ARBITRATION OF DISCIPLINARY CASES INVOLVING INCOMPETENCE OR NEGLIGENCE

Thesis for the Degree of M. A.

MICHIGAN STATE COLLEGE

Gerald E. Schairer

1952

This is to certify that the

thesis entitled

"Arbitration in Disciplinary Cases Involving Incompetence or Negligence"

presented by

Garald E. Schairer

has been accepted towards fulfillment
of the requirements for

The Masters degree in Economics

Charles C. Killingsworth
Major professor

Date August 20, 1952

O-169


MSU

ARBITRATION OF DISCIPLINARY CASES INVOLVING INCOMPETENCE OR NEGLIGENCE

By

Garald E. Schairer

Submitted to the School of Graduate Studies of
Michigan State College of Agriculture and
Applied Science in partial fulfillment
of the requirements for
the degree of

MASTER OF ARTS

Department of Economics

1952

The writer wishes to express his appreciation to Mr. Charles Killingsworth and Mr. Henry Albers for their supervision and helpful suggestions in the development of this thesis. I am grateful for the use of the arbitration decisions published by The Bureau of National Affairs in their Labor Arbitration Reports.

TABLE OF CONTENTS

CHAPTER I

Introduction

An incompetent or negligent worker deprives management of efficient production. If an employee is unwilling to work, incapable or careless, it is clear that output will suffer. In our highly industrialized plants of today incompetence may even cause danger to the safety of employees or great financial loss to the company.

Order and efficiency then are the direct objects of management disciplinary action. Before the advent of unionism, management had the sole authority for determining what constituted cause for discipline. Management made the rules of conduct and imposed the penalties sometimes arbitrarily. Discharge or other discipline resulting from prejudice, ill will, and ignorance of the real circumstances could not be contested if management objected. In other words discipline was management's prerogative and the employee's sole recourse was to conform or quit.

One of the many motives for union organization was the desire for elimination of arbitrary use of discipline. It is now generally accepted that management does not have an exclusive right to discipline. Rules for order, standards of efficiency and the degree and type of discipline are more and more being jointly determined by union and management. The degree of penetration by the union into this "prerogative" of management may be greater than is seen in the rules, standards, and specific provisions for penalties made by both parties. Neil Chamberlin[1] found from a study of large corporations

that there exists a common complaint from them

> "that the union has been responsible for an even greater loss of managerial disciplinary power than contract provisions or their application would indicate. It is charged that unofficial group action in the shop has succeeded in intimidating many formen, leading them to believe that to impose discipline will only result in loss of production through a protest work stoppage, or in a contest of power in which their authority may suffer more than it would by permitting laxities in the shop, or possibly in an over-ruling by higher management or the umpire which may likewise constitute erosion of their authority."[1]

Arbitration of cases involving incompetence or negligence is the result of management's wanting to define and perhaps check union penetration into this area of control and the union's wish to define and limit management's authority to discipline. The questions of what are fair standards of efficiency or reasonable rules of conduct, are often the subject of arbitration. The answer to these determine whether a worker is guilty or if the penalty is too severe. The jurisdiction of an arbitrator's decision is limited by what the parties themselves intend. The difference in the interpretation of these stated intentions makes the arbiter's job difficult. The position in which the arbiter thus finds himself is both precarious and important. He could easily be lost at the pleasure of the two parties as to which penalty or rule applies. If he always attempted to please both parties, the award given would often be a compromise.

There are two divergent schools of thought as to how the arbitrator may remove himself from this awkward position and bridge the gap of differing opinions. The Wayne Morse and Noble Braden approach

---

1. Neil Chamberlin, The Union Challenge to Management Control, Harper and Brothers, N.Y., p. 79, 1948.

is that there is a clear-cut meaning of the contract and the arbitrator must find it and not modify, add to, or change the terms. In Mr. Morse's words "the arbitrator sits as a private judge, called upon to determine the legal rights and the economic interests of the parties, as those rights and interests are proved by the records made by the parties themselves. The principle of compromise has absolutely no place in arbitration hearings."[1] Those with this view would hold that penalties and the factors of incompetence are determined at the time the collective agreement was made and are clearly written into the contract.

The Harry Shulman approach, on the other hand, says in effect that there is necessary ambiguity in contract clauses, in fact the vagueness which shows no "meeting of the minds" may be what made the agreement possible.[2] He also maintains in the same address that the arbitrator must get a solution from an industrial relations standpoint or to "advance the parties' cooperation in their joint enterprise", and to do this he must confer and mediate with the parties except where the agreement is absolutely clear-cut. In another work[3] Mr. Shulman has said "an award which does not solve the problem and with which the parties must nevertheless live, may become an additional irritant rather than a cure." The discipline for "good and just cause" provision found in many contracts is used by the holders of this view to point out the

---

1. Wayne Morse, The Scope of Arbitration in Labor Disputes, Commonwealth Review, March 1941, p. 6. For further understanding of this viewpoint see, Current Problems in Labor - Management Arbitration, by J. Noble Braden, American Arbitration Association, in "Arbitration Journal", N.S. vol. 6, pp. 91 ff.

2. Harry Shulman, The Role of Arbitration in the Collective Bargaining Process, an address at Institute of Industrial Relations, University of California, Berkeley, March 3, 1949.

3. Neil Chamberlin, Collective Bargaining, New York, McGraw-Hill, 1951, p. 155.

necessity of private confering with the parties to clear up the vagueness implied in such clauses.

Neither of these views deny an arbitrator's responsibilities to union and management. A prime responsibility in disciplinary cases involving incompetence is to discover and perhaps help draw the limits beyond which management's rights to discipline are non-existent. Whether there is a collective agreement or not and whether an agreement expressly limits management's rights to discipline or not, his right to discipline is not absolute. It is generally agreed, however, that if an agreement has no express limitation on such right or if there is no collective agreement, that federal and state labor laws are the only restrictions.[1] Arbitrator Rogers adds the restriction that the "generally accepted understanding of employer employee relationships obligates the employer to discharge for cause... even where no contract or bargaining relationship with the employer exist."[2] In the same case he argues that an employer's voluntary submission to arbitrate the issue of whether discharge was for "just and sufficient" cause, is an admission that his right to discharge is not absolute.[3]

---

1. Frank Elkouri, How Arbitration Works, the Bureau of National Affairs, Inc., Washington D.C., 1952, p. 253. The cases of 3LA770, In re Flintkote Company and Textile Workers Union of America, Local 655 (CIO), July 16, 1946, David L. Cole, arbitrator; and 4LA399, In re Fruehauf Trailer Company (Detroit, Mich.) and United Automobile & Agricultural Implement Workers of America, Local 99 (CIO), August 12, 1946, Dudley E. Whiting, arbitrator; support this view.

2. 3LA815, In re Daily World Publishing Co. (Atlantic City, N.J.) and The Newspaper Guild of Philadelphia and Camden, Local 10 (CIO), March 16, 1946, Herbert W. Rogers, arbitrator. Hereinafter citations from Labor Arbitration Reports, will appear as in this footnote with page number L.A. volume number and an identification of the union, company, and the arbitrators involved.

3. 3LA815, Daily World Publishing Company.

Express provision of discipline for "cause" or "just cause" is included in most collective agreements today.[1] Where this clause does exist the arbitrator's function in regard to it is stated by arbitrator Harry H. Platt in clear language: "it is ordinarily the function of an arbitrator in interpreting a contract provision which requires 'sufficient cause' as a condition precedent to discharge... to safeguard the interest of the discharged employee by making reasonably sure that the causes for discharge were just and equitable and such as would appeal to reasonable and fair-minded persons as warranting discharge".[2] When specific reasons for discipline are not spelled out, the arbiter must look at the intended meaning or spirit of the contract. Past practice and circumstance, as seen in detail below, determine the intended meaning of good and just cause.

Specific penalties are often provided for in an agreement. The right to discharge, for example, may be given to management while no reference is made for other forms of discipline. It is logical to assume that if a specific right to discipline is reserved to management, this does not restrict him from giving a lesser penalty nor should it compel him to use that specific discipline at the exclusion of others.[3]

Another responsibility of the arbiter is to review disciplinary penalties in such a way as to give fair weight to management's decision. Investigation revealed no opinion that an umpire may

---

1. Elkouri, op. cit., p. 254.
2. 7LA764, In re Riley Stoker Corp. (Detroit, Mich.) and United Steel Workers of America, Local 1907 (CIO), July 11, 1947, Board of arbitration: Harry H. Platt (chairman); Harry J. Lavery (union-appointed arbitrator) and Franklin Treat (company-appointed arbitrator).
3. 3LA122, In re Auto-Lite Battery Corp., Owen Dynteo Division (Syracuse, N.Y.) and United Automobile, Aircraft and Agricultural Implement Workers of America, (CIO), April 6, 1946, Maxwell Copelof, arbitrator.

substitute his judgment for that of management's merely because he thinks a penalty is too severe. At least three arbitrators held the opposite view. Two of these held respectively that management's action could not be set aside for being too severe, "unless it can be shown that the company acted in a discriminatory manner or acted arbitrarily, without proper investigation,"[1] of "...in absence of clear showing that managements' decision was not a bona fide exercise of judgment and discretion in connection with the maintenance of efficiency and productivity in the plant."[2] Arbitrator McCoy puts the question in positive language claiming that "the only circumstance under which a penalty imposed by management can be rightfully set aside by an arbitrator are those where discrimination, unfairness, or capricious and arbitrary action are proved--in other words, where there has been abuse of discretion."[3] In a summary of his findings he says in effect that action on grounds other than those stated above would constitute illegal usurpation of the proper function of management.[4]

In all of these statements the arbitrator leaves himself enough authority and recognizes his responsibility to set a poor penalty aside. An "abuse of discretion" may be that the penalty is too severe under the circumstances or management may have acted in "bad

---

1. 9LA510, In re Consolidated Vultee Aircraft Corp., Fort Worth Division (Fort Worth, Texas) and International Association of Machinists, Aeronautical Industrial District, Lodge 776, Jan. 26, 1948, Byron R. Abernethy, arbitrator.
2. 13LA28, In re National Lead Co., Magnus Metal Division (Los Angeles, Calif.) and International Union of Mine, Mill and Smelter Workers, Western Mechanics Local 700 (CIO), April 1, 1949, Paul Prasow, arbitrator.
3. 1LA160, In re Stockhom Pipe Fittings Company (Birmingham, Alabama) and United Steelworkers of America (CIO), March 28, 1945, Whitley P. McCoy, arbitrator.
4. 1LA162, Stockhom Pipe Fittings Company.

faith". When the arbiter sees mitigating circumstances that management did not take into account when leveling the penalty, the action may be set aside as an "abuse of discretion". Although an accused man is innocent until proven guilty and therefore the benefit of any doubt is usually given to the employee, if one reads the decisions of arbiters he senses a feeling of high respect for management's judgments.

The arbitrator functions within these responsibilities for his position compels him to decide whether management has exceeded his rights and/or whether he has judged correctly, depending upon the question before him.

The umpire's position is important because of the extensive effects of his decision. A given award may influence his and others' action on similar disciplinary action which may come up for decision. Standards of efficiency and rules of conduct change too frequently to be subject to binding precedents, but precedents may govern when situations are similar. If a case closely parallels a past one, neither party will be willing to accept less than what was granted before. This is true especially if there is a permanent umpire. "In practice when a permanent tribunal polices an industry, the accumulated decisions tend to develop into a body of common law".[1] The effects of this common law when fully developed could be far reaching. If foremen and stewards were familiar with past penalties given for particular offenses of incompetence, hasty and unthinking action on their part would be checked, thus avoiding wasted time in grievance procedures. Quick and easy settlement could be had before the grievance got too

---

1. National Foremen's Institute Incorporated, New York, McGraw-Hill, 1951, p. 155.

far.[1] The potential sphere of influence which a decision has is great. It is important then for the management, union, and arbitrator to think that an award is a good one.

What is a good decision? Mr. Copelof says of arbitration decisions, "given the same set of facts it is presumed that any competent arbitrator would reach the same decision".[2] Surely he cannot mean that because the facts are the same and the arbitrators competent that similar decisions result, for dissenting decisions are not uncommon where more than one arbitrator decides a case. The interpretation of facts, as to the severity of the offense or the degree of incompetence when compared with the performances of other employees, often differ when all participating are thought to be competent. If there is like interpretation of facts among umpires the decisions must reflect principles which when followed result in similar decisions. The truth of Mr. Copelof's statement will be evidenced to the degree that these principles are realized.

The purpose of this thesis is to discover principles which are reflected in awards given in disciplinary cases involving incompetence and negligence. The most significant arbitration decisions are found in a publication of the Bureau of National Affairs entitled, Labor Arbitration Reports. Two hundred and thirty-one decisions covering a period from 1945 to date were examined.

---

1. Thomas Kennedy, Effective Labor Arbitration, Philadelphia, University of Pennsylvania Press, 1948, p. 202.
2. Maxwell Copelof, Management Union Arbitration. Harper Brothers, N.Y., 1948, p. 110.

CHAPTER II

The Nature of Incompetence or Negligence

Upon examination, the decisions seem to very naturally answer the questions; Is the employee incompetent? Did the management's disciplinary action violate the contract? Does the penalty fit the offense? The answer to the first question is requisite to the determination of whether an employee should be penalized. The second will answer the problems of contract interpretation and correct usage.[1] If the employee is incompetent or at least partly so the third question must be answered. The decisions with chief emphasis upon incompetence, contract violations and fairness of penalties, therefore, are discussed in this order.

Whether a man is incompetent in reality is often difficult to determine. An employee may appear to be incompetent and yet be very able and efficient. Carelessness and negligence may or may not be directly attributable to the employee. A job may not get done or may be poorly done while the cause may be company originated rather than employee inefficiency or lack of ability. If there is an appearance of incompetence, but the immediate cause for the error made lies with the company, the worker is usually saved from any penalty. The severity of a penalty is often lessened when the employee is only partly guilty.

---

1. This paper will cover only the interpretation and usage of the contract as found in the cases I have studied. For a more complete analysis of this problem an excellent coverage may be found in the work of Frank Elkouri, How Arbitration Works, The Bureau of National Affairs, Inc., Washington, D.C., 1952, Chap. 6.

Eighty-five decisions dealt directly with the question of who was at fault, the company or the employee. Of these the charge of incompetence was upheld in thirty-five decisions and either completely or partly reversed in the remaining fifty.

Incompetence is not easy to prove. The immediate but hidden or overlooked causes of an error are many and include poor roads or bad weather in case of an accident, an excessive amount of work burdening the employee, lack of assistance, poor or improper equipment, a faulty machine, or inadequate transportation. The burden of proving incompetence is of course on the employer. He must show either that the error is not the result of a "hidden" or "overlooked" cause or that the employee is definitely incompetent. If personal blame is not established, but evidence of a "hidden" cause is not forthcoming, it is probable that the employee is incompetent. All but one of the cases in which the arbitrator upheld the company there was definite evidence of employee inefficiency or inability. The remaining was upheld on the basis of "evidence showing only a remote possibility that employee's large output of scrap was caused by reason other than negligence on his part."[1]

How conclusive should this proof be? The lack of quality or quantity of evidence was the basis upon which forty-six of the fifty decisions reversing company action were decided. A review of some of these give us a relatively clear understanding of the answer to this question. In three cases the evidence given does not "prove" nor

---

1. 9LA733, In re Muncie Gear Works, Inc. (Muncie, Indiana) and United Automobile, Aircraft and Agriculture Implement Workers of America, Local 495 (CIO), Dudley E. Whiting, arbitrator.

"support" the employer's finding.[1] Arbitrators in two other cases declared that evidence cannot be "speculative" nor "based on conjecture".[2] Three other decisions required that evidence should be "decisive and conclusive".[3] The view that there should be no "reasonable doubt" of incompetence was held by six arbitrators in two decisions.[4] Many other decisions express these same views. Is a different degree of "conclusiveness" required depending on the offense committed or the penalty given? The penalty was, "demotion" and the offense, "poor work and not enough work" in the cases last cited. The evidence required

---

1. 4LA131, In re R.H. Macy & Co., Inc. (New York, N.Y.) and United Retail Wholesale and Department Store Employees, Local 1-5 (CIO), July 19, 1946, Mitchell M. Shipman, arbitrator; 6LA921, In re Acme Limestone Co. (Fort Sprag, West Virginia) and United Mine Workers of America, District 50, Local 12424 (AFL), February 10, 1947, Board of Arbitrators: John E. Dwyer (chairman); A.W. McThenia (employer-appointed arbitrator); and Sam Wantling (union-appointed arbitrator); 8LA199, In re Dri-Wear Fur Processing Co. (New York, N.Y.) and International Fur and Leather Workers Union, Local 64 (CIO), July 23, 1947, Jules J. Justin, arbitrator.

2. 5LA443, In re Malone & Hyde, Inc. (Memphis, Tennessee) and Food, Tobacco, Agriculture & Allied Workers Union of America, Local 19 (CIO), October 26, 1946, Verner E. Wardlaw, arbitrator; 6LA913, In re Southeastern Greyhound Lines and Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 1238, 1314, 1315 & 1323 (AFL), February 28, 1947, Board of Arbitration: Whitley P. McCoy (chairman); Fredrick Meyers (union-appointed arbitrator); and Wayne K. Ramsay (employer-appointed arbitrator).

3. 7LA231, In re International Association of Machinists, Aeronautical Industrial District Lodge No. 727 and Office Employees International Union, Local 30 (AFL), April 22, 1947, Board of Arbitration: Benjamin Aaron (chairman); Pearl Holt, (union-appointed arbitrator); and Michael Carroll (employer-appointed arbitrator); 7LA147, In re American Smelting and Refining Co., Federated Metals Division (Pittsburgh, Pa.) and United Steelworkers of America, Local 1154 (CIO), April 22, 1947, Robert S. Wagner, arbitrator; 14LA267, In re Newark Wire Cloth Co. (Newark, N.J.) and International Union of Mine, Mill and Smelter Workers, Local 680 (CIO), March 3, 1950, Thomas A. Knowlton, arbitrator.

4. 4LA52, In re Alan Wood Steel Co. (Conshohocken, Pa.) and United Steelworkers of America, Local 1392 (CIO), July 25, 1946, Board of Arbitrators: Joseph Brandschain (chairman); P. Otis Zwissler (employer-appointed arbitrator); Clarence Irwin (union-appointed arbitrator); 17LA701, In re New Haven Clock and Watch Co. (New Haven, Conn.) and Ply Playthings, Jewelry & Novelty Workers International Union, United Clock Workers Union, Local 459 (CIO), Jan. 3, 1952, Connecticut State Board of Mediation and Arbitration: Robert L. Stutz, Mitchell Sviridoff, and Warren L. Mottram.

had to prove incompetence "beyond doubt". The other cases cited had "discharge" as the penalty and the alleged offenses involved different degrees of incompetence ranging from poor work and misconduct to physical inability to do the work. The answer is not, however, an emphatic no. When incompetence involves the question of safety of other employees, arbitrator Platt declares that it is the "proper concern of management...despite conflicting evidence as to whether crane operator, who had been employed nine years, was actually careless".[1]

Incompetence or negligence must be identified if proven. We have seen that many false charges were made by companies. The complicated nature of the identity of incompetence explains some of these charges. A board of arbitrators in a case involving the Dow Chemical Company fully explained incompetence.[2] This view holds that an employee is incompetent if he lacks either ability or efficiency. These are measured in relation to the quality of work required and a reasonable length of time in which to produce that good quality. If a man cannot do the work within the required time, he lacks ability. If he can do the work within the specified time but does not, he lacks efficiency. According to this definition, the man's "state of mind" or attitude is the key to understanding whether he lacks either ability or efficiency. Ability is lacking if his state of mind is directed toward performing his work yet it does not get done. He lacks efficiency if he does not concentrate on

---

1. 1LA238, In re McLouth Steel Corp. (Detroit, Michigan) and United Steelworkers of America, Local 2659 (CIO), Dec. 3, 1945, Harry H. Platt, arbitrator.

2. 12LA1061-4, In re Dow Chemical Co. (Los Angeles, Calif.) and Oil Workers International Union, Long Beach Local 128 (CIO), Board of Arbitration: Joseph P. Pollard (chairman); William Howard Nicholas (employer-appointed arbitrator); and George Russell (union-appointed arbitrator). No contradiction or challenge to this definition was found in the cases studied.

the performance of the job and it does not get done. Terms like "lack of diligence" "willful or intentional disregard" and "uncooperative attitude" were used by other arbitrators and give a hint as to the expected if not evidenced state of mind of an inefficient employee. Negligence and carelessness are also used to describe the inefficient. A man may be incompetent without being negligent, as when he lacks ability, while he cannot be negligent without also being incompetent.

This definition does not give a clear cut rule to follow when deciding the question of whether a man is competent or otherwise. This is because "ability" and "efficiency" are measured in terms of the standards of quality of work, and in terms of the time in which that quality of work should be done. In many instances these standards are not clearly defined and must be determined by the arbiter. They may also be clearly defined but differ with different companies or bargaining units. In the latter case, the arbiter uses the standards set. In the former, there is room for individual judgment, but I find no basic disagreement among arbitrators.

The employer may discipline a worker for not meeting specific standards of competence, therefore, we need to know the nature of these standards. An examination of arbiter's decisions reveals their views on management rights in setting standards, the degree of quality and efficiency that management may expect from employees and the basis of judging whether an employee has met the standards set.

Arbitrator Naggi held that "it is management's prerogative to determine what constitutes inefficiency...".[1] This prerogative is not

---

1. 10LA439, In re Gaylord Container Corp. (N.J.) and Retail, Wholesale and Department Store Union, Wholesale and Warehouse Workers Union, Local 65 (CIO), May 17, 1948, Frank Wallace Naggi, arbitrator.

unlimited, however, for arbitrator Aaron says that management cannot set standards "to get all the work we can" but that "specific quantitative standards" must be established.[1] There are many instances where the criteria of competence is stated in the collective agreement. The employer with such a contract must of course stay within its limits.

Management may require certain minimum standards of ability. Editorial employees were discharged because they required "more than normal direction" and an "abnormal degree of editing and rewriting".[2] "Consistant failure to make more than 50 points constituted proof of incapability" in an instance where the "contract implies that all workers should be able to maintain a production of 60 points".[3] Common wording of decisions use "average" or "standard" as a measurement of the minimum which may be required.

The requirements for standards of efficiency may be determined with about the same degree of accuracy. Employees are expected to be "reasonably responsible" to take "customary care". Arbitrator Brecht holds that "employees are properly expected to apply themselves with reasonable industry to their work".[4] Mr. Larkan would have a supervisor

---

1. 12LA527, In re Western Stove Co., Inc. (Culver City, Calif.) and Stove Mounters International Union of North America, Local 58 (AFL), March 25, 1949, Benjamin Aaron, arbitrator.

2. 14LA307, In re Farm Journal, Inc., Pathfinder Magazine (Washington, D.C.) and American Newspaper Guild, Washington Newspaper Guild, Local 35 (CIO), August 26, 1949, Alfred A. Colby, arbitrator.

3. 10LA217, In re Standard-Coosa-Thatcher Co., Sauquoit Unit (Gadsden, Alabama) and Textile Workers Union of America, Gadsden Joint Board (CIO), April 19, 1948, Board of Arbitration: A.R. Marshall (chairman); H. Lloyd Pike (employer-appointed arbitrator); and Louie Hathcock (union-appointed arbitrator).

4. 6LA500, In re Glenn L. Martin Co. and United Automobile, Aircraft, and Agricultural Implement Workers of America, Local 738 (CIO), Jan. 4, 1947, Robert P. Brecht, arbitrator.

disciplined in order to make him aware of his responsibility.[1] The man disciplined here was under the impression that he "wasn't responsible". It is therefore evident that he was laboring under a delusion since he was a supervisor and it could be reasonably assumed that he should be thoughtful of his responsibilities. In another case, Mr. Updegraff states "a competent and experienced operator does not require being told to use gauges in a situation where the same obviously should be used".[2] Standards for workers on special jobs may be higher than can be expected from the average employee. This view was held in two decisions. In the words of arbitrator Lindquist, the "nature of foreman's position as key man in production operators entitled employer to require closer cooperation of him than might be expected of ordinary labor".[3] Umpire Vible handing down the decision with two others concuring states that "in view of the nature of the product, an inspector of aircraft should never approve any work unless he is satisfied that it meets standards".[4]

---

1. 6LA55, In re Standard Forgings Corp. (East Chicago, Indiana) and United Steelworkers of America, Local 1720 (CIO), John Day Larkin, arbitrator.

2. 13LA609, In re John Deere Tractor Co., Waterloo Works (Waterloo, Iowa) and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 838 (CIO), Clarence M. Updegraff, arbitrator.

3. 11LA353, In re Rite Way Launderers and Cleaners (Minneapolis, Minnesota) and Laundry Workers International Union, Laundry Workers and Cleaners Union, Local 183 (AFL), Sept. 23, 1948, Leonard E. Lindquist, arbitrator.

4. 11LA139, In re Curtiss-Wright Corp., Airplane Division, Columbus Plant (Columbus, Ohio) and United Automobile, Aircraft, and Agricultural Implement Workers of America, Local 927 (CIO), Aug. 11, 1948, Board of arbitration: Frank R. Vible (chairman); Edward W. Gray (employer-appointed arbitrator); and James Desmond (union-appointed arbitrator).

One basis of judging whether an employee has met the standard is past practice. Arbiters Seward and Johannes in two different cases used this basis as a measure of quality. Mr. Seward said in effect that a job description includes not only that which is written about it but also includes what has been done on that job in the past.[1] If "... similar mistakes had been tolerated",[2] Mr. Johannes suggests that they be taken as a consideration of the quality of work that should be demanded when disciplining a worker for not doing better. This is not to say that a firm cannot demand better quality work, but that a penalty for not meeting this higher standard should not be severe if lower quality work had been accepted previously.

Another basis is by comparison of the work and earnings of other employees with the achievements of the worker being disciplined. This measurement was used by arbiters in fourteen cases and their representative opinions will follow. These are comparisons of the quality of work done on the same machine. Arbitrator McCoy said "... there was no showing that instant employee turned out more defective pieces than other employees working on the same machine".[3] If an employee works on a piece-rate basis, his earnings are compared with others' on the same machine. In one case a company gave a disciplinary layoff for not doing a particularly heavy job successfully and gave assistance to employees later assigned to that

---

1. 15LA622, In re International Harvester Co., McCormick Works and United Farm Equipment and Metal Workers Council 108 (UE-Ind.), Ralph T. Seward, arbitrator.

2. 12LA261, In re Gaylord Container Corp. (Dallas, Texas) and United Paper Workers of America (CIO), Jack Johannes, arbitrator.

3. 15LA664, In re General Electric Co., Memphis Lamp Works (Memphis, Tenn.) and United Automobile, Aircraft, and Agricultural Implement Workers of America (CIO), Whitley P. McCoy, arbitrator.

same job.[1] The arbitrator reversed the company penalty because they required more of a man than was expected of employees later assigned to the same job. Umpire Killingsworth said in effect that women may be discharged from jobs traditionally held by men (before the war) if their ability and performance has been "substantially below what has always been required of the majority of men on the same job".[2]

Viewing the nature of the standards for competence as a whole gives us a better picture of what true incompetence or negligence is than would an arbitrator's definition alone. Employers have the prerogative of determining standards within reason. They may expect an employee to understand and acknowledge his own responsibility. In large part the measure of this responsibility is past, present and, in one case mentioned, future practice. Comparisons of earnings and efficiency of other employees is also a concrete measure. In each case, however, the arbitrator must use his own good judgment and each one merits individual action. Where the requirements of efficiency and ability are stated in the contract, his job is somewhat simpler, but in many cases not easier.

It is seen then that guilt for incompetence is not easily determined. Even in cases where it is, however, other factors often outweigh this fact. The employee may be responsible for the error committed and may be incompetent and yet be allowed to escape the penalty meted out by the firm. Many of these cases determine that

---

1. 9LA828, In re Armour and Co. (Chicago, Illinois) and United Packinghouse Workers of America, Local 347 (CIO), Harold M. Gilden, arbitrator.

2. 7LA163, In re Bethlehem Steel Co., Sparrows Point Plant (Sparrows Point, Maryland) and United Steelworkers of America (CIO), April 10, 1947, Charles C. Killingsworth, arbitrator.

the company is unfair because it has violated the contract. When a term, phrase or intent of a contract is violated, it is a question of contract interpretation which will be discussed in the following chapter and will be separated from the questions of fairness not directly concerning contract interpretation which will be discussed in chapter four.

CHAPTER III

The Use and Interpretation of the Contract

When a violation or alleged violation of a contract occurs, the arbiter must interpret the intent or wording of the contract if the wording does not make the intent clearly evident to the parties. The arbitrator must recognize this "intent" and therefore the guides discussed by Elkouri,[1] if used, are helpful in achieving this aim.

That part of the contract which has been violated usually has to be related to other clauses to see that the intent as well as the wording is upheld. There are times even when the wording or intent of the part contradicts the intent of the whole. Problems of interpretation arise when one clause contradicts another. There are instances where the employer does exactly what a specific provision prohibits him from doing. Special problems arise when the contract provides for particular penalties which are not used by the management.

The correct application of specific provisions or prohibitions is a frequent source of dispute. One employee was transferred and demoted when only the demotion could be used as a disciplinary measure.[2] The right to demote was questioned in another case where the contract provided that such an employee "shall be referred to the

---

1. Elkouri, op. cit., chapter 6.
2. 14LA882, In re International Harvester Co., Melrose Park Works and United Automobile, Aircraft and Agricultural Workers of America, Local 6 (CIO), Whitley P. McCoy, arbitrator.

labor department for placement or furlough".[1] A board of arbitrators found in one instance that if one provision was used, another would be violated.[2] They found that a discipline must be specifically provided for if when used it contravenes another provision. The management of one company took action under a "gross carelessness" clause and not under the "minor offense" clause.[3] They used the wrong provision for the employee was found guilty only of a minor offense. Arbitrator Elson holds that an employer may not discharge physically disabled employees where the contract "gives laid-off employees the right to bid for job vacancies on the basis of their seniority", gives the employer exclusive right to determine employee's qualifications for jobs" and also prohibits him from discharging for the purpose of affecting seniority rights.[4] Here the umpire had to correlate the parts into a meaning of the whole. An employer's right to discharge was denied where he failed to exercise his right to downgrade.[5]

After observing these cases one may conclude that an employer cannot use a penalty which contradicts a clause which provides for

---

1. 9LA780, In re Kelly-Springfield Tire Co. (Cumberland, Maryland) and United Rubber, Cork, Linoleum and Plastic Workers of America, Local 26 (CIO), Jacob J. Blair, arbitrator.

2. 6LA379, In re American Steel and Wire Co., Duluth Works and United Steelworkers of America, Local 1028 (CIO), Board of arbitration: Herbert Blumer (chairman); Eugene Maurice (union-appointed arbitrator); and Walter Kelly (employer-appointed arbitrator).

3. 11LA722, In re General Controls Co. (Los Angeles, Calif.) and International Association of Machinists, Precision Lodge 1600 (Ind.), Spencer D. Pollard, arbitrator.

4. 6LA544, In re Eagle-Picher Mining and Smelting Co. (Henryetta, Oklahoma) and International Union of Mine, Mill and Smelter, Local 429, (CIO) Jan. 8, 1947, Alex Elson, arbitrator.

5. 5LA339, In re The Master Electric Co. (Dayton, Ohio) and United Electrical Radio and Machine Workers of America, Local 754 (CIO), Oct. 16, 1946, Board of arbitration: Charles G. Hampton (chairman); D.T. Warner (employer-appointed arbitrator); and Charles Sims (union-appointed arbitrator).

another penalty. This is different than the idea that an employer must use the discipline provided for. We have seen earlier that a clause reserving to management the right to discharge does not restrict him to discharge when a lessor penalty can be given. The key word is "contradiction". This supports the principle that a clause must be used in relation to others and in relation to the whole. The spirit or intent of the contract must, therefore, be kept in mind and be reflected in the interpretation finally given.

A definition of words or even whole clauses, toward this end, is a large part of the job in many cases. The meaning may often be found by studying the composition of the paragraph concerned. The umpire must be something of a scholar in English grammar in these instances. Arbitrator Platt shows us an example of this in one of his cases when he explained that "qualifications of 'for proper cause' as used in contract clauses vesting exclusively to management 'the direction of the working force including the right to hire, transfer, promote, suspend and discharge for proper cause,' is construed as restricting only the right to suspend or discharge, not the right to hire, transfer or promote".[1] The meanings may also be gotten by discovering a definition not before used or thought of or rather by elucidating one which has been unconsciously used. The understanding of the words "efficiency and ability" as previously spoken of are definitions of this type. One arbitrator used the penalty given to employees involved in similar past offenses as a guide to find which of two provisions should be used in a particular case since the meanings

1. 1LA238, In re McLouth Steel Corp. (Detroit, Mich.) and United Steelworkers of America, Local 2659 (CIO), Harry H. Platt, arbitrator.

of these provisions were questioned.[1] He found that in other cases which were alike in kind, a warning had been given the employee because they were thought to be minor offenses. Because of the similarity, the penalty of layoff which the company gave thinking that the employee was grossly careless, was declared improper in favor of a warning which had been given in the past.

In the discussion thus far about contract interpretation, the final authority for the decisions given was the contract itself or the meaning which eminates from the intent of the contract. To achieve fair interpretation, however, it is sometimes necessary to rely on past usage of the contract. It must be used fairly and consistantly. If it is used one way for a particular grievance case, it should be used the same way under similar circumstances. The contract must not be used contrary to past practice. No case was found to disagree with this philosophy. Also, it was ruled that a penalty on one employee which is legal under a contract may not be used if such action would penalize another, but innocent employee.[2] In this case, the penalty would have displaced another worker. One company had a contract requiring them to "assign physically handicapped workers to such jobs as they can perform and to permit such employees to bump workers of lowest plant seniority on shift".[3] There was no evidence presented to show that a job was available which was sufficiently free from danger, therefore, arbitrator McCoy upheld the discharge of the

---

1. 11LA722, General Controls Co.
2. 9LA480, Kelly-Springfield Tire Co.
3. 2LA326, In re Pacific Mills (Columbia, S.C.) and Textile Workers' Union of America, Local 254 (CIO), April 4, 1945, Whitley P. McCoy, arbitrator.

employee. In one case[1] there was no convincing proof of the employee's guilt, but the contract authorized the management to transfer a worker for "proper cause". Management thought he was endangering the safety of other workers. This was found to be sufficient reason for the transfer.

It is thus seen that past applications of the collective agreement and circumstances which the contract does not cover are used to make the decision a fair one. It is also seen that if the safety of employees is threatened or if an innocent employee will be penalized by the strict use of a contract, the application of it will be sacrificed for the sake of good judgment.

If the contract merely authorizes management to take disciplinary action "...for just cause without specifying what constitutes offenses or the nature of the penalty..."[2] the arbitrator must decide whether the disciplinary action is warranted. Even if the contract provides for a specific penalty, it must be a fair one in light of the circumstances and cannot be considered just and fair merely because it is in the contract. Considering these aspects involves two questions, one of which has been discussed in chapter two, that of whether a man is incompetent. In other words, is he guilty or partially guilty? The other question involves what is fair according to the agreement and past practice. Fairness of applying the agreement has been discussed in chapter three. This leaves us to answer the question of whether the penalty fits the offense. Is it reasonable in the light of established precedent? Is it fair according to prevailing notions of justice? These are dealt with in the next chapter.

---

1. 1LA238, McLouth Steel Corp.
2. Copelof, op. cit., p. 110.

CHAPTER IV

The Fair Use and Reasonableness of Penalties

The reasonableness of a penalty depends upon whether management used good discretion as to what type or how much of a penalty should be given. In the cases studied, arbitrators have decided two questions as to the extent of the penalty. Should a penalty be such that the employee suffers no loss except that intended in the disciplinary action? The layoff of an employee for disciplinary reasons made it impossible for him to work on the "sixth day" and thereby earn time and one-half. The union complained of this but the arbitrator decided that "there is no obligation on an employer, in administering a justifiable disciplinary penalty, to insure the worker against his suffering other contractural consequences as a result of penalty imposed".[1] Two arbitrators hold the view that a company may not impose one penalty after the other for the same offense. In one case, discharge followed a week's disciplinary layoff of an employee accused of poor workmanship. The company reinstated her but without back pay, therefore, umpire Whiting thought it "... would compound the penalty for previous derelictions" and awarded back pay for the worker.[2] The obligation to uphold this principle is clearly stated by arbitrator

---

1. 3LA656, In re Roberts and Mander Stove Co. (Hatbora, Penn.) and United Steelworkers of America, Local 1839 (CIO), Joseph Brandschain, arbitrator.

2. 6LA693, In re Fruehauf Trailer Co. (Detroit, Mich.) and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 99 (CIO), Jan. 27, 1947, Dudley E. Whiting, arbitrator.

McCoy: "when a long established principle, such as protection from double jeopardy, is applicable" the arbitrator "should apply it even though he is not a criminal court judge". To hold otherwise "would be contrary to fundamental concepts of justice, and would diminish confidence in arbitration as a process for obtaining justice".[1]

The rights of both parties must be safeguarded and their interest served if a penalty is to be fair. One company was made to reinstate after discharge of an aged man physically capable to produce only one-half the normal rate because his age would bar him from other jobs, but since the shop was small and "financially insecure" the employer was allowed to pay "one-half the prevailing rate".[2] Arbitrator Platt sums up a number of points to consider which include: "the adequacy of the instruction given to the employees, whether his error was a common one or unusual, his general attitude as an employee and his past work record, the substantiality of the damage caused, whether prior warnings were given, and other circumstances...". He concludes by saying that all must bear relationship to the "prevailing notions of justice in the industrial community".[3] Other umpires include as "other circumstances", whether there had been a radical change in work assignment, personal family problems, employee's physical condition, relations with foremen and whether the workman had improved or was

---

1. 14LA882, In re International Harvester Co; 16LA616, In re International Harvester Company, Evansville Works (Evansville, Indiana) and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 1106 (CIO), May 22, 1951, Whitley P. McCoy, arbitrator.

2. 12LA34, In re Dandy Mattress Corp. and United Furniture Workers of America, Bedding Local 140 (CIO), Feb. 19, 1949, Israel Ben Scheiber, arbitrator.

3. 15LA772, In re Evans Products Co. (Plymouth, Mich.) and United Steelworkers of America, Local 2340 (CIO), Harry H. Platt, arbitrator.

experienced. As arbitrator Platt put it "in imposing disciplinary penalties, an employer should exercise humane discretion".[1]

Management must make itself understood, act in a relatively consistant manner and be sure that the employee has been helped as much as is reasonable. Many companies have discharged without notifying the worker of possible discharge action in case of another error. Employees should receive "ample" or "sufficient" warning in case of probable discharge. Arbitrator Cheney reversed a company's discharge action partly on the basis that a general warning to all employees had been given, but a personal one had not been given to the worker discharged.[2] Umpire Shipman mitigated a penalty because there was an "evident possibility that employee did not fully understand the import of management's admonishments".[3]

If in all prior cases involving similar offenses, employees were given two warnings, consistancy must rule and discharge cannot come after only one warning.[4] It seems obviously inconsistant to discharge and praise an employee at the same time[5] or to discharge

---

1. 1LA254, In re Campbell, Wyant and Cannon Foundry Co. and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Local 539, (CIO), Nov. 21, 1945, Harry H. Platt, arbitrator.

2. 8LA282, In re Adel Precision Products Corp. (Burbank, Calif.) and International Association of Machinists, Precision Lodge 1600 (Ind.), Aug. 27, 1947, George Cheney, arbitrator.

3. 9LA954, In re Bethlehem Steel Co., Sparrows Point Plant Sparrows Point, Maryland) and United Steelworkers of America, (CIO), Feb. 16, 1948, Mitchell M. Shipman, arbitrator.

4. 12LA1, In re Goodyear Clearwater Mills No. 1 (Rockmart, Georgia) and Textile Workers Union of America, Local 883 (CIO), Feb. 1, 1949, Whitley P. McCoy, arbitrator.

5. 13LA865, In re Sill Properties, Inc., D/B/A Bakersfield Press (Bakersfield, Calif.) and American Newspaper Guild (CIO), Dec. 30, 1949, Michael I. Komaroff, arbitrator; 10LA178, In re Daniels-Kummer Engraving Co. (Chicago, Ill.) and International Metal Engravers Union, Local 1 (Ind.), March 16, 1948, Nathan P. Feinsinger, arbitrator.

for "refusal to improve" where the "horseplay of supervisors" would "tend to sustain in the employee's mind the assumption that all employees were entitled to take it easy and to ignore the admonitions of supervisors".[1]

It is unreasonable to discipline an employee for incompetence when he "had been on the job only a few months" with "practically no training"[2] or "insufficient supervision".[3]

There are various viewpoints as to what management is obliged to do if it suddenly decides to discipline for action previously tolerated. The difference of opinion among arbitrators is on the reasonableness of the discipline. They all agree that management has the right to set specific standards of efficiency and agree also that the company could require that the standards be met. Two companies wanted to cut the work force down for efficiency reasons and make employees do that which was previously not required.[4] A disciplinary layoff was given in both of these instances. In three other cases the management wanted to exact more efficiency out of the workers than they had previously required. A layoff was given in one of these,[5] a

---

1. 15LA38, In re Kraft Foods Co. of Wisconsin (Wausau, Wis.) and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 446 (AFL), July 27, 1950, Board of arbitration: Clarence M. Updegraff (chairman); Walter Graunke and Henry Stanton (union-appointed arbitrators); and Byron H. Hill and Noyce Bullis (employer-appointed arbitrators).
2. 3LA412, In re Batian-Morley Co., Inc. (La Porte, Ind.) and United Farm Equipment and Metal Workers of America, Local 173 (CIO), May 23, 1946, Albert A. Epstein, arbitrator.
3. 3LA40, In re Jarecki Machine and Tool Co. (Grand Rapids, Mich.) and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Local 944 (CIO), April 15, 1946, Dudley E. Whiting, arbitrator.
4. 12LA261, Gaylord Container Corp.
   9LA828, Armour and Co.
5. 12LA1061, Dow Chemical Co.

demotion in another,[1] and a discharge in the third.[2] Four decisions showed that the desire for increased efficiency came when the labor supply was large and that the companies had tolerated the inefficient when there was a labor shortage. In the case of discharge last cited, the company re-established prewar standards of job performance and was allowed to fire the wartime hires who could not meet those standards. It was held that the employers "necessarily tolerated" low level performance during the war but "should not be required to continue to do so." In another case, the company's discharge for failure to meet peace time standards was reversed in favor of a transfer to a job whose requirements could be met by the worker.[3] The only recognizable difference between these two instances is that in the latter the employer had upgraded the employee too rapidly during war time. A worker was demoted because he was unusually slow, and the board of arbitrators found that even though the employer had tolerated it over a period of time this "does not prohibit him from taking steps to increase efficiency at a later time.[4]

The toleration of inefficiency when there is no special drive for maximum production is held by arbitrators, however, to be inexcusable unless effort is made to help the employee improve. The employee, in the case covering the exception, was demoted for incompetence four and one-half years after his promotion. This seems to be a long time to tolerate incompetence, but the umpire upheld the

---

1. 15LA622, International Harvester Co.
2. 7LA163, Bethlehem Steel Co.
3. 5LA60, In re The Federal Machine and Welder Co. (Warren, Ohio) and United Electrical, Radio and Machine Workers of America, Local 730 (CIO), Sept. 3 and 17, 1946, Dudley E. Whiting, arbitrator.
4. 12LA1061, Dow Chemical Co.

discharge because "repeated attempts by management to assist him in improving his work had failed".[1] A construction company permitted a carpenter to remain through the probationary period, gave him "five or six" merit increases in addition to a general increase, and twice was reinstated with full seniority after illness, then discharged him for incompetence. The board of arbitration deciding the case thought the discipline was not for "just cause".[2] Another board found that a discharge is unreasonable when the company recognizes the employee's inability to "perform newly-assigned work", but fails to act upon it shortly after his promotion to that position.[3] The attitudes or viewpoints that govern any particular case stems in part from circumstances peculiar to it.

Employers are often accused of discrimination in their dealings with particular employees, or that they discharged an employee when they could have transferred or demoted him. What is fair action under these considerations? When there is a claim from the union that an employee was disciplined because of his union activity, one board of arbitration holds that the "history of company and union relations" should be taken into consideration when this charge is made.[4] The burden of proof of discrimination, according

---

1. 17LA580, In re E. I. Dupont De Nemours and Co. and Textile Workers Union of America, Local 674 (CIO), Nov. 16, 1951, Board of arbitration: Albert I. Cornsweet (chairman); Edward E. Reinbold (employer-appointed arbitrator); and Matthew Lynch (union-appointed arbitrator).

2. 5LA339, The Master Electric Co.

3. 11LA932, In re Art Chrome Company of America (Boston, Mass.) and United Furniture Workers of America, Local 136 B (CIO), Dec. 3, 1948, A. Howard Myers, arbitrator.

4. 2LA335, In re Grayson Heat Control, Limited (Lynwood, Calif.) and United Electrical, Radio and Machine Workers of America, Local 1006 (CIO), Sept. 10, 1945, Board of arbitration: Paul Prasow (chairman); T. H. Pender (employer-appointed arbitrator); and Edwin Thompson (union-appointed arbitrator).

to these same arbitrators, is on the employer if the history has been anti-union, and on the union if past relations have been favorable.

The discipline of union officers raises problems peculiar to their unique position, and is an easy target for the charge of discrimination. The steward is responsible to the company as an employee for meetings, standards of efficiency and ability on the job, and to the union as its representative. An employee's contractural rights are guaranteed to him in the use of the grievance procedure. Stewards function as a part of this procedure and are responsible for settling worker grievances or directing them through the proper channels. If the steward is not immune to management's authority to discipline, enough to enable him to act as a steward, the employee's contractural rights may be infringed upon. Can a steward be declared incompetent if he neglects his duties as an employee in favor of his duties as a steward? In one case an employee failed to keep up her good work record after she became union steward.[1] She was discharged for that reason, but the umpire thought that she would still be competent on the same job if relieved from her position as union steward and therefore gave her reinstatement on the condition that the union replace her as steward. Unions sometimes claim that they have sole authority to discipline a steward if he is incompetent in his union duties and can contest a company discipline imposed upon him as on ordinary employees for incompetence as an employee. Management sometimes says that, since the steward performs union duties at the expense of his work as an employee, it has the authority to discipline

1. 8LA746, In re International Shoe Co., Bluff City Factory (Hannibal, Missouri) and United Shoe Workers of America, Local 100 A (CIO), July 15, 1947, Maxwell Copelof, arbitrator.

for union activity. Most arbitrators agree that a union officer may be disciplined as any employee is disciplined for a similar offense. Agreement is also had that these officers must not be punished for either performing or failing to perform any function as a union officer.

There are also instances of discrimination where the union or its members are not involved. There may be discrimination because of bad feelings between supervisors and an employee. One case showed that a worker had antagonized his supervisors in the past and as a result the foremen "maintained a policy of watchful waiting in hope of catching him in some mistake".[1] The worker was discharged but arbitrator Aaron reversed the action. Umpire Baab decided that a discriminatory motive may not be used to discharge a man merely because he was handicapped.[2] Mr. McCoy held that it was unfair for an employer to give "unequal penalties for equal offenses".[3] Among the "two-time offenders" of a particular negligence only one was warned that a third offense would bring discharge and since the action involved discrimination among employees, her discharge was mitigated to a two-week layoff.[4]

---

1. 11LA7, In re Consolidated Vultee Aircraft Corp. (Fort Worth, Texas) and International Association of Machinists, Aeronautical Industrial District Lodge 776 (Ind.), March 12, 1948, Benjamin Aaron, arbitrator.

2. 12LA495, In re Sager Lock Works (North Chicago, Ill.) and United Steelworkers of America, Local 1647 (CIO), March 28, 1949, Board of arbitration: Otto J. Baab (chairman); D.W. McClay (employer-appointed arbitrator); and Ernest Sirvidas (union-appointed arbitrator).

3. 10LA786, In re Dwight Manufacturing Co. (Alabama City, Ala.) and Textile Workers Union of America, Local 576 (CIO), June 10, 1948, Whitley P. McCoy, arbitrator.

4. 12LA682, In re Goodyear Decatur Mills (Decatur, Ala.) and United Textile Workers of America, Local 88 (AFL), May 11, 1949, Whitley P. McCoy, arbitrator.

A disciplinary penalty given to one employee and not another, both of whom were accused of the same offense, is not fair, again according to arbitrator McCoy.[1] The employees here were proven guilty, but the discriminatory action completely nullified the penalty. He stated that "all other questions aside, the discipline must be set aside for the reason that the two employees were not treated identically". Employees with different past records of discipline and work, however, who are guilty of the same offense may be treated differently. One employee who has been previously disciplined may receive a stiffer penalty than one who has a clean past record. Identical discipline is not, therefore, required when there are mitigating circumstances for one and not for the other.

The company and union may differ as to whether an employee should be discharged or receive a lesser penalty like transfer or demotion. In one case the employee was bumped into a job on which he did admittedly poor work. He had requested a transfer to his former job but his request had been denied despite the occurance of a vacancy. He was discharged for his poor work, but the arbitrator awarded a reinstatement with back pay.[2] The promotion of one employee was to a job he was incapable of doing. His previous lower-rated job was found to be satisfactory. He was reinstated to his previous job because the employer "should have demoted, rather than discharge" the employee.[3]

---

1. 12LA990, In re Dwight Mfg. Co. (Gadsden, Ala.) and Textile Workers Union of America, Local 576 (CIO), Whitley P. McCoy, arbitrator.

2. 6LA593, In re Caterpillar Tractor Co. (Peoria, Ill.) and United Farm Equipment and Metal Workers of America, Local 105 (CIO), Jan. 30, 1947, Jacob J. Blair, arbitrator.

3. 2LA283, In re Kansas Motors (Kansas City, Kansas) and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Local 710 (CIO), Sept. 20, 1945, Horace C. Vakoun, arbitrator.

On a doctor's recommendation that an employee "should do no work involving conditions unfavorable to his health" the company discharged him and the arbitrator said that the doctor did not mean that the employee should do no work and therefore reinstated him to his old job.[1] Arbitrator Brecht pointed out that under a discharge for "just cause" provision, an employer may not discharge for inability when the "employer had made no effort to try her out on work commensurate with her capacities".[2] It is evidenced by viewing these cases that an employer should make every reasonable effort to keep a worker in his employ. In another instance bearing out this point an employee was transferred at her own request from a job where she was producing a little under the guaranteed minimum to one that promised more pay. Her piece-rate pay was "appreciably lower" here than on her old job and umpire Sachs said that she should have been returned "to her former operation or placed on some other operation".[3] Arbitrator Marshall rendering the decision on a tripartite board seems to disagree with umpire Leary on the right to discharge in lieu of transfer. The former says, a "contract requiring observance of seniority in cases of promotion, curtailment, and re-employment does not entitle unsatisfactory workers in one department to be transferred to other departments in which they might be able to meet job requirements".[4] Leary says in effect that a contract which "guarantees seniority on plant-

---

1. 2LA245, In re American Radiator and Standard Sanitary Corp. Malleable Steel Plant (Buffalo, N.Y.) and United Steelworkers of America, Local 2580 (CIO), March 28, 1946, Jacob J. Blair, arbitrator.
2. 6LA500, In re Glenn L. Martin Co.
3. 8LA861, In re Kaylon, Inc. (Baltimore, Maryland) and Amalgamated Clothing Workers of America, Baltimore Joint Board (CIO), Nov. 4, 1947, Leon Sachs, arbitrator.
4. 10LA217, In re Standard-Coosa-Thatcha Co.

wide basis" is to be construed to require the employer to offer to an employee, who "fails to meet standards for his current job opportunity," a transfer to a less difficult job if one is available and not held by a senior employee.[1] The difference is not apparently reconcilable.

Upon considering the decisions relating to the propriety of the penalty given, I find many circumstances which either completely reverse the penalty or lessen it. This happens because management has violated the contract or past practice or else it has failed in its obligations to act with discretion and good faith. The question of how much a penalty should be reduced if there are mitigating circumstances has yet to be answered.

How is back pay determined? There are cases where the employee gets no back pay, full back pay or only part of it. In three cases the employee was paid one-half of the time he lost, the employee was only partly to blame in all of these instances. In one case the employee's work was admittedly satisfactory in two of the three errors he was accused of. He was awarded pay for one of the two weeks he was laid off.[2] Another employee was discharged because of his union activity, however, he did have a poor production record so he received only half pay for the time lost.[3] An incompetent

---

1. 10LA814, In re Utah Ice and Storage Co. (Provo, Utah) and United Packinghouse Workers of America, Local 410 (CIO), April 20, 1948, William H. Leary, arbitrator.

2. 17LA701, New Haven Clock and Watch Co.

3. 8LA748, In re American Lead Corp. (Indianapolis, Ind.) and International Union of Mine, Mill and Smelter Workers, Local 632 (CIO), Aug. 4, 1947, Board of arbitration: Charles G. Hampton (chairman); Eric G. Hagstrom (union-appointed arbitrator; and Edward B. Raub, Jr. (employer-appointed arbitrator).

carpenter was reinstated with back pay equal to half of back wages he would have received had he not been discharged.[1] He was given this consolation because management had tolerated incompetence without doing anything about it. A denial of pay for the first month of discharge was the condition of reinstatement in two cases. In one, the employee did unsatisfactory work because of "unusual domestic difficulties".[2] The worker in the other case was partly to blame for not taking special safety measures.[3]

After being discharged the employees concerned in two different cases were put to work by another employer. One was reinstated with back pay minus his earnings on the other job.[4] He was not proven guilty of the accident he was accused of. The other was also given back pay minus his earnings on the other job, but only because the employer failed to file written complaints, since he actually was entirely to blame for an accident.[5]

In one instance the discharged employee was found not guilty and was therefore reinstated. He was denied two weeks pay, however, because he admitted that he was uninterested in maintaining

---

1. 5LA339, The Master Electric Co.
2. 11LA139, Curtiss-Wright Corp., Airplane Division, Columbus Plant.
3. 8LA486, In re Armour and Co. (Chicago, Ill.) and United Packinghouse Workers of America, Local 347 (CIO), Sept. 5, 1947, Harold M. Gilden, arbitrator.
4. 6LA754, In re Alabam Freight Lines (Phoenix, Ariz.) and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Transport and Local Delivery Drivers, Local 104 (AFL), March 11, 1947, George Cheney, arbitrator.
5. 5LA430, In re Schreiber Trucking Co. (Rochester, N.Y.) and Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local 118 (AFL), Nov. 12, 1946, Jacob J. Blair, arbitrator; 14LA882, In re International Harvester Co., Melrose Park Works and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 6 (CIO), April 30, 1950, Whitley P. McCoy, arbitrator.

maximum productivity.[1] A denial of one weeks pay was awarded for an uncooperative attitude and faulty work by another worker. The penalty was reduced from discharge because the employer took a wrong method, contrary to the contract, for discharging him.[2]

The extent of partial back pay given must be determined in relation to the particular characteristics of the case. Even where cases appear to be similar, the amount of back pay awarded is not always similar. This can be seen in the cases cited, for in some cases of discharge, where mitigating circumstances prevailed, the award was half pay for the time lost, in others it was denial of one and two weeks pay. No other instances of discharged workers getting other work were found than those cited. These, however, show agreement that the awarded back pay should be for time lost minus earnings from the other work. The denial of all back pay together with reinstatement is in effect a layoff and will therefore be discussed below.

There is no self evident rule governing the length of a probationary period. Of eight cases studied the length was two weeks for two cases, sixty days for three others, six weeks, three months and six months respectively for the last three. All except two specifically stated that if the employees were incompetent at the end of the

---

1. 7LA935, In re L. F. Fales Machine Co. (Walpole, Mass.) and United Steelworkers of America, Local 3722 (CIO), April 28, 1947, Board of arbitration: Maxwell Copelof (chairman); Burgess P. Reed (employer-appointed arbitrator); and Michael Ryan (union-appointed arbitrator).

2. 3LA156, In re Die Tool and Engineering Co. (Detroit, Mich.) and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 155 (CIO), April 30, 1946, Dudley E. Whiting, arbitrator.

period the original penalty could be given.[1] These two,[2] however, inferred as much also. None of them provided for different disciplinary action.

If a layoff is reduced to a less severe one, what determines "how much"? A three day layoff was reduced to one-half day for two employees accused of negligence. The mistakes made had been tolerated before so the original penalty was deemed too severe.[3] The other case also involved negligence and the three day layoff was reduced to one day because the workers' previous record was good.[4] An employer gave different layoffs for the same offense to eighteen employees. He started in the morning to send employees home for the rest of the day for committing a specific error and continued this policy throughout the day. The umpire said that "it is apparant that employer regards loss of two and one-half hours' work as an adequate penalty

---

1. 15LA300, In re Miller and Hart, Inc. and United Packinghouse Workers of America, Local 27 (CIO), Sept. 19, 1950, Peter M. Kelliher, arbitrator; 4LA486, In re Godwin Realty Corp. (Bronx, N.Y.) and Building Service Employees' International Union, Local 32 E (AFL), Sept. 18, 1948, Morton Singer, arbitrator; 4LA211, In re Modernage Furniture Corp. (New York, N.Y.) and United Retail, Wholesale, and Department Store Employees of America, Retail Furniture and Floor Covering Employees' Union, Local 853 (CIO), June 17, 1946, Irving Weinzweig, arbitrator; 4LA125, In re Safeway Stores, Inc. (Richmond, Virginia) and Amalgamated Meat Cutters and Butcher Workmen of North America, Local 302 (AFL), July 12, 1946, John E. Dwyer, arbitrator; 1LA238, McLouth Steel Corp.; 9LA775, In re Mason and Dixon Lines, Inc. (Kingsport, Tenn.) and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 473 (AFL), Feb. 11, 1948, Elmer T. Bell, arbitrator.

2. 11LA902, Art Chrome Co. of America; 7LA191, In re International Shoe Co. (Cape Girardeau, Missouri) and United Shoe Workers of America, Local 125 A (CIO), Feb. 25, 1947, Clarence M. Updegraff, arbitrator.

3. 12LA261, In re Gaylord Container Corp. (Dallas, Texas) and United Paper Workers of America (CIO), Feb. 16, 1949, Jack Johannes, arbitrator.

4. 15LA769, In re Evans Products (Plymouth, Mich.) and United Steelworkers of America, Local 2340 (CIO), Dec. 29, 1950, Harry H. Platt, arbitrator.

for the offense".[1] Here again we see that the company must be consistant and fair in his disciplinary action. Other than this requirement, however, there seems to be no guide to determine the extent of the layoff.

Should a discharge, if too severe, be changed to demotion, transfer or layoff? If a long service employee or one just promoted does poor work, they should be demoted rather than discharged, according to umpires Whiting and Vakoun.[2] A long service employee for an ice company worked five years as a refrigeration engineer after delivering ice for thirteen years under one management and was fired under new management as an incompetent engineer. Arbitrator Lear said that he "should have been transferred to ice delivery job which he was capable of performing".[3] In each of these cases the man was to be given a job which he could do satisfactorily. When a man is capable of doing a job but commits negligence, the most popular form of reduction from discharge is the layoff. Eighteen of twenty cases of this type involved layoff, the other two were demotions. When a discharge is reduced to reinstatement on probation coupled with a denial of back pay, the resulting effect is a layoff plus a trial period. If the employee requires a trial period and discharge was the original penalty, it is evidently thought that a denial of all back pay is not too severe. The offenses committed where layoff was the mitigated penalty range in seriousness from "responsibility for a very expensive accident" to "argument with supervisors". The layoff given ranges from the total

---

1. 3LA40, Jarecki Machine & Tool Co; 10LA786, Dwight Mfg. Co.
2. 2LA283, Kansas Motors.
3. 10LA814, Utah Ice & Storage Co.

time of the discharge, in cases where denial of back pay is awarded, to one week or in accordance with the provision of the contract. Many contracts make seniority subject to ability to do the job. The extent of a layoff under this provision would be subject to the employee's seniority position and his abilities. Whatever the discipline finally awarded, it probably conforms to what the umpire thinks will be a sufficient deterrent to a repeat of the offense. There are instances where the umpire is not asked to decide on the reasonableness. Even when asked to do so, however, the arbitrator may decide that a more appropriate penalty is up to the parties to decide upon.

CHAPTER V

Conclusion

Arbitration awards have limited the management prerogative to discipline its employees. Fundamentally, the basis for this limitation arises out of the institution of collective bargaining. The trade agreements that arise out of collective bargaining generally provide for procedures that will facilitate the administration of the contract. In most of these agreements voluntary arbitration is designated as the final step in the settling of disputes. The study of arbitration awards for discipline cases involving incompetence or negligence show that management's right to discipline has been modified in several respects. In summary form the following seem to be the significant modifications.[1]

What are the modifications when the management prerogative to discipline is restricted by arbitration decisions?

1. The burden of proving the charge of incompetence lies with the company.
2. The evidence should be sufficient to prove guilt beyond reasonable doubt in most cases.
3. Management may discipline for not meeting set standards of work only where they are reasonably determined and known to the employee.

---

1. All modifications listed were generally accepted by arbitrators in the cases studied except numbers 8, 9, 10 and 11. In these later cases problems which would cause the particular rules to be voiced occured only twice for #8, four times for #9 and #10, and once for #11.

4. The contract should be used fairly and consistantly.
5. Management should consider circumstances which would mitigate the penalty.
6. An employee should be made aware of possible disciplinary action, especially where discharge is the pursuing penalty.
7. Barring mitigating circumstances for one of two employees committing the same offense equal penalties should be given.
8. Employees should not be subjected to double jeopardy.
9. If the labor supply is plentiful and management tolerates incompetence under these conditions, his future discipline for the same offense is more severely restricted.

The import of these rules are many and varied. Management will make sure that none other than the employee's own incompetence is the cause of the error. More investigation will possibly be made to determine the true causes before a penalty is given. Employees will possibly be enlightened as to exactly what is expected of them. This may reduce the number of incompetence cases, for those instances where the standards are vague or unknown will probably be fewer if these principles are carried out in action. If principle number four is observed, the parties may feel that it is desirable to put more of what they mean into the collective agreement for if they understand the contract they are more likely to use it fairly and consistantly. When such things as the employee's long, good service or unusual home problems are involved or whether adequate warning and

training should have been given the employer will perhaps recognize more clearly his responsibilities to the employee as an individual. Rules seven and eight may tend to make management realize its true motives for disciplining particular workers. Less personal discrimination may ensue and the company will therefore give more reasonable penalties. If an employee is lax, the observance of these principles will tend toward more immediate acknowledgment of incompetence whether a warning, punishment, or help be given to the worker.

How do arbitration decisions affect union's penetration into management's prerogative to discipline. The following seem important:

10. Management does not have to tolerate inefficiency when the labor supply is plentiful.
11. The union may not require management to insure contractural rights to a disciplined employee.

As the union is presented with rules which restrict his challenge of management rights, it will gradually learn, with more certainty, what it may or may not challenge. In a sense, every arbitration decision defines more clearly the relative position of the parties. If these eleven principles are observed, arbitrary discipline will perhaps vanish as a problem, for some companies will act with better discretion than previously. Fewer cases of incompetence may be brought to arbitration for the union will have more respect for management's judgment.

Several problems deserve particular attention. One such problem is the Shulman vs. Morse approach to arbitration.[1] Shulman

---

1. These views are more fully discussed on pages 2 & 3 in the introduction.

says in effect that the collective agreement is based upon a mass of unstated assumptions which the arbitrator needs to define. Morse maintains that the arbitrator should always be bound by the legal meaning of the contract since the parties knew what they meant when negotiating. Both men agree that the parties may use any method they agree upon for settling a dispute and that the arbiter must stay within the intent of the parties. The question is which approach should be used to find this intent. It seems that if arbitration as a method for the peaceful settling of industrial disputes is to be correctly used a more concise and widely accepted definition is in order.

Another problem is that of whether a union officer may be punished more than other employees because of his dual responsibility. One view holds that management should discipline the steward only for incompetence as an employee and that a greater penalty may not be levied because of the steward's double responsibility. The other side of this argument is that the union is the only party that can discipline a steward for incompetence as a union officer. Another view holds that the company may discipline if the steward is incompetent in either capacity. It is held that if this is done a discipline for incompetence as a union officer should be levied not on the steward but on the union. The analysis here is that the company may sue the union for acts of union activity which are in violation of the contract. An extreme view is that the employer should have full authority to discipline workers no matter what status they are in as long as the offense is reflected in the employee's work. The solution to this problem seems far off. As

arbiters decide this argument, one way or another, perhaps a precedent will be established.

The use of past practice as a guide to disciplinary action presents another problem. Precedent is gradually established with the continued use of a particular method of handling a case of incompetence. As industrial situations change, however, old precedents will become obsolete and new ones will be established. It may be that the mere fact a dispute is being arbitrated is evidence of changing conditions. The arbitrator must recognize this and act accordingly, for principles of consistancy may be used only where circumstances are relatively similar.

Further investigation into the principles and problems of arbitrating disciplinary cases could become the basis of common laws for industry and individual companies. A greater pooling of information, as in the Labor Arbitration Reports used in this thesis, by authorities in labor relations would contribute much toward this end. Perhaps the example set by the General Motors Corporation of printing decisions received from arbitrators could be followed by other companies. If this type of information is more widely distributed, perhaps the day to day employer-employee problems will be more easily solved.