be expected that lay arbitrators would have trouble with this term, and would fail to anticipate the difficulty of administering such qualifications of it as "gross," "slight," and other terms implying degree. Equally unfortunate is the temptation to eliminate negligence as the basis for disciplinary action. In damaging or destroying material it requires little ingenuity to cover up intention with the cloak of negligence. Accordingly, arbitrators must, in the long run, accept the concept of negligence as one of their working tools, but would do well to avoid the pitfalls into which the case-law has fallen.

Finally, the arbitrators in this group of cases have shown the same tendency, as in others, to admit rather freely evidence which aggravates or mitigates the offense; and they have agreed also what evidence has these effects. Accordingly, these cases, dealing as they do, with one of the most serious of industrial problems, show the same tendency toward uniformity, resulting largely from following legal analogies, that has been observed in the arbitration of other disputes.

RICHARD C. ALLEN

## DISHONESTY, DISLOYALTY AND THEFT

It might seem that an employee who has been guilty of theft or other dishonesty would in every case be subject to discharge. Indeed, many labor-management contracts expressly make the dishonesty of an employee a ground for summary discharge; and, in any event, discharge or other discipline for theft or other dishonesty would fall squarely within the general requirement that discipline and discharge are to be imposed only for "just cause." Nevertheless, even a casual perusal of the reported arbitration cases would reveal that most arbitrators are extremely reluctant to discharge employees on these grounds. In the vast majority of cases, the arbitrators search the record long and carefully for mitigating circumstances and generally impose penalties much less severe than discharge.[1]

Few employers will hire a man whose record of previous employment shows that he has been discharged for theft or

1. A study of forty-two cases shows that in approximately 15 per cent only was discharge permitted in cases of dishonest acts committed within the scope of employment. See *infra*, for a possible explanation of what seems a surprisingly low figure.

other dishonesty. Hence, any apparent leniency of the arbitrators may rest on their realization that virtual exclusion from further gainful employment, and not merely the loss of the job then in question, will result from their sustaining a discharge on such grounds.[2] To avoid any such socially undesirable result, arbitrators resort to various techniques. Sometimes, when other bases for discharge appear in evidence, in addition to evidence of theft or dishonesty, arbitrators sustain the discharge on the grounds conveying the lesser social stigma; and this has been done even when the company has not urged the ground on which the discharge is ultimately based.[3] Many arbitrators quite properly refuse to discharge an employee on the ground of theft or dishonesty unless the company meets a very heavy burden of proof.[4] In general, arbitrators display an appreciation and understanding of the importance to the employee of his job rights, and inquire into all the surrounding circumstances to insure against inequality of treatment, other discrimination, and improper employer motivation.[5]

As a partial explanation for the large percentage of theft or dishonesty cases in which penalties less extreme than discharge are imposed, it has been suggested that only the questionable ones reach the arbitration level. Since most unions dispose of the clear cases of stealing and other dishonesty at the grievance level, it must be noted that this high percentage of cases in which the company is not sustained in discharging the offending employee is misleading. Hence, it does not follow merely from these arbitration cases that theft and dishonesty are lightly dealt with in industry.

2. See Myron Gollub, *Discharge for Cause* (N. Y. Dept. of Labor 1948) 45, where the author indicates that in his opinion this has been the chief influence in mitigating punishment in cases in the state of New York.

3. An intimation of this solution may be found in In re New England Bakery and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Bakery and Food Drivers, Local 64, 3 ALAA ¶ 68,202 (1948).

4. A case which clearly indicates the reluctance to discharge for dishonesty because of the social implications is In re Goodyear Decatur Mills and United Textile Workers of America, Local 88 (AFL), 11 LA 303 (1948). Other cases indicating that the social implications make necessary a heavy burden of proof are In re Amelia Earhart Luggage Co. and Luggage Workers Union, Local 62 (AFL), 3 ALAA ¶ 68,064 and In re Pennsylvania Greyhound Lines, Inc. and Amalgamated Ass'n of Street, Electric Railway and Motor Coach Employees of America, 3 ALAA ¶ 68,130 (1948).

5. The constant reiteration of these principles can be seen by reference to any case cited herein.

## I. Dishonesty Within the Scope of Employment

The first tendency to be observed in cases where the issue is a dishonest act within the plant arises where there is a union-management contract. Where it is specified that dishonesty will in all cases give the employer grounds for discharge, the arbitrators have construed the word "dishonesty" narrowly. The effect is to confine the cases in which this terminology can apply to relatively few situations. Thus where, in the words of an arbitrator, the report of a truck accident "was not a frank and full disclosure of what had occurred" this was held insufficient to warrant discharge where the employer could not show financial loss resulting therefrom.[6] Similarly, where a contract permitted immediate discharge for dishonesty, it was determined that the term did not include taking an extended lunch hour and using the company's time for the employee's own purposes.[7]

Another factor which mitigates against discharge where there is a claim of dishonesty within the plant is previous knowledge by the company of the practice involved, especially where other employees who did the same thing have not been disciplined. If the arbitrator finds a time interval between the time the practice is made known to the company and the time of punishment, this too will tend to diminish the degree of punishment. A milk driver who pocketed charges to customers for goods not delivered, and who falsified his records, was ordered reinstated, the arbitrator stating that management had collaborated by failing to take earlier action.[8] Again, the discharge of bus operators accused of dishonesty in handling fares collected was held to be without just cause where the loss of a few coins was recognized as normal and the company had not posted these employees for discrepancies, as was the custom.[9] Two assumptions would seem to underlie this reason for mitigation: (1) that

6. In re Ruan Transportation Company and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local 90, 2 ALAA ¶ 67, 879 (1947). The quoted arbitrator is Judson E. Piper.

7. In re Coca-Cola Bottling Company of New York, Inc. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Soft Drink Workers Union, Local 812 (AFL), 7 LA 236 (1947).

8. In re Borden's Farm Products and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 584 (AFL), 2 LA 173 (date unknown).

9. In re Southern Indiana Gas & Electric Company and Amalgamated Ass'n of Street, Electric Railway and Motor Coach Employees of America, Div. 878 (AFL), 6 LA 89, 2 ALAA ¶ 67,575 (1946).

where the company is so lax, it must share the blame with the employee, and (2) if other employees are similarly involved, the company is guilty of discrimination against the individual singled out to receive punishment.[10]

Another factor which affects the degree of punishment to be given is the employee's past record. "When one considers Dzikowski's exemplary record as an employee,"[11] "Since the company does not dispute the ten and a half year's service of Licciardi"[12] are but two examples of the words used by arbitrators which indicate their interest in the welfare of the employee with a good service record extending over a long period of time.

In summary, the general problems raised by the intra-plant and on-the-job acts of dishonesty have been handled in a manner which bears an analogy to the doctrine of the balancing of equities found in courts of chancery. The analogy cannot be carried to extremes, for the social consequences of an outright discharge are so apparent that there is a strong initial equity in the employee's favor when management seeks to deprive him of his job. The concept has influenced all arbitrators, but was stated most frankly in this manner:

> These facts support the general principle, applicable to individual contracts between employer and employee, which is recognized both in law and equity, that such contracts should be construed most strongly against the employer.[13]

## II. Acts Outside the Scope of Employment

Quite different problems are raised when disciplinary action is taken against an employee who has been accused of dishonest acts outside the plant. Here the mitigating factors so vital where intra-plant acts are concerned are reduced in importance. There are few cases from which to draw conclusions as to the degree to which an employer can impose penalties in such a

10. The balancing of the equities by the arbitrator seems clearly evidenced.

11. In re Yonkers Bus, Inc. and Transport Workers Union of America (CIO), 7 LA 144, 145 (1947). The quoted arbitrator is Sidney L. Cohn.

12. In re Boston Sausage and Provision Company and United Packinghouse Workers of America, Local 11 (CIO), 8 LA 483, 486 (1947). The quoted arbitrator is A. Howard Myers.

13. In re Aviation Maintenance Corp. and International Ass'n of Machinists, Aeronautical Industrial District Lodge 727, 8 LA 261, 268 (1947). The quoted arbitrator is Benjamin Aaron. He cited no authority to sustain this sweeping generalization, and it is questionable that many arbitrators would care to see the concept phrased in this manner.

case, but it would certainly seem that the employer will at least be given the opportunity to remove such an employee from a position of trust. Where a militarized police guard was arrested on suspicion of burglary, the arbitrator held that an immediate discharge was justifiable; in an award published concurrently, this same employee was denied a right to insist on reemployment when acquitted in a jury trial.[14] While war-time conditions may account for the first decision, the second would seem to indicate that employers have considerable latitude in such circumstances.

Another case involved a salesman suspended from work in a department store when arrested on suspicion of receiving stolen merchandise. When the grand jury decided not to indict the employee, he petitioned to receive back pay. The arbitrator found his suspension was for good and sufficient reason.[15]

### III. Falsification of Application

Here the type of dishonesty involved is quite different from outright theft. It is generally conceded that the desire to succeed in winning employment may tend to cause a "stretching" of the truth. Many labor-management contracts contain a provision that falsification of application is sufficient reason for discharge by the company. Arbitrators have chosen to construe these provisions with considerable leniency toward the employee, however, to prevent companies from using such clauses as a means towards other ends.[16]

When the company discharges a worker for alleged falsification of an employment application, the arbitrator's first concern is to see that the motive of the employer is as it appears on the surface. In one case, where the company expended time and effort in proving falsification of the job application, but the arbitrator found that the true motive of the discharge was to promote another who was junior in service, the fact that the

14. In re Swift & Company and United Packinghouse Workers of America, Local 47 (CIO), 5 LA 703 (1946).

15. In re Wilson and Rogers and Retail, Wholesale and Department Store Union, Retail, Wholesale and Chain Store Food Employees Union, Local 338 (CIO), 10 LA 244 (1948).

16. Arbitrators are often faced with a difficult decision; the factors may indicate that falsification may not be the only reason for discharge and at the same time the employer might never have hired the employee had he told the truth. The cases cited *infra*, unfortunately, seem to be rather clear cut examples at either end of the two extremes.

company was able to show minor discrepancies in the application was insufficient, and the employee was reinstated.[17] The arbitrator made a detailed inspection and analysis of the evidence, and reached the conclusion that it was apparent that the falsification charge was a mere sham. The decision was heavily buttressed by the admitted skill of the employee and his excellent past record. Where an employee failed to give the name of his most recent employer and this was later discovered, the employee was held to have been discharged for just cause.[18] The test used by the arbitrator was that this was a part of the application which, if answered correctly, might well have resulted in a failure to hire.[19]

Further mitigating factors, some of which have been discussed under *Dishonesty Within the Scope of Employment*, play a part in cases of this type also. A paucity of arbitrated cases on this subject makes further deductions in this field unprofitable.

## IV. Disloyalty

The infrequency with which disloyalty cases arise makes for a difficulty of analysis, and discussion will be confined to the factors concerned in two cases in which employees were charged with at least some variation of disloyalty.

A controversy arbitrated some three years ago serves to outline in clear perspective the manner in which the interests of employer and employee can clash, although both are acting in good faith. An employee of good standing was engaged in operating a lathe in a gear-manufacturing plant, where it was admitted he "had the run of the shop." Two sons of the employee went into business in direct competition with the employer and the employee was fired, the company stating that confidential information inadvertently might be disclosed to the advantage of the competitors. The arbitrator upheld the discharge,[20] draw-

17. In re Aviation Maintenance Corporation and International Association of Machinists, Aeronautical Industrial District Lodge 727, 8 LA 261 (1947).

18. Having found the company innocent of anti-union activity, the arbitrator does his bit for industrial relations by pleading that "the parties will not permit this unpleasant incident to interfere in any way with their exceptionally good relations." *Id.* at 272.

19. In re Borg-Warner Corp., Ingersoll Steel Division and United Farm Equipment and Metal Workers of America, Local 139 (CIO), 12 LA 207 (1949).

20. In re E. B. Sewall Mfg. Company and United Steel Workers of

ing an analogy to the granting of injunctive relief against the violation of trade secrets in chancery courts. After noting the hardship to the employee involved in the decision, he referred to

> the much more costly hardship imposed upon the company if they were required by a ruling in this arbitration to continue the employment of a man having access to their technical information and trade secrets in circumstances indicating their probable leakage from time to time. . . .[21]

The careful balancing of the equities involved and the socially desirable result obtained point up the careful attention which arbitrators must pay to conflicting interests.[22]

In another case which involved the employment, during off-hours, of a ship-repair worker by a competitor of his principal employer, the arbitrator refused to permit the discharge. It was found as a fact that the employee sought employment for financial reasons only, and that no thought of disloyalty was involved. The award was a suspension of the employee for two months. The arbitrator noted in passing that the employee had performed his job efficiently, and that the company could hardly expect the same degree of loyalty from this employee as it received from executives.[23]

The lone conclusion yielded by the paucity of cases on disloyalty is that before disloyalty can be grounds for discharge, there must be actual harm resulting to the company or a very great likelihood thereof.

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America, Local 3346 (CIO), 3 LA 113 (1946). The arbitrator was Clarence Updegraff.

21. *Id.* at 115.

22. As a safeguard for the interests of the discharged employee, the arbitrator, in his award, provided that if the sons should sever their connection with the competing firm within one year, the employee should be reinstated with no loss of seniority.

23. In re Merrill-Stevens Dry Dock & Repair Company and Industrial Union of Marine and Shipbuilding Workers of America, Local 32 (CIO), 6 LA 838 (1947).