

ployee is placed in a very precarious situation: if he follows the union's orders, he risks discharge by the company; if he follows the company's orders, he risks being expelled from the union, or losing his position as shop steward. The arbitrators have not dealt satisfactorily with this problem. Usually some penalty is imposed upon the worker, thus making him a martyr.⁷¹ For this, the arbitrator cannot be blamed entirely, for the fault lies in the want of power to reach the union and the union officials.

In some cases, the worker is either entirely blameless, meriting no penalty whatsoever, or his conduct does not warrant as severe a penalty as the arbitrator has imposed. Still arbitrators have imposed penalties on management's claim that to impose no penalty would destroy plant discipline;⁷² or the arbitrators, interested in encouraging resort to the grievance machinery, make awards that will act as deterrents to other employees who consider "self-help."⁷³ Such "scape-goat" awards do not seem proper.

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LOAFING AND LEAVING POST

Loafing and leaving post, as conducts subject to discipline, are very closely related and often hard to distinguish. An employee may loaf, or he may leave his post, or he may leave his post for the purpose of loafing. However, with knowledge that the problem of distinguishing them exists, for the purposes of this article an arbitrary distinction will be made. That conduct which takes an employee away from his regular place of work will be designated leaving post, while that which occurs on his post will be designated loafing.

I. LOAFING

Loafing, which Webster defines as "to spend time in idleness; to lounge or loiter about or along," is a rather abstract concept, and therefore difficult to handle. As loafing is to a great extent

71. In re Rhode Island Tool Company and United Steelworkers of America, Local 1530 (CIO), 7 LA 113 (1946); In re Franklin Tanning Company and International Fur and Leather Workers Union, Local 31 (CIO), 9 LA 167 (1947).

72. In re Dairymen's League Cooperative Association, Inc. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 584 (AFL), 11 LA 1113 (1948).

73. In re Continental Can Company, Inc. and United Steelworkers of America (CIO), 6 LA 363 (1947).

a mental state, it is very hard to determine definitely whether a man is loafing just by looking at him. Moreover, the mere fact that an employee is slow in out-put is not conclusive evidence that he has been loafing, and he should not be disciplined on that ground alone.¹ Low out-put is often an indication of loafing; and, if there is further evidence, discipline may be imposed.

One of the reasons why this problem is difficult is that an employee may be doing absolutely nothing and still there will be no grounds for disciplining him on the ground that he is loafing. There are some jobs where the work comes in cycles, and between cycles there is no duty to be doing anything. Examples of this are service jobs such as welding and jobs such as driving a jitney.² In these cases, the testimony of a foreman, or other plant official, that the employee was observed to have been idle is not conclusive evidence of loafing; and, in the absence of further pertinent evidence, will not justify discipline. Conversely, an employee may be very busy, and still be loafing when his conduct is considered from the company's viewpoint. A man who is using the company's records on company time to draw up certain charts for his personal use is definitely loafing.³

Perhaps the most serious loafing offense, and one for which many contracts provide discharge even on the first offense, is sleeping on the job.⁴ Should the arbitrator be satisfied with the evidence, he will usually sustain any disciplinary action which has been taken. There is involved, however, a very difficult problem of evidence. It is practically impossible to tell by looking, whether a man is asleep, or merely resting with his eyes

1. In re Bryant Heater Company and International Union, United Automobile, Aircraft & Agricultural Implement Workers, Local 337 (CIO), 3 LA 346 (1946); In re Alan Wood Steel Company and United Steelworkers of America, Local 1392 (CIO), 4 LA 52 (1946).

2. In re Chrysler Corporation, Marysville Plant and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 375 (CIO), 10 LA 110 (1948).

3. In re Title Guarantee and Trust Company of New York and United Office and Professional Workers of America, Financial Employees Guild, Local 96 (CIO), 5 LA 240 (1946).

4. In re Louis Marx and Company and Playthings, Jewelry and Novelty Worker's International Union, Local 149 (CIO), 3 LA 787 (1946); In re Keystone Asphalt Products Company (division of American Marietta Company) and United Mine Workers of America, District 50, Local 12405 (AFL), 3 LA 789 (1946); In re Consolidated Vultee Aircraft Corporation, Ft. Worth Division and International Association of Machinists, Aeronautical Industrial District Lodge 776, 10 LA 844 (1948).

shut, so the misconduct must often be dealt with as mere loafing.⁵

An intentional slowdown or interference with the production schedule is also a serious offense, which, if it is proved to the arbitrator's satisfaction, will generally lead to disciplinary layoff or even discharge. These offenses occur frequently where there has been a recent change in the production schedule. In one case,⁶ where the time allotted for a job had been 30 minutes and was reduced to 15 after the operation had been retimed, the arbitrator found that the men had been discharged for just cause when they finished the work in 15 minutes and then rested 15 before starting on the next piece. But where employees were suspended for interfering with the production schedule, and the arbitrator found the employer had a misconception of the factors which were delaying the unit, he ordered the men reinstated.⁷

Generally speaking, systems which attempt to keep every man at work all the time, in accordance with the "day's work for a day's pay" doctrine have proved impractical and unenforceable. Vultee Aircraft Corporation instituted a very comprehensive plan of this type. It provided that when a break occurs in the task immediately at hand, the employee should (1) report any delays to the superintendent, (2) obtain blue-prints to either study the job at hand, or the next assignment, (3) check over previous work for errors and bad rivets, etc., (4) be sure that all necessary equipment is ready for the present assignment, (5) tidy up work area by removing surplus parts and scraps and, (6) "Never loaf or sit idle—because there is always work to be done." Speaking of a violation of these rules, one arbitrator said,

It seems that in a plant of this size there would always be work to be performed and that every employee might keep himself occupied at all times, but on the other hand, where there is no fault to be found with his performance of the immediate job at hand, it would be a harsh rule to say that one should be discharged for momentary idleness.⁸

5. *Ibid.*

6. In re Fruehauf Trailer Company and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 99 (CIO), 4 LA 399 (1946).

7. In re Aluminum Cooking Utensil Company and United Steelworkers of America, Local 302 (CIO), 5 LA 85 (1946).

8. In re Consolidated Vultee Aircraft Corporation, Fort Worth Division and International Association of Machinists, Aeronautical Industrial District Lodge 776, 9 LA 552 (1948).

II. LEAVING POST

This class of misconduct occurs when the employee leaves his work place in violation of a company rule. The walkout, most serious of these offenses, occurs when an employee leaves the plant rather than perform an assigned task. The walkout may result from the employee's being ordered to do something not within the usual scope of his duties,⁹ or from a change in working conditions in his regular work.¹⁰ In these cases, the arbitrator must look to the assignment or change to determine if it is reasonable. If it is, the employee's refusal to comply will be just cause for some discipline.

A less serious offense is quitting early or leaving the job before the end of the shift.¹¹ This is often a difficult problem, as it generally results from lax enforcement on the company's part. It is generally not grounds for discipline for the first offense. A similar problem arises where an employee who wishes to leave the plant early applies to his foreman for permission. If the request is refused and the employee leaves without permission, the arbitrator must, on appeal, determine whether or not the refusal was unreasonable in the light of the reason for the request.¹² If the arbitrator finds that the refusal was not unreasonable, he will affirm the discipline. That is a chance the employee takes when he disobeys his superiors.

Perhaps the most common "leaving post" offense is the taking of rest periods of more than the prescribed number or duration.¹³ This offense more than any other indicates a definite disregard and disrespect for the management's rules. While each offense is perhaps minor and insignificant in itself, there is a great cumulative, and progressively bad, effect on production and

9. In re Sivyer Steel Casting Company and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 800 (CIO), 1 LA 485 (1945).

10. In re Briskin Manufacturing Company and United Automobile Workers of America, Amalgamated Local 286 (AFL), 6 LA 9 (1946).

11. In re John Deere Tractor Company and United Automobile, Aircraft and Agricultural Workers of America, Local 838 (CIO), 4 LA 161 (1946); In re Adler Manufacturing Company and United Brotherhood of Carpenters and Joiners, Local 3160 (AFL), 4 LA 700 (1946).

12. *Ibid.*; In re Ford Motor Company and United Automobile, Aircraft and Agricultural Implement Workers of America (CIO), 8 LA 1023 (1947).

13. In re Sivyer Steel Casting Company and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 800 (CIO), 1 LA 485 (1945); In re Boston Sausage and Provision Company and United Packing House Workers of America, Local 11 (CIO), 2 LA 128 (1946).

morale. It is in this situation that the early imposition of mild discipline could obtain the desired result, and the arbitrator would do well to impose progressively more severe discipline even though the contract does not require him to do so.

III. UNION ACTIVITIES

Where the offenses of loafing or leaving post occur in connection with union activities, there arises a somewhat different problem, which should be treated separately. Contracts generally provide for pre-arbitration grievance procedure, often for a meeting of a committee of the workers and of the management in an attempt to arrive at an acceptable compromise. Where that procedure is abandoned and an unofficial group of employees attempts to take things into its own hand and calls *en masse* on its foreman, or other official, during working hours,¹⁴ there is usually just cause for minor disciplinary action taken against the employees as a group. However, it should be noted that an arbitrator should not sustain the company's disciplinary action where it has taken one employee from such a group and discharged him as an example to the rest of the employees.¹⁵ Generally speaking, an arbitrator will never uphold such an action in the absence of conclusive evidence that the conduct of the employee was deserving of the discipline.

A still more difficult problem is that of disciplining the shop steward. A vigorous protest is raised every time the problem arises, the union claiming the steward was discharged for union activities and the company saying that if the employee were not a steward, they would have disciplined him much sooner.¹⁶ The arbitrator, therefore, must look strictly to the merits of the case, keeping in mind that by the terms of the contract the steward must be allowed a certain amount of time to attend to union affairs. But if the steward is found to have abused his privileges, the arbitrator should award discipline.

14. In re Republic Steel Corporation and United Steelworkers of America, Local 2176 (CIO), 6 LA 85 (1947).

15. In re Pacific Mills and Textile Workers Union of America, Local 254 (CIO), 2 LA 545 (1946); In re Argonne Worsted Company and Industrial Trades Union of America, 4 LA 81 (1946).

16. In re Columbian Rope Company and United Farm Equipment and Metal Workers, Local 184 (CIO), 3 LA 90 (1946).

IV. MITIGATING FACTORS

When the arbitrator is presented with a dispute, there is a certain procedure which he should follow in these cases. *First*, he should review the evidence to determine whether or not the employee did in fact do what is charged against him. If the company disciplined him for being away from his job from 9:00 a. m. to 10:00 a. m. on the morning of June 1, 1949, the arbitrator must make a finding of fact as to whether or not the employee was actually gone during that time.

Second, he must decide if discipline was justified. There may be some valid excuse for the employee's conduct. Valid mistake on the employee's part as to what job has actually been assigned, will very often serve to excuse the employee for what would otherwise be just cause for discipline.¹⁷ Waiting for materials or tools or an assistant may be valid excuses for what would otherwise be loafing. A valid mistake as to the enforcement of a company rule will sometimes serve to excuse an offense.¹⁸ Something analogous to the estoppel doctrine is applied here. The company may have all sorts of rules "on the books," but if they are not enforced during a long period of time, the employee may be acting reasonably in assuming them no longer to be in existence, and the company will be denied the privilege of enforcing them.

Though some discipline is justified, the arbitrator may feel that the action taken was too severe because of some "fault" on the company's part. One arbitrator has stated that:

When an employee alleges that he was discharged or penalized without good cause, he places at issue not only his own conduct, but that of the employer, as well. Present in every such case is the question of whether or not the employer was properly exercising his disciplinary functions under the agreement. The Umpire must ask not only, "What did Employee do?" but also, such questions as "What did Management do to warn and correct him? Did Management treat other employees, similarly situated, in the same way? In the last analysis and under all the circumstances, was Management fair?" These inquiries have constantly been pursued by the Umpire in discipline cases. Only when they

17. In re The Mosaic Tile Company and Federation of Glass, Ceramic and Silica Sand Workers of America, Local 79 (CIO), 9 LA 625 (1948).

18. In re John Deere Tractor Company and United Automobile, Aircraft and Agricultural Workers of America, Local 838 (CIO), 4 LA 161 (1946).

were answered has the Umpire been able to decide whether the Management's exercise of its right to discipline for cause was proper and should be upheld.¹⁹

This is somewhat analogous to the comparative negligence doctrine in Tort law. If the action taken by the employee was instigated by some "fault" on the part of the management, the arbitrator will often reduce the punishment, stating that the employee was deserving of some punishment, but not as much as the company gave.²⁰ Likewise, the company may be at "fault" in not following the grievance procedure,²¹ or the provision calling for progressive disciplinary steps.²²

Third, even if the arbitrator has decided that the employee is deserving of a penalty, and the company has not been at fault, there may be other factors to consider in deciding what discipline should be awarded. Length of service is often one of the most important of these factors. In one case, an employee of nine years conscientious service was found asleep on the job. The contract provided for discharge for the first offense. The arbitrator held that although seniority and a good record did not give an employee extra privileges, it should entitle the employee to "consideration" in the case of a violation.²³ A consistently good attitude will be considered in deciding whether to uphold a harsh disciplinary measure.²⁴ Likewise, arbitrators will also take into consideration such things as the employee's state of health,²⁵ his war service record and readjustment problem,²⁶ and many other things.

19. In re Valley Dolomite Corporation and International Union of Mine, Mill and Smelter Workers, Local 618 (CIO), 11 LA 98, 99 (1948), quoting the permanent umpire for General Motors and United Automobile Workers.

20. In re Shartle Bros. Division, Black Clawson Co. and Int'l. Ass'n. of Machinists, Local 1850, 3 ALAA ¶68068 (1948).

21. In re Valley Dolomite Corporation and International Union of Mine, Mill and Smelter Workers, Local 618 (CIO), 11 LA 98 (1948).

22. In re Bryant Heater Company and International Union, United Automobile, Aircraft and Agricultural Implement Workers, Local 337 (CIO), 3 LA 346 (1946).

23. In re Louis Marx and Company and Playthings, Jewelry, and Novelty Worker's International Union, Local 149 (CIO), 3 LA 787 (1946).

24. In re Sperry Gyroscope Company and United Electrical, Radio and Machine Workers of America, Local 450 (CIO), 10 LA 687 (1948).

25. In re Shartle Bros. Division, Black Clawson Co. and Int'l. Ass'n. of Machinists, Local 1850, 3 ALAA ¶68068 (1948).

26. In re Sears, Roebuck and Company and Department Store Employees Union, Local 1100 (AFL), 6 LA 211 (1947).

V. CONCLUSION

In conclusion, let it be remembered that the twin misconducts, loafing and leaving post, are very closely related and will often be found together. They are relatively minor offenses and are important only because they have a tendency to become habitual. They are difficult to deal with because the offense depends to a great extent on the state of mind of the employee. It is this question of evidence which will present the greatest problem to the arbitrator. The problem is further complicated by the fact that there are some jobs which do not require constant attention.

The arbitrator will have to extend his abilities to the limit and exercise his greatest discretion where the offense is connected with union activities, and most especially where a shop steward has been disciplined.

Perhaps the most important idea which can be taken from this study of arbitration awards is the value of catching these offenses when they first begin and imposing minor discipline. Then, with the recurrence of the offense, progressively more severe discipline should be imposed. In this way both the employee and the company will be aware of the exact situation and better labor-management relations will be achieved.²⁷

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UNION ACTIVITIES

An employer can no longer discharge or otherwise discipline his employees merely because they belong to a union or engage in union activities. In 1935 and again in 1947 federal statutes secured these rights to employees engaged in production for interstate commerce. The labor relations acts of some states contain similar provisions, and express guarantees are commonly written into collective bargaining agreements.¹

27. In re Old Colony Furniture Company and United Furniture Workers of America, Local 136-B (CIO), 2 ALAA ¶67777 (1947); In re National Lead Company, De Lore Division and United Gas, Coke and Chemical Workers of America, Local 229 (CIO), 9 LA 973 (1948).

1. In nearly all of these cases the arbitrator is faced with the construction of a contract between the employer and the union. Typical of this type of contract is that set out in In re Chattanooga Box & Lumber Company and United Woodworkers of America, Local 1271 (CIO), 10 LA 260 (1948):

"The company agrees that it shall not discriminate against any of its employees because of union affiliation, and the union and its officers, representatives or members agree that: