discharge for a first offense is too severe. (2) There is a qualification that if the company proceeds properly and acts in good faith, it is wholly within its discretion to rule that gambling will not be permitted on its premises, and that discharge will be the penalty. Company rules are usually left within the discretion of the company, and if said rules are not harsh or arbitrary, the union cannot object. Thus, if there is proper publication of the rules and the penalty, arbitrators uphold the company in discharging an employee for gambling. (3) As to those in a position of responsibility with the company or the union, arbitrators charge them with notice of the rules and the penalty for violation, and uphold discharge even for the first offense.

LESLIE BRYAN

INCOMPETENCY

Incompetency is one of the most frequent encountered reasons advanced by management as "just cause" for the discharge or disciplining of an employee. Although, as a general proposition, proof of an employee's incompetency satisfies the "cause" limitation on the managerial disciplinary power, the existence of certain factors will not only affect the severity of the penalty imposed, but may even prohibit the imposition of any penalty. It is the purpose of this note to consider, first, what types of emloyee conduct amount to incompetency, and, second, what mitigating factors may operate in the employee's favor.

I. TYPES OF EMPLOYEE CONDUCT

If an employee is physically incapable for performing his assigned duties, it is obvious that some change in his status is justified. The awards indicate that discharge is justifiable only as a last resort. If continued employment in the same position would endanger the health and safety of other employees, and there is no suitable transfer available, "just cause" for discharge has been found to exist.[1] On the other hand, if there is no health hazard to other employees involved, and there are other jobs which the employee could perform, an arbitrator has held that discharge is improper.[2]

1. In re Pacific Mills and Textile Workers Union of America, Local 254 (CIO), 2 LA 326 (1945).
2. In re American Radiator and Standard Sanitary Corporation, Malle-

The technical inability of an employee to perform his assigned duties is often evidenced by negligent acts. Ordinarily, a single act of negligence is not regarded as just cause for discharge, though some disciplinary measure may be imposed. Nevertheless, even in the absence of any evidence of prior negligence, the discharge of an employee whose careless act resulted in substantial injury to the machine on which he had been working has been upheld.[3] Similarly, the discharge of an employee who fixed only part of the machinery which he was ordered to repair was sustained.[4]

That the seriousness of the incident is the key fact in this line of cases is indicated in *In re Boston & Maine Transportation Company*.[5] A truck-driver, discharged for running into a pedestrian, was ordered reinstated only after he was acquitted of a manslaughter charge. The arbitrator stated that the discharge would have been justified, even though the employee's record was free of prior negligence, had the employee been found guilty. However, the mere fact that an employee has been involved in a serious accident is not just cause for discharge if there is no causal relation between the negligence of the employee and the damage sustained. Thus, in *In re Malone and Hyde, Inc.*,[6] a truck driver who had been discharged was reinstated upon proof that brake failure was largely responsible for the serious accident in which he was involved. At least one arbitrator has used degrees of negligence as a criterion for cause for discharge where a single act is involved. If the act is only "ordinarily" negligent, discharge is unwarranted; but if the act is "grossly" or "maliciously" negligent, the discharge is said to be for "cause."[7]

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able Steel Plant and United Steelworkers of America, Local 2580 (CIO), 2 LA 245 (1946).

3. In re Tri-United Plastics Corp. and United Gas, Coke and Chemical Workers of America, Local 242 (CIO), 2 LA 398 (1946).

4. In re Auto-Lite Battery Corporation, and United Automobile, Aircraft and Agricultural Implement Workers of America (CIO), 3 LA 122 (1946). The arbitrator emphasized the carelessness demonstrated by this act, rather than the violation of rules aspect.

5. In re Boston & Maine Transportation Company and Amalgamated Association of Street, Electric Railway and Motor Coach Employees, Local 1038 (AFL), 5 LA 3 (1946).

6. In re Malone and Hyde, Inc., and Food, Tobacco, Agricultural and Allied Workers Union of America, Local 19 (CIO), 5 LA 443 (1946).

7. In re The Glenn L. Martin Company and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 738 (CIO), 6 LA 500 (1947).

An accumulation of minor incidents of carelessness, on the other hand, shows a lack of adaptability for the job in issue and thus has generally been held to constitute incompetency.[8] Such extended negligence may, in fact, demonstrate a lack of adaptability for any job.[9] Thus, a truck-driver who had an unusual number of accidents, at least part of which were attributable to his carelessness, was properly discharged.[10] As one arbitrator has said, a discharge may be upheld where the evidence indicates a "pattern of unsatisfactory work."[11] If the extended carelessness of the employee is actually dangerous, management can discharge properly even when there is a failure to follow the contract procedure for discharge.[12] A truck-driver who travels at an excessive rate of speed as a matter of habit is an example of such dangerous conduct. However, the basic inefficiency of the employee himself rather than a mere personality conflict with his immediate supervisor must be the cause of his inadequate performance.[13]

The scope given to the definition of incompetency is nowhere better illustrated than in awards which hold that a persistent refusal to follow orders is incompetency. The rationale employed by arbitrators is that such a persistent disregard of rules constitutes negligence. This is clearly indicated where the refusal to follow orders results in sub-standard work or damage to the employer's property. In *In re Micamold Radio Corp.*,[14] a condensor molder continually disregarded oral instructions to comply with the proper time cycle, used in the production of condensors. The condensors produced by him were defective, and he was

8. In re Art Chrome Company of America and United Furniture Workers of America, Local 136-B (CIO), 11 LA 932 (1948); In re Republic Oil Refining Company and Oil Workers International Union, Local 449 (CIO), 2 LA 305 (1946); In re Standard Forgings Corporation and United Steelworkers of America, Local 1720 (CIO), 6 LA 55 (1946).

9. In re C. F. Hathaway Company and Amalgamated Clothing Workers of America, Local 486 (CIO), 6 LA 216 (1947).

10. In re Schreiber Trucking Co. and Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers, Local 118 (AFL), 5 LA 430 (1946).

11. In re Bakelite Corporation and Chemical & Crafts Union, Incorporated, 1 LA 227 (1945).

12. In re Jacobs Transfer Company, Inc., and International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers, Local 639 (AFL), 2 LA 631 (1946).

13. In re Electronic Corporation of America and United Electrical, Radio and Machine Workers of America, Local 430 (CIO), 3 LA 217 (1946).

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

properly discharged. In *In re Glenn L. Martin Co.*,[15] a woman employee attempted to cover up defective work on the part of a fellow-employee. This was a clear violation of an established plant rule. As a result of her conduct, a valuable machine was extensively damaged. The arbitrator adjudged her to be incompetent and sustained her discharge by the company. Thus, it appears that regardless of the terminology employed by the arbitrator to describe the misconduct, a persistent refusal to follow orders resulting in poor work or material damage to property is "just cause" for discharge. The rule seems to have been unduly extended in *In re U. S. Cartridge Co.*,[16] where a steadfast refusal to submit to a medical examination was held to amount to incompetency even though there was no showing that the employee's work was not up to standard nor that any property damage resulted.

Another, and perhaps the most frequently found basis for a finding of incompetency, is a failure to maintain an adequate production rate. Every employee must, of necessity, produce at a rate approximately equal to that of other workers on similar jobs. A failure to do so indicates incompetency and will warrant some form of discipline. Thus, in *In re Universal Tool Corp.*,[17] an employee who took an average of 160 hours to turn out work that normally required 100 hours was properly discharged. Similarly, the discharge of a milk route salesman was sustained on a showing that his sales were falling off at the same time that other salesmen with comparable territories were either maintaining their sales level or improving it.[18] It is not necessary for the employee's inefficiency to have already reached substantial proportions, if it is clear that it soon must do so because of the increasing difficulty of the work, [19] even when no trial

15. In re The Glenn L. Martin Company and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 738, 6 LA 500 (1947).

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

17. In re Universal Tool Co. and United Automobile Workers of America, Local 785 (CIO), 4 LA 731 (1946); In re Timm Industries, Inc. and International Association of Machinists, Lodge 758, 11 LA 308 (1948).

18. In re O'Dowd's Dairy and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Milk Drivers and Dairy Employees Union, Local 680 (AFL), 3 LA 344 (1946).

19. In re Gray Advertising Agency, Inc., and United Office and Professional Workers of America, Local 20 (CIO), 7 LA 107 (1947).

period is provided by the contract.[20] Additional relevant factors in all these cases are the necessity of constant supervision and a failure to improve after a warning and an adequate opportunity to do so have been provided.[21]

The relative importance of the employee's job in the scheme of plant organization is a significant factor in determining his incompetency for failing to maintain an adequate rate of production. Thus, if substandard production on a particular job would seriously curtail total plant output, an admittedly inefficient employee may be properly discharged even though it is shown that other equally incompetent employees were retained.[22] The arbitrator felt that it would be unjust to condition the right to discharge on the ground that the one so discharged must be the most incompetent of the group.

The union may undertake certain obligations in the collective bargaining contract which bear on the power of management to discharge or discipline for incompetency. A typical provision is a union pledge to support a company program of maximum production. In *In re Pressed Steel Car Co.*,[23] an employee's work was unsatisfactory and his output light compared to that of other employees with similar opportunities. Another employee who had started with the discharged employee outproduced him to a marked degree in a short period of time. Aided by this definite standard of comparison, the arbitrator held that to force the company to continue the worker's employment would violate the union's contractual pledge.

The company-union relationship may assume significance in still another way. Some employees are also union officials. Arbitrators have reached diametrically opposite conclusions as to the precise effect of that fact. In *In re Michigan Contracting Corp.*,[24] the arbitrator upheld the discharge of a union steward with a poor production record, on the basis that he, as a union

20. *Ibid.*

21. In re Kaiser Company, Inc. and United Steelworkers of America (CIO), 1 ALAA ¶67,467 (1946).

22. In re Kaiser Company, Inc., Lyon & Steel Division and United Steel Workers of America (CIO), 4 LA 346 (1946).

23. In re Pressed Steel Car Co., Inc., and United Steelworkers of America, Local 1844 (CIO), 2 LA 332 (1946).

24. In re Michigan Contracting Corp. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 247 (AFL), 2 LA 630 (1946).

representative, should assume added responsibility for the maintenance of production. On the other hand, *In re Nathan Manufacturing Co.*,[25] the arbitrator, although upholding the discharge of a union steward whose production record was 50 per cent below standard, said that a union steward should be discharged only for "very good cause."

II. Mitigating Factors

Up to this point we have been primarily concerned with the types of conduct to which the label of incompetency has been appended by arbitrators. A survey of the awards reveals conclusively that even though factual incompetency may be established, certain mitigating factors operate in the employee's favor to limit or prohibit an otherwise justifiable discharge.

When a worker has been employed for a considerable length of time, it is clear that a discharge for incompetency will be very difficult to sustain, primarily because it will be harder to prove the charge. Where the element of physical incompetency is present, a ruling that an employee with a long service record should be reinstated and transferred to another job, commensurate with his ability and seniority, and where his health would not be jeopardized, is proper.[26] In a case where an employee with seventeen years seniority was promoted to department manager and there found incompetent, the arbitrator ordered him reinstated and ruled that he must be given at least a six-months' trial in another department of another store.[27] In a similar case, a worker with ten years service was promoted to a higher-rated job, found inefficient, and discharged. He was ordered reinstated, the arbitrator suggesting that demotion to his old job rather than discharge was the proper disciplinary action "in view of his long service."[28]

A case of extreme abuse of discretion on the part of manage-

25. In re Nathan Manufacturing Company and International Association of Machinists, District #15, Local Lodge #402, 7 LA 3 (1947).

26. In re American Radiator and Standard Sanitary Corp. and United Steelworkers of America, Local 2580 (CIO), 2 LA 245 (1946).

27. In re Safeway Stores, Inc. and Amalgamated Meat Cutters and Butcher Workmen of North America, Local 302 (AFL), 4 LA 125 (1946).

28. In re Jarecki Machine & Tool Company and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Local 944 (CIO), 3 LA 41 (1946).

ment is *In re January & Wood Co.*,[29] in which two elderly women were discharged after 24 and 27 years of service. Instead of conceding their inefficiency, the arbitrator reasoned that "considering their advanced age, they were not inefficient." He might have ruled, with equal justification, that, while the women were inefficient, they could not be discharged because of their long service. When the same result is reached on the basis of different reasoning, it is immaterial whether the arbitrator chooses to consider the seniority as a mitigating factor, or as a matter going to the proof of incompetency. In a number of other awards,[30] the length of service of the employee was a factor considered in ordering reinstatement, although there were other grounds as well. For example, in *In re Sperry Gyroscope Co.*,[31] the arbitrator flatly declared that "the employee's long and previously excellent work record cannot be ignored."

Many awards have ordered reinstatement when the employee was discharged without any hint or forewarning that his work was unsatisfactory—the so-called "sudden-death" discharge. Where the basis of the discharge is a series of incidents such as negligent acts, prior warning or complaint is a condition precedent to the right to discharge for incompetency.[32] Thus, in one case a discharge "for failure to meet production standards" was held improper where the standards were not known by, nor explained to, the worker.[33] However, the failure to notify the employee has been overlooked where the union was notified and acquiesced in the lack of warning to the employee.[34] Even where

29. In re The January & Wood Company and Textile Workers Union of America (CIO), 6 LA 7 (1946).

30. In re Nineteen Hundred Corporation and United Electrical, Radio and Machine Workers of America, Local 931 (CIO), 6 LA 709 (1946); In re Curtiss-Wright Corporation and United Automobile, Aircraft & Agricultural Implement Workers of America, Local 927 (CIO), 11 LA 139 (1948); In re Sperry Gyroscope Co., Inc. and United Electrical Radio and Machine Workers of America, Local 450 (CIO), 11 LA 553 (1948).

31. In re Sperry Gyroscope Co., Inc. and United Electrical Radio and Machine Workers of America, Local 450 (CIO), 11 LA 553 (1948).

32. In re International Association of Machinists, Aeronautical Industrial District Lodge #727 and Office Employees International Union, Local 30 (AFL), 7 LA 231 (1947).

33. In re L. F. Faler Machine Company and United Steelworkers of America, Local 3722 (CIO), 7 LA 935 (1947).

34. In re Shwayder Brothers, Inc. and International Fur and Leather Workers Union, Local 96 (CIO), 7 LA 552 (1947).

gross incompetence is clearly proved, if there is lack of supervision or notice, the discharge is improper.[35]

Apparently there is no set or clearly defined standard as to the type of notice which must be given. Oral warnings seem to be enough,[36] and the failure to protest warning notices through the grievance procedure is tantamount to admitting the justification for them.[37] Several other cases have given a failure to warn or give notice as one of a number of reasons for ordering reinstatement.[38]

Closely related factors are the successful completion of a trial period and periodic wage increases. These factors, of course, tend to rebut evidence of incompetency, and in many cases where there seems to be clear evidence of inefficiency, the arbitrators order reinstatement with a recommendation to demotion if such factors are present. *In re Bastian-Morley Co., Inc.*,[39] clearly points this up. There the worker had successfully completed his trial period and had been granted two wage increases. Suddenly, the company charged him with inefficiency and discharged him. The arbitrator ordered reinstatement, saying that demotion, rather than discharge, was the proper remedy under the circumstances. In another case the contract provided for a six-months' trial period which had been completed by the employee. A discharge on the ground that the employee's "initial qualifications were lacking" was held to be improper,[40] the arbitrator stating that "survival of the trial period must be accepted as proof of his initial qualification." In a similar case,[41] a discharged carpenter who had survived the trial period was ordered reinstated, the conclusion being that he was no more incompetent then than he was at the end of his trial period. Therefore, he was still

35. In re Art Chrome Co. of America and United Furniture Workers of America, Local 136-B (CIO), 11 LA 932 (1948).

36. In re The Glenn L. Martin Company and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 738 (CIO), 6 LA 500 (1947).

37. In re Timm Industries, Inc. and International Association of Machinists, Lodge 758, 11 LA 308 (1948).

38. In re Die Tool and Engineering Company and Int'l. Union United Automobile, Aircraft and Agricultural Implement Workers of America, Local 155, 1 ALAA ¶67,313 (1946).

39. In re Bastian-Morley Company, Inc. and United Farm Equipment and Metal Workers of America, Local 173 (CIO), 3 LA 412 (1946).

40. In re Neches Britane Products Company and Oil Workers International Union, Local 22-S (CIO), 5 LA 307 (1946).

41. In re The Master Electric Company and United Electrical, Radio and Machine Workers of America, Local 754 (CIO), 5 LA 339 (1946).

qualified for the job that he held at the end of the trial period, even though he might not be able to handle the job which he held at the time of discharge, and so the proper disciplinary action was demotion. In a case where no trial period was provided for in the contract, but where numerous wage increases had been granted, failure to meet production standards was held not to be sufficient to warrant discharge.[42] It should be noted that the union agreed to relieve the employee of his union duties which were materially contributing to his inefficiency, and the arbitrator felt that the wage increases showed that the man was capable of doing his job if relieved of this additional burden.

If the case is a close one, a factor which may weigh heavily against the sustaining of a discharge on grounds of incompetency is an extended anti-union record on the part of the company. Thus, in one case where the arbitrator held that there was sufficient evidence of incompetency to warrant discharge, he nevertheless said that,

> Where there is substantial evidence justifying a conclusion that the employer is opposed to unions, or has shown a previous hostility to them, then the burden of showing incompetence would be on the employer to a greater degree than in the absence of such a showing.[43]

Similar language is found in other awards,[44] but if a gross enough case of incompetency is established, the anti-union record of the company would be of little consequence.

Except in extraordinary cases, the discharge of an employee for clear incompetency will be set aside if the employer fails to follow the contract procedure for discharge. If, however, the incompetency of the employee is so extreme as to endanger the safety of his fellow-employees or even of strangers, partial back pay rather than reinstatement will be ordered even though the correct procedure has not been followed.[45] Where a lesser penalty than discharge has been agreed upon by the union and the company, such an understanding may not be disregarded; and an employee who has been discharged under such circumstances will

42. In re Sherron Metallic Corp. and Int'l. Associations of Machinists, Local Lodge 295, District 15, 1 ALAA ¶67,314 (1946).
43. In re Grayson Heat Control Ltd. and United Electrical, Radio and Machine Workers of America, Local 1006 (CIO), 2 LA 335 (1945).
44. In re Universal Tool Company and United Automobile Workers of America, Local 785 (CIO), 4 LA 731 (1946).
45. In re Schreiber Trucking Co. and Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers, Local 118 (AFL), 5 LA 430 (1946).

be ordered reinstated.[46] Similarly, where the contract provided that the union must be notified of reasons for the employee's discharge, a discharge was voided because the company failed to give such notification—failure to abide by important details of the discharge procedure bars an otherwise justified discharge.[47] The same rule applies where the contract provides for notice to the employee rather than the union.[48] In the above situations, reinstatement with full back pay was ordered. However, it seems that there is nothing to prevent the employer from accepting the award, reinstating the employee, then going through the correct procedure and redischarging the employee.

Discharge, of course, is regarded as the maximum penalty, and if the particular defect can be cured by transfer to another job, transfer and not discharge is the proper remedy. In a case where the employee was capable of handling a lower-rated job, but not capable of handling a higher-rated one, he was reinstated to the lower-rated one.[49] It is significant that there was present in the case the factor of anti-union discrimination. Occasionally, an active union member may be promoted so fast that he cannot adjust himself to his new position. Such a type of anti-union activity can be effectively stopped by ordering a demotion rather than allowing the company to discharge for incompetency.

There are some situations where the inefficiency of the employer is a factor contributing to the inefficiency of the employee. In such cases discharge will not be permitted. For example, an employee was fired for lack of effort. When the evidence disclosed that his poor production record was due in part to the lack of truck and crane facilities, he was ordered reinstated.[50] It is equally clear that where inefficiency is partly due to inade-

46. In re Capco Steel & Engineering Company and United Steelworkers of America, Local 2652 (CIO), 11 LA 414 (1948).

47. In re Die Tool and Engineering Company and Int'l. Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Local 155, 1 ALAA ¶67,313 (1946).

48. In re Art Chrome Co. of America and United Furniture Workers of America, Local 136-B (CIO), 11 LA 932 (1948).

49. In re Kansas Motors and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Local 710 (CIO), 2 LA 283 (1945).

50. In re Alan Wood Steel Co. and United Steelworkers of America, Local 1392 (CIO), 4 LA 52 (1946); and see, In re Alabama Freight Lines and Int'l. Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Transport and Local Delivery Drivers, Warehousemen and Helpers, Local 104 (AFL), 6 LA 754 (1947).

quate supervision or training, a discharge for incompetency is not justified.[51] If an employee is promoted too fast for his own ability the resulting incompetency is chargeable in part to the company and discharge is unwarranted.[52] The same rule applies where there has been a transfer to a job for which the worker is not qualified.[53]

III. Conclusion

We may conclude that an incompetent employee may be discharged where there are no mitigating circumstances. Incompetency is generally made out if the employee is physically incompetent, if he is careless over a period of time, if he has committed any single act which could be characterized as grossly negligent and where extensive damage to the employer's property results, if he refuses to follow orders or rules, or if he is a slow worker unable to keep up with the production rate set by other workers, similarly trained and equipped.

The factors of length of service, the successful completion of a trial period, periodic wage increases, an anti-union record on the part of the employer will all mitigate against the discharge of an otherwise incompetent worker. Furthermore, if the company fails to give prior notice or warning to the employee, or fails to abide by the discharge procedure set out in the contract, or if the company itself, through its own fault, contributes to the inefficiency of the employee, the employee will ordinarily be ordered reinstated.

H. Jackson Daniel

51. In re Jarecki Machine & Tool Co. and Int'l. Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Local 944 (CIO), 3 LA 40 (1946); In re McDonnell Aircraft Corp. and Int'l. Association of Machinists, District 9, 3 LA 158 (1946); In re Uptown Dental Laboratories and United Office and Professional Workers of America, Dental Technician Equity, Local 201 (CIO), 6 LA 950 (1947); In re Art Chrome Co. of America and United Furniture Workers of America, Local 136-B (CIO), 11 LA 932 (1948).

52. In re The Federal Machine and Welder Co. and United Electrical, Radio and Machine Workers of America, Local 730 (CIO), 5 LA 60 (1946); In re Acme Limestone Co. and United Mine Workers of America, District 50, Local 12424 (AFL), 6 LA 921 (1947).

53. In re Curtiss-Wright Corp. and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 927 (CIO), 11 LA 139 (1948).