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General Considerations

Rexford H. Caruthers

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tion's leading arbitrators, has just recently collaborated in the preparation of a case-book made up of selected arbitration awards.³

Still, the degree to which the decisions of other arbitrators "offer relevant experience"⁴ to a pending labor problem varies widely with the phase of labor relations involved. The issues commonly present in discipline and discharge cases are more nearly comparable throughout industry; and in the resolution of these issues arbitrators employ concepts familiar to law students. Hence, this initial law journal venture in the annotation of labor arbitration awards has been confined to such cases.

It is hoped that, despite its inherent limitations, this experimental offering will profit those readers who participate, or have an interest, in labor relations.

ELMER E. HILPERT†

GENERAL CONSIDERATIONS

The power of employers to discharge, or otherwise discipline, their employees has been greatly curtailed in recent years. At common law, a contract of employment which stated no express term of employment was terminable at the will of either party.¹ Tenure of employment was thus largely at the sole discretion of the employer. The impact of trade unionism has wrought a tremendous change. Legislation has imposed some limitations. Thus, the discharge or discipline of employees because of their union activity has been prohibited by Congress² and by some state legislatures.³ The collective bargaining agreement, now common in American industry, usually provides that discipline and discharge shall be imposed only for "cause" and that disputed cases shall be submitted to arbitration. It is these provisions that constitute the broader and more effective circum-

3. Shulman & Chamberlain, *Cases on Labor Relations* (1949). For a review of which, see *infra*.

4. Tilove, Robert, "Foreword" to Gollub's *Discharge for Cause*.

† Professor of Law, Washington University School of Law. Arbitrator in various labor disputes.

1. 161 ALR 706; Note (1942) 42 Col. L. Rev. 107; (1927) 40 Harv. L. Rev. 646; (1923) 32 Yale L. J. 850; Restatement, *Agency* (1933) sec. 442.

2. National Labor Relations Act. (1935) 49 Stat. 449, c. 372, 29 U.S.C.A. secs. 151-158, 159-166; Labor Management Relations Act. (1947) 61 Stat. 136, c. 120, tit. I, sec. 101, 29 U.S.C.A. secs. 151-167.

3. See *e. g.*, The Wisconsin Employment Peace Act. WIS. STAT., c. 111, §§111.01-111.65 (1947).

scription of the hitherto unrestrained power to discipline and discharge employees.

The general effect of these developments on American industry, as this is reflected in arbitration awards, is the subject of this note. Later notes will deal with more detailed phases of the discipline and discharge of employees under collective bargaining agreements.

I. POSITION OF EMPLOYER, EMPLOYEE AND UNION OFFICER

It is basic that every sort of enterprise, if it is to function at all, requires that someone be vested with authority to run it. In American industry, such authority inheres in the employer. Collective bargaining agreements do not dispute the location of this authority, and often expressly "vest" it in management;⁴ but they do restrict managerial power to discipline and discharge employees in order to prevent an abuse of this authority. Thus, the right of management to give orders and directions remains, but it is qualified by the grievance procedures established in collective bargaining agreements. Moreover, it is incumbent on management, in the exercise of its admitted powers, to use humane discretion in imposing disciplinary action and to take into account the employee's physical condition, his prior record, his attitude toward his work, and many other factors.⁵

The new right of the employee, and of the union official, is to resort to the grievance procedure to question the propriety of managerial action. Grievance procedures exist to redress grievances; they do not exist to divest management of its proper sphere of authority.⁶ An industrial plant is not a "debating society";⁷ production cannot be halted while employer and employee discuss a proposed course of action. Thus, a union com-

4. A fairly standard CIO Management Clause reads:

"The management of works and the direction of the working forces including the right to hire, suspend, discipline or discharge for proper cause, or transfer and the right to relieve employees from duty because of lack of work or for other legitimate reasons is vested exclusively in the Company; Provided that this will not be used for purposes of discrimination against any member of the union."

5. In re Campbell, Wyant and Cannon Foundry Company and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Local 539 (CIO), 1 LA 254 (1945).

6. In re Ford Motor Company, Spring and Upset Building and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Local 539 (CIO), 1 LA 254 (1945).

7. *Ibid.*

mitteeman may not direct or advise an employee to disobey supervisory instructions, and an employee cannot refuse to carry out a management order because he believes it to be improper or the violation of a contract right. If either does so, he is properly subject to discipline. The grievance procedure contemplates that there will be claimed violations of contract or other grievances that will require adjustment. The only real difference between what the employee and union official believe to be a "clear" violation and a doubtful one is that the former makes a clear grievance and the latter a doubtful one.⁸

"Self-help" is allowable only if the managerial order would require the performance of an illegal or criminal act or when it would involve exposure to an unusual hazard to life or health.⁹ In such situations, which will be rare, the employee's or union official's refusal to obey management's orders will be excused.¹⁰

A difficult question is presented when the contract reserves to the union the exclusive power to discipline its officers, since union officers are also frequently employees. In *In re Symington-Gould Corporation*,¹¹ a union committeeman deliberately caused a work stoppage, which was in violation of contract; and the union president, who had neither caused nor participated in the work stoppage, refused to order the men involved to return to work. The company discharged both men. In the ensuing arbitration proceeding, the union contended that it had sole jurisdiction to discipline these men because their misconduct consisted of a failure, as union officers, to enforce the union's contract obligations. The arbitrator found that the union committeeman had acted in a dual capacity and that he was, therefore, subject to company discipline. On the other hand, the arbitrator sustained the union's contention as to the union president, since he had acted only in his representative capacity, and held that he was not subject to company discipline. Thus, while there may be a clear division of jurisdiction, the mere fact that an employee is an official of the union is no cloak of immunity from the disciplinary power of management.

8. *Ibid.*

9. In re American Car & Foundry Company, St. Charles Plant and United Steelworkers of America, Local 2409 (CIO), 10 LA 324, 329-330, 334 (1948).

10. *Ibid.*

11. In re Symington-Gould Corporation, Depew Works and United Steelworkers of America, Local 1630 (CIO), 9 LA 819 (1949).

II. POSITION OF THE ARBITRATOR

Collective bargaining agreements may, but seldom do, specify the grounds for which an employee may be discharged or disciplined; and, similarly, they seldom spell out in detail what penalties are to be invoked for particular infractions of managerial policy, practice or rules. Indeed, there is no discernible pattern in collective bargaining agreements in this regard, unless it be in the general limitation that discharge and discipline shall be "proper," only for "cause," or shall not be "unfair," "discriminatory," or the like. In this situation, the arbitrator generally finds himself in the position of having to weigh and determine, in the light of all the surrounding circumstances, whether an industrial offense has in fact been committed, the gravity of the offense, whether there are mitigating circumstances, and what, if any, is an appropriate penalty.¹²

A contrary view has been expressed in some few cases. Thus, in *In re Perkins Oil Co.*,¹³ the arbitrator held that

Where, as in this case, no schedule of offenses and punishment has been put into effect, either by agreement, by company rules, or by practice, the penalty to be imposed for an offense rests in the sound discretion of management. Arbitrators have no right to substitute their judgment for that of management except where there has been such an abuse of discretion. While the writer, if he had had Mr. Holly's decision to make in the first place, might have imposed a ten-day lay-off instead of discharge, it does not follow that discharge was unreasonable or an abuse of discretion, especially in view of the admitted warning.

The same arbitrator has ruled to the same effect in *In re Stockham Pipe Fitting Company*,¹⁴ where he said

The only circumstances under which a penalty imposed by management can be rightfully set aside by an arbitrator are those where discrimination, unfairness, or capricious and arbitrary action are proved—in other words, where there has been abuse of discretion.

12. See notes on particular bases for discipline and discharge, *infra*.

13. *In re Perkins Oil Company and Food, Tobacco, Agricultural and Allied Workers of America, Local 19 (CIO)*, 1 LA 447 (1946) (offense was union solicitation on company time).

14. *In re Stockham Pipe Fittings Company and United Steelworkers of America (CIO)*, 1 LA 160 (1945) (offense was fighting on the job and the facts seem to have justified discharge here).

The opposite point of view is elaborately set out in *In re American Car & Foundry Co.*¹⁵

This fundamental difference in point of view is sharply presented in *In re Bakelite Corporation*.¹⁶ The arbitrator in this case was confronted with the usual contract provision which stated that management might discharge or discipline "for proper cause." But another, and unusual, contract provision, in Article IX of the contract, expressly provided that "The arbitration committee shall not have power . . . to substitute its judgment for that of management unless it finds that the Company has acted arbitrarily or without reason or in violation of this agreement."¹⁷ Despite this, the arbitrator reinstated certain discharged employees, because he felt that the penalty was too severe in all the circumstances, stating that

. . . a rigid interpretation of the limitation of Art. 9 of the contract would so vitiate the spirit and purpose of the collective bargaining agreement as to leave the arbitration procedure a mere form and that a determination that a discharge was not justified could be concluded without violation of the agreement in the absence of a specific determination that the action was arbitrary or without reason.¹⁸

Of course, when a company and a union do provide, by agreement, or by acquiesced-in plant rules or practice, for a schedule of offenses and penalties, the arbitrator will be bound thereby.¹⁹ But even here, arbitrators have found that such a schedule of offenses requires "interpretation" and the schedule of penalties is subject to rules of "amelioration."²⁰

III. ARBITRATION UNDER LAPSED AGREEMENT

Since the union's and employees' right to insist that discharge and discipline be imposed only for "cause" rests, in the main, on the collective bargaining agreement, it is arguable that, upon, and during, the lapse of such agreement, such right is in abey-

15. *In re American Car & Foundry Company, St. Charles Plant and United Steelworkers of America, Local 2409 (CIO)*, 10 LA 324, 334-335 (1948).

16. *In re Bakelite Corporation and Chemical & Crafts Union, Inc.*, 1 LA 227 (1945).

17. *Id.* at 229.

18. *Id.* at 229.

19. *In re American Car & Foundry Company, St. Charles Plant and United Steelworkers of America, Local 2409 (CIO)*, 10 LA 324, 331 (1948).

20. See notes on particular bases for discipline and discharge, *infra*.

ance. This has been held in *In re Fruehauf Trailer Company*.²¹ Under this view, the employees are remanded to such redress as may be found in processing an "unfair labor" practice under the federal or state labor relations acts, wherein the relief is limited to discipline or discharge that involve, in the main, discrimination because of union activity.

However, it may be questioned as to whether the view expressed by the arbitrator in the *Fruehauf Case* is realistic. Labor-management contracts do have terminal dates; but the union, if "certified," or otherwise "recognized," as the "exclusive bargaining agency," continues to have "rights" and "powers," both as against the employer and its members after a contract has "lapsed." Moreover, in that situation, it is contemplated that the company and the union will, at some later date, enter into a "new" agreement. The negotiations pending the new agreement are generally concerned with wage increases or the securing of other "improved working conditions." Meanwhile, both the company and the Union wish to, and do, continue plant operations under the terms and conditions of the allegedly "lapsed" agreement. In these circumstances, it would be far better for all concerned to consider many provisions of the "lapsed" agreement as still being in force and effect. Certainly among these, would be the provisions relating to "job security" and the processing of grievances with respect thereto. This seems to be the well-recognized practice in industry, despite the dearth of "precedents" on the precise point;²² and it is submitted that this view should prevail as being conducive to industrial peace.

IV. EFFECT OF OTHER CONTRACT LIMITATIONS ON MANAGERIAL POWER OVER PERSONNEL

In addition to the general limitation on managerial power, arising from the requirement that discipline and discharge shall be imposed only for "cause," labor-management contracts contain other limitations on managerial power over personnel. The principle of interpretation which seems to be followed, however, is that managerial power is residual and that, hence, it is not

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

limited except as expressly provided or as arises from necessary implication from the contract as a whole.

Thus, a contract limiting the right of management to discharge for cause, but imposing no express limitation on other forms of discipline, does not deprive the employer of power to impose such lesser penalties.²³ The contrary result has, however, been reached²⁴ on the basis of the maxim *expressio unius est exclusio alterius*. The latter result seems clearly wrong.

Similarly, it has been held that a company retains its power to lay-off²⁵ or discharge²⁶ an employee during a probationary period, unless the contract expressly provides otherwise. In this situation, however, a company is not free to discipline or discharge a probationary employee under circumstances that violate the union security clauses²⁷ or the National Labor Relations Act.²⁸ So too, the limitation on management's power to sever the employment relation for reasons of economy is not limited by a contract requirement that discipline and discharge shall be only for "cause,"²⁹ although arbitrable cases might arise

22. See to this effect, *In re Daily World Publishing Company and The Newspaper Guild of Philadelphia and Camden, Local 10 (CIO)*, 3 LA 815 (1946), *but compare In re Benrus Watch Company and Waterbury Brassworkers Union, Local 251, 1 ALAA ¶ 67,225 (1945)*.

23. *In re Auto-Lite Battery Corporation, Owen Dyneto Division and United Automobile, Aircraft and Agricultural Implement Workers of America (CIO)*, 3 LA 122 (1946).

24. *In re Reynolds Alloys Company and Aluminum Workers Federal Labor Union, No. 22724 (AFL)*, 2 LA 554 (1943).

25. *In re Flintkote Company and Textile Workers Union of America, Local 655 (CIO)*, 3 LA 770 (1946).

26. *In re Luckenbach Steamship Company, Inc. and International Longshoremen's & Warehousemen's Union, Ship Clerks' Local 34 (CIO)*, 6 LA 98 (1946); *In re Philadelphia Company, Equitable Real Estate Company, Equitable Sales Company, Duquesne Light Company, Allegheny County Steam Heating Company, Cheswick and Harmar Railroad Company, Equitable Auto Company, Equitable Gas Company, Finleyville Oil and Gas Company, Philadelphia Oil Company, Pittsburgh and West Virginia Gas Company, and W. D. George and Thomas Fitzgerald, Trustees for Pittsburgh Railways Company, debtor, and for Pittsburgh Motor Coach Company, subsidiary, and Independent Association of Employees of Duquesne Light Company and Associated Companies*, 6 LA 470 (1947).

27. *Ibid.*

28. *In re Flintkote Company and Textile Workers Union of America, Local 655 (CIO)*, 3 LA 770 (1946).

29. *In re PM and Newspaper Guild of New York and American Newspaper Guild (CIO)*, 3 LA 683 (1946); *In re New York Tribune, Inc. and American Newspaper Guild, Newspaper Guild of New York, Local 3 (CIO)*, 8 LA 410 (1947).

under lay-offs for economy reasons under the seniority provisions of the contract.³⁰

Management's exercise of its right to discipline or discharge for cause frequently involves seemingly unrelated provisions of the labor-management contract; and here the arbitrators are often met with difficult problems of reconciling separate contract provisions so as to give sensible effect to the whole. For example: an employee was properly disciplined for "absenteeism" on a given Monday. The penalty imposed by the company was the deprivation of over-time pay for work performed on Saturday of that week. The arbitrator sustained the company's action on the ground that the deprivation of over-time pay for Saturday, while *literally* a violation of the over-time provisions of the contract, was here a properly imposed disciplinary penalty.³¹ To much the same effect, a company was sustained for denying an employee his "equal opportunity to participate in over-time" as a penalty for excessive "absenteeism."³² Nor do these examples exhaust the possibilities.

Although labor-management contracts do fall into somewhat of a "pattern," they are complex, often quite detailed, and touch on a large variety of matters. They also vary to a great degree from industry to industry and union to union. Hence, in the final analysis, even in discipline and discharge cases, the arbitrator will do well to relate the facts of the case before him as much to the contract involved as to the "precedents" available from other arbitration cases.

REXFORD H. CARUTHERS

30. See seniority cases collected in Bureau of National Affairs, Commerce Clearing House and Prentice-Hall.

31. In re Roberts and Mander Stove Company and United Steelworkers of America, Local 1839 (CIO), 3 LA 656 (1946).

32. In re Ingersoll-Rand Company and United Electrical, Radio & Machine Workers of America, Local 313 (CIO), 7 LA 564 (1947).