DRINKING AND INTOXICATION

Intoxication or drinking during the hours of employment is a very serious offense and is often held to be a just cause for discharge. Such conduct tends to lower the efficiency and morale of the employee as well as to endanger the public relations of the employer and to pose the threat of severe damage to the lives and property of many people. That the employer has the right to prohibit the use of intoxicating beverages during working hours and to discipline the violators of such a prohibition is not open to question. However, the severe and extreme penalty of discharge is questioned in some instances where it is believed that an injustice has been done to an employee by the meting out of such discipline.

A discharge for intoxication or drinking during working hours is arbitrated and determined according to the terms of the collective agreement or contract between the union and the employer. That agreement usually provides that an employer may discharge an employee for "just and sufficient cause," with a further stipulation that "if after investigation it is found that the employee is disciplined unjustly he will be reinstated with full rights and lost compensation." In some cases the agreement expressly provides for summary discharge for intoxication or drinking. A few agreements stipulate that management has a right to discharge employees, but that the employee has a right to show that he has been "unjustly dealt with" or that "any difference or dispute" between the parties is to be referred to arbitration.

The contract usually sets up an arbitration procedure for the determination of disputes that are not otherwise settled through the grievance machinery. When the arbitration stage is reached, the arbitrator has to decide two basic issues: (1) Did the employee commit the offense for which he was discharged? (2) Was the employee disciplined unjustly under the circumstances of the particular case? (If it is conceded that the employee committed the offense, then, of course, only the second issue has to be determined.) The burden of proving the commission of the offense is on the company since it is attempting to establish a fact essential to its right to discharge.[1]

1. See note, *Evidence, Burden and Quantum of Proof*, this issue.

In the absence of a contract provision regarding the quantum of evidence required to sustain the burden of persuasion, cases are ample[2] which require a preponderance of evidence, or the satisfaction of the arbitrator that there was just cause. (The latter is a subjective standard, but it is probably equal to the objective standard of the preponderance of the evidence.)[3]

When it is admitted or proven, however, that the employee has committed the offense charged, the second issue is arbitrated—Was the employee disciplined unjustly under the circumstances of the particular case? To determine this issue, each case is decided on its own merits. Sometimes there are extenuating circumstances or mitigating factors present which weigh heavily in determining the justice of the penalty imposed. Such factors include: (1) other contract provisions, (2) the employer's handling of such offenses in the past, (3) discipline for such offenses in the industry generally and in the community, (4) the employee's equities—his past record, years of seniority and whether it was his first offense. It was aptly said in the case of *In re Atlas Press Company*:[4]

> . . . it is an arbitrator's function and duty not only to decide whether an employee is guilty of misconduct, but also to decide, according to the habits and custom of industrial life and the standards of justice and fair dealing prevalent in the community, whether the penalty imposed is equitable and just and not seriously disproportional to the offense. This requires an arbitrator in a discharge case to frame his decision on broad moral and equitable principles and compels a consideration on an individual basis, of the penalties imposed in this case.

However, the cases illustrate that there are two categories where mitigating factors are present but are not given substantive weight by arbitrators when reviewing the justice of a

2. In re Republic Oil Refining Company and Oil Workers International Union, Local 449 (CIO), 2 LA 305 (1946); In re Union Pacific Railroad Company and The American Railway Supervisors' Association, Inc., 2 LA 384 (1945); In re Griggs, Cooper and Company and International Brotherhood of Teamsters, Chauffeurs, Warehousmen and Helpers of America, Warehouse Employees Union, Local 503 (AFL), 11 LA 194 (1948); In re John Deere Tractor Company and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 838 (CIO), 10 LA 318 (1948).

3. Myron Gollub, *Discharge For Cause* (N. Y. Dept. of Labor 1948) 16. See note, *Evidence, Burden and Quantum of Proof*, this issue.

4. In re Atlas Press Company and United Steelworkers of America, Local 2167 (CIO), 9 LA 810, 812 (1948).

particular penalty. Where public or plant safety is involved, the justice of the penalty is considered in the light of public policy, safety, morals, laws and good business principles and ethics. These two categories are:

(1) If the employee works around inflammable gases,[5] power houses[6] or highly dangerous machinery at the time the offense is committed, it is held consistently that drinking or intoxication during hours of employment is a just and sufficient cause for discharge.

(2) When the employee is a driver[7] or in personal contact with the public at the time the offense is committed, discharge for drinking or intoxication is held just, even though other considerations and merits are present which, except for the type of work, would cause the arbitrator to rule the discharge unjust.

When the employee is engaged in an ultra-hazardous occupation,[8] the type of work is such that carelessness resulting from drinking or intoxication will endanger the safety and lives of others and may result in disaster. Arbitrators consistently hold that an employer is under a duty to take prompt action in such cases, and that the safety and protection of other employees require an inflexible enforcement of a no-drinking rule even though the penalty for such conduct has not been so severe elsewhere in the plant, or the employer has condoned drinking in the past. When the employee is driving or in direct contact with the public at the time the offense is committed the justice of the penalty is reviewed in the light of state laws and the public policy—risks to life and property—which the law seeks to protect and a discharge is held just even though the employer has condoned such conduct in the past. It has been held that an employee could not reasonably suppose himself free to drink in that instance because the company had (wrongfully) tolerated similar conduct at an earlier time.

5. In re Hiram Walker and Sons, Inc. and Distillery, Rectifying and Wine Workers' International Union of America, Local 55 (AFL), 3 LA 146 (1946).

6. In re American Woolen Company and Textile Workers Union of America (CIO), 5 LA 371 (1946).

7. In re The Western Express Company and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 118 (AFL), 10 LA 172 (1948); In re United Parcel Service, Inc. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 177 (AFL), 7 LA 292 (1947).

8. In re Allied Maintenance Company and Transport Workers Union of America (CIO), 12 LA 350 (1949).

When the type of work is not ultra-hazardous and the employee is not a driver nor in direct contact with the public, then the mitigating factors or merits previously enumerated are given due weight.

Discipline awarded in the past for similar offenses in the particular plant, and in the industry generally, and the employer's handling of such offenses in the past, are determining factors when considering the justice of the penalty of discharge. Employers must show that discrimination has not been followed in the disciplining of an employee. When the discipline for such offenses in the past or in the industry generally has not been the extreme penalty of discharge, it is considered unjust when rendered without due notice and warning to the employees. If the company has condoned intoxication or drinking in the past, it is generally held that discharge is too severe and out of proportion to the offense.[9] Arbitrators hold that management's policy should be firm and consistent so the employee will not be led into the belief he can "get away with it." It is felt that a systematic warning system would correct an abuse found to be generally prevalent and would have apprised employees of the serious consequences of repeated infractions of a no-drinking rule.

In reviewing the justice of the penalty, the penalty for such offenses in the courts of the particular community may influence the arbitrator to hold that the discharge was unjust. It was held in *In re Atlas Press Co.*:[10]

> With respect to M., I think that in consideration of his past work record, his age and seniority status, the facts that the indiscretion occurred not on a regular work day and that it was his first offense, the penalty of discharge imposed on him was too severe. Frankly, in a state whose courts deem a $100.00 fine an appropriate penalty against a public judge convicted of drunk driving, a penalty of discharge imposed upon an elderly but satisfactory industrial worker for a not dissimilar offense, strikes me as something less than full justice.

The working agreement may require the employer to post its

9. In re A. I. Namms and Son and Retail, Wholesale and Department Store Employees, Department Store Employees Union, Local 1250 (CIO), 7 LA 704 (1947); In re Tubular Rivet and Stud Company and International Association of Machinists, Granite Lodge 1451, 8 LA 97 (1947).

10. In re Atlas Press Company and United Steelworkers of America, Local 2167 (CIO), 9 LA 810, 812 (1948).

shop rules. The violation of this contract provision is usually a mitigating factor when accompanied by other factors such as the company's condoning such conduct in the past, etc. Then it is an additional reason for holding the penalty unjust. However, in one case the violation of this contract provision was the only mitigating factor and in that case it was held:

> Argument that the company is obligated to post shop rules with penalties before disciplining employees has little merit in principle, since it is contrary to every conception of the rights as well as the obligations attached to the management and administration of a business property. Its only merit is that, in the absence of posted shop rules the employer is under a somewhat greater responsibility in showing that discrimination has not been followed in the discipline of an employee.[11]

The company may or may not be obligated to give the union notice of offenses of the employees. But, if they have in the past, and the union has always acted and warned the employee, and the company discharges an employee without giving the union notice, the discharge may be held too severe a penalty under the circumstances. Arbitrators realize that such notice to the union is a commendable procedure in that it gives the union a chance to assume responsibility for the conduct of its members, and consider it unjust not to give the union a chance to "straighten out" the member in question as they have in the past.[12]

The employee's equities—seniority, good record, whether his first offense—are considerations that aid in determining any case. However, it is when the offense is only drinking or having intoxicating liquor on the premises (rather than intoxication proper) that these "equities" have controlling weight. Such conduct is not considered so serious as intoxication. When the offense is only drinking, and the employee has several years seniority, a good record with no previous offenses, and is considered to be a good worker by his superiors, it is generally held the employee deserves some discipline but that the penalty of discharge is too severe.[13] The employee can strengthen his case

11. In re Watt Car and Wheel Company and International Molders and Foundry Workers Union, Local 143 (AFL), 4 LA 67 (1946).

12. In re A. I. Namms and Son and Retail, Wholesale and Department Store Employees, Department Store Employees Union, Local 1250 (CIO), 7 LA 704 (1947).

13. In re Pennsylvania Greyhound Lines, Inc. and Amalgamated Asso-

by convincing the arbitrator that the offense won't happen again. It is not at all unusual to find, in the same proceeding, the discharge of one employee for intoxication sustained and discharge of another employee for drinking set aside because the latter had a good record and several years' seniority and it was his first offense, while these factors alone do not mitigate if the employee is actually drunk.

The cases have recognized the difference in the danger of drinking in the extra hazardous occupations and the normal occupations, but drinking is in and of itself, such a major deterrent to efficiency, safety, employee morals, good working conditions and public relations, that it is necessary that some discipline be imposed for the violation. Even though the arbitrator finds it just and equitable to commute a discharge to a lesser discipline the employee is always penalized in some manner. The tenor of the punishment is of necessity guided by the many and sundry extenuating corcumstances, each of which plays a small but significant part in each case.

OTTO A. JOHNSON

GAMBLING

I. GENERAL

Gambling of some type is prevalent in most industrial establishments, but the instances are relatively few where employees have been discovered at and disciplined for such activity. By a review of the cases where employees have been penalized for gambling, either on company property or on its time, a few general principles may be observed. The severity of discipline exacted varies with factors such as the kind of gambling involved, the job status of the offender, repetition of offense and the nature of the plant rules prohibiting gambling. The penalty ranges from discharge, in a minority of the cases, to mere reprimand in others.

The present survey covers a five year period commencing in 1943. Not much is reported on the discipline meted out to gamblers before the rise of union and governmental controls over

ciation of Street, Electric Railway and Motor Coach Employees of America, Division 1210 (AFL), 3 LA 880 (1946); In re Atlas Press Company and United Steelworkers of America, Local 2167 (CIO), 9 LA 810 (1948).