ABSENTEEISM

Absenteeism, as cause for discharge or other discipline, was formerly left to the uncontrolled discretion of the employer. Under collective bargaining agreements this right is limited.

The problem of balancing the right of the employer to discipline employees for absenteeism and the right of employees to "job security" becomes one of distinguishing between wrongful and excusable absences.

There is no definite rule which may be applied to every case of absence to determine whether disciplinary action is proper. Every case involves variable factors: the existence of company rules or of contract provisions in regard to absenteeism, whether notice was required in case of absence and whether the proper notice was given, whether prior warnings were required and given, the reasons for absence and their sufficiency as an excuse, the employee's record of previous absences as an aggravating circumstance, and other surrounding circumstances going to aggravation or mitigation. These are questions with which the arbitrator commonly has to cope in a dispute arising out of discharge or other discipline of an employee for absenteeism.

Union contracts often contain a clause governing the company's right to discharge or discipline for absenteeism. The most common of these is the provision forbidding discharge except for "just cause," with an exception for the case of probationary workers.[1] But the term "just cause" is a broad one, leaving much room for interpretation and conflict. This means, of course, that the arbitrator may have to consider all the previously mentioned factors in order to arrive at what will be considered a "just decision."[2] For example, in one case in which an employee was habitually absent the day after pay-day with the excuse that he had slept, and where the company had warned him personally that discipline would result if an absence without sufficient excuse recurred, and such absence did recur, a three day disciplinary lay-off was held to be justified.[3] But, on the

1. 5 Labor Equipment ¶66,003 (Prentice-Hall).
2. See In re Michigan Steel Casting Co. and United Automobile Workers of America, Local 155 (CIO), 2 ALAA ¶67,652 (1947); In re Pittsburgh Metallurgical Co., Inc. and United Mine Workers of America, District 50, 12 LA 95 (1945).
3. In re Eagle-Pitcher Mining and Smelting Co. and International Union of Mine, Mill and Smelter Workers (CIO), 2 ALAA ¶67,625 (1947).

other hand, where the employer contended that all unauthorized leaves are without "good cause," it was held that the discipline based on this contention was not justified and would not be upheld without further proof.[4] In both of these cases, the only contract provision invoked was the general one limiting discharge and discipline to "just cause."

Many contracts contain more specific absenteeism provisions. Contracts may provide a procedure for the employee to follow in obtaining permission to be absent. In the contract involving the Bell Aircraft Corporation, it was provided that an employee who is absent for more than three days shall lose his seniority rights upon failure of proper notice to the company or satisfactory reason for the absence. An employee was absent for five consecutive days and upon return presented a doctor's certificate, testifying to his illness and inability to work on the days absent. Pursuant to the company's interpretation of the clause, the employee, having failed to notify within the three-day period, was deprived of his seniority rights, as a result of which this employee was the first to be laid off when the company cut down on employment. The arbitrator ordered that the employee be reinstated with back pay in the absence of impeachment of the doctor as a witness, and held that the compliance with the requirement of presenting a satisfactory reason for the absence was sufficient to justify the absence under the contract.[5] On the other hand, arbitrators are unlikely to overrule the employer's decisions in matters relating to absenteeism unless the contract has been violated or there is evidence of an abuse of discretion. For example, employees discharged for failing to notify their supervisors when they were unable to appear for work have been ordered reinstated if they had made some effort to notify or if there is some doubt as to whether they did notify.[6]

In a case involving John Morrell & Co., a distinction was made in imposing a penalty on one employee, who had failed to notify the company of his absence, and another employee, who did send such notice and was not penalized, although absence in both cases

4. In re Pittsburgh Metallurgical Co., Inc. and United Mine Workers of America, District 50, 12 LA 95 (1945).

5. In re Bell Aircraft Corp. and United Automobile Workers of America, Local 10 (CIO), 1 LA 281 (Date not available).

6. 5 Labor Equipment ¶66,011 (Prentice-Hall).

was justified.[7] In another case, a penalty was upheld when an employee had notified the company of a one-day absence but had failed to give additional notice when she found it necessary to stay home another day.[8] An unexplained absence may cause great inconvenience to a company, especially if the employee holds a key position; and, therefore, a company is justified in presuming that such absence was not justified and a commensurate penalty may be imposed. Notice is required regardless of whether the reason for the absence is valid or will subject the employee to discipline; and, in the latter case, the lack of notice would be regarded as an aggravating circumstance permitting a heavier penalty.[9]

On the other hand, contracts may require the employer to give the employee warning before disciplinary action for absence is taken. Arbitrators are generally reluctant to sustain discharges, unless the employer shows sufficient evidence of misconduct and unless he proves that he followed the established contract procedure in each case.[10] In a number of cases the arbitrator has refused to uphold the penalty imposed by the company on an employee who had been absent without proper justification because the company had failed to warn the employee that his conduct (excessive or unjustified or unexcused absence) would result in disciplinary action if continued. It has been held that an employee should be previously warned or reprimanded for poor attendance before he is discharged for that reason, especially where a certain amount of absence has been tolerated in the past.[11] In this case, the discharge was reversed and the employee reinstated to his former position, because of the lack of previous

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7. In re John Morrell & Co. and United Packinghouse Workers of America, Local 1 (CIO), 9 LA 931 (1948).

8. In re United States Rubber Co. and United Textile Workers of America (AFL), 3 ALAA ¶68,110 (1948).

9. In re American Steel and Wire Co. and United Steelworkers of America (CIO), 12 LA 47 (1948).

10. 5 Labor Equipment ¶66,003 (Prentice-Hall).

11. In re International Association of Machinists and Office Employees International Union, Local 30 (AFL), 7 LA 231 (1947); Accord: Crown Cotton Mills and Textile Workers of America (CIO), 3 ALAA ¶68,107 (1948), where it was held that although, under the contract, habitual absence was a just cause for discharge, the company cannot discharge an employee for excessive absence due to illness even though the illness is brought on by drinking, if such absences have prior to this time been tolerated without penalty.

warning. In arriving at this conclusion, the arbitrator stated that

> An employer who has tolerated a certain amount of absences and tardiness in the past has a right to establish more rigid standards for the future, but has no right to put the new policy into effect without warning.[11a]

The purpose of a formal warning is to give an employee an opportunity to better his attendance record before a penalty is imposed. Therefore, under a contract permitting an employer to demote or discharge an employee whose absences have exceeded a certain quota after the employee has been given formal warning, the arbitrator decided that, in determining that employee's quota for the purpose of imposing a penalty, the company would be permitted to consider only those absences which occurred after the formal warning. If the arbitrator had applied a strict interpretation to this contract provision and had permitted the company to determine the quota from the over-all attendance record of the employee, the discharge would have been proper. But under the liberal interpretation, the employee's reinstatement was ordered.[12] In a decision involving the United Auto Workers, the requirement of a warning before the imposition of a penalty was carried even further. An employee had been given a "final warning" that the next absence would mean discharge. Subsequently, this employee was absent five more times without any action being taken against him. On the sixth occasion the employee was absent in the afternoon without leave after he had been given permission to be absent in the morning. This time the company discharged him; but its decision was reversed upon arbitration because the company had "lulled the employee into a false sense of security." The previous warning, which had gone unenforced, was not sufficient to justify discharge later for a minor absence.[13] Although this decision may be somewhat extreme, it is a clear indication of the lenient attitude which some of the abitrators have taken in reversing discharges of employees based on absenteeism.

On the other hand, arbitrators have allowed proof of previous warning as justification for disciplinary action. An interesting

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11a. *Ibid.*

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

13. In re Michigan Steel Casting Co. and United Automobile Workers of America, Local 155 (CIO), 2 ALAA ¶67,652 (1947).

comparison may be drawn between the *United Auto Workers Case, supra,* in which the employee was "lulled into a false sense of security," after having been warned that future absence would result in discharge, and a somewhat similar case. In the latter case, the employee was habitually absent with the excuse that he had "slept." He was warned that disciplinary action would result if his absence with insufficient excuse should recur and was given a three-day lay-off when he failed to heed the warning. The punishment was imposed on the first occasion of his absence after the warning, and the company's stand was upheld by the arbitrator.[14] The reasoning of the arbitrators in these two cases is consistent. In another case, the contract required the employees to give twenty-four hours' advance notice of contemplated absences and further required permission to be absent from the foreman in order to avoid an AWOL status for which punishment might be imposed. One of the employees, despite the warning that he would be punished if he were again AWOL, was absent without permission on a subsequent occasion. In upholding the temporary lay-off, the arbitrator stated that the previous warning gave the company a stronger case.[15]

The predominant cause and the most popular "excuse" for absence is illness, either of the employee himself or some member of the immediate family. In passing upon the validity of such excuses, the arbitrator must ask: Was there a bona fide illness? Was the excuse sufficient? Was the contract provision complied with? The decisions generally indicate that arbitrators have interpreted provisions in regard to absence for illness with a view most favorable to the employee. It appears that all doubt as to the validity of the employee's excuse in the light of the contract provisions has to be overcome in order to justify some punishment by the company.[16]

14. In re Eagle-Pitcher Mining and Smelting Co. and International Union of Mine, Mill and Smelter Workers, Local 429 (CIO), 2 ALAA ¶67,625 (1947).

15. In re Brown & Sharp Manufacturing Co. and International Association of Machinists, 7 LA 134 (1947); Accord: In re United States Rubber Co. and United Textile Workers of America (AFL), 3 ALAA ¶68,110 (1948), where an excuse which had justified one or two absences was insufficient for a later absence after the employee had been warned that excuse of sickness without medical certificate would no longer be taken, and the discharge was upheld.

16. In re Chicago and Harrisburg Coal Co. and United Mine Workers of America, 2 LA 56 (1945), where an employee did not lose his vacation pay despite a five months' absence, which was excusable due to illness, although

In determining the justification of a penalty imposed for absenteeism, all the surrounding circumstances are to be taken into account, including the employee's general employment record.[17] Thus, in upholding the discharge for absenteeism of an employee, who had on a previous occasion caused some difficulty at the plant, the arbitrator held that an employee's past record cannot be entirely disregarded in determining the fairness of a penalty in a disciplinary case, stating that "Events occurring two months before the suspension must be considered if they might justify it."[18]

Furthermore, a company will not be forced to retain persons

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the length of the absence was partly due to excessive drinking after his injury and although the doctor's certificate accounted for only three months of the absence, the employee having been sent home by the company for the other two months because of his inability to work; In re Erie Resistor Corp. and United Electrical, Radio and Machine Workers of America, Local 631 (CIO), 5 LA 161 (1946), where the contract provided that leaves of absence would be required for absences of four or more days, and the arbitrator held that the leave of absence rule should not be applied where an employee was absent for four days due to illness and had notified her foreman on the 2d and 3d days but did not think it necessary to send notice that she would need a fourth day off; In re Texas Textile Mills and Textile Workers Union of America, Local 617 (CIO), 5 LA 762 (1946), where the contract provided that the company had a right to deny vacation bonuses where an employee was absent for a certain number of days without "such excuse as the company in its discretion shall consider sufficient," and the arbitrator held that since the employee's foreman had by prior arrangement approved of her absence for six days, the company must take the approval of the foreman as sufficient excuse for the absence and cannot use such absence as a basis for discipline; In re General Tire and Rubber Co. and Federal Labor Union, Rubber Workers (AFL), 6 LA 918 (1947), where it was held that where an employee, because of an erroneous interpretation of his rights under the contract of employment, refused to work on Sunday and was absent on that day, the company could not discipline him under a rule which provided for strong punishment for disobedience to proper authority, but could impose only the minor penalty provided for in the rule prohibiting absence; In re United States Rubber Co. and United Textile Workers of America (AFL), 3 ALAA ¶68,110 (1948), where it was held that a penalty for failure to notify a company of an absence was not justified where the employee had sent notice of her absence due to illness on two consecutive working days but was absent a third day, because the company could reasonably conclude that the employee was still ill without the otherwise required notice; In re Phelps-Dodge Corp. and Long Island Refinery Workers (CIO), 3 ALAA ¶68,161 (1948), where a contract provided that seniority would be broken for a three days unexplained absence (without notice) and the employee notified the company of his illness on the first day of absence and then was absent for nine consecutive days, the arbitrator held that the lack of additional notice (every three days) was not cause for a penalty, as the company was notified of the illness and the employee was absent for no longer than a reasonable period of time.

17. Myron Gollub, *Discharge for Cause* (N. Y. Dept. of Labor 1948) 74.

18. In re Phelps-Dodge Corp. and United Electrical, Radio, & Machine Workers, Local 430 (CIO), 2 ALAA ¶67,548 (1946).

in their employ who have no value and perform no service. The reported decisions on this point are few. There are some which have held that the reasons for absence become immaterial where the number of absences becomes so great that an employee's services are of no value to the company. In a recent case, the discharge of an employee was upheld although the particular absence which precipitated the discharge was "necessary and excusable," because the over-all attendance was so bad that the employee became more of a burden than an asset to the company.[19]

As in our courts of equity, arbitration tribunals will avoid the perpetration of an injustice on the parties. In *In re John Morrell & Co.*,[20] three employees were each given a three-day suspension for a relatively short period of absence. The first employee had been with the company for over ten years. The reason for the penalty in his case was that he had been absent on four scattered days in order to visit a doctor to be treated for an ailment. Although he had reported his absence, he was not excused. The second employee also had a legitimate excuse for his absence, but had failed to give notice of such to the company. The third employee's excuse was invalid, and he had totally neglected to give any notice of his absence. The circumstances of the first case caused the suspension to be set aside, and the employee was reinstated with back pay. In the second case, the punishment was reduced; and in the third case it was permitted to stand as being justified. The company rules had provided for suspension and discharge of employees who accumulated a specified number of absences, regardless of circumstances. Besides being in conflict with the contract provision providing for discharge only for just cause, this rule was found unjustified and arbitrary, even though the problem of absenteeism had risen to serious proportions in the company. Although a company has a right to make rules in furtherance of orderly conduct of the business, it must take into consideration mitigating and extenuating circum-

19. In re Goodyear Clearwater Mills No. 2 and United Textile Workers of America, Local 90 (AFL), 11 LA 419 (1948).

20. In re John Morrell and Company and United Packinghouse Workers of America, Local 1 (CIO), 9 LA 931 (1948); Accord: In re Pacific Mills and Textile Workers Union of America, Local 254 (CIO), 3 LA 141 (1946), where an employee was reinstated despite a two-year record of repeated absences, because the absences were due to illness and hospitalization, and the employee had a good record for nearly eighteen years.

stances. Each case should be considered on its merits, and all absent employees should not necessarily be punished equally.

Disciplinary action need not necessarily take the form of affirmative punishment. Frequently the withholding of a privilege is more effective than another form of punishment; and an arbitrator is more likely to sustain the former than the latter. Thus, some union-management agreements have provisions whereby such privileges as bonuses, vacation pay, and the right to work over-time are denied to those employees who have worked less than a certain prescribed minimum of hours per year, regardless of the cause of their absences. In one contract, the company was required to regulate wages so that employees of "equal ability and responsibility" shall receive the same rate above the minimum wage as better paid employees of no greater competence and performing comparable work were receiving. Here, the company properly denied the wage increase to an employee who was frequently absent, even though excused for illness, as this employee fell into a class of "lower responsibility" even though he would be of equal ability. In support of the company's position, the arbitrator said, "absence of an employee is upsetting to a company's production record regardless of cause." The responsibility of an employee with a record of absence cannot be equal to that of a worker with a steady record.[21]

The right of management to take disciplinary measures against its employees as a result of absence from work is limited under

21. In re Godfrey Conveyor Company and International Association of Machinists, Local 163, 3 LA 757 (1946); Accord: In re Walworth Company and United Steelworkers of America, Local 1275 (CIO), 5 LA 551 (1946), where it was held that the company should have the right, because of the admitted need of controlling absenteeism, to deny overtime to employees regardless of seniority (which was required by rule), if the absence was attributable to any reason other than those specified as "excusable"; In re Texas Textile Mills and Textile Workers Union of America (CIO), 5 LA 762 (1946), where the contract provided that the company had the right to deny vacation bonuses if the employee were absent for a certain number of days without "such excuse as the company in its discretion shall consider sufficient"; In re Reading Street Railway Company and Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 1345 (AFL), 6 LA 860 (1947), in which a transit company contract provided that if an operator fails to take out his regular run, and fails to show that it was for reasons beyond his control, he shall be charged with a "miss," and that if he be charged with two or more "misses" in one month, he shall be placed at the bottom of the extra operators list for two days; In re Phelps-Dodge Corporation and Long Island Refinery Workers (CIO), 3 ALAA ¶68,161 (1948), where the contract provided for loss of seniority for three days' unexplained absence.

collective bargaining agreements. A company cannot operate without assurance that its employees will come to work with reasonable regularity. The question thus arises as to how far a company's right to discharge or discipline its employees for absenteeism extends. As we have seen, the answer to this problem is found in contract provisions and in the company rules, subject to their proper interpretation in the light of the reasons offered by way of excuse, the employee's previous record of absence, and other surrounding circumstances.

LUDWIG MAYER

ALTERCATIONS OR FIGHTS

I. INTRODUCTION

Throughout the history of collective bargaining both labor and management have realized the impossibility of smooth production amid fights, heated arguments, and like disturbances. It is thus a broad, general truth that an employer has the right to discharge employees who participate in an actual fight. The word "actual" is important, as some friction is to be expected in the tense atmosphere of modern industrial plants. Lesser breaches of proper decorum may, of course, result in disciplinary action short of discharge, and, as we shall see, numerous mitigating circumstances qualify the rule stated.

It is difficult to isolate those arbitration decisions which impose discipline for fights and altercations alone. Many such affrays are apt to occur during the process of procuring some collective bargaining advantages, and they frequently appear during strikes or in connection with zealous solicitation of union membership. An employer may entertain an ulterior motive and disguise it as discipline for a fight or altercation. This discussion, insofar as it is possible, will exclude the topics of coercion and intimidation, destruction of property, inciting strikes and boycotts—all of which are grounds for disciplinary action—and discrimination against union members in disciplinary penalities, evidence of which will make the penalty unjustified.

Disciplinary action by an employer for fights in the plant may be based upon the bargaining contract, the past practice of the company, or a general understanding among employees.[1]

1. In re Dayton Malleable Iron Co., G.H.R. Foundry Division and United