INSTIGATING STRIKES AND SLOW-DOWNS

I. SCOPE OF THE OFFENSE

When responsibility for an unauthorized strike can be traced directly to a union officer, his discharge for that reason will generally be upheld. The proposition implicit in this general rule is that union officials are held to a strict degree of compliance with the provisions of the contract between the employer and the union. The most troublesome problem in this type of case is the difficulty of proving the pertinent facts, rather than that of arriving at a legal definition of what constitutes "instigating a strike." A typical example is the instigation of an unauthorized strike by the passing of "secret signs" by a shop steward to the men in the shop.[1] The difficulties involved in proving the charge under those circumstances need no elaboration.

Nor is the general proposition that responsibility for an unauthorized strike will lead to discharge limited to high-ranking union officials. Thus, where lesser union officers condoned such a strike and failed to exert authority to prevent a stoppage, they were properly discharged.[2] It is not necessary that the union official be the active instigator of the strike. For example, where the union president, at a meeting of the union, did not take an active part in preventing the strike, nor insist that the dispute be submitted to arbitration, he was held to be properly discharged.[3] In another case a high union official was discharged for condoning a strike, although he in no way participated in the original conspiracy that led to the strike.[4]

Another type of conduct which falls within the scope of this topic is the threatening of employees by union officers with either physical harm or loss of union membership if they fail to participate in a strike or work-stoppage. In most of the cases of this type the discharge is grounded in part on instigating a strike

1. In re Fruehauf Trailer Company and United Auto Workers, Local 99 (CIO), 1 LA 155 (1944).
2. In re Ford Instrument Company and United Electrical, Radio & Machine Workers of America, Local 425 (CIO), 4 LA 403 (1946).
3. In re Pittsburgh Tube Company and United Steelworkers of America, Local 1002 (CIO), 1 LA 285 (1946).
4. In re Mueller Brass Company and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (CIO), 3 LA 285 (1946).

as a union officer and partly on the threats. In *In re Koven & Brother, Inc.*,[5] the discharge of union committeemen was grounded on their having threatened employees with loss of membership in the union if they failed to participate in a slow-down. The committeemen were held to be justifiably discharged, and this seems to be the general view. On the other hand, in *In re Corn Products Refining Company*,[6] an employee "threatened to kill" another employee for exceeding his work quota. The arbitrator held that he could not be discharged, either for instigating a slow-down or for instigating a breach of the peace. The rationale of the case was that there was no actual showing by the company that the threats resulted in a slow-down. The case seems without parallel.

It does seem to be true, however, that an inexperienced union officer may fare better than one who is experienced in the handling of union affairs. That this is true is indicated in *In re Borg-Warner Corporation*,[7] where the discharge of all the participating union officers was upheld, but the arbitrator recommended that the union president, who was the only "new man," be reinstated as a "good-will" measure, stating that he sustained his discharge with reluctance. It seems true also that a union officer has the duty to resume work in the shop in spite of the fact that he fears that other workers will resort to violence if he does so, and if he breaches that duty, his discharge will be upheld.[8]

When the discharged employee is not a union officer, a great variance can be seen in the decisions. The cases are rare in which the discharge of an ordinary employee for participation in an unauthorized strike has been upheld by an arbitrator. In most instances such factors as seniority and comparative guilt serve as the basis for a mitigation of the penalty. In one case a group of men who had been trouble-makers for years were held to be properly discharged for participation in a slow-

5. In re L. O. Koven and Brother, Inc. and United Association of Journeymen Plumbers and Steamfitters, Local 274B (AFL), 2 LA 615 (1946).

6. In re Corn Products Refining Company and Grain Processors Union, Federal Labor Union, Local 18851 (AFL), 3 LA 242 (1946).

7. In re Borg-Warner Corporation, Rockford Clutch Division and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 803 (CIO), 4 LA 4 (1945).

8. In re Eberhard Manufacturing Company, Division of Eastern Malleable Iron Company and International Molders and Foundry Workers Union of North America, Local 27 (AFL), 4 LA 419 (1944).

down.[9] The men were union officials but that is nowhere mentioned in the opinion, nor given as a reason for the severity of the penalty. And in *In re Argonne Worsted Co.*,[10] an employee who had been a trouble-maker for a long time was discharged for instigating a work-stoppage. The arbitrator refused to sustain the discharge on the grounds of failure of proof and discrimination, but he did give sufficient weight to the previous misconduct of the employee to enable him to award reinstatement *without back pay* and to place the employee on probation for a 60-day period. The discharge of employees who usurped the authority of the company to fix work schedules and who declared a slow-down has been upheld.[11] Contract provisions or company rules which state that employees who participate in an unauthorized strike automatically or "voluntarily" terminate their employment with the company are enforced.[12]

II. Factors Going to Mitigation or Aggravation

It may be said in general that if some doubt exists as to the guilt of the employee or if the penalty exceeds the seriousness of the offense, discharge will be mitigated to reinstatement without back pay and/or loss of seniority.[13] However, there are inequities inherent in indiscriminately mitigating discharges to that particular punishment. For example, in every case noted the reinstatement dates as of the date of the arbitration deci-

9. In re General Television & Radio Corporation and United Electrical, Radio and Machine Workers of America, Local 1121 (CIO), 2 LA 483 (1942).

10. In re Argonne Worsted Company and Industrial Trades Union of America, 4 LA 81 (1946).

11. In re Lake Shore Tire and Rubber Company and United Rubber, Cork, Linoleum and Plastic Workers of America, Local 164 (CIO), 3 LA 455 (1946); In re Cutter Bit Service Company and United Mine Workers of America, District 50, Local 12441 (AFL), 7 LA 662 (1947); In re United States Rubber Company and United Rubber, Cork, Linoleum and Plastic Workers of America, Local 224 (CIO), 8 LA 44 (1947); In re Inspiration Consolidated Copper Company and International Union of Mine, Mill and Smelter Workers of America, Local 586 (CIO), 9 LA 454 (1948).

12. In re Interstate Plating Company and United Construction Workers, Local 200 (AFL), 7 LA 583 (1947); In re Atlantic Foundry Company and United Steelworkers of America, Local 1001 (CIO), 8 LA 807 (1947); In re The Dayton Malleable Iron Company, G. H. R. Foundry Division and United Electrical, Radio and Machine Workers of America, Local 768 (CIO), 8 LA 544 (1947).

13. In re Bell Aircraft Corporation, Burlington Division and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Local 999 (CIO), 6 LA 988 (1947).

sion, regardless of the character of the offense. In practical effect this means that the degree of punishment varies directly with whether the company and union are successful in getting an early arbitration. The suspension is a short one if an arbitration award is quickly obtained, but if the company or union delays the arbitration, the employee will receive a much longer suspension and a much greater loss of seniority. Thus, for equal offenses one employee may be laid-off without pay for as little as two weeks and another may be suspended without pay for six months. Such a system is obviously unjust.

Arbitrators look upon discharge as the maximum punishment, and are reluctant to sustain discharges if mitigating factors can be found. For example, one arbitrator took "judicial notice" of the fact that a negro union vice-president could not order white workers to return to work, and ordered him reinstated.[14] Another arbitrator refused to sanction the discharge of union officers where the effect of doing so would be to break the union, even though their conduct, based on the usual standards, warranted discharge.[15]

Perhaps the most important single factor operating to mitigate discharges is seniority. If employees are equally guilty, the discharge of one may be sustained and the other reversed purely on the basis of the fact that one has a long service record and the other has not. The importance of seniority in this respect may perhaps be best illustrated in *In re Argonne Worsted Company*.[16] In that case a female employee with ten years service had been an admitted trouble-maker. She had been warned by both the company and union. She was discharged for leading a walkout. The evidence as to whether she had actually led the walkout was conflicting, and in mitigating the discharge to a lesser penalty the greatest single factor considered by the arbitrator was the woman's seniority.

The next most important mitigating factor in these cases seems to be comparative guilt. Even though the discharged employee is admittedly guilty of the offense charged, the fact that

14. In re Armour and Company and United Packinghouse Workers of America, Local 42 (CIO), 8 LA 758 (1947).
15. In re Bethlehem Steel Company, Williamsport Plant and United Steelworkers of America, Local 2499 (CIO), 2 LA 194 (1945).
16. In re Argonne Worsted Company and Industrial Trades Union of America, 4 LA 81 (1946).

other equally guilty employees did not receive comparable punishment is sufficient reason for the arbitrator to reverse the discharge. Thus, in *In re Fruehauf Trailer Company*,[17] the arbitrator ordered two discharged union stewards reinstated because employees who were equally guilty were given no punishment, and because the union president, who was the actual instigator of the stoppage, received no punishment. And in the case of *In re Argonne Worsted Company*,[18] the arbitrator stated that he was influenced by the fact that no punishment was given to other equally guilty parties. The arbitrator in that case concluded that no matter how bad an employee's conduct may be, the employer cannot make a "goat" out of him in order to keep the other employees in line. Similarly, an employer cannot pick out employees with bad records and call them strike leaders. If a discharge is to be sustained, it must be shown that the discharged employee actually was a leader in the strike.[19] Again, if the employer is unable to determine who the strike leaders were, he may not discipline an entire shop on that ground. In the absence of proof that specific individuals were the guilty parties, the employer is without a remedy.[20] It may be noted that if an arbitrator upholds the discharges of several employees, and the company later reinstates some of them, it must reinstate all of them.[21]

The length of the strike and the comparative loss to the company are factors which seem to be considered only in mitigation and not in aggravation of the offense. Thus, in *In re Stockham Pipe Fittings Company*,[22] the fact that a wildcat strike

17. In re Fruehauf Trailer Company and United Auto Workers, Local 99 (CIO), 1 LA 155 (1944); *but see* In re Carnegie-Illinois Steel Corporation, South Charleston Works and United Steelworkers of America, Local 2336 (CIO), 5 LA 363 (1946), where it was held that the defense that others were equally guilty is a mitigating factor only.

18. In re Argonne Worsted Company and Industrial Trade Unions of America, 4 LA 81 (1946).

19. In re Rheem Manufacturing Company and United Steelworkers of America, Local 2084 (CIO), 8 LA 85 (1947).

20. In re John Waldron Corporation and International Association of Machinists, Local 329, 5 LA 473 (1946); In re Cumberland Undergarment Company, Inc. and International Ladies' Garment Workers Union, Local 434 (AFL), 5 LA 766 (1946); In re S. Co., Inc. and United Electrical, Radio and Machine Workers of America, Local 475 (CIO), 10 LA 924 (1948).

21. In re Art Metal Works, Inc. and International Association of Machinists, District 128, Lodge 1724, 8 LA 340 (1947).

22. In re Stockham Pipe Fittings Company and United Steelworkers of America, Local 3036 (CIO), 4 LA 744 (1946).

lasted seven and one-half weeks with great loss to the employer failed to excite comment on the part of the arbitrator. Even though the discharge of the union officers was upheld, there cannot be found in the decision any indication that the great loss to the company was one of the factors. On the other hand, the fact that the employer's loss is relatively small is an important mitigating factor. Thus in *In re January & Wood Company*,[23] the same arbitrator who decided the *Stockham Case* reinstated a discharged employee on the ground that the company suffered no damage.

Another very significant factor in this type of case is whether the discharged employee is a union official. It may be generally stated that most arbitrators are more lenient in the case of an ordinary employee who is merely following the directions of the union leaders than in the case of union officers who violate a no-strike covenant. There are, however, many opinions in which a different attitude on the part of the arbitrators is apparent.

We have previously noted that the discharge of union officers will be upheld if they instigate an unauthorized strike.[24] We have also seen that minor officers may not be punished if the major union officers go free. In some cases union officers have been able to escape serious punishment by placing responsibility on the international union.[25] The strictest view on the effect of the employee's being a union official is to be found in *In re Eberhard Manufacturing Company*.[26] In that case it was held that acquiescence in a work-stoppage by a union officer was grounds for discharge. The arbitrator said that the union committeeman should have set an example by resuming work, and that the defense that he feared violence if he broke the strike was of no avail. And in *In re Mueller Brass Company*,[27] it was held that union officers who "condoned" a strike were properly discharged, although they did not actually participate in it.

23. In re January and Wood Company and Textile Workers Union of America, Local 337 (CIO), 1 LA 577 (1942).
24. *Supra.*
25. In re Nathan Manufacturing Company and International Association of Machinists, District 15, Local Lodge 402, 7 LA 3 (1947).
26. In re Eberhard Manufacturing Company, Division of Eastern Malleable Iron Company and International Molders and Foundry Workers Union of North America, Local 27 (AFL), 4 LA 419 (1944).
27. In re Mueller Brass Company and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (CIO), 3 LA 285 (1946).

At the other extreme is *In re Ampco Metal Inc.*,[28] where it was held that union officers were justified in uniting with the majority of the union, or, stated differently, that loyalty to the union and its members exceeds loyalty to the company. In that case the union president and vice-president actively led a work-stoppage, wrote handbills, had them printed and passed them out on company time, all in disregard of the grievance machinery. Discharge was held to be too severe a penalty.

An intermediate position may be found in *In re Bethlehem Steel Company.*[29] In that case union officers were discharged for instigating a strike. Although they participated in a picket line and failed to do everything in their power to end the strike, it was held that discharge was too severe a penalty on the ground that the above conduct did not amount to "instigating a strike." In *In re American Steel and Wire Company,*[30] where "condoning a strike" was defined as not making an effort to prevent it, it was said that there must be a reasonable effort on the part of union officers to prevent any unauthorized strike.

HARRISON KING

INSUBORDINATION

I. NATURE OF THE OFFENSE

This note is intended to give an arbitrator who has a case involving insubordination a bird's-eye view of the decisions of other arbitrators. I have excluded from this article a large group of cases in which the central point is refusal to accept a job assignment.[1]

At the outset, it should be noticed that we are dealing with an organization—usually an industrial plant. Implicit in the word "organization," itself, is the idea of authority, for how

28. In re Ampco Metal, Inc. and Employees' Mutual Benefit Association, 3 LA 375 (1946).

29. In re Bethlehem Steel Company, Williamsport Plant and United Steelworkers of America, Local 2499 (CIO), 2 LA 194 (1945).

30. In re American Steel and Wire Company of New Jersey, Cuyahoga Works, and United Steelworkers of America, Local 1298 (CIO), 5 LA 193 (1946).

1. There is a logical basis for this exclusion, although the issues do overlap. For a case involving refusal to accept a work assignment where the discipline imposed was grounded on insubordination, see In re Goodyear Clearwater Mills and United Textile Workers of America, Local 90 (AFL), 6 LA 117 (1947).