Vanderbilt Law Review

Volume 20
Issue 1 *Issue 1 - December 1966*

Article 4

12-1966

Discharge In the "Law" of Arbitration

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NOTES

Discharge In the "Law" of Arbitration

I. Introduction

A. *Background*

At common law a master was entitled to discharge his servant without notice at any time, unless the contract of employment, either expressly or by implication, covered a specific term.[1] Even if the parties intended the master-servant relationship to encompass a specific term, the master retained the power, though not the right, to dismiss the servant without cause, thereby making himself liable in damages for wrongful discharge.[2] Since relatively few workers were employed under individual contracts, the employer was able to discharge at will for any reason and perhaps for no reason at all. So it was until various factors, including the wish of employees to limit this arbitrary and often capricious exercise of power by employers,[3] led to union organization and the eventual passage of the National Labor Relations Act in 1935.[4] This act not only prohibited the discharging of employees for the purpose of encouraging or discouraging union membership,[5] but also afforded an impetus to collective bargaining by making a refusal to bargain in good faith an unfair labor practice.[6] The wider scope thus afforded collective bargaining permitted inclusion of grievance procedures in labor contracts which, in turn, further circumscribed the employer's ability to discharge by requiring the parties to *try* to resolve those differences occasioned by the discharge. While this arrangement worked well in most instances, it was inevitable that in some cases the parties would fail to agree upon a terminal point in their grievance procedure. This, of course, presented a substantial stumbling block to industrial self-government.

Impartial arbitration for the final settlement of labor disputes first became accepted in those industries having a long history of collective bargaining, such as the garment, coal-mining and printing industries.

1. Fidelity & Cas. Co. v. Gibson, 135 Ill. App. 290 (1907), *aff'd*, 232 Ill. 49, 83 N.E. 539 (1908); Summers v. Phenix Ins. Co., 50 Misc. 181, 98 N.Y. Supp. 226 (Sup. Ct. 1906); 1 Labatt, Master and Servant § 183 (2d ed. 1904).

2. Champion v. Hartshorne, 9 Conn. 564 (1833).

3. For a general treatment of why workers organize, see Macdonald, Labor Problems and the American Scene ch. 20 (1938).

4. 49 Stat. 449-57 (1935), as amended, 29 U.S.C. §§ 141-88 (1964).

5. National Labor Relations Act § 8(a)(3), 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(3)(a)(3) (1964).

6. National Labor Relations Act § 8(a)(5), 49 Stat. 453 (1935), 29 U.S.C. § 158(a)(3) (1964).

Paralleling the growth of union organization, it rapidly spread to many other mass-production enterprises in the middle and late 1930's.[7] Its use was encouraged and often required by the National War Labor Board during World War II,[8] and during the postwar reconversion period it became widely recognized as a viable means of preventing labor strife.[9] By 1947, a majority of collective bargaining agreements contained arbitration clauses. The passage of the Taft-Hartley Act in that same year not only indicated congressional approval of the arbitration process,[10] but, in section 301,[11] also afforded a means by which both agreements to arbitrate[12] and arbitration awards[13] could be enforced by the federal courts.

From the foregoing, it is clear that a "rule of law" has been substituted for the employer's unilateral right of action so well known and often abused a scant thirty years ago. No longer is it incomprehensible that an unjustly discharged employee should be afforded an effective measure of relief.[14] Today, he may dispute his employer's action before the arbitrator, the National Labor Relations Board, and, in some cases, before the courts.[15] Of these several tribunals, the arbitrator's is by far the most important both in terms of the number of disputes decided, and because it affords certain advantages to the parties not offered by the Board or the courts. Before proceeding to a discussion of discharge in the arbitral forum, however, it would seem proper to relate the discharge grievance to the collective bargaining process.

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7. 1964 CCH LABOR LAW COURSE ¶ 3517.

8. The Board's heavy caseload usually led it to refer grievance disputes back to the parties for settlement by private arbitration, as well as to order the inclusion of arbitration clauses in all new contracts where the parties had failed to agree on a terminal point in their grievance procedure. COPELOF, MANAGEMENT-UNION ARBITRATION 3 (1948); TROTTA, LABOR ARBITRATION 26 (1961).

9. Following the war, President Truman called a "Labor-Management Conference to explore new ways of achieving industrial peace during reconversion to a peacetime economy." *Ibid.* Though generally regarded as a failure, the 36 representatives of management and labor unanimously agreed that parties to a labor contract should provide for an effective settlement of contract grievances by arbitration, thereby providing a tremendous impetus to the already wide acceptance of the arbitration process. See The President's National Labor Management Conference, U.S. Dep't of Labor, Division of Labor Standards, Bulletin No. 77, 1946, p. 37.

10. Labor Management Relations Act § 201(b), 61 Stat. 153 (1947), 29 U.S.C. § 171(b) (1964).

11. 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1964): "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States . . . ."

12. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

13. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

14. See Boyer v. Western Union Tel. Co., 124 Fed. 246 (E.D. Mo. 1903).

15. See, *e.g.*, Donnelly v. United Fruit Co., 40 N.J. 61, 190 A.2d 825 (1963).

B. *Perspective*

Discharge, while not the most important grievance in terms of direct economic consequences, will often have a significant effect upon the bargaining relationship as a whole. A single discharge case, charged with emotion as it often is, will at times generate stronger feelings on the part of the parties than "a wage case involving large numbers of employees and great sums of money."[16] In addition, the discharge case is more often taken to arbitration than any other type of grievance dispute. Nor may the effect of the discharge on the individual employee be overlooked. Although a reference to discharge as "economic capital punishment" may be somewhat inaccurate from an analytical standpoint, it is at least a useful descriptive term to underline the importance of discharge to the dischargee.

The discharge situation is unique not only because of its recurring nature and its impact on both the bargaining relation and the individual, but also because of the body of principles that has grown out of it. Categorizing grievance arbitration as being "solely a matter of contract" is at best an overstatement, and this is particularly so when dealing with the arbitration of discharge and discipline cases. Quite simply, the collective bargaining agreement is more than a contract; "it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate."[17] Accordingly, the purpose of the principles of industrial discipline about to be discussed is to take up where the draftsmen left off; to supply the rules which the parties were unable to develop in the give and take of contract negotiation. In short, these principles find their origins in the tenets of enlightened personnel administration, and are designed to reconcile the individual dischargee's interest with that of the industrial community. They constitute a growing body of industrial common law, the contractual source for which is the bargaining agreement's requirement of "just cause" as a condition precedent for the imposition of disciplinary sanctions.

II. Procedure

A. *The Requirement of "Just Cause"*

This almost universal requirement may state simply "Employees

16. Ross, *The Arbitration of Discharge Cases: What Happens After Reinstatement*, in Critical Issues in Labor Arbitration 21, 23 (Proceedings of the Tenth Annual Meeting of the National Academy of Arbitrators 1957).

17. United Steelworkers v. Warrior & Gulf Navigation Co., *supra* note 12, at 578; Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1004-05 (1955).

may be discharged for just cause,"[18] or it may be accompanied by a list of dischargeable offenses,[19] or embodied in a management prerogative clause.[20] It may also be expressed in synonymous terms such as "proper cause," "obvious cause," or merely "cause." Even if no such clause is contained in the agreement, it will in some cases be implied absent a clear indication to the contrary, at least by the better view.[21] In any event, whether or not the employer violated the contract by discharging the grievant without just cause constitutes the central issue at the arbitration proceeding.

Just cause is not susceptible to definition, but its essence is indicated as follows:

> [It] excludes discharge for mere whim or caprice. . . . [It is] intended to include those things for which employees have traditionally been fired. . . . [It] includes the traditional cause of discharge in the particular trade or industry, the practices which develop in the day-to-day relations of management and labor and most recently . . . [it] includes the decision of the courts and arbitrators. . . .[22]

In its modern sense, just cause requires "not merely that the employer's action be free of capriciousness and arbitrariness but that the employee's performance be so faulty or indefensible as to leave the employer with no alternative except to discipline him."[23] This view of just cause rests upon the following theory:

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18. Agreement between Revere Sugar Refinery and Local 400, United Packinghouse Workers art. IX, 1964 CCH LABOR LAW COURSE ¶ 2952, at 3844 (effective Dec. 20, 1961).

19. "Employees shall be disciplined or discharged only for just cause, which shall include, but not be limited to insubordination; violation of plant rules; failure to obey instructions of supervisors; failure of an employee to properly perform his job in accordance with the Company standards. . . ." Agreement between American Thread Co., and Local 1386, Textile Workers art. IV, § 1, quoted in Local 1386, Textile Workers v. American Thread Co., 291 F.2d 894, 898 (4th Cir. 1961).

20. "Nothing in this Agreement shall be deemed to limit or restrict the Company in any way in the exercise of the customary functions of management, including the right to . . . hire, suspend, discharge, or otherwise discipline an employee for violation of [company] rules or other proper cause." Agreement between Todd Shipyards Corp. and Local 6, IAM art. XXX, quoted in Todd Shipyards Corp., 36 Lab. Arb. 333, 335 (1961) (Williams, J.).

21. Cameron Iron Works, Inc., 25 Lab. Arb. 295, 300-01 (1955) (Boles, W.). *Contra*, American Oil & Supply Co., 36 Lab. Arb. 331 (1960) (Berkowitz, M.). If the employer has an unrestricted right to discharge under the agreement, those clauses of the contract dealing with job security and the adjustment of grievances would be rendered meaningless. The company could layoff, recall, transfer and promote in violation of seniority provisions merely by using its unlimited power of discharge. It is reasonable to assume that this could not have been the parties' intention, and, accordingly, a just cause provision may be implied. See Coca-Cola Bottling Co. (1949), in COX & BOK, CASES ON LABOR LAW 527 (6th ed. 1965).

22. Worthington Corp., 24 Lab. Arb. 1, 6-7 (1955) (McGoldrick, J.).

23. Platt, *Arbitral Standards in Discipline Cases*, in THE LAW AND LABOR-MANAGEMENT RELATIONS 223, 234 (Univ. of Mich. 1950).

> Proper industrial discipline is corrective rather than punitive. The purpose is to instill self-discipline in the working force. Both the employer and the employee lose when the employment is terminated. The employer must recruit and train a replacement, and must often reckon with ill will on the part of the discharged employee's fellow workers, while the employee loses his seniority and all valuable rights connected with it. Therefore discharge should normally be invoked only as a last resort, after it has become clear that corrective measures will not succeed.[24]

This rationale runs throughout grievance arbitration, but nowhere is it more clearly manifested than when the arbitrator is called upon to construe the technical requirements for discharge under the contract.

B. *Technical Requirements*

Typically, the collective bargaining agreement will contain a disciplinary procedure, which will provide for a system of oral and written warnings and reprimands. It may also set out a system of progressive punishment; and, in cases where management believes discharge is warranted, provision may be made for notification of the bargaining representative or the grievance committee.[25] If the parties fail to include a disciplinary procedure in the contract, some system for handling discharges usually will become established through custom and past practice. Whatever the manner in which the disciplinary procedure is established, however, its requirements must be strictly complied with. This rule rests upon the assumption that informal and non-technical handling of labor disputes, while often desirable, is inappropriate where the discharge of an employee is concerned.[26]

1. *Warnings.*—In determining whether a disputed discharge was for just cause, it is relevant that the employee has or has not received a prior warning as to the unsatisfactory nature of his conduct. If prior warning has been given, this will weigh against the employee,[27] but failure to give such previous warning will often result in the discharge being set aside.[28] Whether or not an absence of warning will constitute a fatal defect, of course, will depend upon the contract language and the past practice of the parties. At the very least, however, such a failure may be one of the reasons for upholding the grievance. On the other hand, there are a number of offenses for the commission of which an employee may be summarily discharged.

24. Ross, *supra* note 16, at 26-27 (footnotes omitted).
25. Thyer Mfg. Corp., 62-2 CCH Lab. Arb. ¶ 8351 (1962) (Williams, R.).
26. Kroger Co., 36 Lab. Arb. 1386 (1961) (Barnhart, R.).
27. ELKOURI & ELKOURI, HOW ARBITRATION WORKS 431 (2d ed. 1960) [hereinafter cited as ELKOURI & ELKOURI].
28. See Smith's Tranfer Corp., 62-3 CCH Lab. Arb. ¶ 9005 (1962) (Seidenberg, J.).

For the most part, these involve a degree of moral turpitude, such as theft, assaults on supervisory personnel, and aberrant sexual practices, among other offenses. The contract, moreover, may specify additional dischargeable offenses that require no warning as a condition to discharge.[29] Yet, it is apparent that even though an offense constitutes a ground for discharge under the contract, this without more does not dispense with the warning requirement.[30]

Although a warning, or even several, may be given by the employer, the appropriateness of such warning or warnings may be called into issue. Again, this relates back to the disciplinary procedure; that is, the warning must comply with the very letter of the contract. Thus, an employee may not be discharged for violation of a company rule where the contract requires warning for the offense, even though the rule may have been adequately promulgated, and the employees warned that infraction would result in discharge.[31] Obviously, then, a form of individual warning is required, as opposed to the group warning implicit in the promulgation of a rule. In a similar vein, an oral warning, regardless of its severity, will not suffice if a written warning is required by the contract.[32] It is a further requirement that the offense which occasions the warning must be the same or at least closely related to that for which the employee is finally discharged.[33] Accordingly, a mere general warning often will not be sufficient. However, if the written communication makes reference to the employee's shortcomings with sufficient particularity, it will usually be adequate even though it is not framed in typical warning language.[34]

Further, the employer is held strictly to the spirit and intent, as well as the letter, of the contract's warning requirements. Thus, where

29. *Ibid.*

30. Roy Stone Transfer Co., 39 Lab. Arb. 577 (1962) (Strong, G.). In this case, a truck driver was discharged for tampering with the tachograph mounted on his truck, an offense made dischargeable by the contract. The policy of the company was clear and the driver knew of the rule. In rebuttal, the union offered the dischargee's exceptionally good record, contending that the discharge penalty was too severe. The arbitrator ordered the employee reinstated without back pay, noting that the grievant had not received warning that his previous good record would not mitigate the severity of the discipline.

31. *Cf.* Ingalls Shipbuilding Corp., 39 Lab. Arb. 419 (1962) (Hebert, P.).

32. McKesson & Robbins, Inc., 62-1 CCH Lab. Arb. ¶ 8222 (1961) (McConnell, J.).

33. Consolidated Badger Co-op., 64-1 CCH Lab. Arb. ¶ 8033 (1963) (Gundermann, N.).

34. Colonial Baking Co., 64-1 CCH Lab. Arb. ¶ 8015 (1963) (Holly, J.). The grievant in this case had been absent in the vicinity of 11% of his scheduled shifts. Prior to discharging him the company sent him a letter summarizing his past record of excessive absences. The union argued that this did not constitute a warning, but was merely for the purpose of calling past warnings to the grievant's attention. The arbitrator, however, held that the letter satisfied the contract's written warning requirements and upheld the discharge.

a union official was discharged for leaving his post early, the arbitrator ordered him reinstated because the employer had issued both an oral and a written warning for only the previous offense.[35] Clearly, the arbitrator will not regard a mere formal compliance as controlling, if such a construction will in effect allow the employer to bypass a step of the disciplinary procedure.[36]

2. *Progressive Punishment.*—It is not unusual for the contract to specify warning for the first offense, layoff for the second offense, and discharge for the third offense, or some other system whereby the degree of punishment is increased with each transgression. If such a procedure is provided for in the contract, the arbitrator usually will not allow the employer to depart from it in the absence of compelling necessity.[37] The purpose of a graduated sequence is "to impress upon the employee on the occasion of each offense in the sequence the necessity of improving his habits and correcting his faults, thus giving him one or more additional opportunities and incentives to become a satisfactory employee."[38] It is apparent that the inclusion of a graduated sequence clause in the contract imposes upon management an affirmative duty of patience, and the arbitrator will require the employer to fulfill this duty.[39]

3. *Notice to Bargaining Representative.*—The agreement may well require that the employer notify the union or the grievance committee when it has decided to discharge an employee, either before or just after the discharge. Again, this requirement is construed strictly by arbitrators in order to protect the integrity of the grievance procedure. Clearly, the purpose of the grievance procedure is to re-

35. Marathon Elec. Mfg. Corp., 64-1 CCH Lab. Arb. ¶ 8082 (1963) (Shister, J.) (contract required both an oral warning and a written warning as conditions precedent for discharge; the obvious intention of the parties was that an oral warning would be issued for the first offense, and a written warning would be issued for the second offense); Aetna Ball & Roller Bearing Co., 39 Lab. Arb. 417 (1962) (Larkin, J.) (two warning notices bore the same date).

36. However, several recent awards indicate the existence of a growing uudercurrent of contrary authority. By this minority view, substantial compliance with the procedural requirements of the contract is held to be sufficient so long as the rights of the dischargee have not been prejudiced and the purpose of the procedural requirements has been satisfied. See, *e.g.*, Forest City Foundries Co., 44 Lab. Arb. 644 (1965) (Strasshofer, R.); Columbus Show Case Co., 44 Lab. Arb. 507 (1965) (Kates, S.).

37. Commercial Steel-Casting Co., 39 Lab. Arb. 286 (1962) (Kates, S.).

38. *Id.* at 290. See also SHULMAN & CHAMBERLAIN, CASES ON LABOR RELATIONS 409 (1949).

39. Alexander, *Discussion*, in MANAGEMENT RIGHTS AND THE ARBITRATION PROCESS 81 (Proceedings of the Ninth Annual Meeting of the National Academy of Arbitrators 1956). For two cases in which management's patience simply ran out and the arbitrator agreed that rehabilitation had failed, see Potash Co. of America, 40 Lab. Arb. 582 (1963) (Abernethy, B.); United States Steel Corp., 40 Lab. Arb. 205 (1963) (Florey, P.).

quire management and the bargaining representative to try to reach agreement in a timely fashion.[40] If news of the discharge is left to filter back to the bargaining representative via the employee or by other means, chances are that this purpose will be defeated.[41] It is not uncommon, then, for the arbitrator to order reinstatement when the representative has not been notified by the appropriate means set out in the contract.[42] Moreover, it is held that actual notice is not equivalent to written notice, when the latter is required by the contract.[43] Should the contract not stipulate that notice must be given prior to the discharge, this requirement will not be implied,[44] and, generally, the notice will be deemed sufficient so long as it is delivered within a reasonable time following the discharge.[45]

40. Most grievance procedures require that grievances be filed and processed according to a timetable. The following procedure, excluding its provisions relating to arbitration, is included by way of illustration:

"[SECTION] 01. Any employee shall have the right, at any time within twenty (20) days after the incident out of which the grievance arises, to present grievances to the Company. Any such grievance shall be handled in accordance with the following procedure:

"*First:* Between the aggrieved employee accompanied by the shop steward, if the employee so desires, and the foreman involved. The foreman shall give the employee and the shop steward, if present, an answer.

"*Second:* Failing satisfactory adjustment within forty-eight (48) hours, the shop steward, accompanied by the employee, will take the matter up with the assistant superintendent, whose first duty shall be to ascertain whether the matter has been properly presented through the regular channels, and if not, he shall see that this is done. The complaint at this point shall be reduced to writing by the shop steward on a printed form. An answer shall be given in writing by the assistant superintendent within seventy-two (72) hours.

"*Third:* Failing satisfactory adjustment, the grievance shall be turned over to the business representative, who, with the grievance committee of not to exceed three (3) shop stewards, shall take the grievance up with the plant superintendent, and plant personnel director.

"*Fourth:* Failing satisfactory adjustment, the grievance shall be taken up by the representative of the International Union with the vice president in charge of operations or his desiguated representative.

"*Fifth:* Failing satisfactory adjustment, the grievance shall be referred to a Board of Arbitration . . . ." 1964 CCH LABOR LAW COURSE ¶ 2596.01.

41. See Heavy Minerals Co., 32 Lab. Arb. 962 (1959) (Williams, R.). Under grievance procedures requiring that grievances be filed within a certain number of days from the date of the discharge, see note 40 *supra*, a failure to comply with the time limitations set forth therein will result in the dischargee losing his right to process a grievance. See Contmental Baking Co., 62-3 CCH Lab. Arb. ¶ 8857 (1962) (Duff, C.); H. Reznikoff & Sons, 62-2 CCH Lab. Arb. ¶ 8468 (1962) (McPherson, W.). Accordingly, it is of the utmost importance that the union be informed of the discharge promptly in order to enable it to start processing a grievance.

42. *Accord,* Deere & Co., 37 Lab. Arb. 787 (1961) (Davis, P.).

43. Great Bay Chem. & Plastics, Inc., 62-3 CCH Lab. Arb. ¶ 8999 (1962) (Kerrison, D.); American Lava Corp., 61-3 CCH Lab. Arb. ¶ 8708 (1961) (King, G.). *Contra,* Forest City Foundries Co., *supra* note 36.

44. Kroger Co., *supra* note 26.

45. Merchants Fast Motor Lines, Inc., 64-1 CCH Lab. Arb. ¶ 8217 (1963) (Wren, H.).

C. *Management at Fault*

It is axiomatic that management may not impose the supreme penalty if it is in any way responsible for the employee's faulty conduct. Management may be held partially to blame when its criteria for imposing discipline are confused and unknown to employees; when it overlooks rule violations, or permits a course of misconduct to continue without taking prompt action calculated to halt such misconduct; or when it neglects to instruct employees in the proper performance of their duties. It may also be at fault if it fails to enforce rules or assess discipline in a consistent and uniform manner. Should it be shown that management was partially at fault, the employee's transgression must be of a particularly serious nature in order for the discharge to be upheld.

1. *Clearly Defined Position.*—In addition to being reasonable and understandable, plant rules must be promulgated and employees informed of the consequences of their breach.[46] Moreover, if the employer fails to make its position reasonably clear in regard to conduct it considers objectionable, the discharge penalty imposed for such conduct may well be set aside. In *Tower Iron Works*,[47] for example, the arbitrator refused to sustain a discharge for absenteeism because the company failed to support its position by means of a system of understood administrative procedures. That is to say, its position on absenteeism was unclear.

2. *Leniency and Overpermissiveness.*—The employer may nullify a plant rule by continually overlooking its breach on the part of the work force, for employees may not be subjected to severe penalties "when the violation is known to members of supervision and is tolerated and condoned."[48] It, of course, makes no difference that

46. Indiana Gas & Water Co., 63-1 CCH Lab. Arb. ¶ 8025 (1962) (Willingham, J.); Lockheed Aircraft Co., 28 Lab. Arb. 829 (1957) (Hepburn, W.). Further, plant rules must be enforced in a uniform and nondiscriminatory manner. See notes 65-85 *infra* and accompanying text.

47. 62-2 CCH Lab. Arb. ¶ 8663 (1961) (Teele, J.); *cf.* Gateway Prod. Co., 61-3 CCH Lab. Arb. ¶ 8639 (1961) (Marshall, P.); Minnesota Mining & Mfg. Co., 29 Lab. Arb. 528 (1957) (Horlacher, J.).

48. Misco Precision Casting Co., 40 Lab. Arb. 87, 90 (1962) (Dworkin, H.). In the *Misco* award, the arbitrator set aside the grievant's disciplinary suspension for card playing on company time in violation of a plant rule because their foreman had known of it and was not adverse "to taking a hand" on occasion. If higher management had not known of the rule violation and had suspended the supervisor as well, the question would be whether the foreman's knowledge could be imputed to his superiors. Quite possibly, the foreman's superiors would be likewise charged with knowledge. It is true that the employees could hardly help but be aware that the foreman was violating the rule; but it is likewise true that the foreman is entrusted with securing compliance with company rules and regulations at that level, and by his action lulled the grievants into assuming that their transgressions would go unpunished. Seemingly, this situation could be likened to those where the employer has "entrapped" the employee. On the entrapment defense generally, see text accompanying notes 139-42 *infra*.

the employer's condonation was reluctant;[49] the important factor is whether it took affirmative steps to require observance of the rule[50] In the absence of such affirmative action, the employer is required to make known his intention to enforce the rules as a condition to applying disciplinary sanctions for their breach.[51]

This problem may arise in a similar context when management has tolerated an employee's idiosyncrasies over a long period of time, or when it has failed to impose sanctions calculated to improve the employee's attitude and performance. Thus, where an employee, generally known as a "character," was discharged for insubordination, the arbitration board ordered him reinstated without back pay upon learning that he had been behaving in a like manner for some twenty years. It reasoned that "some new variation of a theme which has run through years of employment should not precipitate anything so violent as total discharge."[52] In *Greer Limestone Co.*,[53] the arbitrator ordered an employee discharged for absenteeism reinstated. Although the dischargee had received five warning notices and had been told that he would be discharged for the next unexcused absence, he subsequently accumulated twelve unexcused absences for which he was not disciplined. The reinstatement was based on the ground that, "not to discipline nor to warn in a manner different from past warnings would reasonably lead the person warned to believe that the warnings were not seriously intended."[54] Therefore, it would seem that a discharge will not be sustained when management has led an employee to assume that his future transgressions will go unpunished as they have in the past.[55]

49. Albert Scaletti, Inc., 61-1 CCH Lab. Arb. ¶ 8070 (1960) (Kerrison, L.).
50. *Cf.* Soule Steel Co., 40 Lab. Arb. 765 (1963) (Roberts, T.).
51. Misco Precision Casting Co., *supra* note 48.
52. Armour Agricultural Chem. Co., 40 Lab. Arb. 289, 291 (1963) (Logan, C.).
53. 40 Lab. Arb. 343 (1963) (Lugar, M.).
54. *Id.* at 349.
55. It is, however, most difficult to distinguish this situation from the case in which management has been excessively patient to a point where it becomes apparent that the employee will never "mend his ways." Potash Co. of America, *supra* note 39, involved an employee who was discharged for leaving his post early. He had received numerous oral warnings and three written warnings, the last oral warning having been delivered the day before the discharge. In spite of this, the arbitrator held that the employer was not estopped from discharging him, that "one more chance" would be of no avail.

Obviously management was at fault in both cases for not imposing a disciplinary layoff when it first became apparent that the repeated warnings were having no effect for at least two reasons. First, it may be that if the grievants had been convinced at an early date that management was in earnest, they might have developed into reasonably satisfactory employees. Secondly, by neglecting to take further action beyond warning, higher management undermines the authority of foremen and supervisors who are placed in the position of delivering repeated warnings which come to mean little or nothing to the work force. The result in *Greer* at least makes certain that management will not repeat its mistake. The arbitrator in *Potash*, by *expressly* rejecting the idea

3. *Inadequate Instruction and Supervision.*—This problem usually arises after an employee has been discharged for negligence or inefficiency. To support its contention that discharge is an unduly severe penalty, the bargaining representative may offer the fact that the employer was at fault for not having instructed the employee in the performance of his job,[56] or that he had been inadequately supervised.[57] If it appears that the employee was in fact inadequately trained or supervised, the arbitrator will usually mitigate the discharge penalty at least. This general proposition is well illustrated by the award in *Lockheed Aircraft Co.*[58] In this case, the grievant had been transferred to the classification of final inspector over his objections, a position for which he was poorly suited by temperment and experience. He was given no formal instruction but was left to "learn the ropes" from the other inspectors. He subsequently was discharged for inefficiency, and there was no doubt that his performance had been seriously deficient. Noting his fine work record before having been transferred, the arbitrator ordered him reinstated with back pay and full seniority to a comparable but not necessarily identical job classification. If it appears that a grievant's performance is markedly inferior to that of other employees, however, and they likewise have not had the benefit of proper instruction, his discharge may be sustained.[59]

4. *Fault of the Immediate Supervisor.*—In instances where the grievant's misconduct is in some way attributable to the fault of his immediate supervisor, the arbitrator will usually mitigate the discharge penalty and order the grievant reinstated without back pay or with partial retroactivity where appropriate. The problem usually arises when the grievant is discharged for insubordination and the foreman has either provoked or initiated the exchange. If such is the case, the employee's act of insubordination must be of a particularly serious nature in relation to the provocation in order for the discharge penalty to be upheld.[60] In addition, the awards indicate that the immediate supervisor is charged with a duty of tact[61] and perhaps even

that the failure to impose a disciplinary layoff raises an estoppel against the company, merely perpetuated an undesirable situation. See also Times Publishing Co., 63-2 CCH Lab. Arb. ¶ 8531 (1963) (Dworkin, H.).

56. Kroger Co., 61-2 CCH Lab. Arb. ¶ 8366 (1961) (Giles, J.).

57. *Cf.* United States Borax & Chem. Corp., 62-1 CCH Lab. Arb. ¶ 8077 (1961) (Guild, L.) (issuance of warning notice held improper when employee sought supervisor's help and his request was initially denied).

58. 26 Lab. Arb. 682 (1956) (Hawley, L.).

59. March Elec. Co., 61-1 CCH Lab. Arb. ¶ 8238 (1961) (Seinsheimer, W.).

60. See National Castings Co., 41 Lab. Arb. 442 (1963) (Walter, P.) (supervisor hurled racial epithet; grievant hurled 7½ lb. casting—discharge upheld).

61. See Lone Star Heat Treat Corp., 62-1 CCH Lab. Arb. ¶ 8080 (1961) (Williams, J.) (employee persisted talking to supervisor about some damaged dies for which he had

understanding. To illustrate, *Tungsten Mining Corp.*[62] involved a miner who refused to perform a work assignment without assistance, although past practice had established that he was not entitled to a helper for this particular job. He was discharged upon his further adamant refusal. The arbitrator ordered him reinstated, noting that the man's actions indicated his fear of the work assignment, and that the supervisor should have inquired into his reasons for wanting a helper before discharging him. Finally, there have been cases in which the grievant's reinstatement was based upon the fact that the foreman had not properly identified himself.[63] Obviously, in this situation the alleged insubordinate act lacks the requisite element of wilfulness.[64]

5. *Discrimination and Unfairness.*—It is clear that in imposing the penalty of discharge, whether for infraction of plant rules or other misconduct, management must not unfairly discriminate among employees.[65] Basic fairness requires that employees engaging in similar misconduct be penalized equally in the absence of circumstances justifying unequal treatment.[66] Thus, the term "discrimination" connotes an unfair distinction in treatment,[67] and the prohibition against discrimination requires merely "like treatment in like circumstances."[68]

The discrimination issue may arise in a variety of factual situations. It may be that less than all employees guilty of the same misconduct are discharged,[69] or an employee may be discharged for a particular offense for which no other employee had ever been discharged,[70] or finally two employees may be discharged for engaging in similar misconduct but one is less culpable than the other.[71] Since a reasonable variation in punishment is permissible, the discriminatory

been responsible despite latter's admonition to stop talking; held, improperly discharged); Colson Corp., 61-3 CCH Lab. Arb. ¶ 8814 (1961) (Sabella, A.) (female employee discharged for refusing to prepare a report on orders of her foreman; arbitrator set aside discharge, finding that employee was upset by foreman's practice of continually asking her for dates—she apparently got into the habit of saying "no").

62. 22 Lab. Arb. 570 (1954) (Maggs, D.).

63. See, *e.g.*, General Tel. Co., 44 Lab. Arb. 499 (1965) (Roberts, T.); Libby-Owens-Ford Glass Co., 44 Lab. Arb. 493 (1965) (Sembower, J.).

64. See text accompanying notes 227 & 228 *infra.*

65. Pittsburgh Standard Conduit Co., 33 Lab. Arb. 807 (1959) (McCoy, W.).

66. ELKOURI & ELKOURI 431-32.

67. Alan Wood Steel Co., 21 Lab. Arb. 843, 849 (1954) (Short, J.).

68. *Ibid.*

69. Texas Co., 32 Lab. Arb. 413 (1958) (Owen, J.).

70. United States Steel Corp., 63-1 CCH Lab Arb. ¶ 8181 (1963) (Garrett, S.). In this context, however, the question will turn on the past practice of the parties. For thorough discussions of this topic, see ELKOURI & ELKOURI 266-83; Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements,* in ARBITRATION AND PUBLIC POLICY 30-58 (Proceedings of the Fourteenth Annual Meeting of the National Academy of Arbitrators 1961).

71. *Cf.* Bethlehem Steel Co., 39 Lab. Arb. 686 (1962) (Voltin, R.); Gimbel Bros, 61-3 CCH Lab. Arb. ¶ 8899 (1961) (DiLeone, P.).

discharge case most often will involve a determination of whether one or more of a host of mitigating or aggravating factors will serve to justify the disparity in treatment.

A reasonable distinction in treatment may be supported on the basis of a corresponding distinction in culpability,[72] the work records of the respective employees,[73] a distinction in the nature of the involved employees' jobs,[74] and the employer's lack of knowledge that the non-discriminated-against employee had engaged in such misconduct.[75] In addition, the bargaining representative's claim of discrimination based on past practice sometimes may be refuted by a clearly defined company policy whereby each case is individually considered on its merits.[76] Yet, when an employee is discharged for an offense and the company historically has been lenient in dealing with employees guilty of this same offense, the union's case is extremely strong. In these circumstances, it is possible that the arbitrator may regard the company's failure to notify the union of the change in policy as grounds for setting aside the discharge,[77] at least in the absence of special circumstances.[78] Furthermore, it has been held

72. Detroit Steel Joist Co., 65-1 CCH Lab. Arb. ¶ 8181 (1965) (Mittenthal, R.). In this case, four employees were discovered drinking on the job. The grievants, who were plainly drunk and abusive, were discharged, while the remaining two employees, who returned to their assigned tasks quietly and completed them without difficulty, were not. On these facts the arbitrator denied the grievance, stating that the union's charge of discrimination had not been substantiated. See also United States Steel Corp., 63-1 CCH Lab. Arb. ¶ 8005 (1962) (Altrock, D.) (discipline of two members of crew who volubly refused a work order upheld, although other members of crew who remained silent were not disciplined); Gimbel Bros., *supra* note 71 (four week suspensions of five employees who merely joined another in sharing a bottle brought into plant by latter reduced to one-week suspensions on the ground that drinking on the job is not as serious an offense as bringing liquor into plant).

73. Consolidated Badger Co-op., *supra* note 33 (dischargee had received prior warning, while other employee who had committed same offense had not); Alan Wood Steel Co., 21 Lab. Arb. 843 (1954) (Short, J.).

74. *Cf.* Southwest Potash Corp., 63-1 CCH Lab. Arb. ¶ 8293 (1963) (Abernethy, B.). This case involved a miner who was suspended for refusing a direct order to return to work. The suspension was challenged on several grounds, including an allegation of discrimination. The latter allegation was based on the fact that other employees who had not returned to the job immediately were not suspended. The arbitrator found the distinction in treatment justified because the nature of the employee's job was such that work could not proceed until he had returned.

75. Detroit Steel Joist Co., *supra* note 72.

76. Celotex Corp., 63-1 CCH Lab. Arb. ¶ 8302 (1963) (Larkin, J.).

77. Perth Amboy Evening News Co., 63-2 CCH Lab Arb. ¶ 8793 (1963) (Schmertz, E.). See also United States Steel Corp., *supra* note 70.

78. See White Pine Copper Co., 63-2 CCH Lab. Arb. ¶ 8548 (1963) (Larkin, J.) (intoxicated employee discharged when he became abusive in spite of long history of leniency for reporting drunk); Pasadena City Lines, Inc., 62-3 CCH Lab. Arb. ¶ 9055 (1962) (Roberts, T.) (company policy of offering drivers a chance to resign where proof of misconduct would require additional investigation unavailable to dischargee because no additional proof was needed in his case). See also American Hoist & Derrick Co., 35 Lab. Arb. 1 (1960) (Bradley, G.).

that the discrimination issue may not be raised when the favorably treated employee is a foreman or supervisor, although the latter may be guilty of the same offense.[79] This result was supported by the following hypothesis: "[T]he Union has no contractual or other basis for questioning the Employer's relations with its supervisors or for demanding that disciplinary action shall be meted out uniformly and in precisely the same manner as between members of supervision and employees represented by the Union."[80]

On the other hand, arbitrators as a rule have not considered the favorably treated employee's greater seniority as a factor in and of itself significant enough to warrant a great distinction in treatment.[81] Practically, this seems wise since the older employee has a greater familiarity with plant rules and the disciplinary practices of the employer.[82] Yet, greater seniority apparently has not been considered an aggravating factor justifying a greater degree of punishment. In addition, there is no clear agreement among arbitrators whether the employer may single out an employee for special punishment because he is a union representative or some other kind of employee leader, merely because of his status as such.[83]

In the final analysis, then, the discrimination issue resolves itself into a rather simple question of degree. Given that the favorably treated employee would have been discharged but for the existence of one or more of the above factors, the mitigating circumstances must serve to justify the degree of disparity between discharge and the punishment actually accorded. To illustrate, in *Wellman Bronze*

79. Eberhard Foods, Inc., 31 Lab. Arb. 675 (1958) (Smith, R.). *Contra,* Great Atl. & Pac. Tea Co., 39 Lab. Arb. 823 (1962) (Turkus, B.).

80. Eberhard Foods, Inc., *supra* note 79, at 679. The facts of this case are interesting and worth noting. The grievant, a union officer, believed that a certain supervisor had discriminated against him in the application of company rules and had solicited employees to withdraw from the bargaining unit. His resentment led him to accost his supervisor after working hours in a non-company owned parking lot. The principals fought and there was ample evidence that the grievant initiated the fight. Later the same evening the supervisor came upon the employee looking under the former's car, and assuming that he was up to no good, unceremoniously kicked him in the head, got into his car and left. Holding that the fight was work related, the arbitrator upheld the discharge. He refused to regard the company's failure to discharge the supervisor as evidence of discrimination for the reason already stated. At first glance this may appear to be a poor award, but it is a general rule that management must be allowed to select and control supervisors without interference from the bargaining representative as an incident to its right to control plant operations. ELKOURI & ELKOURI 370. In most instances a demand by the union for the discharge of a supervisor is not even arbitrable. *Ibid.*, citing Electro Metallurgical Co., 19 Lab. Arb. 8 (1952) (McCoy, W.). It is apparent that the union was on shaky ground in asserting this argument.

81. Moraine Mfg. Co., 40 Lab. Arb. 1161 (1963) (Warns, C.); Great Atl. & Pac. Tea Co., *supra* note 79.

82. *Ibid.*

83. See American Radiator & Standard Sanitary Corp., 61-3 CCH Lab. Arb. ¶ 8897 (1961) (McCoy, C.).

& Aluminum Co.,[84] the grievant left his work area early and was finally found by his foreman in the locker room along with six other employees who had similarly left their areas early. The grievant was discharged on the basis of this offense and his poor work record, while the other six employees merely received warning notices. The arbitrator refused to uphold the discharge on the ground that, even considering the grievant's poor record, such a disparity in punishment amounted to discrimination.[85] In this factual situation, had the remaining six employees been suspended, it is possible that the discharge would have been upheld. If so, it would have been because the arbitrator was convinced that the grievant's record warranted the degree of disparity between discharge and suspension.

D. *Double Jeopardy*

The legal concept of double jeopardy, so deeply engrained in our system of justice, has become a firmly established principle of industrial discipline. To punish a man, or even expose him to punishment, more than once for the same offense not only is repugnant to the concept of just cause,[86] but it serves to "diminish confidence in arbitration as a process for obtaining justice."[87] Accordingly, it is held that "once discipline . . . has been imposed [by the employer][88] and accepted, it cannot thereafter be increased."[89]

Difficulty in applying this principle has centered around the question of whether the employee, in fact, has been punished or exposed to punishment prior to the discharge. Some arbitrators have held that "the rule presupposes that something in the nature of a formal charge and hearing and final disposition of the merits has been held,"[90] but more often the test is whether a matter, once closed, is being reopened to the employee's detriment.[91] Of course, both the employee and management must consider the matter closed with the initial determination of whether or not to impose discipline in order to bring the doctrine into play,[92] and establishing this fact admits of some difficulty.

84. 39 Lab. Arb. 212 (1962) (Miller, D.).

85. See also Todd Shipyards Corp., 36 Lab. Arb. 333 (1961) (Williams, J.).

86. Durham Hosiery Mills, 24 Lab. Arb. 356 (1955) (Livengood, C.).

87. International Harvester Co., 16 Lab. Arb. 616 (1951) (McCoy, W.).

88. It is well established that unless the initial discipline is imposed by the employer, the doctrine of double jeopardy will not apply. Thus, where an employee is tried and convicted for a work-connected offense, the doctrine of double jeopardy does not prevent his subsequent discharge. *Cf.* ELKOURI & ELKOURI 427-28.

89. Durham Hosiery Mills, *supra* note 86, at 358.

90. Diamond Gardner Corp., 32 Lab. Arb. 581, 586 (1959) (Smith, R.) (discipline); International Harvester Co., 13 Lab. Arb. 610 (1949) (Wirtz, W.); ELKOURI & ELKOURI 427.

91. Hi-Life Packing Co., 41 Lab. Arb. 1083 (1963) (Sembower, J.); Olin Mathieson Chem. Corp., 35 Lab. Arb. 95 (1960) (Hebert, P.).

92. *Ibid.*

It would appear that if this initial determination is made by a supervisor having the power to discharge, and the employee is led to believe that this determination is final, the initial decision should be binding upon management.[93] Certainly, it is unfair to lead the employee to believe that the matter is foreclosed and then impose the discharge penalty as an afterthought. In this connection, it should make no difference that further reflection convinces the supervisor that the original action taken was too lenient,[94] or that subsequent events show the offense to be more serious than it first appeared.[95]

Since management is held to any decision which purports to be final, it is important that it acts only after ascertaining all relevant facts and determining the magnitude of the offense. If it is made clear that the action taken in the first instance is temporary, pending further investigation or consideration by higher officials, double jeopardy will not constitute a defense to a subsequent discharge.[96] For example, the use of a suspension for a definite period, or even an indefinite suspension which is terminated within a reasonable time by either discharge or a revocation of the suspension upon investigation "is . . . not a denial of due process or . . . [an] imposition of double jeopardy."[97]

It is often said that an employee may not be discharged on the basis of his record alone.[98] That is to say, there must be a disciplinary event to precipitate the discharge, although this offense need not be such that would, by itself, require the discharge penalty.[99] The reasoning behind this rule lies in the double jeopardy doctrine. To

93. *Ibid.* The *Hi-Life* award involved an employee who reported to work under the influence or so his foreman thought. The employee denied that he was drunk and the foreman finally sent him home after telling him that he would be reported sick. Instead, the incident was brought to the attention of higher management and the employee was discharged. The arbitrator, in ordering reinstatement, held that the doctrine of double jeopardy was applicable. In the *Olin Mathieson* award, an employee was found sleeping on the job by his foreman, an especially serious offense in that particular plant. The foreman mentioned that he had caught the grievant in a pretty bad position and admonished him not to repeat the offense. He reported the incident to his relief foreman who, in turn, informed his superiors. The employee was discharged and the arbitrator, after noting that the double jeopardy doctrine was inapplicable, upheld the discharge. These awards may be reconciled by the fact that in *Hi-Life* the foreman had the power to discharge the grievant on the spot while the foreman in *Olin* did not. It is apparent that in the latter case the foreman could not have considered the matter closed with his admonition because he realized that he did not have sufficient authority to discipline such a serious offense. In addition, he did not lead the grievant into believing that the warning would be the only discipline imposed. If he had, it is possible that this would have brought the doctrine into play.

94. Durham Hosiery Mills, *supra* note 86.

95. *Ibid.*

96. Ross Gear & Tool Co., 35 Lab. Arb. 293 (1960) (Schmidt, M.).

97. Vulcan Corp., 37 Lab. Arb. 1112, 1115 (1961) (Emerson, F.).

98. Metropolitan Transit Authority, 39 Lab. Arb. 855 (undated) (Fallon, W.).

99. United States Steel Corp., 40 Lab. Arb. 205 (1963) (Florey, P.).

discharge on the basis of past offenses alone, in effect, would reverse the prior action taken and amount to double jeopardy.[100] It is established, however, that an employee's prior record may be *considered* in determining the propriety of the penalty assessed for a later offense.[101]

E. *Procedural Due Process*

"Due process," by which an employee is protected against the arbitrary action of his employer, is an essential element of the arbitration process. Much of what has already been said and much of what is to follow involves this concept; but here it will suffice to examine some of the particular problems connected with the requirements of notice and hearing which assure the employee of his "day in court." Additionally, it would seem appropriate to mention some of the special problems which may arise from the nature of collective bargaining itself, a process often described as not overly concerned with the rights of the individual.

1. *Contractual Due Process.*—It has been noted that arbitrators tend to construe the procedural requirements for discharge strictly. The notice and hearing requirements in no way constitute exceptions to this rule. The vast majority of contracts will provide that the dischargee must be formally notified of the action taken and the reasons therefor. Further, he invariably will be entitled to some form of hearing in which facts surrounding the incident will be examined in detail. The requirement of notice necessitates little discussion. In general, it may be said that if the notice is delivered in a timely fashion in accordance with the contract, and is such as to inform the employee of his discharge and the reasons for the company's action with sufficient particularity, this requirement will be held to have been satisfied.[102] Obviously, the notice requirement is designed to inform the employee of the charges pending against him in order to enable him to file a grievance. The requirement of a hearing, however, merits more explanation.

The contract may provide for a review prior to the imposition of the discharge penalty,[103] or the discharge may precede the hearing which is then held following the employee's resort to the grievance procedure.[104] If the contract does not provide for a full investigation by the grievance committee and management prior to the dis-

100. Metropolitan Transit Authority, *supra* note 98.

101. Coast Pro-Seal Mfg. Co., 63-1 CCH Lab. Arb. ¶ 8361 (1962) (Komaroff, M.).

102. See Babcock & Wilcox Co., 41 Lab. Arb. 862 (1963) (Dworkin, H.).

103. Decor Corp., 44 Lab. Arb. 389 (1965) (Kates, S.).

104. See, *e.g.*, Trans World Airlines, Inc., 61-2 CCH Lab. Arb. ¶ 8535 (1961) (Smith, L.).

charge, the employee is often protected from arbitrary discharge by the fairly common requirement that a union representative be present when the penalty is imposed.[105] The inclusion of such provisions in the contract, however, prohibits summary dismissals and may not be dispensed with in the absence of compelling circumstances.[106] For the most part, arbitrators regard such requirements as elements of contractual "due process" without which a discharge must be held "premature and wrongful."[107]

Often, a form of prior review will become established through past practice, and on this basis arbitrators tend to require an affirmative duty of investigation prior to imposing the discharge penalty. This fact is well illustrated by *United States Steel Corp.*,[108] wrich involved two truck drivers who allegedly had swindled their employer's lessor. The lessor, after assuring the employees that the matter did not concern their employer, secured confessions from them which, in turn, led to their conviction for larceny. They agreed to make restitution and were given suspended sentences. Upon learning of their convictions their employer discharged them summarily. The arbitrator, noting that it was the company's practice to call in employees and acquaint them with the reasons for the action taken, set aside the discharge, stating:

> The Company took the unsupported word of an adversely interested party (the Lessor) with no attempt whatever to weigh the fair risk or false confessions having been elicited by the Lessor's assurance, although this could readily have been done by interviewing the aggrieved employees.[109]

It must be noted that where the right of an employee to be heard prior to the imposition of the discharge penalty is not created by the contract or established by past practice, there is some disagreement as to whether the employer retains the power of summary dismissal. One view is that an employer retains this right so long as the dischargee is informed of the charges pending against him and is afforded a

105. See, *e.g.*, Merchants Fast Motor Lines, Inc., 41 Lab. Arb. 1020 (1963) (Wren, H.); Heavy Minerals Co., 32 Lab. Arb. 962 (1959) (Williams, R.).

106. Decor Corp., *supra* note 103.

107. *Id.* at 391. "The review requirement is important because, among other things, it tends to diminish the likelihood of impulsive and arbitrary decisions by supervisors and permits tempers to cool and deliberate judgment to prevail; it encourages careful investigation of the facts by both the Company and the Union; it provides an opportunity whereby the accused may be heard; it permits the presentation, sifting and weighing of all relevant factors; it provides an opportunity to measure the proposed penalty against the alleged offense in the light of the grievant's history, the past treatment by the employer of similar offenses, and other relevant circumstances; it permits consideration of apologies, regrets, and other mitigating circumstances; and encourages the parties to consider rehabilitation possibilities." *Ibid.*

108. 29 Lab. Arb. 272 (1957) (Babb, H.).

109. *Id.* at 277-78. .See also *National Carbide Co.*, 27 Lab. Arb. 128 (1956) (Warns, C.); ELKOURI & ELKOURI 424-25.

hearing within a reasonable time.[110] The contrary, and perhaps more prevalent, view is that an investigation must be made before management makes its decision to discharge, for there will have been a "hardening of positions" by the time the grievant is afforded an opportunity to be heard through the grievance procedure.[111] Perhaps these views are not as irreconcilable as they may seem, for the second appears to envision an informal investigation along the lines suggested in the *United States Steel* award,[112] while it is doubtful that under the first an employer may summarily dismiss without at least making an attempt to discover whether the employee, in fact, committed the offense charged.[113]

Regardless of whether the dischargee is afforded a hearing before or after the imposition of the discharge penalty, the aggrieved employee has a right "to a fair and impartial determination of his alleged culpability. . . ."[114] If the conduct of the hearing indicates that this right is in any way impaired, the arbitrator may regard this as a ground for setting aside the discharge. Thus, where a company official acting as a hearing officer refused to allow the grievant to present evidence on his behalf freely, the arbitrator ordered him reinstated, ruling that his right to an impartial hearing had been "irreparably prejudiced."[115]

2. *Due Process in the Arbitral Forum.*—The due process considerations mentioned above have dealt with fairness in the grievance procedure, but the question may be asked: "What of fairness in the arbitral hearing itself?". At this juncture the interests of the dischargee and the parties to the collective bargaining agreement may at times diverge, raising as a further problem the extent to which the arbitrator should protect individual rights. Behind this pregnant question lies a veritable myriad of fascinating problems.[116] Among those most

110. Trans World Airlines, Inc., *supra* note 104; Trans World Airlines, Inc., 61-2 CCH Lab. Arb. ¶ 8407 (1961) (Smith, L.).

111. See West Virginia Pulp & Paper Co., 45 Lab. Arb. 515 (1965) (Daugherty, C.); Grief Bros. Cooperage Co., 42 Lab. Arb. 555 (1964) (Daugherty, C.).

112. *Supra* note 108.

113. See Philco Corp., 45 Lab. Arb. 437 (1965) (Keeler, V.) (employer's investigation so shallow and worthless that it failed to meet due process requirements).

114. Hudson & Manhattan R.R., 38 Lab. Arb. 641, 642 (1962) (Seidenberg, J.).

115. *Ibid.*

116. The subject of due process and individual rights in the arbitral forum has been exhaustively commented upon by a number of writers. See, *e.g.*, HAYS, LABOR ARBITRATION: A DISSENTING VIEW 105-13 (1966); Barbash, *Due Process and Individual Rights in Arbitration*, in N.Y.U. 17TH ANNUAL CONFERENCE ON LABOR 7 (Christensen ed. 1964); Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601 (1956); Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957); Fleming, *Due Process and Fair Procedure in Labor Arbitration*, in ARBITRATION AND PUBLIC POLICY 69 (Proceedings of the Fourteenth Annual Meeting of the National Academy of Arbitrators 1961); Hanslowe, *Individual Rights in Collective Labor Rela-*

pertinent to this discussion are notice, participation by the dischargee in the arbitral hearing, right to counsel, the agreed or informed award, and confrontation. These are all the more important in view of the drastic nature of the discharge penalty and the relatively recent interest in individual rights shown by the courts.[117]

By and large, the awards indicate that arbitrators attempt to effect a balance between the sometimes competing interests of the dischargee on the one hand and those of the union and the employer on the other. Their efforts include:

> (1) a willingness to permit individuals to be heard in arbitration hearings if they ask to be heard, and even some willingness to listen to counsel for the individuals; (2) an uneasiness about (and frequently a rejection of) 'rigged arbitrations'; and (3) a stated concern about notice. . . .[118]

If, however, the arbitration hearing is seriously tainted by unfairness, as, for example, where the propriety of a discharge is determined without affording the dischargee notice or an opportunity to be heard, the award may be collaterally attacked either before the National Labor Relations Board or in the courts. For over a decade, the Board has ignored arbitration awards determining the propriety of discriminatory discharges within the meaning of section 8(a)(3)[119] of the NLRA, if they fail to meet a certain minimal standard of fairness.[120] In 1962, the Board broadened its influence in this general

tions, 45 CORNELL L.Q. 25 (1959); Lenhoff, *The Effect of Labor Arbitration Clauses on the Individual*, 9 ARB. J. (n.s.) 3 (1954); McRee, *The Adversely Affected Employee and the Grievance and Arbitration Process*, in SYMPOSIUM ON LABOR RELATIONS LAW 431 (Slovenko ed. 1961); Silver, *Rights of Individual Employees in the Arbitral Process*, in N.Y.U. 12TH ANNUAL CONFERENCE ON LABOR 53 (Stein ed. 1959); Stockman, *Discussion of Due Process of Arbitration*, in THE ARBITRATOR AND THE PARTIES 37 (Proceedings of the Eleventh Annual Meeting of the National Academy of Arbitrators 1958); Summers, *Individual Rights in Collective Agreements—A Preliminary Analysis*, in N.Y.U. 12TH ANNUAL CONFERENCE ON LABOR 63 (Stein ed. 1959); Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. REV. 362 (1962); Williams, *Intervention: Rights and Policies*, in LABOR ARBITRATION AND INDUSTRIAL CHANGE 266 (Proceedings of the Sixteenth Annual Meeting of the National Academy of Arbitrators 1963); Wirtz, *Due Process of Arbitration*, in THE ARBITRATOR AND THE PARTIES 1 (Proceedings of the Eleventh Meeting of the National Academy of Arbitrators 1959).

117. See, *e.g.*, Local 770, Retail Clerks v. Thriftimart, Inc., 59 Cal. 2d 421, 380 P.2d 652 (1963); Donnelly v. United Fruit Co., 40 N.J. 61, 190 A.2d 825 (1963); Clark v. Hein-Werner Corp., 8 Wis. 2d 264, 99 N.W.2d 132 (1959), *cert. denied*, 362 U.S. 962 (1960).

118. Barbash, *supra* note 116, at 13.

119. 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(3) (1964).

120. Since 1955 the Board has indicated its willingness to give 'hospitable acceptance to the arbitral process' as part of the collective-bargaining machinery, by voluntarily withholding its undoubted authority to adjudicate alleged unfair labor practice charges involving the same subject matter," 28 NLRB ANN. REP. 38, 39 (1964), if the arbitral proceeding meets certain minimal standards of fairness. Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955). The *Spielberg* criteria governing the Board's recognition of arbitration

area, indicating that it will assert jurisdiction when the individual grievant has been subjected to "unfair . . . or invidious treatment" at the hands of his bargaining representative, and declaring this "breach of the duty of fair representation" an independent unfair labor practice.[121]

Moreover, the courts have recognized that an employee alleging a breach of the duty of fair representation states a cause of action against the bargaining agent under the National Labor Relations Act.[122] And this breach "may be imputed to the employer as an unfair labor practice if the breach is related to union membership, loyalty, the acknowledgement of union authority or the performance of union obligations, in violation of section 8. . . ."[123] In *Humphrey v. Moore*,[124] the Supreme Court, in addition to holding that an individual may maintain an action based on the breach of the duty of fair representation under section 301 of the LMRA, seemingly intimated that arbitration awards may be upset if affected individuals are not given notice or an opportunity to be heard.[125] Quite possibly, then,

awards, as expanded and delineated by subsequent cases, is basically as follows: "(1) The arbitration proceeding must have been fair and regular, *i.e.*, (a) notice must have been given the parties, and (b) representation must have been adequate. (2) The alleged unfair labor practice issue must have been fully litigated. (3) All parties must have agreed to be bound by the award. And (4) the award must not be repugnant to the Act." ABA, SECTION OF LABOR RELATIONS LAW, REPORT OF THE DEVELOPMENT OF LAW UNDER THE NLRA 118 (1965). The Board is constantly re-evaluating its position in this area. See Virginia-Carolina Freight Lines, 155 N.L.R.B. No. 52 (1965); Aetna Bearing Co., 152 N.L.R.B. No. 85 (1965); Modern Motor Express, Inc., 149 N.L.R.B. 1507 (1964); Aerodex, Inc., 149 N.L.R.B. 192 (1964); Thor Power Tool Co., 148 N.L.R.B. 1379 (1964); The Coachman's Inn, 147 N.L.R.B. 278 (1964); Roadway Express, Inc., 145 N.L.R.B. 513 (1963); Valley Transit Co., 142 N.L.R.B. 658 (1963); Dubo Mfg. Co., 142 N.L.R.B. 431 (1963); Precision Fittings, Inc., 141 N.L.R.B. 1034 (1963); Raytheon Co., 140 N.L.R.B. 883 (1963), *enforcement denied*, 326 F.2d 471 (1st Cir. 1964); Denver-Chicago Trucking Co., 132 N.L.R.B. 1416 (1961); General Motors Corp., 132 N.L.R.B. 413 (1961); Monsanto Chem. Co., 130 N.L.R.B. 1097 (1961); J. Oscherwitz & Sons, 130 N.L.R.B. 1078 (1961); Ford Motor Co., 131 N.L.R.B. 1462 (1961); Hershey Chocolate Corp., 129 N.L.R.B. 1052 (1960); University Overland Express, Inc., 129 N.L.R.B. 82 (1960); Honolulu Star Bulletin, Ltd., 126 N.L.R.B. 1012 (1960). See also McCulloch, *Arbitration and/or the NLRB*, 18 ARB. J. (n.s.) 3 (1963).

121. Miranda Fuel Co., 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963), 18 VAND. L. REV. 268 (1964); Note, 63 MICH. L. REV. 1081 (1965).

122. Syres v. Local 23, Oil Workers, 350 U.S. 892 (1955) per curiam; Steele v. Louisville & N.R.R., 323 U.S. 192 (1944). See also Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

123. 17 VAND. L. REV. 1328, 1331 (1964).

124. 375 U.S. 335 (1964).

125. *Id.* at 350. At least one commentator has thought it extremely significant that "the court went beyond the basis for the union's decision to consider whether the . . . employees were 'deprived of a fair hearing by having inadequate representation at the hearing'. . . . and . . . apparently used . . . some 'trial-type hearing standards' in conducting its inquiry." Barbash, *supra* note 116, at 21.

a dischargee who finds himself the victim of a collusive arbitration award, or whose discharge has been deemed for proper cause without his being allowed to appear and be heard, may find a measure of relief beyond the arbitral forum. Therefore, if the parties wish the arbitration award to represent the final disposition of the dischargee's rights under the agreement, it would seem that certain basic standards of fairness must be observed in the hearing.[126]

III. EVIDENCE

The facts establishing the alleged dischargeable offense are most often proved by testimonial evidence. Testimony is given in an informal atmosphere and adherence to the technical rules of evidence is not usually required. Arbitrators, however, have recognized the essential validity of the reasons underlying the rules of evidence and, where appropriate, have adopted them for use in the arbitral forum. Accordingly, though the evidentiary rules have been greatly simplified and their use is characterized more by flexibility than by consistency, their essence has been retained.

A. *Free Admissibility*

The parties are given wide latitude in presenting evidence tending to strengthen or clarify their position, and such proffered evidence is for the most part freely received.[127] It may be said that, as a general proposition, nearly any evidence which adds to the arbitrator's insight into the total situation will be accepted.[128] There are several reasons for this liberal attitude, but the most important involves the function of the arbitration process. The grievance procedure, of which arbitration is merely the final step, is designed to facilitate the settlement of disputes to insure the smooth functioning of the industrial community. If the arbitration award provokes further discord, the purpose for which the grievance procedure was established will be defeated.[129] Thus, the arbitrator must take into consideration the entire bargaining relation of the parties in order to render a viable award, and his knowledge of the total situation may well be enhanced by seemingly irrelevant matter. In the discharge context, for example, the arbitrator must consider, among other things, "the employee's

126. See HAYS, *op. cit. supra* note 116, at 105, predicting with obvious enthusiasm that unless arbitrators are more receptive to the requirements of procedural due process, the courts will be forced to take an increasingly greater interest in arbitration proceedings.

127. ELKOURI & ELKOURI 174.

128. Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999 (1955).

129. Aaron, *Some Procedural Problems in Arbitration*, 10 VAND. L. REV. 733, 744 (1957).

past record, his length of service, or the possibility of severe economic forfeiture resulting from discharge, on the one hand, or the effect of his reinstatement on the morale of supervisors and fellow employees . . . on the other."[130]

Several other factors are usually advanced in support of the broad admissibility policy. First, quite often either one or both parties will not be represented by counsel. Needless to say, the unrepresented party would be considerably hampered in the presentation of his position were it not for the free admissibility policy.[131] Moreover, some arbitrators apparently feel that "the grievance process serves psychological ends quite apart from the righting of specific wrongs and that these objectives may be thwarted if the parties are not allowed to speak their piece in full."[132] Lastly, the severity of the discharge penalty demands that all relevant facts be brought forward for the arbitrator's consideration.

Of course, the arbitrator may properly refuse to admit evidence in his discretion if it appears that the proceedings will be drawn too far afield. With this exception, most arbitrators will agree with the following words of Dean Shulman:

> Ideally, the arbitrator should be informed as fully as possible about the dispute he is asked to resolve. He should hear all the contentions with respect to it either party desires to make.
>
> . . .
>
> The more serious danger is not that the arbitrator will hear too much irrelevancy, but rather that he will not hear enough of the relevant.[133]

B. *Protection of the Dischargee by Analogy to Criminal Procedure*

1. *"Search and Seizure."*—The awards dealing with the admissibility of evidence obtained from an improper search of an employee's private effects are too few and inconclusive to support any broad principle. It will suffice to say that on occasion evidence has been rejected on this ground when the search was such as to offend the basic notion of fairness that underlies due process. In *Campbell Soup Co.*,[134] for example, an employee was discharged for violation of a plant rule prohibiting the possession of dangerous knives on the premises. A plant guard had discovered the violation through a unilateral search of the employee's locker. The arbitrator, in upholding the grievance, stated: "Knowledge, even though incriminating if acquired through such illegitimate procedures, is of questionable

130. *Id.* at 741.

131. See Seitz, *Problems Faced by Arbitrators in the Process of Judging*, in SYMPOSIUM ON LABOR RELATIONS LAW 413 (Slovenko ed. 1961).

132. COX & BOK, CASES ON LABOR LAW 519 (6th ed. 1965).

133. Shulman, *supra* note 128, at 1017.

134. 2 Lab. Arb. 27 (1946) (Lohman, J.).

validity in bringing action against the individual."[135] A fairly recent award, *Congoleum-Nairn, Inc.*,[136] also supported the right of employees to be free of improper searches and seizures, although on somewhat different facts. Municipal police officers seized lottery slips from the grievant's locker, but this evidence was rejected on constitutional grounds at his trial. The employer subsequently discharged the grievant for gambling and sought to justify its disciplinary action by introduction of the lottery slips. In rejecting this proffer of evidence, the arbitrator stated: "the constitutional protection against unlawful search and seizure is of little value if evidence ordered suppressed may be recaptured by public authorities and used against an accused in a collateral proceeding. . . ."[137] On the whole, rowever, arbitrators probably will not reject evidence obtained through a private search of an employee's effects. In this connection, the right of the employer to inspect the briefcases and lunchboxes of employees as they leave their place of work is generally upheld when not prohibited by past practice.[138]

2. *"Entrapment."*—This problem rarely arises in its familiar context; that is, where the employer devises a plan by which an employee is led to commit a wrongful act which he otherwise would not have committed. In this situation, it is apparent that the arbitrator would refuse to uphold the discharge.[139] More often, the doctrine is called into issue when an employer utilizes surveillance techniques to halt pilferage, gambling, violation of company rules, or other wrongful activity. Evidence obtained in this fashion is usually credited by arbitrators, and discharges based thereon are quite generally upheld. For example, in *Sun Drug Co.*,[140] a warehouseman's superiors gradually came to suspect him of gambling on the company's premises and secreted a listening device in the warehouse telephone booth in order to gather evidence against him. He was discharged after he was heard telephoning bets. The arbitrator, in sustaining the discharge, brushed aside the union's defense of entrapment. It is apparent that an entrapment defense could not be sustained in these circumstances, for the employer did not in any way induce the dischargee to commit the offense. Objections to surveillance of this type would more properly appear to violate the grievant's right of privacy, a problem which, while sometimes dealt with on the lower steps of the grievance

135. *Id.* at 31.
136. 63-2 CCH Lab. Arb. ¶ 8843 (1963) (Short, J.).
137. *Id.* at 5727.
138. See, *e.g.*, Friedrich Refrigerators, Inc., 63-1 CCH Lab. Arb. ¶ 8108 (1962) (Williams, J.).
139. *Cf.* Borg-Warner Corp., 3 Lab. Arb. 423 (1944) (Gilden, H.).
140. 31 Lab. Arb. 191 (1958) (Marcus, J.).

procedure, is rarely taken to arbitration.[141] It is also generally considered that the company may employ the services of unidentified checkers or spotters, and evidence obtained by them is admissible to support the company's imposition of discipline.[142]

3. *"Privilege Against Self-Incrimination."*—To a certain extent there is a concensus among arbitrators that this privilege, as such, has no place in the arbitration of discipline cases.[143] It is nonetheless true that, in a proceeding to determine the propriety of a discharge, arbitrators have no power to compel the grievant to take the stand and testify as to his alleged acts of misconduct.[144] To say there is no privilege against self-incrimination, then, means merely that the grievant's refusal to testify is subject to certain inferences. These go not to ultimate guilt or innocence, however, but rather are inferences of certain evidentiary facts which, in turn, serve to establish guilt or innocence.[145]

The effect of this inference upon the union's case is better understood in relation to allocation of the burden of proof. It is generally held that the company has the burden of establishing a prima facie case which the union must rebut. The failure of an available grievant to testify is taken into consideration in assessing the weight to be given to the defense's evidence and determining whether it suffices to rebut this prima facie case.[146] In this manner, the inference is used to obviate any advantage which the grievant might initially gain by not testifying.[147]

There are two principal reasons why arbitrators fail to recognize the privilege against self-incrimination. The first lies in the distinction between the arbitral and the judicial processes; that is, "the typical disciplinary case is 'a matter not to be viewed primarily as a question of penalty for misconduct, but as a problem of whether or not, all things considered, the individual has proved an unsatisfactory employee.' "[148] Secondly, the inference encourages the grievant to testify, thereby bringing additional facts to the arbitrator's attention which, in turn, results in a more informed award.

There are indications, however, that in some instances this inference should be given little weight. For example, if the grievant's failure to testify is simply because his personality is such that he would make

141. See Wirtz, *supra* note 116, at 17.
142. See, *e.g.*, Pasadena City Lines, Inc., 62-3 CCH Lab. Arb. ¶ 9055 (1962) (Roberts, T.). See also notes 205-12 *infra* and accompanying text.
143. Wirtz, *supra* note 116, at 19.
144. Southern Bell Tel. & Tel. Co., 25 Lab. Arb. 270 (1955) (McCoy, W.).
145. *Ibid.*
146. See Sonthern Bell Tel. & Tel. Co., 26 Lab. Arb. 742 (1956) (McCoy, W.).
147. McCormick, Evidence § 132 (1954).
148. Wirtz, *supra* note 116, at 19 (quoting Arbitrator James Hill).

a poor witness, attaching any importance to the inference would be manifestly unfair.[149] Furthermore, when the employee is discharged for alleged offenses involving moral turpitude, use of the inference runs contrary to the belief that the arbitrator should require the same exacting standards that prevail in a criminal proceeding.[150]

4. *"Confessions."*—Coerced confessions are subject to the same defects and criticisms whether they are used to support the imposition of the discharge penalty, or to prove the commission of a public crime. Since the use of inducements, commitments or threats to obtain a confession is regarded as being patently unfair, the arbitrator may be expected to rule confessions inadmissible when any one or more of these coercive elements appear.[151] Consequently, a confession is admissible only when given by the grievant of his own free will.[152]

C. *Proof*

1. *"Burden of Proof."*—The allocation of the burden of proof is stressed far more in the arbitration of discharge cases than in other types of industrial disputes owing, no doubt, to the serious nature of the penalty imposed. The manner of allocating the burden of proof is quite similar to that used by a court. The burden of proving wrongdoing is generally held to rest upon the employer throughout the proceeding.[153] The burden of first proceeding also rests upon the employer, but the making of a prima facie case by the employer will discharge this burden and cast upon the union the burden of going forward to rebut the prima facie case.[154] It is clear that if the employer fails to establish its case, it will not have discharged its burden and the union is not required to put on any proof in order to prevail.[155] Further, this defect may not be cured by the inference arising from the grievant's failure to testify.[156]

Not unexpectedly, the burden of introducing and proving affirmative defenses rests upon the union.[157] For example, the union may be expected to advance evidence of circumstances to justify the employee's conduct, or to mitigate the seriousness of the offense; and it has the burden of proving, by a reasonable degree of proof, that the

149. *Id.* at 19 n.9.

150. See Aaron, *supra* note 129.

151. United States Steel Corp., *supra* note 108.

152. Kroger Co., 12 Lab. Arb. 1065 (1949) (Blair, J.); ELKOURI & ELKOURI 194-95.

153. Southern Bell Tel. & Tel. Co., *supra* note 146.

154. *Ibid.*

155. Publishers' Ass'n, 65-1 CCH Lab. Arb. ¶ 8014 (1964) (Altieri, J.).

156. *Ibid.*

157. See ELKOURI & ELKOURI 417 n.34 and the authorities cited therein.

discharge penalty was unwarranted because of these circumstances.[158] In order to sustain a defense of discrimination, however, the union is required to show by a very high degree of proof that the more favorably treated employees were guilty of the same offense, that management knew of their transgressions, and that "[it] had sufficient evidence to establish their guilt."[159]

2. *"Quantum of Proof."*—The degree of proof which must be adduced by the employer is subject to some disagreement among arbitrators. Those who subscribe unequivocally to the view that discharge constitutes "economic capital punishment" most likely will require "proof beyond a reasonable doubt" in all discharge cases.[160] Other arbitrators recognize that such a high standard of proof is often impossible to satisfy. They recognize as well that, particularly in periods of full employment, discharge is not in any sense economic capital punishment, since "by the time the grievance reaches arbitration the grievant may be happily employed somewhere else."[161] Accordingly, a majority of arbitrators tend to require a somewhat milder degree of proof such as "preponderance of the evidence"[162] or "clear and convincing evidence."[163] This latter approach appears preferable in view of the nature of the dispute being arbitrated. Clearly, a standard of proof which the employer is rarely, if ever, able to satisfy impedes rather than encourages the collective bargaining relationship. Little imagination is needed to see that cooperation with the bargaining representative will be difficult for an employer whose right to enforce shop discipline is sharply curtailed.

Yet, there is an overwhelming concensus that the arbitrator is justified, even required, to observe the stringent, "reasonable doubt" standard in a hearing to determine the propriety of a discharge for alleged acts of moral turpitude.[164] Quite simply, "[the] protection of

158. See, *e.g.*, Minneapolis-Moline Co., 61-2 CCH Lab. Arb. 8305 (1961) (Flagler, J.).

159. Detroit Steel Joist Co., 65-1 CCH Lab. Arb. ¶ 8181, at 3655 (1965) (Mittenthal, R.).

160. Aaron, *supra* note 129.

161. *Id.* at 740. See also Cannon Elec. Co., 28 Lab. Arb. 879 (1957) (Jones, E.), where it was pointed out that "competitive labor conditions . . . [will] redress the injustice of a mistaken or unjust discharge" only where there is a "shortage of the particular skills possessed by the discharged employee. . . ." Arbitrator Jones concluded "where the local labor situation means an employee is not readily employable elsewhere . . . a vigorous standard . . . [of proof] seems applicable." *Id.* at 883.

162. See, *e.g.*, Ormet Corp., 63-2 CCH Lab. Arb. ¶ 8453 (1963) (McDermott, T.).

163. See Cannon Elec. Co., *supra* note 161.

164. See, *e.g.*, Geo. H. Dentler & Sons, 42 Lab. Arb. 954 (1964) (Boles, W.); Ames Harris Neville Co., 42 Lab. Arb. 803 (1964) (Koven, A.); Congoleum-Nairn, Inc., *supra* note 136; McKesson & Robbins, Inc., 63-1 CCH Lab. Arb. ¶ 8306 (1963) (Sembower, J.). *But see* Illinois Bell Tel. Co., 62-3 CCH Lab. Arb. ¶ 8955 (1962) (Ryder, M.), where it was held that in cases involving discharge for acts which carry

an innocent employee against the injustice of industrial blackballing and social ostracism demands the most careful and exacting scrutiny to assure that the facts alleged as the basis of the discharge actually exist."[165] Implicit in this, of course, is the idea that a finding of just cause in such a case condemns a dischargee just as surely as would a criminal conviction. It is recognized "that the employer will at times be required, for want of sufficient proof, to withhold or rescind disciplinary action which in fact is fully deserved. . . ."[166] "[T]his kind of result," however, "is inherent in any civilized system of justice."[167]

In spite of numerous statements to the effect that the employer must prove just cause by a "preponderance of the evidence," or beyond a "reasonable doubt," there are indications that arbitrators "will not evaluate the evidence solely on the basis of rigid standards of proof."[168] The nature of the industrial offense is such that frequently the most an arbitrator can do is determine whether or not the discharge penalty was warranted under the circumstances. In reaching this decision, the arbitrator is influenced by considerations wholly apart from the evidence adduced in the particular case, such as the employee's record, his seniority, and the bargaining history of the parties, all of which may be expected to color his view of the evidence. Consequently, in any two cases the quantum of proof required for just cause may well vary according to these collateral considerations. Consider, for example, the following admonition to two employees whose discharges were reduced to disciplinary layoffs:

> Your Arbitrator's experience is that in cases where severe disciplinary lay-offs have been previously imposed, or where once before the grievant was 'saved by the bell' that the quantum of proof required by succeeding arbitrators for just cause seems in reverse ratio to the prior history, *i.e.*, the more the history, the less the proof to measure just cause.[169]

D. *Surprise*

1. *Admissibility of New Evidence.*—Evidence proferred for the first time in a hearing to determine the propriety of the discharge may or may not be ruled admissible depending upon the character of the evidence and the circumstances under which it is presented. Generally speaking, "the validity of the discharge should be tested by the evidence considered and acted upon by the Company official who

connotations of illegality, the standard of proof is high, but falls below that required in criminal proceedings.

165. Cannon Corp., *supra* note 161, at 883.

166. Kroger Co., 25 Lab. Arb. 906, 908 (1955) (Smith, R.), quoted in ELKOURI & ELKOURI 418.

167. *Ibid.*

168. Aaron, *supra* note 129, at 741.

169. Loblaw, Inc., 62-2 CCH Lab. Arb. ¶ 8431, at 4596 (1962) (Reid, B.).

made the decision to discharge."[170] This general rule would exclude evidence discovered after the discharge has occurred,[171] as well as consideration of post-discharge acts of the grievant.[172] Yet, both of these propositions must be qualified to some extent.

There appears to be no reason why after-acquired evidence discovered by the employer in the course of its investigation should not be admissible if the bargaining representative is advised of its existence at the earliest opportunity, and it is introduced at the lower steps of the grievance procedure.[173] Some arbitrators will go further and admit such evidence provided that it is directed to the fundamental issues,[174] and no "deliberate attempt to mislead the other party is disclosed."[175] In this situation, surprise is generally avoided by granting the party a continuance during which to prepare a defense.[176] Of course, if the union has also produced supplementary evidence, there is little question but that the arbitrator will base his award upon all material evidence.[177]

In support of the more liberal rule, it has been pointed out that the grievance procedure is informal and matters are often dealt with superficially.[178] Further, management may not have "made the thorough investigation it will properly consider warranted if the union ultimately decides to take the case seriously enough to go to arbitration."[179] These arguments, although strongly advanced, do not seem applicable in the discharge context. If, in fact, management has a duty to investigate and ascertain *all* relevant facts before the penalty is imposed, as numerous arbitrators have held,[180] it does not seem unfair to restrict the admission of evidence to that which was uncovered during the investigation. Moreover, the more liberal rule would seem derogative of the hearing prior to, or shortly following, the grievant's discharge, which is provided for in virtually every collective bargaining agreement. It will be remembered that this hearing is designed to permit "the presentation, sifting and weighing of

170. Kennecott Copper Corp., 62-1 CCH Lab. Arb. ¶ 8277, at 4043 (1962) (Wyckoff, H.).

171. ELKOURI & ELKOURI 425.

172. Abilene Flour Mills Co., 61-1 CCH Lab. Arb. ¶ 8049 (1960) (Granoff, A.).

173. *Cf.* Lyon, Inc., 24 Lab. Arb. 353 (1955) (Alexander, G.).

174. Kennecott Copper Corp., *supra* note 170.

175. Wirtz, *Due Process of Arbitration*, in THE ARBITRATOR AND THE PARTIES 1, 15 (Proceedings of the Eleventh Annual Meeting of the National Academy of Arbitrators 1958).

176. *Id.* at 16.

177. Kennecott Copper Corp., *supra* note 170.

178. Wirtz, *supra* note 175, at 15 (quoting Arbitrator Ralph Seward).

179. *Id.* at 15.

180. See text accompanying notes 103-13 *supra*.

all relevant factors."[181] If this hearing is to fulfill its assigned role as a discovery device, the burden of thorough investigation and presentation should be thrust upon the parties at this early stage while the facts surrounding the incident in question are fresh in the minds of the principals and witnesses.[182]

As a rule, post-discharge acts are not deemed relevant in determining the propriety of a discharge, and may not be advanced to support the case of either party.[183] Considering that an employee who has been informed of his discharge may react in a somewhat intemperate manner, and is in no way subject to plant discipline, this rule is well founded in fairness. On the other hand, however, his subsequent acts may bear such a relation to the conduct of the employer's business that such acts may be considered in relation to the penalty imposed in lieu of discharge.[184] Further, where the grievant has threatened objectionable conduct, the arbitrator may consider the fact that he has carried out his threat as evidence that the employer's fears were well founded. This is particularly relevant when the threat was one of the factors leading to discharge.[185]

2. *Change of Theory.*—This problem arises when the employer asserts at the arbitration hearing a basis for the grievant's discharge different from that relied upon at the time of the discharge. The policy considerations applicable here are similar to those noted above—fairness, the arbitrator's need to know all relevant facts, and protection of the integrity of the grievance procedure.[186] Accordingly, the awards show a similar disparity in balancing these considerations. That a change in theory may not be considered, even in the pre-arbitral hearing, has been strongly put: "[W]hen a procedure . . . is established, the charge must fit exactly the so-called 'crime.' If

181. See note 107 *supra.*

182. It takes anywhere from 3 to 12 months to process a discharge case. Tecle, *But No Back Pay Is Awarded,* 19 ARB. J. (n.s.) 103 (1964).

183. See Aro, Inc., 61-1 CCH Lab. Arb. ¶ 8006 (1960) (Carson, R.). In this award, the grievant had been discharged for engaging in a work stoppage. After his grievance had reached the third step of the grievance procedure one month following the discharge, other employees committed the same offense under similar circumstances but were not discharged. On this basis, the union argued that the grievant had been discriminated against, but the arbitrator refused to consider this as bearing on the propriety of the discharge. *But see* Record Pressing, Inc., 64-1 CCH Lab. Arb. ¶ 8057 (1963) (Miller, E.), where the arbitrator held that a post-discharge attack on a foreman compounded his previous offense of creating a disturbance.

184. Columbus Show Case Co., 44 Lab. Arb. 507 (1965) (Kates, S.) (vituperative language directed toward supervisory personnel in the presence of others following discharge).

185. V. E. Anderson Mfg. Co., 43 Lab. Arb. 174 (1964) (King, G.) (union officer continually intimidated members of supervision by threatening to take the employees "out"; he led a walkout following his discharge).

186. See ELKOURI & ELKOURI 178.

charges are to be changed willy nilly, then defenses never meet them, and issues are not presented nor rights protected."[187] It seems clear that if the employer stands on one ground as the basis for the discharge throughout the grievance procedure, it should not be allowed to fall back on another.[188] However, when evidence supporting a second ground is discovered, and communicated to the bargaining agent immediately, there would appear to be less reason why it should not be considered.[189] In any event, the arbitrator may well hold that the facts proven by the employer, although falling short of showing a dischargeable offense, serve to establish a related offense and, on this basis, refuse to award back pay.[190]

E. *Grievant's Prior History*

In addition to the facts surrounding the alleged disciplinary event, the grievant's past record is a factor of considerable importance in determining whether his discharge is for proper cause.[191] Not only may it serve to mitigate the seriousness of the disciplinary event, but, as indicated above, it may establish a pattern of "unworkmanlike performance," which will compound the seriousness of an offense and often justify discharge.[192] "In order to be fair and equitable . . . [the] totality of . . . [the] employee's record, good or bad, must be weighed."[193] Yet, management may not support its action by means of warnings or disciplinary notations that have not been communicated to the employee at the time they were issued; and it makes no difference that such records were made known to the union before the arbitration hearing.[194] This rule rests upon the consideration that fairness requires

187. Bendix-Westinghouse Corp., 33 Lab. Arb. 466, 470 (1959) (Sembower, J.).

188. Sealtest Dairy Prod. Co., 35 Lab. Arb. 205 (1960) (Morvant, R.); Lyon, Inc., *supra* note 173.

189. *Ibid.* If the change in theory is considered during the grievance procedure, or early enough that the parties have the chance to resolve the matter through negotiation, the principal argument against admissibility is answered. See Fleming, *Due Process and Fair Procedure in Labor Arbitration* in ARBITRATION AND PUBLIC POLICY 69, 79 (Proceedings of the Fourteenth Annual Meeting of the National Academy of Arbitrators 1961).

190. See, *e.g.*, Mack Trucks, Inc., 64-1 CCH Lab. Arb. ¶ 8274 (1963) (McCoy, W.) (evidence insufficient to show that employee had been sleeping on job, but it did show that he had left his post without authorization; discharge mitigated to one month suspension without back pay).

191. Rogers v. Allied Aviation Serv. Co., 315 F.2d 518 (2d Cir. 1963) (objections to consideration of record deemed frivolous).

192. Lone Star Cement Corp., 39 Lab. Arb. 652 (1962) (Oppenheim, L.); Phillips Chem. Co., 61-1 CCH Lab. Arb. ¶ 8181 (1961) (Horton, G.).

193. Harshaw Chem. Co., 32 Lab. Arb. 23 (1958) (Belkin, L.).

194. The Borden Co., 62-3 CCH Lab. Arb. ¶ 8812 (1962) (Boles, W.). "It is generally deemed not proper for an employer to accumulate a record against an employee over a period of time without notice to him, and while he is permitted to work as usual, and then spring the accumulated record as a ground for discharge." *Id.* at 5952, quoting SHULMAN & CHAMBERLAIN, CASES ON LABOR RELATIONS 439 (1949). See also Northwestern Bell Tel. Co., 37 Lab. Arb. 605 (1961) (Johnston, C.).

that the employee should have the opportunity to contest the reprimand at the time of issuance and should not be required "to disprove stale grievances."[195] Although the preferable practice is to issue written reprimands and warnings, a record of oral warnings may be considered if the employee is specifically told that the reprimands are being entered on records and these are left open for inspection.[196] Moreover, the prior offenses must have occurred within a reasonable time of the discharge in order to be of value in determining its propriety.[197] In this connection, some agreements provide that warnings and reprimands expire after a certain period of time; hence, these may not be considered by the arbitrator in framing his award.[198] There is some disagreement whether the record of a previous offense is admissible as "evidence on the factual issue of whether a similar offense has again been committed."[199] Perhaps most arbitrators will not regard such records of probative value in establishing guilt, but some express misgiving as to the utility of this rule.[200] It is difficult to reach any conclusion other than that caution obviously should be exercised in using similar acts as probative evidence of guilt.[201]

F. *Confrontation*

1. *"Right of Cross-Examination."*—The courts regard cross-examination as an absolute necessity to assure the reliability of evidence.[202] Arbitrators also support the right of cross-examination but to a lesser extent than do the courts. Although the arbitrator may consider absentee evidence, it is apparent that he will be somewhat prone to give the dischargee the "benefit of a doubt" when the discharge is supported in large part by evidence not subjected to the rigors of cross-examination.[203] Obviously, such evidence is far less convincing

195. ELKOURI & ELKOURI 429.

196. Purex Corp., 38 Lab. Arb. 313 (1962) (Edelman, M.).

197. ELKOURI & ELKOURI 429, citing Borg-Warner Corp., 22 Lab. Arb. 589 (1954) (Larkin, J.).

198. See, *e.g.*, General Controls Co., 34 Lab. Arb. 432 (1960) (Roberts, T.) (also holding that record must be admitted at lower steps of grievance procedure); Traben Engineering Corp., 62-1 CCH Lab. Arb. ¶ 8237 (1962) (Williams, P.).

199. Wirtz, *supra* note 175, at 20-21.

200. *Id.* at 21 n.22.

201. See ELKOURI & ELKOURI 430 n.84 and the authorities cited therein. In Rogers v. Allied Aviation Serv. Co., *supra* note 191, the court said: "[P]ast instances of similar misconduct would seem peculiarly pertinent to assessing the *reasonableness* of an employer's discharge of an employee." *Ibid.* (Emphasis added.) By implication, it would seem that instances of similar misconduct may not be used as evidence of the grievant's guilt.

202. MCCORMICK, EVIDENCE § 19, at 41 (1954).

203. Twin City Rapid Transit Co., 62-1 CCH Lab. Arb. ¶ 8128 (1961) (Levinson, J.); see Baldwin Piano Co., 62-3 CCH Lab. Arb. ¶ 8931 (1962) (Schmidt, M.). *Contra,* Los Angles Transit Lines, 25 Lab. Arb. 740 (1955) (Hildebrand, G.), where it was stated, "the system may be odious, but there is no practical alternative." *Id.* at 741.

and, on this basis, the arbitrator may hold that the advancing party has not sustained its burden of going forward.[204] No hard and fast rule may be stated, however, for the weight and credibility of absentee evidence may vary with the circumstances, and, in some instances, perfect fairness to the dischargee may give way to countervailing interests.

Two of the more difficult problems involve the reports of secret investigators and customer complaints. In *Twin City Rapid Transit Co.*,[205] the arbitrator set aside the discharge of a bus driver who had allegedly mishandled fares because the company checkers, on whose report the discharge was based, were unavailable for cross-examination. He noted that had the checkers been present, it could have been shown how closely they had observed the driver. In this situation, it is of crucial concern in evaluating the reports whether the investigators sat near the driver or toward the rear of the bus, whether the bus was crowded or not, or whether the driver's actions were partially obscured by the curtain separating his compartment from the passengers. It is of equal concern to the employer, however, that open identification of the checkers would destroy their future effectiveness.[206] Seemingly, a proper balancing of these interests would take into consideration the importance of the checking system in maintaining discipline and control over the employees,[207] the nature of the alleged offense,[208] and the degree of doubt naturally arising from the report itself.[209] This balancing process, in turn, will determine the weight to be attributed to the absentee evidence.

What the arbitrator is to do when the discharge is based upon written customer complaints is an even more difficult question. For instance, if a customer complains of insolence on the part of the employee, the arbitrator would wish to know whether the customer was oversensitive or naturally peevish, and whether the alleged act of

204. Twin City Rapid Transit Co., *supra* note 203.

205. *Ibid.*

206. Los Angeles Transit Lines, *supra* note 203.

207. *Ibid.* Obviously, if the employer is engaged in the service industry and his employees characteristically work without direct supervision, *e.g.*, airline stewardesses, bus drivers, a checking system would be of far greater importance than if the employees normally work under the direct control of supervisory personnel. In the latter instance, the employer will normally use investigatory personnel only when plagued by sabotage or pilferage. The investigators are usually employees of independent contractors aud, thus, there is no harm in requiring their presence at the hearing.

208. Arbitrators have a tendency to discount absentee evidence all but entirely when it is offered to prove offenses involving moral turpitude. See Aaron, *Some Procedural Problems in Arbitration*, 10 VAND. L. REV. 733, 741 (1957); *cf.* Ames Harris Neville Co., *supra* note 164.

209. It is axiomatic that the weight to be given the report must turn in large part on its completeness and specificity.

insolence was provoked. On the other hand, the employer often will be unable to produce the customer at the hearing because of the danger of prejudicing customer relations, or because the customer is unable or unwilling to testfy. Under these circumstances some arbitrators will accord considerable weight to the complaint,[210] while others will demand additional corroboration.[211] Perhaps the only conclusion possible is that "there is simply no way of eliminating the question of elemental fairness"[212] from these cases, and traditional notions of fair play will prevail unless the countervailing interests are exceedingly strong.

2. *"Hearsay Evidence."*—Not a great deal can be expected of a simple definition of hearsay evidence, but the following definition proposed by the drafters of the Uniform Rules of Evidence may be useful in providing a starting point for a discussion of this important problem area: "Evidence of a statement . . . [including a written expression] which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence. . . ."[213] In a trial at law, of course, such evidence is inadmissible unless it can be brought within one of the various exceptions to the hearsay rule.[214] This stems from a judicial cognizance of the inherent unreliability of evidence untested by cross-examination. It does not imply, however, that hearsay evidence is without probative value. Accordingly, "the characterization of evidence as hearsay is in reality simply a criticism of the weight that should be given to it."[215] For this reason, arbitrators generally admit hearsay evidence "for what it is worth," determining its weight and credibility in light of its tainted character and the objections made to its admission.[216]

Although it is clear that a discharge will not be upheld on the basis of hearsay evidence alone,[217] there are at least four situations in which the arbitrator will accept and credit hearsay testimony. First, when the hearsay is capable of being corroborated by other

210. See, *e.g.*, Turnpike Texaco, 62-1 CCH Lab. Arb. ¶ 8230 (1962) (Stutz, R.).

211. *Cf.* Niagara Frontier Transit Sys., 32 Lab Arb. 901 (1959) (Thompson, R.). See also Fleming, *supra* note 189, at 86.

212. *Ibid.*

213. UNIFORM RULES OF EVIDENCE 63. See also *id.* 62(1): "'Statement' means not only an oral or written expression but also nonverbal conduct of a person intended by him as a substitute for words in expressing the matter stated."

214. MCCORMICK, *op. cit. supra* note 202, §§ 223-90.

215. Local 116, United Instrument Workers v. Minneapolis-Honeywell Regulator Co., 54 L.R.R.M. 2660, 2661 (E.D. Pa. 1963).

216. ELKOURI & ELKOURI 191, citing Continental Paper Co., 16 Lab. Arb. 727 (1951) (Lewis, A.).

217. See, *e.g.*, Ames Harris Neville Co., *supra* note 164; Chardon Rubber Co., 64-1 CCH Lab Arb. ¶ 8096 (1963) (Hertz, D.); McCord Corp., 64-1 CCH Lab. Arb. ¶ 8335 (1963) (Witney, F.); Turnpike Texaco, *supra* note 210 (evidence held direct, but agreeing that hearsay alone may not support a discharge).

evidence adduced in the hearing, it obviously is entitled to correspondingly greater consideration.[218] Second, if the adversary has had an opportunity to interview the absent witness, the principle objection to hearsay testimony is overcome.[219] Third, when the nature of the hearsay evidence is such that it is inherently believable, it is unlikely that the arbitrator will discount it because of its hearsay character.[220] Fourth, nearly all arbitrators will accept hearsay testimony rather than require one employee to testify against another member of the bargaining unit. This is rationalized on the theory that if the testimony is false, the union may offer the testimony of the absent witness in rebuttal.[221]

IV. The Final Criterion for Discharge

The foregoing has dealt with due process—the means by which arbitrators attempt to inject fairness into the arbitration process. For the most part, as we have seen, fairness is achieved by imposing conditions precedent upon the employer's right of dismissal. These conditions or requirements, in turn, constitute the guidelines by which arbitrators determine the propriety or impropriety of a discharge. Recently, these guidelines were developed into a test composed of the seven following questions, all of which must be answered in the affirmative if the discharge in question is to be sustained:

> 1. Did the company give to the employee forewarning or foreknowledge of the possible or probable consequences of the employee's conduct?
>
> 2. Was the company's rule or managerial order reasonably related to the orderly, efficient, and safe operation of the company's business?
>
> 3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
>
> 4. Was the company's investigation conducted fairly and objectively?
>
> 5. At the investigation did the 'judge' obtain substantial evidence or proof that the employee was guilty as charged?
>
> 6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?
>
> 7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?[222]

218. Container Stapling Corp., 63-1 CCH Lab. Arb. ¶ 8265 (1963) (Garman, P.).

219. Niagara Frontier Transit Sys., *supra* note 211.

220. See Aaron, *supra* note 208, at 744. Needless to say, an arbitrator is far more likely to credit a memorandum of a conversation made by the personnel director's predecessor, than a statement allegedly made by the "big shots in the front office." *Ibid.*

221. Fleming, *supra* note 189, at 86.

222. Grief Bros. Cooperage Co., 42 Lab. Arb. 555 (1964) (Daugherty, C.). See also West Virginia Pulp & Paper Co., 45 Lab. Arb. 515 (1965) (Daugherty, C.).

It is at once apparent that the seventh and final query introduces a new and broader question which, in essence, asks "Did the punishment fit the crime?" The answer to this question is often the result of a delicate balancing process in which the detrimental effects upon the industrial community caused by the offense are realistically appraised in light of the drastic nature of the discharge penalty. By way of illustration, the following few paragraphs will consider the industrial offense of insubordination, emphasizing those factors which will mitigate or compound the seriousness of the offense.

Insubordination ranks as one of the most serious industrial offenses, representing a direct attack upon the authority of management to control the work force and compel adherence to its directives. The elements of the offense are twofold: first, there must be some overt act of defiance constituting an open challenge to management's authority,[223] and, secondly, the alleged insubordinate act must be wilful or intentional.[224] Arbitrators, therefore, may be expected to set discharges for insubordination aside when either of these requisite elements is missing.[225] The insubordination issue arises in two related but separate contexts: specific acts of insubordination, including refusals to obey managerial directives legitimately related to the orderly, efficient and safe operation of the company's business, and refusals to accept work assignments and overtime work. The following deals only with specific acts of insubordination, for it is in this area that the awards best exemplify the balancing process noted above.

If management is to fulfill its responsibility for maintaining production, challenges to its authority to issue reasonable orders and discipline employees for just cause must be sternly met. Otherwise, plant discipline will be undermined to the detriment of both employer and employee. It is because of its tendency to have this effect on plant discipline that insubordination constitutes a dischargeable offense. In spite of its purported seriousness, however, a relatively recent survey based on published arbitration awards indicates that of the 71 discipline cases involving insubordination, arbitrators upheld the penalty assessed by the employer in only 25 instances, while in 29 cases the arbitrators reduced the original penalty.[226] The question becomes why the original penalty is so often set aside. In some cases, of course, management fails to establish wilfulness as, for example, where an employee simply neglects to perform a task or to refrain

223. Philco Corp., 45 Lab. Arb. 437 (1965) (Keeler, V.); Steel Scaffolding Co., 45 Lab. Arb. 361 (1965) (Mullin, C.).

224. Hub City Jobbing Co., 43 Lab. Arb. 907 (1964) (Gundermann, N.).

225. *Ibid.*

226. See Teele, *But No Back Pay Is Awarded*, 19 ARB. J. (n.s.) 103, 105 (1964), citing ELKOURI & ELKOURI 435.

from doing some act, rather than explicitly refusing to act or refrain from acting.[227] Too, the alleged act of insubordination may be due to an honest misunderstanding or a failure of communication between the employee and his supervisor and, thus, lacks this essential element.[228] Moreover, there may be no overt act on the part of the employee implementing his challenge of authority. For example, if the employee states that he will not comply with a future order, there is no insubordination until the order is given and he refuses to comply therewith.[229] Yet, the penalty is reduced in many instances simply because the arbitrator believes that it fails to bear a reasonable relation to the seriousness of the proven offense. The basis on which this conclusion is usually predicated, though sometimes unexpressed, is that the employee's misconduct, for one reason or another, does not tend to undermine plant discipline and morale to the point where necessity dictates his termination. Although plant discipline is the most important policy consideration, the arbitrator may also consider the extent to which the offensive behavior tends to affect adversely the grievance procedure and the bargaining relation of the parties in general.

In deciding whether a specific act of insubordination merits the supreme industrial penalty, the circumstances under which the insubordinate behavior occurred are often determinative. With only slight exaggeration, it may be asserted that whether a discharge is upheld or reduced to a disciplinary layoff sometimes depends less upon the prima facie impropriety of the employee's conduct than on such collateral factors as "why," "when," and "where" the misconduct occurred. Obviously, the degree to which the interests of

227. See General Tel. Co., 44 Lab. Arb. 691 (1965) (Prasow, P.); Wilkof Steel & Supply Co., 39 Lab. Arb. 883 (1962) (Maxwell, M.).

228. Chris-Craft Corp., 45 Lab. Arb. 117 (1965) (Autrey, L.). "Insubordination is usually thought of as a 'face-to-face' refusal of an employee to perform a task or restrain from doing some act at the time a supervisor has unequivocally directed the employee to do such task or to refrain from such act." *Id.* at 119. See also Hub City Jobbing Co., *supra* note 224. In this case, the grievant driver had been told by his foreman not to leave the motor of his truck running while it was parked in the company yard. Shortly following this admonition the foreman discovered that the truck again had been left unattended with its motor running. The grievant subsequently was discharged for failure to obey a work order. The arbitrator set aside the discharge, saying the evidence failed to establish that the employee's disobedience was deliberate rather than negligent.

229. Note, 1949 WASH. U.L.Q. 154, 157, citing National Lock Co., 4 Lab. Arb. 820 (1946) (Gilden, H.) (worker told that she had to obey orders of certain foreman; she replied that she might as well quit; discharge set aside—no overt act of insubordination); Toledo Scale Co., 1 Lab. Arb. 459 (1945) (Lehoczky, P.) (employee ordered to stop objectionable past practices, order effective the following day; employee refused; discharge set aside—there could be no insubordination on the day the order was given).

the industrial community are injured at times will depend upon these collateral factors.

The profanity or abusive language cases furnish perhaps the best example of insubordinate behavior failing to undermine plant discipline because of circumstances peculiar to the shop. The realities of industrial life must surely indicate that the use of profanity in the shop is not uncommon;[230] in fact, it is nearly as often used between employees and supervisory personnel as it is among employees.[231] Accordingly, the fact that strong language is used by an employee in a dispute with a supervisor cannot, by itself, have any particular effect on plant discipline.[232] "One cannot look nor expect to find that polished decorum of a cotillion leader"[233] in an industrial environment, and, most often, such language will be categorized as mere "shop-talk." Conversely, profanity or abusive language used in anger and directed specifically at a member of supervision cannot be categorized as "shop-talk."[234] Under these circumstances it is clear that the employee's behavior constitutes "an attack on the right of the Company to direct the working forces and to require that a member of Supervision be treated with common decency and respect for the position which he holds."[235] Obviously, such behavior cannot be condoned and, in most instances, the employee involved will be held to have been discharged for just cause.

Yet, admittedly insubordinate behavior may not constitute grounds for discharge if one or more factors tending to ameliorate the offense are present. In the context of this discussion, perhaps the most important of these factors is whether the insubordinate behavior was observed or overheard by other members of the work force.[236] Flagrant insubordination not only saps the morale of supervisory personnel, but, more importantly, it tends to undermine managerial authority in the eyes of production employees. It is reasonable to assume that this pernicious tendency becomes more pronounced when the actual confrontation is observed by members of the work

230. See Mayville Metal Prod. Co., 64-1 CCH Lab. Arb. ¶ 8351 (1964) (Young, G.); Cleaners Hangers Co., 63-2 CCH Lab. Arb. ¶ 8626 (1962) (Klein, J.); Fox Mfg. Co., 62-1 CCH Lab. Arb. ¶ 8059 (1961) (Williams, R.).

231. See Gaffers & Sattler Corp., 45 Lab. Arb. 65 (1965) (Roberts, T.); Freuhauf Trailer Co., 62-2 CCH Lab. Arb. ¶ 8437 (1962) (Dahl, R.); Cameron Iron Works, 62-1 CCH Lab. Arb. ¶ 8322 (1962) (Giles, J.).

232. Philco Corp., *supra* note 223; see generally authorities cited notes 230-31 *supra*.

233. Terminal Cab Co., 7 Lab. Arb. 780, 784 (1947) (Minton, H.).

234. Westinghouse Elec. Corp., 42 Lab. Arb. 948 (1964) (Luskin, B.); Freuhauf Trailer Co., *supra* note 231 (discharge set aside because the evidence was in conflict as to whether the abusive language was directed at foreman).

235. Westinghouse Elec. Corp., *supra* note 234, at 950.

236. Columbus Show Case Co., 44 Lab. Arb. 507 (1965) (Kates, S.); Paragon Bridge & Steel Co., 43 Lab. Arb. 864 (1964) (Bradley, G.).

force, at least as to those employees witnessing the incident.[237] Accordingly, the arbitrator may well conclude that plant discipline has not been endangered to the point where the discharge of the offending employee becomes mandatory, if the insubordinate behavior is not observed by other employees[238] as, for example, when it occurs in the relative privacy of a supervisor's office,[239] or perhaps on the graveyard shift when the work force is reduced.[240] Upon reaching this conclusion, the arbitrator usually will consider a disciplinary lay-off sufficient punishment.[241]

The gravity of the insubordinate behavior also depends on "why" the misconduct occurred. That is to say, the arbitrator may be expected to consider all relevant factors surrounding the incident, including those which caused the employee to act as he did. In some cases, the incident may have occurred against a background of

237. *Ibid.*

238. A comparison of two recent awards, both arising out of rather extreme factual situations, will suffice to illustrate the importance of this factor. In Paragon Bridge & Steel Corp., *supra* note 236, the grievant was discharged for suggesting in obscene terms that his "foreman perform an act of indignity upon himself" after the foreman fired a probationary employee with whom the grievant had been working. The arbitrator upheld the discharge penalty, noting that the exchange took place within earshot of 10 to 20 employees on their way to the wash room following the termination of their shift. Gaffers & Sattler Corp., *supra* note 231, involved an employee who became engaged in a somewhat overenthusiastic conversation over the plant's ventilation system with the new plant manager. He subsequently was summoned to the personnel manager's office along with the union president. Not caring for the plant manager's version of the earlier incident, the grievant twice called him a liar. The plant manager, noticeably, and perhaps understandably perturbed, snapped "You can't talk to me like that." To this the grievant replied, "Well you are a big liar." The plant manager ordered him discharged on the spot, but the arbitrator set aside the discharge on the ground that it was unduly severe.

Concededly, the employees involved in both of these cases were clearly insubordinate, but the offense in *Paragon* is by far the more serious of the two. Consider the adverse effect a failure to sustain this employee's discharge would have on plant morale, efficiency and discipline. His challenge to authority, if unpunished, certainly would undermine the authority of lower level managerial personnel in the eyes of the 10 to 20 employees who witnessed, and undoubtedly lost no time in relating, the incident. On the other hand, it would not seem that plant discipline was adversely affected by the employee's offense in *Gaffers*. With the exception of the union president, no employee witnessed the incident, and perhaps the only damage was to the plant manager's ego. In any event, the latter case illustrates the viability of the following maxim of industrial discipline: "Discipline should not be upheld solely on the basis that insulting remarks were made to . . . [a member of supervision]. There should be a further showing that due to the surrounding circumstances, the remarks had an adverse effect on production or managerial authority." Bucyrus-Erie Co., 44 Lab. Arb. 858, 861 (1965) (McGury, J.).

239. *Cf. ibid.*

240. *Cf.* COPELOF, MANAGEMENT-UNION ARBITRATION 133 (1948).

241. *Ibid.*

tension,[242] while in others the offending employee may have believed that his actions were in the best interests of the company,[243] or that his obedience would entail an unusual risk of personal injury.[244] Perhaps the most prevalent motivating factor, however, is the offending employee's self-interest, or interest in vindicating the rights of his fellow employees.

No doubt an employee is acting in his own self-interest when he refuses to obey a work order on the ground that, according to his interpretation, it is in violation of the agreement. The question, however, is whether this self-interest is legitimate. The great majority of arbitrators are of the opinion that this interpretation is not one for the employee to make; rather, it is a question for the grievance committee and the collective bargaining process.[245] Logically, such a refusal is insubordinate behavior and constitutes ample cause for discharge. It is apparent that if the integrity of the grievance procedure is to be protected, the employee must obey the order and *then* file a grievance.[246] Moreover, the awards indicate that it makes little difference whether the order is a clear or doubtful violation of the contract. As Dean Shulman has said: "The only difference between a 'clear' violation and a 'doubtful' one, is that the former makes a clear grievance and the latter a doubtful one. Both must be handled in the regular prescribed manner."[247]

242. See Cleaners Hangers Co., *supra* note 230 (deterioration of labor-management relations); Hayes Aircraft Corp., 33 Lab. Arb. 847 (1959) (Griffin, J.) (tense atmosphere following strike; company hurling rules at union and union hurling grievances at company).

243. Higgins, Inc., 63-2 CCH Lab. Arb. ¶ 8522 (1963) (Carmichael, P.) (grievant refused to operate heavy equipment because of risk of damaging equipment on floor—reinstated without back pay); W. T. LaRose & Assoc., 62-3 CCH Lab. Arb. ¶ 8823 (1962) (Lanoue, E.) (employee made a practice of going to company president with his complaints).

244. A. M. Castle & Co., 64-1 CCH Lab. Arb. ¶ 8102 (1963) (Sembower, J.) (suspensions set aside); New York Shipbuilding Corp., 63-1 CCH Lab. Arb. ¶ 8180 (1963) (Crawford, D.) (reinstatement with back pay); Rome Kraft Co., 61-3 CCH Lab. Arb. ¶ 8792 (1961) (Hawley, L.) (reinstatement but no monetary award); Water Saver Faucet Co., 61-2 CCH Lab. Arb. ¶ 8360 (1961) (Sembower, J.) (reinstatement with back pay). *But cf.* Marble Prod. Co. v. Local 155, United Stone Workers, 335 F.2d 468 (5th Cir. 1964).

245. De Mello's Office Furniture Co., 45 Lab. Arb. 398 (1965) (Koven, A.). See also Safeway Stores, 45 Lab. Arb. 663 (1965) (McNaughton, W.); Note, *supra* note 229, at 158.

246. Pittsburgh-Des Moines Steel Co., 61-3 CCH Lab. Arb. ¶ 88-40 (1961) (Levinson, J.) (recognizing principle but ordering reinstatement without back pay because of mitigating circumstances).

247. Ford Motor Co., 3 Lab. Arb. 779, 780-81 (1944) (Shulman, H.). "Some men apparently think that, when a violation of contract seems clear, the employee may refuse to obey and thus resort to self-help rather than the grievance procedure. That is an erroneous point of view. In the first place, what appears to one party to be a clear violation may not seem so at all to the other party. Neither party can be the final judge as to whether the contract has been violated. The determination of that

In the absence of a grievance procedure, however, an aggrieved employee certainly may approach a member of supervision to voice his complaint, at least after having complied with the offending work order.[248] If, in the ensuing discussion, the employee becomes intemperate in his remarks, most arbitrators will be reluctant to find just cause for discharge unless the employee's actions are inexcusable.[249] Seemingly, the prevailing attitude is that the employee must be allowed considerable latitude in presenting his grievances. Of course, the employee's conduct in this regard can have little adverse effect on plant discipline and none whatever on the expeditious processing of grievances.

There have been numerous cases involving the allegedly insubordinate behavior of shop stewards, committeemen and other union officials. If "the discharge of a union official is based upon insubordinate conduct in connection with his production activities, the results should be, and in the main have been, the same as in other cases."[250] In fact, some arbitrators have held that because of his greater familiarity with the agreement and the grievance procedures, it is proper to demand even a higher degree of responsibility on his part.[251] There obviously are limitations to this line of reasoning, for the imposition of too great a degree of responsibility may amount to discrimination within the meaning of section 8(a)(3) of the National Labor Relations Act.[252]

When the union representative is acting in his capacity as such, it is clear that his conduct must be intolerably insubordinate before the arbitrator will find that just cause for discharge exists.[253] In this connection, *Hunt Foods & Industries*[254] is illustrative of the great latitude union officials enjoy. Two stewards had spoken to their foreman on at least two occasions, bringing it to his attention that they

issue rests in collective negotiation through the grievance procedure. But, in the seeond place, and more important, . . . [t]hat procedure is prescribed for all grievanees, not mcrely for doubtful ones. Nothing in the contract even suggests the idea that only doubtful violations need be processed through the grievance procedure and that clear violations can be resisted through individual self-help." *Ibid.*

248. Millage Produce, Inc., 45 Lab. Arb. 211 (1965) (Miller, E.).

249. *Ibid.*

250. Note, *supra* note 229, at 166; see Bethlehem Steel Co., 45 Lab. Arb. 612 (1965) (Seward, R.); Buick Youngstown Co., 64-1 CCH Lab. Arb. ¶ 8113 (1963) (Dworkin, H.); Caterpillar Tractor Co., 63-2 CCH Lab. Arb. ¶ 8654 (1963) (Larkin, J.); Carling Brewing Co., 63-1 CCH Lab. Arb. ¶ 8332 (1963) (Dworet, T.).

251. See, *e.g.*, Vickers, Inc., 63-1 CCH Lab. Arb. ¶ 8270 (1962) (Justin, J.).

252. 49 Stat. 252 (1935), as amended, 29 U.S.C. § 158(a)(3) (1964): "It shall be an unfair practice for an employer—(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."

253. Bucyrus-Erie Co., *supra* note 238; Carnation Co., 42 Lab. Arb. 568 (1964) (Miller, E.); Spartan Printing Co., 42 Lab. Arb. 563 (1963) (Murphy, W.).

254. 44 Lab. Arb. 664 (1965) (Jenkins, J.).

objected to his performing hourly-rated work. The foreman merely told them to get on with their own work. The stewards were discharged for situating themselves on either side of the foreman and shouting obscenities at him, while he subsequently was attempting to effect a repair on one of the machines, work they also considered hourly-rated. The arbitrator ordered them reinstated without back pay, noting that this was a contract dispute and, therefore, the stewards must be granted a greater latitude of speech than when they were engaged in production.[255] The denial of back pay was based not so much upon their verbal misconduct, but rather on the fact that they should have allowed the foreman to finish repairing the machine while reserving their right to file a grievance.

By parity of reasoning, clearly insubordinate conduct in the presentation of grievances, whether informally or at a grievance meeting, will not constitute grounds for discharge unless the union representative's actions far exceed the legitimate scope of his official activity.[256] The permissible scope of his official activity, of course, will vary according to past practice, but, on the whole, arbitrators have been quite liberal in construing its limitations. It must be remembered that the union and employer representatives are equals in the collective bargaining process.[257] To compel the union representative to bow to management's authority while presenting grievances would restrain him from vigorously advancing the union's position.[258] Therefore, it is not surprising that "refusal[s] to take orders or involvement in discussion and disagreement" are not grounds for discipline. Rather, these actions are "part and parcel of a necessary dialogue in search of a solution to a controversial issue."[259] Even if the union representative is decidedly and perhaps unnecessarily disrespectful, the arbitrator will tend to attribute this to an excess of zeal, although in setting aside the discharge he may well refuse to include back pay in his award.[260] In short, discharge of a union official is proper only when his conduct so far exceeds the bounds of his legitimate activity that it fairly may be termed "outrageous."[261] From the foregoing, it is clear that the

255. See also Wyandotte Chem. Corp., 62-3 CCH Lab. Arb. ¶ 8922 (1962) (Kadish, S.).

256. Carnation Co., *supra* note 253; Spartan Printing Co., *supra* note 253; Wyandotte Chem. Corp., *supra* note 255; Ceco Steel Prods. Co., 61-1 CCH Lab. Arb. ¶ 8064 (1960) (Daugherty, C.).

257. Dallas Morning News, 45 Lab. Arb. 258 (1965) (Giles, J.); Wyandotte Chem. Co., *supra* note 255; International Salt Co., 62-3 CCH Lab. Arb. ¶ 8904 (1962) (Mittenthal, R.); Note, *supra* note 229, at 159.

258. *Ibid.*

259. Dallas Morning News, *supra* note 257, at 261.

260. Carnation Co., *supra* note 253; Spartan Printing Co., *supra* note 253; Ceco Steel Prods., *supra* note 256.

261. See, *e.g.*, Singer-Fidelity Co., 42 Lab. Arb. 746 (1963) (Rock, E.).

arbitrator must consider the union's legitimate interest in retaining the right of its representatives to present effectively its position in addition to management's interest in maintaining plant discipline and the parties' interest in promoting the expeditious processing of grievances.

Although the above discussion has been limited to a consideration of insubordination, it indicates that in many instances the cause of disagreement is not so much whether the grievant's conduct was wrongful, as it is a question of whether discharge was the proper penalty under the circumstances. The propriety of the penalty depends upon the seriousness of the grievant's offense which, in turn, is measured in terms of its harmful effects upon the various interests of the industrial community. Not only must the arbitrator determine the extent to which the misconduct injured these interests, but, on occasion, he will be required to balance them as, for example, when a union representative is charged with insubordination. If the degree of harm is slight in relation to the severity of the discharge penalty, or if discharge is inappropriate because of countervailing interests, the arbitrator will hold that management has abused its authority to discipline and discharge for just cause. On this basis, he will set aside the discharge penalty, and order reinstatement without back pay or with partial retroactivity as the circumstances may require.

V. Modification of the Discharge Penalty

The above discussion on insubordination indicates that in those instances in which the arbitrator finds that the grievant's offense merits discipline short of discharge he will feel compelled to modify the discharge penalty assessed by management. This modification usually takes the form of disciplinary lay-off; that is, reinstatement with partial or no back pay. In a sense, then, the arbitrator is passing on the *appropriateness* of the penalty imposed by the employer. Yet, the right to assess discipline is clearly vested in management by most contracts, and the question becomes whether the arbitrator has the power to rule on the degree of punishment imposed. Some contracts expressly provide whether the arbitrator has this power,[262] but the

262. See, *e.g.*, Agreement between Ford Motor Co. and International Union, UAW § 16(b)(3); 1 1965 CCH Lab. L. Rep. ¶ 59,923.056 (effective Nov. 23, 1964): "Powers of Umpire—(3) He shall have no power to substitute his discretion for the Company's discretion in cases where the Company is given discretion by this Agreement or any supplementary agreement, except that where he finds a disciplinary lay-off or discharge is in violation of the standards set up in this Agreement, he may make appropriate modifications of the penalty." In 1945, the Chrysler-UAW umpire "was expressly empowered, 'in proper cases,' to modify penalties assessed by the management in disciplinary discharges and layoffs.' This authority has been continued in . . . subsequent agreements. . . . However, the parties have retained a contractual pro-

majority either leave the question in doubt or make no such provision.[263] It will be seen below that if the answer is not found in the submission, the question is one of contract interpretation.

A. *The Arbitral Viewpoint*

For the most part, arbitrators have not been overly concerned with this problem, and the awards are replete with assertions of implied jurisdiction to reduce the penalty imposed by management. It is said that unless the language of the contract or submission clearly limits the arbitrator's power to modify an unfair discharge penalty, the right to do so is "implied in the arbitrator's power to decide the justice of the cause . . . and in his authority to finally decide and adjust the dispute before him."[264] Not only must the arbitrator be satisfied that the employee was guilty of the offense charged and that some form of discipline is warranted, but he must also find that the degree of punishment imposed, *i.e.*, discharge, was proper under the circumstances.[265] In other words, "A punishment that fits the crime is equally a part of 'just cause' and must be proved to the arbitrator's satisfaction."[266]

It may not be assumed, however, that the arbitrator will modify the discharge penalty merely because "management has imposed a somewhat different penalty or a somewhat more severe penalty than the arbitrator would have, if he had had the decision to make originally. . . ."[267] An arbitrator may properly assess a lighter penalty in lieu of discharge only when he finds that the penalty imposed was so excessive under the circumstances as to amount to an abuse of discretion.[268] Unless the employer's action is such that would "shock"

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hibition against the chairman's allowing back pay to any employee disciplined for violating the strikes and lockouts section of the Agreement." Wolff, Crane & Cole, *The Chrysler-UAW Umpire System,* in THE ARBITRATOR AND THE PARTIES 111, 116 (Proceedings of the Eleventh Annual Meeting of the National Academy of Arbitrators 1958). See also Agreement between Lunkinheimer Co. and Local 1728, United Steelworkers, quoted in Lunkenheimer Co., 39 Lab. Arb. 580, 581 (1962) (Seinsheimer, W.): " 'Should it be determined by the Umpire that an employee has been suspended or discharged for cause, the Umpire shall not have jurisdiction to modify the degree of discipline imposed by the Company.' "

263. Platt, *The Arbitration Process in the Settlement of Labor Disputes,* 31 J. AM. JUD. SOC'Y 54, 58 (1947).

264. Platt, *Arbitral Standards in Discipline Cases,* in THE LAW AND LABOR MANAGEMENT RELATIONS 233, 236 (Univ. of Mich. 1950). See also Vickers, Inc., 33 Lab. Arb. 594 (1959) (Bothwell, W.); ELKOURI & ELKOURI 422 n.54 and the authorities cited therein.

265. Todd Sbipyards Corp., 36 Lab. Arb. 333 (1961) (Williams, J.); Grief Bros. Co-op., *supra* note 222; Vickers, Inc., *supra* note 264.

266. Justin, *Arbitrator's Authority in Disciplinary Cases,* 8 ARB. J. (n.s.) 68, 69 (1953).

267. Stockham Pipe Fittings Co., 1 Lab. Arb. 160, 162 (1945) (McCoy, W.).

268. *Ibid.;* Franz Food Prods., 28 Lab. Arb. 543 (1957) (Bothwell, W.); Esso

the senses of "an ordinary reasonable man," the arbitrator would do well to avoid interfering with the punishment imposed by a "careful competent management which acts in the full light of all the facts."[269]

A definite minority of arbitrators subscribe to the view that in no case is the arbitrator justified in substituting his judgment for that of management.[270] Under this view the absence of an affirmative grant of authority to modify the penalty imposed indicates that no such power exists. The arbitrator is called upon to determine only whether the grievant committed the offense charged and whether some degree of punishment is warranted.[271] Once these questions are answered in the affirmative, the degree of punishment rests solely within the discretion of management by virtue of its right to direct the work force and discipline or discharge for just cause.[272] In the event that either question is answered in the negative, of course, the grievant must be reinstated with back pay and all rights unimpaired.

In actual practice, however, the "either/or" view has largely been rejected as detrimental to the collective bargaining process. The implied authority to formulate an appropriate remedy is said to "rest upon the dictates of necessity" to secure the successful functioning of the industrial institution.[273] Accordingly, most arbitrators will not hesitate to modify a penalty they consider unjust. The following table represents the disposition of 321 discharge cases and illustrates the frequency with which arbitrators tend to reduce the discharge penalty.

TABLE I. DISPOSITION OF DISCHARGE CASES[274]

Disposition	Number	Percentage
Discharge Upheld	149	46.4
Reinstatement Ordered (full back pay)	60	18.7
Divided (Generally without back pay or with partial back pay)	112	34.9
Totals	321	100.0

Standard Oil Co., 19 Lab. Arb. 495 (1952) (McCoy, W.); Perkins Oil Co., 1 Lab. Arb. 447 (1946) (McCoy, W.).

269. Fruehauf Trailer Co., 16 Lab. Arb. 666, 670 (1951) (Spaulding, C.). See also Republic Steel Corp., 23 Lab. Arb. 808, 810 (1955) (Platt, H.); ELKOURI & ELKOURI 420-21.

270. See, *e.g.*, Davison Chem. Co., 31 Lab. Arb. 920 (1959) (McGuiness, K.).

271. Consolidated Paper Co., 33 Lab. Arb. 840 (1959) (Kahn, M.); Justin, *supra* note 266; Platt, *supra* note 264.

272. *Ibid.*

273. Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1492 (1959).

274. REPORT OF THE AMERICAN ARBITRATION ASS'N, PROCEDURAL ASPECTS OF LABOR-MANAGEMENT ARBITRATION, reprinted in 28 Lab. Arb. 933, 946 (1957).

The modification issue is most often raised in the arbitration of discharge cases, but this is not to say that arbitrators will not modify a lesser penalty assessed by management when appropriate. A somewhat more recent survey of 502 discipline cases, including discharge, is also illustrative of the arbitrators' tendency to review the penalty assessed by management.

TABLE II. DISPOSITION OF DISCIPLINE CASES INCLUDING DISCHARGE[275]

Disposition	Number	Percentage
Discharge Upheld	165	32.9
Lesser Penalty Upheld (as assessed by employer)	74	14.7
Penalty Reduced by Arbitrator	150	29.9
No Penalty Permitted	113	22.5
Totals	502	100.0

If, in fact, most agreements are silent as to whether the arbitrator has the power to pass on the appropriateness of the discharge penalty, the question whether this power may be implied is of obvious importance in light of the frequency with which arbitrators exercise this power. The authoritative answer to this question, however, must be given by the courts which enter the picture when called upon to enforce or vacate an award.

B. *The Judicial Response*

The attitude of the courts when required to review arbitration awards modifying the discharge penalty in favor of lesser degrees of punishment is largely favorable to the arbitration process.[276] The

275. ELKOURI & ELKOURI 434-41.

276. This discussion assumes that the arbitrator has the power to afford an unjustly discharged employee full relief (reinstatement with back pay and all rights unimpaired) even when neither the collective agreement nor the submission makes any specific provision for the granting of any relief whatever. Prior to 1960, there was considerable controversy as to whether this could be done. See, *e.g.*, Refinery Employees v. Continental Oil Co., 268 F.2d 447 (5th Cir.), *cert. denied*, 361 U.S. 896 (1959). Following the *Steelworkers Trilogy*, however, the courts generally have held that the arbitrator may award such relief on the ground that there must be an express prohibition negating the arbitrator's power to fashion a remedy before he may be denied this authority. Marble Prod. Co. v. Local 155, United Stone Workers, *supra* note 244; Lodge No. 12, IAM v. Cameron Iron Works, Inc., 292 F.2d 112 (5th Cir.), *cert. denied*, 368 U.S. 926 (1961); Electric Specialty Co. v. Local 1069, IBEW, 222 F. Supp. 314 (D. Conn. 1963); see generally Groske, *Arbitration Back-Pay Awards*, 10 LAB. L.J. 18 (1959). *Contra*, Kansas City Luggage & Novelty Workers v. Neevel Luggage Mfg. Co., 325 F.2d 992 (8th Cir. 1964).

proposition that arbitration is to be given a preferred position is now quite generally accepted, a fact which has led one commentator to say "that under the leadership of the Supreme Court the courts have been vying with each other in paying homage to labor arbitration."[277] Nevertheless, the courts will examine the contract and stipulation to determine whether the arbitrator has exceeded the power delegated to him by the parties. If it does not appear that he had the necessary power to make the award, it will be set aside.[278]

An analysis of judicial attitude in this area must of necessity begin with *United Steelworkers v. Enterprise Wheel & Car Corp.*[279] There the Supreme Court was called upon to determine the enforceability of an award rendered by an arbitrator sitting after the expiration of the contract. The award had ordered the reinstatement of unjustly discharged employees with back pay for all time lost, after deducting pay for a ten-day suspension and amounts earned in other employment. The court of appeals, in reversing the district court's judgment enforcing the award, held that the failure to specify the amounts deducted from the back pay rendered the award unenforceable. While stating that this defect could be cured by requiring the parties to complete the arbitration, it further held that both the award of back pay subsequent to the expiration of the contract, and the order of reinstatement were unenforceable because the agreement had expired. The Supreme Court agreed that the district court's judgment should be modified so that the amounts due the employees might be ascertained by arbitration. The remainder of the judgment, however, was reversed. The Court noted that the arbitrator's opinion as to the award of back pay beyond the date of the agreement's expiration and that of reinstatement was ambiguous, permitting the inference that he had exceeded the scope of his submission, but stated that "a mere ambiguity . . . is not a reason for refusing to enforce the award." Although the modification issue was not raised, the Court indicated the allowable limits of judicial review in the following far-from-conclusive language: "[The] *award is legitimate only so long as it draws its essence from the collective bargaining agreement.* When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."[280]

Taken as a whole the broad teaching of *Enterprise* appears to be that the courts may examine the plain meaning of the contract or stipulation to determine whether the arbitrator has exceeded his authority, but that the arbitrator's abuse of discretion must be clear

277. HAYS, LABOR ARBITRATION: A DISSENTING VIEW 34 (1966).
278. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).
279. 363 U.S. 593 (1960).
280. *Id.* at 597. (Emphasis added.)

and manifest before the award may be set aside on this ground.[281] In other words, it would seem that doubts must be resolved in favor of enforcing the award.[282] Beyond this admittedly imprecise guideline, of course, each case turns on the language of the particular collective bargaining agreement or submission.

In some instances, however, the answer is relatively simple. The courts have been quite willing to enforce awards modifying the discharge penalty when the question of the appropriate remedy is submitted by the parties.[283] Seemingly, there can be little doubt of the arbitrator's power and authority when the issue is submitted in terms of whether "X has been discharged for just cause, and if not what shall the remedy be"?[284] On the other hand, the arbitrator may be prohibited from ruling on the degree of punishment imposed by management by the terms of the collective bargaining agreement itself.

281. Lodge 12, IAM v. Cameron Iron Works, Inc., *supra* note 276; Texas Gas Transmission Corp. v. International Chem. Workers, 200 F. Supp. 521, 528 (W.D. La. 1962); see Fleming, *Arbitrators and the Remedy Power*, 48 VA. L. REV. 1199, 1213-14 (1962).

282. Texas Gas Transmission Co. v. International Chem. Workers, *supra* note 281.

283. See Local 453, IUEW v. Otis Elevator Co., 314 F.2d 25 (2d Cir. 1963). In this case, the company discharged an employee for violation of a company rule prohibiting gambling after the employee had been convicted in a county court for the possession of lottery slips on company premises. The parties submitted the issue to the arbitrator in these terms: "'Has [X] . . . been discharged for just cause, and if not what shall the remedy be?'" The arbitrator held that in view of mitigating circumstances the penalty was too harsh and ordered the grievant reinstated. *Ibid.* The district court while acknowledging the arbitrator's power to make such an award, refused enforcement on the ground that the award violated public policy. 201 F. Supp. at 218. The court of appeals reversed, holding that the arbitrator was clothed with authority to determine whether the discharge was for just cause, and thus his award is not reviewable. The court, however, did say "when public policy is sought to be interposed as a bar to enforcement of an arbitration award, a court must evaluate its asserted content." 314 F.2d at 29. Obviously, the court of appeals thought, as did Professor Fleming, "that the [district] court simply found the arbitrator's award outrageous, and therefore stretched to find a way out of what it understood the Supreme Court's ruling to have been in the *Enterprise* case." Fleming, *supra* note 281, at 1209. Several state courts have also refused enforcement of awards contravening public policy. See, *e.g.*, Western Union Tel. Co. v. American Communications Ass'n, 299 N.Y. 177, 86 N.E.2d 162 (1949); Publishers Ass'n v. Newspaper & Mail Deliverers, 280 App. Div. 500, 114 N.Y.S.2d 401 (1952); HAYS, *op. cit. supra* note 277, at 102-05.

284. Professor Gorske believes that "a submission of this type . . . would grant jurisdiction to the arbitrator to fashion any remedy, including, of course, back pay, which could be termed reasonably responsive to the injury caused by the breach of the agreement." Gorske, *supra* note 276, at 19. For an examination of arbitral versatility in formulating remedies, see ELKOURI & ELKOURI, *Arbitral Review of Discipline: Variations in Penalties*, in SYMPOSIUM ON LABOR RELATIONS LAW 458 (Slovenko ed. 1961). And for an indication of the courts' reaction to unusual remedies, see Arterberry v. Lockheed Aircraft Serv., 33 Lab. Arb. 292 (Calif. Super. Ct. 1959) (refusal to enforce that portion of award ordering grievant to give up his position as union steward and forbidding him from representing the union in any capacity for a period of one year); Gulf Oil Corp. v. Guidry, 160 Tex. 139, 327 S.W.2d 406 (1959) (voiding an award ordering demotion and back pay at the lower job classification).

In *Local 1386, Textile Workers v. American Thread Co.*,[285] for example, the court held that the express provision of the management prerogative clause to the effect that the employer's exercise of his reserved rights of discipline might be made the subject of a grievance and collective bargaiming, but not of arbitration, meant "the employer's established disciplinary practices were not to be upset by an arbitrator on the ground of inappropriateness."[286]

Collective bargaining agreements quite often contain clauses limiting the powers of the arbitrator. One of the most common limitations is that the arbitrator shall not substitute his judgment for that of the employer. The question becomes whether this phrase, in and of itself, is enough to foreclose any review of the penalty assessed by management. In *Local 784, Truck Drivers v. Ulry-Talbert Co.*,[287] the Court of Appeals for the Eighth Circuit gave this construction to a contract clause containing such a phrase. In this case, a trucker was discharged for falsifying records relating to hours worked. The impartial arbitrator, while believing that some measure of discipline was warranted, felt that the imposition of the discharge penalty was unduly severe. Acordingly, he ordered the driver reinstated without back pay. The district court refused enforcement and the court of appeals affirmed, holding that the following language of the agreement prevented any modification of the discharge penalty:

> Section 6. Such arbitration board shall have no power or authority to add to, subtract from or in any way modify the terms of this Agreement . . . and if any grievance, arising out of any action taken by the Company in discharging . . . any employee, is carried to arbitration, the arbitration board shall not substitute its judgment for that of the management and shall only reverse the action or decision of the management if it finds that the Company's complaint against the employee is not supported by the facts, and that management has acted arbitrarily and in bad faith or in violation of the express terms of the Agreement.[288]

Under the express language of this clause it is apparent that the arbitrator lacked the power to modify the discharge penalty. Although the court gave effect to the "substitution of judgment" phrase,[289] its

285. 291 F.2d 894 (4th Cir. 1961). There was a second ground for refusing to enforce this award. The arbitrator adopted the report of a former arbitrator which stated that the company had failed to adequately train card operators without receiving evidence on this point. In so doing, he went beyond his jurisdiction as fixed by art. XII, § 7 of the agreement, requiring him to "confine himself strictly to the facts submitted in the hearing, the evidence before him and the terms of the contract. . . ." *Id.* at 898.

286. *Id.* at 900.

287. 330 F.2d 562 (8th Cir. 1964).

288. *Id.* at 564.

289. "In attempting to go further and in assessing the penalty as 'excessive,' the arbitrator was attempting to 'substitute . . .[his] judgment for that of the management' . . . ." *Id.* at 565.

conclusion was considerably strengthened by other language in the clause. In this connection, the term "reverse" connotes reinstatement with full back pay and all rights unimpaired, and, accordingly, is sufficiently broad to forestall any improvement in the grievant's status.[290] Moreover, the board was required to find that the "company's complaint against the employee is not supported by the facts" as a condition to granting relief. This, of course, requires that the company prove only the commission of a disciplinary offense. Section 6 empowers the arbitration board to reinstate the grievant only if it finds that the grievant had not committed the offense charged or that no discipline whatever is warranted, *i.e.*, the "either/or" approach. It is clear that the holding of this case must be sustained along these lines, rather than on the "substitution of judgment" phrase. If the language discussed above had been omitted, the limitation would have read: "the arbitration board shall not substitute its judgment for that of the management and shall only . . . [overturn] the action or decision if it finds that . . . management has acted arbitrarily or in bad faith. . . ." Under this wording the board clearly would have had the power to review the penalty imposed to determine its reasonableness. If the "substitution of judgment" language appeared without any further qualification, however, it probably would prevent the arbitrator from passing on the appropriateness of the penalty imposed by management. No case has been found, but it is difficult to escape the conclusion that the arbitrator is, in fact, substituting his judgment for that of management when he assesses some intermediate penalty in lieu of discharge.[291]

A significant number of agreements, although by no means a majority, stipulate the remedies available to an unjustly discharged employee. By and large, these will provide for reinstatement with full back pay and all rights unimpaired, or some such similar relief, in the event that the arbitrator finds the discharge to be without cause. In the only reported case found by this writer, *Carr v. Kalamazoo Vegetable Parchment Co.*,[292] the Michigan Supreme Court was called upon to determine whether a similar clause restricted the arbitrator's power to modify the discharge penalty. There the parties submitted the issue in terms of whether the grievant's discharge was "justifiable." The arbitrator found the discharge unjustifiable, but refused to include back pay in his award because the grievant was not entirely blameless. The court, reaching the only possible conclusion, held that the award of no back pay was without jurisdiction, void and severable. Under this clause the arbitrator was required

290. American Cyanamid Co., 34 Lab. Arb. 390 (1960) (Singletary, A.).
291. Teele, *But No Back Pay Is Awarded,* 19 ARB. J. (n.s.) 103, 105 (1964).
292. 354 Mich. 327, 92 N.W.2d 295 (1958).

to determine only whether the discharge was justifiable. Once he had made this determination in favor of the grievant, the express contract language took over for admeasurement of the grievant's rights.

The cases analyzed above have dealt with various provisions of the collective bargaining agreement and the effect these may have upon the arbitrator's power to mitigate the discharge penalty. In the event that the agreement or stipulation contains no clause bearing on the power of the arbitrator, the courts have been somewhat reluctant to vacate awards reducing the discharge penalty on the ground that it is overly severe. Perhaps the leading authority for this view is *Capital Airways v. Airline Pilots Ass'n*,[293] where the court recognized that the just cause provision is not satisfied unless the penalty bears a reasonable relation to the offense. In this case, two pilots were discharged for refusing to fly a ferry flight and attempting to smuggle goods into the country to avoid the imposition of customs duties. The arbitrator, however, found mitigating circumstances and, while not exonerating the pilots, ordered them reinstated without back pay. The company sought a declaratory judgment as to the invalidity of the award, and the union counterclaimed for its enforcement. The court, in granting the defendant-union's motion for summary judgment, specifically recognized the arbitrator's inherent power to pass on the degree of discipline imposed, stating:

> A decision of the company to discharge an employee for misconduct, even if the employee is guilty, may or may not be for just cause. If the offense and the circumstances accompanying it are sufficient to warrant such a penalty, just cause would exist, but it is also true that in many cases such a penalty may be excessive and unwarranted.[294]

A number of state courts also have had the opportunity to pass on the question under consideration. By and large, they usually have upheld the arbitrator's power to assess an intermediate penalty in lieu of discharge. This is the case even though the question of the appropriate remedy may not have been specifically submitted to the arbitrator, at least in the absence of contractual language to the

293. 237 F. Supp. 373 (M.D. Tenn. 1963), *modified on other grounds*, 341 F.2d 288 (6th Cir.), *cert. denied*, 381 U.S. 913 (1965).

294. 237 F. Supp. at 377. See also Russ v. Southern Ry., 218 F. Supp. 634 (E.D. Tenn. 1963). In this case, the court enforced an award of the National Railway Adjustment Board, ordering the reinstatement of a dischargee with partial retroactivity. The court rejected the carrier's contention "that the Board could not substitute its judgment for management in matters of discipline." Sanders and Couch, *Labor Law—1963 Tennessee Survey*, 17 VAND. L. REV. 1091, 1105 (1964).

contrary. The reasoning used by these courts in reaching this result is very similar, but two principal theories are discernible.

The implied authority approach is best illustrated by *William J. Burns Int'l Detective Agency, Inc. v. New Jersey Guards Union, Inc.*[295] There the New Jersey Superior Court held that though the issue is simply whether the grievant was discharged for just cause, the arbitrator is clothed with an implied power to order reinstatement with or without back pay on the ground that the remedial power thus implied is necessary to render the award viable. To similar effect is *Samuel Adler, Inc. v. Local 584, Teamsters Union*,[296] where the New York Supreme Court held that although the issue of reinstatement and its terms may not be expressly submitted, "it is necessarily implicit in submitting issues that could . . . result in a finding of improper discharge."[297] As to the modification issue, the court stated: "Since, concededly, the arbitrator had the power to order reinstatement, there is no reason why a condition could not be attached."[298]

Other courts have ordered the enforcement of awards modifying the discharge penalty on a similar but distinguishable theory. Under this view the issue of just cause is considered apart from the offense as such, and a finding that the grievant committed the offense charged does not preclude an award that no just cause for discharge existed. Although a finding of just cause *would* preclude the imposition of a lighter penalty in lieu of discharge, the arbitrator, expressly finding that just cause for discharge was not established, at the same time may find just cause for the imposition of a lighter penalty.[299] On this basis, the court will enforce an award substituting an intermediate penalty for that assessed by management.[300] It is apparent that this view differs only slightly from that discussed above and, in any event, the end result is the same.

Under both views the language of the bargaining agreement and submission is of prime importance, and at times a careless wording of

295. 64 N.J. Super. 301, 165 A.2d 844 (1960); *accord*, Reading Tube Co. v. Steel Workers Federation, 20 Lab. Arb. 780 (Pa. Super. Ct. 1953).

296. 282 App. Div. 142, 122 N.Y.S.2d 8 (1st Dep't 1953), *overruling by implication* Simon v. Stag Laundry, 259 App. Div. 106, 18 N.Y.S.2d 197 (1st Dep't 1940).

297. 282 App. Div. at 143, 122 N.Y.S.2d at 9. See also Arterberry v. Lockheed Aircraft Serv., *supra* note 284; *In re* Livingston, 34 Lab. Arb. 653 (N.Y. Sup. Ct. 1960); *In re* Adler, Inc., 20 Lab. Arb. 546 (N.Y. Sup. Ct. 1953).

298. 282 App. Div. at 143, 122 N.Y.S.2d at 9.

299. Niles-Bement-Pond Co. v. Local 145, UAW, 140 Conn. 32, 97 A.2d 898 (1953); Overall v. Delta Refining Co., 207 Tenn. 445, 340 S.W.2d 910 (1960). *But see* American Brass Co. v. Local 423, Torrington Brass Workers, 141 Conn. 514, 107 A.2d 255 (1954).

300. Niles-Bement-Pond Co. v. Local 145, UAW, *supra* note 299; Overall v. Delta Refining Co., *supra* note 299.

the submission agreement may result in the vacation of an award. This is strikingly illustrated by *Polycast Corp. v. Local 8-102, Oil Workers*,[301] a recent Connecticut decision. There the parties submitted the issue in the following fashion: "Was employee [X] disciplined for just cause under the labor agreement. . . ? If not, what shall the remedy be?"[302] X had been discharged and the arbitrator, while believing the discharge unjustifiable, noted that he was not without fault and reinstated him without back pay. The court ordered the award vacated as going beyond the scope of submission, reasoning that just cause for some discipline existed and, hence, there was no occasion to consider the second question of the submission. In order for either of these views to obtain, therefore, the issue must be framed in terms of "discharge for just cause."

The obvious question at this juncture is whether these representative cases will support any broad principle. Certainly, it can be said that they indicate an awareness of two competing policies. First, there is the necessity of giving effect to the intentions of the parties as manifested by the agreement or submission, for the very foundation of the arbitration process continues to be mutual consent. Second, arbitration must, in fact, provide for the final settlement of labor disputes if it is to remain a viable instrument for the prevention of labor strife. The first policy requires rejection of the idea that the arbitrator sits as a chancellor, possessing broad equitable powers by virtue of his appointment,[303] but the second implies a certain latitude in allowing the arbitrator to fashion suitable remedies.[304] No doubt this is what Mr. Justice Douglas had in mind when he observed,

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice.[305]

In any event, the courts, in trying to give effect to these competing policies, seemingly will allow the arbitrator some degree of latitude in formulating appropriate remedies, even in the absence of contractual

301. 59 L.R.R.M. 2572 (Conn. Super. Ct. 1965).
302. *Ibid.*
303. Carr v. Kalamazoo Vegetable Parchment Co., *supra* note 292, at 327, 92 N.W.2d at 296; Fleming, *supra note* 281, at 1205.
304. See Lodge 12, IAM v. Cameron Iron Works, Inc., *supra* note 276.
305. United Steelworkers v. Enterprise Wheel & Car Corp., *supra* note 279, at 597.

language to guide him. This must be qualified to the extent that the courts will carefully scrutinize the submission and the collective agreement to determine whether this power has been denied the arbitrator by the parties. If no such limitation on the arbitrator's power appears, the courts will tend to enforce an award of reinstatement with or without back pay.

C. *Observations*

The courts seem to have arrived at a viable method of determining the enforceability of arbitration awards affording an unjustly discharged employee less than full relief. By allowing the arbitrator to order reinstatement with or without back pay unless this power is specifically forbidden him, they are remaining steadfast to the teachings of *Enterprise*. That is to say, they are giving the freest possible rein to the arbitration process, while still giving effect to the intentions of the parties as expressed in the agreement or submission. In the main, the *Enterprise* view represents a rational reconciliation of the competing policies noted above; yet, there can be little doubt that this view regards the second interest as being the stronger. Thus, some elaboration on the policy supporting this view would seem proper.

It is often said that the object of "arbitration is to settle disputes justly . . . as a substitute for strikes and lockouts,"[306] and that "this objective necessarily implies . . . [an] ultimate and complete disposition of a discharge grievance."[307] Clearly, the answer must be no; for the resulting friction can only harm the bargaining relationship of the parties. It is just as clear that one of the parties is certain to be dissatisfied when the arbitrator is empowered to determine only whether the employee committed an offense justifying discipline, leaving the degree of punishment solely within the discretion of management. In so restricting his jurisdiction, the parties leave the arbitrator with two choices: he may either sustain the discharge or reinstate the grievant with full back pay and seniority. Given the reluctance of most arbitrators to find just cause for discharge "when the employee, in their opinions, does not deserve the ultimate penalty,"[308] the arbitrator, in all probability, will come to demand a far greater degree of proof in order to find that the grievant committed the offense charged. In most instances, this will lead to full reinstatement with the concomitant ill effects on plant discipline and morale that management fears. Even if a particular arbitrator

306. Phillips Chem. Co., 17 Lab. Arb. 721, 722 (1951) (Emery, C.).

307. Weyerhaeuser Timber Co., 25 Lab. Arb. 634, 638 (1955) (Wyckoff, H.).

308. Note, 2 OSGOODE HALL L.J. 140, 142 (1960).

does not demand a higher degree of proof and sustains the discharge, the employer must often contend with dissatisfaction on the part of the discharged employee's fellow workers who usually will regard the penalty as being overly severe.[309] Surely, this black and white view of the arbitrator's role breeds discontent which, more often than not, will dilute the purported beneficial effects of the arbitration process.

It has been noted that in many cases the arbitrator will refuse to allow a discharge penalty to stand because management has failed to comply with the technical requirements of the contract, or that in some fashion it is also at fault.[310] Yet, management's complaint against the employee is usually well founded. Rather than allow the guilty employee to escape discipline altogether on a technical defense, the arbitrator sometimes will impose an intermediate sanction in lieu of discharge.[311] In this fashion, the arbitrator is best able to reconcile the differences of the parties and assure justice in the individual case. From this standpoint as well, the interests of the parties are best served by granting the arbitrator the power to formulate a remedy that may fall short of full reinstatement.

Moreover, by submitting a discharge dispute to arbitration, the parties concede that they cannot reach agreement. Ideally, they are referring a highly volatile matter to an expert in industrial relations uniquely equipped to make an award that will finally resolve their dispute, representing "such factors as the effect on productivity of a particular result, its consequence to the morale of the shop . . . [and] his judgment whether tensions will be heightened or diminished."[312] Of course, if the arbitrator is to make an award that will significantly contribute to the smooth conduct of labor-management relations, it is apparent that he must have sufficient power to formulate an appropriate remedy. Under the *Enterprise* view a court is not justified in concluding that the parties intended to restrict the arbitrator's authority, and thereby deprive themselves of his informed judgment, merely because it cannot specifically point to an affirmative grant of power in the agreement or submission.[313]

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309. See text accompanying note 24 *supra.*

310. See notes 27-45 *supra* and accompanying text.

311. See, *e.g.*, Marathon Elec. Mfg. Co., 64-1 CCH Lab. Arb. ¶ 8082 (1963) (Shister, J.); Smith's Transfer Corp., 62-3 CCH Lab. Arb. ¶ 9005 (1963) (Seidenberg, J.); American Lava Corp., 61-3 CCH Lab. Arb. ¶ 8708 (1961) (King, G.).

312. United Steelworkers v. Warrior & Gulf Navigation Co., *supra* note 278, at 582.

313. Judge Paul R. Hays, in his Storrs Lectures at Yale Law School, has sharply disagreed with Mr. Justice Douglas with respect to the arbitrator's proper role in the interpretation of collective bargaining agreements. See HAYS, *op. cit. supra* note 277. In essence, Judge Hays argues that the parties intend for the arbitrator to base his

Not only is the approach currently being taken by the courts sustainable on policy grounds, it is inherently logical in view of the nature of the discharge dispute. In virtually every discharge case, the union will introduce evidence of mitigating circumstances and contend that the discharge penalty is overly severe. In fact, as noted above, the dispute between the parties often involves the reasonableness of the discipline assessed by management, rather than a controversy over the original facts or whether the grievant's offense was wrongful. Obviously, the union is protesting that management has abused its right to discharge for just cause, and this protest constitutes at least one issue the arbitrator is called upon to resolve. To say that an arbitrator may determine whether the employee involved committed a disciplinary offense, but the degree of discipline lies solely within the discretion of management, is to solve nothing, for it is this very exercise of discretion that the union is protesting. In this situation, unless the arbitrator's jurisdiction is made an issue and argued by the parties, it is ridiculous to assert that they did not intend the arbitrator to rule on the reasonableness of the discharge penalty, and to reduce it if he finds that it was, in fact, overly severe.

If, on the other hand, the parties wish to restrict the arbitrator's remedy power, this can be accomplished "by the simple expedient of adding appropriate language to the contract, including the same in the submission agreement, or by orally advising the arbitrator that . . . [they] have so agreed."[314] The parties themselves are the best judges of what will effectuate their own bargaining relationship, and, therefore, their wishes must govern. To this end the arbitrator is charged with the duty of scrutinizing the agreement and determining whether he has the jurisdiction to make an award of no back pay or partial retroactivity. If he fails to make any such determination, or makes an erroneous determination, the losing party may find relief in an action to vacate the award.[315] The opposite result would

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decision solely on the language of the collective agreement, rather than referring to such collateral factors as whether tensions would be "heightened or diminished." See *id.* at 40-44. See also Davey, *The Supreme Court and Arbitration: The Musings of An Arbitrator,* 36 NOTRE DAME LAW. 138, 140 (1961). Specifically, he contends, "The fact of the matter is that arbitration cases ought to be decided in much the same manner as any other controversy in which violation of a contract is alleged." HAYS, *op. cit. supra* at 42. Judge Hays, a scholar of high repute and no novice to the arbitral forum, has made a strong argument which deserves careful consideration in relation to just about every dispute arising under a collective agreement. When applied to the arbitration of discharge cases, however, this argument fails in light of the peculiar nature of this dispute. See text directly following this footnote.

314. Horton, *The Arbitration of Discharge Cases,* 9 SW. L.J. 332, 340 (1955).

315. *But see In re* Oil Workers Union, 36 Lab. Arb. 832 (Calif. Super Ct. 1961), where the court held that an arbitrator's determination that he did not have jurisdiction to modify the discharge penalty under the contract was final and could not be reviewed by the court "whether its decision was right or wrong." *Id.* at 833. To the extent

amount to a replacement of the collective bargaining process by arbitration and an elevation of the arbitrator's role to that of a "philosopher king."

VI. Conclusion

It is well known and often stated that prior arbitration awards have little or no precedent value. Factual distinctions, past practices peculiar to the particular trade or industry, and basic differences in collective agrcements all militate against the development of a cohesive body of binding substantive law. During the twenty years in which arbitration has become a widely accepted means of settling grievance disputes, however, there has been a definite formulation of certain basic criteria which are considered "requisite to a just award."[316] With published awards numbering in the thousands, it is inevitable that the principles announced in prior opinions should influence the reasoning in subsequent awards. Perhaps the greatest degree of cohesiveness has been attained in the arbitration of discharge grievances and to a certain extent this is desirable. As stated by Professor Elkouri:

> [A] great contribution to industrial stability lies in the probability that many disputes are settled by the parties themselves before reaching arbitration because they are aware of prior awards on the issue involved which point out the objective merits of contentions and which are indicative of results likely to be had through arbitration.[317]

The principles relating to procedural fairness are particularly well developed. Most arbitrators will agree that prior warning, investigation and notice are valid conditions precedent to discharge, although they may differ in some small degree as to the application of these principles. The concepts of progressive punishment, discrimination and double jeopardy likewise are evolving in a fairly definite pattern. In regard to double jeopardy, however, there appears to be a difference of opinion as to just what action on the part of management will expose the grievant to punishment or amount to punishment prior to discharge. The better view requires only that the supervisor taking the initial action has the power to discharge the offending employee, and that the action taken purports to be final in order to bring the doctrine into play.

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that this decision implies "that the courts are powerless to set aside an award where the arbitrator acted in excess of the jurisdiction and powers conferred upon him by the collective agrcement," it is clearly erroneous. See Sanders, *Labor Law—1962 Tennessee Survey*, 16 Vand. L. Rev. 792, 794 (1963).

316. Holly, *The Arbitration of Discharge Cases: A Case Study*, in Critical Issues in Labor Arbitration 1, 17 (Proceedings of the Tenth Annual Meeting of the National Academy of Arbitrators 1957).

317. Elkouri & Elkouri 265.

The rules of evidence show a relatively consistent development with respect to admissibility and self-incrimination. Possibly, arbitrators have been overly liberal in admitting evidence of questionable relevancy, in view of the fact that the opposing party often will feel obligated to controvert this extraneous matter. The unfairness of throwing this burden on the adversary underscores the need to draw more definite boundaries between admissible and inadmissible evidence. Seemingly, the arbitrator should refuse to admit evidence of those matters which have such little bearing that they would not normally be considered by the adversary in a thorough preparation for the hearing. Questions relating to the concepts of "search and seizure," confessions, and "entrapment" have arisen so seldom that it is difficult to discern any true pattern other than that they constitute somewhat doubtful defenses. The areas of surprise and confrontation show perhaps the greatest divergence of opinion. Arbitrators have had considerable difficulty in coping with these immense practical problems, and there is a tendency to resort to makeshift arrangements such as recesses and private consultations to obviate the unfairness of admitting after-acquired and absentee evidence, respectively. Though such evidence continues to be admitted, arbitrators have recognized the basic unfairness of doing so, and, accordingly, appear to be giving somewhat less weight to these forms of evidence.

The impact of the courts' recently expressed interest in the fairness of arbitral proceedings is still to be felt. Yet, there is a clear indication that such procedural irregularities as a failure to notify the grievant of a pending hearing, or refusing him an opportunity to be heard, will not be tolerated. In view of the severity of the discharge penalty, it may be assumed that the courts will first assert their authority in this area. Therefore, it would be advisable for both arbitrators and the parties to an arbitration proceeding to sacrifice some of the much vaunted informality in favor of fairly consistent procedures designed to protect the rights of the dischargee.

The vast majority of arbitrators will refuse to find just cause unless the discharge penalty bears some reasonable relation to the seriousness of the grievant's offense. They believe it to be their responsibility to determine whether the "punishment fits the crime" by realistically appraising the wrongful act's deleterious effects on the industrial community. If the grievant's proven offense appears to merit discipline short of discharge, the arbitrator usually will feel compelled to modify the discharge penalty in favor of some lesser degree of discipline. Since this amounts to a review of the penalty imposed by management, there is a substantial question as to whether the arbitrator has this authority. Generally, arbitrators have not been