CHAPTER II

THE ARBITRATION OF DISCHARGE CASES: WHAT HAPPENS AFTER REINSTATEMENT

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1. Introduction

Law and statistics are notoriously uncongenial. While the original "Brandeis brief" was filed almost fifty years ago, and while some courts are increasingly willing to take notice of economic and sociological data (particularly the Supreme Court in constitutional cases), concepts and principles remain the staple item of diet. So it is in arbitration. Since arbitration is a private system of contract enforcement, and is manned to a growing extent by attorneys, it is not surprising that rules, maxims and precedents are so prominent. The small but developing literature of labor arbitration, insofar as it is not preoccupied with procedural matters, deals chiefly with the emergence and evolution of doctrines and principles to attack the peculiar problems of contractual interpretation which confront the labor arbitrator.

Doubtless this state of affairs will continue in large measure. But logic and legitimacy are not the only tests of a doctrine. The question of how it actually works out is also of interest. In various fields of the law, judges, attorneys and scholars are already concerned with the efficiency of established principles in ordering the affairs of men and solving their controversies. Divorce law, concepts of insanity, the jury system in auto accident cases, anti-trust law and regulation of sexual behavior come to mind readily. If studies of experience under legal doctrines are to be made, contact with statistics cannot be entirely avoided.

In labor arbitration, also, there is much to be gained from studies

[1] The author is glad to acknowledge the valuable assistance of Mr. Paul Hartman of the Institute of Industrial Relations.

of experience after the award. For example, we are frequently called upon to decide whether particular employees are qualified for particular jobs on which seniority rights are being asserted. We have developed various tests of capability; we consider certain types of evidence as relevant. We decide that some of the employees are qualified, and order that they be assigned, promoted or recalled to the jobs in question. Are they *really* qualified? It would be instructive, and not very difficult, to learn how many of them actually "make out" on the jobs.

I am reporting today on a study of experience under arbitration awards in which discharged employees have been reinstated. For arbitrators there ought to be an unusual degree of interest in how these reinstatements have worked out. The principal reason is that arbitrators themselves have created the standards of decision for this type of case. This has been a matter of necessity rather than preference; we are a timid lot for the most part. We have had to invent standards because none have been furnished. In no field of arbitration can less guidance be had from general legal doctrines or from the language of contracts and submission agreements than in the field of industrial discipline.

To be sure, an arbitrator is applying the terms of a collective bargaining agreement when he decides a discharge case. Typically the agreement recites that the employer will not discharge without proper cause, and the arbitrator makes a judgment as to whether there *was* proper cause. Technically this is contractual interpretation. But it is contractual interpretation in the same sense as it was statutory interpretation when the O.P.A. decided that $1.00 was a "fair and equitable" ceiling price for a peck of winter potatoes. The Emergency Price Control Act required that ceiling prices be "fair and equitable." It was the task of the O.P.A. to develop standards of fairness and equity, and then apply them to particular commodities. Clearly this task called for a good deal of administrative rule-making as well as adjudication. In the same way the arbitrators collectively have had to contrive standards of proper cause and then apply them individually to particular cases.

It is true that some collective agreements afford more guidance than the familiar rubrics of "just cause," "proper cause," or just plain "cause." The contract may incorporate a list of disciplinary offenses with the corresponding penalties. It may specify that certain derelictions, such as persistent absenteeism or falsification of production rec-

ords, will be grounds for discharge. The submission agreement may limit the arbitrator to finding whether the grievant was guilty of the offense for which he was terminated. The contract or submission agreement may instruct the arbitrator as to whether he is authorized to mitigate the penalty, as an alternative to upholding it or rescinding it altogether. In these and other ways the parties may "structure" the situation, as the sociologists would say. Ordinarily they do not.

Certainly the antecedent Law of Contracts offers little help. At common law the employer generally had an unrestricted right to discharge, just as the employee had an unlimited right to quit his job. There are, of course, many court decisions in the books involving termination of employment and utilizing familiar contractual concepts such as failure of consideration, mutual mistake, anticipatory repudiation and legal impossibility. These, however, were actions for breach of individual employment contracts for a fixed term. The notion of an individual employment contract is still of help to the courts in rationalizing some of their labor-law decisions; but if such a contract really exists, it is only a contract at will and does not confer any rights of tenure. It is the collective bargaining contract, not the supposed individual employment contract, which is brought into play in the ordinary discharge case. Perhaps the developing standards of "just cause" for discharge under a collective bargaining contract could be translated into more traditional categories such as failure of consideration; but it is not clear that such a translation would accomplish much and, in any case, it has never been attempted.

There were additional reasons for studying the aftermath of the reinstatement award. Although the discharge case is probably not the most important type of grievance brought to arbitration, from some standpoints, it is almost certainly the most numerous type. During a recent year, for example, about 25 percent of all arbitration appointments made by the Federal Mediation and Conciliation Service were in discharge matters.

Many discharge cases are charged with emotion and generate strong feelings among the parties. In fact, the parties may have stronger feelings about the discharge or reinstatement of a single employee than about a wage case involving large numbers of employees and great sums of money. For this reason, it was expected that they would have clear recollections of the cases and definite reactions to the awards. This expectation was generally borne out. I received quite a few inter-

esting letters from company and union officials, amplifying their responses concerning particular cases and commenting on the discharge problem generally.

Finally, some widely divergent theories about the subsequent career of the reinstated employee are current. One theory runs something as follows: He is a marked man, or he never would have been discharged in the first place. His number was up. Management will nail him again soon, and make it stick. Reinstating him merely throws him back into an impossible situation. His best bet will be to pick up his retroactive pay and find himself another job. At the other extreme, it is said that he was probably discharged by an impetuous supervisor in a fit of anger. Everyone is relieved when the arbitrator slaps him on the wrist and puts him back to work. Having been discharged once, he will now get religion and keep his nose clean. In fact he will become a model employee. Neither of these popular theories, nor any of the intermediate positions, has ever been tested statistically.

2. The Arbitrators' Approach to Industrial Discipline

In their search for principles of industrial discipline, the arbitrators have turned not to the Law of Contracts but to modern concepts of enlightened personnel administration, sprinkled with elements of procedural due process in criminal cases. This is not the place to present a full-blown theory of industrial discipline.[2] For the present purpose it will suffice to list a few of the major tenets which are stressed in the literature of personnel administration and in the thinking of arbitrators concerning disciplinary grievances.

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[2] See A. Howard Myers, "Concepts of Industrial Discipline," and Gabriel N. Alexander, "Comment," in Jean T. McKelvey [ed.], *Management Rights and the Arbitration Process*, Proceedings of the Ninth Annual Meeting of the National Academy of Arbitrators (Washington: BNA Incorporated, 1956), pp. 59-83; Harry H. Platt, "Arbitral Standards in Discipline Cases," in *Lectures on the Law and Labor-Management Relations* (Ann Arbor: University of Michigan, 1951), 233-237; Robert H. Skilton, *Industrial Discipline and the Arbitration Process* (Philadelphia: University of Pennsylvania Press, 1952); American Management Association, *Constructive Discipline in Industry* (New York, 1943); J. M. Porter, Jr., "The Arbitration of Industrial Disputes Arising from Disciplinary Action," in Milton Derber [ed.], *Proceedings of the Second Annual Meeting, Industrial Relations Research Association* (New York, 1950), pp. 262-270; William H. Knowles, *Personnel Management—A Human Relations Approach* (New York: American Book Company, 1955), pp. 277-279, 293; Gordon S. Watkins, *et al., The Management of Personnel and Labor Relations* (New York: McGraw-Hill, 1950), pp. 481-508; and Harry Shulman and N. W. Chamberlain, *Cases on Labor Relations* (Brooklyn: The Foundation Press, 1949), pp. 366-575.

1. The employer is entitled to prescribe reasonable rules of conduct. What rules are necessary will vary from one establishment to another, and the employer enjoys considerable discretion in making this determination.[3]

2. The employee has a right to know what is expected of him. Therefore the employer has an obligation to give adequate notice of the rules, unless they are so self-evident as not to require notice.[4] This requirement gives rise to a number of chronic issues, such as (a) whether a particular rule has been promulgated with sufficient notoriety, and (b) whether violations have been condoned to such an extent as to make the rule invalid.

3. The employer has no jurisdiction over the employee's private life, and no right to impose discipline for behavior off company time and property—this being a task for the civil authorities. The exception occurs when the employee's actions away from the job have the effect of damaging or seriously jeopardizing the employer's legitimate interests. The problem in cases of this type is to decide whether the employer's interests were sufficiently involved as to justify his intervention.

4. The employee must conform with valid rules in good faith and with serious purpose. He must comport himself as a disciplined individual; otherwise goods or services cannot be produced with any degree of efficiency.[5]

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[3] "An organization requires policy and formal coordination in order to pursue its aims, with adequate authority for internal discipline to effectuate its program." (Myers, *op. cit.* p. 62.) "Any sort of group action, if it is to be efficiently performed, requires coordination, control and personal discipline. Industrial discipline is exactly of that sort. It seeks to eliminate practices that make for group inefficiency and to encourage those that facilitate effective cooperation." (Yoder, *op. cit.*, p. 463.)

[4] "The right to discipline for infractions implies that workers will be informed as to the rules to be followed and that foremen who supervise and administer penalties know what the policies are so as to avoid charges of discriminatory treatment." (Myers, *op. cit.*, p. 63.)

[5] "Management is entitled to have an obedient and cooperative working force and ought not to be subjected to the necessity for retaining in its employ persons who over a period of time demonstrate by their conduct that they cannot accommodate themselves to reasonable shop rules." (Alexander, *op. cit.*, p. 81.) "It is an implied obligation of a worker to be reasonably regular in his attendance, to exert reasonable effort and diligence on his job, to perform adequately, and to render a fair day's work for a day's pay . . . to follow instructions, to accept work assignments, and to obey orders of supervision at all times, except possibly if they would subject him to criminal liability or to safety and health hazards." (Platt, *op. cit.*, p. 234.)

5. The employer must avoid arbitrary, hasty or capricious action when confronted with unsatisfactory conduct. The tendency for supervisors to "over-react" against what they regard as a challenge to their authority is one of the persistent problems of industrial discipline.[6] To guard against this tendency, collective agreements frequently provide that an employee will not be discharged until after a preliminary suspension, or until after consultation with the union.

6. Disciplinary policies should be applied consistently and even-handedly.[7] This standard is clear enough in disparaging capricious decisions and discriminatory purposes. It does not mean, however, that a mechanical uniformity of treatment must be achieved, regardless of differences in the background or circumstances of particular cases. What is important, as Benjamin Aaron has stressed, is consistent purposes rather than uniform penalties.[8]

7. The punishment should fit the crime. There is a controversy among arbitrators as to whether they have authority to mitigate penalties where the employee is guilty of the offense charged but the penalty is regarded as excessive. In 70 percent of the reinstatement cases covered by the present survey, workers were reinstated with partial back pay or no back pay.

8. Proper industrial discipline is corrective rather than punitive. The purpose is to instill self-discipline in the working force.[9] Both employer and employee lose when the employee is terminated. The em-

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[6] Porter points out that particularly in cases of alleged insubordination, "there is frequently an over-reaction, by first-line management. . . . The discipline applied need only meet the requirements of management's responsibility for efficient production in the plant, but, in fact, it tends to exceed this need and becomes an action mainly of vindication of status and exercise of authority." (Porter, *op. cit.*, p. 268.)

[7] "Employees want a uniform and consistent application of the rules—the rule of shop policy instead of the whimsical rule of men—and, indeed, adherence to policy is sound personnel practice." (Knowles, *op. cit.*, p. 278.)

[8] See Benjamin Aaron, "The Uses of the Past in Arbitration," in Jean T. McKelvey [ed.], *Arbitration Today*, Proceedings of the Eighth Annual Meeting of the National Academy of Arbitrators (Washington: BNA Incorporated, 1955), p. 12.

[9] "The highest type of control is that which originates within the individual worker. . . . It develops from a man's belief in the personal integrity, in the fairness, and in the understanding of his superiors. Self-discipline in the employee group is the goal of enlightened leadership." (American Management Association, *op. cit.*, p. 5.) "The purpose [of discipline] according to the most modern thinking of industrial relations people, is not to inflict punishment for wrongdoing, but to correct individual faults and behavior and to prevent further infractions." (Platt, *op. cit.*, p. 235.)

ployer must recruit and train a replacement, and must often reckon with ill will on the part of the discharged employee's fellow workers; while the employee loses his seniority and all the valuable rights associated with it. Therefore discharge should normally be invoked only as a last resort, after it has become clear that corrective measures will not succeed.[10]

9. It follows that the evaluation of a given penalty will depend not only on the immediate offense but also on the employee's previous disciplinary record. It also follows that, in the normal case, a series of disciplinary measures—including interviews, formal reprimands, and disciplinary layoffs—should be applied with gradually increasing severity before discharge is considered. "Capital punishment" should not be levied until it has been established that the employee will not respond to lesser penalties.[11] Doubtless many cases of mitigated penalties represent the arbitrator's attempt to apply this principle to a firm which does not make a practice of assigning disciplinary layoffs. Whether the arbitrator should, in effect, impose such a practice on a firm which has never used it is subject to much controversy.

3. Summary of Findings

It was said of the late Dr. Kinsey that no one could study a matter so long and so intensively without developing a certain amount of enthusiasm for his subject. Nevertheless, it is not my purpose to endorse—or disparage, for that matter—the prevalent practices in disciplinary cases. My objective is limited to reporting what they are. In

[10] If one views the objective of disciplinary action as the improvement of behavior, then it is clear that insofar as the individual disciplined is concerned, any value in terms of reformed behavior is lost to the company when the man is discharged." (Porter, *op. cit.*, p. 269.) "Corrective discipline imposes upon management a twofold burden of firmness and patience. . . . [Management must] adopt a reasonably firm attitude against minor violations . . . [and must be] patient. . . . Even though an employee's behavior is aggravating and provocative, the employee must be dealt with objectively and not because of anger or desire to retaliate" (Alexander, *op. cit.*, p. 81.)

[11] "Clearly a duty to issue reprimands or warnings exists as a reasonable first step of discipline, preliminary to disciplinary layoffs and dismissals." (Platt, *op. cit.*, p. 65.) "In the attempt to enforce discipline and secure a fair day's work, the employer should . . . give proper consideration to method. . . . The appropriate first measure may be to warn him [the offender]. Then if he does not improve within a reasonable time after warning, the stiffer penalty may be imposed—disciplinary layoff to discharge." (Shulman, *op. cit.*, p. 409.)

the spirit of Section 206 of the Labor-Management Relations Act, this is a fact-finding report without recommendations.

The reinstatement cases analyzed here were found in the printed volumes of LABOR ARBITRATION REPORTS covering the years 1950-55. I looked for cases in which the grievant was discharged for cause, and subsequently reinstated by an arbitrator or board of arbitration; and providing enough reference information to permit correspondence with the employer and the union. All cases meeting these tests were included, except that I eliminated any case in which I had served as arbitrator. Exactly 207 individual grievants in 145 establishments were found.[12]

Some of the material in this report (including seniority status of the grievants, grounds for discharge, principal reasons for reinstatement, and terms of reinstatement) has been taken from the body of the decisions.

In addition a questionnaire covering each grievant was sent to his employer, along with an explanatory letter. (Appendix A.) A similar but not identical questionnaire was sent to the union representing each of the grievants. (Appendix B.)

The response from employers was unusually good; by the time the replies were tabulated, 60 percent of the employer questionnaires had been returned. A good deal of the information in this report has been derived from the employer questionnaires. The union questionnaires came in more slowly, and only about 20 percent had been returned when the tabulations were made. This was to be expected, because many unions are not in a position to follow the subsequent career of reinstated individuals. In view of the limited response, it has not been practical to make an elaborate analysis of the union questionnaires. Nevertheless, they have yielded some very worthwhile data.

The basic tables are set out in Appendix C below. All statistics cited in the text of the report have been taken or derived from Appendix C. As the appendix tables indicate, some of the respondents did not answer all the questions. For example, some of the questions were not applicable in the case of employees who did not return after reinstatement, or who stayed only for a short time. Where percentages are used in the text, these refer to the employees for whom the par-

[12] This is the point to make the conventional disclaimer that cases reported in LABOR ARBITRATION REPORTS are not necessarily representative. At the same time, it has never been shown that they are unrepresentative; and in any event, they are the most convenient source of arbitration awards.

ticular information was supplied. The exact number of employees involved can be ascertained from the appendix tables.

With these explanations out of the way, we can now proceed to the results of the study.

Seniority Status at the Time of Discharge

The discharge problem seems to be concentrated among relatively junior employees. To the extent that seniority information is available, 28 percent of the reinstated workers had two years or less seniority on the date of discharge. (See Appendix Table C-1.) Another 23 percent had from three to five years. Thus, more than half can be classified as junior, if five years or less will serve as a definition of junior status. Only eighteen percent had eleven years or more of seniority at the time of discharge.

While official probationary periods in industry usually run from thirty days to six months, it is well known that a considerably longer period elapses before an employee becomes permanent in the full sense of the word. The first few years of employment are a period of trial and error. Many studies have shown that a large proportion of workers who quit their jobs have low seniority.[13] Layoffs for lack of work are normally concentrated among workers with relatively recent hiring dates. It now appears that the majority of discharged employees are also fairly new.[14] By the time that employees have accumulated substantial seniority, they have likewise accumulated important rights which they are careful to protect. They have become valued members of the work force, and will not be discharged hastily. They have adjusted to their supervisors; the supervisors have adjusted to them. They have arrived, and are likely to remain.

Grounds for Discharge

A majority of the employees were discharged for overt and dramatic types of misbehavior. Twenty-seven percent were discharged for illegal

[13] See, for example, P. Eldridge and L. Wolkstein, "Incidence of Employer Change," *Industrial and Labor Relations Review*, Vol. 10, October 1956, pp. 101-107.

[14] It is true, of course, that the present study covers only those discharged employees who were subsequently reinstated. However, there is no reason to believe that discharged employees who are not reinstated have any greater seniority, on the average.

strikes, strike violence, or deliberately restricting production. (Table C-2.) Another twenty-two percent were accused of refusing to perform job assignments, refusing to work overtime, and similar forms of insubordination. Nine percent were terminated on the score of fighting, assaults, horse-play and trouble-making. Thus, almost sixty percent of the cases involved these three types of offenses. All of them represent an open challenge to the authority of management, as viewed by management, or a breach of peace inside the plant.

The quieter, less conspicuous and more gradual forms of dereliction did not account for such a large proportion of all the terminations. Eleven percent were discharged for absenteeism, tardiness or leaving early; eight percent for incompetence, negligence, poor workmanship or violation of safety rules; and five percent for dishonesty, theft or falsification of records. The remaining eighteen percent were scattered among numerous categories, including intoxication, disloyalty, gambling, loafing and miscellaneous rule violations.

If a similar distribution of all discharged employees were made, including those *not* reinstated, the proportions would be somewhat different. Nevertheless, it seems evident that the drastic and shocking episode, such as a fight, an illegal strike or an act of defiance, puts the greatest strain on the employment relationship. Quieter problems like absenteeism and poor workmanship do not produce a crisis in the shop, do not mobilize emotions, and are more likely to be resolved without resort to the sanction of discharge. It may be that the modern theory of corrective discipline, which emphasizes patient educational effort with the delinquent employee, is widely accepted in industry insofar as the less dramatic offenses are concerned; and that fighting, illegal strikes, etc., are regarded by employers as "capital crimes," justifying immediate discharge notwithstanding the employee's previous record. The proper application of corrective discipline to these kinds of offenses has never been fully explored or explained.

Principal Reasons for Reinstatement

In each of the 207 cases, the arbitration opinion has been analyzed to determine the arbitrator's principal ground for reinstating the grievant. It is instructive that the question of literal guilt or innocence has not been decisive in the majority of the cases. The reason most frequently invoked has been the existence of mitigating circumstances. For example, the grievant did assault a fellow worker, but had been sorely

provoked. Or the grievant did refuse an overtime assignment, but had worked a great deal of overtime in recent months. Or the grievant's long service and previously unblemished disciplinary record should have been given more weight. In 50 cases, or 24 percent of the total, discharged employees were reinstated because of mitigating circumstances. (Table C-3.)

A closely related ground for reinstatement was that discharge was an excessive penalty for the offense. This ground was assigned in 39 cases, or 19 percent of the total. Here again, the grievants were not held innocent of blame. Rather the arbitrators found they had been dealt with too harshly: that the punishment did not fit the crime.

In 20 cases (ten percent), arbitrators held that the employer had failed to met his own obligations.

In nineteen cases (nine percent), employees were reinstated on the ground of unequal treatment. They were singled out for discharge although other employees, guilty of identical or similar conduct, were not terminated. The employer's actions were held to be capricious or discriminatory.

Among the remaining 79 cases, 43 grievants were reinstated on the ground of insufficient evidence to support the charge against them. Sixteen were reinstated because their actions were found partly or wholly justified. Twenty were reinstated for miscellaneous reasons.

Thus, in over 60 percent of the cases, the crucial issue was not whether the grievant had misbehaved. The issue was whether discharge was a fair and reasonable penalty in view of the nature of the misbehavior, the surrounding circumstances, the employee's previous record and the employer's policy in handling similar cases. Some arbitrators, it is true, accord the employer more leeway than others. Some will uphold a penalty if it is within an area of reasonable discretion. Others will uphold it only if they are personally convinced that it was fair. In either case, apparently the typical discharge hearing is not so much a trial of guilt or innocence as a review of the reasonableness of managerial action.

Terms of Reinstatement

In view of what has been shown, it is not surprising that only a minority of the grievants were reinstated with complete retroactivity. (In practically every case, of course, the unions asked that they be made

whole.) Sixty-three, or thirty percent, were reinstated with full back pay; sixty, or 29 percent, with partial back pay; and 84, or 41 percent, with no back pay at all. (Tables C-2 and C-3.)

The extent of back pay varied with the original charge. Most of the grievants who had been accused of insubordination were reinstated without back pay. (Table C-2.) The same was true in cases of fighting, assaults, etc. On the other hand, the larger group of those charged with strike leadership or violence or deliberately restricting production were reinstated with full back pay.

As one would expect, the extent of back pay also varied with the arbitrators' reasons for reinstatement. Where mitigating circumstances were found, the largest group was restored without retroactivity, the second-largest with partial back pay, and only a few were made whole. The same is true of cases in which discharge was deemed an excessive penalty. Where the employer had failed to present sufficient evidence to sustain the charge, the majority of grievants were restored with full back pay.[15] (Table C-3.)

People will have different opinions concerning the frequency of no-back-pay or partial-back-pay decisions. Some will accuse the arbitrator of compromising instead of facing the issue. Some will say that he strained the facts to get the grievant back on the payroll by hook or by crook. In defense, it will be argued that in these cases there was just cause for some punishment, but not for the ultimate sanction of discharge; that the arbitrator should not be required to select between two equally unfair results; and that he should not be stigmatized as a "compromiser" when he finds a reasonable solution. In any event, it is clear that the majority of arbitrators believe they have authority to mitigate penalties when not prevented by the contract, the submission agreement, or perhaps the previous practice of the parties.

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[15] At first blush, it seems difficult to understand why some of the arbitrators denied back pay after finding insufficient evidence to support the charge. Analysis of such decisions indicates that in the majority of cases, the grievant was accused of several delinquencies. The principal accusation was not supported, but some of the minor charges were admitted or established. Regrettably, however, there were a few cases in which the arbitrators apparently concluded that (a) the grievants were guilty, but (b) the employers had not proved it. This curious concept of "proof," as being something different from persuasion, is widely held by lay juries but has not been characteristic of persons in a judicial role. In one or two cases it is possible that the arbitrators resolved their genuine doubts by splitting the award, an expedient requiring no comment.

How Long Did They Stay?

We come now to the after-history of the reinstatement decision. First, do the reinstated actually return; and if so, how long do they stay? We have this information for 123 employees covered by the employer questionnaires.

Twelve employees never returned to work. (Table C-4.) Six of these had less than two years of seniority. Seniority information concerning the remaining six is lacking, but presumably most of them were short-service men. The probable inference is that the employees who failed to take advantage of reinstatement were too new to have established roots in the plant. Incidentally, eleven of the twelve were ordered reinstated without retroactivity; so that if they pressed their grievances merely to secure back pay, they were sadly disappointed. (Table C-5.)

Of those who returned, thirteen were terminated, for one reason or another, within six months; 22 within a year; and 32 within two years. Among the entire group of 123, 63 are still employed in the same establishment and sixty are no longer there. Thirty-five have quit since the date of reinstatement, including the twelve who never returned. Seventeen have been discharged a second time, including nine within the first year. Eight are dead, have retired, or were laid off in the permanent closing of a plant.

Among those reinstated in 1950, the majority are no longer in the establishment. (Table C-6.) Of those reinstated from 1951 to 1954, about half have left and half have remained. Most of the workers reinstated in 1955 are still employed in the same establishment. Naturally, the more time passes, the more likely it is that a given employee will resign, retire, die or be discharged.

Most of the employees who have been terminated since the date of reinstatement were short-service men (to the extent that we have information concerning seniority status). Conversely, a majority of the short-service men have been terminated. Most of the long-service men (six years or more of seniority) are still employed. *Only one of these has been discharged a second time since being reinstated. Only three have quit.* (Table C-4.)

The implications are obvious. The reinstated long-service employee will probably last. The reinstated short-service employee is not so likely to remain.

With respect to the short-service employees, however, the statistics must be interpreted with great caution. They do not necessarily show that a reinstated short-service employee is more likely to be terminated than any other short-service employee. The quit rate in manufacturing industries tends to run at about two percent per month, or 24 percent per year, and is doubtless considerably higher among junior employees. The discharge rate averages 0.3 percent per month, or 3.6 percent per year.[16] Elaborate calculations would have to be made to establish precise comparisons. My own view, however, is that the reinstated short-service employee is not more likely to quit than others with similar seniority. He is more likely to be discharged, however.

The Reinstated Employee as Seen by His Employer

Employers were requested to state whether the grievant has been a satisfactory worker since reinstatement; whether he has made normal occupational progress in terms of promotions, merit increases, etc.; whether there has been a recurrence of disciplinary problems; whether further disciplinary action has been necessary; how his supervisors have felt toward him; and what has been the grievant's attitude. In some cases it was impossible for the employer to state an opinion on these questions, because the grievant did not return or did not remain long enough to provide any basis for an opinion. The responses were given in the employers' own words, often with supporting details, but have been grouped into convenient categories for presentation here.

Has the grievant been a satisfactory employee since reinstatement? "Yes": 65 percent. "No": 35 percent. Of those employees deemed satisfactory, two-thirds are still employed. Of those regarded as unsatisfactory, about sixty percent have left—primarily by the discharge route. (Table C-7.) Practically all the "unsatisfactory" employees had less than five years' seniority at the time of the original discharge. A majority had less than two years. (Table C-8.) Only three with six years or more were classified "unsatisfactory."

Has the grievant made normal occupational progress? "Yes": 64 percent. "No": 35 percent. (Table C-9.) Of those still employed, however, more than 70 percent have made normal progress, according to the employer. Of course there is more room for advancement in some

[16] Turnover statistics are published in *Monthly Labor Review* (Washington: U. S. Department of Labor).

plants than in others. Some of the grievants are in the same jobs which they held at the time of discharge, but are still described as having made "normal progress." But many workers who have never been discharged are assigned to the same jobs for long periods of time. For those employees who failed to make normal progress, another question is whether they failed because of personal deficiencies or because they were working under a cloud. Analysis of the questionnaires does not furnish any clear answer. It is likely, however, that the reinstated employee has a somewhat diminished chance of being promoted.

Has there been a recurrence of disciplinary problems? Have any disciplinary penalties been imposed since reinstatement? The answers to these questions deserve careful scrutiny. As noted above, it is sometimes said that the reinstated employee will be particularly careful to keep out of trouble thereafter; others feel that the difficulty will probably recur, and that supervisors will endeavor to "nail" him a second time.

A total of 123 reinstated employees are covered by the employer questionnaires. No information on subsequent disciplinary history is reported for 27. (Table C-10.) These include the twelve who never returned, twelve who resigned shortly after reinstatement, and three others.

With respect to the remaining 96, employers state that 67, or 70 percent, have presented no subsequent disciplinary problems. Eight have repeated the same offense for which they were originally terminated; four of these have been discharged again. Twenty-one, the employers state, have been guilty of some different offense, and eleven of these have been discharged.

Once more the influence of seniority is striking. Practically all of the "repeaters" were short-service men with five years or less of seniority at the time of their original discharge. (Table C-11.) So far as we have information, only three employees with six years or more have experienced further difficulties, and none with eleven years or more. Apparently the employee with considerable seniority is almost certain to stay out of trouble after being reinstated.

How have the supervisors felt toward the reinstated employee? In 71 percent of the cases, the responses can be classified as favorable or neutral. In the remaining 29 percent, supervisors were reported as holding an unfavorable or resentful attitude. (Table C-12.)

Needless to say, a supervisor will not be overjoyed when a discharged employee is reinstated to his work group. The employee stands as a

symbol of two unpleasant facts: that the supervisor's authority is limited, and that the arbitrators disagreed with his judgment. Many employers emphasize, however, that the supervisors have attempted to let bygones be bygones and deal with the grievant as with any other employee. Some employers report that the supervisors have been unhappy over the need to reinstate employees whom they consider unacceptable.

What has been the grievant's attitude since reinstatement? The responses can be classified as follows:

"Attitude good": 54 percent—mostly still employed. In 28 cases, employers state definitely that the disciplinary crisis had a favorable effect on the grievants' behavior.

"Attitude unchanged": fourteen percent—mostly still employed. The significance of this response is not too clear. Presumably what is meant is that the attitude continued unsatisfactory, or else that the original problem was not one of attitude.

"Attitude poor": thirty percent, about half of whom are still employed. Some employers state that the reinstated employees now consider themselves above the law. (Table C-13.)

It would be only human if the employers were somewhat more charitable in describing the attitudes of the supervisors than in characterizing those of the reinstated employees. Nevertheless, it is significant that about three-quarters of the supervisors and a strong majority of the grievants are reported as having satisfactory attitudes. These reports indicate a generally sound adjustment to the difficult human problems attending reinstatement after discharge.

The Arbitration Award as Viewed by the Employer

The final question addressed to the employers reads as follows: "Looking back on the incident, do you believe the arbitrator made the right decision in reinstating this employee? Please give reasons."

This question was not answered in thirteen cases, mostly involving workers who never returned. Of the remaining 110 cases, employers believe the decision was correct in 43 cases (39 percent), and wrong in 67 cases (61 percent). (Table C-14.)

Many of the affirmative responses are explained by the favorable effects of the award. A number of practical benefits were noted. Several employers noted that the grievant became a satisfactory employee after reinstatement. For example:

> Since his belligerency and militancy disappeared, we now have a normal, average buffer who turns out a fair day's work.
>
> He has been as good an employee as most of the other employees. Certain facts developed later revealed that this incident was really a clash of personalities. This is borne out in fact that before grievant left, he and supervisor had developed fairly friendly relations.

Other employers believe the decision supported or clarified the company's disciplinary policy.

> We retained the services of a trained employee while establishing a three-month disciplinary layoff precedent for offense.
>
> This decision based on interpretation of contract. This arbitration gave us a guidepost for future use.
>
> Although the arbitrator ruled that the employee should be reinstated, he upheld the Company's position that employees do not have the right to refuse a suitable job offer on recall from layoff.

Still others agreed with the decision because they considered it correct on the merits, although some felt the outcome would have been different if the evidence had been fully or properly presented.

> Yes—based on facts as presented—although the man should have been discharged. A thorough presentation of all the facts was not made, due to an unwillingness on the part of supervisors to persecute a man of poor capabilities.
>
> While this employee had been troublesome, we were not fortified with enough written evidence of his shortcomings in view of his length of service.

As noted above, employers still disagree with the awards in 67 cases. The reasons assigned mostly relate to the merits of the decisions, as seen by the employers, rather than the practical outcome.

In 33 cases, employers restated their original position on the merits of the discharge. For example,

> It was and still is our opinion that circumstances warranted termination of services, otherwise we would not have gone to arbitration.
>
> Naturally had we thought the arbitrator's decision to be correct we would never have taken action to begin with.

Eleven believe that the decision was not based on a sound view of the evidence.

> We feel that the impartial arbitrator based his decision on assumptions and was more interested in discovering where the Company had made errors rather than basing his decision on the facts of the case.

Six accuse the arbitrator of compromising, mediating, departing from the contract, or exhibiting undue sympathy for the grievant.

> Contract called for reinstatement only if the discharge were unjust, and for full back pay upon reinstatement. Arbitrator's decision to the effect that employee had learned his lesson and should be given another chance, but without back pay since he was not blameless, was an attempt at compromise which was satisfactory to neither the Company, the Union, nor the employee.
>
> Arbitrator was prejudiced in reinstating employee in light of employee's financial difficulties. However, arbitrator admitted employee was a "most misdirected employee."

In a minority of cases the employer criticizes the decision on the ground of its bad effects. In seven cases, the weakening of supervisory authority is stressed.

> Result of having breach of discipline condoned by arbitrator is to make it more difficult to secure cooperation of entire group of employees and maintain supervisor's status as leader of group.
>
> Such decisions tend to weaken long-established company policy.
>
> Set mill and community back ten years by failure to uphold disciplinary action.

And in seven other cases, the objection is that the grievant's poor attitude was only reinforced by his being reinstated.

> Being young, was at stage where drastic action was needed to change his thinking concerning authority. If discharge had been sustained and the fact impressed upon him that he must not disregard rights of others, he might have been turned into proper channels of thinking.
>
> . . . In every respect this employee is marginal and was at the time of the arbitration award. The arbitrator's award encouraged this marginal attitude—which I am fearful is too often the case.
>
> He has never forgotten the incident and has always felt that management was against him. We have been unsuccessful in erasing this attitude. There should be other means established in awarding the employee . . . other than reinstatement.

On the other hand, several employers who disagree with the decision frankly concede that the employee has turned out well.

> Based solely on the facts presented, the decision was a poor one. However, in the light of [grievant's] fine recovery, I feel we will have gained a loyal and conscientious employee.

As a point of purely scientific interest, it might be noted that the employer's reaction to the decision is not greatly affected by the conditions of reinstatement. Employers believe the decision was correct in 35 percent of the cases providing full back pay, 47 percent providing partial back pay, and 37 percent providing no back pay. (Table C-14.)

Employer Evaluation of the Decision as Compared with Practical Outcome

The employers' reasons for approving or disapproving the decisions have been summarized above. There is considerable correlation, however, between these evaluations, on the one hand, and the practical outcome after reinstatement, on the other. (Table C-15.)

The correlation is particularly striking as to those decisions regarded as correct. There were 43 such decisions. Employers say that grievants have been satisfactory in 80 percent of these cases.[17] They have reportedly made normal occupational progress in 90 percent. Disciplinary problems have recurred in only three cases, less than ten percent. Supervisors have had a favorable, or at least neutral attitude toward the reinstated employees in 88 percent of the cases. The employees' attitude has been considered good in 78 percent.

Favorable experience after reinstatement does not guarantee that the employer will approve the decision, however. In numerous cases the employee has been satisfactory, has made normal progress, has kept out of further trouble, etc.; but the employer continues to disagree with the decision on its merits or because of its supposed long-run effects. About all that can be said is that the employer is more likely to approve a reinstatement that works out well, and is almost certain to disapprove of one that works out poorly.

Outcome of Reinstatement as Seen by Unions

Only 38 union questionnaires had been returned at the time it became necessary to tabulate the results. Because of this rather small response

[17] Non-responses are omitted from the percentages throughout this paragraph.

(eighteen percent, as compared with sixty percent of the employer questionnaires), it was not practical to make such an elaborate analysis of the material. However, it has proved helpful for certain purposes.

The first question which arises is whether the union questionnaires are comparable with the larger group of employer questionnaires, or with all the cases originally selected for the survey. In some respects these 38 cases are quite representative. The distribution with respect to grounds for discharge is similar to that of the larger group. The same is true of the distribution of cases according to conditions of reinstatement. The 38 employees are somewhat older, in point of seniority, than the average of all employees involved in the survey. A somewhat larger percentage is still employed than is true of the 123 covered by employer questionnaires (60 percent, as compared with 51 percent.)

The major difference is that most of these 38 cases are ones which turned out well after reinstatement, in view of the employers as well as the unions. That is, in the vast majority of these particular cases, employers reported that the grievants proved satisfactory after reinstatement, made normal occupational progress, encountered no further disciplinary trouble, etc.

The union's view of the outcome of these cases is even rosier. In some instances the unions were not able to reply to all questions, because of lack of detailed familiarity with conditions in the shop. But to the extent that replies were forthcoming, they were almost uniformly favorable.

For example, we asked whether the grievants had been treated fairly after reinstatement. This question was answered affirmatively in 31 cases. *In not a single case did the union complain of unfair treatment.*

Some of the other replies can be classified as follows:

"Do you believe the grievant has been a satisfactory employee, from the employer's standpoint, since reinstatement?" Yes: 29. No: 0. Not reported: 9.

"Has he made normal occupational progress?" Yes: 23. No: 2. Not reported: 9.

"How have the grievant's supervisors felt toward him?" Favorable or neutral: 24. Unfavorable: 0. Not reported: 12.

"What has been the grievant's attitude since reinstatement?" Good: 23. Unchanged or poor: 2. Not reported: 13.

"Does the union believe that the arbitrator made the right decision?" Yes: 33. No: 1. No reply: 4. (Employers disagreed with the decision in a slight majority of these particular cases.)

"From the union's standpoint, was it worthwhile to arbitrate this case?" Yes: 32. No: 3. No reply: 3.

The unions were asked to explain their views on the correctness of the decisions. Most frequently they restated their position on the merits of the case. A substantial number stressed that the grievant was a worthy employee, as shown by his subsequent behavior. Several rested on the arbitrator's reasoning. The single dissenter held that the arbitrator's solution was unworkable and the grievant incorrigible.

Some illustrative passages are as follows:

> I feel that the arbitrator did make the right decision in this case. This man although not wholly blameless did not actually violate the agreement between the Co. and the union. His penalty of three months loss of pay was sufficient, discharge would have been too severe.
>
> This man has advanced himself to a more responsible job and is a very responsible and happy worker.
>
> All indications point to the fact that employer made hasty decision to discharge in the light of employee's previous record, and discharge was effected on the basis of supervisory evidence to the employer not substantiated in the arbitration hearing.
>
> To my knowledge he was noted as a chronic troublemaker and was constantly inciting wildcat strikes without reason.

Likewise, the unions were asked to explain their opinions as to whether it was worthwhile to arbitrate these cases. The largest number replied that the grievant had been unjustly accused, so that it was the union's duty as bargaining representative to oppose his discharge; that the grievant was justified in what he did; and that the grievant was worthy, as confirmed by his conduct after reinstatement. Another sizable group explained that the decision enhanced the union's position and vindicated the principle of unionism. One respondent stated that the grievance lacked merit, and one said the decision had a bad effect on union-management relations.

Some quotations:

> When there is any doubt, we are obligated to defend a member of the union.

Yes, because the union will go to any extremes for any employee who has gotten unfair treatment from the Co.

It added prestige to the union membership, and the leadership was doing their job in policing the execution of the contract in force.

Management has been very careful and call now when there is a problem. It has also made the union much stronger in the shop.

No, because subsequently the unit chairman and chief steward were discharged after another series of wildcats and resulted in two more cases. The problems should have been handled through the grievance procedure instead of using unauthorized work stoppages as a solution.

4. Summary and Conclusions

It has not been the purpose of this study to evaluate the doctrines which arbitrators have developed to handle discharge grievances. Instead the purpose has been to ascertain how reinstatements have worked out Needless to say, the soundness of a decision cannot be tested primarily by whether the litigants are made happy. If they wish to be assured of a happy solution, they are free to negotiate one themselves and stay out of arbitration. Nevertheless, the prevalent theory of corrective discipline does involve a judgment as to whether the grievant is potentially a useful and acceptable employee. When a reinstatement is based on the theory of corrective discipline, presumably the arbitrator has made an affirmative judgment of this type; or at least, he believes the negative has not been sufficiently established. Therefore it should be of interest to know whether his conclusion is borne out.

The most significant variable revealed in the questionnaires is seniority status. A majority of the grievants had five years or less seniority at the time of discharge. A majority of the short-service men did not take advantage of reinstatement, or were terminated after reinstatement. Those reinstated employees deemed unsatisfactory were practically all relatively junior, and a majority had less than two years at the time of discharge. Almost all the employees who encountered disciplinary troubles after reinstatement were in the junior group.

About sixty percent of the grievants were discharged over dramatic and conspicuous episodes such as illegal strikes, assaults and acts of insubordination. The theory of corrective discipline has never been

satisfactorily expounded in relation to this kind of offense, although it is clear enough with respect to continuing problems of a gradual character.

The decision to reinstate was not typically based on a finding of innocence, or a refusal to find guilt. The most common grounds for reinstatement were that mitigating circumstances should be recognized, that discharge was an excessive penalty, and that the employer had failed to pursue a consistent disciplinary policy. Moreover, about seventy percent of the grievants were reinstated with no back pay or only partial retroactivity. Thus it is apparent that the discharge case most frequently becomes a review of the reasonableness of management's action rather than a trial of guilt or innocence.

Ten percent of the employees did not return. Another twenty percent lasted less than a year. Fifty percent are no longer employed. But the normal rate of labor turnover in industry must be taken into account. Probably the reinstated employee is not more likely than other employees to resign, but is more likely to be discharged again.

From an operational standpoint, about two-thirds of the cases have worked out well. Employers say that two-thirds of the reinstated employees have proved satisfactory. About sixty percent have reportedly made normal occupational progress, although there is reason to believe that the reinstated employee is less likely to be promoted. Seventy percent have presented no further disciplinary problems. The attitude of supervisors has been favorable or neutral in about seventy percent of the cases. The reinstated employee's attitude is described as good in about sixty percent of the cases. Since reinstatement creates a delicate human situation in the shop at best, these responses indicate a generally mature and far-sighted adjustment to the difficulties.

A rather small proportion of the union questionnaires was returned.

Nonetheless, it is surely of some significance that the unions did not complain of unfair treatment in a single case. In virtually every case the union reported that supervisors as well as grievants have displayed sound and favorable attitudes.

Employers now believe that the decision to reinstate was correct in thirty-nine percent of the cases. By way of explanation, they stress principally the favorable outcome of the reinstatements. Employers disagree with sixty-one percent of the decisions, chiefly on the merits as they stood at the time of discharge. Thus the employer is more likely

to approve of a reinstatement that works out well, and almost certain to disapprove of one that works out poorly.

The unions agreed with the decision, and considered it worthwhile to have arbitrated the grievance, in almost every case. Unions believe they have a primary duty to support a discharged employee unless the merits of the discharge are clear.

Perhaps the foregoing report has somewhat illuminated the processes of discharge and reinstatement under collective bargaining agreements. To avoid a distorted impression, please bear in mind that not every discharged employee is reinstated. Furthermore, general conclusions—no matter how unassailable, and statistical averages—no matter how accurate, can only place a problem in context. They cannot solve the next case. For the next case, and particularly the next discharge case, is certain to be special and unique.

Appendix A on page 45 reproduces the questionnaire to employers. Appendix B on page 47 reproduces the questionnaire to unions.

APPENDIX A

QUESTIONNAIRE

for Report on "What Happens After Reinstatement?"

Note: *All replies will be strictly confidential. No company or individual will be identified in the Report. Only totals and summaries will be used.*

Name of company .....
Name of employee .....
Classification at time of discharge .....
Date of discharge .....
Date of reinstatement .....
Name of arbitrator .....
Award published at .....

QUESTIONS

(1) Did this employee actually return to work after the arbitration award? .....

a) If not, why not? .....
.....

(2) Is he still employed in your establishment? .....
Answer (3) or (4)

(3) If he is *not* still employed:

a) When did he leave? .....

b) What were the circumstances of his termination? .....
.....
.....
.....

c) Was he a satisfactory employee after reinstatement? (Please give comments) .....
.....
.....

d) Did he progress normally? .....
What was his last classification? .....

e) How did his supervisors feel about him after reinstatement?
.....
.....
.....

(4) If he *is* still employed in your establishment:

a) What is his present classification? .....

.....

b) Has he made normal progress in terms of promotion, merit increases, more responsible assignments, etc.? .....(Please give details):

.....

.....

.....

c) All in all, has he been a satisfactory employee since being reinstated? .....

d) Has there been any recurrence of the difficulty which led to his discharge? ..... (If so, please give details) .....

.....

.....

.....

.....

e) Has any disciplinary action been necessaty since his reinstatement? ..... (If so, please give details) .....

.....

.....

f) How have his supervisors felt toward him since his reinstatement?

.....

g) What has been his own attitude? .....

.....

Did the disciplinary crisis have any effect upon his subsequent attitude or behavior? .....

.....

(5) Looking back on the incident, do you believe the arbitrator made the right decision in reinstating this employee? ..... (Please give reasons) .....

.....

.....

.....

..... (Name)
..... (Title)
..... (Company)
..... (Address)

Please return to:

Arthur M. Ross, Director
Institute of Industrial Relations
University of California
201 California Hall
Berkeley, California

APPENDIX B

QUESTIONNAIRE

for Report on "What Happens After Reinstatement?"

Note: *All replies will be strictly confidential. No union, company, or individual will be identified in the Report. Only totals and summaries will be used.*

Name of Union .....
Name of Company .....
Name of Member .....
Classification at time of discharge .....
Date of arbitration award .....
Name of arbitrator.....
Award published at .....

QUESTIONS

(1) Did this member actually return to the same employer after the arbitration award? .....

(a) If not, why not? .....
.....

(2) Is he still employed in the same establishment? .....

* * *

Answer (3) or (4)

(3) If he is *not* still employed in the same establishment:

(a) When did he leave? .....

(b) What were the circumstances of his termination? .....
.....
.....
.....

(c) If he left because of a second discharge, did the Union arbitrate that case? ..... If not, why not? .....
.....
.....

(d) Do you feel he was treated fairly after being reinstated? (Please give details.) .....
.....

(4) If he *is* still employed in the same establishment:

(a) Has he made normal progress in terms of promotion, more responsible work, merit increases, etc.? .....

.....

.....

(b) Do you believe he has been treated fairly? (Please give details.)

.....

.....

.....

(c) Do you believe that, from the Company's standpoint he has been a satisfactory employee since being reinstated? (Please give details.)

.....

.....

.....

(d) Has he had any further disciplinary difficulties? (Please give details.) .....

.....

.....

.....

(e) How have his supervisors felt toward him since his reinstatement?

.....

(f) What has been his own attitude? .....

.....

(5) Looking back on the incident, do you believe the arbitrator made the right decision in reinstating this member? (Please give reasons.) .....

.....

.....

.....

(6) From the Union's standpoint, was it worthwhile to arbitrate his discharge? (Please give reasons.) .....

.....

.....

.....

..... (Name)

..... (Title)

..... (Company)

..... (Address)

Please return to:

Arthur M. Ross, Director
Institute of Industrial Relations
University of California
201 California Hall
Berkeley 4, California

APPENDIX C

TABLE C-1. Seniority Status of the Grievants at Time of Discharge

Years of Seniority	Number of Grievants	Percentage of Grievants with Known Seniority
0-2	34	27.7
3-5	28	22.8
6-10	39	31.8
11-15	11	8.9
16-20	5	4.0
over 20	6	4.8
Total reported	123	100.0
Seniority unknown	84	
Total grievants	207	

(Appendix C continued on page 50)

TABLE C-2. Grounds for Discharge and Terms of Reinstatement, 207 Cases.

Grounds for Discharge	Terms of Reinstatement							
	Full back pay		Partial back pay		No back pay		Total	
	No.	Percent	No.	Percent	No.	Percent	No.	Percent
Absenteeism, tardiness, leaving early	7	11.1%	7	11.6%	8	9.5%	22	10.6%
Dishonesty, theft, falsification of records	2	3.2	1	1.7	7	8.3	10	4.8
Incompetence, negligence, poor workmanship, violation of safety rules	4	6.3	4	6.7	9	10.7	17	8.2
Illegal strikes, strike violence, deliberate restriction of production	26	41.2	20	33.3	9	10.7	55	26.7
Wilful destruction or damage to property	3	4.8	—	—	—	—	3	1.4
Loafing, sleeping on job, unnecessary conversation	1	1.6	4	6.7	2	2.4	7	3.4
Intoxication, bringing intoxicants in plant	1	1.6	4	6.7	3	3.6	8	3.9
Physical condition (of grievant)	2	3.2	—	—	1	1.2	3	1.4
Disloyalty to company	2	3.2	2	3.3	1	1.2	5	2.4
Fighting, assault, horseplay, troublemaking	3	4.8	5	8.3	10	11.9	18	8.7
Gambling, soliciting bets	—	—	1	1.7	3	3.6	4	1.9
Arrest, criminal conviction (unrelated to employment)	2	3.2	—	—	1	1.2	3	1.4
Insubordination, refusal of job assignment, refusal to work overtime	9	14.2	9	15.0	27	32.1	45	21.8
Union activity in violation of contract	—	—	1	1.7	1	1.2	2	1.0
Miscellaneous rule violations (not elsewhere classified)	1	1.6	2	3.3	2	2.4	5	2.4
Total	63	100.0	60	100.0	84	100.0	207	100.0

TABLE C-3. Principal Reasons for Reinstatement and Terms of Reinstatement, 207 Cases

Principal Reason for Reinstatement	Conditions of Reinstatement							
	Full back pay		Partial back pay		No back pay		Total	
	No.	Percent	No.	Percent	No.	Percent	No.	Percent
Mitigating circumstances	5	7.9%	16	26.6%	29	34.5%	50	24.2%
Discharge was an excessive penalty	3	4.8	15	25.0	21	25.0	39	18.8
Charge was unsupported by the evidence	25	39.7	9	15.0	9	10.7	43	20.7
Grievant was justified in his action	7	11.1	4	6.7	5	6.0	16	7.7
Company failed to perform its obligations	5	7.9	7	11.7	8	9.5	20	9.7
Absence of clear company policy, previous lax enforcement, lack of notice	3	4.8	5	8.3	6	7.1	14	6.8
Unequal or discriminatory treatment	12	19.0	3	5.0	4	4.8	19	9.2
No basis for disciplinary action	3	4.8	1	1.7	2	2.4	6	2.9
Total	63	100.0	60	100.0	84	100.0	207	100.0

TABLE C-4. Seniority at Time of Discharge, and Employment History after Reinstatement, 123 Cases (Employer Questionnaires).

Seniority at time of Discharge	Subsequent Employment History					
	Still Employed	Never Returned	Subsequently Quit	Subsequently Discharged	Other Terminations	Total
0- 2 years	9	6	5	4	—	24
3- 5 years	8	—	6	3	1	18
6-10 years	12	—	2	1	1	16
11-15 years	4	—	—	—	2	6
16-20 years	1	—	1	—	1	3
over 20 years	1	—	—	—	—	1
Seniority unknown	28	6	10	8	3	55
Total	63	12	24	16	8	123

TABLE C-5. Terms of Reinstatement, and Employment History after Reinstatement, 123 Cases

Terms of Reinstatement	Subsequent Employment History					
	Still Employed	Never Returned	Subsequently Quit	Subsequently Discharged	Other Terminations	Total
Full back pay	18	—	9	6	4	37
Partial back pay	18	1	6	4	2	32
No back pay	27	11	9	6	1	54
Total	63	12	24	16	8	123

TABLE C-6. Length of Employment after Reinstatement, by Year of Reinstatement, 123 Cases.

Year	Reason for Termination	Length of Employment after Reinstatement							
		Never Returned	Less than 1 Year	1-2 Years	2-4 Years	Over 4 Years	Total Terminations	Still Employed	Grand Total
	Quit	—	1	—	—	1	2		
	Discharged	—	2	—	1	—	3		
	Other	—	—	—	1	2	3		
1950	Total	—	3	—	2	3	8	4	12
	Quit	5	5	1	2	—	13		
	Discharged	—	2	—	3	2	7		
	Other	—	—	1	—	1	2		
1951	Total	5	7	2	5	3	22	21	43
	Quit	2	4	1	—	1	8		
	Discharged	—	2	1	—	—	3		
	Other	—	—	1	—	—	1		
1952	Total	2	6	3	—	1	12	10	22
	Quit	1	—	2	2	—	5		
	Discharged	—	2	—	—	—	2		
	Other	—	1	—	—	—	1		
1953	Total	1	3	2	2	—	8	10	18
	Quit	2	—	3	—	—	5		
	Discharged	—	—	—	—	—	—		
	Other	—	1	—	—	—	1		
1954	Total	2	1	3	—	—	6	6	12
	Quit	1	1	—	—	—	2		
	Discharged	1	1	—	—	—	2		
	Other	—	—	—	—	—	—		
1955	Total	2	2	—	—	—	4	11	15
1956	Total	—	—	—	—	—	—	1	1
Totals:									
	Quit	11	11	7	4	2	35		
	Discharged	1	9	1	4	2	17		
	Other	—	2	2	1	3	8		
Grand Total		12	22	10	9	7	60	63	123

TABLE C-7. Employer's Evaluation of Reinstated Employees, and Subsequent Employment History, 123 Cases.

Has grievant been a satisfactory employee?	Subsequent Employment History					
	Still Employed	Never Returned	Subsequently Quit	Subsequently Discharged	Other Terminations	Total
Yes	47	—	14	2	8	71
No	15	—	9	14	—	38
No response	1	12	1	—	—	14
Total	63	12	24	16	8	123

TABLE C-8. Employer's Evaluation of Reinstated Employees, and Seniority at the Time of Discharge, 123 Cases

Has grievant been a satisfactory employee?	Seniority at the Time of Discharge							
	0-2 Years	3-5 Years	6-10 Years	11-15 Years	16-20 Years	Over 20 Years	Seniority Unknown	Total Grievants
Yes	7	13	14	6	3	—	28	71
No	11	5	2	—	—	1	19	38
No response	6	—	—	—	—	—	8	14
Total	24	18	16	6	3	1	55	123

TABLE C-9. Occupational Progress after Reinstatement, and Subsequent Employment History, 123 Cases.

Has grievant made normal progress?	Subsequent Employment History					
	Still Employed	Never Returned	Subsequently Quit	Subsequently Discharged	Other Terminations	Total
Yes	42	—	11	3	7	63
No	16	—	9	9	1	35
No response	5	12	4	4	—	25
Total	63	12	24	16	8	123

TABLE C-10. Recurrence of Disciplinary Problems, and Subsequent Employment History, 123 Cases.

Recurrence of disciplinary problems?	Subsequent Employment History					
	Still Employed	Never Returned	Subsequently Quit	Subsequently Discharged	Other Terminations	Total
None	48	—	12	—	7	67
Yes, same offense	4	—	—	4	—	8
Yes, different offense	10	—	—	11	—	21
Not reported	1	12	12	1	1	27
Total	63	12	24	16	8	123

TABLE C-11. Recurrence of Disciplinary Problems, and Seniority at the Time of Discharge, 123 Cases.

Recurrence of disciplinary problems?	Seniority at the Time of Discharge							
	0-2 Years	3-5 Years	6-10 Years	11-15 Years	16-20 Years	Over 20 Years	Seniority Unknown	Total Grievants
None	10	9	12	6	3	1	26	67
Yes, same offense	3	—	2	—	—	—	3	8
Yes, different offense	4	4	1	—	—	—	12	21
Not reported	7	5	1	—	—	—	14	27
Total	24	18	16	6	3	1	55	123

TABLE C-12. Supervisors' Attitudes Toward Reinstated Employees, and Subsequent Employment History, 123 Cases.

How have Supervisors felt toward grievant?	Subsequent Employment History					
	Still Employed	Never Returned	Subsequently Quit	Subsequently Discharged	Other Terminations	Total
Favorable or neutral	49	—	11	6	6	72
Unfavorable	12	—	10	6	2	30
Not reported	2	12	3	4	—	21
Total	63	12	24	16	8	123

TABLE C-13. Grievant's Attitude Since Reinstatement, as Viewed by Employer, and Subsequent Employment History, 123 Cases.

What has been grievant's attitude?	Subsequent Employment History					
	Still Employed	Never Returned	Subsequently Quit	Subsequently Discharged	Other Terminations	Total
Good	39	—	1	—	5	45
Unchanged	9	—	—	2	—	11
Poor	13	—	5	5	1	24
Not reported	2	12	18	9	2	43
Total	63	12	24	16	8	123

TABLE C-14. Employer's Evaluation of Arbitration Award, and Terms of Reinstatement, 123 Cases.

Does employer agree with arbitrator's decision?	Terms of Reinstatement			
	Full Back Pay	Partial Back Pay	No Back Pay	Total Grievants
Yes	12	14	17	43
No	22	16	29	67
Not reported	3	2	8	13
Total	37	32	54	123

TABLE C-15. Employer's Evaluation of Arbitration Award, as Compared with Various Indications of Practical Outcome.

Various Indications of Practical Outcome	Evaluation of Award			
	"Correct"		"Incorrect"	
	Number	Percent of Responses	Number	Percent of Responses
I. Satisfactory Employee?				
Yes	34	79.1	35	56.4
No	9	20.9	27	43.6
Not reported	—	—	5	—
II. Normal occupational Progress?				
Yes	34	89.5	28	50.0
No	4	10.5	28	50.0
Not reported	5	—	11	—
III. Recurrence of disciplinary problems?				
None	35	92.1	29	52.7
Yes, same offense	1	2.6	7	12.7
Yes, different offense	2	5.3	19	34.6
Not reported	5	—	12	—
IV. Supervisors' attitude?				
Favorable or neutral	36	87.8	35	60.3
Unfavorable	5	12.2	23	39.7
Not reported	2	—	9	—
V. Grievant's attitude?				
Good	26	78.8	18	40.9
Unchanged	4	12.1	6	13.6
Poor	3	9.1	20	45.5
Not reported	10	—	23	—

Discussion—

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Arthur Ross' paper is excellent. I read an advance draft earlier this week and found it unassailable. But if he thinks I studied all his tables, he is in for a surprise! There were a few points, however, which I think should evoke discussion and I hope I can provoke discussion.

Ross points out in his paper that a large percentage of reinstated workers did not take advantage of the opportunity of reinstatement. Now this is a matter that we should consider seriously.

The average supervisor is opposed to the return of a discharged worker, and much criticism is levelled at arbitrators who direct reinstatement. If then, following an award requiring re-employment, a worker should refuse to return, the process of arbitration is brought into disrepute.

In a tight labor market where there is keen competition, his return to the job may be of no consequence to the worker. He may have a burning desire merely to clear his record or to recoup his damages. But sometimes his grievance is but a manifestation of a desire to satisfy his ego. He then files a grievance, contesting the discharge.

I am reminded of a recent case I had involving the discharge of a truck driver. While awaiting hearing, he obtained a job elsewhere, but in answer to the usual question put to him by Union counsel, insisted he wanted his job back. On cross examination, he admitted that he did not want his job back, that he wouldn't work for that employer even if it meant starving. When asked why he filed the grievance, he answered—to teach the boss a lesson.

At this point, the Union official withdrew the grievance and directed the employee to appear at the next Union Executive Board meeting. Later I learned he was assessed personally with the entire cost of the arbitration proceedings. Admittedly this is an extreme case.

Wouldn't it be more appropriate, if the worker only wants damages, for him merely to grieve for damages and not ask for reinstatement? If this were done, I am sure that most companies would quickly work out a settlement. The real objection, as I view it, on the part of a company, is to take back what it feels is an unsatisfactory employee. This procedure might cut down the case load, but in the final analysis, it may be better labor relations.

It appears that in many cases, discharged employees were reinstated because, in the arbitrator's opinion, discharge was too severe for the particular offense. This always brings up the question whether the arbitrator goes beyond his jurisdiction in reducing the punishment when the issue submitted is simply whether just cause existed.

As Ross points out, the majority of arbitrators believe they have the authority to mitigate the penalty when not prevented by the contract,

and the Court cases tend to support this statement, although the Court decisions are not uniform.

Ross' study, I think, is most revealing and presents a conclusion that should be of interest to all of us. That is that the short service employee, rather than the senior employee, when reinstated, is more apt to repeat his offense and get into trouble so as to be discharged again. Do we find in this the subtle suggestion that we should only show consideration to the senior dischargee?

In my experience, I have found very few instances of a worker's conduct coming up for review after reinstatement by the arbitrator. It seems to me that experience in this field is like that in the world at large. There are a great many more first offenders than repeaters.

Once someone has stepped out of line and has been caught up, he usually takes the experience to heart. Many times the hearing will reveal to the worker inadequacies of which he was not aware. Once they are brought home to him, he makes a determined effort to give no offense.

The return of a man to the job places added responsibilities both on the employee and the company. Management must be careful to avoid the charge that it is picking on him, and the worker must be careful not to give offense.

This recognition of their responsibilities should cause both sides to behave, and in due course, the constraint between them ought to disappear.

When a man is returned by an arbitration award, the personnel people should have a heart-to-heart talk with the man, preferably in the presence of the shop steward. It should be stressed that bygones are bygones, that there will be no retaliation, and that as long as the job is done, there will be no problem.

In turn, the union representative should make it clear to the worker that it is up to him to do his job properly.

In very few contracts have the parties laid down standards to govern us in the field of industrial discipline. We have seen contracts in page after page state how transfers are to be made, and how seniority is to be applied, but when it comes to industrial discipline, all we find is the sentence that the company will discharge only for just cause.

As I interpret this failure, the parties themselves have been unable to set down standards of conduct to govern the worker. Instead, they are ready to leave the question to the good judgment of an arbitrator.

This is clear-headed thinking. What today might be considered just cause may not be so tomorrow. In case of a labor shortage, an employer may not want to discipline a particular employee to the extent of dismissal. With a set of standards in the contract, the employer might find himself forced to take action. Otherwise he would be laying himself open at a later date to a charge of discriminatory treatment.

Also, a set of standards, or as we sometimes find, a list of derelictions and penalties either in the plant rules or in the contract might well place a company in a straightjacket, denying the company and the arbitrator any maneuverability.

I suggest that the arbitrator not be restricted in cases of industrial discipline. Our record in this field establishes that by far and large our judgments have not been too warped.

In his paper, Ross suggests that in the field of the arbitration of discharge cases, we give attention to the employee involved and fit the punishment to the crime. Yet I suggest, if you will, that in many cases by striving to find mitigating circumstances, the arbitrator is seeking to find a punishment to fit the offender.

I am disturbed by his remarks "that the question of literal guilt or innocence has not been decisive in the majority of the cases." As I view his paper, it appears that in passing on the question of reinstatement the arbitrator first determines whether or not the worker is "potentially a useful and acceptable employee."

But is it for us to determine whether a man is potentially a useful and acceptable employee? Isn't that Management's business? Are we opening too wide a road?

In reaching a determination, an arbitrator will latch on to a man's length of service, his prior record, his attitudes towards the job, his supervisors and co-workers and other factors which I need not repeat. But what is this but an effort to have the punishment fit the offender?

Ross also stresses modern enlightened concepts, sprinkled with elements of procedural due process. Today in the enforcement of our criminal law we are using a growing horde of social workers, psychologists, psychiatrists and do-gooders. Are we to do the same in labor arbitration? If so, we must be well rounded persons, experts in the solution of all problems, human as well as industrial. The psychiatrists tell us that we must consider a person's motivations, why he does these things. Will we bring disapproval down on our heads if we start to chart the uncharted sea of human relations?

I have even read that the psychiatrist finds the use of a sexual symbolism by workers when they swear at their foreman using phrases with unprintable suggestions; or that a wildcat strike is occasioned by the workers' desire to defend against an attack on their manhood; or that horseplay in the plant is a symptom of infantile regression.

Are we to delve into these things? Is the day soon to dawn when a medical degree will be requisite for membership in this august body? These are questions which I leave for your consideration.