PROCEDURE

With the advent of the "just cause" provision in labor-management contracts certain procedural machinery has been established, either by contract or custom, which operates to assure a "due process" disposition of a discharge or discipline case. The purposes of this article are to discuss these procedural requisites and to consider awards wherein an employer discharged or disciplined an employee without following the prescribed procedural requirements.

Since most labor agreements provide adequate means, through a grievance procedure and arbitration, to have an unjust penalty set aside, arbitrators are reluctant to imply conditions which restrict management's right to discharge or discipline.[1] However, in one award where a truck driver had been summarily discharged, but later reinstated when he was acquitted in a criminal suit, the arbitrator based his decision to set aside the discharge, partially upon the fact that the employer, even though he was not required to do so by contract, had failed to provide a hearing before discharge.[2] Though no general statement may be made, it seems that arbitrators will apply the doctrine of "casus omissus" when necessary — Mr. Gollub[3] suggests that arbitrators have done this in several New York awards.

1. In re Third Avenue Transit Corporation, Surface Transportation Corporation of New York, the Yonkers Railroad Company, Westchester Street Transportation Company, Inc., and The Westchester Electric Railroad Company and Transport Workers Union of America (CIO), 1 LA 321 (1946)—the arbitrator refused the union's request to imply a provision for a hearing in discipline cases because a hearing would present unnecessary difficulty of administration—any wrong could be remedied readily by use of the grievance procedure; In re Sivyer Steel Casting Company and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 800 (CIO), 1 LA 485 (1945), where the grievance procedure after discharge was a sufficient protection for employees and thus the arbitrator refused to imply a provision for a hearing in discipline or discharge cases.

2. In re Boston and Maine Transportation Company and Amalgamated Association of Street, Electric Railway and Motor Coach Employees, Local 1038 (AFL), 5 LA 3 (1946); In re Cumberland Undergarment Company, Inc. and International Ladies' Garment Workers Union, Local 434 (AFL), 5 LA 766 (1946), where the company summarily discharged employees who were suspected of leading an unauthorized strike and although the contract did not require a hearing before discharge, the arbitrator held that the company should have consulted with the international before discharging the men.

3. Myron Gollub, *Discharge for Cause* (N. Y. Dept. of Labor 1948) 30, 31.

The major problem arises when an employer discharges or disciplines an employee without following the procedure provided in the labor agreement. Some contracts provide extensive pre-arbitration procedure, including notice, hearing and appeal within the managerial hierarchy; others merely provide for notice or an informal consultation between the company and the union. Although the awards seldom turn upon the amount of pre-arbitration procedure required, an arbitrator is apt to apply a strict interpretation and, therefore, set aside a discharge if the employer breached the terms of a contract which provided for detailed procedure.[4] The apparent reason for this is that the parties clearly manifested an intention to impose conditions precedent upon management's prerogative to discharge or discipline.

Since the general purpose of these requirements is to protect an employee, an arbitrator will set aside a discharge if there is any suggestion that an employer's breach denied the employee "due process."[5] However, if the merits of the case are properly

4. In re Die Tool & Engineering Company and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 155 (CIO), 3 LA 156 (1946), where the company gave notice and reason of discharge to the union rather than to the employee as required by contract. The arbitrator set aside the discharge because the employee was deprived of an opportunity to present his defense; In re Four Wheel Drive Auto Company and Associated Unions of America, Office and Professional Workers Local 15, 4 LA 170 (1946)—here notice was not given to the union and the lack of notice deprived the union of an opportunity to institute the grievance procedure.

5. In re International Shoe Company, Bluff City Reconstruction Preparatory Plant and United Shoe Workers of America, Local 100-A (CIO), 3 LA 500 (1946); In re International Minerals and Chemical Corporation and International Union of Mine, Mill and Smelter Workers, Local 415 (CIO), 4 LA 127 (1946), where it was held that the company, before exercising its right to discharge, must observe provisions of the contract and ascertain the real guilt of suspected violators; In re Ford Instrument Company and United Electrical, Radio & Machine Workers of America, Local 425 (CIO), 4 LA 403 (1946), where the discharge was set aside where the company mistakenly assumed that certain men could be discharged without first consulting the union as provided by the contract; In re Quaker Oats Company and Food, Tobacco, Agricultural and Allied Workers Union of America, Local 125 (CIO), 5 LA 250 (1946), where since the union was prevented from instituting the grievance procedure when the company failed to give the union steward notice as required by contract, the arbitrator held that the merits of the discharge must be tried by the grievance committee; In re Ranney Refrigerator Company and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 308 (CIO), 5 LA 621 (1946); In re Coca-Cola Bottling Company of New York and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Soft Drink Workers Union, Local 812 (AFL), 9 LA 197 (1947), where the company failed to give

before the arbitrator,[6] and if he finds that notwithstanding the employer's breach the employee's conduct warranted discharge, the discharge will be sustained, but the employee will be awarded back pay for the time between the discharge and award.[7] A limitation is imposed upon this latter rule when, by contract or custom, the employer is under a duty to warn the union and the employee that the latter's conduct is sub-standard and a basis for discharge, but the employer discharges without prior warning. Although the arbitrator may permit some disciplinary action, he will set aside a discharge if the union or the employee, or both, were not warned.[8] A somewhat analogous problem

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the discharged employee the notice and hearing required by ten year custom. The charge was theft and only circumstantial evidence had been considered by the company. The arbitrator set aside the discharge on the ground that the employee had been denied an opportunity to defend himself.

6. In some cases the question of the arbitrator's jurisdiction is raised by the company, for some contracts provide that a discharge becomes final if either the union or the employee does not file a grievance within a stated period; In re Four Wheel Drive Auto Company and Associated Unions of America, Office and Professional Workers, Local 15, 4 LA 170 (1946); In re Quaker Oats Company and Food, Tobacco, Agricultural and Allied Workers Union of America, Local 125 (CIO), 5 LA 250 (1946). If the employer breached the contract and the breach prevented the filing of the grievance, the arbitrator may take jurisdiction (4 LA 170, *supra*) or he may not (5 LA 250, *supra*). In any event, if the employer breached the contract, the merits will be heard either by the grievance committee or the arbitrator (4 LA 170, *supra;* 5 LA 250, *supra*). See also In re Michigan Steel Casting Company and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 155 (CIO), 6 LA 678 (1947).

7. In re Schreiber Trucking Company and Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local 118 (AFL), 5 LA 430 (1946); In re Columbian Rope Company and United Farm Equipment and Metal Workers, Local 184 (CIO), 7 LA 450 (1947); In re Pittsburgh Plate Glass Company and Federation of Glass, Ceramic and Silica Sand Workers of America (CIO), 8 LA 317 (1947); In re New York Tribune, Inc. and American Newspaper Guild, Newspaper Guild of New York, Local 3 (CIO), 8 LA 410 (1947); In re Hiram Walker & Sons, Inc. and Distillery, Rectifying and Wine Workers' International Union of America, Distillery Workers Union, Local 55 (AFL), 10 LA 675 (1948); In re Hudson County Bus Owners Association and Amalgamated Association of Street, Electric Railway and Motor Coach Employees, Division 1276 (AFL), 3 LA 786 (1946); In re The Mosaic Tile Company and Federation of Glass, Ceramic and Silica Sand Workers of America, Local 79 (CIO), 9 LA 625 (1948); *cf.* In re Ford Motor Company and United Automobile, Aircraft and Agricultural Implement Workers (CIO), 6 LA 799 (1947).

8. In re The Federal Machine and Welder Company and United Electrical, Radio & Machine Workers of America, Local 730 (CIO), 5 LA 60 (1946), where the contract did not require notice or warning slip before discharge. However, existing plant rules provided for the routing of such a slip to the union. Where this had not been done the arbitrator set aside the discharge. In re Pyrene Manufacturing Company and United Electrical, Radio & Machine Workers of America, Local 444 (CIO), 9 LA

arises when the employer attempts to invoke "hip pocket" legislation, for example, discharges for conduct which was previously condoned without prior notice to the union or employee. These cases generally arise under contracts which do not state specific grounds for discharge, but merely provide that the employer may discharge for "just cause." Under these contracts most arbitrators require the employer to notify the union and the employees what conduct will be a basis for discharge, and, absent such notice, a discharge will be set aside though some discipline may be authorized.[9]

By analogy to the rule that criminal statutes must state a definite penalty for the offense, arbitrators require discipline for admitted offenses to be specific and to be imposed for a definite period.[10] A further requirement is that the discipline must be

787 (1948), where the employer as a matter of policy issued warning slips, a discharge is invalid when the employer fails to issue such a warning. However, the employee was denied back pay. See also, In re National Lead Company, De Lore Division and United Gas, Coke and Chemical Workers of America, Local 229 (CIO), 9 LA 973 (1948).

9. In re Norwich Pharmacal Company and Drug Trade Salesmen's Union (CIO), 5 LA 536 (1946), holding that the company cannot discharge without giving proper notification of the standards it expects; 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), holding that the company should inform the union that practices previously allowed would no longer be condoned; 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 the company cannot depart from past disciplinary measures and procedures without a prior explanation or warning; In re Cedartown Textiles, Inc. and Textile Workers Union of America, Local 820 (CIO), 8 LA 360 (1947), holding that discharge is too serious a penalty for profanity in the absence of a specific warning that it will be considered grounds for discharge. The company was permitted to impose a monetary penalty.

10. In re Republic Steel Corporation and United Steel Workers of America, Local 2176 (CIO), 6 LA 85 (1947), holding that if the company suspends an employee for one day only, it cannot later contend that the employee should have been and was suspended for two days; In re Ford Motor Company and United Automobile, Aircraft and Agricultural Implement Workers of America (CIO), 8 LA 1023 (1947), holding that the company must observe and inflict appropriate discipline according to the agreement and must set a pattern which the employee can understand and rely upon—the company cannot follow an inconsistent disciplinary procedure; In re Pan American Refining Corporation and Oil Workers International Union, Local 449 (CIO), 9 LA 47 (1947), holding that a company may not discipline an employee for an indefinite time, but that the employee should be informed of what his penalty is, and when it will cease; *cf.* In re Thompson Products, Inc. and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 247 (CIO), 9 LA 119 (1947), holding that indefinite suspensions for refusal to work as directed are justified until the employees do as they are told, since there

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]

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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.