

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

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

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## GAMBLING

### I. GENERAL

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

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

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

management prerogative. In the early stages of organized labor relations, summary discharge for any reason was typically within the discretion of the employer. Now that union contracts and governmental agencies set broad limits within which management must operate, as a general rule discharge for gambling is deemed too severe a penalty, especially when the offense is the first one, or when there has been no prior, express warning to the employee concerned. In the great majority of cases where the company has summarily discharged an employee for gambling, the arbitrator has ordered his reinstatement without back pay, but with no loss of seniority as a result of the discharge.<sup>1</sup>

## II. TYPE OF GAMBLING

The extent to which effective operation and the maintenance of order in the plant is affected varies with the kind of gambling involved. Impromptu participation in such games as dice, poker, or various "pots" will not curtail effective plant operation as much as a more elaborate activity, as bookmaking or the operation of a policy game. Of the cases reviewed, not one sanctioned discharge of an employee for participation in common dice or poker games. While it was recognized that this activity is conducive to fighting and disorder and should not be condoned,<sup>2</sup> discharge was considered too drastic except perhaps for chronic offenders. The penalty for these offenses ranged from reprimand<sup>3</sup> to a three months suspension.<sup>4</sup>

Bookmaking and policy writing, on the other hand, involve deliberate and continued activity and therefore exhaust the mind and the time of the offender, as well as that of his fellow em-

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1. In re Goodyear Tire and Rubber Company and United Rubber Workers of America, Local 12 (CIO), 1 LA 329 (1945); In re Galvine Cotton Mills, Inc. and Textile Workers Union of America, Local 677 (CIO), 12 LA 21 (1949); In re Borg-Warner Corporation, Mechanics Universal Joint Division and Agricultural Implement Workers of America, Local 225 (CIO), 3 LA 423 (1944); In re United States Spring and Bumper Company and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 509 (CIO), 5 LA 109 (1946); In re Atlantic Company and United Retail, Wholesale and Department Store Employees of America (CIO), 79 NLRB No. 106, 22 LRRM 1453-55 (1948).

2. In re Goodyear Tire and Rubber Company and United Rubber Workers of America, Local 12 (CIO), 1 LA 329 (1945).

3. In re United States Spring and Bumper Company and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 509 (CIO), 5 LA 109 (1946).

4. In re Galvine Cotton Mills, Inc. and Textile Workers Union of America, Local 677 (CIO), 12 LA 21 (1949).

ployees to whom the bets are sold. In every case reviewed, discharge was upheld where this variety of gambling was involved.<sup>5</sup> Only doubtful predictions can be predicated on these cases, however, since other factors were often present, e. g., the relative responsibility of the position held by the employee, either with the union or the company.

### III. TYPE EMPLOYEE INVOLVED

Lower organizational efficiency and discipline among all the employees will naturally result from gambling by those employees who have positions of responsibility with either the company or the union. The responsibility of the employee's position is undoubtedly a major factor in the arbitrator's decision to uphold a discharge for gambling. In every case where discharge was upheld for gambling, it is interesting to note that the employee occupied such a position.<sup>6</sup> Although the union contended that the cause of discharge was that the offender was a union official, and not merely that he was caught gambling, the arbitrator found, in each case, that the discharge was not discriminatory. In one of the cases (Ford Motor Company, *supra*), the offender did not even belong to the union, but was a foreman of the plant. This adds weight to the principle that the discharge will be upheld where the employee has a responsible position in relation to the other employees. To condone or permit gambling among foremen and union officials would lead to a general deterioration of morale and discipline among the employees, and the arbitrators are acting wisely by upholding discharge in such cases though they do not uphold the discharge of an ordinary employee for the same offense.

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5. In re Bethlehem Steel Company (Sparrow Point Plant) and United Steelworkers of America, District 8, 1 ALAA ¶67511 (1946); In re Ford Motor Company and International Union, United Automobile Workers of America, Local 425 (CIO), 23 NLRB No. 46, 6 LRRM 323-326 (1940); In re Cleveland Graphite Bronze Company and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (CIO) and Mechanics Educational Society of America, Local 5, 75 NLRB No. 61, 21 LRRM 1049-50 (1947).

6. In re Bethlehem Steel Company (Sparrow Point Plant) and United Steelworkers of America, District 8, 1 ALAA ¶67511 (1946); In re Ford Motor Company and International Union, United Automobile Workers of America, Local 425 (CIO), 23 NLRB No. 46, 6 LRRM 323-326 (1940); In re Cleveland Graphite Bronze Company and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (CIO) and Mechanics Educational Society of America, Local 5, 75 NLRB No. 61, 21 LRRM 1049-50 (1947).

#### IV. PRIOR PERSONAL WARNING OR PRIOR OFFENSE

In most of the cases the offense was the first for the particular offender; hence no general rule for a second or third offense can be stated. There are dicta in many of the cases, however, that discharge would be a proper penalty.<sup>7</sup> Some say that the employee may be discharged if he has received a prior, personal warning of the penalty for gambling. In one case, the employee was summarily discharged for his first offense where he had a prior, personal warning not to make book on company property, and the discharge was upheld by the arbitrator.<sup>8</sup> In another award, however, the arbitrator refused to uphold the discharge of an employee who had been caught shooting dice a second time.<sup>9</sup> These two cases appear to have turned on the kind of gambling involved, rather than the repetition of the offense.

#### V. PUBLICITY OF THE RULES AGAINST GAMBLING

All the cases require wide publication of any prohibitive rules, together with the penalty for their violation. In many instances no specific rules had been drawn up or, if drawn up, had not been effectively distributed, to insure reaching all the employees. Ignorance of the law excuses the employee in this case and the arbitrator will not usually heed the company's contention that there are "unwritten" rules against gambling which govern the conduct of society in general.<sup>10</sup> Nor does it appear that mere posting of the rules on the company bulletin board or the inclusion of them in a company rules book, circulated to the employees, is sufficient publication. Something approaching an express, personal warning to the employee is generally required before discharge by the company will be sanctioned by the arbitrator.<sup>11</sup> Not only must the rules be brought to the attention

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7. In re Borg-Warner Corporation, Mechanics Universal Joint Division and Agricultural Implement Workers of America, Local 225 (CIO), 3 LA 423 (1944); In re Chadwick-Hoskins Company and Textile Workers Union, Local 676 (CIO), 1 ALAA ¶67497 (1945).

8. In re Bethlehem Steel Company (Sparrow Point Plant) and United Steelworkers of America, District 8, 1 ALAA ¶67511 (1946).

9. In re Atlantic Company and United Retail, Wholesale and Department Store Employees of America (CIO), 79 NLRB No. 106, 22 LRRM 1453-55 (1948).

10. In re Chadwick-Hoskins Company and Textile Workers Union, Local 676 (CIO), 1 ALAA ¶67497 (1945).

11. In re Borg-Warner Corporation, Mechanics Universal Joint Division and Agricultural Implement Workers of America, Local 225 (CIO), 3 LA

of the employee, but he must be informed of the penalty for violation. The arbitrators feel that a good employee is likely to heed a properly publicized warning if he knows the penalty for ignoring it will be discharge. When the company has thus brought its rules to the attention of the employees and has stated the attendant penalties in unmistakable terms, discharge may be upheld regardless of the type of gambling.

## VI. COMPANY LACHES IN ENFORCEMENT OF RULES

Most of the awards place great emphasis on the company's refusal or neglect to enforce properly the rules after they have been established and publicized. Because of the toleration of other forms of gambling, the employees are deemed to have been misled into the mistaken belief that the company condones such practices, or if apprehended, that only reprimand or some equally light penalty will result.<sup>12</sup> Wide prevalence of gambling of various types and acquiescence by the company may easily lead the employee to assume the offense is not as serious as the company represents it. Another reason for the reluctance of the arbitrators to uphold the discharge of one of many employees who gamble, is that it smacks of discrimination.<sup>13</sup> The arbitrator suspects when one employee is singled out and discharged for gambling, when gambling is common among all employees, that there must be some other motive for the discharge of the employee. This suspicion is given added weight when the discharged employee happens to be an active union member, or when he has had a personality clash with the foreman.<sup>14</sup>

## VII. SUMMARY

With the above discussion in mind it is possible to state a few general conclusions on discharge for gambling. (1) Where an ordinary employee gambles, arbitrators are inclined to rule that

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423 (1944); In re United States Spring and Bumper Company and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 509 (CIO), 5 LA 109 (1946).

12. In re Borg-Warner Corporation, Mechanics Universal Joint Division and Agricultural Implement Workers of America, Local 225 (CIO), 3 LA 423 (1944).

13. In re Chadwick-Hoskins Company and Textile Workers Union, Local 676 (CIO), 1 ALAA ¶67497 (1945).

14. In re Bethlehem Steel Company, Shipbuilding Division and Industrial Union Marine and Shipbuilding Workers, Local 25, 2 ALAA ¶67666 (1947).

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.

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## 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 employee 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.<sup>1</sup> 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.<sup>2</sup>

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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-