CHAPTER I

THE ARBITRATION OF DISCHARGE CASES: A CASE STUDY

J. FRED HOLLY

Professor and Head of the Department of Economics
University of Tennessee

Discharge is the supreme penalty imposed upon employees by the employer to maintain discipline in the work force. The serious implications of the penalty are of such magnitude that both contractual and legislative restrictions have been placed upon the employer to assure that discharge is for "just cause." The contractual limitations upon the employer's freedom of action generally leave him free to exercise initiative in the administration of discipline. His actions, however, are subject to the test of "just cause" as determined through the employee's right to question the decision through his access to the grievance machinery. Frequently, the justness of the employer's decision is finally determined by arbitration.

This case study is concerned with an analysis of the awards of arbitrators in cases involving the question of "just cause" for discharge. The study covers the 1055 discharge cases reported in LABOR ARBITRATION REPORTS[1] in the period January 1942 through March 1956. These awards are grouped into two periods for analysis as follows: (1) January 1942-August 1951, and (2) September 1951-March 1956.[2]

The author's concern with this analysis is twofold: (1) have arbitrators generally upheld or modified the discharge penalty? and (2) what considerations or criteria have been important in the arbitrator's

[1] The Bureau of National Affairs, Inc., *Labor Arbitration Reports*, (Washington), Volumes I-XXV.

[2] These periods were selected simply because of the availability of an earlier study covering the first period. In 1952, Joseph Charles Honeycutt completed a Masters Thesis at the University of Tennessee dealing with the subject and the first time period. The author is deeply indebted to Mr. Honeycutt for this study.

determination of the propriety of the imposed penalty? The answers to these questions should indicate ways to aid the parties in improving the administration of industrial discipline, collective bargaining, and arbitration. Moreover, the results should make possible the drawing of conclusions on the role of precedent in arbitration awards, and should aid arbitrators by indicating to them those considerations that have been deemed to be important in the various types of discharge cases.

A study of this type has many limitations such as the following: First, there is the problem of the representativeness of the cases analyzed. Specifically, are the cases studied representative of all discharge cases? The Bureau of National Affairs does not publish all discharge cases, and this study includes only those that were published. Hence, this study is representative of all discharge cases only in so far as the BNA reports are representative. Second, it is self-evident that a reader will have difficulty in understanding the whole situation merely from a study of the arbitrator's opinion and award. Finally, do the opinion and award truly reflect the criteria involved, or are the criteria merely rationalizations of the award? In addition, there are other limitations of the study that should be apparent to students of the arbitration process.

The 1055 arbitration awards were classified, for the purposes of this study, into four major categories of reasons for discharge and further subdivided as follows:

1. Violation of Plant Rules (354 cases)
   - 1.1 Absenteeism (113)
   - 1.2 Altercation with other employees (74)
   - 1.3 Dishonesty, Theft, or Disloyalty (81)
   - 1.4 Gambling (11)
   - 1.5 Intoxication (33)
   - 1.6 Other Specific Rules (42)
2. Incompetence and/or inefficiency (265 cases)
   - 2.1 Damage to or loss of machines and materials (20)
   - 2.2 Incompetence or Negligence (184)
   - 2.3 Loafing, Leaving Post, Sleeping on Job (61)
3. Insubordination (200 cases)
   - 3.1 Acts of insubordination (92)
   - 3.2 Refusal to accept job assignment or overtime work (108)

4. Union activities and miscellaneous causes (236 cases)
   - 4.1 Striking, instigating strike or slowdown (167)
   - 4.2 Other union activities (39)
   - 4.3 Miscellaneous causes (30)

In this paper, each of these topics is treated separately, both in respect to frequency[3] and important considerations.

1. Violation of Plant Rules

Table 1 shows the distribution of arbitration cases involving discharge for the violation of plant rules. This type of case occurred more frequently than did any of the other major causes of discharge, representing 354 of the 1055 cases. An examination of these data reveals that management's record in this type of case is somewhat improved since 1951. For example, in the period prior to 1951, management was sustained in only 40.5 percent of the cases, whereas this rate improved to 44.5 percent following 1951. While the rate of revocations remained roughly the same in each period, the rate of reduced penalties fell sharply from 30.0 in the first period to 25.3 in the latter period. The areas primarily responsible for this improvement in management's record were absenteeism (45.8 to 50.0) and altercations (48.1 to 54.5).

While this type of study is not designed to reveal the causes for the trends noted above, the author was impressed with several general reasons for such changes. First, all parties to arbitration have a better understanding of the nature of their problems today than they had in the earlier period. Second, experience has given us better criteria for determining infractions, appropriate penalties, etc. Third, more knowledge of this area has led to better administration of discipline in the sense that action is more clear cut, impersonal, and nondiscriminatory. Finally, arbitrators have become more consistent as their experience has led them to give consideration to those elements or factors

[3] Caution must be exercised in weighing the frequency factor since there is no way of determining the representativeness of the 1055 cases studied. While this study provides a complete analysis of all discharge cases reported in *Labor Arbitration Reports*, we have no indication of the completeness or the adequacy of the sample of this publication's reporting. As a result, we cannot rely upon statistical measures of realibility, significance, etc.

TABLE 1: DISTRIBUTION OF ARBITRATION CASES INVOLVING DISCHARGE FOR VIOLATION OF PLANT RULES

1942-1956

	Number			Percent		
	1942 1951	1951 1956	1942 1956	1942 1951	1951 1956	1942 1956
1. Violation of Plant Rules:	235	119	354	100.0	100.0	100.0
1.1 Absenteeism:	83	30	113	100.0	100.0	100.0
Management Sustained	38	15	53	45.8	50.0	46.9
Penalty Revoked	24	11	35	28.9	36.7	30.9
Penalty Reduced	21	4	25	25.3	13.3	22.2
1.2 Altercations:	52	22	74	100.0	100.0	100.0
Management Sustained	25	12	37	48.1	54.5	50.0
Penalty Revoked	10	2	12	19.2	9.1	16.2
Penalty Reduced	17	8	25	32.7	36.4	33.8
1.3 Dishonesty, Theft, Disloyalty:	40	41	81	100.0	100.0	100.0
Management Sustained	14	15	29	35.0	36.6	35.8
Penalty Revoked	15	16	31	37.5	39.0	38.2
Penalty Reduced	11	10	21	27.5	24.4	26.0
1.4 Gambling:	8	3	11	100.0	100.0	100.0
Management Sustained	3	1	4	37.5	33.3	36.3
Penalty Revoked	3	1	4	37.5	33.3	36.3
Penalty Reduced	2	1	3	25.0	33.4	27.4
1.5 Intoxication:	21	12	33	100.0	100.0	100.0
Management Sustained	10	6	16	47.6	50.0	48.5
Penalty Revoked	5	3	8	23.8	25.0	24.2
Penalty Reduced	6	3	9	28.6	25.0	27.3
1.6 Other Specific Rules	31	11	42	100.0	100.0	100.0
Management Sustained	4	4	8	12.9	36.3	19.1
Penalty Revoked	13	3	16	41.9	27.4	38.0
Penalty Reduced	14	4	18	45.2	36.3	42.9
Total Sustained	94	53	147	40.5	44.5	41.3
Total Revocations	70	36	106	30.0	30.2	30.0
Total Reductions	71	30	101	30.0	25.3	28.7

Source: The Bureau of National Affairs, Inc., LABOR ARBITRATION REPORTS, Vols. I-XXV.

that have become rather universal in application to each of the various types of cases.

The analysis of the cases involving discharge for the violation of plant rules revealed many considerations or criteria that weigh heavily in the decision of the arbitrator in cases in this category. The general application of these considerations implies that we have gone far in the direction of finding acceptable criteria for the evaluation of discipline in this particular area. The following considerations applicable to plant rules bear this out.

Criteria Established

Arbitrators have consistently held that the employee must know the rule that he has been punished for violating. The usual test here is that the necessary information must be available to the employee in a manner identical with other employees, and must have been disseminated in the usual manner. Moreover, a new policy must not be inaugurated without informing the employees of the change in policy. Also, the rules must be reasonable, and arbitrators frequently look at the reasonableness of the rule as well as the reasonableness of the penalty.

Except in unusual cases, warning must precede discharge. In the absence of specific contractual requirements, the warning may be either written or oral. A "final warning" must be followed by discharge instead of calling each warning the "final warning."

The employer must not be arbitrary, discriminatory, or unreasonable in administering discipline. Consistency of employer action is required and employees must not be "singled-out" for disciplinary purposes. Consistency of action does not always mean uniformity of action. For example, the length of service of the employee is frequently considered relevant, and the seriousness of the alleged offense may vary with the type of work performed or with the nature of the work area.

Arbitrators usually demand substantial proof of the rule violation and the burden is on the employer to prove the violation. Past acts of a similar nature by the employee may diminish the degree of proof required. Thus, the past record of the employee is often important as indicating the probability of the employee having committed the offense. Moreover, the past record is also used in determining the appropriate degree of penalty that is desirable.

In addition to these general considerations involving the violation of plant rules, it was possible to draw conclusions concerning specific factors for the various subdivisions of this category of discharge cases. These are as follows:

1.1 Absenteeism

It has been consistently held that chronic or excessive absenteeism is just cause for discharge. The only real problem here has been to develop suitable criteria for determining when absenteeism is excessive. In this regard there was no finding which indicated that so many absences in a certain time period were excessive. Rather, arbitrators attempt to decide this question by giving considerations to such factors as the following: the length of the time period involved, reasons for the absences, the nature of the job, the attendance record of other employees, and the employer's attempts to correct the problem. Also, absences are generally excused when they are for the purpose of attending funerals of close relatives, or when they are supported by a doctor's excuse.

Frequently, absences occur when an employee refuses to report for work when the employer has denied his request for a leave of absence or given him a less favorable vacation period. In dealing with this type of case, arbitrators have generally agreed that management has the right to schedule work and rule on requests for leaves of absence.

Many contracts require that an absent employee shall notify the employer of his absence. Arbitrators generally hold that a company must have a standard procedure for reporting absences if the employees are required to notify the employer that they will not report for work.

1.2 Altercations With Other Employees

An employee is not usually subject to the employer's discipline for altercations away from the plant outside of working hours. Yet, attacks on customers of the employer, or altercations that may reflect upon the employer's reputation may alter the aforementioned consideration. On the other hand, the "no fighting" rule applies to altercations on company property outside of working hours as well as during working hours.

Discharges are not usually upheld when the employee's actions were those of reasonable self defense. In some cases arbitrators have considered whether weapons were used and whether serious injury was done or threatened. On the other hand, the act of striking one's supervisor is the most unyielding of the bans on altercations.

1.3 Dishonesty, Theft, or Disloyalty

In general, cases in this category have given arbitrators considerable concern because of the serious implications of the charge against the employee. As a result, arbitrators place much emphasis upon full proof of the alleged act. In addition, cases in this category are frequently troublesome because honesty and loyalty are relative matters, and frequently also involve the consideration of intent. Thus, the arbitrator

TABLE 2: DISTRIBUTION OF ARBITRATION CASES INVOLVING DISCHARGE FOR INCOMPETENCE AND/OR INEFFICIENCY

1942-1956

	Number			Percent		
	1942 1951	1951 1956	1942 1956	1942 1951	1951 1956	1942 1956
2. Incompetence and/or Inefficiency	208	57	265	100.0	100.0	100.0
2.1 Damage to or Loss of Machines and Materials:	13	7	20	100.0	100.0	100.0
Management Sustained	5	3	8	38.5	42.8	40.0
Penalty Revoked	5	2	7	38.5	28.6	35.0
Penalty Reduced	3	2	5	23.0	28.6	25.0
2.2 Incompetence or Negligence:	146	38	184	100.0	100.0	100.0
Management Sustained	63	24	87	43.2	63.2	47.3
Penalty Revoked	42	7	49	28.8	18.4	26.6
Penalty Reduced	41	7	48	28.0	18.4	26.1
2.3 Loafing, Leaving Post, Sleeping on Job:	49	12	61	100.0	100.0	100.0
Management Sustained	20	3	23	40.8	25.0	37.7
Penalty Revoked	11	3	14	22.4	25.0	23.0
Penalty Reduced	18	6	24	36.8	50.0	39.3
Total Sustained	88	30	118	42.3	52.6	44.5
Total Revocations	58	12	70	27.9	21.1	26.4
Total Reductions	62	15	77	29.8	26.3	29.1

Source: The Bureau of National Affairs, Inc., LABOR ARBITRATION REPORTS, Vols. I-XXV.

is in the position of having to establish that the act was actually committed, and that it really constituted dishonesty, theft, or disloyalty. In cases where the employee is caught in an obviously dishonest act, the only problem is the credibility of witnesses. Except in unusual cases, an act committed outside the scope of employment has been considered as a mitigating circumstance.

1.4 Gambling

The arbitration awards in the cases involving gambling were based on the general considerations previously listed at the beginning of this section. No special considerations applying to this type of rule infraction were discovered.

1.5 Intoxication

Cases in this category reveal that discharge is always considered for just cause when there is substantial proof that the employee was intoxicated. Yet, such proof is extremely difficult to obtain. Intoxication must be discovered when the employee is on duty. Evidence based solely on suspicion has not been considered just cause for discharge.

1.6 Other Specific Rules

The majority of the cases involving "other specific rules" included alleged violation of safety rules, no-smoking rules, and bans on political activities on company premises during working hours. The analysis of these cases established that the majority of such rules are concerned with minor infractions which deserve some disciplinary action other than discharge. (The "rule of reason" is applied more generally in this category than in any of the other "plant rule" areas.) Any extenuating circumstances are given considerable weight by arbitrators when hearing cases in this category.

2. Incompetence and/or Inefficiency

As the data in Table 2 indicate, management's record has greatly improved in the arbitration of discharge cases for incompetence and/or inefficiency. In the period 1942-1951, management was sustained in only 42.3 percent of such cases; whereas, following 1951, management has been sustained in 52.6 percent of these cases. In like manner the record on revocations (decline from 27.9 to 21.1) and penalty reduction (29.8 to 26.3) has improved in the latter period. The major

reason for this improvement is found in the fact that 24 of the 30 cases involved the charge of incompetence or negligence where, during the first period, management was sustained in 43.2 percent of the cases, and in the latter period in 63.2 percent. A study of the cases leads to the conclusion that the basic reason for this improvement lies in the fact that management simply has better records now to support such charges, and that such allegations are made infrequently when there is no supporting evidence.

The comparatively small number of cases in the latter period in the other two categories renders comparisons almost meaningless.

The analysis of the reported cases on discharge for incompetence and/or inefficiency revealed that arbitrators have been quite specific in applying many considerations to the determination of the propriety of the managerial decision. The following are among the more important of these considerations. The standard of competency must be reasonable, and was frequently based on the average man concept. A standard of competency should not be adhered to strictly where the factors causing incompetence are beyond the control of the individual.

The employee must have been given adequate training to permit him to qualify for the job. The test of adequacy is a comparison with the training received by other workers on the same or similar jobs. Arbitrators have held that an employee may not be discharged justly for inability to perform duties to which he has been promoted beyond his capacities.

The employee is not protected by the "just cause" doctrine during the trial or probationary period. Successful completion of the probationary period does not immunize the employee against later charges of incompetency.

The presence or absence of adequate supervision and suitable equipment has been considered to be crucial by many arbitrators. There has been little question concerning discharges for incompetence where the employee has consistently ignored previous warnings about his job performance. On the other hand, charges of incompetence and/or inefficiency have not been upheld where the questioned practice was sanctioned by the supervisor.

Generally, no distinction is drawn between reasons for incompetence; for example, physical limitations are given no different treatment than

any other reason that might render an employee incompetent. However, unusual circumstances outside of the work situation have been given some consideration in discharge cases where the employee has a long record of satisfactory service.

The submission to the arbitrator of production records, work sheets, or samples of workmanship has been considered the most adequate method of establishing a charge of incompetence and/or inefficiency. On the other hand, recently received merit increases go far to nullify charges of incompetence.

Deliberate action, wanton disregard of employer's property, or undue carelessness is just cause for discharge. But if the employee's conduct is more thoughtless and negligent than willful and malicious discharge has been held to be unjust.

One employee cannot get another employee discharged by merely reporting to his supervisor a dischargeable offense. The report must be corroborated to justify discharge. Neither can an employer discriminate against an employee by trying to catch him in some mistake.

In addition to these general considerations involving discharge for incompetence and/or inefficiency the analysis revealed additional specific considerations applicable to each of the subdivisions of this category. These specific considerations follow:

2.1 Damage to or Loss of Machines and Materials

Three additional considerations are found to apply specifically to this category, viz:

a. When the employer's charge is carelessness, he must show that an undue amount of carelessness existed and that discharge is an established penalty for the type of carelessness involved in the case.

b. An employee's failure to follow an established practice of paying for lost tools or equipment has been considered a just cause for discharge.

c. Probable resultant damage that an employee might have caused has been considered an unjust cause for discharge.

2.2 Incompetence or Negligence

In some types of work, such as creative editorial work, arbitrators have held that the employers do not have to set any standards of competence in order to discharge an employee for incompetence. In jobs

with more specific duties, arbitrators have held that the failure of an employee to pass a standardized practical test constitutes just cause for discharge.

In many cases involving incompetence, arbitrators have given major consideration to the effect of the employee's incompetence on the employer's business. In some charges of incompetence, the nature of the product has been considered of major importance in the award. In these cases the primary concern has been with the possible effect of the employee's incompetence on the lives of others.

2.3 Loafing, Leaving Post, Sleeping on Job

Arbitrators require a high degree of proof to substantiate discharge for loafing. Mere suspicion of loafing does not constitute just cause for discharge. Moreover, evidence must show that the time spent loafing was within the scope of control of the employee, and that his loafing affected production. Generally, a warning for loafing must precede discharge for this cause.

Where the employer can prove that an employee repeatedly leaves his post, or is absent therefrom for extended periods, or abuses rest periods, discharge is for just cause. If leaving one's post for a common cause has been a general practice in the firm, arbitrators have held that an employer is not justified in discharging an employee for this offense.

Arbitrators have consistently upheld discharges for sleeping on the job in crucial work. Employees generally, however, have received the benefit of the doubt in a charge of sleeping on the job. Arbitrators have questioned the methods which some employers used in obtaining evidence to support a charge of sleeping on the job.

3. Insubordination

Management has found it difficult to deal with problems of insubordination. It is in this area of discharge cases that management has had the lowest rate of sustained cases, the lowest rate of revoked penalties, and the highest rate of penalty reductions. The poorest record in this category relates to "acts of insubordination" where prior to 1951 management was sustained in only 28.0 percent of the cases and in only 29.2 percent following 1951. (See Table 3). The obvious reason for this poor experience is that management simply has encountered extreme difficulty in deciding where a personality clash or a misunderstanding ends and insubordination begins.

In this category of cases the considerations were found to relate to the specific subcategories. Accordingly, there are no general considerations for insubordination as a whole.

3.1 Acts of Insubordination

Employers must be consistent in disciplining employees for insubordination. Because of the nature of the case and extenuating circumstances, insubordination may be either a just or an unjust cause for discharge.

The use of abusive and threatening language toward the employer and the indulgence in excessive displays of temperament have been regarded as insubordination and just cause for discharge. An employee's personality clash with a superior constitutes unjust cause for discharge. For example, momentary displays of unpleasantness or use of abusive language alone to superiors have been considered an unjust cause for discharge.

TABLE 3: DISTRIBUTION OF ARBITRATION CASES INVOLVING DISCHARGE FOR INSUBORDINATION

1942-1956

	Number			Percent		
	1942-1951	1951-1956	1942-1956	1942-1951	1951-1956	1942-1956
3. Insubordination:	143	57	200	100.0	100.0	100.0
3.1 Acts of Insubordination:	68	24	92	100.0	100.0	100.0
Management Sustained	19	7	26	28.0	29.2	28.3
Penalty Revoked	15	4	19	22.0	16.6	20.6
Penalty Reduced	34	13	47	50.0	54.2	51.1
3.2 Refusal to Accept Job Assignment or Overtime Work:	75	33	108	100.0	100.0	100.0
Management Sustained	28	11	39	37.3	33.3	36.1
Penalty Revoked	16	4	20	21.3	12.1	18.5
Penalty Reduced	31	18	49	41.4	54.6	45.4
Total Sustained	47	18	65	32.9	31.6	32.5
Total Revocations	31	8	39	21.7	14.0	19.5
Total Reductions	65	31	96	45.4	54.4	48.0

Source: The Bureau of National Affairs, Inc., LABOR ARBITRATION REPORTS, Vols. I-XXV.

3.2 Refusal to Accept Job Assignment or Overtime Work

There has been little question concerning the propriety of discharge for insubordination when there has been a refusal to comply with a valid order. Arbitrators generally agree that proper procedure for an employee in a case involving a questionable job assignment would be to accept the assignment and file a grievance.

Merely protesting that assigned work is not part of a person's job duties has been considered an unjust cause for discharge. Neither is it just to discharge an employee who has merely failed to carry out an order without refusing to do so. Also the employee must know that he is being given an order before he can be discharged for insubordination. Moreover, employees cannot be expected to carry out orders that would be detrimental to their health or in violation of their physician's instructions.

In those situations where the contract made no reference to whether overtime work was mandatory or voluntary, arbitrators generally held that past practice in the firm or industry was controlling.

4. Union Activities and Miscellaneous Causes

As indicated in Table 4, management has made substantial improvements since 1951 in the arbitration of discharge cases in the fourth category. Yet, the number of cases in this category since 1951 is so small that extreme care must be exercised in interpreting the data. All that can be said with assurance is that the available data show that since 1951 the cases in which management has been sustained increased from 40.3 percent to 53.3 percent; meanwhile, revocations dropped from 23.3 percent to 15.0 percent and penalty reductions declined from 36.4 to 31.7 percent.

4.1 Striking, Instigating Strike or Slowdown

Where there is no evidence of anti-union bias or discriminatory discharge, arbitrators generally have sustained the discharge of an employee for violating the "no-strike" clause. The employer must present a high degree of proof to substantiate his charge in this category. The predominance of union members or leaders among those discharged may be significant in pointing out a union's charge of discrimination. Where the leaders of the employees know a strike is illegal and continue the strike despite warnings by both the employer and the union superiors,

there has been little question concerning the justness of discharging the leaders.

Production records have been regarded by arbitrators as substantial evidence in supporting discharges for slowdowns. The author could find no general agreement concerning a union official's responsibility for strikes or slowdowns.

4.2 Other Union Activities

If the employer has not been anti-union, arbitrators have generally held that the burden of proof is upon the union to show that a discharge was discriminatory. In the absence of an anti-union bias, and with full proof, arbitrators have upheld management's discharges for illegal union activities. A union representative is immune to discipline when he is

TABLE 4: DISTRIBUTION OF ARBITRATION CASES INVOLVING DISCHARGE FOR UNION ACTIVITIES AND MISCELLANEOUS CAUSES

1942-1956

	Number			Percent		
	1942-1951	1951-1956	1942-1956	1942-1951	1951-1956	1942-1956
4. Union Activities and Miscellaneous Causes:	247	92	329	100.0	100.0	100.0
4.1 Striking, Instigating Strike or Slowdown:	117	50	167	100.0	100.0	100.0
Management Sustained	48	25	73	41.0	50.0	43.7
Penalty Revoked	22	7	29	18.8	14.0	17.4
Penalty Reduced	47	18	65	40.2	36.0	38.9
4.2 Other Union Activities:	32	7	39	100.0	100.0	100.0
Management Sustained	13	5	18	40.6	71.4	46.1
Penalty Revoked	10	1	11	31.3	14.3	28.2
Penalty Reduced	9	1	10	28.1	14.3	25.7
4.3 Miscellaneous Causes:	27	3	30	100.0	100.0	100.0
Management Sustained	10	2	12	37.0	66.7	40.0
Penalty Revoked	9	1	10	33.0	33.3	33.3
Penalty Reduced	8	0	8	30.0	0.0	26.7
Total Sustained	71	32	103	40.3	53.3	43.6
Total Revocations	41	9	50	23.3	15.0	21.2
Total Reductions	64	19	83	36.4	31.7	35.2

Source: The Bureau of National Affairs, Inc., LABOR ARBITRATION REPORTS, Vols. I-XXV.

acting within the scope of his union duties, but is subject to discipline when he steps outside that scope.

Arbitrators have held that it is the union's responsibility to allege and to establish a discriminatory discharge to overcome the prerogative of an employer given by a probationary employment clause.

4.3 Miscellaneous Causes

The few cases involved in this category establish that:

a. Employee conduct, taking place outside the plant premises and during non-working hours, must be related to the employer-employee relationship, if the causes complained of are to be accepted as just cause for discharge.

b. Horseplay seldom constituted just cause for discharge.

c. In most cases discharges have been upheld when they are for true economy reasons.

Summary and Conclusion

As indicated earlier this case study had two major purposes; namely, to determine (1) have arbitrators generally upheld or modified the discharge penalty? and (2) what considerations or criteria have been important in the arbitrator's determination of the appropriateness of the imposed penalty?

Inability to select a sample rendered impossible any statistical measures of significance; however, Table 5 is included as a summary of the findings in so far as the available cases are concerned. These data show that for the entire period under study, management's best record on sustained discharges is in the category of incompetence and/or inefficiency and these amount to only 44.5 percent. On the other hand, the low point of 32.5 percent is reached in the insubordination cases. Thus, in no single category has management's record approached 50 percent; yet, when these data are broken down into two time periods, it is demonstrated that management's record is improving.

As to the second major purpose of the study, many considerations were found in each of the categories that are weighed heavily by arbitrators. Although each case is an entity in itself, and extenuating circumstances are usually involved, many principles were found that govern discharge cases. Briefly stated, the more important of these include the following:

1. Policies must be both known and reasonable.
2. Violation of policies must be proven, and the burden of proof rests on the employer.
3. The application of rules and policies must be consistent:
   a. Employees cannot be singled out for discipline.
   b. Past practice may be a controlling consideration.
4. Where employees are held to a standard, that standard must be reasonable.
5. The training provided employees must be adequate.
6. The job rights of employees must be protected from arbitrary, capricious, or discriminatory action.
7. Actions must be impersonal and based on fact.
8. Where the contract speaks, it speaks with authority.

TABLE 5: DISTRIBUTION OF ARBITRATION CASES INVOLVING DISCHARGE BY MAJOR CLASSIFICATIONS

1942-1956

	Violation of Plant Rules		Incompetence and/or Inefficiency		Insubordination		Union Activity, Misc.		Total	
1942-1951 Cases	No.	Percent	No.	Percent	No.	Percent	No.	Percent	No.	Percent
Management Sustained	94	40.0	88	42.3	47	32.9	71	40.3	300	39.4
Penalty Revoked	70	30.0	58	27.9	31	21.7	41	23.3	200	26.2
Penalty Reduced	71	30.0	62	29.8	65	45.4	64	36.4	262	34.4
	235	100.0	208	100.0	143	100.0	176	100.0	762	100.0
1951-1956 Cases										
Management Sustained	53	44.5	30	52.6	18	31.6	32	53.3	133	45.4
Penalty Revoked	36	30.2	12	21.1	8	14.0	9	15.0	65	22.2
Penalty Reduced	30	25.3	15	26.3	31	54.4	19	31.7	95	32.4
	119	100.0	57	100.0	57	100.0	60	100.0	293	100.0
1942-1956 Cases										
Management Sustained	147	41.3	118	44.5	65	32.5	103	43.6	433	41.0
Penalty Revoked	106	30.0	70	26.4	39	19.5	50	21.2	265	25.2
Penalty Reduced	101	28.7	77	29.1	96	48.0	83	35.2	357	33.8
	354	100.0	265	100.0	200	100.0	236	100.0	1055	100.0

Source: Tables 1-4.

Finally, the study shows that there should be grave doubts concerning the value of precedent awards in arbitration. While earlier cases may have a deceptive relevance to a given arbitration, the awards may be wholly inapplicable for a number of reasons, including the major one of basic differences in the governing agreements. On the other hand, the basic considerations or criteria requisite to a just award are highly similar within each category of discharge cases. Thus, an understanding of these considerations should improve the practice of arbitration.

Discussion—

BENJAMIN AARON

Institute of Industrial Relations
University of California, Los Angeles

Among those of the general public who have no direct contact with labor arbitrations, attitudes toward arbitrators' awards seem to range from profound cynicism to amused tolerance. In my experience not much can be done with persons holding the former view; more likely than not, it reflects a bilious world outlook, a disposition to believe that every decision, from the rulings of the Supreme Court to those of a baseball umpire, is "fixed." The attitude at the other side of this rather narrow intellectual spectrum is perhaps more amenable to change. It is one frequently held by professional people—scientists, lawyers, economists—who regard arbitration awards with a kind of good-natured condescension, seeing them only as interesting, if not always comprehensible, products of an imprecise and hopelessly unpredictable decision-making process.

To illustrate this latter attitude, I quote from a letter I recently received from an eminent law professor, regarding a forthcoming symposium on arbitration: "Two or three of the titles may overlap somewhat," he wrote, "but we are not too concerned about that because we believe that any two arbitrators will differ sufficiently on almost any topic to remove whatever objection there might otherwise be to some slight duplication."

I suppose that the most appropriate retort to my learned friend's implied stricture would be that it applies with equal force to judicial

or scholarly opinions in some specialized areas of law, economics, and the physical sciences. Professor Holly's paper suggests, however, that arbitrators may some day be able to advance a more affirmative defense, namely, the fact that the great majority of decisions involving such matters as discipline and discharge are based upon a set of reasonably well-defined principles that have won general acceptance in the field of industrial relations.

I say "some day" because it seems to me that the development of such a set of principles has proceeded quite unevenly, and in some areas it is still relatively immature. With respect to discharge cases, Professor Holly has ventured the guarded conclusion that "the basic considerations requisite to a just award are highly similar within each category." I doubt whether even so cautious a generalization as this would go unchallenged if applied to, say the contracting out of work, or the treatment of employees alleged to be security risks, or a variety of other matters.

I see no reason, however, why arbitrators should be defensive about the fact that precedent counts for so little in their decisions. After all, an arbitrator is concerned with facts, as well as with principles, and the infinite variety of facts permits, indeed requires, a wide range of decision within the scope of a single general principle. It is instructive to recall that as far back as 1898 James Bradley Thayer wrote mockingly of "that lawyer's Paradise where all words have a fixed, precisely ascertained meaning; where men may express their purposes, not only with accuracy, but with fullness; and where, if the writer has been careful, a lawyer having a document referred to him, may sit in his chair, inspect the text, and answer all questions without raising his eyes." Lawyers have not found this Paradise on earth and arbitrators won't either.

If there is any truth in the foregoing observations, then we need not be unduly concerned by the obvious limitations of Professor Holly's statistical analysis of discharge cases—limitations that he has been most careful to point out. Indeed, I find it rather comforting, in this Age of UNIVAC, to know that there are a few areas of human endeavor which yet manage to elude the fell clutch of automatic prediction.

Professor Holly has told us what happened in over 1,000 discharge cases, but he has been commendably cautious in articulating the bases for the decisions. There is a fatal seductiveness about statistical compilations—a cozy invitation to indulge in broad generalizations—that

has proven to be the downfall of many an investigator. In this connection I recall the case of the scientist who performed an experiment on 1,000 fleas. He took each flea in turn and held it under his thumb for three seconds. He then released the flea and said in a loud voice, "Jump!" Each flea, without exception, jumped. The scientist next amputated the legs of all the fleas in his sample group and then repeated the experiment; but this time not a single flea jumped at his command. After analyzing his data, our scientist announced his findings: First, fleas learn to respond to commands with great ease and speed. Second, when a flea's legs are amputated, it is rendered completely deaf.

Professor Holly is too careful a scholar to leap at such unwarranted conclusions. Indeed, the tentativeness with which he has put forth his findings suggests that he is a student of James Thurber and has adopted as his creed the following aphorism of that great man: "Get it right or let it alone. The conclusion you jump to may be your own." Few would quarrel with the list of principles he has found to govern discharge cases; some might even wish to expand the list. Moreover, most of us would agree, I think, that the practice of arbitration will improve as some of these principles gain ever wider acceptance.

I wish I could conclude my remarks without some major criticism of Professor's Holly's work, but more in sorrow than in anger, I must call attention to a very, very serious error, just out of intellectual integrity: In discussing the "shall nots" that employers must observe in administering discipline, Mr. Holly has violated not once, but twice, the Rule of Five that was so definitively stated by our esteemed colleague, James Hill, in one of our previous meetings. He says, in the first part of his paper, that the employer must not be arbitrary, discriminatory, or unreasonable, and in the conclusion he strikes "unreasonable" and substitutes "capricious." In short, he has arbitrarily, unreasonably, discriminatorily, and capriciously reduced the Rule of Five to a Rule of Three, and, what is worse, he has not once mentioned the fact that the employer has a duty not to be whimsical. This flaunting of tradition is an affront to the profession, and I know I speak for an overwhelming majority of the Academy when I say that we resist any implication that we will ever use only three adjectives when five are available.

Just one or two concluding remarks. I suppose I should allude to the box score that Professor Holly has kept on the record of management. I just want to beat somebody in the audience to this comment,

that I don't know who is being educated and getting a better average —the employer or the arbitrator. I suppose it is arguable which group is improving.

Finally, Professor Holly, who is as modest as he is scholarly, asked me somewhat anxiously whether I thought there was any point in an investigation of this kind, whether the paper was worth while. I told him quite sincerely that I thought it was, that the study perhaps is not too meaningful by itself, but will become increasingly meaningful as we get more studies of this kind, and the kind that Professor Ross has made and will be telling us about. I think we are all greatly in the debt of both gentlemen for the work that they have done.