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so as to challenge the authority of a plant supervisor is grounds for disciplinary action short of discharge.⁵⁷

Some arbitrators have mitigated disciplinary penalties because of civil or criminal charges brought against the employee. They have felt that the employer should have a more limited right of discipline when a participant is a defendant in a legal action. Others have upheld the employer's prerogative irrespective of penalties imposed outside the plant. The latter view was enunciated by Mr. Clark Kerr, arbitrator, in *In re Pioneer Mill Company, Ltd.*^{57a}

The arbitrator is not concerned with the appropriateness of penalties under the law, if any, but solely with the propriety of disciplinary action by the company. The question before the arbitrator is, aside from such penalties as society may see fit to assess, what additional penalties, if any, should be placed against these men by the company.⁵⁸

Although penal or civil judgments against the erring employee, or litigation of any sort whereby the employee would stand costs of defending an action, should not finally determine penalties, most arbitrators recognize such a circumstance as limiting the employer's right upon the theory that full punishment has been rendered by the judiciary.⁵⁹

WILLIAM R. HIRSCH

DAMAGE TO, OR LOSS OF, MACHINES AND MATERIALS

It will surprise only the uninitiated that there are little more than a score of arbitration awards dealing with damage to, or destruction of, machines or materials as a ground for discipline or discharge. The vast majority of disputes between employer and employee are "decided" at the foreman level, or in informal meetings between representatives of the workers and management. And this would seem to apply particularly to difficulties arising out of the types of wrong-doing considered in this note. Nevertheless, the cases which have arisen permit of some gen-

57. *In re Verdun Mfg. Company, Inc. and Industrial Trades Union of America, Verdun Mfg. Company Local, 10 LA 637 (1947).*

58. *In re Pioneer Mill Company, Limited and International Longshoremen's and Warehousemen's Union, Local 144, Unit 9 (CIO), 6 LA 644 (1947).*

59. *In re Verdun Mfg. Company, Inc. and Industrial Trades Union of America, Verdun Mfg. Company Local, 10 LA 637 (1947).*

eralizations or rules of arbitration, which fall into the following categories: (1) the definition of "just cause" as a ground for discharge; (2) negligent or malicious destruction as a ground for discharge; (3) general factors weighing against the employee; (4) mitigating factors; (5) employer's antagonism as an independent ground for discharge; (6) sufficiency of evidence and burden of proof.

I. THE DEFINITION OF "JUST CAUSE"

It is a common provision of collective bargaining agreements that there may be discharge only for "just cause," and when there is no such express provision, it is supplied by interpretation.¹ The general meaning of the term "just cause" is separately considered in another note in this issue; the present discussion is limited to its special application to cases of damage to, or destruction of, machines and materials.²

II. NEGLIGENCE OR MALICIOUS DESTRUCTION

Although the futility of establishing degrees of negligence has been pointed out innumerable times by legal scholars, there have been attempts to apply the terms "gross" and "wilful" negligence in labor disputes arising out of the discharge of an employee for damaging machines and materials. In *In re Nineteen Hundred Corp.*, the arbitrator said:

1. 5 Labor Equipment ¶ 66,003 (Prentice-Hall).

2. The arbitrator will sometimes use the broader phraseology "lack of sufficient cause" in overruling a discharge when he might have said, with more particularity, that the value of the damage done was too slight to warrant discharge (In re Precision Film Laboratories, Inc. and Motion Picture Laboratory Technicians, Local 702 [AFL], 3 LA 538 [1946]—although the arbitrator found no "just cause" for discharge, he did impose a disciplinary layoff), or there was insufficient evidence of fault on the part of the employee (In re Modern Workshop, Inc. and United Furniture Workers of America, Upholsterers Union, Local 76 [CIO], 8 LA 710 [1947]. At all events, what constitutes "just cause" in any given case is determined by the facts of that case, and, as with the phrases "reasonable man," "sufficient notice," "due care" and the like throughout our law, the term is incapable of categorical exposition (the phrase was employed by the arbitrator in the following awards: In re Pan American Airways, Inc. and International Air Line Pilots' Ass'n [AFL], 11 LA 62 [1948]; In re Allis-Chalmers Manufacturing Co. and United Farm Equipment and Metal Workers of America, Local 119 [CIO], 8 LA 177 [1947]; In re Harbison-Walker Refractories Co. and United Stone and Allied Products Workers of America, Branches 75 & 76 [CIO], 8 LA 290 [1947]; and In re Reynolds Metals Company and United Steelworkers of America, Local 3911 [CIO], 12 LA 76 [1949].

Discharge should be imposed only for gross (or extreme) negligence amounting to malicious destruction of company property. For ordinary carelessness (such as is normally present in shop operations) discharge is too severe a disciplinary measure.³

In contrast, the arbitrator in *In re Harbison-Walker Refractories Co.* stated that discharge was unjustified where the conduct was "more thoughtless and negligent than wilful and malicious."⁴ Neither the division into "ordinary," "gross," and "wilful" negligence, as suggested by the arbitrator in the former case, nor the rule eliminating negligence entirely as ground for discharge, as urged by the arbitrator in the latter case, seems to be a realistic approach to the problem. The term "negligence" should be used without benefit of adjectival inflection, and should embrace all conduct showing a lack of reasonable care under the circumstances. Whether the fault or the damage warrants the penalty should be determined by an analysis of all the facts, and the employer should not be required to sustain the often impossible burden of proving intent or malice.

III. FACTORS WEIGHING AGAINST THE EMPLOYEE

A. Prior Untoward Conduct. It seems obvious that prior conduct of the same type as that out of which the discharge immediately arose, should weigh heavily against the contention of the worker that the discharge was unjustified. The old metaphor concerning the straw which had such disastrous effects upon the camel should be, and has been, given sympathetic expression by arbitrators. In another place in this issue the admissibility of evidence of past similar acts is considered in more detail.^{5a} It is sufficient to state here that such evidence is freely received for the light it may throw upon the intentions of the employee and the justice of the penalty; and this seems proper, since arbitrations, after all, are intended to settle with justice a dispute between two parties, who will, after settlement of the dispute, go on sharing the same roof and the same problems. Yet, prior negligent acts must be considered in the light of all

3. *In re Nineteen Hundred Corporation and United Electrical, Radio and Machine Workers of America, Local 931 (CIO)*, 6 LA 709 (1946).

3a. See *supra* note, "Evidence, Burden, and Quantum of Proof."

4. *In re Harbison-Walker Refractories Company and United Stone and Allied Products Workers of America, Branches 75 & 76 (CIO)*, 8 LA 290 (1947).

the other factors in the case, and may be overridden by them.⁵

Although the disciplinary action imposed by an employer for the damage to, or loss of, machines or materials has been defended, on the grounds that the employee has a past record of absenteeism, insubordination, and so forth, in none of these cases has the arbitrator stated that the employee's previous delicts should be considered against him. Yet, such evidence has been received and may well have influenced the arbitrator's decision. There seems to be no valid reason to exclude evidence of the employee's prior transgressions simply because they differ in kind from the act which constitutes the ground for the discharge. The cumulative effect of several acts of negligence may count more strongly against the employee than tardiness, absenteeism and other misconduct, coupled with the negligent breaking of a machine part, but such evidence should be received as bearing upon the severity of the penalty at least.

B. Warnings and Instructions. When the employee has received warnings because of his careless methods in the past, or when he has received instructions or been warned of the care required in the job, these facts can be offered in evidence against him when his discharge for carelessness resulting in damage is contested. That prior warnings and instructions do not carry much weight, however, is attested by the cases.⁶

C. Failure to Report Damage. The only case bearing on this point is one in which a machine part was broken wilfully in a fit of anger, and the fact that the damage was not reported was not an indispensable element in the employer's case.⁷ However, it is not difficult to imagine cases in which the failure to make

5. See, *In re Albert J. Bartson, Inc. and Textile Workers Union of America, Local 515 (CIO)*, 5 LA 222 (1946) (Section IV-C, this note).

6. *In re Albert J. Bartson, Inc. and Textile Workers Union of America, Local 515 (CIO)*, 5 LA 222 (1946); *In re Nineteen Hundred Corporation and United Electrical, Radio and Machine Workers of America, Local 931 (CIO)*, 6 LA 709 (1946); and see *In re Tri-United Plastics Corporation and United Gas, Coke and Chemical Workers of America, Local 242 (CIO)*, 2 LA 398 (1946), in which it was held that the fact that the employee was performing the job for the first time and had not received proper instructions (according to the contention of the Union) would not be considered in mitigation where the carelessness and inefficiency of the employee resulted in substantial damage to a machine.

7. *In re Bryant Heater Company and International Union, United Automobile, Aircraft and Agricultural Implement Workers, Local 337 (CIO)*, 3 LA 346 (1946); the discharge was upheld primarily because of the willful nature of the act, but the arbitrator also listed the fact that no report of the damage was made as a further ground for the decision.

a report of the damage would be a most important factor—for example, when an employee negligently damaged a machine the function of which was to cut precision parts for fine watches, and through the worker's attempt to "cover up" his carelessness by failing to inform the foreman of the damage, the parts were imperfectly cut so that the watches produced were of inferior quality. The negligence alone might not warrant discharge, but coupled with failure to report the damage, it might be sufficient.

D. Seriousness of Damage. When the loss to the company is considerable, the arbitrator is more likely to hold that the discipline imposed was not without "just cause." In *In re Tri-United Plastics Corp.*, substantial damage to a machine from the worker's carelessness prevailed over the contention that the employee was not given proper instruction and was performing the job for the first time; discharge was held justified.⁸ However, there is no inflexible rule that the severity of the discipline should be in direct proportion to the value of the property destroyed or the amount of damage done. Other factors often vary the result, as pointed out in a previous section.⁹ It seems that, if in the case last cited, the loss had been the proximate result of erroneous instructions or, if discharge had not been the established penalty for the type of negligence involved, the discharge would not have been sustained.¹⁰

E. Violation of Plant Rules. Ordinarily, violation of a plant rule resulting in damage to, or loss of, machines or materials constitutes a ground for some disciplinary action. If the rule specifies what disciplinary measures will be taken, and if the rule is deemed reasonable by the arbitrator, the imposition of that discipline by the employer will be upheld.¹¹ If there is no specification of the discipline which may be imposed, the arbi-

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

9. See Section IV—"Mitigating Factors."

10. In *In re Potash Company of America and International Union of Mine, Mill and Smelter Workers, Local 415 (CIO)*, 3 LA 403 (1946), although the ties and switches along 1500 feet of railroad track were destroyed, the arbitrator reinstated the discharged employee, who had driven the freight train whose defective wheels had caused the damage, since there was no substantiation for a finding of negligence; accord, *In re Ford Motor Company and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 600 (CIO)*, 6 LA 1007 (1946).

11. *Jacobs Transfer Award*, 5 Labor Equipment ¶ 67,208 (Prentice-Hall).

trator will uphold, overrule, or modify the action taken by the employer, after considering all the facts of the situation, taking into account the discipline which the employer has imposed in the past for violation of the rule and the relative importance of enforcing obedience to it.¹²

Two cases have arisen involving company rules making careless damage to plant equipment cause for discharge. In the earlier of the cases, the rule itself was not questioned,¹³ but in the later case the rule was declared unreasonable, because it did not distinguish between "degrees of carelessness."¹⁴ If the purpose and effect of the rule is to preclude the arbitrator's inquiry whether discharge was too severe a penalty, the decision cannot be sustained; but if the rule is intended merely to apprise workers of the employer's intention to impose discipline if they are careless in their work, even to the extent of discharge in a proper case, the rule should be given the same weight as a warning to each employee individually that the company will insist on careful work.¹⁵

As another section of this note points out,¹⁶ if the employer chooses not to enforce a plant rule, and allows its violation to become a general practice, he cannot impose discipline later for a breach of the rule which results in loss to the company.¹⁷

IV. MITIGATING FACTORS

A. Length of Service and Prior Good Record. Length of service with a particular employer and a prior good employment

12. In *In re Pan American Airways, Inc. and International Air Line Pilots' Ass'n, (AFL)*, 11 LA 62 (1948), an airline pilot was held properly discharged for violation of the regulations of the company and of the Civil Aeronautics Association since the violation of such rules exposed the passengers and company property to undue hazard. See also: *In re Goodyear Decatur Mills and United Textile Workers of America, Local 88 (AFL)*, 11 LA 303 (1948); and *In re Gibbons Engineering and Machine Company and Industrial Union of Marine and Shipbuilding Workers, Local 25 (CIO)*, 2 LA 550 (1946).

13. *In re Potash Company of America and International Union of Mine, Mill and Smelter Workers, Local 415 (CIO)*, 3 LA 403 (1946) (the arbitrator found that there was no substantiation for a finding of willful or careless destruction of property).

14. *In re Nineteen Hundred Corporation and United Electrical, Radio and Machine Workers of America, Local 931 (CIO)*, 6 LA 709 (1946).

15. See Section III-B of this note.

16. See Section IV-D of this note.

17. *In re Allis-Chalmers Manufacturing Company and United Farm Equipment and Metal Workers of America, Local 119 (CIO)*, 8 LA 177 (1947).

record weigh heavily in mitigation of the employee's delict. In *In re National Lead Co.*,¹⁸ and in *In re Ford Motor Co.*,¹⁹ in which the employers and the employees produced conflicting evidence on the issue of negligence, the arbitrators gave greater weight to the testimony of the workers because of the length of their service, unblemished by any prior acts meriting discipline.²⁰ In strict legal theory, the cases might better have been decided on the ground that the employer failed to sustain the burden of proof; certainly, the arbitrators were justified in considering the long years of service to the company as a factor in weighing the evidence. In *In re Harbison-Walker Refractories Co.*, although the action of the discharged workers (engaging in "target practice" with packing hatchets) smacked of wanton conduct, the arbitrator held that the employee's records of "satisfactory conduct" in the past, made discharge too severe a penalty. He imposed a disciplinary lay-off instead, further supporting his opinion by declaring that the conduct "was more thoughtless and negligent than wilful and malicious."²¹ Again, in *In re Nineteen Hundred Corporation*, the arbitrator commuted a discharge to a disciplinary lay-off, because the employee had no prior offenses and was "guilty of only ordinary carelessness."²²

B. Slight Damage. Whether the fact that the loss was not substantial will be considered in mitigation is so far determined by the facts of each case, that generalization is difficult, if not impossible; and the pattern of the cases runs from one extreme to the other. In *In re Albert J. Bartson*, the arbitrator ignored

18. *In re National Lead Company, Texas Mining and Smelting Division and International Union of Mine, Mill and Smelter Workers, Local 412 (CIO)*, 11 LA 993 (1948).

19. *In re Ford Motor Co. and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 600 (CIO)*, 6 LA 1007 (1946).

20. In the case first cited the worker had been employed for 13 years, and in the latter case for 24 years.

21. *In re Harbison-Walker Refractories Company and United Stone and Allied Products Workers of America, Branches 75 & 76 (CIO)*, 8 LA 290 (1947).

22. *In re Nineteen Hundred Corporation and United Electrical, Radio and Machine Workers of America, Local 931 (CIO)*, 6 LA 709 (1946). See also *In re Albert J. Bartson, Inc. and Textile Workers Union of America, Local 515 (CIO)*, 5 LA 222 (1946). In the Intermountain Transportation Award, 5 Labor Equipment ¶ 67,143 (Prentice-Hall), an employee who negligently drove an empty bus off a curve on a lonely mountain road, was ordered reinstated in view of his past record, upon the agreement of the employee to pay for damage to the bus.

the fact that the damage was small and based his judgment entirely on the fact that discharge was not an established penalty for that type of infraction,²³ while in *In re Precision Film Laboratories, Inc.*, the arbitrator held that negligent destruction of a portion of a customer's film, coupled with other carelessness, and with tardiness and absenteeism, was insufficient to warrant discharge (though a lay-off was imposed) because the customer retained a duplicate, thus minimizing the loss to the company.²⁴

In three cases the fact that the damage was slight was held to be no mitigating factor; and in each case discharge was sustained. In one case, a machine part was broken wilfully in a fit of anger and no report of the damage was made. The arbitrator, quite justly, stated that discharge was not too severe a penalty since the act was "... a wanton disregard of instructions and indicated no consideration for company property or rules."²⁵ In another case, discharge was upheld because the employee, having checked out a company tool and having failed to return it, refused to pay for it in accordance with company policy, after promising repeatedly to do so.²⁶ In the third case, an airline pilot's exercise of poor judgment endangered the lives of his passengers and the property of his employer, although little damage was actually done. It was held that the responsibilities placed upon men of such calling, and the employee's prior acts of negligence (which were much of the same type) made discharge reasonable, despite the serious consequences to a pilot's professional career of a discharge for exercising "poor judgment."²⁷

C. Novel Type of Discipline. In the only case decided on the point, discharge of a worker was commuted to a disciplinary lay-off when no evidence appeared that discharge was an established penalty for the sort of carelessness of which the employee

23. *In re Albert J. Bartson, Inc. and Textile Workers Union of America, Local 515 (CIO)*, 5 LA 222 (1946).

24. *In re Precision Film Laboratories, Inc. and Motion Picture Laboratory Technicians, Local 702 (AFL)*, 3 LA 538 (1946).

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

26. *In re Gibbons Engineering and Machine Company and Industrial Union of Marine and Shipbuilding Workers, Local 25 (CIO)*, 2 LA 550 (1946).

27. *In re Pan American Airways, Inc. and International Air Line Pilots' Ass'n. (AFL)*, 11 LA 62 (1948).

was guilty, although it appeared that the employee had twice before been guilty of the same type of negligence and had received warnings.²⁸

D. Condonation of Violation of a Plant Rule. This problem is quite similar to the preceding one, and again there is but one case to serve as a basis for analysis. The case is *In re Allis-Chalmers Manufacturing Co.*, in which an employee was given a disciplinary lay-off for violation of a plant rule, which resulted in damage to a machine.²⁹ The company contended that the employee, in violation of a plant rule that the foreman was to assign material to be worked on, had his own tubes drilled, that he consequently obtained the wrong kind, and that he took that risk by failing to consult the foreman. The union contended that this rule was never enforced, and that workers were never cautioned against getting their own materials. Finding evidence to support the contentions of the union, the arbitrator held that an employer may not condone a practice in violation of a plant rule for a long time and then impose discipline when some loss to the company results. He further stated:

The company assumes a risk of possible loss by not enforcing its plant rules over a long period and taking no action to stop what it should have known was a general practice.

The arbitrator's decision and reasoning seem sound, including the new application of the phrase "assumption of risk."

V. EMPLOYER'S ANTAGONISM

In *In re Modern Workshop, Inc.*,³⁰ an employee was discharged for negligence resulting in the theft of his employer's car. The employee left the car on the street outside a parking lot, relying upon an assurance by the parking lot attendant that the car would be put on the lot as soon as there was space. The arbitrator held that the discharge was without "cause" since the employee took no more risk than a "reasonable and prudent

28. *In re Albert J. Barton, Inc. and Textile Workers Union of America, Local 515 (CIO)*, 5 LA 222 (1946) (the arbitrator was also influenced by the fact that the worker had been employed at the plant for a period of five years).

29. *In re Allis-Chalmers Manufacturing Company and United Farm Equipment and Metal Workers of America, Local 119 (CIO)*, 8 LA 177 (1947).

30. *In re Modern Workshop, Inc. and United Furniture Workers of America, Upholsterers Union, Local 76 (CIO)*, 8 LA 710 (1947).

man." The employer then contended that the employee should not be reinstated since the employer's antagonism because of the loss of his car would lead to friction in the plant, in which the parties to the arbitration worked side by side. The arbitrator agreed that friction would inevitably follow reinstatement of the employee but held that this did not justify a refusal to reinstate.

VI. SUFFICIENCY OF EVIDENCE AND BURDEN OF PROOF

The problems concerning the admissibility of evidence and burden of proof are more fully dealt with in a separate note in this issue of the *Quarterly*,³⁰ and will be referred to only briefly here. Except for probationary workers, the burden of proving that the discipline was justified rests with the employer,³¹ although arbitrators in these cases seldom make use of the term "burden of proof"; and at least one case has held that the employer must offer some evidence that discharge was an established penalty for the carelessness of which the employee was guilty.³²

VII. CONCLUSION

This review of the cases concerning damage to, and destruction of, machines and materials reveals no very startling conflicts among arbitrators. There is substantial agreement upon the rules which should govern such disputes and even upon the factors which should be considered in applying the rules. As one would expect, when the employee inflicts a substantial loss upon the company, his offense is serious enough to warrant discharge in the absence of mitigating circumstances.

Perhaps the most unsatisfactory tendency in the cases is the confusion surrounding the conception of "negligence." It could

30a. See *supra* note "Evidence, Burden and Quantum of Proof."

31. 5 Labor Equipment ¶66,003 (Prentice-Hall); In re Ford Motor Company and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 600 (CIO), 6 LA 1007 (1946); In re Tri-United Plastics Corporation and United Gas, Coke and Chemical Workers of America, Local 242 (CIO), 2 LA 398 (1946); In re Potash Company of America and International Union of Mine, Mill and Smelter Workers, Local 415 (CIO), 3 LA 403 (1946); In re National Lead Company, Texas Mining and Smelting Division and International Union of Mine, Mill and Smelter Workers, Local 412 (CIO), 11 LA 993 (1948); and In re Reynolds Metals Company and United Steelworkers of America, Local 3911 (CIO), 12 LA 76 (1949).

32. In re Albert J. Bartson, Inc. and Textile Workers Union of America, Local 515 (CIO), 5 LA 222 (1946).

be expected that lay arbitrators would have trouble with this term, and would fail to anticipate the difficulty of administering such qualifications of it as "gross," "slight," and other terms implying degree. Equally unfortunate is the temptation to eliminate negligence as the basis for disciplinary action. In damaging or destroying material it requires little ingenuity to cover up intention with the cloak of negligence. Accordingly, arbitrators must, in the long run, accept the concept of negligence as one of their working tools, but would do well to avoid the pitfalls into which the case-law has fallen.

Finally, the arbitrators in this group of cases have shown the same tendency, as in others, to admit rather freely evidence which aggravates or mitigates the offense; and they have agreed also what evidence has these effects. Accordingly, these cases, dealing as they do, with one of the most serious of industrial problems, show the same tendency toward uniformity, resulting largely from following legal analogies, that has been observed in the arbitration of other disputes.

RICHARD C. ALLEN

DISHONESTY, DISLOYALTY AND THEFT

It might seem that an employee who has been guilty of theft or other dishonesty would in every case be subject to discharge. Indeed, many labor-management contracts expressly make the dishonesty of an employee a ground for summary discharge; and, in any event, discharge or other discipline for theft or other dishonesty would fall squarely within the general requirement that discipline and discharge are to be imposed only for "just cause." Nevertheless, even a casual perusal of the reported arbitration cases would reveal that most arbitrators are extremely reluctant to discharge employees on these grounds. In the vast majority of cases, the arbitrators search the record long and carefully for mitigating circumstances and generally impose penalties much less severe than discharge.¹

Few employers will hire a man whose record of previous employment shows that he has been discharged for theft or

1. A study of forty-two cases shows that in approximately 15 per cent only was discharge permitted in cases of dishonest acts committed within the scope of employment. See *infra*, for a possible explanation of what seems a surprisingly low figure.