THE ARBITRATION OF DISCIPLINE GRIEVANCES

An Analysis of Procedural and
Substantive Standards of Review

Thesis for the Degree of Ph. D.
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ABSTRACT

The fundamental objective of this study was to analyze the nature and manner of application of the procedural and substantive standards of review employed by arbitrators in resolving grievance disputes over the propriety of disciplinary penalties assigned employees under collective bargaining conditions.

To accomplish this objective, approximately 2500 arbitral awards were surveyed. These were obtained from many sources, both public and private. The bulk of the decisions studied were rendered during the period 1946-56. Awards were classified according to each of the several types of misconduct most commonly alleged of workers. The principles and rules normally followed by arbitrators in deciding the merits of discipline grievances arising in each of these areas were then analyzed.

The study revealed that, on most of the issues involved in disciplinary disputes, a prevailing consensus of arbitral opinion does exist and may be identified. As a result, a considerable body of "common law" has evolved under which the concept of "just cause for discipline" has been defined under a wide variety of circumstances. A review of the principles which most consistently have served to guide arbitrators in their deliberations supports a number of conclusions relating to appropriate disciplinary procedures and penalties.

In the absence of a specific injunction to the contrary, most arbitrators consider that the issue of cause for discipline requires a determination of three matters. One is whether credible evidence has established a grievant guilty of the misconduct charged to him. A second is whether the facts of a case indicate a proven offender deserving of a

measure of punishment. The third is whether the penalty imposed on such an individual appears reasonable and not seriously disproportionate to the severity of his offense. Under this interpretation of the scope of the jurisdiction granted them, most arbitrators therefore consider it properly within their authority to modify a penalty imposed by management when in their judgment it appears excessive under the total circumstances of a case.

As a rule, arbitrators consider the penalty of employee discharge justified only where either of two conditions have been satisfied. One is a clear showing that a grievant's offense was too serious to risk its reoccurrence by retention of his services. The other is evidence that a worker has developed into an incorrigible offender. Otherwise, penalties ranging from a simple warning to an extended suspension generally are held the maximum punishment warranted. In such a case, the exact measure of discipline found deserved usually depends on a number of variable factors which tend to extenuate or aggravate the degree of employee guilt. Among the most important of these are the presence or absence of a willful intent to do wrong, the quality of a past disciplinary record, the length of service with the firm, the extent of inconvenience or loss suffered by the employer, and the degree to which each of the parties conformed to the disciplinary and appeal procedures provided under the contract.

Arbitrators commonly refer to the above principles as the doctrine of "corrective discipline." In essence, this concept presupposes that the primary function of punishment is not to retaliate against workers for past misbehavior, but rather to assist in promoting a willingness on their part to abide by company rules and regulations in the future.

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By

John Thomas Conlon

A THESIS

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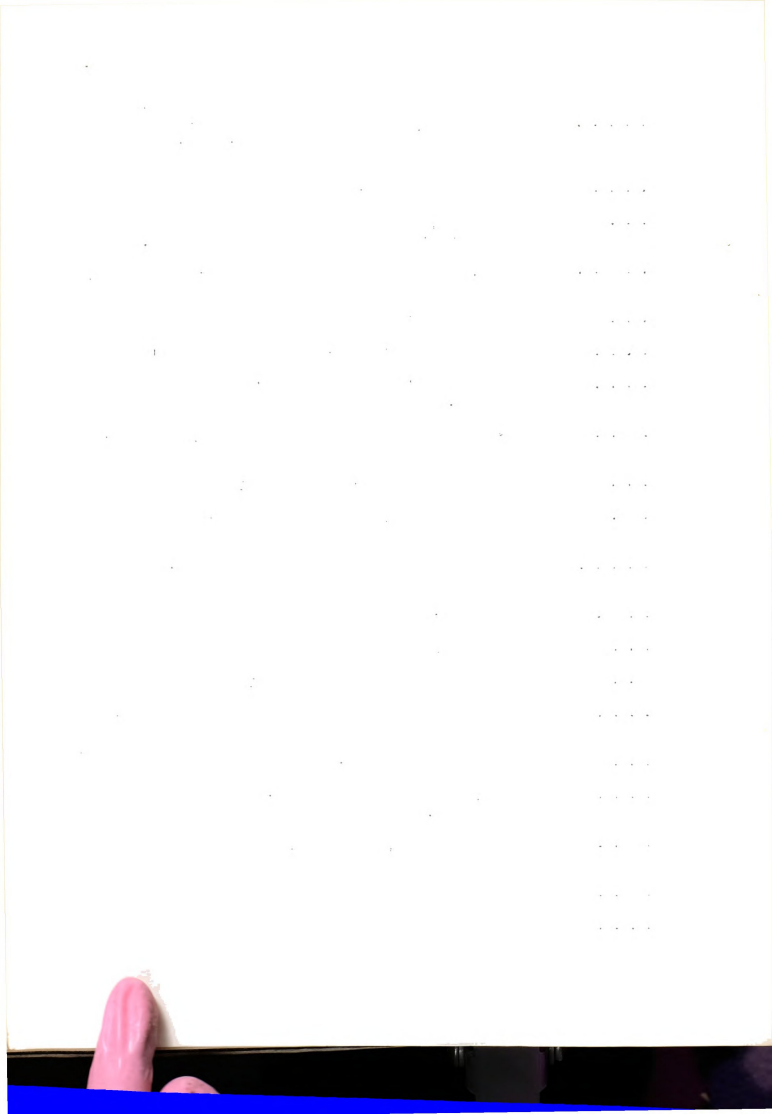
LIST OF UNION ABBREVIATIONS

Abbreviation	Name of Union
A.C.A.	Communications Association; American (Ind.)
A.C.W.A.	Clothing Workers of America; Amalgamated
A.F.G.M.	Grain Millers; American Federation of
A.F.H.W.	Hosiery Workers; American Federation of
A.L.P.A.	Air Line Pilots Association; International
A.N.G.	Newspaper Guild; American
B.B.F.	Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers; International Brotherhood of
B.C.W.	Bakery and Confectionery Workers' International Union of America (Ind.)
B.S.E.	Building Service Employees' International Union
B.S.W.	Shoe Workers' Union; Boot and
C.J.A.	Carpenters and Joiners of America; United Brotherhood of
C.L.G.W.	Cement, Lime and Gypsum Workers International Union; United
C.R.W.	Cafeteria and Restaurant Workers' Union; United
C.W.A.	Communications Workers of America
D.R.W.W.	Distillery, Rectifying and Wine Workers' International Union of America
F.L.W.	Fur and Leather Workers' Union; International
G.C.C.W.	Gas, Coke and Chemical Workers of America; United
G.C.S.W.	Glass, Ceramic and Silica Sand Workers of America; Federation of
H.R.E.U.	Hotel & Restaurant Employees and Bartenders International Union

I.A.T.S.E.	Stage Employees and Moving Picture Machine Operators of the United States and Canada; International Alliance of Theatrical
I.B.E.W.	Electrical Workers; International Brotherhood of
I.B.T.	Teamsters, Chauffeurs, Warehousemen and Helpers of America; International Brotherhood of (Ind.)
I.F.T.A.W.	Food, Tobacco and Agricultural Workers; International Union of
I.L.A.	Longshoremen's Association; International
I.L.G.W.	Garment Workers' Union; International Ladies'
I.L.W.U.	Longshoremen's and Warehousemen's Union; International (Ind.)
I.M.F.W.	Molders and Foundry Workers Union of North America; International
I.T.U.	Typographical Union; International
I.U.E.	Electrical, Radio and Machine Workers; International Union of
I.U.M.S.W.	Marine and Shipbuilding Workers of America; Industrial Union of
I.U.O.E.	Engineers; International Union of Operating
L.D.C.	Laundry and Dry Cleaning International Union
L.W.U.	Leather Workers International Union of America
M.C.B.W.	Meat Cutters and Butcher Workmen of North America; Amalgamated
M.E.U.	Metal Engravers Union; International
M.M.S.W.	Mine, Mill and Smelter Workers; International Union of (Ind.)
M.P.B.P.	Metal Polishers, Buffers, Platers and Helpers International Union
O.C.A.W.	Oil, Chemical and Atomic Workers International Union
O.E.I.U.	Office Employees International Union



O.P.W.	Office and Professional Workers of America; United
P.G.W.	Guard Workers of America; United Plant (Ind.)
P.J.N.	Playthings, Jewelry and Novelty Workers; International Union of
P.S.P.M.W.	Pulp, Sulphite and Paper Mill Workers; International Brotherhood of
R.W.D.S.U.	Retail, Wholesale and Department Store Union
S.A.P.W.	Stone and Allied Products Workers of America; United
S.C.C.J.	Ship Carpenters, Caulkers and Joiners Union
S.E.R.M.C.E.	Street, Electric Railway and Motor Coach Employees of America; Amalgamated Association of
S.M.I.U.	Stove Mounters' International Union of North America
T.W.U.	Transport Workers Union of America
T.W.U.A.	Textile Workers Union of America
U.A.W.	Automobile, Aircraft and Agricultural Implement Workers of America; International Union, United
U.B.C.W.	Brick and Clay Workers of America; United
U.B.W.	United Bakery Workers
U.C.W.	Clock Workers Union; United
U.E.	Electrical, Radio and Machine Workers of America; United (Ind.)
U.F.M.W.	United Farm Equipment and Metal Workers Union
U.F.W.	Furniture Workers of America; United
U.I.U.	Upholsterers' International Union of North America
U.M.W.	Mine Workers of America; United (Ind.)
U.P.P.	Papermakers and Paperworkers; United
U.P.W.A.	Packinghouse Workers of America; United
U.R.W.	Rubber, Cork, Linoleum and Plastic Workers of America; United

U.S.A.	Steelworkers of America; United
U.S.W.	Shoe Workers of America; United
U.T.W.A.	Textile Workers of America; United

CHAPTER I

INTRODUCTION

During the period of the last twenty years many significant developments have taken place in the field of industrial relations. One of the most important of these has been the establishment of the grievance procedure as the predominant mechanism by which managements and unions settle controversies over the interpretation and application of the terms of existing collective bargaining contracts. The great majority of negotiated agreements in force today provide that the terminal step of this procedure is the submission of unresolved disputes to private arbitration for final determination.

A large and growing body of arbitral decisions dealing with all phases of contract administration provides a fertile field for research. One area particularly deserving of investigation is that of the arbitration of disputes over the propriety of disciplinary penalties assigned employees for alleged violations of company rules and regulations. It has been reported that these cases represent the largest single category of grievance arbitrations, comprising on the average approximately one-quarter to one-third of all submissions.[1] However, despite the frequency with which these disputes have arisen, very little empirical study has been directed to the important issues and principles involved in these awards. It is to this end that this investigation has been undertaken.

Objectives of the Study

It is widely acknowledged that arbitrators, in deciding the merits of discipline grievances, have formulated and employ a number of procedural and substantive standards of review. Also commonly recognized is the fact that the specific criteria used vary between individual disputes according to the inherent seriousness of the offense charged to employees in each case and the provisions of the contract and submission agreement under which the arbitration has arisen.

Aside from these general truths, however, many important questions relating to the precise nature and manner of application of the principles and rules typically followed by arbitrators nonetheless remain largely unanswered. Illustrative of these are: Under what conditions do arbitrators normally hold employees proven guilty of misconduct properly subject to the ultimate penalty of summary discharge? Of what relative significance in determining the appropriateness of a disciplinary measure assigned is evidence that the offender had accumulated an exemplary work record or long service in employment, or that management in the process of invoking discipline had violated one of the grievant's contractual job rights? What, if any, are the differences in the standards of conduct required of union officers as compared to those to which rank-and-file employees ordinarily are held? To what extent does the right of management to impose discipline extend to penalizing employees for misconduct committed away from the company premises and during non-duty hours?

Also, what types of evidence are, or are not, normally accorded probative value in arbitration proceedings? Where the proofs advanced by each of the contending parties in support of their positions is in conflict and the true factual situation is not readily apparent, by what means do arbitrators reconcile the differences in the evidence? And lastly, what remedies are usually awarded by arbitrators in the case of employees found improperly subjected to discipline?

It is with providing answers to these and other related questions that the present study will be primarily concerned. Of necessity, the results obtained from these inquiries must be presented in the form of generalizations. Differences of opinion are known to exist among arbitrators over many of the issues involved in disciplinary disputes. Initial investigation indicates, however, that in most instances a prevailing consensus of opinion may be identified. This fact, it is believed, suggests the existence of a common philosophical orientation shared by most arbitrators. The validity of this hypothesis will be evaluated in the concluding section of this study.

Source of Awards

To accomplish these objectives, approximately 2500 arbitration awards have been surveyed. These were drawn from many sources, both public and private. The great bulk of the decisions were obtained from those published in volumes 1-30 of Labor Arbitration Reports.[2] Other published awards were drawn from a single volume edition, Cases on Labor Relations.[3] The remainder were obtained from the arbitration decisions on reserve in the Library of Michigan State University and

from the private files of Dr. Charles C. Killingsworth, of the same institution. Included among the unpublished awards are several hundred decided under union contracts in the General Motors Corporation, the Ford Motor Company, the United States Rubber Company, the Bethlehem Steel Company, and in several other firms in the basic steel industry.

In addition to the actual cases analyzed for this study, considerable supplementary reading was conducted in law journals, periodicals and pamphlets dealing with labor arbitration, and textbooks in the field of personnel and industrial relations.

Limitations of the Study

The arbitration awards selected for investigation in this study impose one inherent limitation on the general applicability of the conclusions drawn herein. First of all, the great majority were decided within the period 1946-1956. Also, no sampling technique was employed, nor could an accurate one be devised, to insure that the awards surveyed were representative in terms of the frequency with which the various issues involved in discipline grievances are arbitrated. Although the inclusion of most of the decisions rendered in the steel industry and the General Motors Corporation during these years was intended to provide a representative balance between awards, no conclusive proof exists that this was successfully accomplished. It is nonetheless believed, however, that this limitation does not seriously affect the general validity of the conclusions reached for the period involved.

Perhaps of greater relative importance is the fact that the prevailing views of justice and equity and of the reciprocal rights and

responsibilities of managements and unions are subject to and do change over time. Admittedly, attitudes towards these matters does appear to be fairly well stabilized at the moment. Contract provisions relating to the disciplining of employees and the standards of review normally applied by arbitrators in resolving discipline grievances have not changed substantially over the last decade or so. However, a general shift in the relative strength of the parties to collective agreements could occur. Such a development would result, in all probability, in new and different attitudes toward the proper role of discipline in an industrial society. Hence it cannot be said with assurance that the principles upon which arbitrators presently decide the merits of appeals for relief from discipline have timeless and universal applicability.

For this latter reason, this investigation is conceived as simply one in a continuing series of studies in the field of grievance arbitration. Undoubtedly many others will be conducted in the years to come. This, it is felt, is inevitable for very pragmatic reasons. Not only is information as to the "relevant experience" of prior awards used with effectiveness by employers and unions in ordering their day-to-day relations, but a review of available decisions also indicates an increasing tendency by each of the participants in the arbitration process to rely on previously rendered awards as preparation for pending grievance disputes. Hence a need exists for subsequent studies to further validate or revise, as the case may be, the principal conclusions drawn herein.

Statement on Procedure

Following a description of the nature of industrial discipline under contemporary collective bargaining conditions in Chapter II, this investigation will proceed to identify and indicate the manner of application of the various standards of review commonly employed in the arbitration of discipline grievances. Well established and rather consistently followed rules of procedure relating to the method of contract interpretation, of evidentiary practice and of remedies provide the subject matter of Chapter III.

The substantive principles applied by arbitrators have meaning only within the context in which they are used. For this reason, they are analyzed in Chapters IV-XIV according to the various types of alleged misbehavior which have been charged to employees. These include: Absenteeism, Disorderly Conduct, Dishonesty and Disloyalty, Negligence, Incompetence, Insubordination, Intoxication, Loafing and Leaving Post, Strikes and Slowdowns, Security Risks, and a series of Miscellaneous Acts of Misconduct.

The study will conclude with a summary and synthesis of the major conclusions derived from the foregoing analysis.

Notes for Chapter I

1. A. Howard Myers, "Concepts of Industrial Discipline," Management Rights and the Arbitration Process, Proceedings of the Ninth Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington, D.C.: Bureau of National Affairs, 1956), p. 61. The statistical references were derived from studies conducted by the American Arbitration Association and Federal Mediation and Conciliation Service respectively (source not cited).

2. Bureau of National Affairs, Labor Arbitration Reports (Volumes I-XXX; Washington, D.C.: 1946-1958). Hereafter, awards cited from this source will be identified by: volume number, LA, and page reference.

3. Harry Shulman and Neil W. Chamberlain, Cases on Labor Relations (Brooklyn, New York: The Foundation Press, 1949).

CHAPTER II

INDUSTRIAL DISCIPLINE

Discipline is a term which is subject to many meanings, depending on the context within which it is used. Nonetheless, whether it is employed in an academic, a military or an industrial sense, one element is common to all definitions. That is, discipline implies the existance of a body of rules and principles governing behavior which have been established by a recognized authority.

In a business firm, the right to direct the working force and determine the standards of personal conduct to which employees may be held traditionally has resided in management. At the present time, however, the manner in which that authority typically is exercised in large segments of our economic system is substantially different from that of the past. In large part, two developments of fairly recent origin account for this change. One has been the growth in the practice of collective bargaining which typically has resulted in a number of contractual limitations being placed on the right of management to invoke discipline. The other has been the increased resort to impartial arbitration for the resolution of disputes over the specific application of that right in individual cases.

It is the purpose of this chapter to describe the factors which have given rise to each of these developments, and to indicate in

preliminary fashion the nature and effect of both. A more detailed analysis of the latter matters will be undertaken in the succeeding chapters.

The Right to Discipline: Pre-Collective Bargaining

Prior to the advent of unionism, the authority of employers over employees was virtually absolute. Since the oral employment contract with each worker contained no restraints on the employer's right to discipline and stated no term of tenure, courts generally held that management was free to demote, transfer, suspend or dismiss employees for any cause, or without cause. Typically the power to enforce plant rules and assign penalty measures was delegated to individual supervisors by top management. This often resulted in inconsistent disciplining of workers in a wholly capricious and discriminatory fashion. With the exception of the right of aggrieved employees to leave the employer's service voluntarily, no other means existed by which they might secure relief from the arbitrary exercise of disciplinary authority.

The principle of the right of management to establish a system of rules and penalties to control employee behavior was not, by itself, objectionable to most workers. Rather they readily conceded its need to promote the orderly functioning of the productive process. However, the authoritarian and unfair exercise of that right did cause considerable resentment among employees for it represented an ever present threat to their job equities and earning capacity. The importance of a procedure by which to secure protection from indiscriminate disciplining

was recognized. As a result, the object of "job control" with employment security a matter of "'right' rather than of sufferance"[1] became one of the most effective organizing appeals and insistent bargaining demands of a growing trade union movement.

The Contractual Right to Discipline

The outstanding characteristic of the provisions of collective bargaining agreements relating to discipline is their diversity.[2] Despite the considerable variation which exists in the formal disciplinary policies adopted under particular contracts, however, certain features are commonly included.

Almost invariably the management prerogative section of an agreement will affirm the right of the employer to discharge or otherwise discipline employees. Seldom, though, is this authority unqualified. At a minimum it may simply be the sole restraint that the power to invoke penalties shall not be used in an arbitrary manner. Under other contracts a number of limitations are imposed, extending in a few instances to the requirement of joint and equal participation between management and the union in the administration of the disciplinary procedure. The great majority of discipline provisions in agreements lie intermediate between these two extremes, however. Most commonly they not only state that the power to discipline may be invoked only for "just and sufficient cause" or its equivalent, but they typically establish as well an appeal procedure by which redress may be sought and obtained where penalties have been imposed improperly.

Moreover, although it is the exception rather than the rule for agreements to provide a detailed list of reasons which represent cause for discipline, many contracts do designate one or more specific offenses as offering proper grounds for punishment. These are often accompanied by a schedule of the disciplinary measures which may be imposed for the first or subsequent rule infractions by employees. Also frequently provided are the requirements that alleged offenders be furnished advance notice of and an explanation for a contemplated penalty, together with the opportunity to be represented by the union in a hearing prior to the assignment of discipline.

In addition, contracts not uncommonly stipulate that copies of company rules and regulations must be posted or distributed to employees, that unsettled grievances must be processed to the next higher step in the appeal machinery within prescribed time limits, and that petitions for relief from discharge actions may be introduced at an advanced stage of the grievance procedure. Agreements also often specify that temporary or probationary employees may be subjected to discipline without recourse to appeal. Finally, in the overwhelming preponderance of cases, they provide for the submission of unresolved grievance disputes to arbitration for settlement.

The provisions described above are illustrative of those most widely adopted under collective bargaining contracts. Seldom does any one agreement incorporate all, and many have several additional ones. These facts do more, however, than attest to the substantial variability which exists in the disciplinary procedures followed in individual firms.

They also offer clear evidence that negotiated contracts typically leave a lot unstated as to the manner of administration of the basic policy of discipline which is established. Although the reasons for the frequent failure to provide a well-defined and comprehensive treatment of matters relating to discipline are numerous and interesting, they are of no immediate concern in this analysis. What is important is that such an omission creates serious problems in the interpretation and implementation of the disciplinary policies which do exist. While the grievance procedure is designed to solve these, and performs remarkably well in this capacity, it is nevertheless true that it operates under certain limitations.

The grievance machinery commonly is thought of as an "open-end" device for the determination and enforcement of the intended application of a contract's terms. Its use offers no necessary assurance of providing a mutually acceptable solution to a problem. In fact, resort to this procedure may well result in solidifying divergent views and actually detract from the likelihood of achieving agreement over an issue in dispute. Under these conditions, if it is to function most effectively as a means for resolving controversies without resort to a test of economic strength and endurance, the terminal step of voluntary arbitration is generally recognized as a necessary adjunct to it. In this way not only is an immediate and peaceful disposition of each grievance dispute achieved, but experience has proven arbitration to have a persuasive effect in promoting greater diligence by each of the parties in attempting to arrive at a private settlement of their differences.

The Arbitration of Discipline Grievances

Arbitrators typically are not granted unlimited authority in deciding the merits of employee appeals for relief from disciplinary actions taken against them. As a rule, the contract under which such cases arise will stipulate that under no conditions is an arbitrator empowered to add to, subtract from or modify in any way the terms of the agreement. In addition, the grievance submission generally will state that the sole question to be determined is whether "just cause," or words to a similar effect, did exist, in fact, for the penalty measure which was imposed.

In spite of the apparent clarity of the above statements in defining the scope of the jurisdiction normally allowed arbitrators in discipline disputes, the exercise of a considerable amount of discretion nonetheless is possible, and generally is permitted. This is largely because the term "just cause" is a variable and relative concept and is capable of several interpretations. For example, it may be conceived to pose but two questions for the arbitrator to decide. One is whether the employee has been proven guilty of the offense charged; the other is whether a measure of punishment was warranted under the circumstances. This view of the meaning of just cause, apparently much more widely accepted in the past than today, is rather restrictive and legalistic in nature. It implies that arbitrators, if they answer in the affirmative to each of the two questions posed, are not permitted to substitute their judgment for that of management as to the proper degree of punishment deserved. Instead, in such a case, they

are constrained to uphold the penalty actions taken irrespective of their severity.

At the present time, the great preponderance of arbitrators have adopted a contrary and broader interpretation of the intended application of the just cause clause. Most assume it to be their proper function to determine not only whether the misconduct alleged of a grievant was established by credible evidence and provided a just basis for disciplining, but also whether the punishment imposed on a proven offender bore a reasonable relationship to the gravity of the infraction. Hence, on the theory that a penalty which "fits" the crime is an essential element in the concept of "cause" for discipline, most arbitrators therefore consider it implicit within the authority vested within them to modify the punishment imposed by management when in their judgment it appears excessive under the total circumstances of a case. Considerable logic resides in this position. A strong defense for it can be constructed on the grounds of justice and equity. Of equal importance, however, is that available evidence strongly suggests that the parties to contracts have indicated by acquiescence this interpretation of just cause to be acceptable to them. This conclusion is drawn from the fact that only on a relatively few occasions has the exercise of that authority in this manner by arbitrators been curtailed by express contract provision or been appealed as improper by either employers or unions in court proceedings.

Further proof of the substantial discretion permitted arbitrators in deciding disputes over the propriety of discipline is found in the

failure of collective bargaining agreements to define more precisely the standards to be employed in determining the presence or absence of cause, and if the former, the extent of punishment deserved. To compensate for this, arbitrators have adopted many of the principles and rules by which courts of law determine the intended interpretation and application of a contract's provisions. They also generally rely heavily on evidence of well-established past practice of the parties and prevailing custom within the industry as an indication of the accepted meaning of those terms. Finally, they typically take into account a number of additional factors which, depending on the facts of each individual case, may tend toward extenuation or aggravation of the degree of guilt of an offender. To a detailed description of the specific nature of these standards and the manner in which they have been used in each of the various types of disputes that arise the discussion now turns.

Notes for Chapter II

1. Myron Gollub, Discharge for Cause (Special Bulletin No. 221; New York, New York: Division of Research and Statistics, Department of Labor, State of New York, 1948), p. 7.

2. For a detailed description of contract provisions relating to discipline, see: Bureau of National Affairs, Collective Negotiations and Contracts (Volume III, Section 40, "Contract Clause Finder Series;" Washington, D.C.: looseleaf series, n.d.); Francis Odell, Disciplinary Clauses in Union Contracts (Circular No. 13; Pasadena, California: Industrial Relations Section, California Institute of Technology, 1947); U.S., Bureau of Labor Statistics, Collective Bargaining Provisions (Bulletin No. 908-5; Washington, D.C.: U.S. Government Printing Office, 1948).

CHAPTER III

PROCEDURAL STANDARDS IN DISCIPLINARY ARBITRATIONS

Resort to arbitration rather than court litigation to resolve controversies over the interpretation and application of the terms of a collective contract does not change the character of the provisions. The agreement remains a legal document with the rights and responsibilities created therein ultimately enforceable under the law should they be abridged in arbitration. Nor does reference of a dispute to an arbitrator alter the issues to be decided. Essentially these are identical in either tribunal. Among others they include a determination of the intent of the signatories to the agreement, the acts required of each for contract performance, the degree of proof required to establish non-performance, the appropriate remedies open to an aggrieved party, and the scope of the authority properly to be exercised by the review body. In addition, it is a fact that many arbitrators are trained in the practice of law and that frequently the cases of each of the contestants are prepared and presented by legal counsel. As a natural consequence of these factors arbitrators typically proceed in a manner closely analogous to that followed in a court proceeding. They adhere closely to established rules of contract construction, to normal legal practice in the taking and weighing of evidence, and to judicial processes by which the merits of a controversy are decided. It is the purpose of this chapter to describe the nature of these

procedural requisites. Since they are common to all general classes of disciplinary arbitrations it is necessary to consider them preliminary to the substantive matters at issue.

Principles of Contract Interpretation

Most fundamental of all rules of contract construction is the principle that the mutual intent of the parties to the instrument must be accurately ascertained before the provisions included therein can be given their desired and proper effect.[1] In the matter of determining the contemplated meaning of the terms in dispute arbitrators proceed on the assumption that the parties achieved a meeting of minds over the contents of the agreement and that the document was consummated in good faith and for consideration.[2] In accordance with established legal custom they therefore presume that the parties intended it to be a binding agreement with the language incorporated in it meant to be controlling.[3]

In those cases where the language employed is held by arbitrators to be clear and unambiguous in meaning it will almost invariably be interpreted strictly against the offending party. Under the principle that "to express one thing is to exclude all others,"[4] the explicit provisions will be accorded precedence over all informal practices which exist or acts taken in contravention of express contractual terms. Oftentimes, for example, the agreement establishes a number of procedural requirements which must be satisfied as a condition of just exercise of the employer's right to discipline. Included among the most common of these are that management must post its rules and regulations,[5] that it

must consult with or notify the union before assigning a penalty,[6] that the alleged offender must be accorded a pre-discipline hearing,[7] that in such a hearing he has the privilege of union representation,[8] and that the employee and/or the union must receive a written warning prior to the imposition of severe discipline[9] or be notified of and given the reasons for a disciplinary action already taken.[10] In addition, many contracts specify the particular penalty measure to be assigned for the first or for subsequent violations of specific plant rules.[11] Some also provide that disciplinary action must be taken by management, if at all, within a definite period following the commission of misconduct.[12] Employers, in exercising their general right to discipline, normally are not permitted to exceed these precise limitations on their authority.

In general there are only two exceptions to this rule. Typically these restraints on the employer's discretion do not apply to the disciplining of probationary employees.[13] The right of management to penalize these workers is, under most contracts, absolute and non-contestable. Also these restrictions often are waived where there is a showing of mutual fault. If the employer's violation is solely technical in nature and did not prejudice the employee's right to a fair hearing,[14] or where by comparison the employee's violation is exceedingly gross,[15] the employer's breach is not held of sufficient relative import to relieve the aggrieved worker from liability for discipline. Arbitrators may hold, however, depending on the circumstances of such a case, that a penalty short of discharge is the maximum punishment appropriate.

Just as with the employer, there frequently are contractual procedural requirements which apply to the employee and qualify his right to appeal and seek redress. Among these are the proviso that grievances must be submitted in writing, be signed by the complainant and specify the reasons for filing the petition and the relief sought,[16] that appeals must be initiated and processed through the various steps of the grievance machinery within prescribed time limits,[17] and that recourse must be sought for an alleged wrong only by resort to the agreement's grievance procedure and not by self-help measures.[18] Under these circumstances as well, arbitrators adhere to the letter of the law and withhold relief on the grounds that the appeal is procedurally defective and therefore without status.

On the other hand arbitrators often find the intent of the language to be, at least on the surface, obscure. Where this is so they usually seek to determine the manner in which the terms have been construed by the parties in the past. If it can be shown by clear evidence that the provisions have been applied in a well-established and uniform fashion and that neither party has ever previously served notice on the other that the prevailing interpretation was no longer acceptable to it, arbitrators customarily hold these practices to be a clear indication of the intended purpose of the language. Hence they rule that for the case at hand these practices establish the actual meaning of the ambiguous or general contract language.[19]

Where resort to this procedure fails to resolve the ambiguity in terminology, it then becomes the arbitrator's function to provide a

practical and reasonable construction. In so doing they maintain that in order to be consistent and avoid contradictory interpretation the contract must be read in its entirety.[20] In no case do they countenance construction of individual words or phrases which conflict with others or, as where the agreement is silent on the issues in question, with the imputed purpose of the document as a whole. Where language having a well-known meaning is used it will, in the absence of qualification, be assumed that the parties intended it to have its normal usage.[21] If, despite the application of this standard, alternative meanings are still possible, the one consonant with the general spirit of the document and with prevailing concepts of natural justice will as a rule be selected.[22]

As these tests have been applied, a common law system of employee "due process" has been held to exist even where procedural safeguards against capricious employer action have not been provided. Many arbitrators have ruled the just cause for discipline clause[23] and the privilege of workers to receive both adequate notice and a hearing[24] to be implicit in contracts where they did not exist. They have done so on the theory that employee rights collectively created may not be revoked unilaterally or arbitrarily. As a result, under the principle of fair play and on the grounds of equity, they have often set aside or otherwise mitigated penalties which involved in whole or in part an unreasonable employee promise or apology as a condition of reinstatement,[25] or the forfeiture of an employee right not generally or expressly permitted as a measure of punishment.[26] Similarly held improper have been those which represented a double penalty for the same offense,[27]

were justified by an inaccurately phrased or absolutely wrong reason,[28] or were of an indefinite duration.[29]

Evidence

Although arbitrators receive and weigh evidence in much the same manner as does a court of law they are not, under the typical submission agreement, bound to strict observance of legal rules of procedure. In practice they are much more liberal than are judges in the reception of evidence and generally permit the advancement of all testimony or documentary information which the union or the employer consider to be pertinent to the dispute at hand. Much of this would normally be admissible in a judicial proceeding, but a great deal as a rule would not. Hearsay and other evidence of questionable legal competency, rather than being excluded by the arbitrator on technical grounds alone, instead are commonly accepted in the interests of providing the parties an opportunity of a full hearing.[30] However in the matter of assessing the probative value of the various forms of evidence offered, arbitrators are highly selective and accord substantive worth to some, and deny it to others, largely through the application of well-established legal standards.

The so-called spoken or parole evidence rule has often been invoked to deny evidentiary status to oral agreements or understandings which have existed in direct conflict with express contract terms.[31] Arbitrators also typically follow the legal practice of rejecting as inappropriate incriminating evidence secured without warning by the process of entrapment[32] or that obtained by unreasonable searches and

seizures.[33] In addition, under a principle similar to the equitable doctrine of laches, evidence of employee guilt not discovered or acted upon promptly following the commission of an offense,[34] or that knowingly withheld during the preceding steps of the grievance procedure and then introduced for the first time at the arbitration level,[35] likewise is generally held lacking in qualitative value. In effect these latter decisions have thereby established a statute of limitations for the advancement of evidence.

Arbitrators normally are not vested with the right to subpoena evidence in private submissions. Nonetheless they still adhere to the rule that a defendant should have the right of confrontation and cross-examination of those who have made accusations against him. Accordingly, testimony of a second-hand character[36] or written statements by anonymous witnesses[37] usually are not, in the absence of strong corroborating proof, given determinative weight. Seldom do arbitrators take supporting testimony in private in an attempt to substantiate the sufficiency of such evidence. In general they do so only where both parties accede to this procedure, or where there are compelling reasons for protecting the identity of the giver and the arbitrator is convinced the evidence is essential to rendering a just verdict.[38]

Where irreconcilable differences exist in the evidence offered, the basic problem faced by the arbitrator is one of determining which body of proof is the more credible. This may be accomplished in many ways depending on the circumstances of the individual case. As a rule testimony which is positive and direct in character or that in which

the witness evidences a cooperative attitude and is careful and consistent in his recollection of facts will be accorded greater credibility than that which is negative or contradictory in nature or is offered in vague and evasive fashion.[39] In most instances the evidence advanced in behalf of aggrieved employees who without good cause absent themselves from the arbitration hearing[40] or that by witnesses who resort to outright falsehoods[41] is discredited in its entirety. On occasion arbitrators may also be influenced in their decision by such factors as the past employment record of the complainant, the reputation of the person giving testimony for truth and veracity, or whether as a party other than a principal he has a personal interest in the outcome of the proceeding.[42] Where no other basis exists for determining the relative plausibility of the evidence offered, and apparently only then, do arbitrators follow the rule that the true factual situation has more likely been presented by the side having the greater rather than the smaller number of witnesses.[43]

Burden and Quantum of Proof

In the vast majority of disciplinary arbitrations, the location in a technical sense of the responsibility to sustain the burden of proof is not a matter of critical importance. As a rule, the nature of the evidence presented in individual cases clearly offers greater support to the position of one party than the other. Under such conditions arbitrators affirm the justness of the employer's disciplinary action or award in favor of an aggrieved on the basis of the relative

balance of the proof, rather than on the extent to which the burden has been sustained.

Only on those infrequent occasions where irreconcilable and equally credible differences exist in the testimony and evidence presented by each of the parties do arbitrators resort to legal and procedural rules for the allocation of the burden of proof. If, in such an instance, the dispute has arisen under an agreement in which the sole restraint on the employer's authority to invoke discipline is that he not do so arbitrarily or capriciously,[44] or in which it is expressly provided that an aggrieved employee must be shown "not guilty" to qualify for redress,[45] arbitrators hold it to be the intent of the contract language for the union to assume the responsibility of establishing the case. This, they infer, logically follows from the fact that the right to grieve in such cases is limited to instances of alleged abuse of managerial judgment or outright error in disciplining, and only the union is likely to assert the affirmative of these matters.

More commonly in those cases in which no obvious basis is apparent to choose between the positions of either party, the right of management to discipline is subject to the specific requirement that penalties may be assigned only for just cause. On the theory that under this provision the issue raised by the grievance is the justifiability of both cause for discipline and of the severity of the particular penalty measure imposed, and that employees should be presumed innocent and not be deprived of valuable employment rights until they are adequately shown guilty of the misconduct attributed to them, arbitrators

almost without exception place the preliminary burden of proof on the employer.[46] If he is successful in establishing at least a prima facie basis for disciplining and the arbitrator is satisfied that on the surface the penalty assigned is not patently improper, the burden then is generally held to shift to the union to demonstrate that in the light of substantial equities in the employee's favor the discipline assigned is unjustified or unduly onerous.[47]

As to the quantum of proof required of either party to sustain its burden of proof, no precise standard of evidence of uniform applicability can be defined. In general, however, the degree of proof needed is relatively great in all cases. At the minimum it must, as a rule, be considerably more than merely a combination of suspicious circumstances,[48] a series of vaguely phrased or undated allegations,[49] or simply a showing that an action was taken in good faith.[50]

Where reasonable doubt exists in the mind of the arbitrator either as to the question of employee guilt or to the appropriateness of a given penalty, the measure of proof required of management varies directly with the severity of the charge lodged against a grievant and the extent of the disciplinary action taken against him. Normally the evidence advanced in support of penalties for allegedly fraudulent or otherwise dishonest misconduct must meet the highest standard of exactness to establish culpability, that generally required in criminal-type proceedings of "proof beyond a reasonable doubt."[51] This same stringent test of the adequacy of the proof may also be applied in cases involving discharge actions taken against long-service and otherwise

satisfactory employees.[52] In practically all other instances the standards of proof employed by arbitrators are to all intents and purposes interchangeable. These include: "a clear preponderance of the evidence,"[53] "a fair weight of the evidence,"[54] proof "to the arbitrator's satisfaction,"[55] or that which is "reasonable to fair-minded persons."[56] Where the evidence is wholly circumstantial in nature arbitrators typically require evidence of guilt that is "substantial and convincing" before they will find cause for discipline.[57]

Standards of Penalty Determination

Arbitrators acknowledge that the decision as to the precise degree of discipline deserved by employees proven guilty of rules violations must in large part be a matter of individual judgment. This, they maintain, follows from the fact no wholly accurate and generally accepted formula exists by which this determination can be made with exactitude. Since only the general principle of equity that "a penalty should fit the crime" is available to serve as a guide in this matter, they consider it inevitable that the minds of equally reasonable men would on occasion differ as to the extent of punishment deserved. For this reason they are therefore extremely hesitant and even reluctant to substitute their discretion for that fairly exercised by management. In no case do they consider the mere fact they would have selected a different or somewhat less severe penalty, if the decision had been theirs to make originally, to be adequate grounds for reversing or otherwise altering that imposed by the employer. Instead, as a rule, they must be convinced that under the total circumstances of the case the

severity of the disciplinary action clearly was disproportionate to the gravity of the offense before they will modify it.[58]

In general, for a given penalty to be sustained as appropriate in arbitration, it must bear a direct relationship to the extent to which the offense committed represented a challenge to the authority of management to maintain order and efficiency. As this rule has been applied, only a limited number of individual acts of misconduct are considered intrinsically so serious in nature that an offender is held properly subject to the ultimate penalty of summary discharge. Foremost among these are self-help measures taken in express disregard of employee responsibility to seek recourse for alleged wrongs only through contractually established channels. Most commonly these take the form of physical violence against another,[59] flagrant insubordination toward a member of supervision,[60] deliberate destruction of company property,[61] or instigation of an illegal strike[62] or slowdown.[63] Likewise usually held cause for immediate discharge are violations involving dishonesty of a material character,[64] gross negligence[65] or extreme intoxication.[66] In such cases a finding that it would be unreasonable to require the employer to risk recurrence of the offense is decisive, and even the existence of strong extenuating factors in a grievant's behalf normally does not suffice to warrant arbitral mitigation of a dismissal action. However, where job equities are substantial arbitrators on occasion do recommend the employer reconsider the possibility of worker reinstatement at a reduced penalty.[67]

Under only one other condition is termination of an employee's services generally justified. That is where a review of a grievant's disciplinary record fairly supports the conclusion he has developed into a chronic and apparently incorrigible offender.[68] In all instances, however, such a decision is dependent on a clear showing the defendant had received adequate advance warning as to the consequences of continued misbehavior. Usually that notice is expected to take the form of a series of progressively more severe penalties for repeated infractions, with the one immediately preceding his severance from employment a suspension of lengthy duration.[69] Thus, even though in such cases the immediate violation standing alone would support no more than minor discipline, the fact it is accompanied by a history of similar misconduct is held proper grounds for dismissal.

Except under the circumstances presented above, however, arbitrators typically do not regard the penalty of discharge as an appropriate disciplinary remedy. Also usually excluded as improper forms of punishment are quasi-disciplinary measures which abridge contractual employee rights, as for example the treatment of a job refusal as a quit,[70] a permanent demotion for reasons other than proven incompetency,[71] or the denial of a guaranteed monetary benefit as holiday pay.[72] Rather, depending on the presence or absence of mitigating influences in individual cases, arbitrators generally hold penalties graduated in severity from simple warnings and reprimands to extended layoffs the most that may be imposed.[73] Among the factors most commonly serving to extenuate the degree of guilt are the lack of willful

intent on the part of a worker to do wrong,[74] an exemplary work record,[75] long seniority in employment,[76] or a past custom of laxity in enforcing rules by the employer.[77] Where management neglects to reflect these conditions in the discipline assigned, but instead follows a policy of strict adherence to a predetermined schedule of penalties for various offenses[78] or assesses like sanctions on a mass basis among several joint but not necessarily equal offenders,[79] arbitrators set aside the measures imposed and provide the grievants partial redress. Sometimes, however, they condition permanent restoration of employment rights on the employee's successful completion of a prescribed probationary period.[80]

In mitigating the severity of penalties arbitrators follow the rule that in no case should the reduced measure of discipline awarded be less than the maximum justified under the circumstances.[81] Customarily this is fixed by a subjective evaluation of all relevant data, including the arbitrator's appraisal of the measure best designed to induce the employee to correct his pattern of misbehavior.[82] Only infrequently is it possible to make this determination in objective and fairly automatic fashion. Usually this occurs where an unwarranted discrepancy is found to exist in the discipline assigned like violators. In such instances arbitrators as a rule order the penalties equated at the lesser measure of punishment.[83] Also, in those cases where only a fraction of the multiple charges upon which an employee suspension is based are supported by credible evidence, arbitrators commonly award a layoff of shorter duration. As a rule, the length of that ordered is

directly proportional to the number of alleged offenses found established in fact.[84]

Unless it is contrary to the agreement[85] or well-established custom,[86] or an aggrieved voluntarily waives his right to retroactive compensation,[87] it is standard practice in arbitration to indemnify employees for financial losses sustained due to improper disciplining. In computing the amount of restitution due such an individual, arbitrators typically project his past average earnings over the period in question, and from this sum deduct interim income received by him in the form of wages or unemployment compensation benefits.[88] Under normal circumstances this represents the monetary judgment awarded him. However, if the grievant has unreasonably ignored his implicit responsibility[89] to mitigate the extent of damages by seeking temporary employment elsewhere, or unnecessarily delayed in processing his appeal for relief,[90] arbitrators as a rule reduce the employer's financial liability commensurately. Where back pay awards have not been permitted under a contract, arbitrators have on numerous occasions made employees whole by ordering they be given make-up work equivalent in value to the hours lost by unjust punishment.[91]

Notes for Chapter III

1. Phillips Petroleum Co.-O.C.A.W., 19 LA 733, Kane (1952).

2. Pacific Mills-T.W.U.A., 2 LA 545, McCoy (1946);
Mueller Brass Co.-U.A.W., 3 LA 285, Wolff (1946).

3. Texas Textile Mills-T.W.U.A., 5 LA 762, McCoy (1946).

4. Reynolds Alloys Co.-Aluminum Workers Federal Labor Union, 2 LA 554, McCoy (1943).

5. International Shoe Co.-U.S.W., 2 LA 295, Copelof (1946);
Keystone Box Co.-P.S.P.M.W., 18 LA 336, Harkins (1952).

6. Daniels-Kummer Engraving Co.-M.E.U., 10 LA 178, Feinsinger (1948);
Hayes Manufacturing Corp.-U.A.W., 17 LA 412, Platt (1951).

7. Baldwin-Lima-Hamilton Corp.-U.A.W., 19 LA 177, Day (1952);
Trans World Airlines, Inc.-I.A.M., 24 LA 95, Gilden (1955).

8. Bell Aircraft Corp.-U.A.W., 18 LA 374, Shister (1952);
North American Aviation, Inc.-P.G.W., 22 LA 313, Blair (1953).

9. New York Tribune, Inc.-A.N.G., 8 LA 410, Cahn (1947).

10. United States Hoffman Machinery Corp.-U.A.W., 22 LA 649, Hazell (1953);
Kohler Brothers Sand & Gravel Co.-I.B.T., 25 LA 903, Anderson (1956).

11. Baltimore Transit Co.-S.E.R.M.C.E., 23 LA 663, Kotin (1954);
Apex Smelting Co.-M.M.S.W., 25 LA 332, Luskin (1955).

12. Lau Blower Co.-U.S.A., 24 LA 52, Warns (1955).

13. Ford Motor Co.-U.A.W., 6 LA 853, Shulman (1946).

14. California Electric Power Co.-I.B.E.W., 11 LA 1, Prasow (1948);
Kendall Refining Co.-O.C.A.W., 13 LA 520, Blair (1949).

15. Borg-Warner Corp.-U.F.M.W., 15 LA 308, Pedrick (1950);
Link Belt Co.-U.A.W., 17 LA 224, Updegraff (1951).

16. General Motors Corp.-U.A.W., Dec. No. D-2, Seward (1945);
General Motors Corp.-U.A.W., Dec. No. G-1, Alexander (1950).

17. General Motors Corp.-U.A.W., Dec. No. C-250, Seward (1944);
Bethlehem Steel Co.-U.S.A., Gr. No. 3415, Shipman (1947);
Bethlehem Steel Co.-U.S.A., Dec. No. 186, Seward (1956).

18. Ford Motor Co.-U.A.W., Case No. 17655, CK-4, Killingsworth (1955).

19. Firestone Tire & Rubber Co.-U.R.W., 20 LA 880, Gorder (1953);
Huntington Chair Corp.-U.F.W., 24 LA 490, McCoy (1955).

20. Riley Stoker Corp.-U.S.A., 7 LA 764, Platt (1947);
Harbison-Walker Refractories Co.-S.A.P.W., 8 LA 290, Wagner (1947).

21. Goodyear Tire & Rubber Co.-U.R.W., 2 LA 367, McCoy (1946);
Allis Chalmers Manufacturing Co.-U.F.M.W., 8 LA 177, Kelliher (1947).

22. F. L. Jacobs Co.-U.A.W., 11 LA 652, Platt (1948);
Safe Bus Co.-T.W.U., 21 LA 456, Livengood (1953).

23. Atwater Manufacturing Co.-U.S.A., 13 LA 747, Donnelly, Sviridoff and Clark (1949);
Cameron Iron Works, Inc.-I.A.M., 25 LA 295, Boles (1955);
Higgins Industries, Inc.-S.C.C.J., 25 LA 39, Hebert (1955).

24. North American Aviation, Inc.-U.A.W., 10 LA 304, Grant (1948);
American Iron & Machine Works Co.-I.A.M., 194 LA 417, Merrill (1952).

25. Bethlehem Steel Co.-U.S.A., 17 LA 574, Killingsworth (1951);
International Harvester Co.-U.A.W., 22 LA 101, Cole (1953).

26. Boeing Airplane Co.-I.A.M., 23 LA 252, Kelliher (1954);
Goodyear Atomic Corp.-O.C.A.W., 25 LA 736, Kelliher (1955).

27. John Deere Tractor Co.-U.A.W., 12 LA 129, Updegraff (1949);
Durham Hosiery Mills-A.F.H.W., 24 LA 356, Livengood (1955).

28. International Shoe Co.-U.S.W., 7 LA 941, Whiting (1947);
United Press Association-A.N.G., 22 LA 679, Spiegelberg (1954).

29. Lincoln Industries, Inc.-U.F.W., 19 LA 489, Barrett (1952);
New York Shipbuilding Corp.-B.B.F., 22 LA 851, Dash (1954).

30. Raybestos-Manhattan, Inc.-Manhattan Rubber Workers Industrial Union, 21 LA 788, Copelof (1954);
Bower Roller Bearings Co.-U.A.W., 22 LA 320, Bowles (1954);
Los Angeles Transit Lines-S.E.R.M.C.E., 25 LA 740, Hildebrand (1955).

31. New York Tribune, Inc.-A.N.G., 8 LA 410, Cahn (1947);
Owl Drug Co.-I.L.W.U., 10 LA 498, Pollard (1948).

32. Lightning Local Express, Inc.-I.B.T., 14 LA 651, Blair (1950);
Republic Steel Corp.-U.S.A., Gr. No. 1132, Selekman (1953).

33. Campbell Soup Co.-I.F.T.A.W., 2 LA 27, Lohman (1946).

34. Lockheed Aircraft Corp.-I.A.M., 13 LA 433, Aaron (1949); Metalsalts Corp.-G.C.C.W., 23 LA 223, Wildebush (1954).

35. Swift & Co.-U.P.W.A., 12 LA 108, Healy (1948); Jones & Laughlin Steel Corp.-U.S.A., Case No. 3-C-54, Cahn (1955).

36. Pacific Mills-T.W.U.A., 2 LA 326, McCoy (1945); Beaunit Mills, Inc.-U.T.W.A., 20 LA 784, Williams (1953).

37. Murray Corporation of America-U.A.W., 8 LA 713, Wolff (1947); Bower Roller Bearing Co.-U.A.W., 22 LA 320, Bowles (1954).

38. General Motors Corp.-U.A.W., Dec. No. C-247, Seward (1944); General Motors Corp.-U.A.W., Dec. No. C-318, Seward (1945).

39. Consolidated Vultee Aircraft Corp.-I.A.M., 9 LA 552, Coffey (1948); Bethlehem Steel Co.-U.S.A., Dec. No. GAD-3, Dash (1954).

40. Brown Shoe Co.-I.B.T., 16 LA 461, Klamon (1951); United States Steel Corp.-U.S.A., Gr. No. A-51-11, Garrett (1953).

41. Marlin Rockwell Corp.-U.A.W., 24 LA 720, Donnelly, Curry and Mottram (1955).

42. Bethlehem Steel Co.-U.S.A., 16 LA 99, Shipman (1951); Firestone Tire & Rubber Co.-U.R.W., 16 LA 569, Cheney (1951); United States Rubber Co.-U.R.W., Dec. No. 101-W-4, Killingsworth (1956).

43. General Motors Corp.-U.A.W., Dec. No. C-167, Dash (1944); Bethlehem Steel Co.-U.S.A., Gr. No.'s 326-327, Shipman (1949).

44. Flintkote Co.-T.W.U.A., 3 LA 770, Cole (1946); Owl Drug Co.-I.L.W.U., 10 LA 498, Pollard (1948).

45. Aluminum Company of America-U.A.W., 8 LA 234, Pollard (1947).

46. Century Foundry-I.U.E., 19 LA 380, Klamon (1952); F. J. Kress Box Co.-U.P.P., 24 LA 401, Pollack (1955).

47. Stewart Warner Corp.-M.M.S.W., 21 LA 186, Havighurst (1953).

48. Submarine Signal Co.-U.E., 4 LA 56, Babb (1946); Panhandle Eastern Pipe Line Co.-O.C.A.W., 19 LA 413, Updegraff (1952).

49. Bethlehem Steel Co.-U.S.A., Gr. No. 1349-3265, Selekman (1947); Republic Steel Corp.-U.S.A., Gr. No. W-514, Killingsworth (1951).

50. Southern Bell Telephone & Telegraph Co.-C.W.A., 25 LA 85, Alexander, McCoy, Schedler and Whiting (1955).

51. Freuhauf Trailer Co.-I.A.M., 21 LA 832, Murphy (1954);
Marlin Rockwell Corp.-U.A.W., 24 LA 728, Somers (1955);
Kroger Co.-I.B.T., 25 LA 906, Smith (1955).

52. American Smelting & Refining Co.-U.S.A., 7 LA 147, Wagner (1947);
American Smelting & Refining Co.-M.M.S.W., 16 LA 416, Pollard (1950).

53. Sears, Roebuck & Co.-Department Store Employees Union, 6 LA 211, Cheney (1946);
United States Potash Co., Inc.-M.M.S.W., 17 LA 258, Granoff (1951).

54. Fabet Corp.-I.L.A., 12 LA 1126, Wallen (1949);
Bower Roller Bearing Co.-U.A.W., 22 LA 320, Bowles (1954).

55. Cone Finishing Co.-T.W.U.A., 16 LA 829, Maggs (1951);
Southern Bell Telephone & Telegraph Co.-C.W.A., 25 LA 85, Alexander, McCoy, Schedler and Whiting (1955).

56. F. L. Jacobs Co.-U.A.W., 11 LA 652, Platt (1948);
Copco Steel & Engineering Co.-U.S.A., 21 LA 410, Parker (1953).

57. Chrysler Corp.-U.A.W., 5 LA 420, Wolff (1946);
John Deere Tractor Co.-U.A.W., 10 LA 318, Updegraff (1948).

58. For a discussion of these principles see in particular:
Bethlehem Steel Co.-U.S.A., 2 LA 194, Shipman (1945);
Riley-Stoker Corp.-U.S.A., 7 LA 764, Platt (1947);
Bauer Bros.-U.A.W., 23 LA 696, Dworkin (1954).

59. Kraft Foods Co.-I.B.T., 9 LA 397, Updegraff (1947).

60. Cameron Iron Works, Inc.-I.A.M., 25 LA 295, Boles (1955).

61. Harbison-Walker Refractories Co.-S.A.P.W., 8 LA 290, Wagner (1947).

62. Inland Steel Co.-U.S.A., 19 LA 601, Updegraff (1952).

63. Yale Rubber Manufacturing Co.-U.R.W., 9 LA 447, Bowles (1948).

64. International Harvester Co.-U.F.M.W., 17 LA 334, Seward (1951).

65. National Petro-Chemicals Corp.-Petro Independent Union, 25 LA 235, Fitzgerald (1955).

66. Owens-Corning Fibreglass Corp.-T.W.U.A., 19 LA 57, Justin (1952).

67. Morris Paper Mills-P.S.P.M.W., 20 LA 653, Anrod (1953);
Valley Steel Casting Co.-U.S.A., 22 LA 520, Howlett (1954).

68. F. J. Kress Box Co.-U.P.P., 24 LA 401, Pollack (1955).

69. Distributor's Association of Northern California-I.L.W.U., 16 LA 217, Pallen (1951).

70. General Motors Corp.-U.A.W., Dec. No. C-91, Dash (1943).

71. Republic Steel Corp.-U.S.A., 25 LA 733, Platt (1955);
American Steel & Ware Co.-U.S.A., Case No. A-1-8, Blumer (1946).

72. Parke, Davis & Co.-G.C.C.W., 13 LA 126, Platt (1949);
Standard Steel Spring Co.-U.A.W., 16 LA 317, Platt (1951).

73. American Bakeries Co.-United Bakery Workers, 12 LA 900, McCoy (1949).

74. John Deere Tractor Co.-U.A.W., 5 LA 534, Updegraff (1946);
John Deere Tractor Co.-U.A.W., 13 LA 606, Updegraff (1949).

75. Pennsylvania Greyhound Lines, Inc.-S.E.R.M.C.E., 17 LA 598, Loucks (1951).

76. William Brooks Shoe Co.-U.S.W., 19 LA 65, Dworkin (1952).

77. Lincoln Industries, Inc.-U.F.W., 19 LA 489, Barrett (1952).

78. National Union Radio Corp.-U.E., 12 LA 935, Halliday (1949);
Ford Motor Co.-U.A.W., Case No. 11673, M-2328, Shulman (1952).

79. Standard Steel Spring Co.-U.A.W., 17 LA 423, Platt (1951);
Dirilyte Company of America-U.S.A., 25 LA 639, Kelliher (1955).

80. F. L. Jacobs Co.-U.A.W., 11 LA 652, Platt (1948);
Certain-Teed Products Corp.-S.A.P.W., 24 LA 606, Simkin (1955).

81. Rock Hill Printing & Finishing Co.-T.W.U.A., 16 LA 722, Jaffee (1951);
Lincoln Industries, Inc.-U.F.W., 19 LA 489, Barrett (1952).

82. Bower Roller Bearing Co.-U.A.W., 22 LA 320, Bowles (1954).

83. Aleo Manufacturing Co.-T.W.U.A., 15 LA 715, Jaffee (1950);
General Motors Corp.-U.A.W., Dec. No. C-407, Seward (1946).

84. North American Aviation, Inc.-P.G.W., 22 LA 313, Blair (1953);
General Motors Corp.-U.A.W., Dec. No. B-83, Dash (1942);
Bethlehem Steel Co.-U.S.A., Dec. No. GAD-3, Dash (1954).

85. General Motors Corp.-U.A.W., Dec. No. C-99, Dash (1943).

86. General Motors Corp.-U.A.W., Dec. No. C-91, Dash (1943);
Republic Steel Corp.-U.S.A., Gr. No.'s ED 355 & 356, Platt (1955).

87. United States Rubber Co.-U.R.W., Dec. Mo. 44-K-1, Killingsworth (1954).

88. American Iron & Machine Works Co.-I.A.M., 19 LA 417, Merrill (1952); Oklahoma Furniture Co.-U.F.W., 24 LA 522, Merrill (1955); Gibson Refrigerator Co.-U.A.W., Dec. No. L-2880, Killingsworth (1947).

89. Pacific Mills-T.W.U.A., 2 LA 545, McCoy (1946); Charles Eneu Johnson Co., Inc.-O.C.A.W., 17 LA 125, Coffey (1950); Barbet Mills, Inc.-T.W.U.A., 19 LA 677, Maggs (1952).

90. Erie Resistor Corp.-U.E., 5 LA 161, Lappin (1946); General Motors Corp.-U.A.W., Dec. No. C-156, Dash (1944); United States Rubber Co.-U.R.W., Dec. No. 101-K-8, Killingsworth (1954).

91. General Motors Corp.-U.A.W., Dec. No. B-56, Taylor (1942); General Motors Corp.-U.A.W., Dec. No. C-208, Dash (1944); General Motors Corp.-U.A.W., Dec. No. F-139, Alexander (1950).

CHAPTER IV

ABSENTEEISM

Employee absenteeism, estimated to average three to four per cent of the workforce daily under normal peacetime conditions, represents a serious control problem in American industry. It not only results in a direct business expense to employers of many millions of dollars a year, but also often has indirect and detrimental effects on plant morale and the ability of management to maintain discipline. In recognition of these facts employers have sought to minimize absence rates among their employees by improved methods of personnel selection and training, by rewards distributed to workers with exemplary attendance records, and most frequently by establishing rules and regulations under which unauthorized work absences are designated as disciplinary offenses.

A substantial number of grievances contesting the propriety of penalty measures assigned for unexcused absences have been processed to arbitration. In passing on the merits of these appeals, arbitrators normally subject the conduct of both the employer and the aggrieved to several tests of reasonableness. They inquire, did management fulfill its obligation to make the members of the workforce, and this employee in particular, familiar with company policies governing absenteeism? Was advance notice of absence required of the grievant, and if so, was it either properly provided or reasonably attempted? What reasons if any were advanced by the complainant for his failure to report for work

as scheduled, and to what extent do those offered suffice as an excuse? Is the severity of the penalty imposed appropriate in terms of the seriousness of the inconvenience suffered by the employer, and in the light of the employee's prior disciplinary record? Is it comparable to those invoked in similar situations in the past? And lastly, was all other evidence tending toward aggravation or extenuation of the absence offense weighed and accurately reflected in the disciplinary action taken by management?

The relative importance attached to each of the above standards varies according to the circumstances of each specific case. Most important of these is the frequency and duration of the absenteeism alleged as cause for discipline. Arbitrators as a rule distinguish between four general classes of offenses, each of which represents a substantially different aspect of the absence problem. One involves occasional short term absences of one or at most a few days by an otherwise reliable employee. Another includes extended absences, usually those of several weeks' or months' duration. A third is excessive absenteeism of a persistent and recurring nature. A final type is that of tardiness in reporting for work. The nature of the penalties normally assessed by management for each of these forms of absenteeism, and the conditions under which the measures imposed have been sustained as levied or reduced in severity or rescinded in arbitration are discussed below.

Absence of Short Duration

Many employee absences for a single day or for a period up to three to four consecutive days are unavoidable. Often they are the result of job-connected injuries, a genuine illness, or other circumstances similarly beyond the control of the absentee. In such cases, however, the individuals involved are obligated nonetheless under most company policies to notify the employer of the absence and its cause, and on request to establish that the failure to report for work was in fact for the reason advanced. The alleged failure of employees to satisfy these procedural requirements frequently has been held by management a just and sufficient basis for subjecting offenders to penalties ranging from short layoffs to dismissal.

Arbitrators normally do not condone unduly strict and literal application of rules requiring employees to furnish both notice and excuse for absences of short duration where the reasons for absenteeism are substantial. Where the evidence of a case has indicated that the transmittal of notice or an attempt to provide one was physically impossible under the circumstances,[1] or that a conscientious though unsuccessful effort to notify the employer by reasonable means of reporting was made,[2] arbitrators often have freed an aggrieved from responsibility for discipline in any form. Full redress has also usually been granted workers who have failed to present a doctor's certificate to verify a bona fide illness where alleged company policies requiring such a corroborative statement have been found never fully explained to the grievants.[3] Only, as a rule, where arbitrators

have concluded that a reasonable effort to report an absence could and should have been made, but was not,[4] or that the absentees should have explained the nature of the "personal business"[5] or "out of town",[6] reasons which were in fact compelling, has a proper basis for disciplining been held to exist. At no time in such instances, however, have arbitrators sustained disciplinary actions more severe than a brief suspension.

On the other hand, where employees have steadfastly refused to divulge any reason for an absence,[7] have advanced as an excuse an untruthful reason,[8] or are found to have inexcusably absented themselves simply as a matter of personal convenience,[9] more severe penalties have often been upheld in arbitration. Usually, in such cases, the maximum punishment held justified is at most a layoff of several weeks' duration. Seldom, and only under the most aggravated of circumstances, has the extreme measure of discharge been held warranted. This has occurred usually only where the offender's instant violation is shown to have been compounded by a long record of prior misconduct, or where the inconsequential reason for his absence and failure to provide notice have indicated a gross and willful disregard of his responsibilities.

On many occasions, however, the propriety of disciplining has turned not on the sufficiency with which an aggrieved satisfied procedural absence requirements, but rather on the extent to which he substantiated by credible evidence a claim of an alleged abuse of discretion by management. Where such an individual has established to the arbitrator's satisfaction that the penalty action was unduly severe or

entirely unwarranted under the disciplinary policies formally adopted by the employer in the contract or plant rules,[10] or was excessive in the light of the measures previously imposed on others for similar infractions in the past,[11] arbitrators as a rule have ordered appropriate modification or outright recision of the punishment assigned. At the same time they normally have not found management to have disciplined in arbitrary fashion as alleged where enforced absences due to a disciplinary layoff resulted in the forfeiture of a benefit for which grievants would otherwise have qualified.[12] In these cases arbitrators have sustained such penalties as the disallowance of premium pay for the sixth day worked in one week or the denial of Saturday overtime work as not patently unreasonable under the circumstances.

Absence of Sustained Duration

The failure of employees to provide both timely notice of and an acceptable excuse for an extended absence generally has been held by arbitrators a much more serious offense and deserving of a commensurately stronger penalty than is true in cases involving short term absences. The disciplinary measure most commonly subject to arbitral review in these instances, that of summary dismissal, often has been sustained on a clear showing of such cause.[13] Nonetheless, it also remains a fact that the conditions under which arbitrators have found employers to have erred in assigning this or other lesser measures of discipline are numerous. Under these circumstances, depending on the evidence at hand, they have typically either set aside in their entirety

the penalties imposed, or have otherwise drastically reduced them in severity.

Oftentimes the basis for awarding partial or full relief to a grievant has been proof of an unreasonable interpretation and application by management of company rules governing attendance. This may have been evidenced by requiring that notice once given within the time limit prescribed by the contract be repeated at successive intervals during the absence,[14] by disciplining an employee for being absent without permission when a leave granted two months earlier authorizing him to be away during that period was cancelled only two days preceding the absence,[15] or by complete disregard by the employer of the fact that a worker's absence was due to a genuine and protracted illness.[16] In cases such as the latter, arbitrators normally have disallowed penalties in any form on the grounds that the worker's responsibility to his family and himself to regain his lost health supersedes his obligation to provide continuous work service to his employer.

Also, as has happened on numerous occasions, discharge penalties predicated on an employee's absence for at most a few weeks because of jail confinement typically have not been allowed to stand as levied. This has been particularly the case where strong extenuating factors have been established in the grievant's favor.[17] Usually these, singly or in combination, have taken the form of a long and excellent service record with the employer, a showing that the invocation of discipline by management preceded the indictment on the charge levied against the employee, proof that the misconduct alleged of the worker

was in no way related to his employment relationship with the firm, or evidence that despite the duration of the absence no substantial inconvenience was suffered by the employer as a result. Although arbitrators, under these circumstances, normally have ordered the reinstatement of the absentee with full retroactive compensation, in a few cases they have held a moderate layoff justified and have awarded only partial back pay.

Excessive Absenteeism

Because of the particularly acute and adverse effects of excessive or chronic absenteeism on production planning and plant efficiency, arbitrators typically grant management considerably greater discretionary authority in disciplining such offenders than is generally true in cases involving other forms of absences. This is reflected by the wide variety of conditions under which they have sustained the ultimate penalty of employee discharge. That measure has been upheld as for just cause not only where on a numerical basis employee absence rates have clearly been extreme, as for example where they have averaged between twenty and forty per cent of the scheduled work time,[18] but also where workers have exceeded the allowed maximum of the three to five unexcused absences which were permitted under the union contracts.[19] Moreover, in cases such as the former, arbitrators often have ruled employers are under no obligation to investigate the reasons for the employee's final absence,[20] nor to entertain and reflect in the penalty assigned a verified and normally acceptable excuse for the last or earlier absences on a worker's unacceptable attendance record.[21]

Neither, under these circumstances, is management necessarily required to take into account in determining the extent of discipline deserved the fact that such an employee provided proper notification of absence.[22] Although these factors may suffice to mitigate the severity of other absence offenses, they normally do not induce arbitrators to hold dismissal actions unwarranted for absenteeism of an habitual nature.

Despite the substantial leeway allowed management in exercising its judgment as to the disciplinary remedies it may properly invoke for excessive and recurring employee absences, arbitrators have often ruled the extreme penalty of discharge undeservedly severe and substituted lesser measures of punishment in its stead. One common basis for such an award is a finding that the record of an employee's poor attendance falls short of that required to establish chronic absenteeism.[23] On other occasions, even though the basic charge of excessive absences has been established by management, evidence that the employer failed to put a grievant on clear notice that continuation of his absence habits would lead to his termination,[24] to provide an adequate opportunity following a warning for the employee to indicate whether he had made a genuine attempt to be regular in his work attendance,[25] or lastly, to implement within a reasonable period the warning given when the improvement demanded was not forthcoming,[26] also has frequently led arbitrators to order modification of a discharge penalty. Similar decisions have likewise resulted where there has been a showing of discrimination by management in the discipline assigned to like offenders,[27] or where the employer arbitrarily has disregarded the fact

an employee's absences were at least in part attributable to an on-the-job injury,[28] to an illness which impending surgery would likely cure,[29] or to an honest and not unreasonable belief he had secured a medical leave of absence for the period he was away from work.[30]

Apparently only under one condition are workers who have absented themselves frequently from their jobs generally held not liable for discipline in any form. This occurs in the case of union officials whose irregular attendance can be shown to have been necessary in order to conduct pressing bargaining unit business with the employer.[31]

Tardiness

The failure of employees to be at their posts and ready to start work promptly at the start of a shift may prove just as disruptive of productive operations and as much an economic cost to the employer as other types of absenteeism. For this reason, arbitrators, when reviewing the propriety of penalties assigned for tardiness, typically sustain reasonable measures of discipline where they appear warranted under the facts of each particular case.

Infrequently in such instances, however, has the penalty of discharge been upheld in arbitration. This has occurred only where, despite adequate warning, employees have developed nonetheless into chronic violators of company rules governing tardiness and other forms of absences.[32] Otherwise, discipline ranging in severity from reprimands to layoffs of one or two days are normally held the maximum punishment deserved for such offenses. The more severe of these measures generally have been reserved for those individuals whose failure to

report for work on time has been shown a deliberate self-help measure designed to reflect dissatisfaction with the existence or manner of enforcement of a shop rule,[33] whose job was of such a nature that their tardiness necessitated a substantial rearrangement of work assignments,[34] or who without good cause were several hours late in appearing for work.[35] Also, in the special case where an employee has been found tardy for an extended period on the day preceding or following a holiday, he may be held properly declared ineligible for and denied holiday pay benefits by management.[36] Under all other circumstances, however, no more than the most nominal of punishment is typically held justified for tardiness.

If, on the other hand, arbitrators have found even minor disciplinary action undeserved in the light of an employee's excellent work record,[37] a sudden and unannounced reversal of management's former policy of lax enforcement of tardiness rules,[38] or a violation by the employer of his authority as defined by the collective contract,[39] they have rescinded the actions taken and granted grievances in full.

Notes for Chapter IV

1. Tennessee Products and Chemical Corp.-M.M.S.W., 10 LA 903, Dwyer (1948).

2. Erie Resistor Corp.-U.E., 5 LA 161, Lappin (1946); Buffalo Springfield Roller Co.-U.A.W., 8 LA 212, Hampton (1947); Hudson Restaurant-H.R.E.U., 15 LA 616, Handsaker (1950).

3. Potash Company of America-M.M.S.W., 16 LA 32, Garrett (1951); Maryland Drydock Co.-I.U.M.S.W., Dec. No. 1, Killingsworth (1949).

4. General Motors Corp.-U.A.W., B-138, Dash (1942); Bethlehem Steel Co.-U.S.A., Dec. No. 11, Seward (1953).

5. Tennessee Coal, Iron & Railroad Co.-U.S.A., 11 LA 909, Seward, Levitsky and Kelly (1948); General Motors Corp.-U.A.W., C-348, Seward (1945).

6. American Steel & Wire Co.-U.S.A., 12 LA 47, Seward (1948).

7. Ford Motor Co.-U.A.W., CK-29, Case No. 18225, Killingsworth (1956).

8. Lockheed Aircraft Corp.-I.A.M., 17 LA 804, Warren (1952); Capital Airlines, Inc.-I.A.M., 25 LA 13, Stowe (1955).

9. International Shoe Co.-U.S.W., 23 LA 542, Rader (1954); North American Aviation, Inc.-U.A.W., 15 LA 905, Komaroff (1951).

10. International Harvester Co.-U.F.M.W., 14 LA 418, Seward (1950); Chrysler Corp.-U.A.W., 19 LA 471, Wolff (1952); Apex Smelting Co.-M.M.S.W., 25 LA 332, Luskin (1955).

11. A. D. Juilliard & Co., Inc.-U.T.W.A., 15 LA 934, Maggs (1951); General Motors Corp.-U.A.W., C-35, Dash (1943).

12. Roberts & Mander Stove Co.-U.S.A., 3 LA 656, Brandschain (1946); Walworth Co., Inc.-U.S.A., 6 LA 858, Selekman (1947).

13. For a sampling of these awards, see: St. Louis Car Co.-U.S.A., 5 LA 572, Wardlaw (1946); Consolidated Vultee Aircraft Corp.-I.A.M., 11 LA 152, Hepburn (1948); Presto Recording Corp.-U.E., 16 LA 146, Kaplan (1950); and North American Aviation, Inc.-U.A.W., 21 LA 248, Komaroff (1953).

14. Phelps Dodge Refining Corp.-El Paso Copper Refinery Workers Union, 11 LA 535, Cahn (1948).

15. Bethlehem Steel Co.-U.S.A., 11 LA 629, Shipman (1948).

16. See, for example:
Don Lee Broadcasting System-I.A.M., 1 LA 571, Strong, McMurray and Sandler (1946);
Spaulding Fibre Co.-U.E., 21 LA 58, Thompson (1953); and
International Harvester Co.-U.A.W., 24 LA 274, Wirtz (1955).

17. Sherwin-Williams Co.-G.C.C.W., 22 LA 1, Kelliher (1954);
Trane Co.-Federal Labor Union No. 18558, 23 LA 574, Spillane (1954);
Hertner Electric Co.-U.E., 25 LA 281, Kates (1955);
Glasgow-Adrian Co.-U.A.W., 25 LA 614, Bowles (1955).

18. See, for example:
Buffalo Weaving & Belting Co.-U.R.W., 2 LA 59, Brown (1945);
Republic Steel Corp.-U.S.A., 6 LA 85, McCoy (1947);
Rock Hill Printing & Publishing Co.-U.T.W.A., 14 LA 153, Soule (1949);
Aspinook Corp.-U.T.W.A., 15 LA 593, Shapiro (1950).

19. Cameron Manufacturing Co.-U.E., 4 LA 185, Guild (1946);
American Zinc Company of Illinois-M.M.S.W., 20 LA 527, Merrill (1953).

20. Eagle-Picher Mining & Smelting Co.-M.M.S.W., 6 LA 544, Elson (1947);
National Union Radio Corp.-U.E., 13 LA 515, Halliday (1949).

21. Pacific Mills-U.T.W.A., 3 LA 141, McCoy (1946);
Celanese Corporation of America-U.T.W.A., 9 LA 143, McCoy (1947);
Larson Clay Pipe Co.-U.B.C.W., 13 LA 410, Blair (1949);
Rock Hill Printing & Publishing Co.-U.T.W.A., 14 LA 153, Soule (1949).

22. Tioga Mills-American Federation of Grain Processors, 10 LA 371, Wilcox (1948).

23. International Shoe Co.-U.S.W., 7 LA 941, Whiting (1947);
Corn Products Refining Co.-A.F.G.M., 18 LA 311, Gilden, Estep and Morgan (1952).

24. International Association of Machinists (employer)-O.E.I.U., 7 LA 231, Aaron (1947).

25. Homestead Valve Manufacturing Co.-U.S.A., 6 LA 627, Wagner (1947);
Pacific Mills-U.T.W.A., 20 LA 891, Marshall (1953);
United States Rubber Co.-U.R.W., Dec. No. 44-K-8, Killingsworth (1954).

26. Michigan Steel Casting Co.-U.A.W., 6 LA 678, Platt (1947);
United States Rubber Co.-U.R.W., Dec. No. 217-K-1, Killingsworth (1954).

27. Homestead Valve Manufacturing Co.-U.S.A., 6 LA 627, Wagner (1947).

28. Weber Aircraft Corp.-I.A.M., 19 LA 166, Spaulding (1952).

29. United States Rubber Co.-U.R.W., Dec. No. 217-K-1, Killingsworth (1954).

30. United States Rubber Co.-U.R.W., Dec. No. 44-K-8, Killingsworth (1954).

31. International Harvester Co.-U.F.M.W., 21 LA 151, Platt (1953); see also, Brown & Sharpe Manufacturing Co.-I.A.M., 1 LA 423, Myers, Anderson and Phillips (1945).

32. National Radio Union Corp.-U.E., 13 LA 515, Halliday (1949); Atlantic Broadcasting Co.-I.B.E.W., 20 LA 7, Bailer (1953); Metalsalts Corp.-G.C.C.W., 23 LA 223, Wildebush (1954).

33. Pittsburg Plate Glass Co.-Allied Chemical & Alkali Workers of America, 12 LA 803, Cornsweet (1949); International Harvester Co.-U.F.M.W., 23 LA 311, Platt (1954).

34. Bethlehem Steel Co.-U.S.A., Gr. No. 9630, Seward (1953).

35. Bell Aircraft Corp.-U.A.W., 20 LA 448, Shister (1953); Ford Motor Co.-U.A.W., CK-65, Case No.'s 18183 & 18184, Killingsworth (1956).

36. General Motors Corp.-U.A.W., F-95, Alexander (1950).

37. O'Dowd's Dairy-I.B.T., 6 LA 141, MacAdie (1947); United Parcel Service of New York, Inc.-I.B.T., 7 LA 292, Feinberg (1947).

38. Jacob Rabinowitz & Co.-P.J.N., 6 LA 762, Singer (1947); Progress Furniture Manufacturing Co.-U.F.W., 12 LA 233, Komaroff (1949); Ohio Steel Foundry Co.-U.A.W., 14 LA 490, Lehoczky (1948).

39. Clark Grave Vault Co.-U.A.W., 13 LA 924, Lehoczky (1949).

CHAPTER V

DISORDERLY CONDUCT

One expression of plant behavior which seriously detracts from the orderly and efficient conduct of work operations is resort to force and violence by employees. Another, which has many of the same detrimental effects as the use of force, is a heated argument among workers in which one or more individuals employs profane and abusive language or makes intimidating or threatening statements. For either of these forms of disorderly conduct employees have often been subjected to disciplinary penalties. Usually management has reserved the strongest of these measures, that of summary dismissal, for those whom it has charged with participating in a fight or with having assaulted or threatened to strike another with fists or with a weapon. Where the offense allegedly has involved intemperate or coercive language, the penalties imposed have generally been less severe in nature with minor measures normally assessed for mild infractions and extended layoffs imposed for the more serious altercations.

The right of the employer to punish employees for such misconduct is an issue which has often been arbitrated. Although arbitrators in these cases have strongly supported in principle the authority of management to discipline proven offenders and frequently have sustained the penalties as levied, they have also often held the actions taken either unduly severe under the circumstances or wholly unjustified. The

standards normally employed in determining in any specific instance the extent if any of cause for disciplining present are generally several in number. One is whether any provocation existed for the physical or verbal attack, and if so, its form and severity. Another is the relative participation of the parties to the incident, whether their conduct was joint and of comparable intensity, or whether the behavior of one was purely passive or solely defensive in nature. Also generally of significance are the degree to which the affair offered a clear threat to the physical well-being of the participants and to harmonious plant relations, the location and timing of the offense, the past disciplinary record of a grievant, and the nature of the penalties normally imposed by the employer for similar violations in the past.

The manner in which arbitrators have applied the above standards in individual disputes is described below. The subject matter is divided into three sections. The first includes cases where disciplinary action has been predicated on alleged fighting by workers. A second involves those in which grievants have been charged with assaulting another person. The final portion considers the conditions under which penalties have been upheld or modified for participation in an altercation.

Fighting

Not every physical contact between two or more employees is properly classified as a fight. Many of the encounters that are a normal occurrence in industrial life, the shoving, the jostling and the horseplay, are not considered to be fights. They may degenerate into

fighting, but as long as they remain mild and brief they fall short of fighting. It is only when these and other affrays involve violence, when an open conflict contains the threat or intent of bodily harm, that one can be classified as an actual fight. The two or more individuals who engage in such an incident commit a serious offense and are likely to be severely disciplined by their employer, with the penalty of discharge the measure most commonly imposed.

In arbitration, persuasive evidence that a grievant initially provoked and aggressively participated in a fight has typically been ruled just and sufficient grounds for dismissal.[1] This has generally been so irrespective of the fact that the adversary in the affair received a less severe penalty[2] or no penalty at all.[3] It should not be assumed from the latter case, however, that provocation by another is considered by arbitrators an adequate basis for seeking redress through violence rather than through the contractually established grievance machinery. Under certain circumstances, as where an employee's participation has been mild and reluctant, provocation may be held a mitigating factor in a grievant's favor.[4] However, it offers no protection for one who has retaliated with a violent attack on the provocateur. In such a case he may be held deserving of the same[5] or perhaps a more severe disciplinary penalty.[6]

The above citations represent instances in which one party has been found to have clearly precipitated a fight with a provocatory act or statement. This may have taken one of several forms, as for example, a push, a blow, a jibe, an uncomplimentary remark, a threatening gesture,

a challenge, or anything else which could have been interpreted by the recipient as a threat to his safety, pride or prestige. Such cases, however, are exceptional, rather than typical. More frequently the initial cause of a fight has not been readily discernible, often having been inextricably interwoven and lost in the history of events preceding the outbreak of violence. Under this condition the value of provocation as a standard in evaluating the appropriateness of a penalty imposed on a participant is negligible. Arbitrators, in such cases, therefore usually base their decisions principally on evidence of the relative aggression of those who engaged in a fight. Where it has been shown that participation was joint and equal and of such severity that serious injury was inflicted upon each of the combatants, discharge actions taken against offenders have been sustained as for good and just cause.[7] On the other hand, where the facts of a case have indicated that a grievant limited his response to the aggression of another to the minimum of force necessary to protect himself from harm, penalties no more severe than a layoff have been allowed to stand.[8]

On many occasions, however, the answer to the question of relative participation in a fight by employees has not been readily apparent from the evidence at hand. This has especially been the case where directly contradictory versions of events have been related in the arbitration hearing and the absence of eye witness testimony corroborating the statements made by either side has made it difficult to assess blame. Sometimes such a dilemma has been solved by utilizing measures to test the credibility of the witnesses, as by probing for

inconsistencies in their accounts of the action[9] or by reviewing the prior record of a grievant in an attempt to determine his inherent combativeness.[10] Where no basis has existed to choose between the conflicting versions of the action, arbitrators usually have insisted that the fighters be treated alike. If penalties of equal severity have been assessed, they have commonly been sustained.[11] If unequal penalties have been imposed, arbitrators have ordered their equalization either by setting the penalties aside[12] or by directing one be reduced or the other increased until equal.[13]

Only infrequently in arbitration has the propriety of disciplining for fighting turned on the site and timing of the incident. In these instances, arbitrators have held the right of the employer to penalize proven participants extends to those who engage in fights during non-duty hours on the company grounds[14] and, under certain restrictive conditions, during their free time away from the employer's premises. In the latter type situations however, it must be clearly shown as a condition of arbitral finding of cause for discipline that the contest either grew out of past employment relationships within the firm[15] or inevitably would have detrimental aftereffects on the efficient and harmonious performance of plant operations in the future.[16] Otherwise, arbitrators rule the civil authority to be the only proper body which may properly exercise jurisdiction over the conduct of the participants and levy punishment.

Under a variety of other circumstances employees have been held unjustly penalized for fighting and grievance appeals for relief have

been sustained in full. This has most obviously been the case where management has failed to sustain its burden of proving that an actual fight took place and that the aggrieved was a party to it.[17] It has also been true in other instances where the employer has succeeded in establishing employee participation in a fight, but where compelling mitigating factors have dictated that the only appropriate remedy was to award full redress to the complainant. This has occurred where management has been found to have invoked discipline in a manner prohibited under the contract,[18] to have discriminated in unwarranted fashion between two like offenders by reinstating one but not the other following their discharge,[19] or to have practically encouraged the outbreak of fighting by failing to take firm corrective action to alleviate a tense and unwholesome post-strike atmosphere.[20]

Assaults

The principal difference between a fight and an assault is that whereas the former technically requires the participation of at least two individuals, assaults typically involve only the belligerency of a single person against another. A second basis for distinguishing between them is that while physical contact is presumed to be a necessary ingredient in a fight, it need not be present in an assault. Though violence often does accompany an assault, the classification is sufficiently broad to embrace those instances where threats of aggression are sufficiently real in the mind of the potential recipient that he is put in fear of his life or safety.

Aside from the above differences, however, the two forms of misconduct are closely related. In part this is reflected by the similarity in the principles applied by arbitrators in resolving each type of grievance dispute, but more clearly illustrated in assault cases because of the greater frequency with which they are encountered. Proof of provocation, especially when combined with evidence that an aggression consisted merely of the threat of violence without the actual resort to force,[21] that similar offenders had been treated more leniently by management in the past,[22] that an aggrieved had compiled a long and excellent past service record with the employer,[23] or that the employee's tense physical and mental condition was the direct result of inadequate training on a new job[24] or recent military experience,[25] often has led arbitrators to hold the penalty of discharge excessive under the circumstances. Although the workers involved in such cases have been ordered reinstated in their jobs, arbitrators have recognized the seriousness of their infractions by withholding all or a considerable portion of back pay for the period of their unemployment.

Conversely, the extreme penalty of summary dismissal frequently has been found a just and proper remedy for an assault where the offense has been aggravated by a factor of consequence. A prior disciplinary record of like misconduct which includes a prior warning that one more incident of aggressiveness would result in immediate discharge is one of these.[26] Another is the fact the assailant either utilized a degree of violence which resulted in the severe injury of another[27] or clearly threatened the same by brandishing a dangerous and potentially deadly

weapon.[28] Finally, where an assault has been sufficiently delayed following the provocation for it that it had the unmistakable appearance of a deliberate and premeditated act, in the absence of an alternate explanation arbitrators have held aggressors properly terminated from employment.[29]

Altercations

Employees who in the heat of argument direct offensive language at another commit a serious industrial offense. Such behavior not only distracts attention from the orderly and efficient conduct of work assignments, it also often leads to physical aggression and violence. For this reason, altercations are generally classed only one step below acts of force as violations of proper job decorum and have generally been held in arbitration to warrant the disciplining of a proven offender.

No single and generally acceptable standard exists which permits arbitrators to distinguish with exactness the demarcation line between permissible and non-permissible forms of personal address. Rather, this decision depends on the circumstances peculiar to each individual case. One matter typically of importance is evidence of what is or has been the common vernacular in the particular occupation or location. Another is the manner in which the remarks were delivered, especially with reference to the tone of voice employed and the length of time over which the sentiments were expressed. Also often of significance are such factors as the personal reaction and official position of the person to whom the language was directed, whether the offender was a

union officer acting in a representative capacity at the time of the incident, and the extent to which the disciplinary action taken by management conformed to the terms of the contract and established past practice. From a review of grievance arbitrations in which these and other principles have been employed a number of conclusions may be drawn.

As a general rule it may be stated that employees or their representatives may employ considerably more forceful and colorful language in official grievance discussions with members of supervision than normally is allowable in the conduct of their day-to-day affairs. There is, nonetheless, a hazy line beyond which statements made in grievance proceedings no longer are regarded as privileged and may provide a just basis for disciplining. Usually it is the union officer who oversteps that boundary. Where such individuals have resorted to vitriolic slurs or intimidating remarks, or otherwise have injected a personal and highly derogatory note into the discussions, they have been held properly subjected to punishment. Seldom, however, has the discharge penalty been held an appropriate remedy by arbitrators under these conditions.[30] Usually, and particularly in the presence of evidence of provocation by a managerial representative, the maximum discipline generally held justified has been at most a moderate suspension.[31]

Although employees are permitted considerably less liberty in their manner of addressing management personnel outside of formal grievance proceedings, only infrequently under such circumstances has the use of intemperate language without a related act of disobedience

been found sufficiently flagrant to be deserving of more than a layoff.[32] Moreover, a number of factors may play an extenuating though not a completely exonerating role, including a measure of provocation,[33] a penalty inconsistent with company rules or the employer's past practice,[34] proof that the employee charged with multiple violations has been guilty of one or more but not all of those alleged,[35] or a good past record which standing alone or combined with one of the above reflects in a grievant's favor.[36] Under these conditions severe penalties have commonly been commuted to reprimands or brief layoffs.

Similarly, only under the most aggravated of circumstances has improper and abusive language addressed to someone other than a supervisor been held a proper basis for dismissal. Among the awards available and studied this has occurred only where an offender has been found to have repeatedly directed foul and offensive remarks to others in the past,[37] where an agreement provided that "any" abusive language would represent cause for discharge,[38] or where women have been present when grossly obscene and slanderous remarks were literally shouted.[39] Apart from these situations, penalties no more severe than suspensions have been sustained. This has been so even in those instances where the offense has involved calling another employee by one of the most highly inflammatory of shop terms, a "scab." Where this "fighting" word has been used unthinkingly and in a non-coercive and non-retaliatory fashion, it has been held to deserve at best the most nominal of penalties.[40] However, even where its deliberate and repeated use in a derogatory manner has been established, it has still been held to warrant no more than a relatively severe suspension.[41]

The above awards establish rather clearly that arbitrators generally consider altercations among employees or between workers and supervisors to be somewhat inevitable in industrial life and with the exception of extreme cases to be deserving of minor corrective rather than punitive disciplinary action.

Notes for Chapter V

1. Kraft Foods Co.-I.B.T., 9 LA 397, Updegraff (1947);
   John R. Evans Co.-F.L.W., 24 LA 145, Abersold (1955).

2. Robertshaw-Fulton Controls Co.-Federal Labor Union, Local 21754, 15 LA 372, Marshall (1950);
   General Motors Corp.-U.A.W., Dec. No. B-258, Dash (1943).

3. Kennametal, Inc.-U.M.W., 19 LA 255, Landgraf (1952).

4. General Motors Corp.-U.A.W., Dec. No. C-405, Seward (1945);
   Kold-Hold Manufacturing Co.-U.A.W., Gr. No. 5763, Killingsworth (1952).

5. General Motors Corp.-U.A.W., Dec. No. C-407, Seward (1946).

6. General Motors Corp.-U.A.W., Dec. No. C-394, Seward (1945).

7. Stockham Pipe Fittings Co.-U.S.A., 1 LA 160, McCoy (1945).

8. Robertshaw-Fulton Controls Co.-Federal Labor Union, Local 21754, 15 LA 372, Marshall (1950);
   Texas Co.-I.A.M., 24 LA 240, White (1955);
   General Motors Corp.-U.A.W., Dec. No. C-394, Seward (1945).

9. Bethlehem Steel Co.-U.S.A., Gr. No. 8585, Killingsworth (1950).

10. Link Belt Co.-U.A.W., 4 LA 434, Gilden (1946).

11. Caterpillar Tractor Co.-U.F.M.W., 6 LA 65, Larkin (1946);
    General Motors Corp.-U.A.W., Dec. No. C-161, Dash (1944).

12. United States Steel Corp.-U.S.A., Gr. No. P-52-23, Kerr (1952);
    United States Steel Corp.-U.S.A., Gr. No. 155-924, Garrett (1952).

13. General Motors Corp.-U.A.W., Dec. No. C-407, Seward (1946).

14. Standard Steel Works-U.S.A., 6 LA 136, Ensinger (1946);
    Indiana Railroad-S.E.R.M.C.E., 6 LA 789, Updegraff (1947);
    Stewart-Warner Corp.-M.M.S.W., 21 LA 186, Havighurst (1953).

15. General Motors Corp.-U.A.W., Dec. No. C-64, Dash (1943).

16. International Harvester Co.-U.F.M.W., 9 LA 592, Blumer (1947);
    Burndy Engineering Co.-U.E., 12 LA 1012, Cahn (1949).

17. Palmer-Bee Co.-U.S.A., 2 LA 63, Platt (1945);
    Trane Co.-Federal Labor Union No. 18558, 14 LA 1039, Fleming (1950).

18. Paranite Wire & Cable Corp.-I.B.E.W., 9 LA 112, Greene (1947).

19. Master Electric Co.-U.E., 16 LA 781, Stashower (1951).

20. United States Potash Co.-I.A.M., 17 LA 258, Granoff (1951); for a similar decision under somewhat comparable circumstances, see: Fulton Glass Co.-Federal Labor Union No. 24080, 10 LA 75, Hampton (1948).

21. General Motors Corp.-U.A.W., Dec. No. F-97, Alexander (1950).

22. Klausner Copperage Co.-Coopers' International Union of North America, 14 LA 838, Blair (1950);
International Harvester Co.-U.A.W., 21 LA 32, Cole (1953).

23. Swift & Co.-U.P.W.A., 11 LA 57, Healy (1948);
Certain Teed Products Corp.-S.A.P.W., 24 LA 606, Simkin (1955).

24. Swift & Co.-U.P.W.A., 11 LA 57, Healy (1948).

25. International Harvester Co.-U.F.M.W., 2 LA 158, Gilden (1946);
A.B.C. Steel & Wire Co.-P.J.N., 3 LA 666, Copelof (1946).

26. Standard Oil Company of California-Independent Union of Petroleum Workers, 17 LA 589, Pollard (1951);
General Motors Corp.-U.A.W., Dec. No. G-219, Feinsinger (1955).

27. General Motors Corp.-U.A.W., Dec. No. C-308, Seward (1945);
American Steel & Wire Co.-U.S.A., Case No. A-220, Seward (1947).

28. Goodyear Clearwater Mills-U.T.W.A., 8 LA 647, McCoy (1947) (knife);
National Lock Co.-U.A.W., 10 LA 15, Epstein (1948) (knife).

29. Hiram Walker & Sons, Inc.-D.R.W.W., 10 LA 675, Whiting (1948);
Bethlehem Steel Co.-U.S.A., Gr. No. 2104, Shipman (1949).

30. International Harvester Co.-U.F.M.W., 9 LA 563, Blumer (1947).

31. General Motors Corp.-U.A.W., Dec. No. D-38, Seward (1946);
Bethlehem Steel Co.-U.S.A., G.A.D. 3, Dash (1954).

32. General Motors Corp.-U.A.W., Dec. No. C-171, Dash (1944).

33. Central Franklin Process Co.-T.W.U.A., 17 LA 142, Marshall (1951);
Stylon Southern Corp.-G.C.S.W., 24 LA 430, Marshall (1955);
General Motors Corp.-U.A.W., Dec. No. C-303, Seward (1945);
General Motors Corp.-U.A.W., Dec. No. E-170, Seward (1947).

34. Whitney Chain Co.-U.A.W., 23 LA 516, Stutz (1954);
General Motors Corp.-U.A.W., Dec. No. C-327, Seward (1945).

35. General Motors Corp.-U.A.W., Dec. No. B-83, Dash (1942).

36. Terminal Cab Co.-I.B.T., 7 LA 780, Minton (1947);
Stylon Southern Corp.-G.C.S.W., 24 LA 430, Marshall (1955);
General Motors Corp.-U.A.W., Dec. No. C-330, Seward (1945).

37. Cities Service Oil Co.-O.C.A.W., 17 LA 335, Larkin (1951).

38. Torrington Co.-I.U.M.S.W., 11 LA 1135, Lockwood, Mottram and Sviridoff (1949).

39. General Motors Corp.-U.A.W., Dec. No. C-340, Seward (1945);
see also: Cragin Manufacturers-I.A.M., 3 LA 746, Chaney (1946).

40. Fairbanks Co.-U.A.W., 20 LA 36, Sanders (1951);
International Harvester Co.-U.F.M.W., 21 LA 122, Platt (1953).

41. Rock Hill Printing & Publishing Co.-T.W.U.A., 16 LA 722, Jaffee (1951) (two week layoff).

CHAPTER VI

DISHONESTY AND DISLOYALTY

The right of management to subject workers to punishment for any one of a number of dishonest or disloyal acts committed within the scope of their employment is well established in practice and in arbitration. Numerous union contracts and plant rules specify that such misconduct represents just cause for discipline, and penalties invoked on this basis have often been sustained in arbitration. Moreover, the gravity with which these violations typically are viewed by employers and arbitrators alike is reflected in the frequency with which discharge and other severe measures have been levied and upheld on proven offenders.

In a very real sense however, the seriousness of a charge of dishonest or disloyal conduct lodged against an employee in and of itself is a source of substantial protection. This is especially so in the case of workers dismissed from employment for such alleged cause. Arbitrators consider the moral and ethical implications as to the character of one so charged, as well as the possible effects on his reputation, potentially too grievous for such an allegation to be made indiscriminately. In addition, they recognize that individuals terminated for either of these reasons not only lose valuable job rights built up over time, but may well also suffer virtual exclusion from the working force and be unable to secure other gainful

employment. As a result, arbitrators normally have sustained severe penalty measures, and particularly that of discharge, only where three conditions have been satisfied by the employer. One is the establishment of employee guilt by evidence commensurate with the severity of the offense alleged. Another is a showing that the act serving as a basis for discipline was of a sufficiently material and substantial nature to warrant the penalty imposed. The last is that the penalty assigned accurately reflect the presence of compelling mitigating factors which may exist in an employee's favor.

The following description of the application of the above standards in specific cases is divided into two parts. The first analyzes the circumstances under which employees have been held justly or unjustly penalized for dishonesty. Usually in these instances the offenses alleged as cause for discipline have been stealing the money or property of another, the falsification of time or work records, or a material misrepresentation on an application for employment. The second section includes those cases in which grievants have been charged with evidencing disloyalty to their employer by making public statements of a degrading or damaging nature about the firm or its products, by operating or in some way assisting a competitive enterprise, or by sheltering or abetting others whom they know to be engaging in conduct detrimental to the company's interests.

Dishonesty

Workers who without authorization appropriate or attempt to appropriate that which rightly belongs to a fellow employee or their

employer commit one of the most serious of industrial offenses. Management, as well as arbitrators, typically place such behavior in the same class as gross insubordination, illicit strike leadership, deliberate sabotage and those few other forms of extreme employee misconduct which provide just cause for immediate dismissal, even for a first offender. And, almost without exception, among those grievances which have reached arbitration contesting the propriety of penalties assigned for theft, the disciplinary measure imposed has been that of discharge.

There appears to be rather widespread agreement among arbitrators that the standard of proof required of management to establish an employee guilty of stealing and properly terminated should be of an extremely high order. Under no conditions, they generally maintain, should it fall short of clear preponderance of the evidence. Moreover, many arbitrators expressly hold management to the strictest standard of all, that applied in similar cases in criminal court proceedings of proof "beyond a reasonable doubt." These stringent evidence requirements have most clearly been met where a grievant's signed and uncontested statement admitting a theft has been introduced,[1] or where authoritative and undisputed eye witness testimony has attested to the commission of the act.[2] On the other hand, proof which is wholly circumstantial in nature may or may not, depending on the facts of each individual case, be held adequate to support a charge of stealing. As a rule, only where such proof has been found clear and convincing and sufficient other evidence capable of supporting an alternate conclusion has not been established has the penalty of summary discharge

been sustained.[3] In no award among those available and studied was circumstantial proof which created no more than the mere suspicion of employee guilt held an adequate basis for discipline in any form.[4]

In the case of employees proven guilty of thievery, arbitrators ordinarily have not ruled the dismissal of the offending party an unreasonable measure of punishment simply because of the fact that the value of the article stolen was nominal,[5] that a criminal penalty had also been assessed,[6] or that the aggrieved was a long service employee with a good prior record with the employer.[7] However, where these factors have existed in combination with one another,[8] or together with such other strong extenuating influences as clear evidence of managerial discrimination in disciplining,[9] a significant abridgement of a grievant's contractual rights,[10] or a lack of dishonest intent on the part of the accused,[11] discharge actions normally have not been allowed to stand. In their place arbitrators have generally substituted extended suspension graduated in severity according to the circumstances of each particular case.

Where, in contrast to disputes involving a claimed theft, penalties have been based upon an allegedly dishonest attempt by employees to secure payment for time not worked or production not rendered, seldom has the question of a grievant's guilt or innocence of wrongdoing been a matter of controversy. Usually objective and documentary proof in the form of altered or otherwise inaccurate time cards or work records has confirmed the commission of an offense. Thus the basic problem generally facing arbitrators in these cases has not been

one of determining the presence or absence of cause for discipline, but rather the appropriateness of the degree of discipline imposed.

As a rule, only where arbitrators have been convinced that the false entries on such records were made as a deliberate and conscious attempt to defraud or deceive the employer, and that management has in no way condoned such behavior in the past, have they held employees justly subject to discharge.[12] Otherwise, if they have instead concluded that the infraction was no more than a careless and inadvertent mistake,[13] or that management has greatly magnified its seriousness in the light of its former policy of lax enforcement of rules governing such conduct,[14] no more than relatively brief suspensions have generally been held justified.

The largest single source of grievance arbitrations over the propriety of disciplining for dishonesty arise out of penalties given for making false statements or failing to provide required data on applications for employment. In reviewing the merits of these appeals, arbitrators consistently have ruled that not every misrepresentation of an employee's background offers a just basis for dismissal, or even for discipline. As a general rule, unless it has been shown to the arbitrator's satisfaction that the inaccuracy in question was a willful attempt to conceal a material fact, one which if known would in all probability have resulted in the rejection of a grievant's application for work, penalties in any form have been held unwarranted.[15] In a much different class, however, are those mistakes or omissions which the evidence has indicated were made purposefully and which if

disclosed would undoubtedly have led to employment being withheld. Illustrative of these are failures to note a serious physical disability[16] or an arrest record for major crimes,[17] or gross misstatements of past work experience[18] or educational training.[19] For such errors arbitrators often have sustained discharge actions as just and proper remedies under the circumstances.

It is nonetheless a matter of record that not every deliberate falsification of an item of consequence on an application blank automatically provides a just ground for termination of an employee's services. On many occasions employers have been held to have waived their right to discipline where they have unnecessarily delayed in exercising that authority once the true facts became known to them.[20] This has been especially so where the timing of the advancement of the discrepancies in support of a penalty indicates an attempt by the employer to retaliate against the union for engaging in legitimate strike activities.[21] In other cases, the failure of management to investigate and discover a falsification within a reasonable period of time following hiring has likewise been ruled sufficient ground for disallowing a discharge and restoring grievants to employment with either full or partial back compensation. Although there is no universal agreement as to the length of this time interval, many arbitrators apply the standard first developed by Umpire Shulman that a period of one year should represent its maximum duration.[22]

Only infrequently have arbitrators been called on to decide the right of management to impose penalties for acts of dishonesty other

than those previously mentioned. The fact that in many of these instances awards have sustained disciplinary actions imposed for such offenses as lying,[23] forgery[24] or the willful concealment of defective work performance[25] does indicate, however, the rather broad construction which may be given on occasion to the term "dishonest conduct." Although infractions of the above nature ordinarily have not been held adequate to support a discharge penalty, dismissal actions have been sustained in a few instances where the act of deception was only one of a number of aggravating factors present in a case.[26]

Disloyalty

Although the right of management to discipline employees for acts of disloyalty has been affirmed often in arbitration, the circumstances under which severe measures of punishment have been upheld for that cause are rather restricted. Usually such penalties as discharge or demotion have been sustained only where clear evidence has indicated that a grievant's behavior either resulted in actual damage to the firm's business interests, or created the distinct likelihood that damage would be experienced in the future. Moreover, some arbitrators have additionally insisted on occasion that to represent cause for the extreme penalty of dismissal, it must also be established that the misconduct charged to the employee was malicious and purposeful in nature.

In but a few cases have arbitrators found one or both of the above conditions sufficiently present to hold the offending parties justly subject to termination or downgrading. This has occurred most commonly where workers have been proven to have made,[27] or to have threatened to

make,[28] derogatory or defamatory statements in public about the employer or his products. It has also happened, however, where an employee holding a position of trust has been shown to have knowingly refrained from reporting to his superiors the thefts of company property by a fellow worker,[29] or where management has succeeded in establishing that the operation of a competitive concern by members of the family of an aggrieved employee created an unreasonable risk that intentionally or otherwise he would disclose to them the employer's customer lists or technical trade secrets.[30]

Among all of the other awards involving alleged disloyalty which have been analyzed, arbitrators have set aside the discharge penalties usually assigned. In several of these employees had committed in fact acts of bad faith. These had taken the form of the acceptance of off-duty work with a competitor of the primary employer,[31] gossiping in public about the character of a company official and his wife,[32] or the granting of a price discount when in reality none was warranted.[33] For such improprieties the grievants were ruled, therefore, deserving of a measure of discipline. However, the lack of proof in each case that the employee had either intentionally or seriously jeopardized the prospects for success of their employer was the deciding factor leading arbitrators to hold moderate suspensions in lieu of dismissals the maximum punishment warranted under the circumstances.

On the other hand, where without proof of prejudice to the company's business the sole basis advanced in support of discharge actions has been that an employee was friendly with the management of a rival

producer,[34] that the aggrieved worker had violated a previously unenforced rule by reclaiming discarded containers from the company dump for resale,[35] or that according to hearsay evidence the alleged offender had shown discourtesy to customers,[36] arbitrators have sustained grievances in full and ordered the complainants restored to employment with retroactive compensation for the entire period of their unemployment.

The above citations illustrate that while arbitrators do not deny the employer the right to penalize workers who commit disloyal acts, they are careful to see that that authority has not been used in a capricious fashion. Before they generally hold discipline to be justified, they must be convinced that a deliberate and material indiscretion has been committed and that the offender can properly be held answerable, in the light of the surrounding circumstances, for that misconduct. It is to be noted that the firm adherence to these general principles is not limited to cases involving disloyalty. They served as the basis upon which penalties were sustained or modified for every form of dishonest conduct as well.

Notes for Chapter VI

1. General Motors Corp.-U.A.W., Dec. No. C-183, Dash (1944).

2. Isle Transportation Co.-S.E.R.M.C.E., 6 LA 958, Cole (1947).

3. United Hosiery Mills Corp.-A.F.M.W., 22 LA 573, Marshall (1954).

4. Cafe Romillon, Inc.-Waiters and Waitresses Union, 4 LA 726, Kaplan (1946);
   Coca-Cola Bottling Company of New York-I.B.T., 9 LA 197, Jacobs (1947);
   Amelia Earhart Luggage Co.-L.W.U., 11 LA 301, Lesser (1948);
   General Refractories Co.-U.B.C.W., 24 LA 470, Hale (1955).

5. International Harvester Co.-U.F.M.W., 17 LA 334, Seward (1951).

6. General Motors Corp.-U.A.W., Dec. No. C-183, Dash (1944).

7. General Motors Corp.-U.A.W., Dec. No. G-38, Alexander (1952);
   United States Rubber Co.-U.R.W., Dec. No. 101-K-1, Killingsworth (1954).

8. Boston Sausage & Provision Co.-U.P.W.A., 8 LA 483, Myers (1947);
   Waterfront Employer's Association of Pacific Coast-I.L.W.U., 8 LA 1061, Miller (1947);
   Ralph E. Myers Co.-I.F.T.A.W., 14 LA 437, Bernstein (1950).

9. Southern Indiana Gas & Electric Co.-S.E.R.M.C.E., 6 LA 89, McCoy (1946);
   Gorton Pew Fisheries-I.L.A., 15 LA 388, Seibel (1950).

10. North American Aviation, Inc.-P.G.W., 22 LA 313, Blair (1953).

11. Marlin Rockwell Corp.-U.A.W., 24 LA 728, Somers (1955);
    General Motors Corp.-U.A.W., Dec. No. B-84, Taylor (1941);
    General Motors Corp.-U.A.W., Dec. No. E-39, Seward (1946).

12. Minneapolis-Moline Power Implement Co.-U.E., 2 LA 418, Van Fossen (1946);
    Greenville Milling Co.-G.C.C.W., 10 LA 567, Greene, Milligan and Dannenburg (1948);
    John Deere Harvester Works-U.A.W., 10 LA 943, Updegraff (1948);
    American Saw & Tool Co.-I.A.M., 23 LA 534, Warns (1954);
    Phillips Petroleum Co.-O.C.A.W., 25 LA 568, Kadish (1955).

13. Rubberset Co.-B.B.F., 1 LA 471, Lewis (1945);
    John Deere Tractor Co.-U.A.W., 13 LA 606, Updegraff (1949);
    General Motors Corp.-U.A.W., Dec. No. C-126, Dash (1943).

14. Foote Bros. Gear & Machine Corp.-U.E., 2 LA 84, Epstein (1946); Lincoln Industries, Inc.-U.F.W., 19 LA 489, Barrett (1952).

15. Aviation Maintenance Corp.-I.A.M., 8 LA 261, Aaron (1947); North American Aviation, Inc.-U.A.W., 12 LA 225, Warren (1949); Celanese Corporation of America-U.M.W., 17 LA 187, Jaffee (1951); Ford Motor Co.-U.A.W., CK-5, Killingsworth (1955).

16. Chrysler Corp.-U.A.W., 14 LA 381, Wolff (1950); Deere Manufacturing Co.-U.A.W., 19 LA 203, Kelliher (1952); Ford Motor Co.-U.A.W., CK-58, Killingsworth (1956).

17. Univis Lens Co.-I.U.E., 11 LA 211, Lehoczky (1948); Bauer Bros. Co.-U.A.W., 15 LA 318, Klamon (1950); Lockheed Aircraft Corp.-I.A.M., 18 LA 733, Dworet (1952); Douglas Aircraft Co., Inc.-U.A.W., 19 LA 854, Merrill (1953).

18. Borg-Warner Corp.-U.F.M.W., 12 LA 207, Kelliher (1949); Sperry Corp.-I.U.E., 20 LA 23, Stack (1953); Lyon, Inc.-U.A.W., 24 LA 353, Alexander (1955).

19. Consolidated Western Steel Corp.-U.S.A., 13 LA 721, Pollard (1949).

20. Shell Oil Co.-O.C.A.W., 17 LA 274, 14 LA 274, McCoy (1950).

21. Foote Bros. Gear & Machine Corp.-U.E., 13 LA 848, Larkin (1949); see also, Cutter Laboratories-O.P.W., 15 LA 431, Wyckoff (1950).

22. Ford Motor Co.-U.A.W., Opinion A-184, Shulman (1945), Shulman and Chamberlain, Cases on Labor Relations, op. cit., pp. 466-468; see also, Aviation Maintenance Corp.-I.A.M., 8 LA 261, Aaron (1947); Bell Aircraft Corp.-U.A.W., 17 LA 230, Shister (1951); Duval Sulphur & Potash Co.-M.M.S.W., 21 LA 560, Merrill (1953); J. H. Day Co., Inc.-U.E., 22 LA 751, Taft (1954).

23. Quaker Shipyard & Machine Co.-I.U.M.S.W., 3 LA 490, Copelof (1946); Hayes Manufacturing Co.-U.A.W., 17 LA 412, Platt (1951); General Motors Corp.-U.A.W., Dec. No. F-66, Alexander (1949); Ford Motor Co.-U.A.W., CK-21, Killingsworth (1956).

24. Art Metal Works, Inc.-I.A.M., 8 LA 340, Kirsh (1947).

25. Glenn L. Martin Co.-U.A.W., 6 LA 500, Brecht (1947); General Motors Corp.-U.A.W., Dec. No. C-337, Seward (1945); United States Rubber Co.-U.R.W., Dec. No. 353-K-1, Killingsworth (1953).

26. Coca-Cola Bottling Company of New York-I.B.T., 7 LA 236, Feinberg (1947);
Youngstown Sheet & Tube Co.-U.S.A., Gr. No. 1-204-53, Luskin (1954).

27. Consolidated Western Steel Corp.-U.S.A., 13 LA 721, Pollard (1949);
Northwestern Bell Telephone Co.-C.W.A., 19 LA 111, Doyle (1952).

28. Carl Fisher, Inc.-I.A.T.S.E., 24 LA 624, Rosenfarb (1955).

29. Monolith-Portland Cement Co.-M.M.S.W., 3 LA 801, Cheney (1946).

30. E. B. Sewell Manufacturing Co.-U.S.A., 3 LA 113, Updegraff (1946).

31. Merrill-Stevens Dry Dock & Repair Co.-I.U.M.S.W., 6 LA 838, Marshall (1947);
Armen Berry Casting Co.-U.P.W.A., 17 LA 139, Smith (1950).

32. Four Wheel Drive Auto Co.-Associated Unions of America, 20 LA 823, Rauch (1953).

33. Southwestern Greyhound Lines, Inc.-S.E.R.M.C.E., 4 LA 337, Simkin (1946).

34. Enterprise & Century Garment Co.-I.L.G.W., 24 LA 63, Donnelly, Curry and Clark (1955).

35. Skelly Oil Co.-O.C.A.W., 19 LA 125, Granoff (1952).

36. Andrew Williams Meat Co.-M.C.B.W., 8 LA 518, Cheney (1947);
Borden Co.-I.B.T., 20 LA 483, Rubin (1953).

CHAPTER VII

NEGLIGENCE

The right of the employer to protect the efficiency of his firm carries with it the authority to discipline workers who fail in their obligation of efficient work performance. This chapter and the next deal with the arbitral review of the exercise of that authority for two types of employee behavior which detract from efficient production. The present chapter deals with negligence, the next with incompetence.

Employers insist that members of the workforce carry out their job assignments in a careful and diligent manner. Those who do not are subject to discipline when their acts of negligence either have resulted in or created a risk of personal injury or damage to company property. Scores of arbitration awards have upheld penalties on those grounds. In these, disciplinary measures ranging from warnings to discharges have been sustained on a showing of culpability on the part of the aggrieved and of the reasonableness of the assessment imposed. On the other hand a considerable number of awards where arbitrators have conceded the right of the employer to discipline for carelessness have nonetheless ruled similar penalties unjustified under a variety of circumstances. A review of both of these bodies of decisions permits a few generalizations concerning the right of the employer to advance negligence as cause for discipline and the standards of care to which employees may be held in their work-connected activities.

The first general tendency observed is that arbitrators show a noticeable hesitancy to restrict the employer's decision-making power in determining what acts of negligence do and what acts do not adversely affect efficiency. They do not, for example, require management to show untoward intent and realized damage as a condition for proper discipline. Arbitrators also recognize that because of the nature of the offense absolute proof of guilt is often difficult if not impossible to achieve. Therefore, they do not as a rule hold the employer to the heavy burdens of proof he was required to shoulder in the causes for discipline previously surveyed. These factors contribute to the relatively high proportion of awards which have been decided in management's favor.

Another observation of note is the tendency of arbitrators, occasionally explicitly but more often implicitly, to adopt and apply the legal principles governing the law of bailments. Just as courts in such proceedings distinguish between the differential duties and liabilities of individuals entrusted with the personal property of others, arbitrators hold workers responsible for varying degrees of care, of negligence and of guilt in the performance of industrial work. Employers cannot demand of their employees the impossible, that of human perfection. They can demand, however, that all employees must always use the reasonable and ordinary care that prudent men would be expected to show. If they do not exercise even this low level of "due care," they may be guilty of "ordinary negligence" and properly subject to discipline. Under certain conditions an employee may even be held to the exercise of extreme care. When this is the case and a worker fails to exhibit the

"extraordinary" level of care required of him, he may be guilty of "gross negligence" and again justly penalized. The degree of care required and the degree of negligence present when that care is not forthcoming depend on a number of variable factors. Most important of these are the nature of the employee's job, the amount of experience he has in that position, the instructions he has received, the manner in which he and others have performed that operation in the past, the mental attitude of the grievant at the time of the infraction, and the type and condition of the equipment used.

A third and final generalization involves the process by which arbitrators and employers determine just what penalties are appropriate for proven cases of negligence. In general, the greater the degree of care expected, but lacking, the more severe will be the infraction and, consequently, the discipline levied and upheld. However, the great majority of penalties are measures short of discharge with lay-offs of a few days predominating. In assessing whether the penalty in any particular case is proper, arbitrators attempt to weigh responsibility by inquiring into the substantive issues enumerated in the preceding paragraph. They also investigate any other factors tending toward mitigation or aggravation of the offense. For example, they look to the employee's prior disciplinary record, the extent of the damage or danger, the past practice of the employer, the physical condition of the worker, the motives of management in disciplining, and, of course, the contract, to ascertain if the penalty is consistent with its provisions. No one award embraces the application of all of these criteria,

but many include the application of several. Also, their impact, collectively as well as individually, is very uneven, with factors in extenuation playing a more determinative role in cases involving ordinary negligence than in cases where the negligence is gross and so unduly severe that it more than balances any mitigating factors which might be present.

The following discussion, the first portion of which deals with a review of arbitration awards involving ordinary negligence, will describe more fully the principles upon which these broad generalizations are based.

Ordinary Negligence

All employees are expected to exhibit at all times the reasonable care that a man of prudence would be expected to show. Thus, there is a positive and minimum level of care to which workers are held in their job performance. Arbitrators have borrowed from law the concept of "due or reasonable care" to serve as this objective standard of measurement. Under the application of this principle workers fail to use due care when they do not perform their jobs in the customary manner. If this failure is inadvertent, as a result of poor judgment or momentary inattention to their tasks, it constitutes "ordinary or simple" negligence.

Though arbitrators agree that ordinary negligence provides a just basis for discipline, they do not admit that acts of unintentional carelessness warrant an overly severe penalty. Operating under the theory that the penalty should fit the crime, the measures they consider appropriate for simple negligence are rather mild in nature, being

limited to warnings, reprimands, or at most brief suspensions. Numerous decisions have upheld such penalties. In these the employees had committed careless mistakes which were inconsistent with the degree of skill and judgment to which they could rightfully be held and the right of their employers to penalize them for their defaults was therefore affirmed. For such acts as driving a bus at an excessive speed,[1] producing an inordinate amount of scrap,[2] improper adjustment of equipment,[3] proceeding with an operation without proper instructions[4] or neglecting to heed instructions,[5] and failure to perform an essential duty[6] offenders have had minor penalties sustained in arbitration. In all of these cases the grievants thoughtlessly had failed to take due care when that obligation was inherent in their jobs. All were experienced workers. This alone was a sufficient basis upon which to hold them culpable. Some had been warned of carelessness before, but for others the lack of a prior warning did not preclude their disciplining. In some cases the damage resulting from their negligence was great; in others the fact that the damage was nominal, or only potential, or not even a factor did not suffice to mitigate their penalty. Even in those instances where mechanical defects in the equipment had been present and later were offered before an arbitrator as a defense against discipline, they were not held controlling where the grievants as competent workmen had failed to observe the defects promptly and take immediate corrective action. In these cases, also, the employer had not been required to substantiate his claim by incontestable proof of guilt. Sometimes he has done so, but this has not

been a necessary prerequisite to arbitral finding of cause for discipline. Many of the acts were unwitnessed and in some of these any tangible evidence of carelessness had been destroyed. In such cases arbiters have sustained penalties where only strong circumstantial evidence existed from which guilt could logically be inferred. The overall conclusion that may be drawn from the above citations and the many other awards where penalties have been upheld is that arbitrators permit management to exercise its discretion within rather broad limits as to the conditions under which it may levy minor penalties upon those who by their acts of ordinary negligence detract from the efficiency of the firm. They do not require the employer to take into account in his penalty determination factors which under circumstances such as those described below often play strong extenuating roles. A mere showing that the grievant has been guilty of not exercising reasonable care provides an adequate ground for mild discipline.

The proper exercise of that discretion by management is not completely unrestricted, however. It is subject to some limitations. One is that it does not extend to the imposition of penalties in an arbitrary manner, as for example, by the assessment of unduly harsh measures against those guilty of ordinary carelessness. Almost without exception arbitrators consider the measures most commonly invoked by employers for that cause, those of extended suspensions, demotions and discharges, to be excessive. They typically rule that such penalties do not meet the requirement that discipline be for just cause and, as a result, generally substitute penalties of a lesser order in their

stead. The reasons they consider strong penalties unjustified are many. One basic to many awards is that carelessness which is not willful in nature, being neither malicious nor premeditated, is not inherently a serious enough offense to warrant a severe penalty.[7] Though in these instances arbitrators grant that cause for some discipline existed, as proven by the fact that they do hold employees liable for unintentional carelessness, they are not willing to sustain severe penalty measures for that alone. They also mitigate many of the strongest disciplinary measures on the ground that extenuating factors were present to which the employers did not accord sufficient weight. It is interesting to note that many of the factors which lead to downward revision of severe penalties for ordinary negligence are the same ones which often were present but of no avail to the grievants in the cases where the discipline imposed was mild.

One of these mitigating influences is a good prior employment record by the grievant.[8] Another is a showing that the damage or loss to the employer as a result of the carelessness was slight.[9] An additional one is where the failure to exercise due care was at least in part, but not entirely, attributable to faulty equipment.[10] Either standing alone or in conjunction with another compelling reason for offering at least partial redress, each of these three has been persuasive in leading to reduction of many penalties for ordinary negligence. Nonetheless, a great many of the awards which have mitigated initial disciplinary measures have done so primarily on another ground, that the employer failed in an obligation which, in many cases,

contributed to the carelessness. Under such conditions it has been held unfair to hold the employee wholly responsible for the mistake and discipline him severely. Thus, grievants have had their penalties reduced when they have shown that the employer failed to give them clearcut instructions,[11] to provide them sufficient training on and time to adjust to a new job,[12] to give them a job which they were capable of performing,[13] to establish adequate safety procedures,[14] or to put them on notice by clear warning of the future consequences of carelessness.[15] A final influence which occasionally leads to an arbitrator offering partial relief to those who have failed to use reasonable care is evidence that there is an element of discrimination in the penalty, that the measures selected have been more severe than those received by others of comparable guilt.[16]

Apart from the decisions which have upheld the employer's disciplinary measures and those which have mitigated them, there exists a sizable body of awards in which penalties have been revoked. There are, in the main, two reasons for arbitrators taking such actions, either because discipline in their eyes appears unwarranted or because the employer selected as a penalty one which he was not privileged to invoke under the contract or in the light of his established past practice.

As to the first of these, the employer is frequently held in error in disciplining on the ground that he made an outright mistake of fact. Arbitrators in reviewing the circumstances of a case often conclude that the occurrence which gave rise to a penalty for carelessness was

not in reality caused by a lack of reasonable care on the part of the employee but rather was due to forces over which he had no control. Under these conditions the event will be held inevitable, an accident, and not due to negligence. Penalties based on the latter are, as a result, not allowed to stand.[17] In other awards discipline has also been rescinded as unwarranted where the employer has failed to establish carelessness with a reasonable degree of proof. Although arbitrators are willing to uphold penalties on circumstantial evidence, they will not do so unless it is conclusive. They reject penalties where guilt is based merely upon speculation, opinion or suggestion.[18] In such instances they resolve doubts in favor of the aggrieved and disallow penalties on the ground that the individual must be presumed innocent until he has been proven guilty.

A number of petitions for relief have been granted in full where it was the impropriety of the employer's conduct and not that of his employees which assumed crucial importance. If, for example, it can be shown that the imposition of discipline violated a long standing practice of allowing similar actions to go unpunished, the employer will not be permitted to assess penalties in the absence of clear proof that he had given warning that he would no longer tolerate such acts.[19] Nor will he be permitted to select as a penalty one which under the contract appears inappropriate as a disciplinary measure. Many arbitrators have held permanent and temporary demotions for simple negligence to be just such measures and with few exceptions[20] have revoked them in their entirety.[21]

The primary reason arbitrators have offered for disallowing demotions is that in the absence of an explicit contract provision providing for their use these penalties abridge the grievant's valid seniority rights under an agreement. They recognize also, however, that the use of these measures may create anomalous seniority situations for other employees as well, both for those in the classification from which the individual was transferred and for those in the group which he joined. In addition, they often offer other reasons for rejecting the use of each of the specific measures. They feel, for instance, that a permanent demotion is too severe a measure for simple carelessness, that because of its continuing nature it results in an excessive loss of earnings and position for what amounts to a minor offense. With respect to a temporary demotion of an uncertain duration, they state that because of its indeterminate nature, because of the doubt and uncertainty it raises in the aggrieved as to when he will have atoned for his offense as well as the opportunity it allows for management to exercise its discretion in an arbitrary manner, it should not be allowed to stand. As a consequence of these factors, arbitrators typically do not permit managements to employ demotions as discipline for carelessness, ordinary or other.

Gross Negligence

A charge of gross or extreme negligence levied against an employee connotes one of two things. It may imply, first of all, that the due care reasonably expected of a worker was heedlessly ignored and not even approximated. This may have been illustrated by the employee's

complete indifference to his job responsibilities by the use of extremely poor judgment, or by gross inattentiveness to duty. On the other hand, however, it may imply in other instances that a worker logically expected to exercise unusual or extraordinary care in his job performance inexcusably failed to do so. In either case the charge usually involves the claim that the act of negligence greatly endangered the safety of employee life or limb or that it exposed the employer to substantial property loss. If the charge of gross negligence is established in fact, it is regarded by arbitrators as an offense of a much higher order than ordinary negligence and deserving of a commensurately more severe penalty.

Among the conditions under which the lack of due care becomes so serious as to constitute gross negligence are found those cases where the conduct of the employee approaches willful and deliberate, though not necessarily malicious, destruction of company products or equipment. For such offenses as the wanton making of waste,[22] breaking of a machine in a fit of anger,[23] or the deliberate concealment of an error which did great damage to an aircraft wing,[24] the employees responsible have been held properly charged with extreme negligence and subject to dismissal. In addition to the above mistakes which indicated grievous errors of judgment, there have been others which more properly have represented gross inattentiveness to duty. Such was the case where an employee's excessive production of defective units over a two day period was held due to gross carelessness rather than simple inadvertence.[25] The same finding resulted on another occasion where the grievant

erroneously had reversed the types of fuel going into the proper compartments of a tank truck with a consequent great risk to the property of the firm and the lives of its employees, its customers and the public.[26] In both instances the failure to use due care was so pronounced that the discharges imposed were permitted to stand as levied.

Aside from these illustrations, however, the great bulk of cases involving gross negligence grow out of the failure of workers to use a higher level of care than ordinary care, a level which can be described as "exceptional or extraordinary care." A certain few workers in a firm, due to the inherent nature of their jobs, are always held to a higher level of care and a lower tolerance of error than are the majority of employees. Included in this group are inspectors and highly skilled craftsmen who, because of the serious consequences that are likely to follow an error on their part, assume a greater obligation for careful workmanship than do most other workers. Employers and arbitrators generally regard negligence by these individuals to be extreme rather than simple in nature, and as such, they feel it represents proper cause for a severe penalty - even to the discharge of the guilty parties. This is so irrespective of whether the negligence became gross by virtue of a single mistake or arose from a sequence of errors. One case in point is re General Metals Corporation.[27] In this decision two inspectors, their good previous records notwithstanding, were held justly discharged for gross negligence after they admittedly had failed to detect a serious defect in the casting they were examining with the result that many had to be scrapped at a considerable loss to

the company. In a pair of other awards, however, the serious neglect of duty by the two inspectors involved consisted of a series of careless acts which finally culminated into an offense warranting severe discipline. One of the grievants, twice warned previously for carelessness, was held discharged for cause after she omitted an important notation on a report and as a consequence, two lines of production had to be temporarily shut down.[28] The other inspector had been negligent on three different jobs on successive days and the arbitrator held this evidence of his irresponsibility to be a proper basis upon which to sustain his four-day layoff.[29]

A number of other awards have upheld similarly strong disciplinary measures levied upon skilled workers for carelessness inconsistent with the positions of trust they occupied. The temporary transfer of one crane operator from outside to inside work was sustained despite his long service record and conflicting evidence as to his negligence since the safety and welfare of other employees were at stake and sufficed to outweigh the unresolved doubts of guilt raised by the evidence.[30] Suspensions of approximately one week's duration have also occasionally been assessed and upheld for skilled workers who failed to fulfill a basic responsibility of their jobs.[31] Nevertheless, the penalty most frequently invoked and affirmed in these instances is the discharge of the offending worker. Such a penalty was upheld in the cases of a blue print machine operator for his gross negligence in permitting two expensive drawings to be destroyed,[32] a welder for performing the unsafe practice of plugging a weld,[33] a custom cutter of

chair covers for three costly errors over a two month period,[34] and for many others as well.[35] With respect to all of these awards where dismissals have been upheld, arbitrators have reasoned that acts of negligence on the part of skilled men are of so serious a nature that it would be unreasonable to interfere with the employer's judgment and award a lesser penalty, for to do so would unjustifiably require the employer to run the risk of their repetition.

In addition to the workers described above, those who hold down positions of great responsibility and are always expected to exhibit exceptional care, there may be others in the plant who although normally held only to the use of reasonable care, are also required, under special circumstances, to show especial care in their job performance. For instance, when a worker has been previously disciplined for carelessness or has been given specific instructions concerning the proper method in which to carry out his work assignments, employers typically look for him to use a higher level of care than would otherwise have been expected of him. If he is subsequently negligent his employer will likely regard his carelessness as gross in nature and worthy of discharge. Arbitrators have upheld such penalties under these conditions in a number of awards. One which typifies these decisions is the case of a textile worker who had a prior record of warnings and reprimands for negligence and had been instructed on how to run a sample lot of cloth through a starching machine. For some unexplained reason he ignored the instructions and performed the operation improperly, thus ruining the cloth and causing the company to lose both a large order and

one of its most important customers. He was held properly dismissed for gross negligence.[36]

In the great preponderance of cases in which a charge of gross negligence has been directed against employees, the offense alleged has been substantiated in fact, and penalties invoked on that basis have been upheld. On a relatively few occasions, however, arbitrators have determined the manner in which the disciplinary measures were assessed to be unreasonable or that the measures selected were unnecessarily severe. Sometimes, for example, arbitrators have held the employee to have been justly charged with extreme negligence and properly subject to the discharge penalty, but have found the employer to have flagrantly violated the contractual discharge procedure. In such cases they normally have sustained the dismissal and at the same time penalized the employer for his impropriety by a back pay award in favor of the aggrieved.[37] In somewhat the same vein, where the action taken by an employer has been found inconsistent with established way in which he had treated like violators in the past, grievants have been ordered reinstated with full or partial reimbursement for the period of unemployment.[38] It may tentatively be concluded from each of these sets of circumstances that arbitrators tend to be more protective of a worker's employment rights when there is an element of discrimination involved in his disciplining than when the defendant's sole claim to redress is based on a technical violation of the disciplinary procedure of an agreement.

Other penalties have been mitigated on the ground that the employer exaggerated the seriousness of the offense, either by failing to take into account in a case of aggravated negligence the extemuating factors present,[39] or by incorrectly labeling the carelessness as gross when more properly it should have been classed as ordinary in nature.[40]

Notes for Chapter VII

1. Pennsylvania Greyhound Lines-S.E.R.M.C.E., 20 LA 625, Smith (1953).

2. John Deere Tractor Co.-U.A.W., 13 LA 608, Updegraff (1949); General Motors Corp.-U.A.W., C-244, Seward (1944).

3. Bethlehem Steel Co.-U.S.A., Gr. No. 3981, Crawford (1953).

4. Pet Milk Co.-U.P.W.A., 13 LA 551, Hampton (1949); General Motors Corp.-U.A.W., B-36, Taylor (1941).

5. Bethlehem Steel Co.-U.S.A., Gr. No. 2401-6538, Killingsworth (1951); Bethlehem Steel Co.-U.S.A., Dec. No. 172, Seward (1955).

6. Corn Products Refining Co.-A.F.G.M., 21 LA 105, Gilden (1953); United States Steel Corp., Tennessee Coal and Iron Division-U.S.A., Gr. No. 151-1131, Garrett (1954).

7. Acme Limestone Co.-U.M.W., 6 LA 921, Dwyer (1947); Weyerhaeuser Timber Co.-I.A.M., 25 LA 634, Wyckoff (1955).

8. Nineteen Hundred Corp.-U.E., 6 LA 709, Ziegler (1946); Harbison-Walker Refractories Co.-S.A.P.W., 8 LA 290, Wagner (1947).

9. Florence Stove Co.-S.M.I.U., 19 LA 650, Noel (1952); United States Rubber Co.-U.R.W., Dec. No. 353-K-1, Killingsworth (1953).

10. General Controls Co.-Association of Machinists, Precision Lodge 1600 (Ind.), 8 LA 661, Prasow (1947).

11. Kraft Foods Co.-U.S.A., 15 LA 336, Elson (1950).

12. E. I. duPont de Nemours and Co.-U.T.W.A., 9 LA 345, Hepburn (1947); Evans Products Co.-U.S.A., 15 LA 769, Platt (1950).

13. In two cases arbitrators ruled that the mistakes were not the result of carelessness but of incompetency and replaced discharges with demotions. See Jarecki Machine and Tool Co.-U.A.W., 3 LA 40, Whiting (1946) and Glenn L. Martin Co.-U.A.W., 6 LA 500, Brecht (1947).

14. Armour and Co.-U.P.W.A., 8 LA 486, Gilden (1947).

15. Pequanoc Rubber Co.-U.R.W., 9 LA 422, Stein (1947); Torrington Coal and Oil Co.-I.B.T., 16 LA 290, Stutz, Mottram and Curry (1951).

16. Dwight Manufacturing Co.-T.W.U.A., 10 LA 786, McCoy (1948);
Gaylord Container Corp.-U.P.P., 12 LA 261, Johnnes (1949);
United States Rubber Co.-U.R.W., Dec. No. 353-K-2, Killingsworth (1953).

17. Ford Motor Co.-U.A.W., 6 LA 1007, Shulman (1946);
Modern Workshop, Inc.-U.F.W., 8 LA 710, Singer (1947).

18. Dri-Wear Fur Processing Co.-F.L.W., 8 LA 199, Justin (1947);
National Lead Co.-M.M.S.W., 11 LA 993, Carmichael (1948);
Tennessee Coal, Iron and Railroad Co.-U.S.A., 11 LA 1127, Seward, Levitsky and Kelly (1948);
Bethlehem Steel Co.-U.S.A., Gr. No. 2367-5833, Killingsworth (1951).

19. Alan Wood Steel Co.-U.S.A., 3 LA 557, Brandschain (1946);
Southern Indiana Gas and Electric Co.-S.E.R.M.C.E., 6 LA 89, McCoy (1946).

20. Dewey and Almy Chemical Co.-U.A.W., 25 LA 316, Somers (1955);
Republic Steel Corp.-U.S.A., 25 LA 733, Platt (1955).

21. American Steel and Wire Co.-U.S.A., 6 LA 379, Blumer (1946);
Kelly-Springfield Tire Co.-U.R.W., 9 LA 480, Blair (1947);
Boeing Airplane Co.-I.A.M., 23 LA 252, Kelliher (1954);
Goodyear Atomic Corp.-O.C.A.W., 25 LA 736, Kelliher (1955).

22. Full Fashioned Hosiery Manufacturers of America-A.F.H.W., Shulman and Chamberlain, op. cit., pp. 437-439, Taylor (1936).

23. Bryant Heater Co.-U.A.W., 3 LA 346, Whiting (1946).

24. Glenn L. Martin Co.-U.A.W., 6 LA 500, Brecht (1947).

25. National Lead Co.-M.M.S.W., 13 LA 28, Prasow (1949).

26. Standard Oil Co. (Indiana)-Central States Petroleum Union, 14 LA 516, Platt (1950).

27. General Metals Corp.-I.A.M., 25 LA 323, Gaffey (1955);
See also Autocar Co.-U.A.W., 19 LA 89, Jaffee (1952).

28. Grayson Heat Control, Ltd.-U.E., 2 LA 335, Prasow (1945).

29. Standard Forgings Co.-U.S.A., 6 LA 55, Larkin (1946).

30. McLouth Steel Corp.-U.S.A., 1 LA 238, Platt (1945).

31. General Motors Corp.-U.A.W., E-179, Seward (1947);
Bethlehem Steel Co.-U.S.A., Gr.'s No.'s 5446, 5447, 5448, Killingsworth (1949).

32. General Motors Corp.-U.A.W., C-337, Seward (1945).

33. Valley Steel Casting Co.-U.S.A., 22 LA 520, Howlett (1954).

34. Indianapolis Chair Co.-U.I.U., 20 LA 706, Mann (1953).

35. See for example: Pan American Airways, Inc.-A.L.P.A., 11 LA 62, Broadwin (1948);
Pennsylvania Greyhound Lines, Inc.-S.E.R.M.C.E., 19 LA 210, Seward (1952);
Dravo Corp.-I.U.M.S.W., 15 LA 282, Crawford (1950).

36. Great Falls Bleachery and Dye Works-U.T.W.A., 15 LA 538, Wallen (1949);
See also: Ideal Cement Co.-I.A.M., 21 LA 314, Williams (1953) and
National Petro-Chemicals Corp.-Petro Independent Union, 25 LA 235, Fitzgerald (1955).

37. National Lead Co.-M.M.S.W., 13 LA 28, Prasow (1949);
Kohler Bros. Sand and Gravel Co.-I.B.T., 25 LA 903, Anderson (1956).
However for two awards where the employer's violation was not considered serious enough to mitigate his disciplinary action see:
Full Fashioned Hosiery Manufacturers of America, loc. cit. (company failed to notify shop committee prior to grievant's discharge); and
Bethlehem Steel Co.-U.S.A., Gr. No. 570, Killingsworth (1945) (employee denied access to Step 1 of grievance procedure before he was discharged and evicted from company premises).

38. Curtis-Wright Corp.-U.A.W., 11 LA 139, Uible (1948);
Goodyear Decatur Mills-U.T.W.A., 12 LA 682, McCoy (1949);
Aleo Manufacturing Co.-T.W.U.A., 15 LA 715, Jaffee (1950).

39. Vickers, Inc.-U.E., 6 LA 663, Ziegler (1947) (no prior incidents of carelessness on long service record);
Bethlehem Steel Co.-U.S.A., Gr. No. 7975, Selekman (1950) (only slight damage).

40. General Controls Co.-I.A.M., 11 LA 722, Pollard (1948);
Florence Stove Co.-S.M.I.U., 19 LA 650, Noel (1952).

CHAPTER VIII

INCOMPETENCE

Incompetency implies a lack of ability on the part of an employee to perform his job assignments in a satisfactory manner. In a strict literal sense it may be differentiated from inefficiency, which more properly connotes the failure of a worker to apply the talents he presumably possesses. Seldom, however, is such a distinction made by arbitrators. Since both result in poor work performance, and because of the difficulties generally encountered in most cases in identifying which cause is at fault, arbitrators in practice use the terms somewhat interchangeably, with that of incompetence clearly predominating.

In spite of the fact that alleged incompetence on the part of employees is one of the most common causes for discipline advanced by management in arbitration, arbitrators have found such disputes to be among the difficult of all to settle. Though they agree with the principle that incompetency provides a proper basis for disciplinary action, they have frequently found the problem of determining the presence or absence of cause, and if the former, the reasonableness of a given penalty, an extremely troublesome one. This problem has not proved acute where employers have been able to substantiate their claims by clear and objective proof of guilt. Where they have been able to do so, as by the submission of conclusive production data or medical evidence of inability, and where extenuating factors reflecting in the grievant's

favor have been conspicuously absent, the right of management to dismiss, downgrade or otherwise severely discipline the employees involved seldom has been questioned by arbitrators. Nor has the determination of the justness of penalties proved a serious problem in cases at the other extreme, as, for example, where employers have noticeably fallen down in their burdens of proof or have clearly made outright errors of discretion. In such cases the disciplinary actions are generally reversed as arbitrary and unwarranted and the complainants reinstated in their former positions and made whole. But such clear-cut cases are in a definite minority. The great majority of cases lie between these two poles and it is among this group, those where the merits of the dispute are not clearly evident, that arbitrators encounter difficulties in reaching their decisions.

One primary source of difficulty lies in the fact that in many cases the character of the proof offered by management implies but falls short of clearly and objectively establishing guilt. Oftentimes, arbitrators find the charge has been predicated almost solely, if not entirely, on the judgment of management and is not susceptible to statistical or other objective verification. This in itself is not, as a rule, taken by arbitrators as a sufficient basis upon which to disallow the employer's action. They recognize that the nature and degree of the offense frequently do not lend themselves to precise measurement and feel that to restrict management's right to discipline for incompetence to those instances where absolute proof is present would prove an unduly burdensome restraint on the employer's right to manage. At

the same time, however, they recognize also their obligation to protect the right of the employee to job security unless he has forfeited that right by his unacceptable work performance. The problem then becomes one of determining whose right shall prevail. To arrive at a just verdict where the evidence is inconclusive, arbitrators appear to give precedence to one criterion: did the employer act in apparent good faith and without haste within his contractual authority? If he did, and no extenuating factors in the employee's favor are present, there is a strong tendency to resolve the reasonable doubt in favor of management. This is generally so regardless of the nature of the penalty. Controlling in the arbitrator's reasoning is the necessity to protect the reasonable exercise of managerial discretion in making decisions relating to the survival of the firm and the jobs of the work force.

Seldom, however, are there cases where the situation is not complicated by the existence of one or more mitigating influences. Their presence in turn gives rise to a second major source of difficulty: the necessity to review and weigh the reasonableness of the penalty in the light of surrounding circumstances. The factors most commonly encountered include a long service record with the company or in the position which the worker has been judged incapable of filling, a clear or reasonably clear disciplinary record, the lack of adequate warning notice prior to the imposition of severe discipline, the claim that management was in one way or another partly or wholly at fault for the low output or poor work, or that the employer has in some manner discriminated against the aggrieved. Occasionally the presence of one or

more of these extenuating factors does not warrant altering the employer's action. More often than not, however, it does, and this in large part accounts for the numerous awards which have reduced or rescinded penalties.

It is the purpose of this chapter to discuss in detail the conditions under which penalties have been upheld or modified. This will involve a description of the major causes of inadequate work performance, the character and probative value of the evidence commonly offered by the parties to the dispute, and the standards which arbitrators commonly apply in their review process. The subject matter will be divided into two sections, the first dealing with those cases in which a claim of technical incompetency underlies the disciplinary action, and the second where a charge of physical inability is involved.

Technical Incompetence

A worker may demonstrate his inability to perform capably in a number of ways, all of which reflect the broad scope of the term incompetence. He may be guilty of perennially poor quality workmanship, of continuously being unable to achieve adequate levels of output, of responsibility for a series of accidents, or of evidencing over time an indifferent or uncooperative attitude. When these deficiencies are attributable to a lack of the skills required in the position he occupies or to a temperament unsuited for accepting his obligations, rather than to a physical incapacity, such inability may be classed as technical incompetency.

The right of the employer to discipline for this cause is well established. Arbitrators recognize and adhere to the axiom that an employer has a perfect right to expect from his employees a "fair day's work for a fair day's pay," and that if a worker is technically unable to achieve reasonable or fair work standards, the employer may justifiably and permanently relieve him of his job duties. Proof of lack of qualifications, thus of just cause for discipline, is usually established by showing first, that the level of work performance expected was reasonable, and second, that the worker's performance qualitatively or quantitatively fell short of this standard.

Probably the easiest way for the employer to establish to the arbitrator's satisfaction that the standards were fair is to show that they were set by joint agreement, either contractually with the union[1] or explicitly with the individual employee involved.[2] Agreement as to the propriety of the standards may also be inferred, however. Where, though they were set unilaterally by the employer, the union has failed to challenge either the introduction of the standards themselves or their application when disciplinary measures were levied for failure to achieve them,[3] or itself has warned the employee about the potential consequences of his continued substandard work performance,[4] management and arbitrators may assume implicit agreement as to their reasonableness.

In most cases, however, management will attempt to establish the fairness of work loads, not on the basis of agreement, but on the basis of achievement. Where objective standards have been established, the employer often will relate the normal accomplishment level of others in

the aggrieved's classification to their own specific standard.[5] If substantial achievement of this objective by those in the group can be shown, management will have established a strong presumption in favor of the reasonableness of the standard. If explicit standards have not been determined the task is more difficult, but not impossible. In such instances a standard of performance may be determined in either of two ways. One is to use the average level of quantity or quality achieved by those performing work comparable to that of the allegedly incompetent employee.[6] The other, one sometimes employed where there has been a significant drop in the grievant's normal performance, is to use the employee's formerly acceptable achievement level as the standard.[7] Each of these methods of arriving at a standard has proven acceptable in arbitration as evidence of a reasonable procedure.

Once the fairness of the standard is established, proof that the employee lacked the qualifications required in his job usually is shown by comparing his actual work attainment with the level expected. In the majority of awards which have upheld the employer's disciplinary action, management has been able to submit production records, work samples or credible testimony showing conclusively first, that the employee failed by a substantial margin and over a reasonable period of time to achieve this standard, and second, that this failure was due to the inherent inability, indifference or uncooperative attitude of the grievant, and not to factors beyond his control.[8] In many of these instances they have strengthened their case by additionally showing the presence of one or more aggravating factors. These include proof that the employee,

because of the responsible nature of his job, could properly be held to a superior level of performance,[9] that substantial or potential property loss[10] or risk to life or limb[11] did or could result from the worker's inefficiency, that the employee had been adequately warned and had been given ample opportunity to improve,[12] or that adverse business conditions necessarily put a premium on competency.[13] Where such evidence of guilt and cause for the penalty assessed have existed, even the presence of mitigating influences oftentimes influential in bringing the grievant relief, such as a long and previously good employment record with the firm,[14] the lack of prior and appropriate notice of his shortcomings,[15] lax supervision or inspection,[16] personal troubles originating outside his employment,[17] a technical violation of the contract by the employer,[18] or the absence of a single specific incident itself warranting severe discipline,[19] has proved to be of no avail to the worker.

The right of the employer to discipline for technical incompetency, however, is not limited solely to those cases in which he can determine and enforce objective and reasonable standards of work performance or offer incontestable proof of cause for disciplining. For one thing, the very nature of certain job assignments necessitates that the standard be largely subjective in character.[20] Where this is so, the contention that the employee's performance has fallen short of a reasonable standard is more difficult to evaluate. It does not follow, however, that management is necessarily precluded from penalizing employees for technical incompetence. A number of arbitrators have held that where the employer has established at least a <u>prima facie</u> case for discipline, and no

evidence of bad faith or error is present to indicate an unfair exercise of authority by management, the arbitrator is not free to substitute his judgment for that of the employer.[21] As a consequence they have resolved reasonable doubt as to an employee's ability in favor of management and sustained the discharge or demotion of the aggrieved.

The wide discretion given the employer in the exercise of this right is further and more clearly illustrated in the rather special case of probationary employees. A worker assumes a probationary or trial status in one of two ways, either as a newly hired worker seeking to establish his qualifications for permanent employment, or, if a regular employee, by being promoted to a more responsible position. In either case he is commonly given a time period within which he is expected to achieve an acceptable level of proficiency. Often the contract will give the employer the absolute right to determine without recourse to appeal whether the employee will develop into a satisfactory worker. But in a number of instances, where the contract either has been silent on the issue or specifically brought the employee in question under the protection of a "for cause" clause, arbitrators have been called upon to determine the limits of the employer's disciplinary authority with respect to probationary employees. In such cases they have favored a liberal construction of the contract and upheld discharges for new employees,[22] and demotions for others,[23] on the grounds that the employer must be afforded even greater than usual leeway in enforcing decisions concerning the ability of employees on trial.

In spite of the numerous awards which have verified cause for discipline and upheld the propriety of the disciplinary measures selected by the employer, it nonetheless remains a fact that a far greater number have found reason to modify or reverse the challenged action. In the great preponderance of those cases in which penalties have been mitigated in severity, the charge of incompetence on the part of the worker has been established to the arbitrator's satisfaction. Under such circumstances the cause for mitigation therefore had to be material and substantial. Invariably it has involved the failure by the employer to honor an essential obligation and to recognize and allow for this deficiency in his penalty determination.

One responsibility often violated by management has been that of giving employees a fair chance to prove their capabilities. Arbitrators have held that workers had not had that chance, and implicitly that the employer actually had contributed to their poor work performance, where the aggrieved employees had been burdened with excessive duties,[24] had never been given explicit instructions as to what was expected of them,[25] or had not been informed by proper notice of the employer's dissatisfaction with the quantity or quality of their output.[26] Also, as in any disciplinary arbitration, employers are found to have failed in a responsibility where they have circumvented the due process procedures granted workers under a collective bargaining contract.[27] Each of these failures has been held to represent sufficient cause for modification of the penalties assessed upon employees otherwise properly disciplined for incompetency. As a rule in such situations arbitrators

have restored the worker to his former position but withheld back pay in full or in large part. Additionally, they have frequently conditioned the worker's re-employment right on his successful attainment of an acceptable level of achievement during a stipulated trial period. In arriving at these determinations, arbitrators appear to have been influenced by two considerations, the necessity to impress management to use their authority in a reasonable manner while at the same time to penalize the worker for his culpability in a serious offense. Thus they have ruled that where mutual fault existed, the parties should share in the damages.

In sharp contrast to the above citations in which workers lacking in skill or aptitude were held responsible and disciplined for their poor workmanship stand those many cases in which arbitrators have ruled discipline in any form to be without cause and have granted complete redress to the aggrieved. One clear basis for such an action has been a finding that the proof of guilt offered was wholly without substance.[28] Another has been that the composite evidence actually refuted the charge.[29] In either case a clear error of fact had been made by the employer. As a consequence arbitrators therefore have rescinded the employer's penalty action as arbitrary and unjust and made the grievants whole.

In another sizable body of awards, however, largely those characterized by widely divergent and almost irreconcilable conflicts in the evidence, arbitrators have based their decisions to rescind penalties on the ground that more than reasonable doubt existed in their minds

that the employee was truly incapable. For example, if the employee had recently and successfully survived his probationary period without dismissal,[30] had long years of service with the company and more particularly in the position in question without previously registered complaints as to his ability,[31] or had recently received from his employer warm compliments or strong recommendations attesting to his capability,[32] arbitrators have held such evidence to be inconsistent with the charge of inability, if not almost patent proof of competence. At a bare minimum, at least in the absence of substantial proof of inability, it has sufficed to cast serious doubt as to the propriety of the disciplinary penalty. On this basis arbitrators have revoked the penalty measures and reinstated the grievants in their former positions with reimbursement for any wages lost.

The same degree of doubt of incompetency has resulted in identical awards in other circumstances as well, as where positive identification of intermingled work was impossible,[33] where the work deficiencies could just as likely be explained by influences over which the employee had no power,[34] or where a strong indication of an element of discrimination has been present and suggested an improper motive on the part of management in disciplining.[35] The language of these decisions, although not in so many words, nevertheless leave the impression that in reality the arbitrators involved are giving each of the parties another chance, and a warning. To the employee they are offering the opportunity to prove his qualifications with the implication that the award is to serve as a notice he will be on trial. At the same time they

are granting the employer the chance to raise the issue again in the future with the present decision pointing out the necessity to use his disciplinary authority in a reasonable and consistent manner, and only for cause.

Physical Inability

Physical inability on the part of an employee to perform competently has often been alleged by management as a proper basis for discharge or demotion. Though in these instances the removal of such a worker from the job he occupied is more a remedial and protective measure than disciplinary in nature, the end effect is essentially the same. In either case individuals are disqualified, in part or in full, from the continued exercise of their contractual job rights. For this reason, arbitrators, when charged with determining the propriety of such measures, insist on a clear showing of good and just cause as a condition for sustaining the employer's action.

One condition which arbitrators have regarded as decisive is a showing by management that the continued employment of a disabled worker in the position from which he has been removed might reasonably be expected to result in a serious accident. Where such a mishap would in all probability not only adversely affect the continuity and efficiency of production but, more importantly, would also endanger the safety of the grievant or his fellow workers, arbitrators have recognized the presence of cause for corrective action. Thus an aging employee who increasingly made damaging and dangerous mistakes,[36] another employee who admittedly was physically unable to refrain from falling down,[37]

one who was periodically subject to epileptic seizures,[38] and another who had a partially disabling brain tumor operation[39] were all held to be accident risks and justly dismissed or downgraded in the interest of efficiency and safety. One of the arbitrators additionally justified his award by noting his obligation to sustain reasonable managerial actions designed to comply with and avoid the heavy financial liabilities of Workman's Compensation laws.[40]

Conclusive medical evidence attesting to the physical incapacity of the grievant to perform the duties of his position has also proven a sufficient basis for relieving him of his job responsibilities. Generally in these instances the employee has been directed by his employer to submit to a medical examination and has been found no longer physically qualified for his job.[41] It is interesting to note here two additional possibilities which grow out of such a requirement, one being the refusal of the worker to take the examination, and the other a contrary ruling by the employee's private physician. In the single case where the former occurred the employee was nonetheless found incapacitated on the evidence at hand and the discharge was upheld.[42] In the second instance, the arbitrator resolved the conflicting evidence by appointing a third medical examiner and then based his award upholding the compulsory retirement of the aged worker on the majority finding of disability.[43]

Employers have also sustained their burden of proof by showing a direct and causal relationship between the employee's poor work record and his mental or physical handicap. In most of these cases the worker's

performance has been far below an acceptable standard for an extended time and his discharge was preceded by several attempts to place him in a position he was capable of filling,[44] numerous warnings of his shortcomings,[45] or by a deliberate refusal to take reasonable corrective measures to compensate for his physical impairment.[46] Under these circumstances the justification of even such a severe measure as termination has been established beyond doubt in the eyes of the arbitrator.

In the majority of arbitrations where physical incapacity has been alleged of a worker, management has been held unable to offer adequate proof of the existence of a physical handicap or the unfitness for employment of one suffering from a disability. Often this has been due to the employer's failure to provide competent medical testimony in support of his case.[47] This has especially been so in the face of statements from the employee's personal doctor either absolutely refuting the existence of the claimed impairment or attesting to the non-disabling character of his infirmity.[48] The employer has also failed in his burden of proof where the medical information he did offer was inadequate and incomplete, or was improperly interpreted. In one instance a discharge was held premature and unjustified where the evidence consisted only of the company physician's written statement that the employee was incapacitated without any explanation of the basis for that conclusion.[49] The same result was reached in another dispute where the company doctor was held to have recommended merely that the employee not work at assignments that would aggravate his lung condition, not that he be discharged as unsuited for employment.[50]

On other occasions the sufficiency of medical evidence of incompetency, or even of an existing handicap, have not been matters at issue. Instead the critical questions have been, did the work record of the grievant prove him incompetent and if so, did it disqualify him from employment? An affirmative finding on the first question has not automatically resulted in a like answer to the second query. This has been clearly shown in those disputes that have involved long service employees, many of whom were in advanced years. Although it may have been true that their work performance had deteriorated sharply, and perhaps was below the employment standards presently required of new employees, arbitrators as a rule have not permitted those with at least satisfactory past records to be summarily discharged. They have felt such an action would have unjustifiably voided the seniority rights accumulated under and, specifically or by intent, protected by the collective agreement. Thus they have set aside dismissals and restored the worker's seniority while at the same time allowing for their declining competence by reducing their wage rate,[51] or by permitting layoffs until a position suitable to their capabilities opens.[52]

On the other hand, where a review of the employee's work record fails to establish physical inability arbitrators have not allowed penalties to stand. The allegation of one employer that because a senior employee did not perform as expected he was physically incapable of doing the job was not held a sufficient basis upon which to invoke a suspension. The arbitrator ruled this worker's qualifications had been proven over the years and that his failure showed the task assigned him

was a physical impossibility, not that he was physically incompetent.[53] On this basis he ordered the employee be reimbursed for the period of his layoff. Another arbitrator found that while the employer did not adequately establish his case of inefficiency on the part of an elderly employee whose work had never been criticized before, and that therefore his discharge was unfair, doubt nevertheless did exist that following an illness the employee would be able to re-establish his competence. While the umpire granted back pay for the period the worker was denied work, he made permanent reinstatement subject to acceptable performance during a two week trial period.[54]

Lastly, even where a physical defect admittedly has existed for some time, without convincing evidence of its detrimental effect on the worker's efficiency during that period, the handicap alone has not proven a proper basis for discipline. If the defect antedated employment and was known at the time of hire[55] or had never been the source of prior dissatisfaction,[56] the continued employment of the employee has been accepted as proof of his physical capacity and the later decision to discharge him held to be an injustice. Workers so disciplined have had their job rights restored and have received retroactive compensation.

Notes for Chapter VIII

1. Standard-Coosa-Thacher Co.-T.W.U.A., 10 LA 217, Marshall (1948); Dwight Manufacturing Co.-T.W.U.A., 13 LA 874, Marshall (1949).

2. General Motors Corp.-U.A.W., Dec. No. B-136, Dash (1942).

3. Fruehauf Trailer Co.-U.A.W., 20 LA 854, Dworet (1953); Youngstown Sheet and Tube Co.-U.S.A., Gr. No.'s 1-149-53, 1-66-53, Larkin (1954).

4. Michigan Contracting Corp.-I.B.T., 2 LA 630, Whiting (1946); January & Wood Co.-T.W.U.A., 6 LA 7, Schwab (1946).

5. Ohio Steel Foundry Co.-U.A.W., 8 LA 580, Hampton (1947); Timm Industries, Inc.-I.A.M., 11 LA 308, Prasow (1948).

6. International Shoe Co.-B.S.W., 15 LA 398, Myers (1950); Weber Aircraft Corp.-I.A.M., 22 LA 23, Hildebrand (1953).

7. Northwest Airlines, Inc.-A.L.P.S., 18 LA 656, Robertson, Floan and Whyatt (1952).

8. A sampling of these awards includes:
Bethlehem Steel Co.-U.S.A., 7 LA 163, Killingsworth (1947);
International Shoe Co.-U.S.W., 7 LA 191, Updegraff (1947);
Cannon Electric Co.-U.A.W., 18 LA 363, Warren (1952);
National Tube Co.-U.S.A., Case No. N-110, Seward (1949).

9. Michigan Contracting Corp.-I.B.T., 2 LA 630, Whiting (1946) (union steward);
Brunswick-Balke-Collender Co.-C.J.A., 9 LA 165, Latture, Neel and Searson (1948) (inspector);
Rite Way Launderers & Cleaners-L.D.C., 11 LA 353, Lindquist (1948) (foreman);
Standard X-Ray Co.-U.E., 18 LA 282, Mogul (1952) (watchman).

10. Monsanto Chemical Co.-U.M.W., 12 LA 266, Jaffee (1948); Bethlehem Steel Co.-U.S.A., Dec. No. 231, Seward (1956).

11. Bethlehem Steel Co.-U.S.A., Dec. No. HHP 6, Platt (1954); Youngstown Sheet & Tube Co.-U.S.A., Gr. No.'s 1-149-53, 1-66-53, Larkin (1954).

12. Kaiser Co., Inc.-U.S.A., 4 LA 346, Allen (1946); Atwood & Morrill Co.-U.E., 23 LA 652, White (1954).

13. Dow Chemical Co.-O.C.A.W., 12 LA 1061, Pollard, Nicholas and Russell (1949).

14. Timm Industries, Inc.-I.A.M., 11 LA 308, Prasow (1948);
Northwest Airlines, Inc.-A.L.P.S., 18 LA 656, Robertson, Floan and Whyatt (1952).

15. Shwayder Bros., Inc.-I.F.L.W., 7 LA 552, Whiting (1947);
Connecticut Power Co.-I.B.E.W., 18 LA 457, Donnelly, Mottram and Curry (1952).

16. Pierce Governor Co., Inc.-U.A.W., 8 LA 541, Hampton (1947).

17. Moccasin Bushing Co.-I.A.M., 14 LA 380, Forrester (1950);
Table Products Co.-O.C.A.W., 23 LA 217, Abernethy (1954).

18. Hudson County Bus Owners Association-S.E.R.M.C.E., 3 LA 786, Lesser (1946).

19. Electronic Corporation of America-U.E., 3 LA 217, Kaplan (1946).

20. In creative work like newspaper reporting for example. See:
Bakersfield Press-A.N.G., 13 LA 865, Komaroff (1949);
Pathfinder Magazine-A.N.G., 14 LA 307, Colby (1949);
Los Angeles Evening Herald & Express-A.N.G., 20 LA 353, Komaroff (1953).

21. Ibid; see also: Owl Drug Co.-I.L.W.U., 10 LA 498, Pollard (1948).

22. Grey Advertising Agency, Inc.-O.P.W., 7 LA 107, Feinburg (1947);
Ex-Cell-O Corp.-U.A.W., 21 LA 659, Smith (1953);

23. E. I. duPont de Nemours and Co.-Federal Labor Union No. 21754, Morris (1955).

24. Godwin Realty Corp.-B.S.E., 4 LA 486, Singer (1946);
Barbet Mills, Inc.-T.W.U.A., 19 LA 677, Maggs (1952).

25. RPM Manufacturing Co.-U.A.W., 19 LA 151, Klamon (1952);
Bethlehem Steel Co.-U.S.A., Gr. No. 1406-25, Shipman (1948).

26. Capitol Counter Display Co.-U.F.W., 6 LA 976, Singer (1947);
Fontaine Converting Works-T.W.U.A., 24 LA 555, Marshall (1955);
Bethlehem Steel Co.-U.S.A., Gr. No. 1159, Killingsworth (1948).

27. Master Electric Co.-U.E., 5 LA 339, Hampton (1946);
Acme Limestone Co.-U.M.W., 6 LA 921, Dwyer (1947);
American Lead Corp.-M.M.S.W., 8 LA 748, Hampton, Hagstrom and Raub (1947).

28. Gaylord Container Corp.-R.W.D.S.U., 10 LA 439, Naggi (1948);
Torrington Co.-I.U.M.S.W., 13 LA 323, Stutz, Mottram and Sviridoff (1949).

29. Harvill New England Corp.-I.A.M., 11 LA 785, Healy (1948);
Bassick Co.-I.U.E., 21 LA 637, Maggs (1953).

30. Neches Butame Products Co.-O.C.A.W., 5 LA 307, Carmichael (1946);
United States Pipe and Foundry Co.-I.A.M., 10 LA 48, McCoy (1948).

31. North American Aviation, Inc.-U.A.W., 17 LA 784, Komaroff (1952);
United Airlines, Inc.-A.L.P.A., 19 LA 585, McCoy (1952).

32. Daily World Publishing Co.-Newspaper Guild of Philadelphia, 3 LA 815, Rogers (1946);
Daniels-Kummer Engraving Co.-M.E.U., 10 LA 178, Feinsinger (1948);
Bakersfield Press-A.N.G., 13 LA 865, Komaroff (1949).

33. Tri-United Plastics Corp.-G.C.C.W., 2 LA 398, Brown (1946).

34. Alan Wood Steel Co.-U.S.A., 4 LA 52, Brandschain (1946);
Borden Co.-I.B.T., 20 LA 483, Rubin (1953);
Russell Creamery Co.-Milk Drivers and Dairy Employees Union, No. 32, 21 LA 293, Cheit (1953).

35. Ford Motor Co.-Foreman's Association of America, 7 LA 426, Babcock (1947);
Stenchever's of Hackensack, Inc.-R.W.D.S., 7 LA 922, Reynolds (1947);
International Register Co.-U.E., 8 LA 285, Kelliher (1947).

36. Carnegie-Illinois Steel Corp.-U.S.A., 17 LA 328, Morgan (1951).

37. Pacific Mills-T.W.U.A., 2 LA 326, McCoy (1945).

38. PM Industries-G.C.C.W., 19 LA 506, Donnelly, Mottram and Curry (1952);
see also Pittsburgh Plate Glass Co.-G.C.S.W., 8 LA 317, Blair (1947).

39. Ideal Cement Co.-C.L.G.W., 20 LA 480, Merrill (1953).

40. Ibid.

41. General Cable Corp.-I.B.E.W., 3 LA 506, Wardlaw (1946).

42. Ibid.

43. Carnegie-Illinois Steel Corp.-U.S.A., 5 LA 179, Blumer, Kelly and Maurice (1946);
Instant Milk Co.-I.B.T., 24 LA 756, Anderson (1955).

44. Whitin Machine Works-U.S.A., 10 LA 707, Healy (1948);
Sager Lock Works-U.S.A., 12 LA 495, Baab (1949).

45. Singer Manufacturing Co.-I.U.E., 18 LA 552, Cahn (1952).

46. Ben Myers Co.-A.C.W.A., 12 LA 599, Selekman (1949).

47. Standard Oil Co. of California-Independent Union of Petroleum Workers, 18 LA 889, Pollard, Miles and Maguire (1952);
Carnegie-Illinois Steel Corp.-U.S.A., Case No. C.I.-141, Seward (1949).

48. Linear, Inc.-U.R.W., 14 LA 855, Appleby (1950);
Barre Wool Combing Co.-T.W.U.A., 15 LA 257, Wallen (1949);
Beaunit Mills, Inc.-U.T.W.A., 20 LA 784, Williams (1953).

49. American Iron and Machine Works Co.-I.A.M., 19 LA 417, Merrill (1952).

50. American Radiator & Standard Sanitary Corp.-U.S.A., 2 LA 245, Blair (1946).

51. Dandy Mattress Corp.-U.F.W., 12 LA 34, Scheiber (1949).

52. Eagle-Picher Mining and Smelting Co.-M.M.S.W., 6 LA 544, Elson (1947);
Dodge Cork Co.-U.R.W., 8 LA 250, Brandschain (1947).

53. Armour & Co.-U.P.W.A., 9 LA 828, Gilden (1948).

54. Miller & Hart, Inc.-U.P.W.A., 15 LA 300, Kelliher (1950); for similar decisions, see also:
Rock Hill Printing & Finishing Co.-T.W.U.A., 19 LA 189, Jaffee (1952), and
International Harvester Co.-U.A.W., 24 LA 229, Cole (1955).

55. General Cable Corp.-I.B.E.W., 3 LA 506, Wardlaw (1946).

56. Cannon Electric Co.-U.A.W., 21 LA 1, Jones (1953);
Connecticut Telephone & Electric Corp.-I.U.E., 22 LA 632, Wallen (1954).

CHAPTER IX

INSUBORDINATION

Firmly established in custom and widely acknowledged by contractual provision is the right of the employer to direct the working force, schedule production and determine working conditions. Management thus has the authority to make job assignments, to prescribe work methods and to set standards of work performance and employee behavior. The only restriction placed on management in its determination of these matters is that it exercise its authority fairly and without prejudice to the rights of employees created by the collective agreement. If a directive of management is alleged by a worker to abridge one of his contractual rights, he is typically privileged to challenge the propriety of that action through the grievance machinery. Where, however, instead of resorting to the established appeal procedure he elects to dispute the authority of management to make that decision by open defiance he likely will be charged with insubordination and disciplined as a consequence. The penalties most frequently meted out by management for this offense are suspensions for isolated and minor acts of insubordination and discharges for gross or persistent insubordinate conduct.

An extremely large proportion of appeals to arbitration contest the justification of discipline imposed for alleged insubordination. In general, workers disciplined for that reason have been charged with one of two forms of insubordinate behavior, either an improper refusal

to obey the legitimate orders of a superior, or abusive and unwarranted actions or language toward a member of management. In determining the extent, if any, of cause for discipline present in cases involving alleged disobedience, arbitrators fundamentally appear to have sought from the evidence the answers to three questions. First, they have inquired whether the order given could logically be assumed reasonable and proper. Next, they have tried to determine if the manner in which it was communicated was above reproach. And finally, they have sought to establish whether the response of the grievant could properly be classed as insubordinate and, if so, of sufficient gravity to deserve the penalty levied. Where, on the other hand, the cause advanced has been offensive and abusive conduct toward a person in a position of authority, arbitrators have been concerned with determining the nature and content of the actions or words attributed to the employee, the circumstances under which the alleged behavior took place, and whether the conduct represented an aggressive and belligerent challenge to proper authority worthy of the disciplinary measure assessed.

Out of these inquiries and the arbitral decisions based upon the results obtained therefrom have evolved a body of principles and rules. A brief summary of these preparatory to the analysis of the actual awards will serve to indicate the nature of the offense and suggest the conditions under which it may or may not represent cause for a penalty action.

For a directive to be reasonable and proper it must meet certain tests. For one thing, the person giving it must be empowered by the

employer to do so. He must be a designated company official with authority over the particular employee and must be acting in his official capacity at a time when and place where obedience to his authority is the normal obligation of employees. Another prerequisite of a proper order is that it be consistent with the contractual rights of management under the agreement and, in the absence of notice to the contrary, the customary interpretation of those rights as established by the past practice of the parties. To be reasonable, the supervisor's direction must not grow out of personal animosity and be intended to provoke disobedience; nor should the order, if followed, be one which if later found to be unreasonable the grievant could not secure retroactive and adequate redress under the grievance machinery. Examples of such a directive would be one which ordered the performance of an assignment that would be unduly degrading or humiliating, an illegal act that would likely subject the worker to a civil or criminal penalty, or a task in which the employee assumed a probable risk of injury or to health that was not a normal incident of his job.

If management is to hold an employee to strict compliance, an order must be more than merely proper and reasonable. It must be conveyed to the recipient in a clear, direct and decisive fashion and not delivered in a seeming spirit of jest. It should be specific in nature rather than in the form of non-compulsory suggestion or as a choice among alternatives. In other words, the employee must be made to understand that obedience is expected.

Finally, for a worker to be held guilty of insubordination, there must be a clear showing that his response consisted of a deliberate challenge to proper authority, not merely of a reasonable expression of opinion or of honest misunderstanding of what he was ordered to accomplish or to refrain from doing. The key to this determination in the arbitrator's eyes is the intent of the worker. If the grievant persisted in his refusal to comply with the directive despite its repetition or direct warnings of the consequences, if he was impertinent or insolent though not necessarily abusive, or if he placed an unreasonable condition on his compliance with the instruction, the arbitrator will likely hold him to be guilty of insubordination. But if the worker was obviously ignorant of his responsibilities under the contract, was respectful and calm in manner, and especially if he, in good faith, offered a worthy reason for his refusal, or followed his initial reluctance by immediate compliance, he may or may not properly be subject to some measure of discipline for disobedience. However, his conduct will certainly not be held intentional and probably not insubordinate. In such cases severe penalties will not be allowed to stand.

Insubordination in any form is a grave offense but perhaps the gravest of all is a verbal or physical assault on a representative of management. If established in fact each may represent a proper basis for immediate discharge. As far as a physical attack is concerned, the discipline justified generally is not dependent on the measure of force utilized or of injury inflicted. In most of these instances,

because physical violence toward a superior will involve an overt and discernable act and is almost without exception wholly inexcusable, the arbitrator's task of determining the presence or absence of cause is, on a relative basis, usually not too difficult. The evidence will generally show the employee either guilty or not guilty, with a ruling as to the degree of guilt unnecessary. But where the employee is charged with the use of threatening or excessively abusive language, the very nature of the offense and the usual evidence advanced often make a judgment much more exacting. Frequently, and particularly when faced by conflicting and inconclusive testimony, arbitrators are forced to distinguish between the colorful though acceptable language of the working man and that which exceeds the bounds of propriety and represents a distinct challenge to the status and authority of management. In these cases, the method of expression, the tone of voice and the spirit of use are often more important than the actual words employed. A finding of insubordination and cause for a severe penalty is likely only where the arbitrator is convinced that the language employed was such that the superior to whom it was directed would properly take offense and consider it a definite threat to his ability to maintain discipline.

The specific application of these and other general principles will now be described, initially by analyzing those awards where the complainant was disciplined for allegedly refusing to follow management's orders, and then by those where the charge was aggressive conduct toward a company official. It will conclude with a brief discussion of two

rather special cases of alleged insubordination, the failure of employees to work scheduled overtime and disrespectful conduct toward a member of management by a union representative while in the performance of the latter's duties.

Refusal to Obey

One of the most frequently cited rules in arbitration is that the employee has a responsibility to comply with the orders of management and should not resort to self-help measures.[1] In its application, this rule holds that the employer is under no obligation at the time of issuance of an order to debate or bargain its merits, to explain the reason for his directive, or to tolerate outright disobedience. The worker may question or complain about the propriety of the instruction but if his superior after receipt and consideration of his reply rejects it and insists on compliance, the worker's duty is clearly to yield to authority and seek his remedy in the grievance machinery. A breach of this procedure, except under certain very restricted conditions, generally is classed as an insubordinate refusal to obey and held to be a proper basis for discipline.

The orders most commonly subject to challenge are those involving a work assignment, the manner in which to perform an operation, the standard of output to be achieved on a job, or the observance of prescribed rules and regulations. These are orders which reasonably fall within the province of managerial authority. Where the manner of communication of such an order is not a matter at issue and the employee's response takes the form of a flat declaration of refusal to comply,[2]

walking off the job[3] or failing to report to a post assigned,[4] persistence in the method of work or behavior he was repeatedly directed or warned to correct,[5] engaging in a deliberate slowdown,[6] or a studied and unnecessary prolonging of his protest,[7] his conduct will almost invariably be held to constitute willful insubordination and to warrant the penalty imposed. This is especially likely where a grievance contesting the right of management to give that particular order was already pending[8] or where the object of the disobedience was clearly an extra-legal attempt to force a concession from the employer.[9] The same finding is also highly probable where the employee's immediate offense was compounded by a history of like disrespect for authority,[10] a neglect or refusal to explain the reason for his disobedience,[11] or where the employer's directive was prompted by an emergency situation.[12] In these cases, though, the distinct willfulness of the offense even in the absence of such aggravation would alone have constituted grounds for discipline.

Cause for discipline has been less obvious but the right to penalize not necessarily precluded where the worker, although aware he was refusing to obey, did not intend his act to be a deliberate or defiant challenge to authority. Instead, he may have based his disobedience on an honest but mistaken belief he was for some reason not obliged to comply. Where penalties have been sustained in full, however, the excuse advanced for refusal clearly has not been one of those few for which disobedience is permissive, neither has it been deemed of sufficient importance to establish an element of unreasonableness in the severity of the disciplinary action taken.

Some of the reasons offered in these cases have been ruled so trivial as to be wholly immaterial. In this class would be that the action ordered would have been contrary to the routine way of doing things,[13] that the performance of the assignment would have been inconvenient or unpleasant,[14] or that the refusal represented a protest over a supervisor's allegedly unfair hazing of the grievant.[15] Just as much in error have been those excuses based upon an unfounded and unlikely safety hazard,[16] which claim the disobedience was privileged because the grievant was acting pursuant to union instructions,[17] which allege that the filing of a grievance waives the obligation to comply,[18] or which attempt to justify the refusal on the disproven ground that the directions violated the civil or contractual rights of the employee.[19] In all such instances the disciplinary measures imposed on the complainants have been sustained as levied. While the inability of the grievants to provide a substantial reason contributed to that decision, it usually was not the controlling influence. Instead it has been their failure to test the reasonableness or propriety of the directive.

The rule that an order should be obeyed pending the determination of its propriety in the grievance procedure has also been followed in many arbitrations in which the employer's directive actually did exceed his authority under the collective agreement. In such cases, however, the arbitrators have usually concluded that obedience would not have resulted in a significant or irrevocable impairment of the worker's rights. An occasional alteration in the agreed workday or rest period schedules,[20] an interim and brief assignment in contravention of a

specific right to refuse[21] or of seniority privileges,[22] or a failure to give the short notice required before effecting a change in workloads[23] are cases in point. The philosophy behind these awards upholding the employer's disciplinary assessment has been that two wrongs do not make a right and that a temporary and relatively minor violation of the agreement by management does not give an employee a license to follow suit. One right must be given precedence and that of the employer to hold employees to strict compliance has been deemed the superior.

Though arbitrators are noticeably reluctant to restrict management's power to discipline for proven insubordination, they have not hesitated to amend penalties when the measures appeared unduly harsh under all of the circumstances of the case. Where they have done so, however, the extenuating influences in the employee's favor have usually been quite persuasive. One condition which often has qualified a penalty for abatement is a finding that the employer made a material oversight in not according sufficient weight in his estimate of cause to the employee's reason for disobedience.

Where, as in many of these cases, the excuse offered for failure to follow orders is that uncertainty existed in the worker's mind as to what his obligations were, arbitrators have consistently held such doubt an inadequate basis for refusing to comply. However, if the origin of the uncertainty underlying the refusal can be attributed at least in part to some act of management, arbitrators insist that the penalty for disobedience must reflect management's contribution to the

offense. Where they have been convinced it did not, they have reduced the severity of the penalty measures assessed.

The most common basis for mitigation has been in management's failure to make allowance for a defect in the manner in which the order was transmitted to the employee. It has been, on occasion, in the channel of communication. If one of the reasons for the worker's failure to obey is that a foreman other than his own gave the order[24] or that instructions in conflict with the original ones were later given by another supervisor,[25] the lack of clarity in the exercise of authority and the failure to allow for it in the penalty determination have sufficed to warrant a lessening of a stringent penalty.

More often, however, the employer's deficiency has been in not compensating for a shortcoming in the manner in which the order was conveyed. Where the method of delivery might reasonably be said to create the impression that non-compliance was permissive or of minor import, a refusal as a matter of preference will not be held deliberately insubordinate nor deserving of a severe penalty. "Do-it-or-go-home" orders, or ones of roughly similar electives, provide numerous examples of this principle.[26] Closely related to these are those orders which have in the past been disregarded with immunity but which without warning are suddenly enforced. When such has been the case and the employer's former tolerance of disobedience led an employee to assume he could refuse to obey without penalty, arbitrators often have ruled the employee properly subject to discipline. But they have also held as material the employer's neglect to warn the employee of his

intent to compel obedience. Hence they have balanced the equities of the parties by reduction in the severity of the disciplinary measure.[27]

Arbitrators have also considered other penalties too extreme and held grievances in part meritorious where the source of the doubt and misunderstanding lay solely within the employee. Where in their judgment the penalty did not reflect the contribution to non-compliance of a hearing or language handicap,[28] an honest and not illogical fear that obedience would have posed a safety or health hazard,[29] or a deep-seated and good faith belief by the worker that he had a legitimate right to refuse,[30] the grievants involved have received partial relief from discipline. In many of these and other cases the lack of insubordinate intent on the part of the employee has been but one factor leading toward mitigation of his penalty. Another one re-enforcing it has been a finding of precipitous disciplining or other arbitrariness by the employer. This has been evidenced in many fashions, the most common ones being management's lack of consideration for a worker's long and hitherto unblemished record,[31] the failure to inquire into the presence or reliability of a reason for the employee's obstinate refusal to obey,[32] or allowing prejudice to influence the degree of discipline levied.[33]

In all of the above instances the employer has been able to establish that the grievant did in fact fail to follow an order and, depending on the degree of cause found present, arbitrators have held the employee justly subject to various measures of discipline. A considerable number of other awards have ruled the employer to have clearly

failed in his burden of proving either that the worker's response to a directive constituted an insubordinate refusal to obey or that admitted disobedience was not justified under the circumstances. These decisions have rescinded management's disciplinary actions as without cause.

Before arbitrators will hold an employee's conduct a refusal they must be convinced that a representative of management actually gave him a direct order. Where the employer cannot prove that an order was given,[34] or that the individual who did issue one was authorized to do so,[35] the employee's behavior, though it may be censurable on other grounds, cannot be classed as insubordinate. But even where the issuance of a proper order is established, to represent insubordination the employee's response must involve the act of refusal. The mere speculative intent to disobey,[36] a not clearly defiant and unreasonable delay before performing as directed,[37] or grudging and reluctant obedience,[38] without the actual withholding of compliance, do not constitute insubordination nor are they disciplinary offenses. Moreover, it is also fairly clear that discipline will not be sustained if there is evidence that management itself was not convinced that the grievant's reaction to an order was in fact insubordinate. Employers have been held to have shown uncertainty that such a serious offense was committed where they imposed an extremely mild penalty[39] or drastically reduced the initial discipline.[40] Arbitrators have on occasion interpreted these penalty actions to indicate doubt of guilt and, unconvinced themselves, have decided for acquittal.

As for those cases where the grievant did without question refuse to obey an order and in spite of this was not held insubordinate, one of two conditions has usually existed. In many instances the evidence has clearly established that compliance with the directive would in all probability have seriously aggravated the complainant's disability or resulted in great danger to life and limb.[41] Under such circumstances disobedience has been ruled a matter of right, and the fact that a definite emergency existed[42] or that the employee neglected to inform management of his reason for refusing to obey[43] has been held inconsequential as cause for discipline. The only other basis upon which some arbitrators have relaxed the general rule of obedience is where there has been a clear showing of a major violation of the letter or spirit of the labor agreement by the employer. Thus, for example, penalties have been disallowed and full redress granted workers who refused to accept job reassignments which would have unfairly forced them to relinquish explicit contract rights to union representation and ready access to the grievance procedure,[44] or which involved menial duties materially beneath the specialized tasks to which their professional status entitled them.[45]

Abusive Conduct Toward Supervision

A violent attack on a member of management, without regard to whether it is physical or verbal in nature, is considered by employers and arbitrators alike to be insubordination in its most extreme form. Discharge is the usual penalty imposed by management upon alleged offenders, and arbitrators generally uphold it if guilt is proved.

Numerous dismissals have been upheld for physical violence toward a supervisor ranging in degree all the way from a firm and deliberate shove[46] to prolonged pummeling[47] or attacks with dangerous objects.[48] In the more serious of the physical attacks, the penalty of employee discharge has been sustained despite, and frequently without even consideration of, the sufficiency of the justification offered by the employee to excuse or mitigate his offense. Included among the reasons accorded no weight in such cases have been that premeditation was not established;[49] that the supervisor had in some manner invited the attack[50] or had retaliated in kind;[51] or that although the assault grew out of in-plant relations, it occurred off company premises[52] and civil penalties were levied.[53] In ruling discharges warranted in these awards arbitrators have held that resort to force to secure redress from real or fancied wrongs, if permitted or not discouraged by strong disciplinary action, would undermine both the authority of management to supervise and maintain order as well as the effectiveness of the grievance machinery in serving as the only proper medium of resolving differences.

It should not be inferred though that regardless of the circumstances of a case, the termination of a worker proven guilty of assaulting a managerial representative is always upheld. It has been considered excessive and either reduced or rescinded in a limited number of awards where compelling extenuating factors existed. A showing of intense provocation is one of these.[54] However, while extreme provocation may serve to induce an arbitrator to mitigate an unduly harsh

penalty, it has been held in no way to excuse the offense nor the disregard of the grievance process.[55] Another factor is evidence that the employee was operating under personal stress at the time of the incident and this, together with a lengthy and satisfactory employment record[56] or the fact his offensive gesture threatened no bodily harm,[57] has on occasion led to the reduction of discharges to lengthy layoffs. Another situation frequently encountered involves an attack both removed from the employer's property and unrelated in any manner to the employment relationship. Misconduct of this nature has been ruled an offense over which the courts of law have exclusive jurisdiction to determine whether a basis exists for a penalty, and if so, what it should be. As a consequence, in these cases, arbitrators usually have not upheld disciplining by the employer.[58]

Where, on the other hand, an employee in deliberate and angry fashion, and clearly not in a spirit of jest or as a casual aside, threatens, insults, or otherwise verbally abuses a superior, his offense is regarded to be as serious as if he had struck him a blow. He is also generally considered by management to deserve the ultimate penalty of discharge. This measure of discipline has often been held by arbitrators to be for just cause. This has especially been the case when at the very time of the unprivileged expressions the employee was then being disciplined for other misconduct,[59] when the emotional outburst took place in the presence of other workers,[60] when the offender persisted in his abuse for an inexcusably prolonged period,[61] or where the

grievant's total work record indicated his unwillingness or inability to adapt to plant life and become a satisfactory employee.[62]

However, while a flagrant verbal assault on a managerial representative may be comparable in gravity to a physical one, the circumstances under which it is not and under which disciplinary measures are mitigated are numerous. The most common basis for reducing the severity of a penalty is a finding that management was at least partly at fault for the employee's intemperate expression. Its share of the blame may grow out of past lax and irregular enforcement of discipline, which in turn may understandably have lulled the grievant into believing that this type of conduct either was not improper or would be overlooked.[63] Management may also be held in part responsible where the supervisor was the first to use objectionable language[64] or had issued a wholly unreasonable order,[65] or by his participation in a violent altercation, had both prolonged and intensified the employee's offense.[66]

In addition, the employer may be held at fault where he evidenced arbitrariness in his penalty deliberations or assessment. It may be that he violated his own carefully defined disciplinary procedure by neglecting to provide the required warning prior to the imposition of discharge[67] or levied a penalty in excess of the stated maxima,[68] allowed ill feeling and personal animosity to influence the decision to dismiss the aggrieved,[69] or held an exaggerated view of the seriousness of the offense. With respect to the latter, arbitrators have reached the conclusion that the employee's language was not sufficiently disrespectful or defiant to warrant discharge where it consisted of only

a momentary outburst from which he quickly recovered his composure and repented,[70] where the manner of expression was found common to the occupation,[71] where the evidence supported some but not all of the remarks attributed to the offender,[72] or where the unconcerned attitude of the foreman to whom the remarks were directed belied the gravity of the statements charged to the employee.[73]

In many of these awards prescribing reduced penalties there is a rather clear implication that were it not for the grievant's improper choice of a medium for protest, the presence of the extenuating influences might have resulted in his securing complete relief from discipline. Thus, because employees apparently are held responsible for resorting to direct action in preference to the grievance procedure, this perhaps may help to account for the fact that only seldom are found decisions holding penalties completely unwarranted. In the limited number in which that decision has been reached the aggrieved's impertinence did not extend to belligerence and generally was condoned only because it was to a supervisor other than his own,[74] his past record as an employee was excellent,[75] or the employer was also guilty of an impropriety in that he had committed a clear contract violation.[76]

Overtime Assignments

Arbitrators have frequently held that the prerogative of management to fix production schedules carries with it, in the absence of a provision or practice to the contrary, the right to require overtime of workers to meet those schedules. As this principle has been applied in

arbitration, if a worker after proper notice or without an acceptable excuse refuses or fails to report for an overtime assignment, or walks out part way through one, he may usually be disciplined for insubordination.

In some of the cases involving such situations, an employee's willful violation of a union-management agreement that overtime on an occasional or even a permanent basis was a condition of employment has provided clear grounds for denying his grievance.[77] Among the many others where the contract has been silent on the question of whether overtime was optional or required at the employer's discretion, arbitrators have still upheld penalties in full or in part when they have inferred from the circumstances of a case that the parties understood the performance of reasonable overtime to be obligatory. A clause in the contract defining the normal workday or workweek[78] or establishing premium rates of pay for hours worked in excess of a regular work period,[79] or a showing that such assignments have in the past been customary in the firm with the right of the employer to make them never hitherto contested,[80] have been accepted as proof that the parties contemplated overtime work might be necessary. In the face of such evidence arbitrators have ruled that management acted within its authority and they have held employees liable to discipline for not working the extra time as directed.

However, the right of the employer to schedule overtime is not an absolute one, but is subject to the limitation that it is to be exercised in a reasonable manner. Arbitrators have held employees not

insubordinate nor properly deserving of discipline for refusing such an assignment where the employer failed to provide them with timely notice of at least a few hours of his intent to require overtime. This has particularly been so where no emergency existed and where the workers involved found it impossible or inconvenient to alter their prearranged plans on short order.[81] Likewise, grievants have been made whole on a showing that the performance of overtime had always been on a voluntary basis in the past and those who declined to accept it had never been penalized;[82] that the overtime scheduled was of excessive length, as in the nature of another full turn;[83] that they had notified the employer in advance they would be unable to work and had a legitimate reason for not reporting;[84] that they were physically exhausted and could not continue beyond their regular shift;[85] or that because of the lack of clarity in the communication of the order, they were unaware that overtime was scheduled in their name, and thus, that their absence would be construed as a refusal to work.[86]

Union Officials

A representative of the union when not acting in his official capacity under the agreement receives no special immunity from discipline for insubordinate conduct merely by virtue of the office he holds. Neither does his position as a union official provide an adequate basis for assessing an excessive and discriminatory penalty. Where in his role as a regular member of the workforce he disobeys a proper order[87] or directs verbal or physical abuse toward supervision,[88] he is justly

subject to exactly the same degree of discipline that would be appropriate for any rank-and-file employee guilty of similar misconduct.

It is quite another matter, however, when he assumes to act in his role as an officer in the bargaining unit. As long as he restricts his activities to those provided for in the contract he does acquire privileges denied to him, and others, as workers. In such cases he meets with the representatives of the employer as an equal and is permitted to carry out his functions without interference and with a degree of forcefulness that under other circumstances would constitute insubordination. It has even been held that he may with impunity refuse to follow orders to remain on his job and not check out on union business[89] or to discontinue the investigation of a grievance and return to work[90] where an agreement guarantees him the right to do so. Also, he may refuse a transfer to a distant post which would abridge the contractual representation rights of the workers for whom he acts as spokesman,[91] or he may counsel an employee with respect to the propriety of refusing a dangerous assignment as long as he does not directly usurp the authority of management by ordering the employee not to comply.[92]

Even though he may be engaged in his legitimate union duties and granted considerable liberties in his conduct, he is still held responsible, nonetheless, by discipline for extreme insubordination. He may not, for example, knowingly countermand the orders of a supervisor and instruct workers to disobey a directive simply because he believes it to exceed the employer's contractual powers. Nor may he carry

aggressiveness in his prosecution of grievances to the point where it involves personal abuse of an insulting or threatening nature to a member of management. Under certain circumstances he may even be held deserving of discharge. That penalty has been sustained, for example, where the union officer's past record shows him to be a chronic offender,[93] where his activities resulted in widespread disobedience or even a work stoppage,[94] or where his extreme language toward a superior took place in public.[95] A more moderate penalty may be upheld as levied or ordered in arbitration however, where in his long service the union officer has proven himself a satisfactory and valuable employee,[96] where others guilty of comparable misconduct were not similarly disciplined,[97] where he had only recently acquired his union office and was inexperienced in the scope of authority it carried,[98] or where overzealousness rather than insubordinate intent was a more likely explanation for his improper behavior.[99]

Notes for Chapter IX

1. For a clear discussion of this rule see:
   Ford Motor Co.-U.A.W., 3 LA 779, Shulman (1944);
   John Deere Tractor Co.-U.A.W., 10 LA 355, Updegraff (1948);
   Dayton Malleable Iron Co.-U.E., 11 LA 1175, Platt (1949);
   General Motors Corp.-U.A.W., Dec. No. G-213, Feinsinger (1955).

2. Thomasville Chair Co.-U.F.W., 8 LA 792, Waynick, Greer and Carson (1947);
   National Zinc Co., Inc.-United Acid & Smelter Workers Union of Oklahoma, 19 LA 888, Emery (1953).

3. Goodyear Clearwater Mills-U.T.W.A., 6 LA 760, McCoy (1947);
   Link-Belt Co.-U.A.W., 12 LA 346, Epstein (1949).

4. Ingalls Iron Works Co.-U.S.A., 8 LA 26, Wagner (1947);
   National Tube Co.-U.S.A., 9 LA 549, Seward (1947).

5. Goodyear Clearwater Mills-U.T.W.A., 6 LA 117, McCoy (1947);
   Saratoga Victory Mills, Inc.-T.W.U.A., 10 LA 723, McCoy (1948).

6. Bethlehem Steel Co.-U.S.A., Dec. No. 29, Seward (1953);
   United States Steel Corp.-U.S.A., Gr. No. 155-990, Garrett (1954).

7. General Motors Corp.-U.A.W., Dec. No. G-213, Feinsinger (1955).

8. Harbison-Walker Refractories Co.-S.A.P.W., 8 LA 290, Wagner (1947);
   Norberg Manufacturing Co.-I.A.M., 24 LA 839, Klamon (1955).

9. Distributors' Association of Northern California-I.L.W.U., 17 LA 217, Pallen (1951);
   Minneapolis-Moline Co.-I.U.E., 18 LA 235, Updegraff (1952);
   Babcock & Wilcox Co.-Federal Labor Union No. 20186, 25 LA 802, Begley (1955).

10. St. Paul Buick Co.-I.A.M., 6 LA 294, Rottschaefer, Gehen and Lutz (1947);
    Browne & Sharpe Manufacturing Co.-I.A.M., 11 LA 228, Healy (1948).

11. National Union Radio Corp.-U.E., 13 LA 515, Halliday (1949);
    Electro Metallurgical Co.-U.S.A., 20 LA 281, McCoy (1953);
    Bethlehem Steel Co.-U.S.A., Gr. No. 2883-6847, Killingsworth (1954).

12. Newspaper PM, Inc.-A.N.G., 3 LA 683, Morgan (1946);
    National Tube Co.-U.S.A., 9 LA 549, Seward (1947).

13. Pacific Mills-T.W.U.A., 3 LA 141, McCoy (1946).

14. The Hegeler Zinc Co.-M.M.S.W., 8 LA 826, Elson (1947);
American Can Co.-U.S.A., 11 LA 405, Abrahams (1948).

15. Bethlehem Steel Co.-U.S.A., Gr. No. 5745, Shipman (1951).

16. National Malleable & Steel Casting Co.-U.A.W., 19 LA 5, Luskin (1952);
Pilot Freight Carriers, Inc.-I.B.T., 22 LA 761, Maggs (1954).

17. Morris Paper Mills Co.-P.S.P.M.W., 20 LA 653, Anrod (1953).

18. Triumph Explosives, Inc.-U.M.W., 2 LA 617, Killingsworth (1945);
Dominion Electric Co.-M.P.B.P., 20 LA 749, Gross (1953).

19. The Mosaic Tile Co.-G.C.S.W., 9 LA 625, Cornsweet (1948);
Baldwin Rubber Co.-U.R.W., 22 LA 765, Bowles (1954).

20. Corning Glass Works-G.C.S.W., 6 LA 533, Wagner (1947).

21. Corn Products Refining Co.-Federal Labor Union, Grain Processors Union, 10 LA 414, Rader (1948).

22. Bethlehem Steel Co.-U.S.A., 8 LA 113, Simkin (1947);
Electro Metallurgical Co.-United Chemical Workers, Local 250 (Ind.), 22 LA 684, Shister (1954).

23. Dwight Manufacturing Co.-T.W.U.A., 12 LA 990, McCoy (1949).

24. John Deere Tractor Co.-U.A.W., 4 LA 161, Updegraff (1946).

25. Stern Bros.-R.W.D.S.U., 9 LA 464, Broadwin (1948);
Pacific Mills-T.W.U.A., 14 LA 387, Hepburn (1950).

26. Dairymen's League Cooperative Association-I.B.T., 11 LA 1113, Burke (1948);
Dayton Malleable Iron Co.-U.E., 17 LA 666, Hampton (1951);
Bethlehem Steel Co.-U.S.A., Gr. No. 5734, Selekman (1948).

27. Bethlehem Steel Co.-U.S.A., 12 LA 167, Selekman (1949);
Huntington Chair Co.-U.F.W., 18 LA 94, Latture (1952).

28. John Deere Tractor Co.-U.A.W., 5 LA 561, Updegraff (1946).

29. Goodyear Clearwater Mills-T.W.U.A., 8 LA 647, McCoy (1947);
Reynolds Metals Co.-U.S.A., 19 LA 753, Klamon (1953).

30. American Bakeries-R.W.D.S.U., 12 LA 900, McCoy (1949);
Wolverine Shoe & Tanning Corp.-U.S.W., 18 LA 809, Platt (1952).

31. American Car & Foundry Co.-U.S.A., 10 LA 324, Hilpert (1948); Pennsylvania Greyhound Lines, Inc.-S.E.R.M.C.E., 17 LA 598, Loucks (1951).

32. Tungsten Mining Corp.-S.A.P.W., 22 LA 570, Maggs (1954); United States Rubber Co.-U.R.W., Dec. No. 374-K-5, Killingsworth (1954).

33. Victor Industries Corp.-U.A.W., 11 LA 997, Kaplan (1948); Bethlehem Steel Co.-U.S.A., Gr. No.'s 2057 & 2058, Selekman (1948).

34. Ford Motor Co.-Foreman's Association of America, 7 LA 419, Babcock (1947).

35. Coperweld Steel Co.-U.S.A., Gr. No. 3, Stowe (1954).

36. National Lock Co.-U.A.W., 4 LA 820, Gilden (1946); Rock Hill Printing & Finishing Co.-T.W.U.A., 21 LA 335, Shipman (1953).

37. North American Aviation, Inc.-U.A.W., 10 LA 304, Grant (1948).

38. General Magnetic Co.-U.E., 2 LA 181, Shaeffer (1946).

39. Goodyear Tire & Rubber Co.-U.R.W., 1 LA 329, McCoy (1945).

40. International Harvester Co.-U.A.W., 11 LA 1007, McCoy (1948).

41. The Hegeler Zinc Co.-M.M.S.W., 8 LA 826, Elson (1947); International Paper Co.-U.P.P., 14 LA 967, Kelliher (1950).

42. Copco Steel & Engineering Co.-U.S.A., 22 LA 624, Parker (1954).

43. St. Joseph Lead Co.-G.C.S.W., 16 LA 138, Hilpert (1951).

44. General Motors Corp.-U.A.W., Dec. No. C-321, Seward (1945).

45. Post Publishing Co.-A.N.G., 22 LA 231, Goodale (1953).

46. International Harvester Co.-U.F.M.W., 13 LA 986, Seward (1949).

47. General Motors Corp.-U.A.W., Dec. No. C-82, Dash (1943).

48. Ford Motor Co.-U.A.W., CK-4, Case No. 17655, Killingsworth (1955).

49. General Motors Corp.-U.A.W., Dec. No. 102, Dash (1943).

50. American Republics Corp.-O.C.A.W., 19 LA 770, Emery (1951); General Motors Corp.-U.A.W., Dec. No. C-329, Seward (1945).

51. General Motors Corp.-U.A.W., Dec. No. C-64, Dash (1944).

52. International Harvester Co.-U.A.W., 21 LA 327, Cole (1953).

53. General Motors Corp.-U.A.W., Dec. No. C-141, Dash (1943).

54. Reynolds Metals Co.-U.S.A., 17 LA 710, Granoff (1951).

55. Continental Can Co., Inc.-U.S.A., 6 LA 363, Boyd (1947).

56. Swift & Co.-U.P.W.A., 11 LA 57, Healy (1948); reconsidered in 11 LA 581.

57. Reynolds Metals Co.-U.S.A., 25 LA 404, Hildebrand (1955).

58. Pioneer Gen-E-Motors-U.E., 3 LA 486, Blair (1946); International Harvester Co.-U.F.M.W., 9 LA 592, Blumer (1947).

59. Thompson Products, Inc.-U.A.W., 9 LA 119, Whiting (1947); Armstrong Cork Co.-Federal Labor Union, Rubber Workers Local 22619, 18 LA 651, Pigors (1952).

60. International Harvester Co.-U.F.M.W., 13 LA 986, Seward (1949); Supermatic Products Corp.-I.A.M., 21 LA 512, Bernstein (1953).

61. General Motors Corp.-U.A.W., Dec. No. C-328, Seward (1944).

62. Republic Oil Refining Co.-O.C.A.W., 15 LA 895, Klamon (1951); General Motors Corp.-U.A.W., Dec. No. B-65, Taylor (1942).

63. Finders Manufacturing Co.-U.A.W., 3 LA 846, Gilden (1946); Kroger Co.-I.B.T., 23 LA 104, Reid (1954).

64. Higgins Industries, Inc.-S.C.C.J., 25 LA 439, Hebert (1955).

65. General Motors Corp.-U.A.W., Dec. No. B-130, Dash (1942).

66. Darnell Wood Products Co., Inc.-U.F.W., 8 LA 562, Dwyer (1947).

67. Cedartown Textiles, Inc.-T.W.U.A., 8 LA 360, Griffin (1947); Whitney Chain Co.-U.A.W., 23 LA 516, Stutz, Curry and Mottram (1954).

68. General Motors Corp.-U.A.W., Dec. No. C-327, Seward (1945).

69. General Motors Corp.-U.A.W., Dec. No. C-379, Seward (1945).

70. Crawford Clothes, Inc.-U.I.U., 19 LA 475, Kramer (1952).

71. Terminal Cab Co., Inc.-I.B.T., 7 LA 780, Minton (1947).

72. General Motors Corp.-U.A.W., Dec. No. C-228, Dash (1944).

73. General Motors Corp.-U.A.W., Dec. No. C-355, Seward (1945).

74. Power Equipment Co.-U.E., 2 LA 558, Shaeffer (1945).

75. Parsons Casket Hardware Co.-I.A.M., 14 LA 247, Gilden, Gustafson and Guyer (1950).

76. The Moore Enameling & Manufacturing Co.-Federal Labor Union, Stamping & Enameling Workers Union Local 20113, 7 LA 459, Abernethy (1947);
Republic Steel Corp.-U.S.A., Gr. No. W-745, Stashower (1953).

77. Livermore Chair Co.-C.J.A., 9 LA 315, Williams (1947);
McDonnell Aircraft Corp.-I.A.M., 21 LA 91, Klamon (1953).

78. Carnegie-Illinois Steel Corp.-U.S.A., 12 LA 801, Seward (1949);
Jones & Laughlin Corp.-U.S.A., Case No. 3-C-54, Cahn (1955).

79. Nebraska Consolidated Mills-T.W.U.A., 13 LA 211, Copelof (1949);
Apponaug Co.-T.W.U.A., 13 LA 231, Sharpiro (1949).

80. Dortch Stove Works, Inc.-U.S.A., 9 LA 374, McCoy (1948);
Glamorgan Pipe & Foundry Co.-U.S.A., 15 LA 645, Fuchs (1950).

81. Texas Co.-O.C.A.W., 14 LA 146, Gilden (1949);
Bethlehem Steel Co.-U.S.A., Dec. No. 83, Seward (1954).

82. A. D. Juillard & Co., Inc.-T.W.U.A., 17 LA 606, Maggs (1951).

83. Bethlehem Steel Co.-U.S.A., 24 LA 163, Seward (1955).

84. Bethlehem Steel Co.-U.S.A., 17 LA 436, Killingsworth (1951).

85. Merrill Stevens Dry Dock & Repair Co.-I.U.M.S.W., 21 LA 513, Douglas (1953).

86. Gorton-Pew Fisheries Co., Ltd.-I.L.A., 11 LA 657, Schedler (1948);
Bethlehem Steel Co.-U.S.A., Dec. No. 10, Seward (1953).

87. Republic Oil Refining Co.-O.C.A.W., 15 LA 895, Klamon (1951);
General Motors Corp.-U.A.W., Dec. No. C-113, Dash (1943).

88. Marion Manufacturing Co.-I.L.G.W., 13 LA 616, Shawe (1949);
International Harvester Co.-U.A.W., 21 LA 327, Cole (1953).

89. Electro Metallurgical Co.-United Chemical Workers, 22 LA 684, Shister (1954).

90. International Harvester Co.-U.A.W., 16 LA 307, McCoy (1951); General Motors Corp.-U.A.W., Dec. No. C-124, Dash (1943).

91. United States Steel Corp.-U.S.A., Gr. No. P-52-23, Kerr (1952).

92. Copco Steel & Engineering Co.-U.S.A., 21 LA 410, Parker (1953); see also Ford Motor Co.-U.A.W., CK-60, Case No. 17760, Killingsworth (1956).

93. Nathan Manufacturing Co.-I.A.M., 7 LA 3, Scheiber (1947); M. M. Mades Co., Inc.-U.P.W.A., 14 LA 748, Copelof (1949).

94. Texas Co.-O.C.A.W., 7 LA 735, Carmichael (1947); General Motors Corp.-U.A.W., Dec. No. C-234, Seward (1944).

95. Supermatic Products Corp.-I.A.M., 21 LA 512, Bernstein (1953).

96. Joy Manufacturing Co.-U.S.A., 6 LA 430, Healy (1946).

97. Ford Motor Co.-U.A.W., 3 LA 779, Shulman (1944).

98. Roberts Numbering Machine Co.-U.E., 9 LA 861, Feinberg (1948); John Deere Tractor Co.-U.A.W., 10 LA 355, Updegraff (1948).

99. Rhode Island Tool Co.-U.S.A., 7 LA 113, Healy (1946).

CHAPTER X

INTOXICATION

An employee who reports for work in an intoxicated condition, who improperly partakes of alcoholic beverages while on duty, or brings liquor onto the company premises, commits a serious industrial offense. Many contracts and plant rules explicitly prohibit such conduct and number it among those representing a just basis for discipline, with the immediate dismissal of an offender being the penalty typically provided.

The right of the employer to penalize employees for this cause, with or without an express provision to that effect, is a principle which has been strongly affirmed in arbitration. At the same time, however, arbitrators have not permitted management to apply this rule as an inflexible formula under which the discharge of a guilty party is always the appropriate disciplinary levy to impose. Whether that penalty will be upheld or whether a lesser one or no discipline at all will appear justified, usually will depend on the degree of the employee's intoxication, the nature of his job and the character of the firm's production, the worker's past record and his future prospects of being a satisfactory employee, and the manner in which the employer has exercised his disciplinary authority. A determination of these matters will have a direct bearing on the larger issues over which the arbitrator's award ultimately will turn, those being the effect of the

alleged offense on the productive efficiency of the enterprise, its employee and public relations, and the danger it posed to personal safety and company property. But the important thing to note is that implicit in the application of these standards is the fact that arbitrators consider there may be degrees of culpability and of discipline warranted for the use or possession of intoxicants.

Cause for Discharge

Among the numerous grievance arbitrations in which these criteria have been employed and in which cause to uphold the dismissal of appellants for intoxication has been found, many have arisen in the transportation industry. Because of state laws relating to drunken driving, the responsibility of the carriers for public safety and the close relationship between customer confidence in the reliability of the company's services and the behavior of its representatives, strict enforcement of no-drinking prohibitions is considered particularly necessary in this field. As a result, it is a general rule that any imbibing on the job by an operator of a truck or bus, regardless of the degree of his inebriation, is regarded as a dischargeable offense. In the more serious cases of intoxication, even the presence of extenuating influences, such as the failure of the employer to post his rules as required by the contract or his past laxity in policing such behavior, has not sufficed to excuse the employee's misconduct.[1] Where, on the other hand, the worker has been charged with drinking rather than intoxication proper he has still been held deserving of discharge if his offense has been aggravated by a factor of consequence, as for

example, his appearance in uniform on company property while under the influence.[2] The question of whether the right of the employer to dismiss such employees extends to drinking during non-duty hours has not often been arbitrated but in two instances where it was, that penalty was upheld where the grievants drew public attention to themselves and their condition, in one case by being arrested,[3] in the other by being boisterous in the company's terminal.[4] In both of these cases the long service records of the drivers were acknowledged, but accorded no mitigating weight in view of their extreme indiscretion.

Another sizable group of awards have upheld dismissals for alcoholism of an habitual nature. Where this has been the case and the employer has been able to show that an employee, despite repeated warnings, continued to report for work under the influence and unable to perform his normal functions effectively,[5] or was absent excessively for the same reason,[6] arbitrators have upheld the penalty of discharge. Though most of the grievants so disciplined have been short seniority workers, long tenure with the employer has not alone proven an adequate defense against dismissal for chronic intoxication.[7]

Cause for discharge may also exist where the employee's job duties or work conditions are such that indulgence in intoxicants might reasonably lead to a careless error that would jeopardize life or the safety of the employer's property. These conditions have been found present where employees have worked with or around highly combustible gases,[8] electric power installations,[9] or highly specialized and potentially dangerous equipment.[10] In these instances it has not been

necessary for management to show that the worker was incapacitated by drink or that the penalty of discharge for intoxication has been applied uniformly throughout the plant or consistently over time. Arbitrators have held that the urgency of the situation placed upon the employer a grave responsibility to take prompt and decisive action to reduce the hazard and prevent its recurrence and his decision to terminate the offender's services has not been considered an unreasonable exercise of judgment under such circumstances.

Mitigating Influences

With the exception of situations like those described above in which intoxication or drinking by an employee offered the distinct possibility of seriously damaging the employer's business interests or endangered the welfare of those in his employment, discharge has frequently been regarded by arbitrators to be an excessively severe penalty for such misconduct. This has especially been the case where the grievant has established the presence of strong extenuating factors. It should not be assumed, though, that drunkenness is lightly regarded by arbitrators. While dismissals for that offense may be considered excessively severe under various sets of circumstances, the aggrieved, nonetheless, are usually subjected to lengthy layoffs, often of several months' duration.

One of the most common bases for ordering the reinstatement of a worker with a reduced penalty is a finding that the penalty of discharge is inconsistent with the customary treatment of like offenders by the instant employer or by other firms in the industry. If drinking is

generally prevalent among others in the company's employment[11] or has been tolerated in the employee in question for a long period of time,[12] or is shown to be a widely condoned practice in the industry,[13] a worker may reasonably have been misled into believing his behavior would go unpunished. To discharge him without first serving notice by the posting of rules or by direct warning that such conduct would in the future represent just cause for dismissal seems to many arbitrators to be something less than simple justice. Though they have not considered the failure of the employer to provide that notice to deprive him of all disciplinary power, in its absence they have commonly held discharge to be disproportionate to the offense and decided in favor of suspensions without pay in its stead.

Other arbitrators have awarded similar judgments in the cases of workers who during their years of service had compiled exemplary employment records. When this factor has been coupled with evidence that the grievant's indiscretion consisted of bringing a bottle to work without proof that he actually drank from it,[14] involved the taking of only a drink or two at the most,[15] or occurred during a period when they were not on duty or not on company time so that the employer suffered no loss,[16] even more compelling grounds have existed for finding insufficient cause to sustain discharge. Community standards of justice may also play a determining role in passing on the propriety of dismissing employees for intoxication. One arbitrator ruled that in view of the fact a state court of law had adjudged what he considered the not too dissimilar offense of drunken driving deserving of only a $100

fine, the capital punishment of discharge given to an elderly employee with a long and good record appeared inequitable under the circumstances. He therefore commuted the penalty to reinstatement without retroactive compensation for the period of his unemployment.[17]

The common contractual limitation that discipline must be for just cause has also resulted in many awards in which penalties in any form have been held unwarranted. These decisions spell out some of the limits beyond which the employer is not permitted to exercise his authority to discipline employees for drinking. That right does not extend to invading the private life of an employee and dictating that he may not imbibe during the time he is away from work and not on the payroll as long as his activities cannot be shown to have interfered with his subsequent work or to have been injurious to the employer's public good will.[18] This exemption from discipline has also been held to apply to an employee's taking of an occasional drink while at lunch as well as during free time between shifts.[19] Moreover, employers are often held to the letter of the law as it is set forth in the contract or in plant rules. Where regulations have specified the bringing of intoxicants onto company property or drinking in excess as cause for discipline, an employer's admission that a guard prevented an employee from bringing beer into the plant[20] or his inability to establish unmistakable intoxication[21] has been considered a failure to sustain his burden of proof, and thus, a proper basis upon which to dismiss the charge.[22] It is of interest to note that one arbitrator in a case herein cited stated that had there been no written agreement

necessitating management to post its plant rules and establish clear proof of "insobriety," both of which it failed to do, he would have upheld the dismissal of the grievant "merely on the grounds of drinking intoxicating liquors on company premises."[23]

In the absence of an express statement as to the parties' intent of the meaning of cause, arbitrators apply the subjective test of "reasonableness." Under this standard they do not preclude disciplining on circumstantial evidence alone. Arbitrators recognize that intoxication is largely a matter of degree, a fact which often presents unusually difficult problems of proof for the employer. At the same time, however, they are also aware that employees for many reasons may evidence symptoms of insobriety in their physical appearance or behavior which tentatively suggest intoxication, when in reality no just basis for disciplining exists. As a rule, therefore, unless circumstantial proof of guilt is at a minimum substantial and of a convincing nature arbitrators normally do not allow penalties to stand. Under no conditions does suspicion alone suffice as an adequate basis to sustain a penalty.[24] This is especially the case where management has failed to make a supporting investigation of the employee's condition and the grievant's superior past work record[25] or medical history of illness[26] strongly indicate the employer erred in disciplining.

Notes for Chapter X

1. Western Express Co.-I.B.T., 10 LA 172, Wilcox (1948).
2. Pacific Greyhound Lines-S.E.R.M.C.E., 25 LA 709, Lennard (1955).
3. Modern Coach Corp.-S.E.R.M.C.E., 24 LA 810, Holden (1955).
4. Pennsylvania Greyhound Lines, Inc.-S.E.R.M.C.E., 18 LA 671, Short (1953).
5. Owens-Corning Fibreglas Corp.-T.W.U.A., 19 LA 57, Justin (1952).
6. Cape Ann Fisheries, Inc.-I.L.A., 13 LA 988, Healy (1949).
7. Philadelphia Inquirer, Newspaper Publisher's Association of Philadelphia-Union not Identified, 12 LA 452, Hoffman (28 years of service).
8. Hiram Walker & Sons, Inc.-D.R.W.W., 3 LA 146, Updegraff (1946); Phillips Petroleum Co.-O.C.A.W., 19 LA 733, Kane (1952).
9. American Woolen Co.-T.W.U.A., 5 LA 371, Myers (1946).
10. Allied Maintenance Co.-T.W.U.A., 12 LA 350, Feinberg (1949); James Vernor Co.-R.W.D.S.U., 20 LA 50, Bowles (1953).
11. Tubular Rivet & Stud Co.-I.A.M., 8 LA 97, Healy (1947).
12. A. I. Namms & Son-R.W.D.S.U., 7 LA 704, Scheiber (1947).
13. Western Express Co.-I.B.T., 10 LA 172, Willcox (1948).
14. General Motors Corp.-U.A.W., Dec. No. E-245, Wallen (1948).
15. Brink's Inc.-I.B.T., 19 LA 724, Reid (1953).
16. Pennsylvania Greyhound Lines, Inc.-S.E.R.M.C.E., 3 LA 880, Brandschain (1946);
    Pennsylvania Greyhound Bus Co.-S.E.R.M.C.E., 18 LA 400, Dash (1952).
17. Atlas Press Co.-U.S.A., 9 LA 810, Platt (1948).
18. Republic Oil Co.-O.C.A.W., 2 LA 305, Cavanagh (1946);
    Union Pacific Railroad Co.-The American Railway Supervisors' Association, Inc., 2 LA 384, Gallagher (1945).
19. John Deere Tractor Co.-U.A.W., 10 LA 318, Updegraff (1948).

20. International Harvester Co.-U.F.M.W., 23 LA 245, Platt (1954).

21. Hudson Restaurant-H.R.E.U., 15 LA 616, Handsaker (1950); Keystone Box Co.-P.S.P.M.W., 18 LA 336, Harkins (1952).

22. See also Post Publishing Co.-A.N.G., 24 LA 173, Babb (1955) (reporting for work late after a few drinks does not constitute gross misconduct under the contract, penalty of denial of severance pay reversed).

23. Keystone Box Co.-P.S.P.M.W., 18 LA 336, Harkins (1952).

24. John Deere Tractor Co.-U.A.W., 10 LA 318, Updegraff (1948).

25. Wesson Co.-S.E.R.M.C.E., 12 LA 386, Blumer (1949).

26. Griggs, Cooper & Co.-I.B.T., 11 LA 195, Lindquist, Casseday and Magner (1948).

CHAPTER XI

LOAFING AND LEAVING POST

Employees are expected to be at their work stations and engaged in the performance of their normal duties when they are working. If they willfully neglect their job assignments and spend their time in idleness or, without permission or reasonable excuse, absent themselves from their place of work, they may properly be subjected to a disciplinary penalty. In all such cases the degree of discipline upheld in arbitration will depend on the circumstances surrounding the offense. Where the inattention to duty was of short duration, involved no discernible loss of output or to plant efficiency, or was accompanied by other mitigating factors of similar nature, the penalties usually considered appropriate range from warnings to short layoffs. Under certain conditions, even mild penalties of that order may be held unwarranted. On the other hand, if the offense is aggravated by a factor of consequence, as for example, a past record of like misconduct on the part of the offender, a resultant and substantial disruption of production, or by danger to personal safety or to the employer's equipment, the lengthy suspension and even the discharge of the guilty parties have often been ruled not to be excessive measures of punishment.

In the following discussion of the application of these standards in specific cases an arbitrary distinction will be made between, and separate treatment given to, employee behavior which represents loafing

and that which constitutes leaving post. These two forms of misconduct are often interrelated and frequently it is difficult to distinguish between them. However, where it can be determined from any case that the principal basis for discipline was loitering, regardless of whether it took place at the employee's work station or elsewhere on the premises, the analysis of that award will be included in the section headed Loafing. This designation appears consistent with current practice. A review of the disciplinary measures management has imposed on employees charged with loafing and the criteria applied by arbitrators in such cases does not indicate any attempt to distinguish between various locations of loitering as offering differential cause for discipline. Where, on the other hand, the primary cause advanced by employers for disciplining clearly is an allegedly unauthorized and inexcusable absence of an employee from his post, rather than the manner in which the time was spent, the character of the offense and the principles involved in deciding on the merits of the dispute are sufficiently distinctive to warrant separate attention. Cases of this nature will be discussed under the category Leaving Post.

Loafing

Loafing, both as a concept and as conduct deserving of a penalty, is difficult to define. The source of the difficulty lies in the fact that typically it is considered by arbitrators to be as much a frame of mind as a form of behavior. A determination of whether or not an employee may properly be considered to be loafing usually is not dependent solely, or even principally, on objective evidence as to his state of

activity or inactivity. In most cases it will involve also a subjective judgment as to his intent.

Although idleness usually offers a strong presumption in favor of loafing, it is not always taken in arbitration as conclusive proof of punishable misconduct. On the other hand, neither is the fact an employee is engaged in work activity necessarily accepted as proof he was not loafing. In either case arbitrators typically will attempt to infer from the surrounding circumstances whether deliberate time-wasting or indifference to job responsibilities were or were not present. On occasion evidence concerning the position assumed by the employee for an extended period will prove the deciding factor in this determination. If, for example, the employer can establish that the grievant was observed in the rule violation of sitting down at his workplace when there was work to be done,[1] or apprehended in a washroom leisurely leaning against a wall or squatting on his heels and engaged in conversation,[2] arbitrators have held that the posture of the employee involved indicated intentional loafing and consequently upheld the employer's disciplinary actions.

In other instances, the intent to deny the employer the work effort he had a right to expect has been assumed and disciplinary measures sustained where it has been shown that workers were busily engaged in pursuing personal business matters[3] or recreational activities[4] on company time or, though admittedly working at their post, were operating at less than normal speeds as an expression of dissatisfaction with the production standards.[5] Loafing of the nature herein described provides

an appropriate basis for discipline, but arbitrators generally do not consider it worthy of penalties more severe than a brief suspension. This is particularly so if the employee has never been warned specifically that loitering is considered a serious or dischargeable offense[6] or where his prior disciplinary record does not prove him to be a chronic and incorrigible offender.[7]

Where the employer has been unable to establish by credible testimony or work records that the alleged inattention to duty represented purposeful loitering and that it interfered with production, arbitrators have held management to have failed in its burden of proof and have reversed the penalties assessed. These cases clearly indicate the obligation of the employer to offer more than merely circumstantial evidence of loafing if he is to sustain his charge. Simply to state that an employee was seen inactive and therefore to take for granted he was loitering does not, in lieu of other evidence, and especially in the face of an equally reasonable inference, justify a penalty. If, for example, it can as logically be concluded that an employee was properly waiting for work,[8] that he was handicapped by a lack of sufficient equipment,[9] or was reasonably confused as to his assignment,[10] as that he was loafing, the benefit of the doubt will as a rule be resolved in his favor. In such cases the failure of the employer to inquire into and substantiate the reason for the alleged lack of diligence will be held a sufficient basis upon which to disallow the penalty. This has especially been true where the inattention to work charged consisted of merely a momentary lapse of effort[11] or of casual and

passing remarks to a fellow worker[12] and resulted in no appreciable interruption in his work. However, even lengthy conversations which do disrupt an employee's duties may on occasion not constitute evidence of culpable loitering. If they occur as in the past with a foreman and never previously have provided grounds for disciplinary action,[13] or with an inspector and essentially are related to his normal work functions,[14] arbitrators have held management in error in disciplining and have rescinded the penalties as arbitrary. A final circumstance under which employees have been made whole is where the inactivity was dictated by necessity and due to factors beyond the employee's control, as in the case of a mechanical failure of his machine.[15]

A special type of loafing, one which is distinguished from the forms considered above both by the nature of the penalties typically assessed and often upheld as well as by the evidence commonly offered and required in arbitration, is that of sleeping on duty. This offense is regarded by management and arbitrators alike as a serious form of misconduct. As such they agree it may provide a just cause for discharge, even for a first offender. In those decisions in which dismissals have been upheld the evidence of guilt has been clear and the offense flagrant, as in the case of an engineer who neglected his responsibility for the safety of equipment and life by falling into prolonged slumber of several hours after drinking,[16] where premeditation was indicated by the fact the grievants clearly had taken a position which would induce sleep and when discovered failed to respond to the foreman's conversation or his shining a light in their eyes,[17] or where

the behavior of an habitual offender had failed to improve despite prior lesser disciplinary measures.[18]

However, while dismissal is almost exclusively the penalty which has been meted out for sleeping in appeals to arbitration, it often has been set aside and replaced by suspensions under a variety of circumstances. One of these has been the inability of the employer to establish to the arbitrator's satisfaction that the employee actually was asleep. In such cases, although the evidence has pointed to that tentative conclusion, the neglect of management to show that the employee had been carefully observed in slumber until such time as he awoke, had failed to respond to stimuli, or had had to be awakened, has led arbitrators to conclude the grievant may have been merely resting and, in the absence of proof to the contrary, to be deserving of a penalty no more serious than that appropriate for simple loafing.[19] In other instances employees, some of whom were without question asleep, have been restored to employment at reduced penalties where the employer's disciplinary action was shown to be procedurally defective under the contract and in the light of past practice,[20] where the employer had failed to accord special consideration to the grievant's long service and cooperative spirit,[21] and where the termination penalty appeared unduly excessive in that the offense involved no neglect of duty or danger to life or property.[22]

Whereas circumstantial evidence of sleeping is accorded substantive weight in penalty determination where it is clear and convincing, and also when it is the severity of the discipline and not the propriety

of the charge which is the matter at issue, it has not proved of probative value in the face of an employee's firm and credible denial of guilt. As such, the mere inference of sleeping drawn from the uncorroborated testimony of a fellow employee of the aggrieved[23] or an unverified observation made at a considerable distance,[24] particularly one where the grievant's immediately subsequent movements admittedly were alert and responsive,[25] have not sufficed to sustain a discharge or any other discipline for the offense alleged. Hence, arbitrators in such cases have reinstated the complainants with full job rights and retroactive compensation.

Leaving Post

Whether an employee who without permission absents himself from his work station is guilty of a major dereliction of his work responsibilities, of merely a minor breach of proper plant behavior, or might properly be absolved from blame is seldom an easy matter to decide. Usually the decision involves a balancing of a combination of factors. Among the most important of these are evidence as to the attitude of the employee at the time of the cited infraction, the urgency of the reason for and duration of the absence, whether or not it involved leaving the employer's premises, the frequency and severity of the defendant's previous rule violations, and the degree to which the employer's disciplinary policy has been made known to the employee in question and consistently applied over time.

Perhaps the most serious of the "leaving post" offenses is one in which an employee deliberately and in express disregard of his right of

recourse under the contractual grievance procedure absents himself from his work station because of a matter in dispute. If the issue is one for which the established appeal machinery could have provided adequate redress, as in the case of a dispute over the propriety under the contract of a change in job content,[26] over the reasonableness of a plant rule,[27] or of a managerial denial of permission to leave the plant because the employee's reason was personal and lacked urgency,[28] then any measure of discipline that the employer has deemed appropriate, including that of discharge for those whose earlier disciplinary actions put them especially on notice of their work obligations, is likely to be sustained by arbitrators. Much the same is true, and in some instances dismissals upheld even in the absence of prior explicit warnings, where the regularity of the employee's rule violations[29] or the prolonged period of his instant truancy[30] is taken as evidence of a conscious and perhaps purposeful intent to evade his responsibilities and challenge the employer's authority.

Where, as is more commonly the case, an employee's absence from his workplace has been more in the nature of a careless and brief premature departure for a lunch or rest break, the locker room, or home, rather than an obvious attempt to deprive the employer of his work services over an extended period, the penalties typically levied and often upheld in arbitration are in the order of reprimands or short layoffs. An award upholding such a moderate penalty as not patently unreasonable is especially likely where the employer can show the employee's improper absence stalled production and forced others on his line to be

idle.[31] In many other instances a grievant's alleged excuse or denial of guilt and thus his petition for relief have been disallowed because of the lack of credibility of his defense. This has been so when he neglected at the time of the infraction and before arbitration to offer a reason for leaving his post,[32] was unable to introduce evidence in support of one in the face of convincing testimony by management,[33] or made the not infrequently encountered and almost invariably serious mistake of failing to appear in person at the arbitration proceedings.[34]

On the other hand there have been many circumstances under which arbitrators have ruled the employer's imposition of discipline to be too severe and have mitigated the penalty actions. In all such cases, the great majority of which involve the commutation of dismissals to suspensions of varying lengths, there has been a finding of mutual fault. The offense charged to the aggrieved has been established in fact and cause for some measure of discipline, therefore, has been affirmed, but the particular measure of discipline levied by the employer has been disallowed as excessive. One basis for such a finding is that the employer selected as a penalty form one which was not within his rights to invoke. On occasion it has been a measure considered inconsistent with prevailing standards of justice in industry and in the community, as for example, a double penalty for a single offense[35] or a suspension of indefinite duration with reinstatement unreasonably conditional on employee assurance the offense would not be repeated.[36] Other grounds for holding management's disciplinary action improper have been that it was unauthorized under the schedule of progressive penalties for

repeated offenses formally adopted under the contract[37] or plant rules[38] or well-established informally by past company practice.[39] In the absence of express authority or advance notice, the employer is not at liberty to deviate from his established policy and impose a degree of discipline in excess of that provided as appropriate. The only apparent exception to this general rule is where an employee's offense becomes gross by virtue of a deliberate and malicious attempt to defraud the firm.[40] In such a case, sufficient cause may exist to warrant summary discharge for an initial infraction.

Most frequently, however, the cause for mitigating the severity of the employer's discipline has been that equities in the employee's favor were not accorded suitable weight in assessing his degree of guilt. Foremost among these extenuating factors has been evidence that the employer failed to ascertain and assess the sufficiency of the employee's reason for leaving his post,[41] to provide the grievant with an adequate pre-discharge warning that his disciplinary record was becoming untenable,[42] or to take into account the worker's long and exemplary record.[43] Also, where discrimination is indicated, as by an unjustified disparity between penalties given simultaneously for comparable offenses,[44] or by abrupt reversal of a policy of lax policing if not tacit approval of rule violations,[45] lesser and more appropriate measures of discipline have been ordered in arbitration. In arriving at the decision as to the proper degree of discipline justifiable under these circumstances, accompanying aggravating factors, such as an employee's misrepresentation of facts[46] or his failure to

perform a normal function before leaving,[47] have occasionally resulted in nominal penalties for employees who might otherwise been freed from discipline.

The employer has been held to have erred in disciplining and to be responsible for back pay where proof has been submitted indicating that the aggrieved was engaged in proper work activity while away from his post,[48] compelling reasons of personal hygiene made the departure from the work station unavoidable,[49] or that technically the rule as worded or generally understood could not properly be said to have been violated.[50]

In a class apart from those involving rank-and-file workers are disputes over the reasonableness of disciplinary actions imposed upon union officers for allegedly inexcusable absences from their place of work. The uniqueness of these situations grows out of two conditions, both of which require arbitrators to use extreme care in their deliberations over the propriety of the punishment invoked. The first of these is the dual set of obligations to which the grievants may be held responsible, with one applicable when they are acting in their official capacity as representatives of the bargaining unit, and the other when they operate as regular members of the work force. The distinction as to which is in force in a particular case oftentimes is obscure. The second involves the fact that petitions for redress almost invariably carry with them the serious and not easily resolved charge of discrimination for union activities. In the process of passing on these matters arbitrators have developed and applied a number of standards

relating to the conditions under which the conduct of union officials may be judged either privileged or improper.

During the time an employee who is a union officer is not engaged in the performance of his union duties, he is subject to the same restraints as any member of the work group. When as an employee he commits a rule violation, rather than acquiring a degree of disciplinary immunity simply by virtue of the office he holds, he may at a minimum be punished as other workers similarly guilty.[51] On occasion, however, some arbitrators have ruled that he may be held to a higher standard of good conduct and to be deserving of a stronger penalty for an offense than would a regular employee under the same circumstances. Whereas the latter might qualify for relief from severe discipline because of unfamiliarity with his obligations, this defense may not be allowed as cause for mitigating a penalty in the case of a union representative on the grounds his official position carries the responsibility for and assumed knowledge of company regulations and contract procedures.[52]

Union officers who are legitimately engaged in the pursuit of union functions do occupy a position of privilege. As long as they have properly followed the prescribed procedure for checking-out on bargaining unit business and restricted their subsequent activities to representing the interests of their membership, they are exempt from the employer's disciplinary authority over those in his employment. But if, on the other hand, it can be shown that they have repeatedly ignored warnings and continued to absent themselves from their post

without securing the required permission to leave,[53] consistently made a practice of spending an excessive and unreasonable amount of time in the performance of their union duties,[54] or improperly left the company premises while away from their job on grievance work,[55] the employer may then justly discharge or otherwise discipline them for abusing the privileges of their office. This widely accepted principle is based on the assumption that since under many contracts the employer incurs the financial burden for the time spent by the official on bargaining unit business, he may insist under the pain of discipline on strict compliance with both the letter and spirit of the right of representation. As this rule has been applied in arbitration, however, for union officials to warrant the particular disciplinary measure assessed by management, they must be proven guilty as charged. Where the penalty selected as appropriate is predicated on the employer's mistaken belief the entire period of the defendant's absence from his work station was improper[56] or that he violated an express prohibition against grievance investigation by leaving his post and his department,[57] arbitrators have revised the penalty to one commensurate with only that portion of the alleged offense which was substantiated by evidence and not by conjecture.

Notes for Chapter XI

1. Walter Butler Shipbuilders, Inc.-I.A.M., 2 LA 663, Corder (1944).

2. General Motors Corp.-U.A.W., Dec. No. B-142, Dash (1942);
   General Motors Corp.-U.A.W., Dec. N. C-25, Dash (1943);
   General Motors Corp.-U.A.W., Dec. No. C-382, Seward (1945).

3. Woburn Chemical Co.-G.C.C.W., 12 LA 898, Handsaker (1949).

4. Sperry Gyroscope Co., Inc.-U.E., 10 LA 687, Kaplan (1948).

5. Freuhauf Trailer Co.-U.A.W., 4 LA 399, Whiting (1946); see also
   Alumimum Cooking Utensil Co.-U.S.A., 5 LA 85, Wagner (1946) and
   Bethlehem Steel Co.-U.S.A., Gr.'s 2153 and 2154, Killingsworth (1948).

6. International Minerals & Chemical Corp.-M.M.S.W., 4 LA 127, Prasow
   (1946);
   Pyrene Mamufacturing Co.-U.E., 9 LA 787, Stein (1948).

7. Barbet Mills, Inc.-T.W.U.A., 16 LA 563, Livengood (1951).

8. Chrysler Corp.-U.E., 10 LA 771, Ebeling (1948);
   Valley Dolomite Corp.-M.M.S.W., 11 LA 98, McCoy (1948).

9. Alan Wood Steel Co.-U.S.A., 4 LA 52, Brandschain (1946).

10. Mosaic Tile Co.-G.C.S.W., 9 LA 625, Cornsweet (1948).

11. Consolidated Vultee Aircraft Corp.-I.A.M., 9 LA 510, Abernethy (1948);
    Ford Motor Co.-U.A.W., Opinion A-245, Case No. 4315, Shulman (1947).

12. General Motors Corp.-U.A.W., Dec. No. G-188, Alexander (1954);
    General Motors Corp.-U.A.W., Dec. No. G-224, Feinsinger (1955).

13. Jeffery DeWitt Insulator Corp.-U.B.C.W., 11 LA 1205, Barnes (1949).

14. North American Aviation, Inc.-U.A.W., 19 LA 699, Komaroff (1952).

15. General Motors Corp.-U.A.W., Dec. No. D-25, Seward (1946).

16. James Vernor Co.-R.W.D.S.U., 20 LA 50, Bowles (1953); see also
    General Motors Corp.-U.A.W., Dec. No. E-193, Seward (1948) (under
    similar circumstances, penalty of demotion upheld).

17. Phillips Chemical Co.-I.U.O.E., 22 LA 498, Singletary (1954).

18. Diamond Alkali Co.-U.M.W., 1 LA 105, Kiefer (1946).

19. Century Foundry-I.U.E., 19 LA 380, Klamon (1952).

20. Rock Hill Printing & Finishing Co.-T.W.U.A., 14 LA 153, Soule (1949); Wade Manufacturing Co.-U.T.W.A., 21 LA 676, Maggs (1953); see also General Motors Corp.-U.A.W., Dec. No. D-17, Seward (1945) (double penalty, layoff upheld but demotion rescinded).

21. Louis Marx & Co.-P.J.N., 3 LA 787, Blair (1946).

22. Linde Air Products Co.-G.C.C.W., 23 LA 436, Shister (1954); Tranter Manufacturing Co.-U.A.W., Gr. No. 5738, Killingsworth (1953).

23. Riverton Lime & Stone Co.-C.L.G.W., 14 LA 907, Schedler (1950).

24. Consolidated Vultee Aircraft Corp.-I.A.M., 10 LA 844, Aaron (1948).

25. Consolidated Vultee Aircraft Corp.-I.A.M., 9 LA 552, Coffey (1948).

26. Briskin Manufacturing Co.-U.A.W., 6 LA 9, Elson (1946).

27. Bethlehem Steel Co.-I.U.M.S.W., 15 LA 749, Feinberg (1950).

28. General Motors Corp.-U.A.W., Dec. No. E-254, Wallen (1948); Ford Motor Co.-U.A.W., CK-81, Case No. 18270, Killingsworth (1956).

29. Boston Sausage & Provision Co.-U.P.W., 2 LA 128, Copelof (1946); Borg Warner Corp.-U.F.M.W., 15 LA 308, Pedrick (1950).

30. Campbell Soup Co.-I.F.T.A.W., 10 LA 200, Lesser (1948); General Motors Corp.-U.A.W., Dec. No. C-262, Seward (1944).

31. General Motors Corp.-U.A.W., Dec. No. B-261, Dash (1943); Bethlehem Steel Co.-U.S.A., Gr. No. 8146, Shipman (1952).

32. Electric Storage Battery Co.-U.E., 16 LA 118, Baab (1951); General Motors Corp.-U.A.W., Dec. No. C-262, Seward (1944).

33. General Motors Corp.-U.A.W., Dec. No. C-37, Dash (1943); General Motors Corp.-U.A.W., Dec. No. C-173, Dash (1944).

34. Ford Motor Co.-U.A.W., CK-79, Case No. 18913, Killingsworth (1956); United States Steel Corp.-U.S.A., Gr. No. A-51-11, Garrett (1953).

35. Bethlehem Steel Co.-U.S.A., Gr.'s No. 2153 and 2154, Killingsworth (1948).

36. Ford Motor Co.-U.A.W., Opinion A-245, Case No. 4315, Shulman (1947).

37. General American Transportation Co.-U.S.A., 15 LA 481, Kelliher (1950).

38. Central Boiler & Manufacturing Co.-U.S.A., 11 LA 354, Platt (1948).

39. Huntington Chair Corp.-U.F.W., 24 LA 490, McCoy (1955).

40. Adler Manufacturing Co.-C.J.A., 4 LA 700, Dwyer (1946).

41. St. Regis Paper Co.-P.S.P.M.W., 12 LA 1023, Ralston (1949);
Branch River Wool Combing Co.-T.W.U.A., 15 LA 505, Copelof (1950);
McLean Trucking Co., Inc.-I.B.T., 19 LA 607, Levy (1952).

42. General Motors Corp.-U.A.W., Dec. No. C-32, Dash (1943).

43. General Motors Corp.-U.A.W., Dec. No. B-257, Dash (1943);
General Motors Corp.-U.A.W., Dec. No. C-332, Seward (1945).

44. Pacific Mills-T.W.U.A., 2 LA 545, McCoy (1946);
Argonne Worsted Co., Inc.-Industrial Trades Union, 4 LA 81, Copelof (1946);
Sperry Gyroscope Co., Inc.-U.E., 10 LA 687, Kaplan (1948);
General Motors Corp.-U.A.W., Dec. No. E-198, Wallen (1948).

45. Lincoln Industries, Inc.-U.F.W., 19 LA 489, Barrett (1952).

46. Columbian Rope Co.-U.F.M.W., 3 LA 90, King (1946).

47. Fish Net & Twine Co.-T.W.U.A., 5 LA 228, Davey (1945).

48. Ford Motor Co.-U.A.W., 6 LA 853, Shulman (1946).

49. General Motors Corp.-U.A.W., Dec. No. C-262, Seward (1944).

50. Chrysler Corp.-U.A.W., 5 LA 420, Wolff (1946);
North American Aviation, Inc.-U.A.W., 19 LA 183, Komaroff (1952).

51. Hoboken Land & Improvement Co.-I.B.T., 1 LA 554, Scarborough (1945);
Progress Furniture Manufacturing Co., Inc.-U.F.W., 12 LA 233, Komaroff (1949).

52. Bethlehem Steel Co.-I.U.M.S.W., 15 LA 749, Feinberg (1950); see also
International Shoe Co.-U.S.W., 2 LA 295, Copelof (1946).

53. Columbian Rope Co.-U.F.M.W., 3 LA 90, King (1946).

54. Haslett Compress Co.-I.L.W.U., 7 LA 762, Kleinsorge (1947).

55. General Motors Corp.-U.A.W., Dec. No. C-167, Dash (1944).

56. John Deere & Co.-U.A.W., 17 LA 446, Taft (1951);
General Motors Corp.-U.A.W., Dec. No. D-67, Seward (1947).

57. General Motors Corp.-U.A.W., Dec. No. C-332, Seward (1945).

CHAPTER XII

STRIKES AND SLOWDOWNS

One of the most widely held principles of arbitration is that leadership or participation in an unauthorized work stoppage or slowdown during the life of an existing agreement is among the most serious of industrial offenses. Under the terms of many labor contracts employees who feel aggrieved are specifically prohibited from engaging in such self-help activities by a no-strike, no-slowdown covenant. Instead they are directed to the grievance machinery as the only proper channel by which to initiate action against management to secure redress for an alleged wrong. Despite the apparent clarity of this prescribed procedure, it nonetheless remains true that disciplinary sanctions imposed for acts allegedly in contravention of it are extremely common and disputes over the propriety of such disciplinary actions represent a substantial proportion of all grievance arbitrations.

The reasons for the high frequency with which arbitrators are called upon to adjudicate these cases are many, and often are interrelated. In part they grow out of the degree of discipline which management generally considers commensurate with such imputed cause. Although the extreme penalty of discharge is not the exclusive disciplinary measure assessed for inciting or participating in an illegal cessation or curtailment of work effort, it is the predominant one.

Moreover, an unusually high proportion of the cases where such cause has been advanced and dismissals imposed involve union officers. Because of the position of authority they hold, union officials are particularly susceptible to being suspect of and charged with promoting or prolonging illegitimate strikes and slowdowns. These factors, interpreted as they are to threaten the strength of the bargaining unit, lead unions for essentially defensive purposes to challenge vigorously the right of management to dismiss for such alleged misconduct.

Another reason accounting for the frequent submission of these disputes to arbitration is controversy over the degree of guilt that must be established to justify discipline, and particularly discharge. In many instances the very nature of the alleged offenses results in management's inability to secure more than circumstantial evidence of cause for punishment. Normally, on these occasions, unions contend such proof fails to resolve the issue of employee guilt or innocence or the extent thereof. They therefore maintain management to have failed in its burden of proof and no just basis for disciplining to exist. In other cases, as in those where either a clear showing or strong inference of guilt admittedly is present, unions often likewise argue the impropriety of discipline in the light of one or more extenuating factors. Although these may take many specific forms, usually they involve in some manner a claim of extreme provocation or prejudice on the part of the employer or a good faith belief by the grievant that the conduct in question was authorized by or not an abrogation of the terms or spirit of the agreement.

In order to arrive at a determination of these matters arbitrators have had to develop working definitions of activities which are and which are not reasonably classified as stoppages and slowdowns, of the types of behavior which do or do not constitute improper leadership or participation, of the obligations of union representatives relative to those of rank-and-file workers, of the weight justly to be attached to mitigating influences accompanying the offenses, and the procedural standards to which the employer will be held in exercising his disciplinary authority. These criteria take on meaning only as they have been interpreted and applied in actual cases.

Strikes

Not every interruption of production is an illegal work stoppage. To be considered as one, usually some element of pressure, of retribution or of protest must be intended and shown. Also, for the work cessation properly to be classified as a strike there must in general be evidence of a concerted rather than an individual show of force.[1] On the other hand, a finding of the existence of an illegitimate strike is not contingent upon general group withdrawal of work services for an extended period or upon departure of the participants from their work area or from the company premises. It has been held many times that stoppages by a limited number of employees,[2] including those of relatively brief duration,[3] and those in which pending the formulation, presentation or satisfaction of their demands, the employees cease work and idly stand or mill around,[4] engage in a formal sitdown demonstration,[5] spontaneously gather and hold a meeting on company time and

property,[6] descend en masse upon a supervisor's office,[7] or adjourn to the plant gate[8] constitute illegal strikes. The reasoning behind this position is that such actions are just as disruptive of plant discipline and constructive employer-employee relations, and therefore just as improper, as walkouts of lengthy duration or leavetaking for the union meeting hall, the picket line or home. The broad scope of what is conceived as striking is additionally illustrated by the fact that concerted refusals of job[9] or overtime assignments,[10] or group absenteeism[11] or tardiness,[12] have likewise often been considered untoward expressions of solidarity and protest and therefore to be justly punishable violations under a no-strike proviso.

With but few exceptions, the employer does not exercise his technical right to impose wholesale and identical punishment on all guilty of the common and equal offense of joining in an unauthorized strike. This is particularly the case, and for very practical reasons, where he considers it necessary to impose discharge penalties to prevent recurrence of the stoppage and participation in it was widespread. As a rule he will limit discipline to those who he believes were primarily responsible for inciting, directing or otherwise furthering the strike activity. Where he elects such a course of action, however, he must, where possible, be consistent and not only restrict the disciplinary action to those individuals who the evidence indicates played prominent and responsible roles in causing or prolonging the stoppage but also distinguish by differentiation in the severity of penalties between degrees of responsibility among offenders.[13] Otherwise, if he singles

out and levies like penalties on only some leaders and some followers or fails to recognize in disciplining extreme and obvious differences in leadership responsibility, he is likely to be charged with and found by arbitrators to have penalized in discriminatory fashion. He is not, on the other hand, and especially in the absence of union cooperation in determining degrees of guilt among offenders, expected to accomplish the impossible, but can limit disciplining for strike direction to only those whose leadership culpability can be supported by evidence.[14]

In determining both the extent of leadership responsibility and the appropriateness of the penalty imposed, arbitrators employ a number of general principles. One is a recognition that leadership may be active and direct and thus of a positive nature, or passive and indirect and thus negative in character. They also acknowledge that it may be exercised by rank-and-file employees as well as by union officials, either by initially instigating the strike or by directing the conduct of the participants during it. Although strike leadership in any form normally is held a more serious offense than mere participation,[15] that exercised by a union representative generally is considered in arbitration as misconduct of a much higher order than comparable activity by an ordinary employee.[16] On the other hand, leadership in supporting the continuance of a stoppage in progress is generally considered a less serious offense than calling or fomenting a strike.[17]

Employee behavior commonly interpreted as evidencing positive leadership may take many forms. Among the clearest expressions of active leadership in causing or expanding participation in a walkout,

and held as clear grounds for dismissal when substantiated by proof of positive clarity, is an order, issued usually by a union officer to his fellow employees, to discontinue work and engage in a stoppage;[18] an oral call or arm signal by the accused for his co-workers to follow his lead in departing;[19] or the use of force to induce a reluctant employee to join in a walkout.[20] Also, halting employees reporting for work at the gate and persuading them against entry - by advice, by picketing or by resort to violence - have likewise, when clearly established in fact, frequently been considered evidence of direct leadership and, as such, to represent proper cause for termination.[21]

Where, in contrast to the above instances, evidence of positive leadership responsibility is limited and not wholly conclusive, arbitrators have not necessarily denied employers the right to penalize offenders. Instead, they have often upheld the right of management to draw fair and reasonable inferences and punish by discharge or other severe discipline on the basis of strong circumstantial evidence of guilt. Such has been the case where, in the absence of a convincing alternative explanation, employees have been observed circulating among and conversing with or distributing circulars to members of the workforce and immediately thereafter a walkout occurred,[22] knowingly and in boastful fashion have evidenced to management prior knowledge of an impending strike,[23] or have acted as a willing spokesman for the dissident strikers immediately preceding or subsequent to a work cessation.[24]

The distinguishing features of negative strike leadership are two-fold. One is the fact that only officials of the bargaining unit and not ordinary employees may properly be charged with such misconduct,[25] and the other is that it involves acts of omission and nonfeasance rather than affirmative acts of commission.[26] In essence, this concept as applied by many arbitrators holds that any failure by a union officer to use every means at his disposal to dissuade members of the workforce from engaging in or persisting in an illegal walkout and to disassociate himself clearly from the strikers' position during an actual stoppage represents negative leadership. This conclusion is grounded, first of all, in the conviction that management may legitimately charge union officers to demonstrate a substantially higher degree of understanding and observance of the moral and legal obligation for contract performance than it may expect of the balance of the membership.[27] It is further and generally assumed that the obligation to observe the agreement's terms implicitly imposes upon such officials an absolute duty to do everything in their power to avert or end a work cessation.[28] This is typically inferred to involve forcibly reminding the potential or actual strikers of their responsibilities under the agreement, forthrightly describing to and warning them of the damages that will result to all parties involved, firmly and publicly expressing their personal and official disapproval, and finally themselves desisting from any act that might be interpreted as sanctioning or encouraging the strike action. Anything short of this on their part is likely to

be interpreted by many arbitrators to be evidence of indirect and negative leadership and deserving of severe punishment.

In passing on the reasonableness of penalties imposed for negative leadership arbitrators have held that union officers are not guarantors of the sanctity of the collective contract. If a stoppage occurs or persists despite a genuine and firm effort by such officials to deter it, they may not properly be held liable.[29] They do not avoid responsibility, however, if their attempt was merely half-hearted and registered more to abide by the formal letter of the law than as a sincere exhortation against self-help action.[30] They even more noticeably fail to fulfill their obligations when they assume the role of a passive and disinterested bystander,[31] attempt to act as impartial intermediaries with management,[32] or serve as active participants.[33] Some arbitrators thus interpret neutrality and acquiescence to represent in the eyes of the strikers, and therefore in fact to be, tacit approval and the equivalent of outright espousal of the strike movement. Because it is presumed such conduct indirectly either inspires the employees to carry out a contemplated strike or strengthens their resolution to continue with one it is considered causative in nature and, as a result, to offer a sufficient basis for a stringent penalty.

Any measure of leadership or participation is inherently such a serious offense that influences favoring mitigation in the degree of discipline assessed must be extremely persuasive before arbitrators will find a penalty unreasonably severe and substitute a lesser measure of punishment. They are most unlikely to grant a grievant relief where

extreme aggravating circumstances accompanying the basic offense cancel out those in extenuation of it. This has occurred where stoppages have taken place during a time of national emergency and interrupted the flow of vital and strategic material to our armed forces,[34] where an aggrieved has compounded his misconduct by violence and the use of force[35] or deliberately resorted to evasive and false testimony in the arbitration proceedings,[36] or where the employee's past record has shown him to be an incorrigible offender whose reinstatement would impose an undeserved hardship upon management.[37] In other instances, and standing alone, some circumstances offered in mitigation are dismissed as wholly inadequate excuses for leading a walkout and as insufficient cause for a reduction in the employer's discipline. Allegations of immunity from discharge or other severe discipline have been rejected where the pleas advanced were based upon the fact that leadership was exercised while off company time,[38] that the stoppage was intended solely to show sympathy for and support of a sister local,[39] or that the employer by past lax enforcement of disciplining for strike leadership had waived his right to penalize the instant offenders.[40] Many other decisions have rejected as reasons for granting redress unverified claims that stoppages were necessitated by an assignment that would have proved injurious to the personal health and safety of the strikers. Unless those that offer this common defense can establish that the danger was real or at least sufficiently real to justify a good faith belief in its existence,[41] that excuse offers no protection from discipline for a concerted refusal to accept the assignment.[42]

Arbitrators, however, are not unmindful that leadership or participation, while not in themselves condonable, may be founded, nonetheless, in honest misunderstanding of their responsibilities by employees or motivated by deep provocation by the employer. In the face of clear evidence to either effect, offenders have been held undeserving of extreme penalties. Thus, a finding that a strike action was free of malicious intent and was erroneously but with some degree of cause conceived as a matter of right, although not considered to establish innocence nor excuse the offense, often has resulted in arbitral relaxation in the measure of discipline imposed by management.[43] This especially has been the case in the absence of a showing of noticeable damage to the employer's business interests[44] and where appellants had compiled long or exemplary work records.[45] It has been true also in the case of union officials who assumed improperly that formal authorization of a stoppage by the membership obligated them to represent the strikers in negotiating with management the conditions of a return to work,[46] or who inferred that because a developing strike situation had clearly progressed beyond the point where they were capable of stopping it they were freed of the responsibility to try.[47] Under any combination of these factors the discharge penalty in particular has been considered usually an unduly harsh disciplinary levy.

Some arbitrators have also offered former strikers partial redress despite the impropriety of their actions where they have established the employer precipitated their stoppage by an arbitrary and provocatory act as, for example, the unjustified disciplining of a union leader,[48]

an improper refusal to negotiate the question of reduced employee incentive earnings in the grievance procedure,[49] or a breach of faith by misrepresentation of a material fact.[50] In these latter instances arbitrators, operating under the theory that "two wrongs do not make a right," have held both parties liable for defaulting in their obligations and balanced off their joint misconduct by ordering a reduction in the punishment initially invoked.

The most important single cause for holding a penalty excessive, however, is that affirmative strike leadership or the degree of direction attributed to the grievant by management have not been sufficiently supported by credible evidence of guilt. Often the employer has been found to have adduced leadership and predicated severe discipline on that basis where the evidence was merely circumstantial and suggestive in nature and it was in fact as reasonable or more logical to infer that the employee committed an offense no more serious than that of simple participation in a walkout. Thus, for example, arbitrators have ruled that without corroborating evidence of a employee's culpability, standing beside an acknowledged leader does not make him one as well,[51] nor does a suspicious gesture if knowledge of an impending work cessation is widespread[52] or a single small statement[53] or a turn on the picket line[54] if a strike is already in progress. Similarly, if an employee assumes direction of the conduct of strikers during a stoppage at the request of the legal authorities and limits his activity solely to that of maintaining order, his punishment may not properly exceed that warranted for mere participation.[55]

Where positive leadership action on the part of several employees has been established, the greater relative responsibility of an aggrieved has not been held a just basis upon which to effectuate his discharge when other offenders received no penalties whatsoever.[56] It is, however, generally considered in arbitration as justifying a substantial suspension. In other instances, the inability of management to offer clear evidence of differential degrees of guilt among leaders and thus to justify a wide disparity in their penalties has led arbitrators to order equalization of discipline at the lesser of the measures of punishment.[57]

Seldom do employers so seriously misinterpret the facts of a case, including that of their disciplinary powers under an agreement, that arbitrators find disciplining of a worker for alleged striking to be wholly unwarranted. Nonetheless this does on occasion occur. In many cases employees have been held innocent of wrongdoing because of the inability of management to establish that a work stoppage actually took place. Although those aggrieved may have been shown to have planned to strike,[58] and some to have considered[59] or even endeavored[60] to instigate a walkout, the failure of a stoppage to materialize has been ruled to absolve them of any punishable guilt. These awards tentatively indicate that arbitrators do not consider the intent or exhortation to commit an impropriety, without the anticipated effect, in and of themselves to be one. Moreover, unless employee inactivity during working hours can be shown to have been a willful withholding of effort rather than an unavoidable consequence of a lack of work due to a line breakdown,[61] or the result of a strike to which the complainants were not a

party,[62] the individuals involved may not be charged with and disciplined for engaging in a stoppage. Freedom from fault has been found also and appeals sustained in full where the evidence of the grievant's alleged action in furthering a strike has been either no more than conjectural in nature[63] or completely disproved by other unrefuted evidence.[64]

The other general ground for revoking penalties in their entirety is a finding that the employer was guilty of gross abuse of his discretion in discipling the employees in question. Such has been the case where management's penalty action abrogated an explicit provision of the agreement which qualified and took precedence over his right to discipline. If the employer contractually has ceded sole authority to the union to punish its officers for failing in their official responsibilities,[65] has guaranteed his workers the specific monetary benefit of holiday pay,[66] or established a statute of limitations for the invocation of a penalty following an offense,[67] he is barred from unilaterally imposing a sanction in contravention of those terms. On the basis of equity he is also denied the right to discriminate unjustly among employees and discipline by a blanket penalty which would deprive all like offenders of their accumulated seniority regardless of their relative tenure,[68] or withhold a general merit pay increase when some of those punished were indeed meritorious.[69] Employers have been found likewise to have penalized in discriminatory and arbitrary fashion where in the face of a promise to maintain the <u>status quo</u> as a condition of a return to work and pending discussion of the incident, they have singled out and punished a high union officer without disciplining those more

responsible than he for striking,[70] or where the cause advanced in justification of the penalty assessment is other than the true one and is itself unsubstantiated.[71] Under these circumstances, and despite the fact that the employees involved were not free of wrongdoing, arbitrators consider the only appropriate remedy is to set aside the disciplinary action in its entirety.

Slowdowns

In many ways the arbitration of slowdown cases and those involving stoppages are comparable. The reasons most frequently offered for and the effect of each tend to be similar. A number of arbitral standards have common application, including those of the greater relative guilt for leadership than followership,[72] the obligations of union officers to provide affirmative support of the contract's provisions,[73] that provocation by the employer may extenuate the offense but never absolve an employee completely from responsibility,[74] and that penalties among offenders must bear a just relationship to the relative measure of cause present.[75] There are, nonetheless, unique features of a definitional and evidentiary nature about slowdown arbitrations. For one thing a systematic and punishable curtailment of output may be and often is conducted by an individual employee, as well as by a group of workers acting in concert. Under either circumstance, however, the principal test applied by arbitrators is whether a fair and reasonable day's work has been attempted or accomplished, or has deliberately been denied the employer. Clear and positive evidence of both an actual and a purposeful withholding of work effort normally is required to sustain

the charge. The evidence advanced by a management in support of its penalty action in alleged slowdown cases is usually highly objective and detailed in character with primary reliance generally placed upon the grievant's rates of production or his previous disciplinary record.

Arbitrators, in evaluating the adequacy of such proof and assessing the degree of cause for discipline present, seek to determine only if the grievant produced that of which he was capable by an honest and reasonable work effort.[76] In deciding this matter they in no way concern themselves with the propriety of the minimum work standards or incentive rates established by the employer nor consider data relating to them of critical importance in their deliberations. The mere fact an employee fails to meet the prescribed production standards is not by itself regarded as conclusive proof of an intentional limitation of output and cause for discipline.[77] Neither is evidence that a worker produced at a rate equal to[78] or in excess of[79] his base incentive pace necessarily considered sufficient proof that he did not control and retard his production. Rather than comparing the actual output attained by an employee to the established work standards, arbitrators instead relate it to the trends and variations in his production over a representative interval preceding or, where the penalty invoked was short of dismissal, subsequent to the work restriction attributed to him, and also usually to the achievement levels of other workers in comparable positions. If there is a showing of a precipitous drop by an individual employee or a group from a substantially higher and presumably normal rate of production,[80] or a significant recovery

immediately following disciplining,[81] and the rate of change is not explainable by outside factors beyond the control of the aggrieved, this is generally regarded in arbitration as indicative of a deliberate slowdown and cause for a stern penalty. This finding is especially likely where the new and lower production rates among several employees are identical[82] where the participants persisted in maintaining a reduced level of output despite clear orders or warning by management to cease their work restriction,[83] where the output of an experienced employee suddenly and noticeably fails to meet his former average though others on the same job continue to attain normal production,[84] and lastly, where a grievant has a previous record of engaging in slowdown activity.[85]

Though low productivity by one or several employees or absolute uniformity in output among a group of workers offers a strong presumption favoring a finding of a slowdown, without proof to the effect the curtailment of work effort was purposeful, arbitrators have not considered grievants to have been proven guilty of conducting one and have mitigated severe penalties grounded on that charge.[86] On other occasions clear evidence or reasonable inferences drawn from the circumstances of a case have been held to refute the allegation a reduction in output by an employee was intentional and, therefore, to militate against harsh punishment. Thus, where employees have shown that they were intimidated into passive participation in a slowdown by a ruling clique within the workforce,[87] that the employer's former policy of lax enforcement of regulations governing output led them to believe their

low production was privileged,[88] or that over long years of service they had consistently maintained unblemished work records,[89] they have been held deserving of not more than nominal penalties.

Where evidence of the other essential element of a slowdown is lacking, that of an actual restriction of output, no cause for discipline is found to exist. This may result from an absence of factual data indicating the production in question was other than that which was normal and had always been accepted as reasonable.[90] More frequently, however, it occurs in instances where the rate of production expected of an employee was excessive and unreasonable. If the worker had recently been transferred to a new and different type of operation, disciplining him shortly thereafter for failing to produce the volume anticipated or achieved by more experienced operators represents an arbitrary and improper exercise of management's disciplinary authority. The penalty is particularly likely to be considered unwarranted where the employee's rate of output has been improving and approaching the normal level demanded on the job.[91] The inability of employees to attain output standards has also been held excusable where working at a reduced pace was necessitated by production difficulties at other work stations, rather the result of a conscious slowdown.[92]

Only under extreme conditions have penalties been disallowed in instances where a slowdown did in fact occur. One such circumstance exists where the form of discipline invoked represents a radical departure from normal industrial practice and, more importantly, nullifies a contractual right of the grievant. The denial of guaranteed base

incentive earnings for below standard output is a case in point.[93] Another general ground for revoking discipline is a showing of unjust discrimination. The employer may not impose a mass and equal penalty on a group, only some of whose members were involved in the slowdown. Where he does not establish the number and identity of the participants and limit disciplining solely to these individuals, it is likely that no penalties will be allowed to stand.[94] A final condition under which otherwise guilty parties may be freed of liability for discipline is where management is shown to have failed to honor a promise to an aggrieved to waive his penalty. Compliance with such a commitment has been ordered in arbitration.[95]

Notes for Chapter XII

1. Nathan Manufacturing Co.-I.A.M., 7 LA 3, Scheiber (1947).

2. General Motors Corp.-U.A.W., Dec. No. F-71, Alexander (1949); Bethlehem Steel Co.-U.S.A., Gr. No. 2501, Dash (1954).

3. General Motors Corp.-U.A.W., Dec. No. C-142, Dash (1943).

4. Ford Motor Co.-U.A.W., 6 LA 799, Shulman (1947).

5. C & D Batteries, Inc.-U.E., 16 LA 198, Teaf (1951).

6. Alan Wood Steel Co.-U.S.A., 21 LA 843, Short (1954).

7. North American Aviation, Inc.-U.A.W., 19 LA 712, Komaroff (1952); Bethlehem Steel Co.-U.S.A., Gr.'s No.'s 2913-4140 and 2919-4138, Killingsworth (1954).

8. Bethlehem Steel Co.-U.S.A., Gr. No. 5746, Shipman (1951).

9. Commercial Pacific Cable Co.-A.C.A., 11 LA 219, Kerr (1948); National Tube Co.-U.S.A., 13 LA 404, Seward, Kelly and Levitsky (1949).

10. Glamorgan Pipe & Foundry Co.-U.S.A., 15 LA 645, Fuchs (1950); United Engineering & Foundry Co.-I.A.M., 21 LA 145, Young (1953).

11. Everett Dyers & Cleaners-A.C.W.A., 11 LA 462, Myers (1948); Colonial Provision Co.-U.P.W.A., 17 LA 610, Copelof (1951).

12. Pittsburg Plate Glass Co.-Allied Chemical & Alkali Workers of America (Ind.), 12 LA 803, Cornsweet (1949); Bethlehem Steel Co.-I.U.M.S.W., 19 LA 43, Feinberg (1951).

13. Rheem Manufacturing Co.-U.S.A., 8 LA 85, McCoy (1947); S. Co., Inc.-U.E., 10 LA 924, Scheiber (1948); Birmingham Slag Co.-M.M.S.W., 12 LA 56, Hepburn (1948).

14. Mueller Brass Co.-U.A.W., 3 LA 285, Wolff (1946); Carnegie-Illinois Steel Co.-U.S.A., 5 LA 363, Blumer (1946).

15. Fern Shoe Co.-U.S.W., 14 LA 268, Grant (1950); Inland Steel Co.-U.S.A., 19 LA 601, Updegraff (1952); United States Rubber Co.-U.R.W., Dec. No. 110-K-5, Killingsworth (1953).

16. Stockham Pipe Fittings Co.-U.S.A., 4 LA 744, McCoy (1946); International Harvester Co.-U.F.M.W., 21 LA 239, Platt (1953).

17. Chrysler Corp.-U.A.W., 19 LA 818, Wolff (1953);
Ford Motor Co.-U.A.W., CK-14, Cases No.'s 17407 and 17465, Killingsworth (1956).

18. Freuhauf Trailer Co.-U.A.W., 1 LA 155, Lappin (1944);
Stockham Pipe Fittings Co.-U.S.A., 4 LA 744, McCoy (1946).

19. General Motors Corp.-U.A.W., Dec. No. C-310, Seward (1945);
United States Rubber Co.-U.R.W., Dec. No. 65-K-7, Killingsworth (1954).

20. Ford Motor Co.-U.A.W., Dec. No. B-1, Platt (1955).

21. International Harvester Co.-U.F.M.W., 21 LA 239, Platt (1953);
Parkway Baking Co.-B.C.W., 21 LA 737, Boyer (1953);
Bethlehem Steel Co.-U.S.A., Gr.'s No.'s 326 and 327, Shipman (1949).

22. Timken Roller Bearing Co.-U.S.A., 7 LA 239, Harter (1947);
Bethlehem Steel Co.-U.S.A., 16 LA 99, Shipman (1951).

23. Rheem Manufacturing Co.-U.S.A., 8 LA 85, McCoy (1947);
Oronite Chemical Co.-G.C.C.W., 20 LA 875, Ralston (1953).

24. Armour & Co.-U.P.W.A., 8 LA 758, Gilden (1947);
General Motors Corp.-U.A.W., Dec. No. C-142, Dash (1943).

25. Stockham Pipe Fittings Co.-U.S.A., 4 LA 744, McCoy (1946).

26. Bethlehem Steel Co.-U.S.A., Gr. No. 5746, Shipman (1951).

27. American Brake Shoe Co.-U.A.W., 13 LA 294, Larkin (1949).

28. International Harvester Co.-U.F.M.W., 14 LA 986, Seward (1950);
Green River Steel Corp.-U.S.A., 25 LA 774, Sembower (1955).

29. American Steel & Wire Co.-U.S.A., 5 LA 193, Blumer (1946);
General Motors Corp.-U.A.W., Dec. No. C-247, Seward (1944).

30. General Motors Corp.-U.A.W., Dec. No. C-99, Dash (1943).

31. Chrysler Corp.-U.A.W., 18 LA 565, Wolff (1952).

32. Bethlehem Steel Co.-U.S.A., Gr. No. 6384, Shipman (1951).

33. Mueller Brass Co.-U.A.W., 3 LA 285, Wolff (1946).

34. General Motors Corp.-U.A.W., Dec. No. C-99, Dash (1943);
Inland Steel Co.-U.S.A., Gr. No. 19-C-90, Updegraff (1952).

35. Ford Motor Co.-U.A.W., Dec. No. B-1, Case No. 17002, Platt (1955).

36. General Motors Corp.-U.A.W., Dec. No. F-66, Alexander (1949).

37. International Harvester Co.-U.F.M.W., 13 LA 470, Seward (1949);
Borg-Warner Corp.-U.F.M.W., 22 LA 589, Larkin (1954).

38. International Harvester Co.-U.F.M.W., 21 LA 434, Platt (1953);
United States Rubber Co.-U.R.W., Dec. No. 65-K-7, Killingsworth (1954).

39. John R. Evans & Co.-F.L.W., 6 LA 414, Levy (1947);
Bethlehem Steel Co.-U.S.A., Gr.'s No.'s 326 and 327, Shipman (1949).

40. Eberhard Manufacturing Co.-I.M.F.W., 4 LA 419, Miller (1944);
United States Rubber Co.-U.R.W., 8 LA 44, Healy (1947).

41. Birmingham Slag Co.-M.M.S.W., 12 LA 56, Hepburn (1948).

42. Paramount Printing & Finishing Co.-T.W.U.A., 13 LA 143, Copelof (1949);
Pilot Freight Carriers, Inc.-I.B.T., 22 LA 761, Maggs (1954);
Bethlehem Steel Co.-U.S.A., Gr. No. 2501, Dash (1954).

43. John R. Evans & Co.-F.L.W., 6 LA 44, Levy (1947);
International Harvester Co.-U.F.M.W., 14 LA 302, Seward (1950).

44. Freuhauf Trailer Co.-U.A.W., 1 LA 155, Lappin (1944).

45. International Harvester Co.-U.F.M.W., 21 LA 220, Platt (1953).

46. Simplicity Pattern Co., Inc.-O.P.W., 7 LA 180, Wolff (1947);
General Motors Corp.-U.A.W., Dec. No. F-1, Wallen (1948).

47. Ford Motor Co.-U.A.W., Dec. No. B-1, Case No. 17002, Platt (1955).

48. C. G. Hussey & Co.-Federal Labor Union, Local 22705, 7 LA 590, Dwyer (1947);
Huntington Chair Corp.-U.F.W., 17 LA 440, Latture (1951);
Curtiss-Wright Corp.-U.S.A., 20 LA 15, Carroll (1952).

49. Auto-Lite Battery Corp.-U.A.W., 3 LA 122, Copelof (1946).

50. Speer Carbon Co.-I.U.E., 16 LA 247, Blair (1951);
Saco-Lowell Shops-T.W.U.A., 16 LA 311, Myers (1950).

51. General Motors Corp.-U.A.W., Dec. No. C-239, Seward (1944).

52. General Motors Corp.-U.A.W., Dec. No. D-4, Seward (1945).

53. Rheem Manufacturing Co.-U.S.A., 8 LA 85, McCoy (1947).

54. Stockham Pipe Fittings-U.S.A., 4 LA 744, McCoy (1946).

55. General Motors Corp.-U.A.W., Dec. No. C-236, Seward (1945).

56. Brewer Dry Dock Co.-Brewer Dry Dock Employees Association, 9 LA 845, Copelof (1948);
Chrysler Corp.-U.A.W., 18 LA 379, Wolff (1952).

57. Mueller Brass Co.-U.A.W., 3 LA 285, Wolff (1946);
General Motors Corp.-U.A.W., Dec. No. C-310, Seward (1945).

58. Curtiss-Wright Corp.-U.A.W., 20 LA 15, Carroll (1952).

59. Shell Oil Co.-O.C.A.W., 13 LA 273, Bartlett (1949).

60. Milk Products, S.A.-Unione de Trabajadores de la Milk Products, S.A., 16 LA 939, Rottenberg (1951).

61. Firestone Tire & Rubber Co.-U.A.W., 14 LA 552, Platt (1950).

62. Bethlehem Steel Co.-U.S.A., Dec. No. 77, Seward (1954).

63. Rheem Manufacturing Co.-U.S.A., 8 LA 85, McCoy (1947);
Armour & Co.-U.P.W.A., 8 LA 758, Gilden (1947).

64. John Deere Tractor Co.-U.A.W., 11 LA 675, Updegraff (1948);
International Harvester Co.-U.F.M.W., 13 LA 688, Seward (1949).

65. Symington-Gould-U.S.A., 9 LA 819, Whiting (1948).

66. Parke, Davis & Co.-G.C.C.W., 13 LA 126, Platt (1949).

67. Ford Motor Co.-U.A.W., 6 LA 799, Shulman (1947).

68. Aleo Manufacturing Co.-T.W.U.A., 15 LA 715, Jaffee (1950).

69. John Waldron Corp.-I.A.M., 5 LA 473, Kirsh (1946).

70. South Side Dye House, Inc.-A.C.W.A., 10 LA 533, Myers (1948).

71. Christ Cella's Restaurant-International Alliance of Hotel & Restaurant Employees, 7 LA 355, Cahn (1947).

72. Fabet Corp.-I.L.A., 12 LA 1126, Wallen (1949).

73. Chrysler Corp.-U.A.W., 9 LA 789, Wolff (1947);
American Brake Shoe Co.-U.A.W., 13 LA 294, Larkin (1949).

74. Aluminum Company of America-M.M.S.W., 7 LA 422, Kirsh (1947).

75. Chrysler Corp.-U.A.W., 17 LA 814, Wolff (1952);
McInerney Spring & Wire Co.-U.A.W., 21 LA 729, Howlett (1953).

76. Fabet Corp.-I.L.A., 12 LA 1126, Wallen (1949);
Dirilyte Company of America, Inc.-U.S.A., 18 LA 882, Ferguson (1952).

77. National Malleable & Steel Casting Co.-U.A.W., 12 LA 262, Pedrick (1949).

78. Tennessee Coal & Iron Division, United States Steel Co.-U.S.A., Gr. No. 155-990, Garrett (1954).

79. American Steel & Wire Co.-U.S.A., 8 LA 296, Blumer (1947);
American Brake Shoe Co.-U.A.W., 13 LA 294, Larkin (1947).

80. Bethlehem Steel Co.-I.U.M.S.W., 18 LA 370, Feinberg (1951);
United States Rubber Co.-U.R.W., Dec. No. 101-W-4, Killingsworth (1956).

81. L. O. Koven & Bros., Inc.-United Association of Journeymen Plumbers & Steamfitters, 2 LA 615, Lesser (1946);
Outboard, Marine & Manufacturing Co.-Federal Labor Union No. 23794, 12 LA 488, Lapp (1949).

82. General Television & Radio Corp.-U.E., 2 LA 483, McCoy (1942);
Goodyear Tire & Rubber Co.-U.R.W., 18 LA 557, McCoy (1952).

83. Aluminum Cooking Utensil Co.-U.S.A., 5 LA 85, Wagner (1946);
Inspiration Consolidated Copper Co.-M.M.S.W., 9 LA 454, Cheney (1948).

84. Bethlehem Steel Co.-U.S.A., Dec. No. 192, Seward (1956).

85. Borg-Warner Corp.-U.A.W., 13 LA 710, Updegraff (1949);
National Lock Co.-U.A.W., 18 LA 449, Luskin (1952).

86. John Deere Tractor Co.-U.A.W., 10 LA 165, Updegraff (1948);
General Motors Corp.-U.A.W., Dec. No. C-211, Dash (1944).

87. Lake Shore Tire & Rubber Co.-U.R.W., 3 LA 455, Gorder (1946);
Cutter Laboratories-O.P.W., 9 LA 187, Miller (1947).

88. Dirilyte Company of America, Inc.-U.S.A., 18 LA 882, Ferguson (1952);
McInerney Spring & Wire Co.-U.A.W., 21 LA 729, Howlett (1953).

89. General Motors Corp.-U.A.W., Dec. No. C-240, Seward (1944).

90. Corn Products Refining Co.-Federal Labor Union, Local 18851, 3 LA 242, Updegraff (1946);
General Steel Castings Corp.-U.S.A., 11 LA 834, Hilpert (1948).

91. Firestone Tire & Rubber Co.-U.A.W., 14 LA 552, Platt (1950); International Harvester Co.-U.F.M.W., 21 LA 428, Platt (1953).

92. General Motors Corp.-U.A.W., Dec. No. 59, Taylor (1942); Bethlehem Steel Co.-U.S.A., Dec. No. 252, Seward (1956).

93. Armstrong Tire & Rubber Co.-U.R.W., 18 LA 544, Ralston (1952); but see contra American Steel & Wire Co.-U.S.A., 6 LA 392, Blumer (1945).

94. Standard Steel Spring Co.-U.A.W., 17 LA 423, Platt (1951).

95. United States Rubber Co.-U.R.W., Dec. No. 101-W-4, Killingsworth (1956).

CHAPTER XIII

SECURITY RISKS

One of the controversial policy issues of the past decade has been the extent of the employment rights of individuals alleged to be industrial security risks. Many persons so charged have been deprived by their employer of accumulated job rights by discharge, and occasionally by suspension or transfer. A relatively small number of grievances challenging the authority of the employer to take these actions under existing collective bargaining agreements have been submitted to arbitration for settlement. In these cases, despite the fact that management generally has intended the measures to be corrective or remedial rather than disciplinary in nature, arbitrators nonetheless have consistently maintained that only where just and sufficient cause has been clearly established should the actions taken be sustained in full.

Before discussing the standards normally applied by arbitrators in determining the presence or absence of cause in specific cases, it would be well first to distinguish between the two sets of circumstances under which these disputes normally arise. Underlying many cases is the temporary withholding or outright denial of security clearance to a worker employed in a firm operating under Federal government defense contracts. The decision to withhold or deny clearance is made, on occasion, unilaterally by the employer. More often, however, it is made

by an Industrial Personnel Security Board authorized by the Department of Defense to enforce statutory and administrative security regulations in such firms. The usual procedure in these cases is for that agency to direct the employer to deny such employees access to the classified defense information or materials and the restricted areas of defense production on his premises. Under the terms of his contract with the government the employer is legally obliged to comply. This has been accomplished by the employer by dismissal of the worker in question in the great majority of arbitrations in which the propriety of actions taken as a result of this procedure have been contested. The conditions under which this and other less severe measures have been either upheld or modified are analyzed in the section headed, Denial of Security Clearance.

Another and more sizeable group of cases involve grievants who have been subjected to discharge following public testimony that they formerly held membership in or at the time were affiliated with the Communist Party or in organizations listed as subversive by the Attorney General of the United States. Usually that testimony has been offered before investigative committees created by Federal or State legislatures for the broad purposes of collecting evidence relating to the extent and means of subversion and of proposing laws for its control. In most of these instances the defendants have made no attempt to deny or refute those statements. Instead, quite within their rights and in this sense properly, they have declined to testify in their own behalf on the grounds that such testimony would or might tend to incriminate

them. In electing this course of action they have claimed the privileges granted them under the Fifth and/or First Amendments to the Federal Constitution. On the basis of invoking those rights and withholding testimony, however, their employers have occasionally taken allegedly corrective action against them for refusing to cooperate in or actually hampering a legitimate legislative inquiry. On the other hand, in a greater number of instances, they have been subjected to remedial measures primarily on the ground that by their conduct they did or likely would jeopardize the success of the employing firm's operations. The sufficiency of these grounds as cause for dismissal and the arbitral action taken thereon is discussed under the title, Alleged Prejudice to the Employer's Business Interests.

The few arbitration decisions available for analysis under each of these classifications places a definite limitation on the ability of one to generalize with any great degree of conviction on the extent of the acceptance and application of prevailing standards of review. In addition, many of the important and provocative questions which readily come to mind must at the present time go unanswered for the matters involved have yet to be decided. Some of the most obvious of these provide the subject matter for the third and final section of this discussion, that of Unresolved Issues.

Denial of Security Clearance

Every contractor or subcontractor operating under a defense contract is required to execute a so-called "Security Agreement" with the

Department of Defense. Therein he agrees to enforce the provisions of the Department's "Industrial Security Manual for Safeguarding Classified Information." This document defines the conditions under which security clearance is required of employees, the manner in which it may be obtained, and more importantly for the purposes here at hand, the procedures to be followed in cases where it is withheld or rescinded. As for the latter, the Manual provides merely that the employer must deny such personnel possession of or access to classified information and exclude them from restricted areas of classified material or work. It does not state that these workers must be separated from employment. Thus, to some extent, the manner of compliance is left to the employer's discretion. He may, if he wishes, decide on placement of such an employee in an unrestricted work area and take the necessary measures to ensure that in the performance of his work assignments he does not come into contact with classified information. Undoubtedly in practice this often occurs and is accomplished by transfers to what in official terminology are designated as "Open Areas." Though these actions could and may well be the source of many grievances, they are seldom processed to arbitration. In other cases, however, sometimes by necessity as a result of the organization of production in the employer's establishment, the inability of an employee to obtain or maintain security clearance results in his discharge. Appeals for relief from these measures provide the bulk of arbitrations and a number of substantive matters to decide.

There are two questions which are basic and must be answered preliminary to considering the merits of the cases in dispute. The first relates to the effect of the provisions of the Security Agreement entered into by the employer on the terms of a negotiated collective bargaining contract. It has generally been held in arbitration that the Security Agreement is superimposed on and in the matter of employment rights takes precedence over the union contract.[1] This is obviously so where there is a specific clause to that effect in the labor agreement. It has also been held to be the case however even in those instances where the labor contract is silent on this point. In these latter situations arbitrators reason that on moral grounds the interests of national security are paramount and, in cases of conflict, take priority over job security rights privately granted a worker. They also offer a legal argument in support of this position by holding that private contracts are legally enforceable and valid only to the degree they conform with and do not violate Federal statutes. Thereby defense security regulations established in pursuit of statutory authority become in practical effect a part of every defense contractor's union agreement and establish limits to the employment rights of individuals subject to them.

A second issue which may arise and be a source of misunderstanding is the scope of the jurisdiction of the arbitrators in these cases. Whereas the submission agreement creating the arbitration defines his authority, there are certain powers it typically does not grant. Usually it does not, for example, empower him to decide whether the employee in question is in fact a bona fide security risk. The authority to make

this decision may not be exercised nor may it be assigned by the employer. This is a matter reserved solely to the government. Were it otherwise an employee denied clearance would be deprived of his right to an official hearing under the appeal machinery established by law, for only those officially denied clearance have such recourse. As a result of these conditions, it therefore becomes unnecessary for the arbitrator to pass on the justice of the standards or the degree of conformity to the prescribed procedure by which government security boards make their determinations.[2]

The other general limitation on the arbitrator's authority is that the judgment rendered by him must conform to the provisions of the union contract, as superseded by the Security Agreement. With respect to this, a number of conclusions and inferences may be drawn from a review of recent arbitral decisions.

Arbitrators have ruled that the failure of an employee to obtain or maintain the security clearance required on his job does not, in lieu of a clause to that effect in the labor contract, automatically represent just cause for suspension or dismissal. In such a case, the propriety of an action taken as a result of the inability of an employee to secure clearance has been held to be an arbitrable issue.[3] Whether the measure imposed constitutes just cause turns primarily on two matters of fact. One relates to the nature of the refusal to grant the employee clearance, the other to the manner of organization of production in the employer's establishment. As for the former, clearance may on occasion be withheld on a temporary basis pending

completion of an investigation to determine the applicant's security qualifications. If the results of that investigation are found unfavorable, clearance is denied outright. Once the withholding or denial of clearance is found to have been properly executed in the aforementioned fashion,[4] by the government and not by the employer, the issue before the arbitrator is whether the employer violated the grievant's contractual employment rights by the corrective action taken. In large part a finding on this matter will depend on the nature of the contract provisions and whether there are positions available to which the aggrieved could be assigned in a manner consistent with those rights and with security requirements. Where the company's work is so arranged that there are no unrestricted areas of production and thus no unclassified jobs available in the plant, it has been held that the employer is under no obligation to retain the employee in his employ by creating for him a new position exempt from the requirement of security clearance. His suspension following the tentative withholding of clearance,[5] or discharge following affirmation of that action,[6] has been held to be a reasonable exercise of managerial judgment properly within the scope of the just cause clause.

On the other hand, if there are jobs available in an "Open Area," it then becomes the arbitrator's function to determine if an employee is disqualified for reassignment thereto on grounds other than the fact he has been unable to obtain security clearance. In any such case this matter can be determined only by reference to the terms of the particular contract involved. The few awards available where this issue has

arisen and been resolved do not provide an adequate basis upon which to describe at length the possible outcomes. Nonetheless one factor which often would be controlling is that of the seniority rights provided employees under the contract. These in turn could restrict the ability of the employer to transfer an uncleared employee to a post in an unrestricted area in the plant. If those rights must be exercised only within narrowly defined job lines and there are no jobs available elsewhere in that classification, the inability to secure security clearance likely would be held to necessitate termination of an employee.[7]

Alleged Prejudice to the Employer's Business Interests

Aside from actions taken against employees unable to secure clearance from government agencies for work on classified projects, many others have been based on sworn testimony relating to a grievant's alleged Communistic beliefs or activities. Those statements usually have been made before legislative investigatory committees and, as a rule, have been reported publicly in the press. Normally the individuals involved have not denied the authenticity of those statements, either through the public media available or privately to their employer. On the basis of that incriminating testimony and the fact it has gone unanswered, however, or because of one or more consequences allegedly attending it and affecting the employer's business interests adversely, the defendants have often been subjected to dismissal.

The problem facing arbitrators in deciding the justifiability of these measures is usually that of protecting while at the same time reconciling the exercise of two basic and conflicting rights. One is

the right of employees to freedom of speech and thought and from self-incrimination. The other is that of the employer to conduct his business operations in an efficient and peaceful manner. With respect to these, arbitrators follow the principle of law that no rights granted by society are absolute and unconditional. Those who exercise them have the responsibility not to do so in a fashion which is unduly detrimental to the exercise of the same or other rights by other people. In applying this principle in grievance disputes involving employees reported to be members of the Communist Party or those who have publicly displayed sympathy toward the ends of International Communism, arbitrators have held that to represent cause for discharge, it must be shown that the accused - by those beliefs or activities - has injured or if allowed to continue in employment likely would injure the free exercise of property rights by the employer.

Damage or potential damage to the employer's business interests often has taken the form of a real or threatened decline in the efficiency and output of the workforce. Where this has been the case, the actual or anticipated disruption in production usually can be traced to the development of bitter resentment among the members of the workforce from being forced to associate with an employee who has been charged with and failed to deny Communist affiliations or activities. Outwardly this attitude may have been manifested by the threat of resort to violence, the circulation of petitions protesting the retention of the employee in question, or simply by general unrest and low morale. Evidence to these effects has been regarded, on occasion, by arbitrators

as sufficient cause to sustain the discharge of an aggrieved.[8] In other instances, however, these matters have not been considered as prima facie cause for dismissal. Rather, in such cases, the arbitrators have inquired further and sought to determine whether the employee or the employer contributed in any additional fashion to the existing tension. If the grievant took no positive action in his capacity as a worker to incite the trouble, or if management failed to assume an implicit obligation to explain to the dissident employees that the aggrieved acted within his legal rights in declining to answer the public statements, dismissal actions taken against the individuals involved have not been allowed to stand.[9] In such cases arbitrators often have reasoned that although remedial measures may have been warranted, they were directed at an innocent party rather than at those who tried to force an issue outside of the contractually established channels.

A second and more common ground advanced as just cause for discharge is that the public and unanswered testimony that the aggrieved was a Communist resulted in unfavorable publicity to the firm as his employer. Where this cause has been alleged, management typically has contended that the notoriety incurred injured or inevitably would result in injury to the company's reputation and prestige, and thereby its business prospects. Claims of this nature generally have arisen among two classes of employers, those engaged in government contract work or in newspaper publishing. Where a government contractor has shown that as a direct result of the continued employment of the grievant additional and pending contracts have been withheld,[10] or that

a legislative committee has recommended to the contracting agency a cancellation of those outstanding,[11] the decision to dismiss the employee in question has been held a reasonable exercise of managerial judgment and sustained. The lack of objective evidence of this nature and the mere supposition by such a producer that his ability to secure or retain government production orders would be jeopardized unless he severed the grievant from employment has not sufficed, however, to support the discharge action.[12]

On the other hand, employers in the newspaper industry have not been required to establish specific instances wherein the publicity which identified the alleged Communist as one of their employees induced public or subscriber complaint or resulted in an actual loss of circulation. It generally has been sufficient to show that the employee called before a committee as a witness refused to answer questions regarding the political beliefs or activities attributed to him. Two conditions distinctive to this industry, arbitrators have held, justify this approach. One condition is the intense competition which exists between newspaper publishers as well as between the press in general and other channels of news coverage; the other condition is the fact that news media occupy a position of quasi-public trust for objective reporting. Because of the first of these, arbitrators have not considered it illogical for a management to assume that unless such an employee is dismissed, almost assuredly a rival would report that worker's continued presence on the job in a manner so as to cause the publisher to lose the respect and patronage of his readership and

advertisers. The likelihood that this contingency would be realized, they have held, warrants removal of such an employee from the firm's payroll.[13] In other cases, the primary reason for sustaining dismissal actions has been that the grievants occupied "sensitive" positions, as for example, a foreign news editor,[14] a reporter,[15] or a script rewriter.[16] The element common to these job assignments, and the factor which proved decisive in the arbitrator's reasoning, has been that each required the use of judgment in deciding the content and orientation of news releases. On the grounds that under these circumstances the employer could not be assured that the copy turned out from these posts would not be biased or slanted, and that for management to retain the incumbents as employees inevitably would create suspicion in the minds of subscribers that the reporting might be other than objective, arbitrators have denied employee appeals for reinstatement with retroactive compensation.

Where, in contrast to the situations described heretofore, the discharge measures taken against workers presumed by their employer to be Communists have been based at least in part on the grievant's violation of a no-solicitation rule by in-plant distribution of Communist literature,[17] repeated expression of pro-Russian sentiments before his fellow workers,[18] or material misrepresentation of his background on an application blank,[19] more often than not the individuals involved have been restored to employment. Usually present in these decisions is the inference or conviction by the arbitrator that the severity of the action taken reflected to some degree dislike by management for the

political convictions held by the complainant. On occasion this has been based on the clear failure of the employer to prove that the alleged misconduct had a prejudicial effect on his business. In other instances it may have been drawn from evidence of past laxity in disciplining for such behavior, or prolonged awareness of the instant offense prior to advancement of it as cause for discharge. The general rule applied in these cases to determine the measure, if any, that is justified is the same as that followed in all others in this section - that is, workers are not liable for corrective action merely because they are Communists, but they may be held accountable for the employment consequences of their support of that doctrine.

Unresolved Issues

Despite the fact the above grievance dispositions by arbitrators indicate substantial accord on the conditions under which workers have been adjudged properly or unjustly subjected to full or partial loss of employment rights, their precedent value in providing insight into settlement patterns in the future is limited. With or without changes in the state of international tensions, the attitudes of the public, of the parties to collective agreements, and of arbitrators toward security risks are not likely to remain static. Prevailing views of justice themselves are subject to and do change in time. These will be reflected as they occur in the passage of new laws, the negotiation of new contract provisions, and the development of new and more precise arbitral standards. Thus even the issues so far resolved may well be a continued source of controversy and arbitration submissions. In all

probability their number will be supplemented by a host of other and related matters over which disputes have not yet arisen. The following is suggestive of ones for which arbitrators may at any moment have to formulate criteria to weigh their sufficiency as cause for corrective action.

The extent and application of the seniority rights of employees unable to obtain the security clearance required on their jobs, unless more carefully defined in future agreements than in the past, will probably often be contested. The same might be true for other job rights commonly granted under collectively bargained contracts, including among others coverage under various insurance programs or benefits allegedly due under vacation and paid-holiday plans. Another potential area of controversy is the extent of an employer's obligations to an employee discharged for lack of clearance who on the basis of a successful appeal has it restored, or whose former job is at a later date declassified. Also, it is possible that where an employer's reason for discharging an accused Communist is that he has brought disrepute to the firm and caused it to lose sales, the issue in dispute might be the proportion of lost business which would have to be established to support the dismissal. In other cases it might be whether an employee who has refused on the basis of principle to testify before a legislative committee is entitled to any special consideration if he voluntarily and unequivocally later denies the charges made against him privately to his employer or to an arbitrator. And finally, no objective standard has yet been established to determine how direct a contact to the product to be distributed

to customers an alleged Communist has to have for his job to be considered a "sensitive" position. This matter could be of significance in many industries other than newspaper publishing which also occupy a position of quasi-public trust for protecting the morals of the consuming public.

The above are substantive matters which illustrate in a general fashion the nature of the unresolved issues which some day may provide important questions for arbitrators to decide.

Notes for Chapter XIII

1. Liquid Carbonic Corp.-U.A.W., 22 LA 709, Baab (1954); Wisconsin Telephone Co.-C.W.A., 26 LA 792, Whelan (1956); but see contra, National Foods Corp.-C.R.W., 24 LA 567, Seibel and Jaffee (1955).

2. Liquid Carbonic Corp.-U.A.W., 22 LA 709, Baab (1954).

3. Fitzgerald v. Sperry Gyroscope Co., New York Superior Court, Special Term, Part I, New York County, McNally, Justice, 22 LA 186 (1954).

4. Arma Corp.-Engineers Association of Arma, 22 LA 325, Shake (1954). The arbitrator, pursuant to the terms of the agreement, ordered the employee placed on unpaid leave of absence during the period of delay in securing clearance.

5. Rudolph Wurlitzer Co.-P.G.W., 18 LA 648, Thompson (1952).

6. Bell Aircraft Corp.-U.A.W., 13 LA 513, Day, Andrews, Capen, Garside and Herrick (1949);
M & M Restaurants, Inc.-C.R.W., 29 LA 202, Cayton (1957).

7. Rudolph Wurlitzer Co.-P.G.W., 18 LA 648, Thompson (1952).

8. Jackson Industries, Inc.-U.S.A., 9 LA 753, McCoy (1948);
Burt Manufacturing Co.-U.S.A., 21 LA 532, Morrison (1953).

9. Chrysler Corp.-U.A.W., 19 LA 408, Wolff (1952);
Republic Steel Corp.-U.S.A., 28 LA 810, Platt (1957).

10. Westinghouse Air Brake Co.-U.E., 27 LA 265, Abrahams and Carlson (1956).

11. Bethlehem Steel Co.-U.S.A., 24 LA 852, Desmond (1955).

12. Worthington Corp.-U.E., 24 LA 1, McGoldrick and Sutton (1955).

13. Los Angeles Daily News-A.N.G., 19 LA 39, Dodd (1952);
United Press Association-A.N.G., 22 LA 679, Spiegelberg (1954) (although the arbitrator found just cause for discharge on these grounds, he held the action procedurally defective and on this basis set it aside).

14. New York Times Co.-A.N.G., 26 LA 609, Corsi (1956).

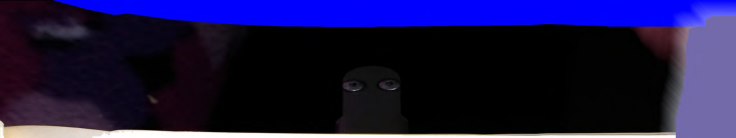
15. Hearst Publishing Co., Inc.-A.N.G., 30 LA 642, Schedler (1958).

16. New York Mirror Division, Hearst Publishing Co., Inc.-A.N.G., 27 LA 548, Turkus (1956).

17. Spokane-Idaho Mining Co.-M.M.S.W., 9 LA 749, Cheney (1947); Chrysler Corp.-U.A.W., 19 LA 221, Wolff (1952).

18. Firestone Tire & Rubber Co.-U.R.W., 16 LA 569, Cheney (1951).

19. Foote Bros. Gear & Machine Corp.-U.E., 13 LA 848, Larkin (1949); J. H. Day Co., Inc.-U.E., 22 LA 751, Taft (1954).



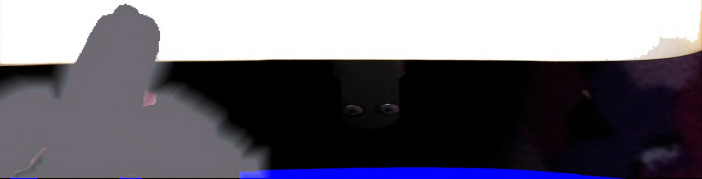
CHAPTER XIV

OTHER CAUSES FOR DISCIPLINE

Gambling

The common plant rule prohibiting gambling among employees on company time and property is, from all appearances, one which is often violated and not rigidly enforced. Moreover, in those relatively few arbitrations in which the propriety of disciplinary sanctions imposed for that alleged cause has been contested, more often than not the penalties as levied have not been allowed to stand. In the great majority of these cases the discipline imposed, and later reduced in severity or revoked outright, has been summary dismissal. From a review of these decisions a number of general principles may be observed.

The standard of proof required of the employer to establish gambling is a strict one. Though it may be met most easily where direct and uncontroverted testimony of eye-witnesses to the rule infraction can be presented, only infrequently has this been possible.[1] In most instances circumstantial evidence of guilt is all that has been available. While arbitrators have not denied management the power to discipline under this condition, they have required that at a minimum this proof be extremely strong and convincing. The court conviction of one employee of participation in an in-plant conspiracy to violate state gaming laws,[2] the implication by a co-worker of two



others as agents of a gambling ring and the subsequent failure of the grievants to appear and testify at the arbitration hearing,[3] and a foreman's unrefuted statement that he overheard the unmistakable sounds of a dice game in progress between three employees each twice previously warned for shooting craps[4] illustrate the types of circumstantial evidence which have been accepted by arbitrators as adequate to support cause for discipline. Where, however, the proof of guilt offered has fallen short of this level and merely has indicated a strong possibility of employee culpability,[5] and especially in the presence of other evidence which was equally capable of supporting an alternative and contrary conclusion,[6] arbitrators as a rule have resolved the benefit of reasonable doubt in favor of the aggrieved and rescinded penalties in their entirety.

To sustain his burden of proof in full the employer must show not only that the grievant was properly liable for discipline, but also that the degree of penalty assessed upon a proven offender bore a reasonable relationship to the gravity of the offense. With respect to this latter principle, arbitrators do not consider all forms of gambling to be equally serious. Some, they hold, are more disruptive of plant efficiency, more conducive to fights, more injurious to the moral fibre of employees, and thus are more deserving of severe discipline, than are others. Also, arbitrators do not regard the measure of discipline warranted unrelated to the length of service and past disciplinary record of an aggrieved, the extent and types of responsibilities which inhered in his job, the timing and location of the gambling

violation, and the consistency with which the firm publicized and enforced its no-gambling rule in the past.

As these standards have been applied, infractions which involve bookmaking or the sale of lottery or policy tickets are considered to be more serious than the flipping of coins, participation in impromptu card or dice games for low stakes, joining in one or another sports pools, or the placing of wagers on horse races. The former activities ordinarily are held properly punishable by discharge.[7] That penalty has been regarded as particularly appropriate where it has been shown that the guilty party was forewarned of the consequences of his act,[8] was a repeated offender,[9] or held an official position in the bargaining unit.[10] Only where unwarranted disparities in penalties have existed to indicate an element of discrimination in disciplining,[11] or where the company failed to prove that an admitted bookmaker did as charged solicit bets on company premises[12] have dismissals been found undeserved.

The separation of employees from employment for engaging in the latter, less serious types of gambling is normally considered unduly excessive punishment. This has been especially the case where grievants have been long seniority workers with previously unblemished work records,[13] where management had been lax in invoking discipline for such misconduct in the past,[14] or where the act of gambling took place during off-duty hours.[15] Depending on the presence or absence of these factors, the maximum penalties considered justified for these

forms of gambling range from reprimands to at most suspensions of short duration.

Financial Irresponsibility

Another well-recognized cause for discipline, but again one not often encountered in arbitration, is employee involvement of the employer in his personal financial difficulties. Most frequently this takes the form of garnishment actions and pay assignments by which a worker's creditors secure a lien on his wages to satisfy debts outstanding. Inasmuch as these require the maintenance of special accounting records, necessitate on occasion the appearance of company representatives in court and, under certain circumstances, expose the firm to potential and irregular liabilities over which it has no direct control, they represent a source of considerable annoyance and expense to the employer. Although arbitrators acknowledge the right of management to discipline the employees at fault for these consequences, they maintain that dismissal is not an appropriate remedy in each and every case. That penalty, they hold, is reserved for only those individuals who have been proven financially irresponsible, and whose retention would impose an undue burden on the firm.

Employers and arbitrators agree in principle that excessive garnishment of an employee's earnings provides good and sufficient cause for discharge. In practice, however, they differ noticeably in the meaning that each attaches to the term "excessive." Management has a tendency to define and apply this concept solely in an arithmetical manner, with a stipulated number of garnishments typically considered

in and of themselves to provide adequate grounds for dismissal. Arbitrators, on the other hand, insist that the determination of this matter cannot be made properly in absolute fashion, but must take into account all relevant considerations. While they assign great weight in their deliberations to the sum of the garnishments brought against a grievant, they also regard as significant the length of the time period over which they occurred, the circumstances which gave rise to the debt obligations and to the failure to liquidate them privately, the over-all service record of the aggrieved, the sufficiency of advance notice of impending discharge, and the extent to which the employee's conduct adversely affected the employer's business operations.

In most cases, regardless of the actual number of garnishment actions, arbitrators are not likely to consider them excessive and find an employee deserving of more than a layoff if he had never been adequately informed of the personal standards required of him,[16] where there is evidence that he is making some effort to settle his debts and avoid default,[17] or where the employer failed to consider in disciplining situations such as illness or unemployment under which garnishments might reasonably be held unavoidable.[18] As a rule, only where there is a complete absence of extenuating factors,[19] or where the employer's business is found to be of such a nature that it places a premium on the reputation of his employees for financial integrity and responsibility,[20] is it probable that an arbitrator's decision to sustain a discharge would be made on a quantitative basis alone.

Smoking

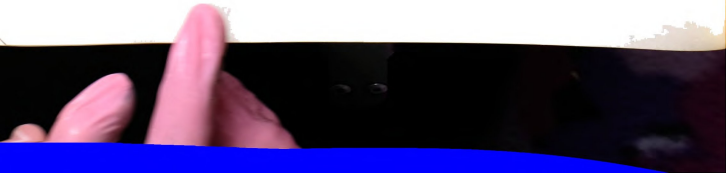
Many firms object to smoking by their employees and in their plant rules either prohibit it outright during duty hours or restrict it to designated areas and times. Some do so primarily in the interest of promoting efficiency, reasoning that smoking distracts an employee's mind from his job and represents time-wasting. Others, including a number subject to state laws relating to the processing of combustible materials, are principally concerned with the elimination of safety hazards and the prevention of accidents. Employees who violate these rules may justly be disciplined, with the severity of the penalty appropriate varying from discharge, in a minority of cases, to a simple warning in others.

Arbitrators, in reviewing the reasonableness of penalties imposed for smoking, consider termination of employment to be warranted only in the case of habitual and repeatedly warned offenders[21] or where the act of smoking posed a clear danger to life and property.[22] Otherwise, depending on the presence or absence of equities in the employee's favor, one of a series of minor penalties at most are justified. Among the factors which serve to mitigate an offense and the extent of discipline deserved are extreme past laxity by management in the enforcement of no-smoking rules,[23] the fact that penalties assigned like violators failed to reflect accurately the wide differences in the quality of their past records,[24] or a showing that an element of personal prejudice influenced the employer in deciding on the measure of punishment to be invoked.[25]

Oftentimes the major issue to be resolved by the arbitrator is not the degree of penalty deserved by an employee proven guilty of smoking, but rather whether the circumstantial evidence established any basis for discipline. In such a case arbitrators generally apply a simple rule in resolving conflicts in testimony. They require the grievant or his representatives to assume and sustain the burden of establishing a more logical explanation than smoking from the facts at hand. If they are unable or unwilling to attempt to do so, and there is absolutely no evidence that management had an ulterior motive in making a false accusation and in assessing discipline, arbitrators typically uphold penalties on the ground that to do otherwise would "jeopardize the responsibility vested in those who direct and supervise."[26] However, if it can be shown that the employer erred in the conclusion he drew from the suspicious circumstances present in the case, as where one employee was disciplined for smoking when in fact he did no more than prepare to smoke,[27] arbitrators find cause to be lacking and order the aggrieved made whole.

Solicitation

It is not at all uncommon for collective agreements and plant regulations to forbid employees to use company time and property for the purposes of enlisting new union members or encouraging others to support the political or religious views they hold. Those who engage in these activities commit a serious offense, for these appeals have a known tendency to stir up emotions, provoke controversy and dissension among the workforce, and oftentimes even to incite fighting among



its members. Where they involve the passing out of literature they also frequently result in littering of the premises and thereby pose a substantial housekeeping problem to the employer. Management has a clear right to hold employees guilty of solicitation subject to discipline, provided that it does not abuse its power of discretion and arbitrarily assign penalties in excess of those justified in the light of its established policy, the past records of the offenders, or the consequences realized from the solicitation.

The subjective intent on the part of the employee at the time of the alleged violation is one of the most important factors considered by arbitrators in deciding the extent of cause for discipline present. Although the state of the worker's mind at that moment typically is a matter of intense dispute and seldom is readily determinable, arbitrators do impute motives where they are convinced sufficiently strong circumstantial evidence exists to support them. Proof that the grievant occupied union office or had been disciplined on numerous previous occasions for solicitation is, they have ruled, adequate ground for assuming him to be fully aware of his obligations. Should they in turn be satisfied that he did in fact commit the misconduct as charged, they are likely to conclude that he is either knowingly derelict in his responsibilities or that he is deliberately challenging the employer's disciplinary authority, and on this account alone properly liable for severe punishment. Whether he may justly be discharged, however, usually turns on the manner in which the employer has penalized for comparable violations in the past. If it has not been his practice to

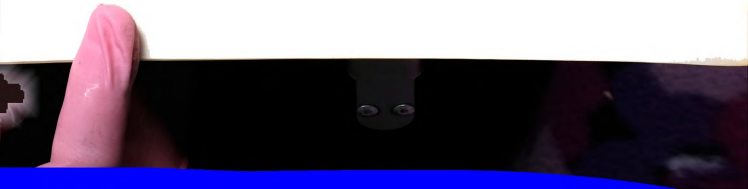
dismiss the offenders he may not suddenly and without notice revoke his former policy. In such a case arbitrators normally find an extended suspension of several months' duration the maximum penalty appropriate.[28] But where it is shown the defendant had received ample warning, his termination is not thought an excessive measure of discipline.[29]

On the other hand, it is highly improbable that arbitrators would find an employee conscious of wrongdoing much less deliberate in intent if his total offense consisted of not more than a single instance of solicitation and a reasonable basis exists for presuming that he is unaware that such activity was prohibited. Where, for example, the evidence has indicated that an existing rule against such conduct had never been formally brought to his attention, or that similar activity had long been engaged in by others with immunity, arbitrators as a rule find his offense unintentional in nature. This by itself they hold suffices to make a discharge an unduly harsh measure of punishment. If no additional extenuating factors are present a short layoff may be ordered in its stead.[30] However, where it can be shown that no adverse results were realized from the solicitation, and that the offense occurred during the employee's free time[31] or constituted the sole blemish on an otherwise exemplary record,[32] arbitrators generally sustain grievances in full.

Miscellaneous Misconduct

It is within management's rightful province to penalize employees who fail to wear or use the safety equipment prescribed for their jobs,[33] take part in horseplay activities,[34] willfully damage the employer's

property,[35] carry dangerous weapons on the company premises,[36] post unauthorized notices on bulletin boards,[37] carry on a private business during working hours,[38] violate the regulations governing parking[39] or the processing of grievances,[40] or engage in any other form of conduct which detracts from the maintenance of orderly employee relations or production schedules. Where appropriate in individual cases, the spirit in which the offense was committed, its impact on the firm's operations, the seniority status and work history of the employee, and the disciplinary procedure followed by the employer will as usual determine the measure of punishment justified.



Notes for Chapter XIV

1. International Harvester Co.-U.A.W., 17 LA 150, McCoy (1951).
2. Chrysler Corp.-U.A.W., 13 LA 235, Wolff (1949).
3. Raybestos-Manhattan, Inc.-Manhattan Rubber Worker's Independent Union, 21 LA 788, Copelof (1954).
4. Brown Shoe Co.-I.B.T., 16 LA 461, Klamon (1951).
5. Chrysler Corp.-U.A.W., 12 LA 699, Wolff (1949).
6. Lockheed Aircraft Corp.-I.A.M., 13 LA 433, Aaron (1949); General Motors Corp.-U.A.W., Dec. No. E-250, Wallen (1948).
7. Chrysler Corp.-U.A.W., 13 LA 235, Wolff (1949).
8. International Harvester Co.-U.A.W., 17 LA 150, McCoy (1951).
9. General Motors Corp.-U.A.W., Dec. No. C-344, Seward (1945).
10. Ford Motor Co.-U.A.W., Opinion A-25, Shulman (1943), Shulman and Chamberlain, Cases on Labor Relations, op. cit., pp. 513-514.
11. General Motors Corp.-U.A.W., Dec. No. C-309, Seward (1945).
12. Bethlehem Steel Co.-I.U.M.S.W., 18 LA 938, Feinberg (1952).
13. United States Spring & Bumper Co.-U.A.W., 5 LA 109, Prasow (1946).
14. Borg-Warner Corp.-U.A.W., 3 LA 423, Gilden (1944).
15. Calvine Cotton Mills, Inc.-T.W.U.A., 12 LA 21, Maggs (1949); see also, Lockheed Aircraft Corp.-I.A.M., 22 LA 210, Grant (1954) (most of the betting transactions were conducted in the company parking lot).
16. D. M. Watkins Co.-P.J.N., 14 LA 787, Healy (1950).
17. Borg-Warner Corp.-U.A.W., 14 LA 745, Updegraff (1950); Ford Motor Co.-U.A.W., M-2328, Case No. 11673, Shulman (1952).
18. General Motors Corp.-U.A.W., Dec. No. E-125, Seward (1947).
19. Ford Motor Co.-U.A.W., RH-1576, Case No. 14500, Haughton (1954).
20. Brink's Inc.-I.B.T., 21 LA 4, Kahn (1953).

21. General Motors Corp.-U.A.W., Dec. No. C-29, Dash (1943);
General Motors Corp.-U.A.W., Dec. No. C-241, Seward (1944).

22. Columbian Rope Co.-U.F.M.W., 7 LA 450, McKelvey, Starr and Aversa (1947);
Baltic Metal Products Co.-U.E., 8 LA 782, Cahn (1947).

23. Douglas Aircraft Co., Inc.-U.A.W., 1 LA 350, Courshon, Mays and Andrews (1945);
Isle Transportation Co.-S.E.R.M.C.E., 6 LA 958, Cole (1947).

24. General Motors Corp.-U.A.W., Dec. No. C-199, Dash (1944).

25. General Motors Corp.-U.A.W., Dec. No. B-51, Taylor (1941).

26. Standard Oil Co. (Indiana)-Central States Petroleum Union, 19 LA 795, Naggi (1952);
see also, Electric Storage Battery Co.-U.E., 16 LA 118, Baab (1951);
General Motors Corp.-U.A.W., Dec. No. B-210, Dash (1942).

27. General Motors Corp.-U.A.W., Dec. No. C-380, Seward (1945).

28. West Boylston Manufacturing Company of Alabama-T.W.U.A., 8 LA 54, McCoy (1947);
Chrysler Corp.-U.A.W., 19 LA 221, Wolff (1952);
United Merchants & Manufacturers, Inc.-T.W.U.A., 35 LA 124, Dworet (1955).

29. Perkins Oil Co.-I.F.T.A.W., 1 LA 447, McCoy (1946);
W. J. Voit Rubber Corp.-U.R.W., 19 LA 904, Bernstein (1953);
Bethlehem Steel Co.-U.S.A., Gr. No. 5378, Shipman (1951).

30. Douglas Aircraft Co., Inc.-U.A.W., 3 LA 598, Aaron (1946);
Four-Wheel Drive Auto Co.-O.P.W., 4 LA 170, Rauch (1946).

31. West Boylston Manufacturing Company of Alabama-T.W.U.A., 8 LA 54, McCoy (1947);
Curtiss-Wright Corp.-U.A.W., 9 LA 77, Uible, Gray and Sneary (1947);
General Motors Corp.-U.A.W., Dec. No. E-260, Wallen (1948).

32. Spokane-Idaho Mining Co.-M.M.S.W., 9 LA 749, Cheney (1947).

33. Higgins, Inc.-Marine Shop & Shipyard Laborers, 24 LA 453, Morvant (1955).

34. United States Rubber Co.-U.T.W.A., 25 LA 723, Marshall (1955).

35. Decorative Cabinet Corp.-U.F.W., 17 LA 138, Berkowitz (1951).

36. General Motors Corp.-U.A.W., Dec. No. G-205, Feinsinger (1955).

37. Anchor Rome Mills, Inc.-T.W.U.A., 8 LA 299, McCoy, Wright and Douty (1947).

38. United States Steel Corp.-U.S.A., Gr. No. 153-949, Garrett (1952).

39. Wolverine Shoe & Tanning Corp.-U.S.W., 18 LA 809, Platt (1952).

40. Mueller Brass Co.-U.A.W., 3 LA 271, Wolff (1946).

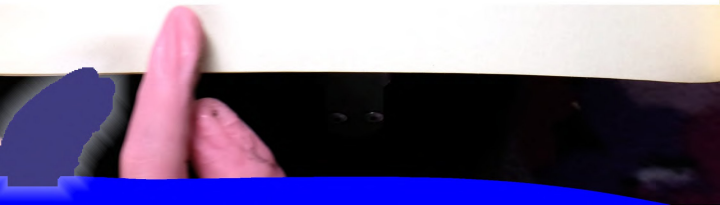
CHAPTER XV

CONCLUDING REMARKS

Under the terms of the typical collective bargaining agreement, management retains its traditional right to direct the working force and initiate disciplinary actions against employees. Unlimited discretion in the exercise of that authority normally is not permitted, however. Rather, the power of the employer to establish and enforce rules governing worker behavior is qualified by the requirement that such actions not abridge the contractually created job rights of employees. One of those rights is the assurance that penalties shall not be imposed arbitrarily and indiscriminately, but only for just and sufficient cause.

The great majority of collective contracts fail to define in precise detail the exact meaning and intended application of the "just cause" clause. As a result, disputes over the propriety of disciplinary measures imposed on employees often have arisen within industry. Frequently, where the parties to these disputes have not succeeded in resolving the matter privately in the grievance procedure, they have submitted the issue to impartial arbitration for final determination.

The preceding chapters have described the circumstances under which arbitrators have held workers to have been justly or improperly subject to punishment for each of the several types of misconduct with which they have been charged most commonly. A review of the awards



rendered in these cases, together with the opinions and principles upon which they have been based, permits a number of concluding observations.

In the absence of a clear statement of intent to the contrary in the agreement, most arbitrators conclude that the issue of cause for discipline involves a determination of three matters. In the first instance, it requires a judgment as to the matter of guilt or innocence of wrongdoing on the part of an alleged offender. If credible evidence has established the commission of a rule infraction by an aggrieved worker, it must be decided additionally whether a just basis for discipline did in fact exist. Finally, assuming a measure of punishment appears warranted under the circumstances, it then must be determined whether the severity of the sanction imposed was appropriate in terms of the seriousness of the violation.

Seldom, and only for the most grievous of offenses, have arbitrators normally held the initial act of misconduct by an employee deserving of the ultimate penalty of summary discharge. As a rule, this measure of punishment has been sustained only where clear proof has indicated that the infraction seriously jeopardized the ability of the employer to maintain efficiency and authority, or either resulted in or created an unreasonable danger of serious personal injury. In this class are violations involving flagrant insubordination toward a representative of management, leadership of an illegal work stoppage or slowdown, or the use of unwarranted force or violence against the person of another. Also commonly found a proper basis for immediate termination is evidence that an offending employee committed a dishonest

or disloyal act of a material nature, exhibited gross negligence in the performance of his work duties, or was guilty of extreme intoxication on the job.

Ordinarily, only under one other condition have arbitrators considered the penalty of employee dismissal an appropriate disciplinary remedy. This has occurred where it has been shown that despite adequate warning of the impending consequences, a grievant has continued in his habit of violating company rules and regulations essentially at will. On the grounds that such an individual has by his own actions proven himself unreliable, and that to order his reinstatement at a reduced measure of punishment would do a definite disservice to management, arbitrators often have sustained a discharge action as for good and proper cause.

Other than under the circumstances indicated above, arbitrators generally have ruled penalties ranging from reprimands or warnings to extended suspensions the maximum punishment justified for a proven offender. Usually, the extent if any of cause for discipline found present in each instance depends on a number of variable factors. According to the facts of each particular case, these factors may act to mitigate or aggravate the seriousness of the offense. Certain of the criteria have a limited and specific relevance to one or at most a few types of disputes. The majority, however, have a more general application.

Among the most important of the factors which normally tend toward extenuation of the degree of employee guilt are the absence of a willful

intent to do wrong, long seniority with the firm, a good prior disciplinary record, the lack of any serious inconvenience or loss to the employer as a result of the violation, and evidence that the employer's action represented a clear violation of the contract rights of the aggrieved worker. Conversely, proof to the opposite effect on any one of these matters normally aggravates the seriousness of an offense and is held by arbitrators a just basis for invoking a more severe penalty than would otherwise be the case.

The frequent and rather consistent application of these and other standards of review by arbitrators has resulted in the evolution of a substantial body of "common law" under which the concept of "just cause" for discipline has been defined under a wide variety of circumstances. No universally accepted title has been designated yet to identify this code of principles and rules. On some occasions, the phrase "discipline by due process," or that of "progressive discipline," has been used for this purpose. Under many important permanent umpireships however, and apparently growing in general practice, there is a tendency to refer to this system of appropriate disciplinary procedures and penalties as the doctrine of "corrective discipline." As this phrase is used most commonly by arbitrators, it directs the attention of managements and employees to the fact that the "desired effect" of discipline is attained only if corrective "intent" is also present. As such, this doctrine represents a new and broader philosophical orientation toward the proper function that discipline should play in an industrial society.

Corrective discipline is based on the precept that penalties should not be conceived as punitive and retaliatory measures to be imposed on errant employees for past misconduct. Rather, they should be designed to promote the willingness on the part of an offender to conform to company rules and regulations in the future. To accomplish this objective, emphasis is placed on the matter of mutual obligations and responsibilities, rather than on the extent of prerogatives and rights.

Under this doctrine, the employer is held to have a moral as well as a contractual obligation not only to make employees familiar with the standards of behavior to which they are to be held, but also to be prompt and firm in assigning penalties for rules violations. Management may not condone minor infractions, and then suddenly and without notice enforce its rules and regulations. Instead, it has an affirmative responsibility to levy a series of increasingly more severe disciplinary measures for each subsequent offense by an employee. Such a system of graduated penalties is both fair and objective. It puts an offending worker on clear notice of a worsening record and of the prospect of receiving a more stringent penalty for the next act of misconduct. It also indicates a desire on the part of management to retain his services, if at all possible. As this policy is generally conceived, only under two conditions should it be necessary to impose the extreme penalty of discharge. This would occur where the infraction by an employee was so serious that it would be unreasonable to risk its reoccurrence, or where a worker's record of repeated violations following

more moderate but progressively more severe penalties has proven him to be an incorrigible offender.

Corrective discipline does more than offer protection to the valuable job privileges workers have accumulated under contemporary collective bargaining conditions, however. It also imposes on employees a corresponding obligation to exercise self-discipline in their personal behavior. It presumes an awareness by workers of the seriousness, both to themselves and to the employing firm, of the failure to uphold their responsibilities under the agreement. Corrective discipline thus implies employee recognition of the fact that an attitude of respect for authority and a spirit of willing cooperation are the quid pro quo of their contractual right to security of employment.

It is the firm conviction of the author of this study that the increased application of the principles incorporated in the doctrine of corrective discipline is among the most significant of the recent developments in the field of industrial relations. This conclusion is based on the belief that the ultimate objective of grievance arbitration is not that of simply serving as a disputes-settlement mechanism. Rather, it should serve as a medium by which the parties to a collective bargaining agreement are educated as to their reciprocal duties and rights. To the extent the arbitration process contributes toward this end, it thereby fosters a high level of industrial statesmanship and mutual accommodation in the administration of a contract's terms. Whether managements and employees adopt and practice the

principles and rules that discipline arbitration has established, only time, and subsequent investigations such as the present one, will determine.

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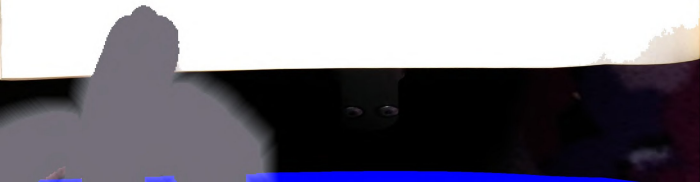

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