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

If the employer, by contract, has no right to discharge unless for "sufficient cause," a fight may be held such cause.[2] But the penalty imposed as discipline must be reasonable and just after a fair investigation and due consideration of all the facts. An analysis of fair and unfair penalties, as determined by arbitration, follows.

II. What Is a "Fight" or "Altercation"?

A breach of peace which interferes with the harmonious operation of the business enterprise subjects the participants to disciplinary action. Employees participating in a fight involving violence may be discharged. This may apply to melees involving many persons and issues which affect many employees;[3] or to instances where only two persons engage in a private scuffle.[4] When actual blows are exchanged, and the possibility of serious personal injury is imminent, the most serious breach of proper

---

Electrical, Radio and Machine Workers of America, Local 768 (CIO), 8 LA 680 (1947), where a discharge was allowed even though no written rules were posted, and there was no stipulation in the contract that an employee could be discharged for fighting.

2. In re Kraft Foods Co. and Int. Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Dairy Employee's Union, Local 754 (AFL), 9 LA 397 (1947).

3. In re Fulton Glass Company and Federal Labor Union, No. 24080 (AFL), 10 LA 75 (1948) (reinstatement without back pay ordered for reasons not here material); In re Pioneer Mill Company, Limited and International Longshoremen's and Warehousemen's Union, Local 144, Unit 9 (CIO), 6 LA 644 (1947) (discharge commuted to 3½ mos. layoff for reasons not here material).

4. In re Caterpillar Tractor Company and United Farm Equipment & Metal Workers of America, Local 105 (CIO), 6 LA 65 (1946) (discharge of both employees upheld); In re Palmer-Bee Company and United Steelworkers of America, Local 1297 (CIO), 2 LA 63 (1945) (reinstatement with back pay from date of application ordered for reasons immaterial here); *same*, Case of Laftus Webb, 8 LA 688 (1947) (discharge commuted to 1 mo. suspension for reasons not pertinent here); In re Kraft Foods Company and Int. Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Dairy Employees' Union, Local 754 (AFL), 9 LA 397 (1947) (discharge upheld); In re Paranite Wire and Cable Corp. and Int. Brotherhood of Electrical Workers, Local B-1112 (AFL), 9 LA 112 (1947); In re McEwan Brothers and United Paperworkers of America, Local 297 (CIO), 9 LA 854 (1948) (discharge upheld); In re Hiram Walker and Sons, Inc. and Distillery, Rectifying and Wine Worker's Int. Union of America, Distillery Workers Union, Local 55 (AFL), 10 LA 675 (1948) (discharge upheld); In re Goodyear Clearwater Mills, Inc., No. 1 and Textile Workers Union of America, Local 883 (CIO), 8 LA 647 (1947) (discharge of perpetrator allowed); In re International Harvester Company Farmall Works and United Farm Equipment and Metal Workers of America, Local 109 (CIO), 9 LA 592 (1947).

employee conduct has occurred, and a discharge is more often the result than some lesser disciplinary action.[5]

Almost as serious, and frequently just as dangerous, are *assaults* upon another. These are not fights in the technical sense as only one party is at fault. Such manifestations of hostility vary greatly in degree and kind, interfere with smooth operations and cause insecurity and apprehension in others. The penalties invoked are almost as severe as those imposed for fights since violence and threat of bodily harm are frequently involved,[6] but a simple assault, not amounting to a battery, is not grounds for discharge.[7] To warrant discharge, either fisticuffs must have been used, or the disturbance must have been a culmination of many such offenses.[8]

Cursing and using threatening language which might cause apprehension in other employees warrant disciplinary action, even in the absence of violence. The employer's right to discipline arises with any unprivileged profane, intimidating, coercive, or threatening words; even though the speaker contemplates no assault,[9] and the remark is made in a jocular spirit.[10]

---

5. See Notes 3 and 4, *supra.*

6. In re Branch River Wool Combing Company and Textile Workers Union of America, Local 390 (CIO), 10 LA 237 (1948) (discharge upheld); In re Profile Cotton Mills and Textile Workers Union of America, Local 196 (CIO), 2 LA 537 (1942) (money damages awarded employee in lieu of discharging supervisor); In re Pioneer Gen-E-Motors Corporation and United Electrical Workers of America, Local 1150 (CIO), 3 LA 486 (1946) (reinstatement allowed as assault was outside of plant); In re International Shoe Company and United Shoe Workers of America, Local 104-A (CIO), 7 LA 669 (1947) (reinstatement allowed as assault was outside of plant); In re Caterpillar Tractor Company and United Farm Equipment & Metal Workers of America, Local 105 (CIO), 6 LA 65 (1946) (reinstatement allowed as assault was outside of plant).

7. In re Goodyear Clearwater Mills, Inc. and Textile Workers Union of America, Local 883 (CIO), 8 LA 647 (1947).

8. In re Chicago Hardware Foundry Company and United Steelworkers of America, Local 1192 (CIO), 6 LA 58 (1946); In re Link-Belt Company and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 281 (CIO), 4 LA 434 (1946); In re Columbian Rope Company and United Farm Equipment and Metal Workers, Local 184 (CIO), 7 LA 450 (1947); In re Kraft Foods Company and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Dairy Employees' Union, Local 754 (AFL), 9 LA 397 (1947). But see, In re A.B.C. Steel and Wire Company and United Wire and Metal Workers Union, Local 36 (CIO), 3 LA 666 (1946).

9. In re Cedartown Textiles, Inc. and Textile Workers Union of America, Local 820 (CIO), 8 LA 360 (1947) (loss of pay for time lost due to wrongful discharge sustained).

10. In re Metropolitan Life Insurance Company, Inc. and United Office and Professional Workers of America (CIO), 2 LA 561 (1945) (loss of one week's wages sustained).

The test is the violation of reasonable job decorum so as to cause apprehension or chagrin in another employee which might hamper production.[11] But such breach of decorum must be more than "somewhat threatening" language,[12] a mere conflict of personalities or incompatability between two workers,[13] an accusation of "neglecting work,"[14] or a disagreement about methods of doing the job.[15] The usual indiscretions of everyday intercourse give an employer no right to discipline.

The penalties invoked for disturbances not culminating in fights or assaults usually fall short of discharge.[16] A mere warning is the "rule," and a layoff or discharge is the "exception." Discharge is only allowed when coupled with another cause, or when based upon many offenses collectively.[17] Thus, in *In re Walworth, Inc.*,[18] the arbitrator refused to sustain the discharge of a union committeeman for bringing pressure upon a nonunion man. "We want you in the union, and, if you do not join,

11. In re Montrose Chemical Company, Inc. and United Gas, Coke and Chemical Workers of America, Local 284 (CIO), 10 LA 317 (1948) (reinstatement without back pay); In re Textron, Inc. and Textile Workers Union of America (CIO), 8 LA 744 (1947) (full reinstatement); In re Metropolitan Life Insurance Company, Inc. and United Office and Professional Workers of America (CIO), 2 LA 561 (1945) (discharge commuted to one week's loss of pay); In re Walworth Company, Inc. and International Association of Machinists, District 9 (AFL), 1 LA 151 (1943) (discharge commuted to warning only); In re Thor Corporation and United Electrical, Radio and Machine Workers of America, Local 1150 (CIO), 10 LA 321 (1948) (discharge commuted to two-week lay-off); In re Terminal Cab Company, Inc. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Taxi Cab Drivers of Trenton, N. J., Local 433 (AFL), 7 LA 780 (1947) (discharge commuted to one-week lay-off); In re Columbian Rope Company and United Farm Equipment and Metal Workers, Local 184 (CIO), 7 LA 450 (1947) (full reinstatement allowed).

12. In re Montrose Chemical Company, Inc. and United Gas, Coke and Chemical Workers of America, Local 284 (CIO), 10 LA 317 (1948) (but loss of pay sustained for other reasons).

13. In re Loews, Inc., Metro-Goldwyn-Mayer Studios and International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Motion Picture Film Editors, Local 776 (AFL), 8 LA 816 (1947).

14. In re Shell Pipe Line Corporation and International Union of Operating Engineers, Local 892 (AFL), 6 LA 458 (1947).

15. In re Cedartown Textiles, Inc. and Textile Workers Union of America, Local 820 (CIO), 8 LA 360 (1947) (but loss of pay sustained for other reasons); In re Power Equipment Company and United Electrical, Radio & Machine Workers of America, Local 937 (CIO), 2 LA 558 (1945) (full reinstatement with back pay).

16. See note 11, *supra.*

17. See note 8, *supra.*

18. In re Walworth Company, Inc. and International Association of Machinists, District 9 (AFL), 1 LA 151 (1943).

I will take care of you myself . . . we will see you in the washroom Saturday morning"[19] was found to be, in the absence of any violence either before or after the statement, a "threat" which warranted a warning but not a discharge. The union committeeman was reemployed with full back pay and seniority rights. But in *In re International Harvester*,[20] unprovoked cursing and threats of physical violence by a shop steward directed at a foreman in the presence of other men was held to be a ground for discharge, the insubordination probably being more determinative than the threat.

III. Who Are Participants?

Actual participants in a fight, assault, or altercation may be disciplined. The question, who precipitated the fight, is immaterial as long as both parties participate.[21] But the employer's right to discipline applies only to the perpetrator. If the recipient uses only reasonable means to ward off an assault, he is not a participant in a fight. In the same way, the use of reasonable language to alleviate a verbal attack does not make the recipient a participant in the altercation. A fight or altercation involves at least two parties, but only one will be deemed a participant if the other utilizes reasonable means to protect himself, and the fight is not one engaged in by mutual consent.[22] Whether the self-defense measures were reasonable under all the circumstances is the test; and even the use of unreasonable means is cause only for a lesser penalty than discharge, as we shall see.[23]

19. *Id.* at 153.

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

21. In re Stockham Pipe Fittings Company and United Steelworkers of America (CIO), 1 LA 160 (1945); In re Caterpillar of America Tractor Company and United Farm Equipment and Metal Workers of America, Local 105 (CIO), 6 LA 65 (1946); In re Indiana Railroad, Division of Wessen Company and Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Local 1069 (AFL), 6 LA 789 (1947).

22. In re Palmer-Bee Company and United Steelworkers of America, Local 1297 (CIO), 2 LA 63 (1945) (employee who was attacked and severely beaten by company official without warning and with little opportunity to defend himself was reinstated with full rights despite company's well-established practice to discharge all participants in a fight); In re Hiram Walker and Sons, Inc. and Distillery Workers Union, Local 55 (AFL), 10 LA 675 (1948) (superintendent merely defended himself from union official's assault).

23. *Infra.*

The relationship of participants in a disturbance may vary, and this affects an arbitrator's determinations of justifiable disciplinary action. The union may appeal a penalty imposed upon participants when they are on an equal footing in the factory hierarchy, or when a lesser employee fights with a foreman or superintendent, in which case the situation is aggravated, and a more severe penalty justified. The union may demand dismissal of a supervisor who has unjustifiably assaulted a lesser employee.

IV. Aggravating and Mitigating Circumstances

Numerous intervening circumstances may require mitigation of an otherwise proper penalty, or justify an otherwise improper penalty. The cause of the disturbance is all-important, and a more serious penalty may be exacted when an employee is in a position to, but does not, stop a disturbance. Thus, a discharge as an accessory (it was conceded that the union representative was not a participant) to an assault was upheld where the representative knew of a plan to "get" an anti-union worker and, after gaining postponement of the act for a couple of hours, finally acquiesced in the placing of the non-union man in a "tar" barrel in the plant.[24]

> (The) union representative was properly discharged as accessory to the act . . . since (1) no reason was given for the representative's failure ever to take the matter of the non-union man's allegedly provocative behavior to the grievance procedure, as was his duty under the contract, and (2) his own testimony supported the allegation that he favored the use of force if management did not immediately agree to transfer the non-union employee.[25]

The representative's non-feasance satisfied any cause requirement.

Extraneous circumstances will often have the effect of mitigating the severity of the penalty imposed. A determination of an outside *cause* of the disturbance is the most common mitigating circumstance. Upon this basis special considerations have been given to veterans with a service-induced neurosis.[26] Also, the

24. In re General Motors Corporation and International Union, United Auto Workers of America, 2 LA 491 (1938).
25. *Ibid.*
26. In re International Harvester Co., Farmall Works and United Farm Equipment and Metal Workers of America, Local 109 (CIO), 9 LA 952 (1946); In re A.B.C. Steel and Wire Company and United Wire and Metal Workers Union, Local 36 (CIO), 3 LA 666 (1946).

company has no right to control employees' activities away from work. Thus, an employee who engages in adulterous relationships with a non-employee's wife outside the plant cannot be penalized by the company when the non-employee enters the plant and fights with the employee while the latter is at his job, the employee's promiscuity off the job being the cause of the fracas in the shop.[27]

Where the company knows of "bad blood" between the employee and a supervisor and fails to separate them, although it could easily have done so, the employer's failure to police was the cause of the disturbance and precluded any right to discharge for fights arising out of that cause.[28] It was so held where the company allowed antagonistic relationships to exist between two departments, and an employee in one engaged in a heated argument with a supervisor of the other department, the employee's relationship in her own department and with her own supervisor being satisfactory.[29] The same circumstance prevents discharge when an underlying friction has existed between two employees for a long time and the company had notice (constructive or actual) of the private resentment.[30]

An overzealous union president who assaults a non-union worker while strengthening union membership (no anti-intimidation clause in contract) received only a one-week layoff, his performance of a proper union function inducing the assault.[31] "Management's abdication of its proper function" in not determining which of two shifts shall work on Saturdays gives no right to discharge participants in the melee arising out of the contest for the overtime.[32]

There can be no provocation sufficient to warrant an assault, but provocation may mitigate the penalty.[33] A provoked, simple

27. In re Textron, Inc. and Textile Workers Union of America (CIO), 8 LA 744 (1947).
28. In re Dayton Malleable Iron Company and United Electrical, Radio and Machine Workers of America, Local 768 (CIO), 8 LA 688 (1947).
29. In re Power Equipment Company and United Electrical, Radio & Machine Workers of America, Local 937 (CIO), 2 LA 558 (1945).
30. In re Verdun Mfg. Co., Inc. and Industrial Trades Union of America, Verdun Mfg. Company Local, 10 LA 637 (1947).
31. In re The Standard Steel Works and United Steelworkers of America, Local 1964 (CIO), 6 LA 136 (1945).
32. In re Fulton Glass Company and Federal Labor Union, No. 24080 (AFL), 10 LA 75 (1948).
33. In re Continental Can Co., Inc. and United Steelworkers of America (CIO), 6 LA 363 (1947).

assault, not a battery, is no grounds for discharge.[34] Provocatory language, if proved in defense, permits only a disciplinary layoff.[35] Continued refusal to join a union, or "scabbing" during a strike (even though by supervisors) has been held sufficient provocation to mitigate a disciplinary penalty.[36] But anti-union provocation was held irrelevant where union enthusiasts "disciplined" a non-union man, where (1) the union had failed to invoke the grievance procedure, and (2) there was no evidence that management was using the non-union man to the detriment of the union.[37] Working all day in the rain is provocative enough to warrant a profane remark to a proper order of a foreman, especially when due humility is shown by refusing to repeat the remark and obeying the order.[38] But being called a "fighting name" is inadequate provocation for an assault upon the name-caller,[39] as is the accusation of "neglecting work."[40] Even a reasonable belief that another employee "was bent on tormenting him" did not warrant the use of fisticuffs.[41]

Employers must give all workers who are equally at fault the same treatment. Evidence of an anti-union motive in the imposition of disciplinary penalties will result in the setting aside of such treatment as discriminatory.[42] Sound public policy supports this view when the ulterior motive is sufficiently manifested. The employer's past practice in dealing with similar offenses may indicate discrimination. If it is proved that the employees' union membership or activity influenced the penalty, the remedies of the National Labor Relations Act may be invoked. The doctrine has been extended to include other than

34. In re Goodyear Clearwater Mills, Inc. and Textile Workers Union of America, Local 883 (CIO), 8 LA 647 (1947).
35. In re Columbian Rope Company and United Farm Equipment and Metal Workers, Local 184 (CIO), 7 LA 450 (1947).
36. In re Pioneer Mill Company, Limited and International Longshoremen's and Warehousemen's Union, Local 144, Unit 9 (CIO), 6 LA 644 (1947).
37. In re General Motors Corporation and International Union, United Auto Workers of America, 2 LA 491 (1938).
38. In re Thor Corporation and United Electrical, Radio and Machine Workers of America, Local 1150 (CIO), 10 LA 321 (1948).
39. In re Kraft Foods Company and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Dairy Employees' Union, Local 754 (AFL), 9 LA 397 (1947).
40. In re Shell Pipe Line Corporation and International Union of Operating Engineers, Local 892 (AFL), 6 LA 458 (1947).
41. In re Branch River Wool Combing Company and Textile Workers Union of America, Local 390 (CIO), 10 LA 237 (1948).

union - non-union relations. It is now settled that an employer's prerogative of discipline for just cause is limited to the *indiscriminate* assessment of penalties.[43] Thus, rehiring as a new employee one of two equally guilty participants in a fight entitles the other to employment as of the date of the original rehiring.[44] It is not discriminatory treatment to discharge one fighting employee at a later time if the grievance committee gives the employer his first notice of the discrimination at such later time, and he merely abides by their request.[45] The discharge of one of two fight participants is no evidence of "unjustified" treatment, there being no discrimination unless the fighters are equally at fault.[46] This equality of treatment for equal blameworthiness has one extremely important qualification. Separate offenses by one employee taken together may justify discharge when any one alone might not.[47] A discharge based upon them collectively may be justified, and, thus, not be discriminatory treatment. In a like manner, a good past record may sustain continuation of employment.[48]

A modern industrial plant cannot operate properly in a hostile atmosphere. The employer may, in his discretion, act to check personal resentment among employees. The right to act arises in regard to all disturbances in the plant, notwithstanding the fact that employees have not as yet "punched in,"[49] or are tem-

42. In re Pioneer Mill Company, Limited and International Longshoremen's and Warehousemen's Union, Local 114, Unit 9 (CIO), 6 LA 644 (1947).

43. In re Hiram Walker and Sons, Inc. and Distillery, Rectifying and Wine Workers' International Union of America, Distillery Workers' Union, Local 55 (AFL), 10 LA 675 (1948); in re McEwan Brothers and United Paperworkers of America, Local 297 (CIO), 9 LA 854 (1948); In re Paranite Wire and Cable Corp. and International Brotherhood of Electrical Workers, Local B-1112 (AFL), 9 LA 112 (1947).

44. In re Paranite Wire and Cable Corp. and International Brotherhood of Electrical Workers, Local B-1112 (AFL), 9 LA 112 (1947).

45. In re McEwan Brothers and United Paperworkers of America, Local 297 (CIO), 9 LA 854 (1948) (where employer didn't know he was discriminating until notification by the grievance committee).

46. In re Branch River Wool Combing Company and Textile Workers Union of America, Local 390 (CIO), 10 LA 237 (1948); In re Pioneer Mill Company, Limited and International Longshoremen's and Warehousemen's Union, Local 144, Unit 9 (CIO), 6 LA 644 (1947).

47. See note 8, *supra.*

48. In re Caterpillar Tractor Company and United Farm Equipment and Metal Workers of America, Local 105 (CIO), 6 LA 65 (1946); See In re Continental Can Co., Inc. and United Steelworkers of America (CIO), 6 LA 363 (1947).

49. In re The Standard Steel Works and United Steelworkers of America, Local 1964 (CIO), 6 LA 136 (1946).

porarily off duty.[50] But an employee may abstain from an act of violence while at work, and once outside the plant assault his superior. The problem of when an employer may discipline employees for a fight or altercation *outside* the plant without unduly supervising their personal lives, is one of causation. The dispute must have started during the working hours,[51] and the assault must (1) be a culmination of a virtually continuous affair which started in the plant in connection with the work,[52] or (2) have a *direct* bearing upon intra-plant relations,[53] that is, be *directly connected* with incidents which occurred inside the plant.[54]

> An employer's contractual right to discipline extends to fights outside the plant between employees and members of management if, but only if, the attack is undertaken 'to affect adversely the contractually sanctioned employee relations in the plant'.[55]

The slugging of a non-union member outside the company property was held not to warrant a discharge unless it be proved that the *purpose* of the assault was to force an employee into joining a union contrary to an "anti-coercion" clause in the contract.[56] Indulging in a private resentment outside the plant

50. In re Indiana Railroad, Division of Wesson Company and Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Local 1069 (AFL), 6 LA 789 (1947).

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

52. In re International Shoe Company and United Shoe Workers of America, Local 104-A (CIO), 7 LA 669 (1947). But see, In re Terminal Cab Company, Inc. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Taxi Cab Drivers of Trenton, N. J., Local 433 (AFL), 7 LA 780 (1947) where the arbitrator, H. Collin Minton, said the following: "[An] . . . employer is not entitled to discharge employee for threatening supervisory employee with bodily injury where the alleged threats, which were aftermath of altercation at work, were made while both parties were off duty and off company property. Fact that the employee's 'personal differences' arose out of company business is irrelevant." (Only one week lay-off was allowed as penalty for the employee's participation in the altercation at work.)

53. In re Chicago Hardware Foundry Company and United Steelworkers of America, Local 1192 (CIO), 6 LA 58 (1946).

54. In re National Lock Company and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 449 (CIO), 10 LA 15 (1948); In re Hiram Walker and Sons, Inc. and Distillery, Rectifying and Wine Workers' International Union of America, Distillery Workers Union, Local 55 (AFL), 10 LA 675 (1948).

55. In re International Harvester Company, Farmall Works and United Farm Equipment and Metal Workers of America, Local 109 (CIO), 9 LA 592 (1947).

56. In re Caterpillar Tractor Company and United Farm Equipment & Metal Workers of America, Local 105 (CIO), 6 LA 65 (1946).

so as to challenge the authority of a plant supervisor is grounds for disciplinary action short of discharge.[57]

Some arbitrators have mitigated disciplinary penalities because of civil or criminal charges brought against the employee. They have felt that the employer should have a more limited right of discipline when a participant is a defendant in a legal action. Others have upheld the employer's prerogative irrespective of penalties imposed outside the plant. The latter view was enunciated by Mr. Clark Kerr, arbitrator, in *In re Pioneer Mill Company, Ltd.*[57a]

> The arbitrator is not concerned with the appropriateness of penalties under the law, if any, but solely with the propriety of disciplinary action by the company. The question before the arbitrator is, aside from such penalties as society may see fit to assess, what additional penalties, if any, should be placed against these men by the company.[58]

Although penal or civil judgments against the erring employee, or litigation of any sort whereby the employee would stand costs of defending an action, should not finally determine penalties, most arbitrators recognize such a circumstance as limiting the employer's right upon the theory that full punishment has been rendered by the judiciary.[59]

WILLIAM R. HIRSCH

DAMAGE TO, OR LOSS OF, MACHINES AND MATERIALS

It will surprise only the uninitiated that there are little more than a score of arbitration awards dealing with damage to, or destruction of, machines or materials as a ground for discipline or discharge. The vast majority of disputes between employer and employee are "decided" at the foreman level, or in informal meetings between representatives of the workers and management. And this would seem to apply particularly to difficulties arising out of the types of wrong-doing considered in this note. Nevertheless, the cases which have arisen permit of some gen-

57. In re Verdun Mfg. Company, Inc. and Industrial Trades Union of America, Verdun Mfg. Company Local, 10 LA 637 (1947).

58. In re Pioneer Mill Company, Limited and International Longshoremen's and Warehousemen's Union, Local 144, Unit 9 (CIO), 6 LA 644 (1947).

59. In re Verdun Mfg. Company, Inc. and Industrial Trades Union of America, Verdun Mfg. Company Local, 10 LA 637 (1947).