V. CONCLUSION

In conclusion, let it be remembered that the twin misconducts, loafing and leaving post, are very closely related and will often be found together. They are relatively minor offenses and are important only because they have a tendency to become habitual. They are difficult to deal with because the offense depends to a great extent on the state of mind of the employee. It is this question of evidence which will present the greatest problem to the arbitrator. The problem is further complicated by the fact that there are some jobs which do not require constant attention.

The arbitrator will have to extend his abilities to the limit and exercise his greatest discretion where the offense is connected with union activities, and most especially where a shop steward has been disciplined.

Perhaps the most important idea which can be taken from this study of arbitration awards is the value of catching these offenses when they first begin and imposing minor discipline. Then, with the recurrence of the offense, progressively more severe discipline should be imposed. In this way both the employee and the company will be aware of the exact situation and better labor-management relations will be achieved.[27]

McCORMICK WILSON.

UNION ACTIVITIES

An employer can no longer discharge or otherwise discipline his employees merely because they belong to a union or engage in union activities. In 1935 and again in 1947 federal statutes secured these rights to employees engaged in production for interstate commerce. The labor relations acts of some states contain similar provisions, and express guarantees are commonly written into collective bargaining agreements.[1]

27. In re Old Colony Furniture Company and United Furniture Workers of America, Local 136-B (CIO), 2 ALAA ¶67777 (1947); In re National Lead Company, De Lore Division and United Gas, Coke and Chemical Workers of America, Local 229 (CIO), 9 LA 973 (1948).

1. In nearly all of these cases the arbitrator is faced with the construction of a contract between the employer and the union. Typical of this type of contract is that set out in In re Chattanooga Box & Lumber Company and United Woodworkers of America, Local 1271 (CIO), 10 LA 260 (1948):

"The company agrees that it shall not discriminate against any of its employees because of union affiliation, and the union and its officers, representatives or members agree that:

Admitting the existence of such rights, they have, of course, been a prolific source of disagreement between unions and management, and the issues created by them have frequently been submitted to arbitration. The cases have arisen in two principal ways: (1) management may predicate discipline of a union official upon his activities for the union, claiming that his conduct exceeds the rights secured to the union and its members by statute or contract; (2) the union may claim that the member's union activities were the real basis for his having been disciplined, although management alleges some other reason for it. The first group of cases requires determination of the scope of the rights, whereas the second group produces almost exclusively questions of fact. The legal problems presented by the two groups of cases are therefore quite different and will be separately considered.

I. UNION ACTIVITIES AS BASIS FOR DISCHARGE OR DISCIPLINE

Out of the diversity of union activities, there emerge three types of fact situations which management has relied upon as the basis for discipline and discharge: First, improper methods used in pressing a grievance, such as using abusive language; second, inefficiency and absenteeism resulting from union activity, and third, strikes and coercion of non-union employees.

A. The Handling of Grievances.

The principal duty of a shop steward is the handling of grievances between the company and the men while in the factory; this is the first level in the determination of disputes and it takes place right in the plant. Hence it is not unusual that friction often develops between the rival factions, and thus there must be certain limits on how far each side may go in pressing the grievance. In an effort to make the grievance machinery run smoothly, the company sets up a procedure to which it expects the union officers to adhere.

First, discharge while in the process of pressing grievances is generally unjust when the grievance is being processed in the

(a) They shall in no way threaten, intimidate or coerce or attempt to coerce any employee of the company for any purpose whatsoever.
(b) The union agrees that no union activity will be carried on during working hours that will interfere with the production of the plant."

proper manner.[2] In fact, in the case of *In re American Lead Company*,[3] it was held that, although there were charges of inefficiency and trouble making, the steward should be reinstated since the timing of the discharge (while he was pressing a grievance) leaves little doubt but that the discharge was for union activities. However, discharge under this category is rare, since it is now well recognized by the employer that the grievance procedure is necessary. In fact, failure to act through the grievance procedure is a ground for discharge.[4]

Next are the cases where the company rules are breached by being away from the job without permission, or at the wrong time, for the purpose of attending to a grievance. As a general proposition the employer has the right to demand that the employee ask permission to leave his machine, and a union steward cannot spend an unreasonable amount of time away from his job in the attendance of his union affairs.[5] If the steward persists in disobeying the company rules, the company may discharge him even though it may face a charge by the union that the company is trying to get rid of an industrious steward.[6] Usually this type of dispute arises out of a specific provision in the Labor-Management contract, such as that set out in the case of *In re Walter Kidde & Co., Inc.*[7] The contract provided that grievances would be held between the hours of 3:30 P. M. and 4:30 P. M. and only with the permission of the company. It was held that the breaching of these rules was one ground for discharge.[8] But on the other hand these rules do not demand unreasonably strict adherence. Answering questions of employ-

2. In re Schick Inc. and International Association of Machinists, District Lodge 127 and Local Lodges 1557 and 1887 (AFL), 2 LA 552 (1945).
3. In re American Lead Corporation and International Union of Mine, Mill and Smelter Workers, Local 632 (CIO), 8 LA 748 (1947).
4. In re Portable Products Corporation, Coldwell-Philadelphia Lawn Mower Division and International Association of Machinists, Lodge 757, 9 LA 765 (1948). The arbitrator held that after prior warnings the failure to use the grievance machinery was grounds for discharge. Accord: In re Roberts Numbering Machine Company and United Electrical, Radio & Machine Workers of America, Local 1217 (CIO), 9 LA 861 (1948).
5. In re Haslett Compress Company and International Longshoremen's and Warehousemen's Union, Local 6 (CIO), 7 LA 762 (1947).
6. In re Columbian Rope Company and United Farm Equipment and Metal Workers, Local 184 (CIO), 3 LA 90 (1946).
7. In re Walter Kidde and Company, Inc. and United Electrical, Radio and Machine Workers of America, Tool, Diemakers and Machinists Local 420 (CIO), 10 LA 265 (1948).
8. *Ibid.*

ees who "flocked around" a committeewoman after the receipt of lay-off notices and stopping on the way back from the water fountain to discuss the lay-off of an employee were held not to violate the company rule which required the steward to "clock-out" and to ask permission of the foreman before handling union business.[9]

Discharge for insubordination and abusive language while pressing the grievance is a common cause of dispute. Generally where there are no mitigating corcumstances, the use of hot abusive language by the steward in the enthusiastic furthering of another employee's complaint, will result in the arbitrator's holding that the discharge was justified.[10] However, where there are mitigating circumstances, such as generally bad labor relations in the plant, or if the foreman's conduct is just as bad as the steward's, then the discharge would be considered for union activities and unjust.[11] There seems to be a tendency to allow the stewards to go further. The justification for this type of conduct is that it permits the steward to meet management aggressively, if need be. Consideration is also given to the length of time the employee has been a steward, i. e., is he familiar with his rights and duties as a steward? In the case of *In re John Deere Tractor Co.*,[12] where a steward of three hours left his job to see that the production was held down, the foreman told the steward to return to his job. The steward told the foreman that, as a steward, he did not have to obey the foreman. It was held that, the steward being "green," and the foreman failing to call the senior steward to inform the employee of his rights and duties as a steward, the discharge was unjust.[13]

Another type of dispute arises when the steward fails to use the grievance procedure. In this type of case the steward encroaches upon the domain of management. For instance, in

9. In re The Copeland Refrigeration Corporation and United Electrical, Radio and Machine Workers of America, Local 776 (CIO), 9 LA 63 (1947).

10. In re International Harvester Company, East Moline Works and United Farm Equipment and Metal Workers of America, Local 104 (CIO), 9 LA 563 (1947).

11. In re Bauman Brothers Furniture Manufacturing Company and United Furniture Workers of America, Local 576 (CIO), 10 LA 79 (1948).

12. In re John Deere Tractor Company, Waterloo Works and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 838 (CIO), 10 LA 355 (1948).

13. *Ibid.*: but note that the steward was not entitled to back pay for the time off due to the discharge.

many union contracts, the men are classified in their jobs as a welder or a certain type of machine operator. These men are not supposed to be given jobs outside their job classification. Management, however, when trying to make some production goal, or when faced with an emergency, sometimes orders the men to work outside their classification. The problem arises when the union steward takes the initiative and begins instructing the men to disobey the company's order. It is generally held that this is not proper action on the part of the union. The steward must act through the grievance procedure because production cannot be stopped then to work out the dispute.[14] However, the discharge of the steward for not following the grievance procedure is usually reduced to a less stringent punishment on the basis of overzealousness or merely following orders.[15] Obviously, when the steward is discharged without a grievance hearing on charges of trying to run the shop, he will be reinstated.[16] This last group of cases illustrates that the union steward has no power of management, but is simply an employee representative for the purpose of protecting the rights and duties of the men through the grievance procedure.

B. Inefficiency and Absenteeism Resulting from Union Activities.

Cases which involve the discharge of union officials for inefficiency and absenteeism have frequently been before the arbitrators. Here the offense does not arise out of the grievance process, but is a result of the official's duties to the men and the union; he may be so busy with his union affairs that the quality of his work is deficient, or he may miss work so frequently that he cannot be depended upon. The issue in these cases is whether the discharge is for inefficiency or because the employee is a union official. Where there is clear evidence of inefficiency, the union will have to prove affirmatively that there was discrimination, since the arbitrator will not disregard the employee's

14. In re Ford Motor Company, Spring & Upset Building and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Local 600 (CIO), 3 LA 779 (1944); In re Sinclair Refining Company and Oil Workers International Union, Local 210 (CIO), 6 LA 965 (1947).

15. *Ibid.*

16. In re Finders Manufacturing Company and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Local 734 (CIO), 3 LA 846 (1946).

lack of ability and make a finding of discrimination based upon conjecture, simply because the employee is a union official.[17] However, this inefficiency must be substantial, such as a serious omission on the part of an inspector which causes the company expense and is a detriment to production.[18] It is also helpful to the company's cause to get into evidence an example of the employee's faulty workmanship.[19] Nevertheless, these facts may be balanced by strong equities on the employee's side. For instance, in the case of *In re International Shoe Co.*,[20] the company discharged an employee of ten years service from her unskilled job shortly after she had been appointed a union steward. The union admitted the inefficiency, but claimed discrimination. It was held that the employee did deserve some punishment, but that discharge was too harsh. The ruling was that since her union activities were causing the inefficiencies, she should be rehired, but on the condition that her union appoint another steward. This ruling, in the opinion of the writer, met the situation perfectly. Furthermore, a long period of inefficient service, during which the employee has not been warned that his work is substandard, tends to make it difficult to justify a discharge on grounds of inefficiency.

Discharge and other punishment for absenteeism usually arise when a union officer is away from the plant on union business for a longer period of time than the company deems reasonable. These cases differ from those discussed *supra* where the steward is absent from his machine in attending a grievance; here the employee is usually a high-ranking officer in the union who is absent from the plant for days at a time attending to the business of his union at various other plants and cities. It is generally held that he will have to limit his time off.[21] However,

17. In re Mitchell Camera Corporation and International Association of Machinists, Cinema Lodge 1185, 9 LA 370 (1948).

18. In re Grayson Heat Control, Ltd. and United Electrical, Radio and Machine Workers of America, Local 1006 (CIO), 2 LA 335 (1945); See also In re Walter Kidde and Company, Inc. and United Electrical, Radio and Machine Workers of America, Tool, Diemakers and Machinists Local 420 (CIO), 10 LA 265 (1948).

and Machine Workers of America, Tool, Diemakers and Machinists Local 420 (CIO), 10 LA 265 (1948).

20. In re International Shoe Company, Bluff City Factory and United Shoe Workers of America, Local 100-A (CIO), 8 LA 746 (1947).

19. In re Walter Kidde and Company, Inc. and United Electrical, Radio

21. In re Brown & Sharpe Manufacturing Company and International Association of Machinists, Lodges 1088 and 1142 (AFL), District 64, 1 LA

in the case of absenteeism by a union official, the company will have to show by strong evidence, not only unreasonable absences, but that they have no general anti-union bias. But where the contract provision allows a discharge if the employee fails to notify the company of absences, and where the employee has been absent an average of two days per week on union business for the current year, in some instances without notice, it has been held that the discharge was justified, especially where the union activity concerned competing companies and prevented the official from performing reasonably valuable services for his employer.[22]

C. Strikes and Coercion.

Generally one of the provisions in the bargaining contract is that there will be no strikes during the contract period. The position of most of the arbitrators seems to be that discharge because of leadership in an unauthorized strike is reasonable, and lay-off of the participants is justified.[23] However, it has been pointed out that the discharge of the union leaders because of the unauthorized strike without punishing the rest of the labor force is discrimination *per se*.[24] And in *In re Univis Lens Co.*,[25] it was held that discharge of the union leaders for being responsible for mass picketing was not justified, since there was a vote by the members, and individual leaders did not control the entire union strike strategy.

Provisions against coercion of non-unionists on the part of the union members, or provisions against solicitation of members on company time, are often put into the bargaining contracts as part of the consideration exchanged for the promise

423 (1945). But the arbitrator went on to say that the discharge was unjust because he had come back the next day following a warning. There was a vigorous dissent by the company-appointed arbitrator, who felt that the company was doing everything possible to keep the employee by giving him warnings, etc.

22. In re Tioga Mills, Inc. and Federal Labor Union, American Federation of Grain Processors, Local 22682 (AFL), 10 LA 371 (1948).

23. In re Mueller Brass Company and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (CIO), 3 LA 285 (1946); In re Carnegie-Illinois Steel Corporation, South Charleston Works and United Steelworkers of America, Local 2336 (CIO), 5 LA 363 (1946).

24. In re Carnegie-Illinois Steel Corporation, South Charleston Works and United Steelworkers of America, Local 2336 (CIO), 5 LA 363 (1946).

25. In re The Univis Lens Company and L. W. Wornstaff et al. [Members of United Electrical, Radio and Machine Workers of America, Local 768 (CIO)], 11 LA 211 (1948).

of the employer not to punish on account of union activities. In *In re Aluminum Co. of America,*[26] it was held that there are three elements of coercion: (1) the intent to coerce, (2) some act which would coerce a person of reasonable mental qualities, and (3) that there was inducement of the person to perform some act which he would not have done had it not been for the coercion. This case lays down rather stringent requisites for the establishment of coercion under the contract clause. It also held that coercion may be accomplished through verbal acts such as booing a non-union man for forty-five minutes, threatening him and frequently calling him "scab"; but high pressure sales talks, suggesting that the employee might lose his job, and single-instance name-calling, were not elements of coercion. Coercion might also involve rival union members as well as independent employees. In *In re Caterpillar Tractor Co.,*[27] where a union president was discharged for fighting outside the plant and for intimidation, the arbitrator held that since the fight occurred during a union election, there was no evidence of intimidation because it was likely that the fight was over the election.[28] Hence, this case further indicates that coercion is a difficult charge for the company to make out. However, where the contract provides that there will be no *solicitation* of union membership during company time, union activity along these lines is much more limited. It has been held that the uncontroverted testimony of company witnesses that the steward had solicited their membership was sufficient to justify the discharge.

II. Discrimination Because of Union Activities

Aside from the union's trying to disprove the company's charge, the union, in most all of the cases discussed *supra,* has contended that the employee was discharged because he was too active in the union; and hence that the employee has been discriminated against. However, in considering discrimination, cases where the union's sole contention is discriminaton best

26. 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).

27. In re Caterpillar Tractor Company and United Farm Equipment and Metal Workers, Local 105 (CIO), 7 LA 554 (1947).

28. *Ibid.:* nor did the board hold that the discharge for fighting was justified since the company had no jurisdiction over the fight which occurred outside the company property.

illustrate the problem. In this type of case the employee is discharged for some alleged breach of conduct or because of some allegedly justifiable company policy and, at the time of the breach of conduct, the union member or leader is not engaged in a union activity. Here the union claims that the real reason for the discharge is not that propounded by the company, but that the true motive of the company is to get rid of an employee because he is active in the union. The results in these cases seem to be based entirely on the facts and circumstances of the particular case so that no general conclusions may be drawn.

A. The Quantum of Proof

Generally the cases which raise the issue of discrimination contain some evidence indicating an anti-union feeling on the part of the company; hence the rationale running through these cases is that the cause of discharge set forth by the company must be shown clearly to exist. However, it was said in the case of *In re Pan American Petroleum Corp.*,[29] that the evidence of discrimination would have to be strong before the discharge was invalid. The problem is a matter of balancing the two conflicting charges so as to reach a just result. The following cases illustrate the proposition that the burden is on the company to show that the discharge was justified. In *In re Daily World Publishing Co.*,[30] it was held that the employer must show clearly that a discharge for economy reasons was necessary, especially when there is evidence of discrimination. In the case of *In re Stenchever's of Hackensack*,[31] it was held that where there was conflicting evidence of incompetency, noncooperation and insolence to customers, the stated grounds for discharge, and the hostility toward the union was uncontradicted, the employee should be reinstated with back-pay. Where six employees were active in the union organization and were discharged on various vague charges such as drinking on the job, loitering, *etc.*, and where evidence of anti-union bias existed, it was announced in

29. In re Pan American Petroleum Corporation and Oil Workers International Union, Local 447 (CIO), 2 LA 541 (1946).

30. In re Daily World Publishing Company and The Newspaper Guild of Philadelphia and Camden (CIO), 3 LA 811 (1946).

31. In re Stenchever's of Hackensack, Inc. and Retail, Wholesale and Department Store Employees, United Retail and Department Store Employees of New Jersey, Local 108 (CIO), 7 LA 922 (1947).

the case of *In re Hunter Fan & Ventilating Co., Inc.*[32] that there would have to be a clear showing of the breaches of the company rules before the discharge would be proper. An extreme example is the case of *In re Fleisher Shoe Co.*[33] In that case the factory employees were laid off due to the reconversion to peace time production. After the reconversion was completed, most of the men were taken back by the company; it was held that the failure to rehire a union employee who was active in the organization of the union was evidence of union discrimination.

B. Factors to be Weighed When Discrimination is the Issue.

In all of the three classes of cases considered *supra*, the arbitrator had just one complex problem, and that was determining whether or not the discharge was justified under the circumstances. However, it is the circumstances to be considered which complicate this problem. In the final analysis, it is only through weighing all of the facts for or against the company, or for or against the union, that the arbitrator can reach a just result. Of course, whether or not the union employee has actually committed the offense has a direct bearing on the case, but in most of these cases the offense is made out and the issue narrows to whether the discharge or other punishment was discriminatory. The following factors should be considered:

1. Factors tending to show good faith discharge or punishment:
   a. Clear-cut evidence of faulty conduct or inefficiency which the arbitrator thinks of itself warrants discharge or the punishment given.[34]
   b. Evidence of warnings previously given for the breach of conduct with which the employee is now charged.[35]
   c. A union leader's telling the men to disobey orders of the company or the men's failing to make the proper use of the grievance procedure.[36]

32. In re Hunter Fan and Ventilating Company, Inc. and United Steelworkers of America, Local 3520 (CIO), 8 LA 911 (1947).

33. In re Fleisher Shoe Company and United Shoe Workers of America (CIO), 6 LA 972 (1947).

34. In re Mitchell Camera Corporation and International Association of Machinists, Cinema Lodge 1185, 9 LA 370 (1948); In re Walter Kidde and Company, Inc. and United Electrical, Radio and Machine Workers of America, Tool, Diemakers and Machinists Local 420 (CIO), 10 LA 265 (1948).

35. In re Grayson Heat Control, Ltd. and United Electrical, Radio and Machine Workers of America, Local 1006 (CIO), 2 LA 355 (1945); In re Haslett Compress Company and International Longshoremen's and Warehousemen's Union, Local 6 (CIO), 7 LA 762 (1947).

36. In re Ford Motor Company, Spring & Upset Building and Interna-

d. The company's trying to make an adjustment with the employee, such as offering him another job or assisting in the procurement of another job.[37]
e. No bargaining trouble between the union and the company in the past.[38]

2. Factors indicating discrimination which mitigate in favor of the employee:
   a. A long satisfactory period of employment; this is a factor in rebutting inefficiency.[39]
   b. An anti-union feeling on the part of the company.[40]
   c. Spying on the employee or being in bad faith in trying to trap the employee committing an offense.[41]
   d. Discharge of a union leader who is very active or who was instrumental in organizing the union in that particular plant or company.[42]
   e. Discharge without a hearing of the grievance committee or discharge while in the process of filing a grievance.

ROBERT S. ALLEN.

---

tional Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Local 600 (CIO), 3 LA 779 (1944); In re Roberts Numbering Machine Company and United Electrical, Radio and Machine Workers of America, Local 1217 (CIO), 9 LA 861 (1948).

37. In re Chattanooga Box & Lumber Company and United Woodworkers of America, Local 1271 (CIO), 10 LA 260 (1948).

38. In re Grayson Heat Control, Ltd. and United Electrical, Radio and Machine Workers of America, Local 1006 (CIO), 2 LA 335 (1945).

39. In re Sinclair Refining Company and Oil Workers International Union, Local 210 (CIO), 6 LA 965 (1947); In re Christ Cella's Restaurant and International Alliance of Hotel and Restaurant Employees, New York Local Joint Executive Board (AFL), 7 LA 355 (1947).

40. In re Fleisher Shoe Company and United Shoe Workers of America (CIO), 6 LA 972 (1947); In re Stenchever's of Hackensack, Inc. and Retail, Wholesale and Department Store Employees, United Retail and Department Store Employees of New Jersey, Local 108 (CIO), 7 LA 922 (1947).

41. In re Keystone Asphalt Products Company (Division of American Marietta Company) and United Mine Workers of America, District 50, Local 12405 (AFL), 3 LA 789 (1946); In re John Deere Tractor Company, Waterloo Works and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 838 (CIO), 10 LA 355 (1948).

42. In re Fleisher Shoe Company and United Shoe Workers of America (CIO), 6 LA 972 (1947); In re Brown & Sharpe Manufacturing Company and International Association of Machinists, Lodges 1088 and 1142 (AFL), District 64, 1 LA 423 (1945).