

At the other extreme is *In re Ampco Metal Inc.*,<sup>28</sup> where it was held that union officers were justified in uniting with the majority of the union, or, stated differently, that loyalty to the union and its members exceeds loyalty to the company. In that case the union president and vice-president actively led a work-stoppage, wrote handbills, had them printed and passed them out on company time, all in disregard of the grievance machinery. Discharge was held to be too severe a penalty.

An intermediate position may be found in *In re Bethlehem Steel Company*.<sup>29</sup> In that case union officers were discharged for instigating a strike. Although they participated in a picket line and failed to do everything in their power to end the strike, it was held that discharge was too severe a penalty on the ground that the above conduct did not amount to "instigating a strike." In *In re American Steel and Wire Company*,<sup>30</sup> where "condoning a strike" was defined as not making an effort to prevent it, it was said that there must be a reasonable effort on the part of union officers to prevent any unauthorized strike.

HARRISON KING

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## INSUBORDINATION

### I. NATURE OF THE OFFENSE

This note is intended to give an arbitrator who has a case involving insubordination a bird's-eye view of the decisions of other arbitrators. I have excluded from this article a large group of cases in which the central point is refusal to accept a job assignment.<sup>1</sup>

At the outset, it should be noticed that we are dealing with an organization—usually an industrial plant. Implicit in the word "organization," itself, is the idea of authority, for how

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28. *In re Ampco Metal, Inc. and Employees' Mutual Benefit Association*, 3 LA 375 (1946).

29. *In re Bethlehem Steel Company, Williamsport Plant and United Steelworkers of America, Local 2499 (CIO)*, 2 LA 194 (1945).

30. *In re American Steel and Wire Company of New Jersey, Cuyahoga Works, and United Steelworkers of America, Local 1298 (CIO)*, 5 LA 193 (1946).

1. There is a logical basis for this exclusion, although the issues do overlap. For a case involving refusal to accept a work assignment where the discipline imposed was grounded on insubordination, see *In re Goodyear Clearwater Mills and United Textile Workers of America, Local 90 (AFL)*, 6 LA 117 (1947).

could the purpose of the organization be carried out if the men were free to work in their own ways? Authority is vested in management, and rightly so, for management, in an industrial plant, is responsible for production—both to the public and to the stockholders—and authority is a necessary concomitant of responsibility.<sup>2</sup> Authority includes not only the right to give orders but also the power to compel obedience to them. To enforce this latter right, management is given the power to discipline recalcitrant workers.

In order to protect the rights of workers secured by collective bargaining contracts and to prevent arbitrary action by management, an orderly grievance procedure is normally set up in each plant. But production cannot wait until the merits of a grievance are determined. The worker must obey the order, file a grievance, and then receive his just deserts at the hands of an impartial arbitrator. Should he fail to follow this procedure, by denying the authority of management and refusing to obey an order, he risks the supreme industrial penalty, discharge. Whether or not conduct warrants discharge is the issue in many arbitrated cases. That issue will be discussed subsequently, with the factors to be considered and weighed in making that determination.

What is “insubordination”? Webster defines it as the “Quality or state of being insubordinate; mutiny.”<sup>3</sup> In a case at law it was said, “Insubordination certainly implies intentional, willful, disobedience.”<sup>4</sup> The first definition is not very helpful, for it includes within it the word to be defined. The second is closer because it attempts to show some of the constituent elements. Perhaps an even better definition can be gleaned from some of the arbitrated cases.

First, there must be an order directed to the employee either to do, or to refrain from doing something, and it must be understood by the employee to be an order. This rules out words by

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2. For an expression of this idea in an excellent opinion by Harry Shulman, see *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).

3. Webster's New International Dictionary (2d ed., 1945).

4. *Matter of Griffin v. Thompson* (1911) 202 N. Y. 104, 113, 95 N. E. 7, 9.

a supervisor in the nature of an inquiry as to whether the employee would like to do a certain task.<sup>5</sup>

Normally the person giving the order is a recognized foreman, or other supervisory employee, and the only question is one concerning the responsive action of the worker receiving the direction. In at least two cases, however, the authority of the person giving the order has been challenged. In one<sup>6</sup> it was held that a worker is required to obey a general order and from a person known by the worker to be a foreman, even though the worker was not directly under the particular foreman. But discharge was considered too severe a penalty in view of the fact that it was not expressly published in the plant that men were to obey general orders given by all foremen. In the other,<sup>7</sup> the worker refused to obey an order on the ground that the man giving it was not in fact an assistant foreman. It was held that the refusal to obey was inexcusable as the man had "the cloak of apparent authority." Thus, there must not only be an order, but the person giving it must have either actual or apparent authority to do so.

Turning now to the conduct of the employee responsive to the order, in general, any challenge of the authority of the foreman or any refusal to do as instructed is termed "insubordination" and such conduct merits discipline, unless the incident is so minor that it may be overlooked.<sup>8</sup> Thus, refusal to speed up work when told to,<sup>9</sup> or refusal to correct poor work,<sup>10</sup> or refusal to take a day off when instructed,<sup>11</sup> or refusal to do a

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5. In re Dairymen's League Cooperative Association, Inc. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 584 (AFL), 11 LA 1113 (1948).

6. In re John Deere Tractor Company and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 838 (CIO), 4 LA 161 (1946).

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

8. In re Utah Ice and Storage Company and United Packinghouse Workers of America, Local 410 (CIO), 10 LA 814 (1948).

9. In re Fruehauf Trailer Company and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Local 99 (CIO), 4 LA 399 (1946).

10. In re Micamold Radio Corporation and United Electrical, Radio & Machine Workers of America, Local 430 (CIO), 3 LA 459 (1946).

11. In re Ranney Refrigerator Company and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 308 (CIO), 5 LA 621 (1946).

task on the ground that it is "janitor's work,"<sup>12</sup> or nose-thumb-ing and saluting the foreman<sup>13</sup> are all clear cases of insubordination.

Generally speaking, to be guilty of insubordination, the worker must not only challenge authority, but must also actually disobey it. Thus, where a worker was told that she had to obey the orders of a certain foreman and she said that if that were true, she might as well quit, it was held that she was entitled to reinstatement plus back pay after being discharged, for there was no overt act of insubordination.<sup>14</sup> So too, where an order was given to an employee to stop certain past practices, the prohibition beginning on the next day, there could be no insubordination on the day the order was given, even though the employee said he would not comply.<sup>15</sup> No cases have been found where a discharge was grounded on insubordination when the employee's action consisted *solely* in failing to carry out an order without an accompanying verbal challenge of authority.

Whether a discharge for insubordination can be based solely upon violation of a plant rule, without resistance to a positive order of a foreman, seems doubtful. In one case,<sup>16</sup> the discharge was put on that ground, but since the worker violated the plant rule under the order of a foreman, there was held to be no insubordination.

Arbitrators have been loath to condone conduct of an employee not responsive to orders. The obvious reason is that if workers were allowed to decide for themselves whether to heed an order, it would sap the life of the grievance machinery and cause plant discipline to break down. Numerous cases have been found where the arbitrator has denied the relief prayed for by the employee, either in whole or in part, because the employee failed "to resort to the grievance procedure."<sup>17</sup>

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12. In re Goodyear Clearwater Mills and United Textile Workers of America, Local 90 (AFL), 6 LA 117 (1947).

13. In re Brown & Sharpe Manufacturing Company and International Association of Machinists, Local 64, Lodges 1088 and 1142, 11 LA 228 (1948).

14. In re National Lock Company and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Local 449 (CIO), 4 LA 820 (1946).

15. In re Toledo Scale Company and Scale Workers of Ohio, Inc., 1 LA 459 (1945).

16. In re The Masonite Corporation and International Woodworkers of America (CIO), 10 LA 820 (1948).

17. In re Continental Can Company, Inc. and United Steelworkers of

Suppose an employee refuses to obey an order upon the ground that according to his interpretation of the contract, the order is a violation of it, and suppose it is later found that (1) his interpretation of the contract is correct, or (2) his interpretation is incorrect? Should it make any difference whether the order is a *clear* violation of the contract or is merely a doubtful one? It seems fairly clear that it makes no difference, and rightly so, for the determination does not rest in the employee—it is a question for the grievance committee. Most of the cases so hold.<sup>18</sup> Nor does it make any difference that the order is a “clear” violation of the contract. As to this point, arbitrator 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.<sup>19</sup>

The question has arisen whether a discharge can be based upon irregular conduct of an employee occurring after working hours and off company premises. In general, the answer is “No.” The company has no control over employees during off-hours. If it assumed control over them, then it would have to assume also, responsibility for them, which it surely would not like to do. The insubordinate conduct must, in some way, affect production; if it does not, no action can be taken by the company because of it.<sup>20</sup> An altercation after hours between an employee

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America (CIO), 6 LA 363 (1947); In re Shell Pipe Line Corporation and International Union of Operating Engineers, Local 892 (AFL), 6 LA 458 (1947); In re Ingalls Iron Works Company, Inc. and United Steelworkers of America, Local 1599 (CIO), 8 LA 26 (1947); In re Allis-Chalmers Manufacturing Company, La Porte Works and United Farm Equipment and Metal Workers of America, Local 110 (CIO), 8 LA 140 (1947); In re Roberts Numbering Machine Company and United Electrical, Radio & Machine Workers of America, Local 1217 (CIO), 9 LA 861 (1948).

18. See cases cited in the previous note. In particular see: In re National Machine Company and Upholsterers' International Union, Local 25 (AFL), 5 LA 97 (1946); In re Nathan Manufacturing Company and International Association of Machinists, District 15, Local Lodge 402, 7 LA 3 (1947). But cf. In re Triumph Explosives, Inc. and United Mine Workers of America, District 50, Local 12774, 2 LA 617 (1945) and In re Goodyear Tire and Rubber Company of Alabama and United Rubber, Cork, Linoleum and Plastic Workers of America, Local 12 (CIO), 6 LA 681 (1947), in which latter case it was held that an honest, although mistaken, belief that the order violated prior arbitration awards, was a mitigating factor but not a complete excuse.

19. 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).

20. In re Cutter Laboratories and United Office and Professional Work-

and his supervisor is remediable in the civil courts and should be handled there.<sup>21</sup> In one case it was suggested that, if production is affected by after-hours conduct, there might conceivably be reason for discharge.<sup>22</sup>

It is no excuse for the worker who disobeys an order that he has been instructed not to obey by a union steward or committeeman, although that fact may have some mitigating effect on the punishment.<sup>23</sup> Although the cases dealing with shop stewards will be discussed later, it is sufficient to say here, that they have no authority to countermand management's orders; hence, following their orders in contravention to those of management, will be no excuse to the employee.<sup>24</sup>

The question has also arisen, whether conduct at a grievance meeting, which would be insubordinate if it had not transpired during the meeting, should be grounds for disciplinary action.<sup>25</sup> If the worker is directly involved in the grievance meeting, he should be immune, unless his conduct is outrageous. The reason is, that the employee and the company are on equal ground at the grievance meeting and to compel the employee to bow to management's orders at that time would restrain the free expression by the employee of his position in the disputed matter. Furthermore, while the employee is at the grievance meeting he is not engaged in production so there is no reason to hold him under the company's control.

The discussion thus far might lead one to believe that an employee is never justified in refusing to obey a superior's orders. There are at least two situations, however, in which an order need not be obeyed. One is an order that directs the employee to perform some act that is illegal or criminal, and the other is an order that directs the employee to expose himself to some un-

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ers of America, Federation of Architects, Engineers, Chemists and Technicians, Bio-Lab Union, Local 225 (CIO), 9 LA 187 (1947).

21. In re Pioneer Gen-E-Motors Corporation and United Electrical Workers of America, Local 1150 (CIO), 3 LA 486 (1946).

22. In re Lou Seidman and Company and Retail, Wholesale and Department Store Union, Wholesale and Warehouse Workers Union, Local 65 (CIO), 9 LA 653 (1948).

23. In re Rhode Island Tool Company and United Steelworkers of America, Local 1530 (CIO), 7 LA 113 (1946).

24. 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).

25. In re Federal Mining & Smelting Company and International Union of Mine, Mill & Smelter Workers, Local 489 (CIO), 3 LA 497 (1946).

usual risk of bodily harm.<sup>26</sup> Perhaps there are other situations that would justify a deliberate refusal to obey an order, but, in general, it is safe to say, that it is the duty of the employee to obey.

## II. EXTENUATING CIRCUMSTANCES

So far we have considered only whether certain conduct of an employee constitutes insubordination. We turn now to the question of punishment. It is assumed that the conduct merits some discipline, and the issue is the severity of the punishment.

At the outset, it should be noticed that most contracts give the power to discipline employees to management.<sup>27</sup> As pointed out previously, the company is responsible for production and for the actions of the employees while engaged in production activities. With this responsibility must also go authority to discipline workers for failure to heed orders. Normally, contracts provide that management may discharge an employee for "proper" or for "just" cause. Beyond this general statement, the contracts do not usually go, thus leaving the matter of defining "just cause" to mediation or arbitration. Because of this, cases are usually handled on an individual basis, in which all the facts and circumstances of the particular case are considered and weighed, to determine whether the conduct is "just cause" for discharge. The general attitude of arbitrators toward insubordination is summed up well in the following language extracted from an opinion by arbitrator Hilpert:

Failure to comply with a proper order, or to carry out a work assignment, is insubordination which is a very serious industrial offense; and this may *in a proper case*, subject the employee to the supreme industrial penalty of discharge.<sup>28</sup>

However, even though the cases are considered on an individual basis, this does not preclude the application of generalizations from prior cases involving the same elements, such as abusive language, prior warnings, or a long and satisfactory service record, and so forth. These elements may be described as extenuating circumstances. Some of them are present in

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26. 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).

27. In re Republic Steel Corporation, Gadsden Plant and United Steelworkers of America (CIO), 11 LA 691 (1948).

28. In re American Car & Foundry Company, St. Charles Plant and United Steelworkers of America, Local 2409 (CIO), 10 LA 324, 334 (1948).

almost every case. How the arbitrators have dealt with these factors is our concern now.

A very interesting and important question is whether, when there are several incidents, no one of which singly would warrant discharge, the incidents may be connected, in order to spell out a case for imposing the extreme penalty. Two factors are of considerable moment in answering this question: the time interval between incidents; and whether the employee was warned at the time of the prior incident that its repetition would lead to his discharge. One may say, generally, that when the incidents are relatively frequent over a short period of time, so that the employee's conduct is "insurgent," then they may be accumulated<sup>29</sup> unless they are so minor that they should be overlooked.<sup>30</sup> When the interval between the incidents is longer, the answer may depend upon whether the employee was given a warning at the time of the prior incident that it would be held against him. One case<sup>31</sup> has held that the incidents could not be accumulated because no warning was given. Another case<sup>32</sup> held that they could not be accumulated even though a prior warning was given. The better rule appears to be that when there is a considerable interval between incidents, and neither incident is in itself of sufficient gravity to warrant discharge, a prior warning should be given. This will make the employee "watch his step," and this is certainly not an unreasonable burden to impose upon management.

A new factor enters when the plant disciplinary regulations provide for written reprimand slips, and the foreman did not make them out on the prior occasions. This situation was in-

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29. In re Homestead Valve Manufacturing Company and United Steelworkers of America, Local 1351 (CIO), 6 LA 627 (1947); In re Bakelite Corporation and Chemical & Crafts Union, Inc., 1 LA 227 (1945). In the latter case, the arbitrator said: "It is entirely consistent with the determination of proper cause that an employee may be found by trial of substantial duration to be unsuited for particular employment. . . . The fact that the conclusion is reached only after extended trial and on the basis of numerous details independently insufficient is not enough to preclude the exercise of a fair judgment."

30. In re Utah Ice and Storage Company and United Packinghouse Workers of America, Local 410 (CIO), 10 LA 814 (1948).

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

32. In re Foote Brothers Gear and Machine Corporation and United Electrical, Radio & Machine Workers of America, Local 1114 (CIO), 1 LA 561 (1945).



volved in at least one case, and it was held that the incidents could not be accumulated.<sup>33</sup> The arbitrator felt that, since express provision had been made for written reprimands, which were not issued, the prior misconduct was minor.

Closely allied to accumulation of incidents is the giving of a warning to an employee of the consequences that will follow his failure to obey a particular order. No warning need be given to an employee that serious consequences will flow from disobedient conduct.<sup>34</sup> Every employee is on notice of that. But when the contract provides for a warning on first offenses, discharge is improper.<sup>35</sup> When an employee receives a personal warning from his foreman, admonishing him that his disobedience will be visited with a certain penalty, and the employee is told what that penalty will be, there is no reason why it may not be imposed, so long as it is a reasonable one.<sup>36</sup> So too, when an employee is warned that punishment will follow if he continues certain objectionable conduct, and he does not heed the warning, discipline is clearly in order.<sup>37</sup> These situations make out a particularly strong case against the employee; the unheeded warning makes his disobedience outright defiance.

A factor often present, and always considered when it is, is the use by the employee of vile or abusive language in a dispute with his supervisor. Only one case has been found sustaining a discharge predicated solely upon the use of abusive language.<sup>38</sup> In the usual case, when an employee has been discharged solely because of vile or abusive language, the arbitrator has ordered his reinstatement with some loss of pay.<sup>39</sup> When women are

33. *In re Bryant Heater Company and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Local 337 (CIO)*, 3 LA 346 (1946).

34. For an extremely harsh case, see *In re Allis-Chalmers Manufacturing Company, La Porte Works and United Farm Equipment and Metal Workers of America, Local 119 (CIO)*, 8 LA 140 (1947).

35. *In re Cedartown Textiles, Inc. and Textile Workers Union of America, Local 820 (CIO)*, 8 LA 360 (1947).

36. *In re Goodyear Clearwater Mills and United Textile Workers of America, Local 90 (AFL)*, 6 LA 760 (1947).

37. *In re Republic Steel Corporation, Gadsden Plant and United Steelworkers of America (CIO)*, 11 LA 691 (1948).

38. *In re Pacific Mills and Textile Workers Union of America, Local 254 (CIO)*, 3 LA 141 (1946); and see *In re Spencer Kellogg and Sons, Inc. and United Gas, Coke and Chemical Workers of America, District Council 4, Local 1 (CIO)*, 1 LA 291 (1945); *In re Micamold Radio Corporation and United Electrical, Radio & Machine Workers of America, Local 430 (CIO)*, 3 LA 459 (1946).

39. *In re Edward F. Behrens, dba Cragin Manufacturers and Interna-*

involved,<sup>40</sup> or when the employee has been specifically told to stop,<sup>41</sup> the use of such language constitutes a more serious offense. If the contract provides for summary discharge in cases of plant disturbance, and the arbitrator decides that the use of abusive language is such a disturbance, reinstatement is denied.<sup>42</sup> Abusive language at a grievance meeting is excused, as indeed, is insubordination itself.<sup>43</sup> In one case the arbitrator ordered the employee's reinstatement but put him on probation for a ninety-day period.<sup>44</sup>

It is hardly necessary to say that vile and abusive language should be avoided and that its presence in a case tends to weaken the position of the employee, nevertheless, the employee should not be condemned to perdition simply because the arbitrator holds Victorian views on the subject. The arbitrator should take notice of conditions in the plant and of the nature of the business in which the employee is engaged.<sup>45</sup> As arbitrator Minton said in a case involving a taxi-cab driver:

. . . one cannot look for nor expect to find that polished decorum of a cotillion leader.<sup>46</sup>

Although it is a rare case indeed when an employee may dis-

tional Association of Machinists, Lodge 1600, 3 LA 746 (1946); In re Sperry Gyroscope Company, Inc. and United Electrical, Radio & Machine Workers of America, Local 450 (CIO), 7 LA 621 (1947) (derogatory remarks); In re Darnell Wood Products Company, Inc. and United Furniture Workers of America, Local 282 (CIO), 8 LA 562 (1947); In re Roberts Numbering Machine Company and United Electrical, Radio & Machine Workers of America, Local 1217 (CIO), 9 LA 861 (1948).

40. In re Edward F. Behrens dba Cragin Manufacturers and International Association of Machinists, Lodge 1600, 3 LA 746 (1946) (used in front of a woman); In re Cedartown Textiles, Inc. and Textile Workers Union of America, Local 820 (CIO), 8 LA 360 (1947) (used by a woman worker).

41. In re Republic Steel Corporation, Gadsden Plant and United Steel Workers of America (CIO), 11 LA 691 (1948).

42. In re Dayton Malleable Iron Company, G. H. R. Foundry Division and United Electrical, Radio & Machine Workers of America, Local 768 (CIO), 8 LA 680 (1947).

43. In re Pioneer Gen-E-Motors Corporation and United Electrical Workers of America, Local 1150 (CIO), 3 LA 486 (1946). See note 25, *supra*.

44. In re Nemirow Company, Inc. and United Furniture Workers of America, Upholsterers and Springmakers Union, Local 76 (CIO), 10 LA 57 (1948).

45. In re Montrose Chemical Company, Inc. and United Gas, Coke and Chemical Workers of America, Local 284 (CIO), 10 LA 317 (1948).

46. In re Terminal Cab Company, Inc. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Taxicab Drivers of Trenton, N. J., Local 433 (AFL), 7 LA 780 (1947).

regard an order and escape discipline completely, it is always possible that the conduct of the foreman or the company may make unfair the imposition of an extreme penalty upon an insubordinate employee. Thus, when a superior distrusts the employee without giving him an opportunity to explain his actions,<sup>47</sup> or when a foreman threatens a worker with discharge when the maximum penalty is loss of seniority,<sup>48</sup> or when the discharge is more or less precipitous or inconsistent with a previous nonchalance in similar incidents,<sup>49</sup> or when the company violates the contract<sup>50</sup>—such facts may well be considered as ground for lightening the penalty.

When the parties are equally at fault, either because of a “personality clash” between foreman and worker, or for some other reason, the framing of an award is not easy. One arbitrator “split the difference” of lost pay between the company and the man but stated that he did not like to do it.<sup>51</sup> When the trouble can be attributed to a “personality clash” between the worker and his foreman, the cases hold that some penalty may be imposed upon the employee, but that he cannot be discharged.<sup>52</sup> One arbitrator reinstated the employee with some

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47. In re Toledo Scale Company and Scale Workers of Ohio, Inc., 1 LA 459 (1945); In re North American Aviation, Inc. and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 887 (CIO), 10 LA 304 (1948).

48. In re The Moore Enameling and Manufacturing Company and Federal Labor Union, Stamping and Enameling Workers Union, Local 20113 (AFL), 7 LA 459 (1947).

49. In re Franklin Tanning Company and International Fur and Leather Workers Union, Local 31 (CIO), 9 LA 167 (1947); In re Dairyman's League Cooperative Association, Inc. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 584 (AFL), 11 LA 1113 (1948).

50. In re Ford Motor Company and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 600 (CIO), 11 LA 213 (1948) in which the arbitrator distinguished the case from a former decision by himself in In re Ford Motor Company, Spring and Upset Building and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Local 600 (CIO), 3 LA 779 (1944).

51. In re Borden's Farm Products, Inc. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local 584, Unit 2 (AFL), 3 LA 480 (1944).

52. In re Bakelite Corporation and Chemical and Crafts Union, Inc., 1 LA 227 (1945); In re A. B. C. Steel and Wire Company and Playthings, Jewelry and Novelty Workers International Union, United Wire and Metal Workers Union, Local 36 (CIO), 7 LA 479 (1947); In re Stern Brothers and Retail, Wholesale and Department Store Union, Local 5 (CIO), 9 LA 464 (1948); In re American Car and Foundry Company, St. Charles Plant and United Steelworkers of America, Local 2409 (CIO), 10 LA 324 (1948).

loss of pay and recommended that he be transferred to another department.<sup>53</sup>

The foreman's conduct may possibly completely exculpate the worker.<sup>54</sup> Then, too, we find cases in which the supervisor is prejudiced against the worker because of his color, and the discharge is falsely based on insubordination.<sup>55</sup>

Another mitigating factor that is almost always considered is the employee's length of satisfactory service with the company.<sup>56</sup>

Some interesting problems are raised by events which occur after the incident upon which the discharge is based but before the grievance meeting. If the worker stays away after an altercation with a foreman, or refuses to come to work after being ordered to, the worker *may* possibly be discharged for absenteeism; but he is almost surely liable to punishment for insubordination.<sup>57</sup> He should continue to work and resort to the grievance machinery. If a worker disciplined for insubordination apologizes to the foreman, that will not affect his case.<sup>58</sup> Similarly, reinstatement of the employee after a discharge for insubordi-

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53. In re Dayton Malleable Iron Company, G. H. R. Foundry Division and United Electrical, Radio and Machine Workers of America, Local 768 (CIO), 8 LA 680 (1947).

54. In re Daily World Publishing Company and The Newspaper Guild of Philadelphia and Camden, Local 10 (CIO), 3 LA 815 (1946); but see In re Continental Can Company, Inc. and United Steel Workers of America (CIO), 6 LA 363 (1947).

55. In re Bethlehem Steel Company, Shipbuilding Division and Industrial Union of Marine and Shipbuilding Workers of America, Local 9 (CIO), 2 LA 187 (1945); see also In re Haslett Compress Company and International Longshoremen's and Warehousemen's Union, Local 6 (CIO), 7 LA 762 (1947).

56. In re Joy Manufacturing Company, Sullivan Division and United Steelworkers of America, Local 2944 (CIO), 6 LA 430 (1946); In re Franklin Tanning Company and International Fur and Leather Workers' Union, Local 31 (CIO), 9 LA 167 (1947); In re WLEU Broadcasting Corporation and American Communications Association (CIO), 7 LA 150 (1947).

57. In re Spencer Kellogg and Sons, Inc. and United Gas, Coke, and Chemical Workers of America, District Council 4, Local 1 (CIO), 1 LA 291 (1945); In re Ingalls Iron Works Company, Inc. and United Steelworkers of America, Local 1599 (CIO), 8 LA 26 (1947). But see In re Bethlehem Steel Company, Inc. and United Steelworkers of America, Local 2604 (CIO), 11 LA 629 (1948).

58. In re Armstrong Cork Company, 27th Street Plant and United Rubber Workers of America, Local 256 (CIO), 1 LA 574 (1946); In re Pure Oil Company, Smiths Bluff Refinery and Oil Workers International Union, Local 228 (CIO), 11 LA 333 (1948).

nation is not an admission by the company that it was in error, which entitles the employee to lost pay.<sup>59</sup>

The cases involving shop stewards, committeemen, and other union officials, have sometimes varied from the general pattern. When 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. If there is any discrimination against him because of his union activity, there would doubtless be a violation of the Federal labor law.

The general rule concerning the right of a steward to countermand management's instructions, is well stated by Mr. Shulman in *In re Ford Motor Co.*, in which he says:

The undisputed testimony as to the policy of the building and the disputed testimony as to what X's instructions actually were are both premised on the assumption that a committeeman may countermand supervision's orders and instruct employees not to do what supervision requires. That assumption is wrong. And it should be clearly understood that it is wrong.

No committeeman or other union officer is entitled to instruct employees to disobey supervision's orders no matter how strongly he may believe that the orders are in violation of agreement. If he believes that an improper order has been issued, his course is to take the matter up with supervision and seek to effect an adjustment. Failing to effect an adjustment, he may file a grievance. But he may not tell the employee to disregard the order.<sup>60</sup>

The awards in cases in which shop stewards have countermanded orders have varied considerably. Some have denied reinstatement altogether;<sup>61</sup> others have awarded reinstatement, but with some loss of pay;<sup>62</sup> still others have awarded reinstatement

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59. *In re United States Cartridge Company and United Electrical, Radio & Machine Workers of America*, 825 (CIO), 1 LA 494 (1945).

60. *In re Ford Motor Company, Spring & Upset Building and International Union, Automobile, Aircraft and Agricultural Implement Workers of America, Local 600 (CIO)*, 3 LA 779 (1944). In that case, the arbitrator awarded reinstatement with four days loss of pay because of mitigating factors.

61. *In re Nathan Manufacturing Company and International Association of Machinists, District 15, Local Lodge 402*, 7 LA 3 (1947); *In re The Texas Company and Oil Workers International Union, Local 23 (CIO)*, 7 LA 735 (1947).

62. *In re Welin, Davit and Boat Corporation*, 3 LA 126 (1942); *In re Rhode Island Tool Company and United Steelworkers of America, Local 1530 (CIO)*, 7 LA 113 (1946); *In re Roberts Numbering Machine Company*

ment with full back pay.<sup>63</sup> Shop stewards usually have permission to leave their jobs to engage in union activities, provided that they notify their foreman as to where they are going. Arbitrators have been fairly lenient when this privilege has been abused by failure to notify the foreman.<sup>64</sup> When the steward has acted under advice from the union officers, and has been discharged for insubordination, the arbitrators again have shown clemency because the fault lies primarily with the union, and to impose a severe penalty upon the steward would make him a "scapegoat."<sup>65</sup>

It is not entirely clear how the order's being in violation of existing custom in the plant affects the award. Logically, it seems that custom must fade completely out of the picture in the face of an express order. One case has so held.<sup>66</sup> On the other hand, it has definitely been held to mitigate against discharge.<sup>67</sup>

The case most strongly showing the effect of custom is *In re Bethlehem Steel Co.*<sup>67a</sup> The employee was discharged for taking "scraps" of metal belonging to the company against express orders of the foreman. The evidence at the hearing showed that the employees at the plant were on an honor system, or "code," which permitted the taking of small items of company property, and that the company did not object to this practice. The value of the articles taken by this employee, however, was slightly

and United Electrical, Radio & Machine Workers of America, Local 1217 (CIO), 9 LA 861 (1948).

63. *In re American Transformer Company and United Electrical, Radio & Machine Workers of America*, Local 415 (CIO), 1 LA 456 (1945); *In re Finders Manufacturing Company and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America*, Local 734 (CIO), 3 LA 846 (1946).

64. *In re Joy Manufacturing Company, Sullivan Division and United Steelworkers of America*, Local 2944 (CIO), 6 LA 430 (1946) (reinstatement with back pay); *In re Johnson-Stephens & Shinkle Shoe Company and The Boot and Shoe Workers of America*, Local 714 (AFL), 7 LA 422 (1947) (reinstatement without back pay on condition that steward resign from that position in union).

65. *In re Modernage Furniture Corporation and Retail Furniture and Floor Covering Employees Union*, Local 853, URWDSEA (CIO), 3 LA 680 (1946); *In re Rhode Island Tool Company and United Steelworkers of America*, Local 1530 (CIO), 7 LA 113 (1946).

66. *In re Pacific Mills and Textile Workers Union of America*, Local 254 (CIO), 3 LA 141 (1946).

67. *In re Daily World Publishing Company and The Newspaper Guild of Philadelphia and Camden*, Local 10 (CIO), 3 LA 815 (1946); *In re Joy Manufacturing Company, Sullivan Division and United Steelworkers of America*, Local 2944 (CIO), 6 LA 430 (1946).

67a. *In re Bethlehem Steel Company, Inc., Cornwall Ore Mines and United Steelworkers of America*, Local 2657 (CIO), 12 LA 167 (1949).

higher than the value of articles normally taken by employees. The arbitrator considered all the facts and circumstances and awarded reinstatement, but without back pay; he held that the offense was aggravated by violation of the "code."

A closely allied problem arises when the company has, in the past, been lax in administering discipline to workers in similar cases. It cannot be argued that because of the laxity the company has lost its right to impose disciplinary penalties at all in the future; and yet a reasonable inference may be drawn that the company is discriminating against the particular employee.<sup>68</sup> Against this inference is the sound doctrine that discipline is an individual matter, based upon a particular infraction by a particular person.<sup>69</sup> The solution lies in reconciliation of the two ideas, permitting individual treatment, yet limiting the company to a penalty not unreasonably divergent from past practices.

### III. AWARDS

The arbitrators' awards in insubordination cases have varied from discharge of the insubordinate employee to reinstatement with back pay, with intermediate awards depending upon mitigating factors. Some arbitrators, perhaps the majority, reach a decision on the merits and then make an award without considering the nature or severity of the penalty imposed by the company, over which the dispute has often, at least in part, arisen. Other arbitrators consider the penalty imposed by the company to see how serious the company thought the infraction was. Some labor contracts limit the arbitrator's power to reduce the penalty imposed by the company to cases in which the company's action is clearly wrong. Even without such a limiting clause, some arbitrators have so restricted themselves.<sup>70</sup>

Much difficulty in making a fair award arises when the employee, usually a shop steward, has clearly been insubordinate but has acted in response to the union's orders. Then the em-

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68. *In re Victor Industries Corporation and United Automobile, Aircraft and Agricultural Implement Workers, Local 259 (CIO)*, 11 LA 997 (1948).

69. *In re Continental Can Company, Inc. and United Steelworkers of America (CIO)*, 6 LA 363 (1947).

70. *In re Allis-Chalmers Manufacturing Company, La Porte Works and United Farm Equipment and Metal Workers of America, Local 119 (CIO)*, 8 LA 140 (1947); *In re Terminal Cab Company, Inc. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Taxicab Drivers of Trenton, N. J., Local 433 (AFL)*, 7 LA 780 (1947).

ployee is placed in a very precarious situation: if he follows the union's orders, he risks discharge by the company; if he follows the company's orders, he risks being expelled from the union, or losing his position as shop steward. The arbitrators have not dealt satisfactorily with this problem. Usually some penalty is imposed upon the worker, thus making him a martyr.<sup>71</sup> For this, the arbitrator cannot be blamed entirely, for the fault lies in the want of power to reach the union and the union officials.

In some cases, the worker is either entirely blameless, meriting no penalty whatsoever, or his conduct does not warrant as severe a penalty as the arbitrator has imposed. Still arbitrators have imposed penalties on management's claim that to impose no penalty would destroy plant discipline;<sup>72</sup> or the arbitrators, interested in encouraging resort to the grievance machinery, make awards that will act as deterrents to other employees who consider "self-help."<sup>73</sup> Such "scape-goat" awards do not seem proper.

HAROLD B. BAMBURG

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## LOAFING AND LEAVING POST

Loafing and leaving post, as conducts subject to discipline, are very closely related and often hard to distinguish. An employee may loaf, or he may leave his post, or he may leave his post for the purpose of loafing. However, with knowledge that the problem of distinguishing them exists, for the purposes of this article an arbitrary distinction will be made. That conduct which takes an employee away from his regular place of work will be designated leaving post, while that which occurs on his post will be designated loafing.

### I. LOAFING

Loafing, which Webster defines as "to spend time in idleness; to lounge or loiter about or along," is a rather abstract concept, and therefore difficult to handle. As loafing is to a great extent

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71. In re Rhode Island Tool Company and United Steelworkers of America, Local 1530 (CIO), 7 LA 113 (1946); In re Franklin Tanning Company and International Fur and Leather Workers Union, Local 31 (CIO), 9 LA 167 (1947).

72. In re Dairymen's League Cooperative Association, Inc. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 584 (AFL), 11 LA 1113 (1948).

73. In re Continental Can Company, Inc. and United Steelworkers of America (CIO), 6 LA 363 (1947).