imposed within a reasonable time after the offense,[11] and unless the employer expressly states otherwise, it is assumed that such discipline is entire, rather than partial.[12] A final limitation is that an employer may not consider past offenses, for which he imposed no penalties, when he is contemplating discharge or discipline for a present offense.[13]

ROBERT G. MCCLINTOCK

EVIDENCE, BURDEN AND QUANTUM OF PROOF

I. RULES OF EVIDENCE

In the absence of statutes arbitrators are not bound by technical rules of evidence.[1] Since the arbitrator is selected by the parties, who impliedly trust his competence and impartiality, there is not the need for excluding relevant though questionable evidence which exists in a trial at law. Moreover, if the arbitrator excluded evidence on technical grounds, it might appear to the parties, especially those not represented by attorneys, that he was not discharging his declared purpose of seeking out the facts. Accordingly, arbitrators are permitted, and sometimes required under penalty of vacation of the award, to receive any evidence which appears to be pertinent and material.[2] Hearsay and other legally incompetent evidence are freely received, the arbitrator retaining the power and the duty to judge their

was no danger involved in carrying out the directions, and since the directions had been successfully carried out in the past.

11. In re Aluminum Company of America and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Local 808 (CIO), 8 LA 234 (1945), holding that an employee may expect disciplinary action to come within a reasonable time after the offense is committed, or not at all.

12. *Ibid.*, holding further that when discipline is imposed, the employee may expect that it is not partial punishment, the remainder of which is to follow at some time in the future.

13. In re Western Automatic Screw Company and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 101 (CIO), 9 LA 606 (1948), holding that the company may not bring in past infractions for which no discipline was invoked, when it is determining seniority rights for lay-off purposes.

1. Dana v. Dana (1927) 260 Mass. 460, 157 N. E. 623; Koepke v. E. Liethen Grain Co. (1931) 205 Wis. 75, 236 N. W. 544.

2. Rexburg Inv. Co. v. Dahle and Eccles Const. Co. (1922) 36 Idaho 552, 211 Pac. 552; Dickens v. Luke (Mo. App. 1928) 2 S. W. (2d) 161; Giannapulos v. Pappas (1932) 80 Utah 442, 15 P. (2d) 353; Dick v. Supreme Body of International Congress (1904) 138 Mich. 372, 101 N. W. 564.

probative value in making the final award.[3] Since one of the functions of arbitration, however, is to induce confidence in its procedure, arbitrators have on occasion refused to admit evidence which would be acceptable in a court of law, for reasons of general policy, such as, encouraging amicable labor-management relations.[4]

In aid of a speedy but fair hearing, arbitrators have applied principles roughly analogous to rules of evidence as applied in courts of law. These similarities to legal rules are not surprising since many arbitrators are legally trained. The application of these analogies is just and practical, and the use of the substance of legal rules of evidence shorn of technicalities would be helpful.

For example, where an arbitration contract provided that the letter of dismissal and the notice of hearing must contain all reasons for the discharge, and the employer pleaded only intoxication, he was not entitled to plead that the employee also violated a different rule, requiring the reporting of accidents.[5] Another employer was not permitted to plead incompetency where the contract provided that he must inform the union of all reasons for discharge, and he had only given the reason of insubordination.[6]

An analogy to the rule requiring confrontation of witnesses was applied in a recent proceeding.[7] The employer based the discipline solely on charges of a fellow employee. At the hearing the company would not reveal the identity of the complaining witness to the union but offered to present him to the arbitrator out of the hearing of the union. The arbitrator rejected the evidence. He stated that to consider it would deprive the employee and the union of their rights to a full and complete appraisal of the facts. To consider the charge under such circumstances would deprive the employee of his right to have the

3. Dana v. Dana (1927) 260 Mass. 460, 157 N. E. 623; Koepke v. E. Liethen Grain Co. (1931) 205 Wis. 75, 236 N. W. 544. And see Wirtz, W. W., Lawyers in Labor Negotiations and Arbitrations (1948) 34 A. B. A. J. 547, 550-551.

4. In re General Mtrs. Corp. and International Union, United Automobile Workers of America, 2 LA 491 (1938) (admission of employees of guilt to third party).

5. In re Union Pacific R. R. Co. and The American Railway Supervisors' Assn., Inc., 2 LA 384 (1945).

6. In re Forest Hill Foundry Co. and International Union of Mine Workers of America, 1 LA 153 (1946).

7. In re Murray Corp. of America and United Automobile, Aircraft and Agricultural Workers of America, 8 LA 713 (1947).

evidence taken in his presence. Although the last rule isn't stated expressly in most arbitration statutes, it is so fundamental that New York has construed its statute as establishing the principle.[8]

A similarity to the rule against admission of evidence obtained by unreasonable searches and seizures is found in another recent arbitration.[9] A female employee was discharged for violating a company rule prohibiting possession of dangerous weapons on the premises. A knife was not received in evidence because it had been discovered and obtained by improper entry into her locker. The arbitrator stated that although the entire episode occurred on company property, the employee's locker and purse were her private realm and that evidence obtained by the illegitimate methods of guards should not be used as a basis of discharge.

Again, an analogy to the admission of circumstantial evidence to prove fraud and conspiracy was applied by a recent arbitrator. Although he refused to sustain a discharge where circumstantial evidence merely created a suspicion that the employee was responsible for instigating an unauthorized strike, he said:

> As in cases of fraud or conspiracy legitimate inferences may be drawn from such circumstances as prior knowledge of time for the strike, unusual actions in circulating among employees communication of time set for strike, and surreptitious signals to employees.[10]

The relevancy of evidence of past charges for which the employee was not disciplined or discharged presents a number of problems peculiar to arbitrations. In one case, when the employer knew of the acts upon which the past charges were based, he was not permitted to use them as a separate basis for discharge,[11] which seems fair, since he did not make them a ground for discipline at the time. But other employers have been per-

8. See Kellor, Frances, *Arbitration in Action* (1941) Chap. IX, p. 102, fn. 8 and cases cited.

9. In re Campbell Soup Co. and Food, Tobacco, Agricultural, and Allied Workers Union of America, 2 LA 27 (1946).

10. In re Stockham Pipe Fittings Co. and United Steelworkers of America, 4 LA 744, 746 (1946).

11. In re Consolidated Vultee Aircraft Corp. and International Assn. of Machinists, Aeronautical Industrial Lodge, 10 LA 907, 909 (1948) ("To compel an employee to disprove charges accumulated over a long period of time would seem to be contrary to the intent and purpose of the terms of the agreement and in conflict with a sense of justice and fair play.")

mitted to introduce evidence of past offenses (1) to show the likelihood that the employee committed the specific act in issue, and (2) to justify the severity of the punishment currently imposed.[12] The employee has no cause to complain of the admission of such evidence since

> This is based upon the common practice in industry of considering a man's record in deciding what penalty to attach to any given infraction of discipline and upon the inherent reasonableness of letting a man's record help decide the penalty for such infraction.[13]

When the employer only discovered the past acts by special investigation in conjunction with discharge for a current act, evidence of the past acts was, of course, received as a separate basis for discharge.[14] Yet, when the past acts are accumulated over a long period of time, the evidence needed by the employee to support his case may be difficult to obtain, and it seems unfair to require him to defend against such charges. If, however, it appears that procurement of evidence is practicable, the employer who is not guilty of unreasonable delay in discovering the past acts should be permitted to introduce evidence of these acts as separate grounds for discipline or discharge.

An understanding of "what is" and "what ought to be" admissible in an arbitration proceeding is complicated by the diversity of background and experience of arbitrators. Some are legally trained, others are not. Some are familiar with special problems pertaining to labor and management, while others are ignorant of them. Hence, it is conceivable that the handling of the evidence will vary from hearing to hearing. Notwithstanding some variance in procedure, the cases discussed above show that some common ground for admission of evidence has been found. The analogy to legal variance and the uniform treatment of evidence of past charges, show a tendency to handle like problems in like ways. The application of the searches and

12. In re Mueller Brass Co. and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, 3 LA 285 (1946); In re Link-Belt Co. and United Automobile, Aircraft and Agricultural Implement Workers of America, 4 LA 434 (1946); In re Portable Products Corp. and International Assn. of Machinists, 9 LA 765 (1948).

13. In re Aluminum Co. of American and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, 8 LA 234, 236 (1945).

14. In re New York Shipbuilding Corp. and Industrial Union of Marine & Shipbuilding Workers, 3 LA 211 (1946).

seizures rule and the right to have evidence taken in the presence of the parties are an adoption of the law of evidence as observed in judicial tribunals. It may well be that as more arbitration cases are heard and reported more substantial rules of evidence as applied in law courts will be utilized. One arbitrator has expressed an opinion which, if not truly reflecting the present state of matters, may be prophetic:

> The collective bargaining process implies a system of industrial jurisprudence operating within a framework of substantive and procedural rules. The parties are bound to observe the sanctity of contracts, to deal fairly and frankly with one another, and are subject to all applicable statutes and principles of common law. The arbitrator is the court of last resort in the process and should follow generally accepted procedural rules in arriving at his decision.[15]

II. Burden and Quantum of Proof

Since arbitrations are adversary proceedings, one part or the other must "prove his case," which requires consideration of the burden of proof. The problem in discharge cases is sometimes specifically treated in the arbitration contract.[16] There is no reason why the contract could not expressly place the burden on the employer. On the other hand, a management prerogative clause, which gives an employer great discretion in controlling tenure, places the burden of proof on the union.[17]

The usual contract provides only for discharge for just cause, without any reference to burden of proof. Under such contracts, burden of proof is usually placed on the employer.[18] This seems logical, for the employer, whose power of discharge is limited by the contract, is asserting the affirmative of the issue of just cause. This test for allocating the burden of proof is the same as a court would apply.

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15. In re American Optical Company and Optical Technicians & Workers Union, 4 LA 288, 292 (1946).

16. In re Walter Butler Shipbuilders, Inc. and International Assn. of Machinists, 2 LA 633 (1944). (In this case where the punishment was minor, the burden of proof was with the union to prove the penalty was based on misinterpretation of the evidence by the employer. This seems just where there is "reasonable grounds for belief" by the employer that an infraction of discipline has been committed. The rule would reserve management prerogative where it is needed to preserve order and efficiency. In cases of severe punishment imposed by the employer in discipline cases the same rules as in discharge cases should apply.)

17. See Gollub, *Discharge for Cause* (N. Y. Dept. of Labor, 1948), Special Bulletin No. 21, p. 14.

After the ultimate burden of proof has been allocated, there remains the problem of administering the burden of going forward. When the employer has the ultimate burden, it seems necessary to impose upon him the preliminary burden of making a prima facie case as well. This is particularly true when the discharge is based upon a series of derelictions, or upon conduct continuing over a great length of time. In such circumstances the union, if it were compelled to prove its case first, would have to introduce a staggering amount of evidence in a blind effort to prove the negative of the issue. Moreover, the evidence first introduced by the union might not rebut that later offered by the employer, so that the true issue could be framed only after receiving additional rebuttal evidence from the union. If this is true, the burden of going forward should be imposed on the employer even when the ultimate burden of proof is on the union.[19]

The quantum of proof necessary to sustain a discharge is relatively great, for arbitrators are reluctant to impose a penalty tantamount to "economic capital punishment." One writer has suggested that the discharged worker may have to rely on public assistance, a social burden to be avoided.[20] Various standards have been applied, ranging from the analogy to criminal law—"guilty beyond a reasonable doubt"—to "proof by a preponderance of the evidence," with variations of each. One arbitrator has suggested as a test "the satisfaction of the arbitrator that there is just cause."[21]

The analogy to criminal law is particularly appropriate when the discharge is for dishonesty or other criminal conduct.[22] This

18. In re Campbell, Wyant and Cannon Foundry Co. and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, 1 LA 254 (1945); In re Bethlehem Steel Co. and United Steelworkers of America, 2 LA 194 (1945); In re American Optical Co. and Optical Technicians & Workers Union, 4 LA 288 (1946); In re American Smelting and Refining Co. and United Steelworkers of America, 7 LA 147 (1947); In re Aviation Maintenance Corp. and International Assn. of Machinists, Aeronautical Industrial Lodge, 8 LA 261 (1947); In re Grayson Heat Control, Ltd. and United Electrical, Radio and Machine Workers of America, 2 LA 335 (1945) (where charge by union of discriminatory discharge for union activities, burden is on union if there is evidence that employer has not in the past been opposed to union organization).

19. See Updegraff & McCoy, *Arbitration of Labor Disputes* (1946) 47.

20. See Gollub, *op. cit. supra* note 17, at 15.

21. See Gollub, *op. cit. supra* note 17, at 16.

22. In re A. S. Beck Shoe Corp. and United Retail, Wholesale and Department Store Employees of America, 2 LA 212 (1944).

is justified by the stigma attached to the charge of dishonesty which would follow the worker and make it difficult for him to find employment elsewhere.[22a] An analogy to the quantum of proof required in fraud cases at law, that of "clear and convincing proof," was applied when an employee was charged with falsification of statements in his application.[23] This, too, is justified, because a charge of fraudulent conduct carries an implication of untrustworthiness nearly as great as a charge of dishonesty.

The "preponderance of evidence" standard applied in arbitrations which do not involve fraudulent or criminal conduct seems justified.[24] Standards of proof greater than this, if applied objectively, would place an almost impossible burden on the employer. But the whole question of quantum of proof is most difficult to place in categories. The arbitrator is probably influenced, by social and economic factors, against discharge even when he verbally applies the milder test. Also, sitting as a trier of fact, he will inevitably be influenced by the conduct of parties and witnesses while they are giving evidence. Special and technical knowledge of particular arbitrators may also be used to "test" the evidence. Finally, arbitrators sometimes have made independent investigations when the parties failed to clarify a disputed issue, a practice which leads away from the application of any objective standards to the evidence.[25] As a practical matter, the quantum of proof in the discharge cases has, almost without exception, been placed upon the employer, by analogy to legal rules.

Thus, in administering the burden and quantum of proof there has been a fair amount of uniformity, largely resulting from application of legal analogies. Recourse to the law of evidence has unquestionably been the weightiest single factor in the development of this uniformity.

KENNETH BECK

22a. See Note, this issue "Dishonesty, Theft and Disloyalty," *infra*.

23. In re Aviation Maintenance Corp. and International Assn. of Machanists, Aeronautical Industrial Lodge, 8 LA 261 (1947).

24. In re Campbell, Wyant and Cannon Foundry Co. and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, 1 LA 254 (1945); In re American Liberty Oil Co. and Oil Workers, International Union, 5 LA 399 (1946) (decisive factual proof); In re American Smelting and Refining Co. and United Steelworkers of America, 7 LA 147 (1947).

25. See Gollub, *op. cit. supra* note 17, at 16-18.