aircraft, and Agricultural Implement Workers of America, (CIO), David A. Wolf, arbitrator. 10LA533, In re the South Side Dye House, Inc. and the Amalgamated Clothing Workers of America, Cleaners' and Dyers' Union, (CIO), A. Howard Meyers, arbitrator. 10LA660, In re the Goodyear Decatur Mills and the United Textile Workers of America, (AF of L), Whitley P. McCoy, arbitrator. 11LA462, In re Everett Dyers and Cleaners and the Amalgamated Clothing Workers of America, Cleaners' and Dyers' Union, (CIO), A. Howard Meyers, arbitrator.

should not be subject to discipline for countermanding an order of management. Good intent implies that the purpose of the action is to protect workers in their rights under the contract, and not a malicious or spiteful one. Reasonable doubt implies that the contract provisions are not clear and unmistakable, and that the interpretation followed by the union officer, while not necessarily the correct one, is one that a reasonable mind might accept, and not a far-fetched one invented for the purpose of evading discipline.

This line of reasoning takes cognizance of the fact that the grievance procedure is at times necessarily slow. It considers that it would be unfair for workers to be compelled to obey unreasonable orders during the weeks that the grievance is being processed before it reaches the final stage of arbitration. It considers that in some cases a certain order, such as to work overtime on a particular day, may be beyond the realm of managerial authority, and that if the employee does work overtime and submits a grievance, and an arbitrator six weeks later decides that the company exceeded its proper authority, the offended worker can get no satisfaction at all from the grievance procedure, since he will already have worked the overtime, and that can never be taken back.

It is quite obvious that an arbitrator following this second line of reasoning might find a company's disciplinary action unjustifiable, while another arbitrator following the line of reasoning first presented here might reach a directly opposite conclusion, even though the facts in the two cases are the same.

The second line of reasoning has been somewhat less common in the arbitrators' decisions than reasoning of the first type, but it does occur in a number of decisions.[1] If this line of reasoning were to become universally accepted by arbitrators, it would increase the scope of union officials' authority, and make union office more meaningful.

In regard to acceptance or rejection of negative causes for discipline, again it seems that differing lines of reasoning are possible. In general, they might be called "strict" or "loose" interpretations.

A strict interpretation of the functions and duties of a union officer would leave him subject to discipline for a greater variety of negative acts than would a loose interpretation. Arbitrators using the strict interpretation reason that the election of an individual to union office imposes upon him a very serious responsibility, not only to abide by the contract himself, but to use all of his persuasive powers to encourage rank and file workers to do likewise. Any contract violation by any worker might, by a strict interpretation of the union officer's duties, be construed as

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1 3LA374, In re Ampco Metal, Inc. and the Employee's Mutual Benefit Association, (Independent), Clarence M. Updegraff, arbitrator. 1LA456, In re the American Transformer Co. and the United Electrical, Radio, and Machine Workers, (Independent), Sol L. Flink, arbitrator. 3LA846, In re the Finders Mfg. Co. and the United Automobile, Aircraft, and Agricultural Implement Workers of America, (CIO), decision of the tripartite board, Harold M. Gilden, chairman. 9LA845, In re the Brewer Dry Dock Co. and the Brewer Dry Dock Employee's Association, (Independent), Maxwell Copelof, arbitrator. 14LA302, In re the International Harvester Co. and the United Farm Equipment and Metal Workers, (Independent), Ralph Seward, arbitrator. 14LA925, In re the International Harvester Co. and the United Farm Equipment and Metal Workers, (Independent), Ralph Seward, arbitrator.

grounds for discipline of the union officer if it could be shown that the official failed to use every power at his disposal to persuade the worker not to violate the contract and company rules established under the contract.

A loose interpretation of the union official's function would still leave him subject to discipline if he neglected his duties as a union official to encourage workers to live up to the contract, but would require him to make only a reasonable effort to prevent the violation, and would generally place upon him a lighter burden of responsibility than would the strict interpretation.

The difference between the two interpretations is quite largely a subjective one. Arbitrators using either interpretation would expect only "reasonable" effort from the union official, but one following the strict interpretation would expect a greater effort than would one utilizing the loose interpretation. Many shades of opinion might exist, of course, between the two extremes of the most strict and most loose interpretations. It is difficult to point out any decisions that illustrate this divergence in interpreting the union officials' proper functions, since each case is so influenced by the attendant circumstances that are peculiar to that case that no two cases are really comparable.

In a decision[1] probably influenced by a loose interpretation of union official responsibility arbitrator Seward ordered the reinstatement of a union steward who had been discharged for his responsibil-

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1 15LA75, In re the International Harvester Co. and the United Farm Equipment and Metal Workers, (Independent), Ralph Seward, arbitrator.

ity in an illegal strike. The company did not charge that he had led the work stoppage, but justified his dismissal entirely on the grounds that he had failed to stop the strike. The arbitrator finally decided that in the absence of any proof that the offending steward was the moving spirit behind the walkout "the company has grounds for suspicion, but not for dismissal".

In another decision[1] arbitrator Copelof upheld a dismissal for negative cause that seemed to be influenced by a stricter interpretation of the union officer's duties. In this case a number of workers left their jobs because of the extraordinarily hot weather that they regarded as intolerable. One of them was the union steward of the department, the others was ordinary employees. All of the workers who walked out were discharged by the company. As in the case previously cited, sufficient evidence could not be produced to prove conclusively that the steward had instigated the work stoppage. The arbitrator, however, ordered that all the other workers be reinstated without back pay, as the severity of their crime did not justify the discharge penalty, but upheld the firing of the union steward on the grounds that he had failed to persuade the rest of the men to remain at work.

The difference between these two decisions shows that arbitrators have sometimes taken a more strict view of the union official's responsibilities than other arbitrators have at other times.

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1 13LA143, In re the Paramount Printing & Finishing Co. and the Textile Workers' Union of America, (CIO), Maxwell Copelof, arbitrator.

In the field of extenuating circumstances, the most pronounced and clear inconsistencies that exist in any area of this study may be found. Some of these have already been mentioned in chapter III. An attempt will be made here to explore the different types of reasoning that justify these differences in decisions.

The doctrine of democratic process has been at times accepted, and at other times rejected by arbitrators.

The arbitrators that have upheld this doctrine as a legitimate extenuating circumstance have reasoned that labor unions are democratic organizations, and that action taken by the membership at large ought not to leave the officers of the union responsible. If the entire membership of a union votes to go out on strike in violation of the contract, the union as a whole is responsible for the illegal action, but the officers of the union are not, since the organization of the union compels them to follow the wishes of the members. If a union officer violates the contract because the membership of the union forces him to, he should not be subject to discipline, for to make him so would undermine the democratic structure of the trade union movement. This line of reasoning has secured considerable acceptance from arbitrators.

Other arbitrators have rejected this doctrine as an extenuating circumstance of valid character. Their principal reason for so

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1 For the clearest statements of this point of view, see 3LA374, In re Ampco Metal, Inc. and the Employee's Mutual Benefit Association, (Independent), Clarence M. Updegraff, arbitrator; 7LA113, In re the Rhode Island Tool Co. and the United Steelworkers of America, (CIO), James J. Healy, arbitrator; and 12LA108, In re Swift & Co. and the United Packinghouse Workers of America, (CIO), James J. Healy, arbitrator.

doing seems to be their feeling that no illegal action should go unpunished. It would be impossible for the employer to punish all the members of the union for an illegal act by discharge or lay-off since that would bring about a termination of production. The punishment of union officials for such actions, then, is the only way that employers can punish such wrongdoings, and prevent their recurrence. This line of reasoning also finds a great deal of support in arbitrators' decisions.[1]

Another extenuating circumstance that seems highly susceptible to differing treatment by arbitrators is the charge of discrimination against union officers when rank and file members of the union participate equally in an illegal action, but are not punished.

Some arbitrators have held that since union officials owe a higher responsibility to the contract than do rank and file workers singling them out for disciplinary action when ordinary workers of equal guilt are not punished is not discriminatory. The fact that the continuous operation of the firm makes it impossible to discipline all the union members has also been cited as a justification for disciplinary action of this type. When an employer disciplines only union officials for actions in which they were not more culpable than rank and file workers, some arbitrators, following this reasoning, have upheld the company action. Carrying the

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1 For the clearest statements of this point of view, see 3LA285, In re the Mueller Brass Co. and the United Automobile, Aircraft, and Agricultural Implement Workers of America, (CIO), David A. Wolf, arbitrator; 4LA744, In re the Stockham Pipe Fittings Co. and the United Steelworkers of America, (CIO), Whitley P. McCoy, arbitrator; and 7LA3, In re the Nathan Mfg. Co. and the International Association of Machinists, (Independent), Isrel Ben Scheiber, arbitrator.

idea to its logical extreme, some arbitrators have discriminated against union officers in this manner in their own decisions, by ordering the reinstatement of rank and file workers, while permitting the disciplinary action against union officials for the same offense to stand.[1] A number of arbitrators have followed this general line of reasoning, and several of them have specifically stated that singling union officials out for discipline is not discriminatory.[2]

On the other hand, some arbitrators have followed an entirely different line of reasoning. They have applied to industrial disputes the principle of English common law that holds that laws should be equally enforced upon all, and that discriminatory treatment should not be upheld, but invalidated by the courts. While all arbitrators have followed this principle to some extent, these arbitrators have applied it to the special case of differential treatment of union officials and rank and file workers. They have held that differential punishment meted out to union officials, and not to lay members of the union, is discriminatory punishment, and

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1 4LA744, In re the Stockham Pipe Fittings Co. and the United Steelworkers of America, (CIO), Whitley P. McCoy, arbitrator. 6LA617, In re the Bethlehem Steel Co. and the United Steelworkers of America, (CIO), Hubert Wyckoff, arbitrator. 13LA143, In re the Paramount Printing & Finishing Co. and the Textile Workers' Union of America, (CIO), Maxwell Copelof, arbitrator.

2 For example, 3LA285, In re the Mueller Brass Co. and the United Automobile, Aircraft, and Agricultural Implement Workers of America, (CIO), David A. Wolf, arbitrator; 10LA533, In re the South Side Dye House, Inc. and the Amalgamated Clothing Workers of America, Cleaners' and Dyers' Union, (CIO), A. Howard Meyers, arbitrator; and 14LA986, In re the International Harvester Co. and the United Farm Equipment and Metal Workers, (Independent), Ralph Seward, arbitrator.

should not be upheld. The principal motivation seems to be a sense of fairness and equality. In these decisions, arbitrators have held that disciplinary action by companies should fall equally upon the officers and the ordinary union members if the offense is the same. This line of reasoning seems to underlie a number of decisions[1], being almost equally prevalent with the idea that differential discipline of union officers is not really discrimination. In one of these cases, arbitrator Gilden specifically stated that "singling out union officials for discharge is discriminatory."[2]

The doctrine of spontaneous causation has been rejected by arbitrators more frequently than it has been accepted by them as an extenuating circumstance. It is all but impossible to say, however, that the arbitrators who have accepted this doctrine have utilized fundamentally different reasoning than those who have rejected it. Some arbitrators have accepted the doctrine and some have rejected it, but every case has such differing circumstances, peculiar to it and no other case, that it is very difficult to compare the cases with any confidence.

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1 3LA779, In re the Ford Motor Co. and the United Automobile, Aircraft, and Agricultural Implement Workers of America, (CIO), Harry Schulman, arbitrator. 7LA180, In re the Simplicity Pattern Co. and the United Office and Professional Workers of America, (CIO), Sidney A. Wolff, arbitrator. 8LA758, In re Armour & Co. and the United Packinghouse Workers of America, (CIO), Harold M. Gilden, arbitrator. 9LA845, In re the Brewer Dry Dock Co. and the Brewer Dry Dock Employee's Association, (Independent), Maxwell Copelof, arbitrator. 9LA944, In re the International Harvester Co. and the United Farm Equipment and Metal Workers, (CIO), Herbert Blumer, arbitrator. 11LA211, In re the Univis Lens Co. and L. W. Wornstaff, et. al., members of the United Electrical, Radio, and Machine Workers, (Independent), Paul N. Lehoczky, arbitrator.

2 8LA758, op. cit.

It would be possible to construct arguments for and against this doctrine parallel to those used for and against the doctrine of democratic process. Those arguing for the acceptance of the doctrine might argue that it is unfair to hold union officers responsible for actions attributable to the entire union membership. Those arguing against the doctrine might hold that if accepted, it will permit wrongful acts to go unpunished, and so encourage them.

In passing on the doctrine of spontaneous origin, arbitrators have made their decisions quite largely on the subjective basis of their personal evaluation of the testimony. When disciplined offenders give straightforward, apparently honest testimony, arbitrators are inclined to give the doctrine some credence. When disciplined officers are inconsistent and evasive in their testimony, and generally influence the arbitrator unfavorably, while company witnesses seem more straightforward, arbitrators are inclined to discredit the doctrine of spontaneous cause.

As has been mentioned in chapter III, this is a very vague and nebulous question, that requires the determination of the psychological motivation of the workers. Arbitrators seem to have been quite competent psychologists, but it is very difficult to determine if their psychology is uniform.

The decisions of arbitrators on this point may perhaps be best summarized by saying that all arbitrators seem to have accepted the principle that disputes that are genuinely spontaneous in origin should not leave the union officials responsible. Some arbitrators have taken a skeptical attitude toward the doctrine, feeling that

almost any illegal action involving great numbers of employees must contain some element of leadership. Some arbitrators have been inclined to give it fuller credence. The differences in the decisions, however, might be due to differences in the particular facts of the cases or the personalities involved.

The authority to do certain acts without discipline that would be punishable when done by rank and file workers is another extenuating circumstance claimed by union officers that has received only limited acceptance by arbitrators.

Arbitrators have taken a quite uniform position with regard to absenteeism and poor job performance, but have not agreed on the important issue of the right of union officers to interpret the collective bargaining contract.

On this point, two schools of thought seem to be prevalent. By one path of reasoning, arbitrators have given union officials this right, free from discipline, and by another reasoning process they are denied this right. These two schools of thought have been quite fully discussed in the first part of this chapter, in connection with the provocative causes for discipline. The discussion regarding the provocative causes for discipline is applicable here in connection with the right of union officers to interpret the contract as an extenuating circumstance.

In summary, it can be said that in passing judgement on several extremely important issues involving differential treatment of union officials, the decisions of arbitrators have been contradictory and inconsistent. The contradictory opinions all seem to make sense, and are supportable by strong logical arguments. The task of

almost any illegal action involving great numbers of employees must contain some element of leadership. Some arbitrators have been inclined to give it fuller credence. The differences in the decisions, however, might be due to differences in the particular facts of the cases or the personalities involved.

The authority to do certain acts without discipline that would be punishable when done by rank and file workers is another extenuating circumstance claimed by union officers that has received only limited acceptance by arbitrators.

Arbitrators have taken a quite uniform position with regard to absenteeism and poor job performance, but have not agreed on the important issue of the right of union officers to interpret the collective bargaining contract.

On this point, two schools of thought seem to be prevalent. By one path of reasoning, arbitrators have given union officials this right, free from discipline, and by another reasoning process they are denied this right. These two schools of thought have been quite fully discussed in the first part of this chapter, in connection with the provocative causes for discipline. The discussion regarding the provocative causes for discipline is applicable here in connection with the right of union officers to interpret the contract as an extenuating circumstance.

In summary, it can be said that in passing judgement on several extremely important issues involving differential treatment of union officials, the decisions of arbitrators have been contradictory and inconsistent. The contradictory opinions all seem to make sense, and are supportable by strong logical arguments. The task of

eliminating the inconsistencies in the arbitrators' decisions appears to be a very difficult one, for it necessitates not the rejection of bad reasoning and the acceptance of good reasoning, but the choosing of the best among completely valid types of reasoning.

Chapter VI

A Summary of Findings and Some Policy Recommendations

In the year 1951, it is quite difficult to read a newspaper editorial or a book on the subject of collective bargaining without encountering the phrase "responsible unionism". Some of our contemporary authors have contended that unionism has within it the power to destroy the pricing system and private enterprise capitalism.[1] A constant aim of labor legislation, and especially of the National Labor-Management Relations Act of 1947, is to produce more responsible unionism.

Responsible unionism would seem to have two aspects, the responsibility of the union to the public at large, and the responsibility of the union leadership to the ordinary union member. The responsibility of the union to the public as a whole includes, among other things, the propositions that production should not be needlessly interfered with and that production should continually be at as high a level as possible. If these aspects of responsibility are to be achieved, management should be given a high degree of authority to discipline for wildcat strikes, absenteeism, or any other disturbance of production. The responsibility of the union leadership to the union members includes, among other things, the protection of the rights of members under the contract, and the following of the wishes of the membership, not only in negotiating the contract, but in the day to day process of grievance procedure

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1 A leading proponent of this viewpoint is Charles E. Lindblom, who in his recent book, Unions and Capitalism, Yale University Press, New Haven, 1949 argues that this destruction is inevitable with the advent of mature unionism.

and contract interpretation. To carry out these responsibilities, union officers must have a high degree of competence and authority.

The great problem concerned with the discipline of union officials is the problem of how to maintain all these rights and duties simultaneously, how to give both management and union officers their proper authority and responsibility when the two authorities are in conflict.

The solution to the problem may be found, in part, through more inclusive and specific contract provisions. The contracts that have been negotiated during this period seem to outline the causes for discipline only rather sketchily, and usually fail to specify what penalties should be attached to the various illegal acts under the contract. In the field of extenuating circumstances, the collective bargaining contracts of the 1945-51 period seem to be almost completely lacking. That extenuating circumstances would appear, justifying actions illegal in themselves, is a condition that contract negotiators could hardly fail to anticipate, yet on this important matter contract provisions are usually silent, and arbitrators are forced to rely upon the abstract ideas of justice and equity in making decisions regarding these circumstances. Contract provisions describing more clearly just what actions of union officials are illegal, just what penalties should be appropriate for each illegal action, and just what sorts of extenuating circumstances should be acceptable as justifying illegal acts, would put the question of union officer discipline on a firmer footing, and would permit arbitrators to base their decisions on

contract provisions resulting from collective bargaining, rather than on the much more shaky base of their own ideas of justice.

The divergence in the decisions of arbitrators, as one would expect, is greatest in those areas in which contract provisions are the most hazy and incomplete. A resolution of the conflicts in arbitrators' decisions, and more specific contract provisions regarding the discipline of union officials should be a great help in promoting responsible unionism. Knowing more precisely where his area of authority lies, and where he may not safely tread in advancing the interests of his union should be a helpful stimulus to a union officer, and should make for better officers.

In such a situation, the arbitrator will still have important functions to perform. Unforseeable causes for discipline, such as practical jokes, and unforseeable extenuating circumstances, such as V-E day or opressively hot weather, will still have to be dealt with individually by arbitrators. Disputes over matters of fact will still require the hearing of conflicting testimony by an impartial third party. But the decisions of arbitrators will be more easily come by, and will rest on a more sturdy footing.

Having decided to resolve the conflicts in arbitrators' decisions, it becomes necessary to set up goals to be attained, that we may have a basis for selecting the best from the several good types of reasoning that arbitrators have followed. The goals here selected will be two, the encouragement of collective bargaining and the promotion of responsible unionism. When faced with a choice between accepting one of two types of decisions, we shall attempt to select the one that seems most compatible with these

goals. As proper ends of public policy, they seem entirely defensible. Modern labor legislation is built around them, and their pursuit seems to be occupying the American economy to a large extent.

In those areas where the decisions of arbitrators are unanimous, it appears that the arbitrators' decisions are, in every case, compatible with the twin goals of encouraging collective bargaining and promoting responsible unionism.

The first conflict to be resolved is the dispute over the right of union officers to interpret the collective bargaining contract. Here it seems that the encouragement of collective bargaining and responsible unionism demand that union officers should be granted that right.

The period of time elapsing between an alleged contract violation and a final decision by the arbitrator as to whether the action was, in fact, a contract violation is, so to speak, an interregnum. If the union is denied the right to interpret the contract during this period, this right passes to management by default. For management alone to exercise this right, while it is denied to the union has a closer semblance to unilateral determination than to collective bargaining.

It is true that if management's right to interpret the contract during this period were granted, uninterrupted production would result, thus better serving the public interest of the highest production possible at all times. But it is equally true that if the union were given the sole right to interpret the contract during this period, and the right were completely denied to the

company, production would likewise be continuous on the union's terms. No arbitrator seems to have even considered this possibility, and it is as equally reprehensible to the principles of collective bargaining as is the first alternative of giving to management the sole right to interpret the contract.

The principle of joint determination of the conditions of employment, then, demands that unions should be granted the authority to interpret the contract equally with management, and that both should be subordinate to the decision of the impartial arbitrator. During the period of time before an arbitrator's decision can be obtained, however, a union officer should be entitled to instruct workers to disobey orders of supervisory employees that he sincerely believes to be in violation of the contract, and the union official's authority to interpret the contract should be accepted as a valid extenuating circumstance if the company is inclined to discipline him for such action, provided that he acts with good intent and his interpretation of the contract is a reasonable one.

This line of reasoning would make the union officer a powerful figure, with great authority and great responsibility. This seems consistent with the goal of responsible unionism, in which the union officer must play a powerful role.

A second conflict to be resolved, that is somewhat dependent upon the first one, is the conflict between a strict interpretation and a loose interpretation of the duties of a union officer in arriving at the validity of the disciplinary actions for negative cause. If the union officer is to have this high degree of author-

ity and responsibility it follows that the strict interpretation should be followed.

Under existing contracts, where arbitrators have quite often decided that the union officer has no right whatsoever to interpret the contract, a loose interpretation of the union officer's responsibility seems entirely logical. The postulate of political science that responsibility should be commensurate with authority, however, dictates that if union officers are given the great authority of contract interpretation, they should be given the great responsibility of strict interpretation of their union duties, and should be subject to disciplinary action if they use less than their utmost efforts to avert any illegal action by rank and file workers.

These grants of greater authority and greater responsibility to union officers seem entirely consistent with collective bargaining and responsible unionism. A union official with greater responsibility and authority should be on a more even footing with the representatives of management, who characteristically have a great deal of authority, in such matters as processing a grievance. This should create a greater approximate equality of bargaining power, which is a necessary prerequisite to collective bargaining, and should make the union officer more capable of carrying out the wishes of the majority of the union members, which makes this arrangement more compatible with responsible unionism.

The doctrine of democratic process, the third major conflict in the decisions of arbitrators, should be resolved in favor of the acceptance of this doctrine as a valid extenuating circumstance.

The acceptance of this doctrine really involves a choice of the lesser of two evils. If the company is not permitted to discipline union officials because a democratic process preceded their illegal actions, it is inevitable that some wrongs will go unpunished. On the other hand, if union officers are subject to discipline for actions that are really the result of a democratic vote of the entire union membership, the cause of responsible unionism will be dealt a serious blow, for union officials may frequently become unwilling to carry out the wishes of the rank and file workers for fear of an adverse arbitrator's decision, and the attendant company discipline.

Consistency with the earlier points made here demands that we choose the first evil as the lesser one. A union official immune from discipline due to the doctrine of democratic process could still be subject to punishment under a strict interpretation of the powers of the company to discipline for negative cause if it could be shown that he failed to explain to the workers that their "democratic action" was a violation of the contract, or if he did not make a strong attempt to dissuade the workers from making such a decision.

Companies have rightly argued that in the case of an illegal democratic decision, they are unable to lay off or discharge all the workers participating in such a decision. The discipline of the union officers has been rejected as an undesirable method of punishing the union for offenses of this type, but another method of punitive action suggests itself. In cases where the union is well-established, and in strong financial condition, a fine

levied against the union treasury might be an effective deterrent to such illegal action. In cases where the union is less well established a small fine against the individual workers, to be deducted from the pay check, might attain the same result. These alternative forms of punishment are obviously the subjects for contract provisions, and not for arbitrators to decide on their own initiative.

In the absence of such contract provisions, however, the ideas that the union official should be a strong official and that he should represent the membership of the union require that he should be immune from discipline in cases where the wrong is the result of the democratic process, and not of his instigation.

The doctrine of spontaneous origin, as has been mentioned before, is one that arbitrators have usually accepted, but infrequently applied. A more liberal application of this doctrine by arbitrators would be desirable policy.

At best, this doctrine of spontaneous origin should decide cases only by default. In cases where the evidence is incomplete, and does not indicate any leadership of an illegal action, or prove quite conclusively that the action was pre-arranged or the result of a democratic process, the only thing left for the arbitrator to conclude is that the illegal action was spontaneous in its cause. If everyone quits work at two o'clock, there is certainly reason to believe that the stoppage was prearranged, but in the absence of any conclusive evidence of leadership, the work-quitting should be considered as spontaneous in origin. It is entirely possible in a stoppage if this sort that some small clique among the men is

responsible, and that although leadership is present, the union officers are blameless. Under such circumstances, it seems most just to give union officers the benefit of the doubt, and consider the illegal act as a spontaneous one, even if it is obvious by its nature that some degree of leadership must be involved.

Some arbitrators in past decisions have been inclined to grasp at straws in this sort of case, and accept evidence of leadership much less adequate than the evidence they demand in cases of other types. If a worker is accused of profanity or fighting, arbitrators demand very strong evidence, such as eye-witness accounts, before upholding company discipline. In cases where illegal acts are performed, and the evidence indicates that some element of leadership is involved, arbitrators seem to uphold action against union officials on much more sketchy evidence. In accordance with parallel reasoning regarding the doctrine of democratic process, it would seem a lesser evil to have an accasional wrong to go unpunished than to subject union officers to discipline of this type.

Singling out union officials for discipline, when rank and file members of the union equally guilty are not punished, is discriminatory, and should not be permitted. Responsible unionism is predicated on union officials of high ability, as is collective bargaining. It is inconsistent with collective bargaining and responsible unionism that potentially capable men and women should be discouraged from holding union office by discipline of this type.

In the negative and provocative causes for discipline, union officials are subject to a higher order of discipline than the lay members of the union. In the extenuating circumstances of extraor-

dinary nature, they may avail themselves of extenuating circumstances denied to rank and file workers. If these two approximately equal each other on balance, the possibility of discipline need not deter anyone from accepting union office.

A careful consideration of the causes for discipline and the extenuating circumstances justifying actions of union officials leads to the conclusion that additional discipline of this type would overbalance the scales against union officials, and leave them subject to discipline to an excessive degree.

In a sense, union officers and rank and file employees are never guilty of the same offense. Fighting by a union steward is one offense; fighting by an ordinary employee is another. It would be rather undesirable, however, to attach a different penalty to these two offenses, both because it might discourage competent individuals from holding union office and because it is offensive to justice in the common law sense.

This does not mean that if a number of workers, including union officers, are picketing in violation of the contract, that the officers should not be disciplined unless all the other workers are disciplined equally. It does mean that the union officers should not be disciplined for their mere presence on the line, but only if it can be shown that they were responsible, by their provocative or negative actions, for the picket line coming into existence. In other words, they can be disciplined when their affirmative actions are no more serious than the affirmative actions of others, but only if their additional provocative and negative actions are culpable.

By eliminating the consistencies of arbitrators' decisions in this manner, we have created in the union officer a figure of great power, capable of doing great good or great evil. Those who have misgivings about the intrinsic value of trade unionism will look upon this development with alarm. Those who have more confidence in the American Union movement will be less inclined to expect evil, but will instead expect great good from such a development.

In this chapter have been outlined the types of decisions that should be made by arbitrators in fields where their decisions have been varied. If these differences in decisions were brought into harmony in the manner here suggested, and the clarifying contract provisions here recommended became more universally adopted, union officials would have a much clearer picture of how far their authority went and when it ceased, and management would have a much more distinct idea of when it could discipline and how it could discipline. Mass unemployment among arbitrators would not be produced, but arbitrators' decisions on the problem of disciplining union officials would probably be reduced in number, and made more easy.

The passage of time perpetually brings new problems, and some future time may demand union leadership of a different sort than the type here envisioned as the most desirable. At the present time, and during the forseeable future, the need of unions for strong leadership should influence arbitrators' decisions on discipline of union officials in these directions.

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